

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALBERTA M. NOLAN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Northport, NY

*Docket No. 97-2522; Submitted on the Record;
Issued August 5, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant had any disability after June 23, 1996, the date the Office of Workers' Compensation Programs terminated her compensation benefits, causally related to her August 3 and September 7, 1985 low back muscular strain and bulging L3-4 and L4-5 disc injuries.

The Board finds that this case must be reversed.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.² Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.³ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁴

The Office did not meet its burden of proof to terminate either monetary compensation or medical benefits in this case.

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁴ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

In this case, there is an unresolved conflict between Dr. Edward Yambo, a Board-certified family practitioner and appellant's treating physician, and Dr. David Koretz, a Board-certified orthopedic surgeon and the Office's second opinion specialist.⁵

Dr. Yambo indicated in multiple form reports leading up to the termination of appellant's compensation that appellant had reached maximum medical improvement but could not work eight hours per day. The nature and extent of the injury was noted as "cervical sprain, arthritis of clavical, bulging lumbosacral disc." Dr. Yambo noted that appellant "returns with increase of back and cervical pain with disc involvement," and indicated that she remained disabled. He renewed appellant's medications for cervical and lumbosacral sprain. By narrative report dated May 4, 1996, Dr. Yambo noted that appellant had severe pain on palpation of the cervical and lumbosacral areas which was suggestive of fibromyositis resulting from her previous injuries. He opined that appellant's pain was so severe that she could not walk for any length of time or bend or raise her hands above her head. Dr. Yambo opined that this precluded appellant from any gainful employment and he additionally noted that appellant was markedly depressed with lack of motivation and slow mental processes. By narrative report dated June 1, 1996, Dr. Yambo noted that appellant still had back pain and neck pain, and that pain was elicited with palpation of L4-5 with some radiation down the lower back. He opined that appellant's work injury continued to be chronic in nature.

The Office second opinion examiner, Dr. Koretz, in a May 1, 1996 report, indicated that appellant complained of tenderness in the right and left paraspinal musculature, more so on the right. Dr. Koretz noted that appellant's range of motion was 50 percent of normal in flexion, extension, rotation and lateral bending, and that she walked on her toes with difficulty and was unable to walk on her heels or to squat. He noted that magnetic resonance imaging scan of the lumbosacral spine demonstrated grade I spondylolisthesis of L3-4, a small left lateral L2-3 disc herniation, and bulging left paramedian disc herniation at L3-4. Dr. Koretz diagnosed cervical and lumbosacral strain and herniated cervical and lumbar discs, and he opined:

"At the time of this examination I find no disability referable to the incident of August 3, 1985. She has degenerative changes with her normal aging process. This creates a condition of temporary aggravation on a repeated basis due to her described job duties.... I feel that the cervical and lumbosacral strains that she did sustain in 1985 have resolved. No further treatment is indicated. Her present condition is chronic, related to her degenerative osteoarthritis."

On May 28, 1996 the Office terminated appellant's compensation effective June 23, 1996 finding that Dr. Koretz's opinion constituted the weight of the medical opinion evidence. The Office found that since Dr. Koretz was a Board-certified orthopedic surgeon, his report was entitled to greater weight and that Dr. Yambo's report contained an inaccurate history.⁶

⁵ Title 5 U.S.C. § 8123(a) states in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination." The Office failed to do this in the instant case.

⁶ The Board notes that the inaccurate history referred to by the Office was not an inaccurate history of the injuries in question and the subject of this case but was a mistaken year given for a previous injury not relevant to this case.

The Board, however, finds that Dr. Koretz's report does not constitute the weight of the medical opinion evidence and merely creates a conflict with Dr. Yambo's report which requires resolution by referral to an impartial medical examiner. The Board notes that Dr. Koretz, despite being given a statement of accepted facts, reported an inaccurate factual and medical history for appellant, noting that she had returned to work after a "July" injury to the lower back and continued up until August 3, 1995 when she injured her neck and back, stopped work and did not return.⁷ Further, the Board notes that Dr. Koretz diagnosed cervical and lumbar strain and herniated cervical and lumbar discs, but he failed to explain how these ongoing diagnoses which matched appellant's accepted conditions were not related to appellant's accepted lumbar strain and bulging lumbar discs. Dr. Koretz merely proclaimed that appellant had no disability due to the August 3, 1985 incident, but he failed to support this conclusion with medical rationale and he failed to address causality with respect to appellant's accepted September 7, 1985 recurrence. As Dr. Koretz's second opinion report was conclusory and was not rationalized, and as it contained an inaccurate history of the injuries which were the subject of this case, the Board finds that it cannot constitute the weight of the medical evidence, and merely creates a conflict with the opinions of Dr. Yambo.

Consequently, the Office did not meet its burden of proof to terminate appellant's compensation entitlement.

Accordingly the decision of the Office of Worker's Compensation Programs dated May 28, 1996 is hereby reversed.

Dated, Washington, D.C.
August 5, 1999

George E. Rivers
Member

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

⁷ In reality appellant was injured on August 3, 1985, returned to work on September 7, 1985, sustained a recurrence accepted by the Office on September 7, 1985 and did not thereafter return.