

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA G. AIKEN and U.S. POSTAL SERVICE,
POST OFFICE, Nashua, NH

*Docket No. 98-2432; Submitted on the Record;
Issued September 6, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant is entitled to compensation benefits on or after June 22, 1997 due to her January 19, 1994 employment injury.

On January 21, 1994 appellant, then a 33-year-old carrier, filed a claim alleging that she sustained an injury on January 19, 1994 when she fell on ice while in the performance of duty. The Office of Workers' Compensation Programs accepted appellant's claim for cervical strain, right shoulder strain and right hip strain.

Appellant returned to work for three hours per day on May 23, 1994. On December 22, 1994 the Office, based upon the recommendation of Dr. M. Dennis Wachs, a Board-certified orthopedic surgeon and appellant's attending physician, authorized an arthroscopy of the right shoulder. Dr. Wachs performed an arthroscopic acromioplasty on appellant's right shoulder on February 22, 1995. The Office placed appellant on the short-term periodic rolls. Following the expiration of appellant's placement on the short-term rolls, she filed claims for continuing compensation on account of disability (Form CA-8).

The employing establishment terminated appellant's casual appointment effective May 19, 1995. By letter dated October 4, 1995, the Office referred appellant to Dr. David Cusson, an orthopedic surgeon, for a second opinion evaluation.

In a report dated October 23, 1995, Dr. Cusson reviewed appellant's history of injury, discussed her current complaints and listed detailed findings on physical examination. He related:

"I feel that there is very little in the way of objective findings relative to the right hip. There is also exaggerated pain behavior throughout the examination and other than slight limitation of elevation and abduction of the right shoulder, I found no spasms and no specific area of tenderness.

“I have indicated extensively the subjective complaints. Apparently, there were no preexisting conditions.

“Diagnosis of the right shoulder at the present time is status post acromioplasty. There is no evidence of impingement at this time. I find very little objectively in the right shoulder. Diagnosis of the right hip; I actually do not know. I feel that there is nothing there orthopedically other than her subjective complaints.”

Dr. Cusson indicated that secondary gain considerations might be a factor in appellant's condition. He found that appellant could resume full-time employment with some restrictions. In an accompanying OWCP-5c form, Dr. Cusson indicated that appellant should work with restrictions for four to six months.

By letter dated February 14, 1996, the Office requested that Dr. Wachs review and comment on Dr. Cusson's report.

In a form report dated March 20, 1996, Dr. Wachs diagnosed a bulging disc at L5-S1, checked “yes” that the condition was due to the injury for which appellant claimed compensation and found her disabled from employment.

By letter dated May 28, 1996, the Office requested that Dr. Wachs provide an opinion regarding whether appellant could resume employment.

On October 25, 1996 the Office referred appellant to Dr. Gerald M. DeBonis, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated December 5, 1996, Dr. DeBonis reviewed the medical evidence and objective studies of record. He further listed findings on physical examination. Regarding appellant's right shoulder, left knee and right hip, Dr. DeBonis related:

“At this point, she is minimally symptomatic regarding the right shoulder and physical examination of the shoulder is normal. I feel it is reasonable that her right shoulder injury is causally related to the January 1994 incident leading to a soft tissue injury and with no residual permanent impairment involving the right shoulder and she has full employment capacity with no limitations.

“In regard to the left knee, she appears to have had a minor sprain of the knee as a result of the slip and fall of January 19, 1994, that went on to full resolution.

“As a result of the injury of January 19, 1994, [appellant] was treated by Dr. Wachs for about one year and beyond for a post[-]traumatic greater trochanteric bursitis on the right side. At this point she is asymptomatic in that region and has no findings of residual swelling or tenderness and the bursitis that was considered causally related to the January 19, 1994 incident is now resolved. She has full employment capacity with no limitations in regard to the right greater trochanteric bursitis.”

Dr. DeBonis further opined:

“It appears to me that [appellant’s] present neck complaints are not in any way causally related to the injury of January 19, 1994. Moreover, the extent of her problem pertaining to her neck is entirely subjective and there are no physical findings or any objective evidence in regard to her neck anywhere in the medical record in examination by Dr. Cusson or on my examination that would verify the presence of any particular problem pertaining to the neck.

“At this point [appellant] presents with her most pressing problem to be that of continuing lower back pain. I note that first mention is made of any lower back problem approximately one year following her injury of January 1994. On that basis, it is my opinion that her present lower back pain is not causally related to the injury of January 1994. I would disagree with Dr. Wachs, who states that in his opinion her lower back pain is brought on by the ongoing greater trochanteric bursitis and the onset of lower back problems. I am of the opinion that [appellant] now suffers from lower back pain on the basis of the degenerative disc disease demonstrated by plain film and by [an] MRI [magnetic resonance imaging] [study] and her lower back pain is not causally related to the injury of January 1994.¹ In regard to her lower back pain, the extent of her problem and any limitations that she experiences in her activity is based on her subjective complaints and not verified by objective physical findings. It is my opinion that she has a full-time employment capacity with no limitations.”

Dr. DeBonis related that appellant had no further need for medical treatment. He listed work restrictions but specified that these were due to “her subjective complaints only and those at the present time pertain to her lower back.” Dr. DeBonis stated that there were “no objective findings to indicate or present any basis for limitations on her activity or on her work.”

By letter dated January 27, 1997, the Office requested that Dr. Wachs provide a detailed medical report regarding appellant’s current condition and ability to work. The Office enclosed a copy of Dr. DeBonis’ December 5, 1996 report for Dr. Wachs to review.

In an office visit note dated January 14, 1997, Dr. Wachs discussed his treatment of appellant for a fracture of the thumb and tenderness of the right shoulder, back and right hip.

In a letter to the Office dated April 8, 1997, Dr. Wachs enclosed office visit notes dated March 25, 1997, which he indicated contained his assessment of her condition. He stated that, “should [appellant’s] suggested care be allowed to be carried out, it would be reasonable for her to be able to get back to a light position.” In the March 25, 1997 office visit note, Dr. Wachs

¹ An MRI study of appellant’s lumbar spine, obtained on December 23, 1995, revealed “early degenerative changes with mild diffuse right paracentral disc bulge at the L5-S1 interspace with subtle right S1 nerve root impingement.”

discussed appellant's complaints of problems with her right shoulder, back and right hip. He listed range of motion findings for appellant's shoulder and noted:

"Pushing on the shoulder and moving it around like this makes it ache and it continues to ache for quite a while afterwards. Her lower back, her sacroiliac joint, her right greater trochanteric bursa are all uncomfortable and tender to her. Neurologically she is intact, but sitting bothers her. [Appellant] has gotten studies in the past, which have shown she has a degenerative disc at L5-S1 and she did have a lot of injury to the right thigh area from her fall and she had chronic pain, chronic bursitis and chronic abnormalities of her gait, which, in my opinion, did aggravate her L5-S1 disc. I do [not] think that the injury caused it to degenerate, but I do think that it brought that symptomatology of the back to the forefront.

"This has never been addressed, I have never been able to do anything about it and because it is a limitation she has not been able to get back to doing anything. She can [not] even sit in the car and drive to Nashua where she worked before and work even for a short period of time and then drive back home. It just [will not] work, it makes no sense. [Appellant's] back does [not] require anything surgically for it.... I would like for her to be able to do something light, but given the situation, that is very difficult if not impossible...."

On October 6, 1997 appellant filed a Form CA-8 requesting compensation from June 22, 1997 to the present.

In form reports dated November 5 and December 30, 1997, Dr. Wachs diagnosed right trochanteric bursitis, disc disease at L5-S1 and right shoulder impingement. He checked "yes" that the condition was due to the injury for which appellant claimed compensation and found her disabled from employment.

By decision dated February 20, 1998, the Office denied appellant's claim for compensation on or after June 22, 1997 causally related to her January 19, 1994 employment injury.

By letter dated February 26, 1998, appellant requested reconsideration of her claim. In a decision dated May 29, 1998, the Office denied modification of its prior decision.

The Board finds that appellant is not entitled to compensation benefits on or after June 22, 1997 due to her January 19, 1994 employment injury.

In this case, the evidence indicates that appellant received compensation benefits continuously for over one year and, therefore, should have been placed on the periodic rolls and provided pretermination notice.² Consequently, the Office had the burden of proof to establish

² The Office did not provide any pretermination notice in terminating appellant's compensation. However, appellant had the opportunity to pursue her appeal rights by submitting new medical evidence establishing continuing disability or arguments for continued receipt of compensation. Appellant's opportunity for either a hearing or further review, together with the present review by the Board on this appeal, constitute meaningful postdeprivation processes whereby the government is able to address the procedural error after it occurs. *Lan Thi Do*, 46 ECAB 366 (1994).

that appellant had no further disability due to her accepted employment injury prior to terminating her compensation benefits.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective June 22, 1997 as the opinion of Dr. DeBonis, constitutes the weight of the medical evidence. The Board has carefully reviewed the opinion of Dr. DeBonis and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. He provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. DeBonis provided a proper analysis of his findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition, which comported with this analysis.⁶ He included medical rationale for his opinion by explaining that he based his finding that appellant had no further residual disability causally related to her accepted employment injuries on the lack of objective findings on physical examination. Dr. DeBonis opined that appellant had no further employment-related impairment of the right shoulder, right hip or neck. He further noted that appellant's primary subjective complaint was of low back pain, which he attributed to degenerative disc disease unrelated to her January 1994 employment injury. Dr. DeBonis concluded that appellant could resume her regular employment without limitations.

The remaining evidence of record, from appellant's attending physician, Dr. Wachs, is insufficient to support a determination that appellant had any further employment-related disability on or after June 22, 1997. In an office visit note dated March 25, 1997, Dr. Wachs listed findings of continued tenderness of the shoulder, lower back and the right trochanteric bursa. He noted that objective tests revealed degenerative disc disease at L5-S1, which he opined was aggravated by her fall. Dr. Wachs, however, did not address whether appellant had any further disability causally related to her accepted employment injuries of right shoulder strain, cervical strain and right hip strain. Dr. Wachs appeared to attribute appellant's inability to work to problems with her lower back. He opined that appellant's employment injury, which caused pain, bursitis and an abnormal gait, aggravated her degenerative disc disease at L5-S1 but provided no medical explanation in support of his conclusion and thus it is of little probative value.⁷ The Board notes that the Office did not accept that appellant sustained an injury to her lower back due to her January 19, 1994 employment injury. It, therefore, remains appellant's

³ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁴ *Id.*

⁵ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *See Melvinia Jackson*, 38 ECAB 443 (1987).

⁷ *Vicky L. Hannis*, 48 ECAB 538 (1997). (Medical conclusions unsupported by rationale are of diminished probative value.)

burden of proof to establish that the condition is causally related to her employment injury through the submission of rationalized medical opinion evidence.⁸

In form reports dated November 5 and December 30, 1997, Dr. Wachs diagnosed right trochanteric bursitis, disc disease at L5-S1 and right shoulder impingement. He checked “yes” that the condition was due to the injury for which appellant claimed compensation and found her disabled from employment. The Board has held, however, that the checking of the box “yes” regarding the cause of appellant’s condition is insufficient, without further explanation or rationale, to establish causal relationship.⁹

The Board finds that Dr. DeBonis’ opinion represents the weight of the medical opinion evidence and is sufficient to meet the Office’s burden of proof in terminating appellant’s compensation.¹⁰

The decisions of the Office of Workers’ Compensation Programs dated May 29 and February 20, 1998 are hereby affirmed.

Dated, Washington, D.C.
September 6, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member

⁸ See *Charlene R. Herrera*, 44 ECAB 361 (1993).

⁹ *Barbara J. Williams*, 40 ECAB 649 (1989).

¹⁰ The Board notes that appellant submitted additional medical evidence to the Office subsequent to its May 29, 1998 decision. The Board cannot consider this evidence submitted after the Office’s decision as its review is limited to the evidence, which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).