

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CARLA J. BEAN and DEPARTMENT OF TRANSPORTATION,  
FEDERAL AVIATION ADMINISTRATION, Denver, CO

*Docket No. 00-1908; Submitted on the Record;  
Issued February 8, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the basis that she no longer suffered from residuals of her accepted March 6, 1978 injury.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof in terminating appellant's compensation.

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 ceased or that it was not longer related to the employment.<sup>1</sup>

Section 8123(a) of the Federal Employees' Compensation Act,<sup>2</sup> provides, "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."

On May 15, 1978 accepted that appellant sustained a superimposed strain on a contusion on her lumbosacral spine, which aggravated preexisting lumbosacral disc disease and disc herniation at L5-S1. The Office authorized bilateral laminectomies at L5-S1 with posterior left fusion. Appellant returned to work as a clerk typist for three hours a day on November 4, 1980 and received compensation for loss of wage-earning capacity.

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<sup>1</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>2</sup> 5 U.S.C. §§ 8101-8193, § 8123(a).

On February 23, 2000 the Office issued a notice of proposed termination of wage-loss benefits. The Office's April 4, 2000 decision which terminated appellant's compensation benefits effective April 22, 2000.

In a report dated December 28, 1999, Dr. Steven Nadler, a second opinion physician and a Board-certified orthopedic surgeon, stated that he had examined appellant on December 20, 1999 but that her complaints of pain did not allow for a full examination. Dr. Nadler noted that appellant's movements were limited, that she flexed 20 degrees and extended to 0 degrees, and that her lumbar laminectomy and fusion had failed. Any movement caused severe pain in her lower back although she appeared to have good sensation and motor function. He noted scar tissue fusion at L5-S1, stating that "these findings are ongoing and contributing to her disability and certainly support all of the past and current objective medical evidence." Dr. Nadler recommended that appellant be restricted from lifting more than 20 pounds and avoid work that required prolonged bending. He noted that appellant could return to work as an air traffic controller. After reviewing her position description, Dr. Nadler stated that appellant could perform the job of an air traffic controller, given the lack of lifting requirements and the allowance of frequent breaks where the average time on position was three and a half to four hours per day.

In a report dated January 24, 2000, Dr. Gerald R. Rupp, appellant's treating Board-certified orthopedic surgeon, stated that he had reviewed Dr. Nadler's report and that "it correlates very well with my impressions and [appellant's] present physical conditions." Dr. Rupp stated that appellant could return to sedentary work with frequent breaks and frequent position changes, and that she could work no more than four to six hours at a time. He noted that, due to appellant's chronic pain, discomfort, incapacitation, persistent reproducible back pain and leg pain, she was disabled from the position of an air traffic controller.

In a March 8, 2000 report, Dr. Rupp stated that he examined appellant that day and stated that appellant's incapacitation has been consistent for over 19 years, as her symptoms have been clinically reproducible and stable for over 19 years. Although, he stated that she could work at a sedentary job with frequent position changes, he also noted:

"[B]ecause of the chronic symptoms that she [i]s having and the pain that she [i]s having, that her ability to concentrate and sit for the prolonged periods of time that [air traffic] controlling requires, particularly if it is busy periods of time, would preclude her from fulfilling those duties. Therefore I feel that she is permanently disabled from the vocational activity of controlling. Therefore, it is my opinion, to state that she is able to return to an [air traffic] controller position is not practical and is unreasonable."

In this case, Dr. Nadler noted that appellant could return to work as an air traffic controller given the lack of lifting requirements and the allowance of frequent breaks. Dr. Rupp, on the other hand, found that, because of appellant's chronic symptoms and pain, she could not perform the duties of an air traffic controller.

The Board finds a conflict in medical opinion evidence between Dr. Nadler and Dr. Rupp and for this reason, the Office did not meet its burden of proof to terminate appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated April 4, 2000 is reversed.

Dated, Washington, DC  
February 8, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member