

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of NORMA F. GEPHART and DEPARTMENT OF THE NAVY,  
FACILITIES ENGINEERING COMMAND, Port Hueneme, Calif.

*Docket No. 97-1102; Submitted on the Record;  
Issued May 7, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant met her burden of proof in establishing that she sustained a recurrence of disability, due to her June 20, 1990 employment injury, beginning June 26, 1996 and whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

The Office accepted appellant's claim for cervical and lumbar strain and multiple contusions for a June 20, 1990 employment injury, for lumbar subluxation for a March 24, 1992 employment injury, and for a L1 compression fracture for a change in her condition in 1993 and combined the claim for the 1990 injury with the claim for the 1992 injury. Appellant was temporarily totally disabled from May 17 to July 9, 1994 and then returned to work. Appellant filed a claim for a recurrence of disability on May 17, 1994 which the Office accepted. The Office also accepted that appellant had a lumbar compression fracture and aggravation of degenerative disc disease. Appellant returned to light-duty work as an environmental protection specialist. On April 21, 1995 appellant alleged that she had a recurrence of disability when she slipped on the stairs at work, and the Office accepted her claim for aggravation of degenerative disc disease of the back and a right shoulder strain which it regarded as a new injury and combined the claim with appellant's 1990 and 1992 claims. Appellant missed work from April 24 to July 11, 1995 and then returned to her job as an environmental protection specialist. It is not clear from the record or from the Office's October 17, 1996 decision whether appellant was ever paid for the period of time she missed work following the April 21, 1995 employment injury. In a legal brief dated November 20, 1996 challenging the Office's decision, appellant stated that no compensation had been paid although it is not clear if appellant is referring to the April 21, 1995 employment injury or her subsequent June 6, 1996 claim for a recurrence of disability. Once appellant began working as an environmental specialist, she apparently suffered no wage loss as the Office noted in its October 17, 1996 decision that in a decision dated January 20, 1996 for appellant's other claim (*i.e.*, a recurrence of disability occurring on May 17, 1994), No. 13-981057, the Office found that appellant's work as an environmental specialist represented her wage-earning capacity.

In a claim for traumatic injury or occupational disease, Form CA-7, dated April 30, 1996, appellant sought compensation from April 29 through May 17, 1996. She also filed a notice of recurrence of disability on June 10, 1996, the claim which is the subject of this appeal, alleging that she sustained a recurrence of disability commencing April 26, 1996 of the April 21, 1995 employment injury. Appellant stated that she resumed heavy data entry the last three to four months and her neck condition had worsened to the point that she could barely turn her head and it was necessary for her to reduce her work hours. Appellant further stated that she reduced her hours to half days from April 26 to May 23, 1996, and then resumed full-time light-duty work. Appellant stated that she had continuous and, at times, severe problems with her neck and back requiring the regular use of pain killers and muscle relaxants. She stated that her right leg occasionally buckled when she stood up and tried to walk and when she used the stairs. Further, she stated that her neck mobility was always limited to some extent and her neck was very painful to touch. Appellant's letter dated June 26, 1996, supplements and corroborates her statements in her claim.

Appellant submitted evidence to support her claim. In his report dated December 26, 1995, Dr. Theodore L. Lamnot, a Board-certified orthopedic surgeon and appellant's treating physician, stated that appellant had been having intermittent pains in her lower back, and that she missed three days of work the previous week because of soreness and did not know of any particular activity causing the pain. Dr. Lamnot stated that appellant continued with some discomfort in the neck which was aggravated mostly when she spent a long time on the computer. Although his report predates the filing of appellant's June 10, 1996 claim for a recurrence of disability, his report corroborates that appellant's working a long time on the computer aggravated her neck.

In the attending physician's report, CA-20, dated May 9, 1996, Dr. Lamnot diagnosed cervical, lumbar and right shoulder strain and checked the "yes" box that appellant's condition was caused or aggravated by her employment activity. He noted that appellant tripped and fell going downstairs at work. Dr. Lamnot opined that appellant could perform light work.

In a report dated May 23, 1996, Dr. Lamnot stated that appellant's problems went back about 10 years when she pulled some muscles at work in 1982 and then a short time thereafter, she had a fall. He stated that she had ongoing problems with her axial skeleton since that time. Dr. Lamnot stated that appellant gradually developed some degenerative changes in the discs in her neck and in her lower back which were noted on x-rays and magnetic resonance imaging (MRI) scans and were associated with spondylosis and mild spinal stenosis in the lower neck region. He also stated that there were the primary, constant, objective findings. He stated that appellant's conditions predispose a person to having recurrent episodes of increased pain and limited motion related to further injury or physical activities. Dr. Lamnot stated:

“[Appellant] has a constant, low grade pain in her neck and in her lower back, which she has been willing to tolerate in order to try to maintain her employment. There are occasions when she has prolonged or increased physical activity that cause her symptoms to increase, to the point where she is limited to the amount of time that she can work. At those times, her increased objective findings are related to limitations of motion in the neck and lower back, greater than what she

has normally. These are flare-ups or exacerbations, which are generally of a transient nature, but do require some temporary reduction or restriction of work activities.”

Dr. Lammot stated that the normal progression of the disease in her spine was “not a consideration thus far.” He released appellant to full-time light-duty work on May 23, 1996.

The Office referred appellant to a second opinion physician, Dr. Charles Sadler, a Board-certified orthopedic surgeon, to determine if appellant’s current disability was work related. The Office provided Dr. Sadler with a statement of accepted facts but did not mention that appellant claimed to have sustained a recurrence of disability commencing on June 6, 1996. In a report dated September 5, 1996, he considered appellant’s history of injury noting that appellant sustained work injuries on in 1981, 1988, 1990 and 1992, had a fall on April 21, 1995 and missed about three to six weeks of work. Dr. Sadler performed a physical examination, reviewed MRI scans performed in 1990 and 1993, and diagnosed spinal degenerative disease and right shoulder strain. He noted that appellant had slightly limited range of motion of the cervical spine and moderately limited range of motion of the lumbar spine and that these findings were consistent with appellant’s long-standing degenerative changes notes on the MRI scans. Dr. Sadler stated that the only basis for the diagnosis of shoulder strain was the tenderness on examination, and that there was no objective basis for this diagnosis as it was based solely on subjective findings.

Dr. Sadler opined that appellant sustained a temporary aggravation of degenerative disc disease of the neck based on the preexisting degenerative disease noted on the cervical spine MRI scan. He noted the mechanism of injury consisted of a sudden jerk on the upper extremity which provided direct trauma to the cervical spine through the muscular connections between the shoulder and neck. Dr. Sadler also based his diagnosis on a notation in the medical record only a few days following the injury of increased neck pain. He stated that the temporary aggravation reasonably ceased by August 24, 1995 when Dr. Lammot in a note of that date noted no more than minor aches and pains. He also stated that appellant was obese and that placed more physical stress on the various body members making her more susceptible to injury and could affect her spine. Dr. Sadler stated that appellant’s preexisting degenerative disease would require ongoing medical attention but this was independent of the April 21, 1995 employment injury.

By decision dated October 17, 1996, the Office denied appellant’s claim, stating that the weight of the medical evidence showed that appellant no longer suffered medical residuals related to her federal employment or work injuries.

The Board finds that the case is not in posture for decision on the issue of whether appellant sustained a recurrence of disability and requires further development.

Appellant has the burden of establishing by reliable, probative and substantial evidence that the recurrence of a disabling condition for which she seeks compensation was causally related to her employment injury.<sup>1</sup> This burden includes the necessity of furnishing medical

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<sup>1</sup> *Dominic M. DeScala*, 37 ECAB 369 (1986).

evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.<sup>2</sup> An award of compensation may not be made on the basis of surmise, conjecture or speculation, or on appellant's unsupported belief of causation.<sup>3</sup>

In the present case, a conflict exists in the evidence between appellant's treating physician, Dr. Lamot, that appellant had recurring temporary exacerbations of her work-related disability and Dr. Sadler's opinion that appellant's current disability is not work related. While Dr. Lamot's opinion is generally supportive that appellant's recurrence of disability on April 26, 1996 is work related, inasmuch as it does not specifically address the April 26, 1996 recurrence of disability, his opinion is insufficiently rationalized to establish the requisite causation. However, while the claimant has the burden to establish entitlement to compensation, the Office shares the responsibility in the development of the evidence.<sup>4</sup> The Office has an obligation to see that justice is done.<sup>5</sup> Section 8123(a) of the Act<sup>6</sup> provides that "[i]f there is disagreement between the physician making the examination of the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

To resolve the conflict between Drs. Lamot and Sadler's opinions as to whether appellant sustained a work-related recurrence of disability on April 26, 1996, the Office should refer appellant with a statement of the accepted facts and the case record to an impartial medical specialist pursuant to section 8123(a) of the Act. In the statement of accepted facts, the Office should note that appellant missed half days of work from April 26 to May 23, 1996 alleging a recurrence of disability and request that the impartial medical specialist address whether that period of disability noted above is causally related to the April 21, 1995 employment injury. Following this and such further development as the Office deems necessary, it shall issue a *de novo* decision. In its decision, the Office should specify which periods of time appellant received compensation, if any.

The Board further finds that the Office failed to meet its burden of proof to terminate compensation benefits.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits. 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

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<sup>2</sup> *Louise G. Malloy*, 45 ECAB 613, 617 (1994).

<sup>3</sup> *Ausberto Guzman*, 25 ECAB 362 (1974).

<sup>4</sup> *Dennis J. Lasanen*, 43 DCAB 549, 550 (1992).

<sup>5</sup> *William J. Cantrell*, 34 ECAB 1233 (1983).

<sup>6</sup> 5 U.S.C. § 8123(a).

employment.<sup>7</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.<sup>8</sup>

In the present case, subsequent to the April 21, 1995 fall, the Office accepted appellant's claim for aggravation of degenerative disc disease and right shoulder strain which it combined with appellant's 1990 and 1992 claims. As noted above, it is not clear from the record whether appellant was ever paid compensation for her period of disability from April 24 to July 11, 1995. Once the claim is accepted, calculation and payment of compensation is a ministerial function which may follow immediately, or some length of time hence. It is, however, at the point of acceptance that a claimant begins to rely upon payment of compensation, and thereafter the Office may not rescind acceptance for the claim without showing error.<sup>9</sup> In his September 5, 1996 report, Dr. Sadler found no basis for the diagnosis of right shoulder strain although his finding that appellant's aggravation of her degenerative disc disease resolved on August 24, 1995 actually establishes that appellant was disabled up to that period of time. Further, whether appellant was disabled after May 23, 1996 when she returned to her usual, light-duty work of an environmental specialist, is irrelevant as appellant was not seeking compensation after her return to work. Dr. Sadler's opinion is unclear and confusing, and is not sufficiently well rationalized to establish that appellant's benefits should have been terminated. To the extent Dr. Lamot found appellant's periods of disability were work related, Dr. Sadler's opinion that appellant has no work-related disability conflicts with Dr. Lamot's opinion, and therefore the conflict in the evidence as to the periods of appellant's work-related disability is unresolved. The Office therefore did not meet its burden of proof to terminate benefits. The Office's decision terminating benefits is reversed.

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<sup>7</sup> *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

<sup>8</sup> *Larry Warner*, 43 ECAB 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>9</sup> *Alphonso Walker*, 42 ECAB 659, 662 (1991).

The decision of the Office of Workers' Compensation Programs dated October 17, 1996 finding that appellant did not sustain a recurrence of disability commencing April 26, 1996 is vacated and the case remanded for further consideration consistent with this decision. The holding in the Office's decision terminating benefits is hereby reversed.

Dated, Washington, D.C.  
May 7, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member