

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GERALDINE C. BAXTER and U.S. POSTAL SERVICE,
POST OFFICE, Hicksville, NY

*Docket No. 98-1499; Submitted on the Record;
Issued January 28, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective June 23, 1996 on the grounds that she no longer had any residuals or disability due to her August 20, 1976 employment injury.

The Board has duly reviewed the case record in this appeal and finds that the Office properly terminated appellant's compensation effective June 23, 1996 on the grounds that she no longer had any residuals or disability due to her August 20, 1976 employment injury.

On August 23, 1976 appellant, then a 38-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on August 20, 1976 she injured her low back pain while bringing mail to the belt in a U-cart. Appellant stated that she backed up to let someone pass and hit the pole. Appellant stopped work on August 23, 1976 and returned to work on November 2, 1976.¹

The Office accepted appellant's claim for a low back contusion with hematoma.

The Office received a November 21, 1995 medical report of Dr. Seymour Einhorn, a Board-certified orthopedic surgeon and appellant's treating physician, stating that appellant was incapable of working at the employing establishment.

By letter dated March 18, 1996, the Office referred appellant, along with medical records, a statement of accepted facts and a list of specific questions to Dr. Harvey Fishman, a Board-certified orthopedic surgeon, for a second opinion examination. By letter of the same date, the Office advised Dr. Fishman of the referral.

¹ On April 13, 1977 appellant filed a claim (Form CA-2a) alleging that she sustained a recurrence of disability on April 6, 1977. Appellant stopped work on April 6, 1977.

Dr. Fishman submitted a March 26, 1996 medical report stating that appellant no longer had any residuals or disability due to her August 20, 1976 employment injury.

In a notice of proposed termination of compensation dated April 30, 1996, the Office advised appellant that it proposed to terminate her compensation based on Dr. Fishman's medical opinion. The Office also advised appellant to submit additional medical evidence supportive of her continued disability within 30 days. Appellant did not respond to the Office's letter.

By decision dated June 3, 1996, the Office terminated appellant's compensation effective June 23, 1996 on the grounds that Dr. Fishman's medical opinion established that appellant no longer had any residuals or disability due to her August 20, 1976 employment injury. In a May 7, 1997 letter, appellant, through her attorney, requested reconsideration of the Office's decision.

By decision dated July 29, 1997, the Office denied modification of the June 3, 1996 decision. In a December 5, 1997 letter, appellant, through her attorney, requested reconsideration of the Office's decision.

In a decision dated March 5, 1998, the Office denied appellant's request for modification.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.² 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.³

In this case, the Office relied on the medical opinion of Dr. Fishman in terminating appellant's compensation benefits. In a March 26, 1996 medical report, Dr. Fishman provided a history of appellant's August 20, 1976 employment injury, 1994 motor vehicle accident and medical treatment. Dr. Fishman further provided a review of the medical records and appellant's employment as an Avon representative, appellant's complaints and his findings on physical examination. Dr. Fishman diagnosed a lumbosacral derangement and evidence of what appeared to be chronic degenerative disc disease at L5-S1. Based on the history, his physical examination and review of medical records, Dr. Fishman opined that appellant had a temporary aggravation of a chronic preexisting condition of degenerative disc disease. He further opined that there appeared to be a causal relationship with appellant's August 20, 1976 employment injury. From an orthopedic standpoint, however, Dr. Fishman opined that "I feel [appellant] has no objective evidence of a disability which can be related to her job injury and is capable of performing her work duties with some limitations. The limitations would be in conjunction with a possible weight-reduction program and back strengthening exercises." In addition, Dr. Fishman opined that appellant did not require further treatment regarding the August 20, 1976 employment injury

² *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

and that any treatment appellant was currently receiving was due to other factors unrelated to the employment injury.

In an accompanying work restriction evaluation (Form OWCP-5c), Dr. Fishman indicated that appellant could work six to eight hours per day with physical restrictions.

The Board finds that Dr. Fishman's opinion is rationalized to support a finding that appellant no longer had any residuals or disability due to her August 20, 1976 employment injury, and based on a proper factual and medical background.

In support of her continued disability, appellant submitted medical evidence concerning the treatment she received due to her December 3, 1993 motor vehicle accident.⁴ Specifically, a February 24, 1994 hospital report of Dr. Allen Zippin, a Board-certified neurosurgeon, indicated treatment appellant received on the date of the accident. He indicated final diagnoses of acute cervical myofascial pain syndrome, acute lumbar myofascial pain syndrome, chronic cervical degenerative disease, chronic lumbar degenerative disease, chronic thoracic degenerative disc disease, contusion and hematoma of the left thigh, left shoulder and left wall, and an infected finger. Dr. Zippin's medical reports covering the period January 5 through September 20, 1994 noted appellant's December 3, 1993 motor vehicle accident, and her neck and back conditions. Further, hospital records reveal that appellant underwent knee surgery due to her December 1993 accident on January 18, 1995. Inasmuch as this medical evidence indicates that appellant's conditions were due to the nonemployment-related automobile accident, these conditions which have not been accepted by the Office and any disability stemming from them is not related to the accepted employment injury.

In further support of her continued disability, appellant submitted Dr. Einhorn's May 30, 1996 medical report. In this report, Dr. Einhorn noted appellant's work as an Avon representative, appellant's complaints and his findings on physical and objective examination. Dr. Einhorn opined that appellant was markedly disabled and unable to return to work at the employing establishment. Dr. Einhorn's report is insufficient to establish continued disability inasmuch as he failed to provide any medical rationale explaining why appellant continued to be disabled due to her August 20, 1976 employment injury, accepted for a contusion with hematoma.

Additionally, appellant submitted Dr. Einhorn's September 17, 1996 medical report revealing a history of appellant's employment history, his findings on physical and objective examination. Regarding his x-ray examination findings, Dr. Einhorn noted that appellant had advanced x-ray changes. Dr. Einhorn opined that appellant continued to be disabled due her employment injury based on his examination. There is no evidence of these x-ray findings in the record. Further, Dr. Einhorn failed to explain how or why appellant's degenerative disease was

⁴ In a letter dated May 14, 1997, the Office advised appellant's attorney to submit medical records regarding appellant's 1994 motor vehicle accident. Appellant's attorney submitted a June 6, 1997 response letter, which revealed that appellant was involved in a motor vehicle accident in December 1993 and not 1994. Although appellant's attorney indicated that he did not have any medical records pertaining to the accident, he subsequently submitted these records to the Office.

due to her employment injury. Therefore, his opinion is insufficient to establish continued disability.

Inasmuch as Dr. Fishman's medical opinion constitutes the weight of the reliable, probative and substantial evidence, the Board finds that the Office properly terminated appellant's compensation benefits effective June 23, 1996 on the grounds that she no longer had any residuals or disability due to her August 20, 1976 employment injury.

The March 5, 1998 and July 29, 1997 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
January 28, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member