U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY J. HENNINGS and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Denver, CO

Docket No. 99-1141; Submitted on the Record;
Issued April 23, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation effective June 16, 1998.

On June 12, 1975 appellant, then a 44-year-old nurse, sustained a traumatic injury in the performance of duty when she twisted her back while trying to restrain a difficult patient. The Office accepted the claim for lumbar sprain and aggravation of preexisting lumbar joint disease. Appellant stopped work on the date of her injury and began receiving compensation on the periodic rolls.

In a report dated July 17, 1975, Dr. Barry Lindenbaum, a Board-certified orthopedic surgeon, noted that appellant had a previous decompressive laminectomy and fusion approximately 12 to 15 years prior to her work injury and that since the June 12, 1975 incident she had experienced severe pain. He indicated that appellant had no evidence of muscle spasm or nerve root compression. Dr. Lindenbaum opined that appellant sustained a severe lumbar strain on June 12, 1975, which was resolving.

In an October 24, 1975 report, Dr. Lindenbaum advised that appellant would not be able to return to work as a nurse aide. During the next two years, the record indicates that appellant was enrolled in a rehabilitation program and went back to school to retrain as a secretary.

In June 15, 1977 report, Dr. Lindenbaum noted that appellant was experiencing severe back pain with "peripheral symptoms in the S1 dermatome on the right side," which he attributed to prolonged sitting. He indicated that x-rays were essentially unchanged except for loss of L5-S1 disc space. Dr. Lindenbaum expressed his concern that appellant would not be able to perform the duties of a secretary and recommended that she be considered partially permanently disabled.

During the early 1980s, appellant was also treated by numerous physicians including Dr. Thomas T. McCarthy and Dr. Frank P. Piccini, both of whom maintained that appellant was

disabled by her low back pain. Under their direction, appellant underwent a course of physical therapy, medication, strengthening exercises and swimming.

In an October 9, 1981 report, Dr. William F. Deverell, a Board-certified orthopedic surgeon and Office referral physician, opined that appellant's work injury caused a permanent aggravation of her preexisting back condition. Dr. Deverell supported his opinion by noting that appellant was relatively pain free for 15 years after back surgery, but then had had continuing symptoms of back pain for 6 years after her work injury.

At the request of the Office, appellant was examined by Dr. Edward M. Fitzgerald, a Board-certified orthopedic surgeon. In a report dated July 24, 1984, Dr. Fitzgerald noted appellant's history of injury, symptoms and physical findings. He indicated that during his examination appellant appeared to exaggerate her symptoms. Dr. Fitzgerald diagnosed low back sprain and chronic pain syndrome reinforced by secondary gain and psychological overlay. According to him, appellant was disabled from work. Dr. Fitzgerald opined that appellant had a 15 percent permanent impairment of the spine with 5 percent due to her work injury.

A vocational rehabilitation report dated March 21, 1985 indicated that appellant was motivated to work but that she was only capable of performing volunteer work as a medical assistant at the employing establishment two times a week and not on consecutive days as she needed to rest her back in between workdays.

In a report dated January 14, 1986, Dr. Piccini, an osteopath, opined that appellant could perform some work but could not lift more than 10 to 15 pounds.

In an OWCP-5 work evaluation form dated May 20, 1986, Dr. Piccini reported that appellant could work 3 to 4 hours per day with a lifting restriction of up to 10 pounds.

Appellant subsequently came under the care of Dr. Joel Cooperman, an osteopath, for treatment of her low back condition.[1] In a March 31, 1987 report, Dr. Cooperman noted that appellant had been referred to him by Dr. Piccini and that her chief complaint was chronic back pain. He stated:

> "She had sustained injury in June 1975, working at the [employing establishment]. The injury apparently has accounted for the continuation of her symptoms since that time. While under my care her symptoms of back pain have been controlled but are aggravated by any prolonged sitting, standing or walking. In May 1986 a CT [computerized tomography] scan of the lumbar spine was obtained which showed a number of abnormalities including facet arthrosis at L3-4, narrowing of the L4-5 intervertebral disc space and almost total obliteration of the L-5, S-1disc space with boney erosive changes noted. Her last visit was March 10, 1987, she continued to exhibit mild to moderate lumbar spasm and decreased motion in her low back and lumbosacral areas. In reviewing [appellant's] history I feel that she is still disabled at this time and I foresee no significant change in her condition in the future."

[1] It appears that appellant moved from Colorado Springs to Denver, which necessitated the change in physicians.

The record contains treatment notes from Dr. Cooperman, dating from 1986 to 1996, indicating that appellant was seen intermittently for symptoms of low back pain.

In an August 19, 1997 report, Dr. Cooperman stated: "[Appellant] is totally disabled from work and has been since I started treating her in May 1996. Her care at this point is [episodic] when her pain increases beyond tolerance. Intervals vary from one week to six months. Her symptoms are per history related to the injury of 1975."

On January 21, 1998 the Office referred appellant to Dr. Robert C. Schutt, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a February 26, 1998 report, Dr. Schutt related that appellant had a history of severe back pain leading to a spinal fusion and a wide lumbar decompression fusion from L4 to the sacrum when she was only 23 years old. He described appellant's work injury of June 12, 1975, reported her continuing complaints of low back pain, and recorded physical findings. According to Dr. Schutt, appellant was not disabled from work due to her lumbar strain on June 12, 1975. He stated that the only active and disabling residuals [were] related to the radiographic findings of a decompression and fusion," which occurred prior to the work injury. Dr. Schutt noted that appellant was disabled from work only by factors such as "obesity, age, general poor physical condition, difficulty with recall and mentation as well as poor memory."[2]

On May 6, 1998 the Office issued a notice of proposed termination of compensation. The Office advised appellant that the weight of the medical evidence residing with Dr. Schutt's report established that she was no longer disabled due to her accepted work injury and that she no longer suffered any residuals due to her June 12, 1975 lumbar sprain.

In a decision dated June 16, 1998, the Office terminated appellant's compensation benefits effective June 20, 1998.

Appellant subsequently requested a review of the written record and submitted a July 17, 1998 report from Dr. Cooperman, which stated as follows:

> "I would like to respond to your decision on [appellant] I first assumed [appellant's] care with reference to her back in 1986. She was at that time disabled due to her previous injury. Historically she had undergone a lumbar laminectomy and fusion in the 1950s. She had recovered and was able to work there after. Her disability developed after the lifting injury at the [employing establishment] in 1975. I would assume that [appellant] underwent appropriate evaluations at [that] time to substantiate her injuries and resultant disability. In 1987 I submitted a letter stating her condition had not improved while under my care and that I felt she was still totally disabled. Her condition has further deteriorated since 1987 and she remains permanently disabled."

[2] Dr. Schutt completed a work evaluation form dated February 19, 1998, which reported that appellant could work 8 hours per day with a lifting restriction between 20 to 50 pounds and only intermittent hours of sitting, standing, bending, twisting, walking, squatting, lifting, climbing and kneeling.

In a decision dated December 8, 1998, an Office hearing representative affirmed the Office's June 16, 1998 decision.

The Board finds that the Office improperly terminated appellant's compensation effective June 16, 1998.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] 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.[4]

In terminating appellant's compensation, the Office assigned probative weight to the second opinion report of Dr. Schutt, finding that appellant's disability from work was due to her preexisting degenerative back condition and not the June 12, 1975 work injury. The Office specifically noted that Dr. Schutt's opinion was the only reasoned medical opinion addressing the issue of causal relationship and finding that there was no work-related residuals that prevented appellant from returning to work.

The Board, however, finds that a conflict in the medical evidence exists between the opinions of Dr. Schutt and appellant's treating physician, Dr. Cooperman, as to whether appellant has continuing disability that is causally related to the June 12, 1975 work injury. For more than 20 years, the Office has paid compensation to appellant for her disability from work, based in part on the opinion of Dr. Cooperman. Although Dr. Cooperman's opinion is not completely rationalized, it is sufficient to support appellant's contention that she is unable to return to work and has residuals causally related to her work injury. Because a conflict exists in the record between Drs. Cooperman and Schutt, the Board concludes that the Office failed to meet its burden of proof in terminating appellant's compensation.[5]

[3] *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979).

[5] Section 8123(a) of the Federal Employees' Compensation Act provides that: "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 December 8 and June 6, 1998 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
April 23, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member