

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY L. SEPULVEDA and DEPARTMENT OF HEALTH & HUMAN SERVICES, INDIAN HEALTH SERVICE, Albuquerque, NM

*Docket No. 00-382; Submitted on the Record;
Issued April 18, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated compensation for wage loss effective January 13, 1998.

In this case, appellant a 33-year-old nurse, filed claim alleging that on February 27, 1988 she sustained a back injury while attempting to lift a patient onto a bed. The Office accepted the claim for low back strain with emotional overlay; appellant continued to receive compensation benefits. In a letter dated July 24, 1997, the Office notified appellant that it proposed to terminate her compensation for wage loss on the grounds that the evidence established her employment-related disability had ceased. By decision dated January 13, 1998, the Office terminated compensation for wage loss. In decisions dated April 13, June 24, 1998 and September 7, 1999, the Office denied modification.¹

The Board finds that the Office met its burden of proof to terminate compensation for wage loss as of January 13, 1998.

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.²

In this case, the accepted condition included both an orthopedic component as well as a psychological overlay. The Office properly referred appellant for second opinion examinations by an orthopedic surgeon as well as a psychiatrist/neurologist. In a report dated May 3, 1997,

¹ The record also contains a February 19, 1999 decision, denying appellant's request for a hearing. In a February 18, 1999 letter, appellant had withdrawn her request for a hearing and appellant did not request review of the February 19, 1999 decision on this appeal.

² *Patricia A. Keller*, 45 ECAB 278 (1993).

Dr. Willard Hunter, an orthopedic surgeon, provided a history and results on examination.³ Dr. Hunter indicated that he found no objective findings of a low back strain or other disc pathology. He opined that there was no orthopedic disability that would prevent her from returning to work.

In a report dated June 10, 1997, Dr. Frederick Green, Jr., Board-certified in psychiatry and neurology, diagnosed adjustment disorder with anxiety and depressed mood. Dr. Green opined that the adjustment disorder was due to the intrusion of pain caused by the employment injury.⁴ He also opined that appellant emotionally could return to work in the date-of-injury job and that any disability would be due to her orthopedic condition.

In a supplemental report dated July 7, 1997, Dr. Hunter indicated that he had reviewed Dr. Green's June 10, 1997 report; he reiterated that there were no objective findings to substantiate complaints of pain and that appellant was physically capable of returning to her date-of-injury job. In a supplemental report of the same date, Dr. Green noted that he had reviewed Dr. Hunter's May 3, 1997 report; he stated that his previous opinion had not changed, that appellant was emotionally capable of performing her duties as a nurse, given control of physiologic pain.

In reviewing the reports of Drs. Hunter and Green, they represent probative evidence that the employment-related disability had ceased. Dr. Hunter found that appellant was physically capable of returning to work and Dr. Green found no psychiatric condition disabling appellant.

Appellant was provided an opportunity to submit probative and relevant medical evidence prior to the termination decision, but she did not do so. The most recent medical report from an attending physician was a July 5, 1996 report from Dr. Alexander Zimmer, a neurologist. Dr. Zimmer stated that appellant had low back pain that appeared to be part of her chronic pain syndrome, "which over the years has been characterized as a somatoform disorder related to both her work injury and concurrent psychiatric problems." He did not provide a reasoned medical opinion with respect to causal relationship between work restrictions and the employment injury. Dr. Zimmer noted that he had not seen appellant between May 11, 1993 and June 28, 1996 and although he noted that appellant's condition had in the past been characterized as work related, he did not offer an opinion with supporting explanation as to whether appellant continued to be disabled due to an employment injury. As a result his report is of diminished probative value to the issues presented.

Accordingly, the Board finds that the weight of the medical evidence as of January 13, 1998 did indicate that appellant's employment-related disability had ceased. Therefore, the Board finds that the Office met its burden of proof in this case.

³ Appellant has argued that Dr. Hunter was not qualified to serve as a second opinion referral physician, submitting evidence that in November 1995 Dr. Hunter had been placed on probation by the State Board of Medical Examiners, with temporary restrictions on performing or assisting with surgeries. There is no indication, however, that Dr. Hunter's license had been revoked or any other indication that as of May 1997 Dr. Hunter was not a "physician" under the Federal Employees' Compensation Act. *See* 5 U.S.C. § 8101(2).

⁴ The Board notes that the January 13, 1998 decision did not terminate medical benefits. Based on the report of Dr. Green, the Office should accept adjustment disorder as consequential injury.

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.⁵

Appellant has submitted additional medical evidence following the January 13, 1998 decision. In a report dated May 20, 1998, Dr. Zimmer noted continued history of mood disorder, with depression and anxiety, associated with diffuse pain over various muscle groups. He noted that an attending psychiatrist had indicated in 1988 her psychiatric symptoms were triggered by the employment injury, but the issue is whether appellant continued to be disabled for work after January 13, 1998 causally related to an employment injury. Dr. Zimmer does not provide a reasoned medical opinion on this issue. In a report dated May 27, 1998, Dr. John Tesser, a rheumatologist, opined that appellant's fibromyalgia, chronic fatigue syndrome, depression and dysfunctional status were totally disabling and were "distinctly related to the injury of [February 27, 1998]." Dr. Tesser did not provide medical rationale on causal relationship with the employment injury.

The record also contains a report dated April 16, 1999 from Dr. Sharon Steingard, an osteopath. Dr. Steingard noted that since 1988 appellant had multiple physical problems out of proportion to her medical findings and over time had become depressed with a recent anxiety component to the depression. She further stated that appellant had been "unable to work due to these problems for many years and I think that it is unlikely that she will have a significant improvement." Dr. Steingard did not provide further explanation or a reasoned medical opinion that appellant continued to be disabled for work due to an employment injury.

The Board, therefore, finds that appellant has not submitted sufficiently probative evidence to establish an employment-related disability for work after January 13, 1998.

⁵ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

The September 7, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 18, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member