U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LENORE BISMAN and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 97-1873; Submitted on the Record;
Issued August 12, 1999

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 10, 1995 and (2) whether appellant has established recurrences of total disability commencing October 23, November 2, November 26 or November 29, 1995.

In the present case, appellant filed a claim alleging that she sustained a back injury on June 26, 1991 causally related to lifting mail. The Office accepted the claim for herniated disc at L4-5. Appellant eventually returned to work in a light-duty position at two hours per day on July 10, 1995.

In a letter dated October 24, 1995, the Office advised appellant that it proposed to terminate her compensation on the grounds that the weight of the medical evidence established that she no longer had any continuing employment-related disability.

On November 6, 1995 appellant filed a notice of recurrence of disability for October 23 and 24 and November 2 and 3, 1995.

By decision dated November 28, 1995, the Office terminated appellant's compensation effective December 10, 1995.

On December 1, 1995 appellant filed a notice of recurrence of disability for November 26, 29 and 30, 1995.

By decision dated January 11, 1996, the Office denied appellant's claim for a recurrence of disability on October 23 and 24, November 2 and 3, 1995. By decision dated January 30, 1996, the Office denied appellant's claim for recurrence of disability on November 26, 29 and 30, 1995.

On November 21, 1996 appellant requested reconsideration of the November 28, 1995, and January 11 and 30, 1996 Office decisions. By decision dated February 4, 1997, the Office denied modification of the prior decisions.

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

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1]

In the present case, the Office found that a conflict in the medical evidence existed between appellant's attending physician, Dr. Roman Sorin, a specialist in physical medicine and Dr. Barry S. Gloger, an orthopedic surgeon serving as a second opinion referral physician. In a report dated April 4, 1995, Dr. Sorin diagnosed sprain and strain in lumbosacral paraspinals, L5-S1 radiculopathy, bulging discs at L4-5 and L5-S1 and fibromyalgia, opining that there was a causal relationship between appellant's condition and the employment injury. In a report dated June 16, 1995, Dr. Gloger provided a history and results on examination. Dr. Gloger opined that appellant's employment injury had long since healed with no continuing residuals of the employment injury. He indicated that appellant had a mild disability secondary to a preexisting degenerative disc disease.

To resolve the conflict, the Office referred appellant, along with a statement of accepted facts and medical records, to Dr. Jack Levine, a Board-certified orthopedic surgeon.[2] In a report dated September 5, 1995, Dr. Levine provided a history and results on examination. Dr. Levine stated in pertinent part:

> "There are no objective findings that the work-related accepted conditions of herniated disc of L4-5 are still active and causing disabling residuals. This opinion is based on my clinical findings on examination…. There are no objective findings to suggest symptoms arising from hypertrophic osteoarthritis of L4-5. There is no remaining injury related disability. Patient is capable of performing her date-of-injury job as a letter carrier. Before resuming her date-of-injury job on a full-time basis, she should gradually increase her workday to four, six and ultimately eight hours. The injury related condition has fully recovered."

In a form report (OWCP-5c) dated September 5, 1995, Dr. Levine stated that he believed appellant could "return to a full work program, gradually working first four, then six and ultimately eight hours daily. About a month at each level would be reasonable."

By letter dated October 27, 1995, the Office requested that Dr. Levine clarify his report as to appellant's return to work. The Office noted that the employing establishment would like

[1] *Patricia A. Keller*, 45 ECAB 278 (1993).

[2] 5 U.S.C. § 8123(a) provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.

to make appellant a job offer of eight hours per day and inquired as to whether appellant was capable of working eight hours per day.

In response, Dr. Levine explained: "[appellant] has only been working two hours per day since July of 1995 and alleged considerable difficulty with that program. I simply felt that it would be more sensible to return her to work on a gradual basis, a sort of work-hardening program." Dr. Levine further stated that he agreed with the employing establishment that appellant "could probably work eight hours a day; however, in my opinion, it would be more logical to reach that goal on a gradual basis."

The Office terminated appellant's compensation on the grounds that Dr. Levine's reports established that appellant did not have a continuing employment-related disability.[3] The Board finds, however, that Dr. Levine did not provide an opinion that employment-related disability had ceased. The term "disability" as used under the Federal Employees' Compensation Act means the incapacity, because of injury in employment, to earn the wages which the employee was receiving at the time of injury.[4] In his September 5, 1995 report, Dr. Levine stated that appellant should gradually return to full-time work; in his form report of that date he estimated approximately a month at four hours and a month at six hours. He further stated in his October 30, 1995 report, that this was similar to a work-hardening program, since appellant had only been working two hours a day. These statements establish that Dr. Levine believed there was some deconditioning resulting from the employment injury and that appellant must return to work on a part-time basis until, at some point in the future, she could work eight hours per day.

As noted above, it is the Office's burden to establish that disability has ceased before it terminates compensation. Even though Dr. Levine stated that the employment injury had recovered, in order to terminate compensation for wage loss there must be medical evidence establishing that the disability had ceased; in other words, that the employee can earn the wages earned at the time of injury. Dr. Levine clearly does not provide a date certain as to when the employment-related disability had ceased in this case. Accordingly, the Board finds that the Office did not meet its burden of proof in terminating compensation for wage loss in this case.

The Board further finds that appellant has not established a recurrence of disability for October 23 and 24, November 2, 3, 26, 29 and 30, 1995.

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light duty requirements.[5]

[3] The Board notes that the Office requested the supplemental report from Dr. Levine after the notice of proposed termination had been issued and the November 28, 1995 decision does not discuss Dr. Levine's October 30, 1995 report.

[4] *Donald Johnson*, 44 ECAB 540, 548 (1993); 20 C.F.R. § 10.5(17).

[5] *Terry R. Hedman*, 38 ECAB 222 (1986).

In this case, appellant returned to work at two hours per day on June 10, 1995 and it is therefore, her burden to establish a recurrence of total disability on the dates claimed. The contemporaneous medical evidence consists of a note dated October 23, 1995 that appellant could return to work on October 25, 1995, a note dated November 3, 1995 that appellant had low back pain and could return to work on November 6, 1995 and a noted dated November 29, 1995 that appellant had low back pain, neck pain and shoulder pain. In a report dated November 12, 1996, Dr. Sorin stated that appellant's total disability on October 23, November 2, November 26 and 29, 1995 were causally related to the employment injury, stating that her condition on each date "represents a clear change in nature and extent of her injury and disability causally related to the original work related injuries…" Dr. Sorin further stated that because of the persistence of symptoms he believed appellant's low back conditions were permanent in nature and have a tendency to progression.

The Board notes that Dr. Sorin did not discuss in any detail his findings on examination on the dates in question, or otherwise explain his statement that her condition represented a change in the nature and extent of the injury-related condition. His report was dated a year after the claimed recurrences of disability and Dr. Sorin does not clearly explain his opinion that on the dates in question appellant had an employment-related disability. In the absence of a reasoned medical opinion, the Board finds that appellant has not met her burden of proof in this case.

The decision of the Office of Workers' Compensation Programs dated February 4, 1997 is reversed with respect to termination of compensation for wage loss and affirmed with respect to the claimed recurrences of total disability.

Dated, Washington, D.C.
August 12, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member