

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARILYN ZOBIE and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Syracuse, NY

*Docket No. 01-2179; Submitted on the Record;  
Issued June 5, 2002*

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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 appellant's compensation.

On February 3, 1982 appellant, then a 37-year-old registered nurse, was helping to turn a patient in bed when she sustained a strain in her lower back. She stopped working that day, returned on February 6, 1982, stopped again on February 18, 1982 and returned on April 2, 1982. Appellant received continuation of pay for the periods she did not work. She stopped work again on April 8, 1982. The Office accepted appellant's claim for cervical and lumbar strains and began payment of temporary total disability compensation. Appellant returned to part-time work with a private employer on June 13, 1983 but subsequently stopped working. The Office resumed payment of temporary total disability compensation. In an August 16, 1984 decision, the Office found that appellant could perform the duties of a claims examiner and, therefore, had a 47 percent loss of wage-earning capacity. The Office reduced appellant's compensation effective August 27, 1984. On June 9, 1997 appellant underwent surgery for a hemilaminectomy, foraminotomy and nerve root compression at L4-5, bilaterally. The Office began payment of temporary total disability compensation effective June 9, 1997.

In a September 14, 1998 decision, the Office terminated appellant's compensation effective September 12, 1998 on the grounds that the weight of the medical evidence established that her employment-related condition had ceased. She requested a hearing which was conducted on May 5, 1999. In a July 14, 1999 decision, the Office hearing representative affirmed the Office's September 14, 1998 decision.

In a March 31, 2000 letter, appellant's attorney submitted new medical evidence and requested reconsideration. In an April 18, 2000 merit decision, the Office denied appellant's request for modification. Appellant's attorney requested a hearing before an Office hearing representative. In a July 26, 2000 decision, the Office found that appellant was not entitled to a hearing because she had previously requested reconsideration. The Office further reviewed the record on its own discretion and denied appellant's request for a hearing on the grounds that she

could submit additional evidence and request reconsideration. In an August 22, 2000 letter, appellant's attorney again requested reconsideration.<sup>1</sup> In a January 3, 2001 merit decision, the Office again denied appellant's request for modification of its prior decision. In a May 1, 2001 letter, appellant's attorney again made a request for reconsideration. In an August 3, 2001 decision, the Office again denied appellant's request for modification.

The Board finds that the Office did not 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 benefits. 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.<sup>2</sup>

The Office based its decision on an August 4, 1998 form report in which Dr. David MacMillan, a Board-certified neurosurgeon, indicated that appellant could work eight hours a day without marking any restrictions for appellant on the form. In an August 7, 1998 note, Dr. MacMillan indicated that appellant's condition had improved but not resolved. He diagnosed spinal stenosis. In an August 17, 1998 report, Dr. MacMillan indicated that appellant had spinal stenosis, a chronic problem. He noted that the back surgery only reduced pressure on the spine without eliminating the spinal abnormality. Dr. MacMillan stated:

“[Appellant] has reached the point of maximum medical improvement, which is a totally arbitrary point at which one estimates that little or no additional improvement will occur. [She] continues to have intermittent pains and discomfort. [Appellant] continues to have difficulties with certain types of physical activities. It is my feeling that [she] is capable of certain work activities for as much as 8 hours a day. [Appellant] will need rest breaks during the interval, as most people normally due. Her disability rating I believe is 12 percent and that is permanent/partial. The date of maximum improvement was determined to be December 9, 1997.”

In a July 21, 2000 deposition, Dr. MacMillan stated that appellant's employment injury aggravated a preexisting back condition which resulted in her back surgery.

The Office's decision to terminate appellant's compensation is, therefore, based solely on a form report. The form report, in which no restrictions were reported, was contradicted by Dr. MacMillan's August 17, 1998 report in which he stated that appellant had difficulty with certain physical activities, which he did not specify. In the July 21, 2000 deposition, he attributed appellant's disability to spinal stenosis that had been aggravated by appellant's employment injury. Dr. MacMillan gave no statement that the effects of the February 3, 1982

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<sup>1</sup> Appellant appealed to the Board but subsequently requested that the appeal be withdrawn. (Docket No. 00-2404, Order Dismissing Appeal, August 23, 2000).

<sup>2</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

employment injury had resolved completely, that appellant was able to return to her full preinjury duties as a registered nurse or that the February 3, 1982 employment injury had caused only a temporary aggravation of an underlying condition. Dr. MacMillan's reports contain no rationale explaining when and how appellant's employment-related disability had ceased. His reports, therefore, have reduced probative value and are insufficient to support a finding that appellant's employment-related disability had ceased. The Office did not meet its burden of proof in terminating appellant's compensation.<sup>3</sup>

The decisions of the Office of Workers' Compensation Programs dated August 3 and January 3, 2001 are hereby reversed.

Dated, Washington, DC  
June 5, 2002

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>3</sup> The Board also notes that appellant underwent surgery on March 12, 2001 for what Dr. John R. Robinson, a Board-certified neurosurgeon, diagnosed as L4-5 spondylolisthesis, spinal stenosis and failed back surgery. As the Office authorized appellant's June 9, 1997 back surgery, the evidence of record raises the question of whether the Office is responsible for any effects of that surgery, whether or not the surgery was for an employment-related condition. *Melvin D. Dombach*, 8 ECAB 389 (1955) (where treatment is authorized while the question of causal relation is in doubt, the employer is not acting gratuitously and disability produced by such treatment is compensable).