

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SARAH L. ALLEN and VETERANS ADMINISTRATION, NORTH
CHICAGO VETERANS ADMINISTRATION MEDICAL CENTER,
Chicago, Ill.

*Docket No. 96-1233; Submitted on the Record;
Issued June 17, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 10, 1995 on the grounds that any disability due to her January 5, 1988 employment injury had ceased.

On January 5, 1988 appellant, then a 35-year-old part-time food service worker, filed a traumatic injury claim for injuries she sustained to her back and left knee when she slipped on the ice. On January 27, 1988, the Office accepted appellant's claim for acute cervical and lumbosacral strain and left knee strain. Appellant received appropriate compensation for temporary total disability. On April 3, 1989, appellant returned to work in a limited duty position. On April 27, 1989, she filed a claim for recurrence of disability. On May 4, 1989, appellant returned to work again, however, she filed a second claim for recurrence of disability beginning June 20, 1989. Thereafter, appellant did not return to work. On March 7, 1991, the Office accepted appellant's claims for acute cervical and lumbosacral strains.

On October 26, 1995, the Office sent appellant a letter of proposed termination on the grounds that the medical evidence did not establish that she had any residual medical condition or disability causally related to her accepted employment injuries. By decision dated November 29, 1995, the Office terminated appellant's compensation effective December 10, 1995 on the grounds that the medical report by Dr. Allan Kagen, a Board-certified neurologist and Office referral physician, constituted the weight of the medical evidence and did not support a finding that appellant had continued disability from either her acute lumbosacral strain or ankle or knee strains.

The Board has carefully reviewed the entire case record and finds that the Office has not met its burden of proof in terminating appellant's compensation effective December 10, 1995.

Under the Federal Employees' Compensation Act,¹ once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.² After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.³

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.⁴ Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after December 10, 1995, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

In the present case, on August 16, 1995 appellant was referred to Dr. Kagen for a second opinion examination and opinion. In a report dated September 18, 1995, Dr. Kagen provided a history of appellant's injury and a synopsis of the medical reports of record and her medical treatments. After examining appellant, he noted that although old records and electromyography (EMG) scans showed minimal changes compatible with cervical or lumbar radiculopathy, these findings needed to be correlated clinically. Dr. Kagen found that while the history might be compatible with lumbar radiculopathy it was not compatible with cervical radiculopathy and that the normalcy of appellant's cervical magnetic resonance imaging (MRI) scans would be evidence against cervical radiculopathy. He then noted that appellant's June 1994 MRI scan revealed central cervical protrusions and minimal foraminal involvement, but concluded that the historical and objective evidence of cervical radiculopathy was essentially nonexistent. In addressing the questions posed by the Office, Dr. Kagen indicated that there was no objective evidence of acute lumbosacral strain or left knee or ankle strain and that appellant's symptoms of neck, head, low back and leg pain had been previously noted. He concluded that medical evidence for either total or partial disability was lacking. However, Dr. Kagen also reported that the changes on appellant's MRI scan might be associated with her neck discomfort, that MRI scans tended to exaggerate actual changes, that the central disc protrusions were often seen without symptoms and that he did not believe that cervical MRI findings were likely directly related to appellant's January 5, 1988 employment injury or her continuing pain. This report which the Office found constituted the weight of the medical evidence is not fully rationalized and is somewhat speculative. While the Office accepted appellant's claim for acute cervical and lumbosacral strain and left knee strain, in posing questions to Dr. Kagen, it did not specifically

¹ 5 U.S.C. §8101 *et seq.*(1974).

² *William Kandel*, 43 ECAB 1011 (1992).

³ *Carl D. Johnson*, 46 ECAB 804 (1995).

⁴ *Dawn Sweazey*, 44 ECAB 824 (1993).

⁵ *Mary Lou Barragy*, 46 ECAB 781 (1995).

ask the physician to address whether appellant was partially or totally disabled due to residuals of her acute cervical strain.

In response to the Office's letter of proposed termination, appellant submitted three medical reports by Dr. Shaku Chhabria, a Board-certified neurologist and appellant's treating physician. Dr. Chhabria indicated that appellant continued to be disabled due to her accepted employment injuries, was in chronic pain and was subject to multiple physical restrictions. In a work capacity evaluation form, Dr. Chhabria diagnosed chronic lumbar syndrome and cervical and lumbosacral radiculopathy and indicated that appellant could not work. While Dr. Chhabria's reports are not fully rationalized, the deficiencies in these reports are similar to those delineated above in Dr. Kagen's report. Thus, the medical reports by Drs. Kagen and Chhabria are of substantially equal weight and there is a conflict in the medical opinions concerning the diagnoses of appellant's back and neck conditions, the relationship between these conditions and her accepted employment injuries and the degree of disability from the same.

Section 8123 of the Act⁶ provides that if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.⁷ Inasmuch as the Office relied on the opinion of Dr. Kagen to terminate appellant's compensation without resolving the conflict between his opinion and that of Dr. Chhabria, the Board finds that the Office has not met its burden of proof in terminating compensation.

The decision of the Office of Workers' Compensation Programs dated November 29, 1995 is hereby reversed.

Dated, Washington, D.C.
June 17, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁶ 5. U.S.C. § 8123(a)

⁷ *Shirley L. Steib*, 46 ECAB 309 (1994).