

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEMI L. SPAULDING and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION, Wichita, KS

*Docket No. 01-653; Submitted on the Record;
Issued September 9, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to justify termination of appellant's compensation benefits effective January 10, 2000 on the grounds that she had no residual medical condition or disability causally related to her accepted employment injuries; and (2) whether appellant met her burden of proof in establishing that she had an employment-related disability which continued after termination of benefits.

On September 25, 1991 appellant, then a 30-year-old biological technician, filed a claim alleging that she developed cold abscess formations on her left breast as a result of her employment duties which involved cleaning test animal cages. She indicated that she became aware of her condition on August 5, 1991. Appellant worked intermittently from August 6 to 27, 1991 and stopped completely on August 29, 1991. The Office accepted appellant's claim for microbacterium chelonae and cold abscess formation of the left breast. Appellant was paid appropriate compensation.

Appellant submitted various reports from Dr. Hewitt C. Goodpasture, a Board-certified internist, dated August 1991 to May 1992; and reports from Dr. Whitney L. VinZant, a Board-certified surgeon, dated September 1991 to April 1992. Dr. Goodpasture's treatment notes dated August 1991 to May 1992 indicated a history of appellant's work-related injury. He noted that appellant continued to form small abscesses on her left breast and sinus tracts which required incision and drainage. Dr. Goodpasture noted that appellant experienced chronic pain in the breast area radiating to the left quadrant which was caused by the lymphatic congestion associated with the chronic inflammatory process. He noted that mycobacterium chelonae was a soil and water organism which would be expected to be present in large numbers in the animal cages appellant cleaned and he noted this organism was resistant to usual detergents used to clean the cages. Dr. Goodpasture further indicated that appellant developed a narcotic dependency resulting from medication taken to control her pain. The reports from Dr. VinZant indicated a history of appellant's work-related injury and indicated that he performed several surgeries to drain appellant's abscesses.

Thereafter, in the course of developing the claim, the Office referred appellant to several second opinion physicians.¹

The Office referred appellant for vocational rehabilitation services on August 30, 1994. Appellant underwent a functional capacity evaluation (FCE) on August 25, 1994 which indicated that appellant had become deconditioned. The therapist noted that appellant refused to do certain tasks and concluded that the FCE was unreliable.

In a letter dated April 19, 1995, appellant was referred for a conditioning program.

By letter dated May 31, 1995, the Office proposed to suspend appellant's benefits for failure to participate in the work-conditioning program.

In a decision dated July 10, 1995, the Office suspended appellant's benefits on the grounds that she failed to participate in the conditioning program. Appellant requested a hearing which was held on May 19, 1997.

Thereafter, appellant sought treatment from Dr. Paul L. Steer, a Board-certified internist, dated August 21, 1996; and Dr. Leon H. Chandler, a specialist in pain management, dated September 12, 1996 to October 9, 1997. Dr. Steer noted a history of appellant's work-related injury. He diagnosed appellant with status post atypical mycobacterium, left breast infection, probably inactive; marked left breast symptoms related to hormonal menstrual cycle; probably prior chronic fatigue immune dysfunction in recovery phase; and furunculosis. Dr. Chandler indicated in his treatment notes of September 12, 1996 to October 9, 1997 a history of appellant's injury. He diagnosed appellant with chronic abscesses of the left breast and treated her with narcotic therapy.

In a decision dated August 26, 1997, the hearing representative reversed the Office's decision dated July 10, 1995 noting that the Office improperly applied the sanctions of section 8123 of the Federal Employees' Compensation Act and noted that suspension of benefits for failure to undergo or participate in a recommended treatment program was not covered under section 8123.

Appellant continued to submit treatment notes from Dr. Chandler indicating that she remained totally disabled due to her accepted employment injury.

In a letter dated November 25, 1998, appellant indicated that she relocated to Alaska and was seeking travel reimbursement for a physician's appointment in Anchorage. She also noted that she was experiencing dental problems that she believed were causally related to her accepted work injury. Appellant indicated that she was seeking reimbursement for doctor and dentist bills.

By letter dated January 7, 1999, the Office indicated that they would be sending appellant for another second opinion examination. The Office indicated that they did not accept appellant's dental condition as work related and in order to consider this condition appellant

¹ This included referring appellant to a second opinion physician in 1992, 1993 and 1994.

would need to submit a rationalized opinion from a physician explaining the causal relationship of this condition to the original work-related condition.

On February 8, 1999 the Office referred appellant for a second opinion evaluation to Dr. Garrison H. Ayars, Board-certified in allergy and immunology, and Dr. Michael K. Friedman, a specialist in psychiatry. The Office provided Drs. Ayars and Friedman with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a letter dated February 23, 1999, appellant requested authorization for her daughter to accompany her to the second opinion examinations. Appellant also inquired as to payment for outstanding medical bills and the travel arrangements for the upcoming trip for the second opinion examinations.

In a letter dated March 12, 1999, the Office responded to appellant's inquiries regarding her travel, expenses and reimbursement for the second opinion evaluations. The Office indicated that they would pay reasonable child care expenses for her daughter while she was out of town but would not pay for her daughter's travel without prior authorization.

In a letter dated March 18, 1999, appellant indicated that her daughter suffered from asthma and could not be left with anyone. She noted that her mother was sickly and her brother could not financially afford to take time off work to watch her daughter. Appellant requested that her daughter travel with her and noted that she would not leave her in a day care facility but would require her to accompany her to the appointment.

In a letter dated March 24, 1999, the Office notified appellant of her traveling arrangements indicating that her daughter was authorized to travel with her round trip. The Office further notified appellant:

“Section 10.320 of the Code of Federal Regulations states:

“[The Office] sometimes needs a second opinion from a medical specialist. The employee must submit to examination by a qualified physician as often and at such times and places as [the Office] considers reasonably necessary. The employee may have a qualified physician paid by him or her, present at such examination. However, the employee is not entitled to have anyone else present at the examination unless [the Office] decides that exceptional circumstances exist...”

Appellant was examined by Drs. Ayars and Friedman on March 30, 1999. In a medical report dated March 30, 1999, Dr. Ayars indicated that he reviewed the medical records provided and performed a physical examination of appellant. He noted an essentially normal physical examination indicating a dimpled scar on the left breast. Dr. Ayars diagnosed appellant with mycobacterium chelonae breast infection; chronic pain of the left breast, neck and shoulders; hepatitis C; and chronic fatigue. He noted that there was no evidence appellant had continuing mycobacterium chelonae infection. Dr. Ayars noted that appellant had disproportionate symptoms to the findings on examination and indicated that there was an element of opiate addiction which confused the issue. He was unsure as to how appellant contracted hepatitis C as

there was no evidence in the medical records to reflect a transfusion at the time she was hospitalized for the mycobacterium infection. Dr. Ayars concluded that it was unlikely she got the hepatitis from a work-related problem. His indicated that appellant's chronic fatigue and fibromyalgia were not related to her mycobacterium infection but possibly a result of the hepatitis C. Dr. Ayars noted that in reviewing the literature on these illnesses most of the people with chronic fatigue syndrome and fibromyalgia have no history of antecedent illnesses such as appellant. He further noted that appellant's dental infections were the result of poor oral hygiene and lack of fluoride in the water and had no relation to an infectious disease. Dr. Ayars' concluded that he did not believe appellant's fibromyalgia, chronic fatigue or dental disease was related in any way to the original infection. He noted that appellant's infection was not disabling and noted that he would not recommend any work restrictions other than to avoid excessive physical activity.

In a medical report dated March 30, 1999, Dr. Friedman indicated that he reviewed the medical records provided and performed a physical examination of appellant. He diagnosed appellant with a history of narcotic analgesic dependency; probable mixed personality disorder with histrionic and narcissistic features; and history of chronic left breast infection. Dr. Friedman concluded that appellant did not have a psychological disorder as a result of her infection or the treatment she received. He indicated that appellant suffered from a preexisting psychological disorder which stemmed from a long-standing personality disorder which was unresolved. Dr. Friedman concluded that appellant did not have a work-related psychological disorder.

In a supplemental report dated April 2, 1999, Dr. Friedman indicated that an MMPI profile was performed and appellant's behavior was consistent with individuals with somatoform disorders. He noted that appellant may be obtaining secondary gain through the attention or services she received from her complaints.

In a letter dated October 7, 1999, appellant indicated concern over not being reimbursed for several pharmacy bills and traveling expenses in attending the second opinion evaluations.

On October 12, 1999 the Office issued a notice of proposed termination of appellant's wage-compensation benefits on the grounds that Dr. Ayars' report of March 30, 1999 and Dr. Friedman's reports of March 30 and April 2, 1999 noted that the accepted condition of microbacterium chelonae; and cold abscess formation of the left breast had ceased.

Appellant submitted a letter dated October 28, 1999 and a memorandum date stamped November 25, 1999. Her letter dated October 28, 1999 indicated that she went to see a physician in Anchorage and was seeking reimbursement for her travel expenses. In her memorandum to her attorney, dated March 25, 1999 and date stamped November 25, 1999 appellant noted that she contacted the physician referral organization MCN on March 23, 1999 to confirm her second opinion appointments and requested to bring her physician with her to the examinations. Appellant indicated that the MCN representative, Jessica Hctor, noted that appellant could not bring her physician with her because he or she would get in the way of the evaluation. She noted that neither Dr. Friedman nor Dr. Ayars would permit her family physician to observe the second opinion examinations.

By letter dated November 18, 1999, the Office requested the name and phone number of the physician appellant wished to have in attendance at Dr. Friedman's examination. The Office noted that appellant corresponded several times with the Office prior to the second opinion examinations in letters dated February 23 and March 18, 1999; however, never mentioned the desire to have her own physician present at the second opinion examinations. The Office further noted that on March 24, 1999 appellant was notified in writing that she could have her own physician present at the examination, however, appellant never notified the Office that MCN denied her this opportunity until after the proposed notice of termination of benefits.

A conference call was held on November 18, 1999 between the Office and MCN. The representative from MCN, Ms. Hctor, indicated that she did not recall speaking with appellant several months ago. She noted that Dr. Friedman does not allow outsiders into his examination room and indicated that had appellant requested her physician attend the examination she would have rearranged the examination with another physician who does allow other physicians to be present. Ms. Hctor indicated that she would never inform a patient that they do not allow other physicians to attend examinations. She further noted that she was unsure about Dr. Ayars' policy with regard to having other physicians present during his examination but believed he did permit it.

In a letter dated November 20, 1999, appellant, through her attorney, indicated that the Office had not provided her with sufficient notice to allow her to make arrangements for her physicians to travel to the second opinion examinations. Appellant's attorney noted several other cases he participated in which the Office had effectively denied injured workers of their statutory right to have a physician present at the second opinion examination. He instructed appellant to attend the examination under protest.

By decision dated January 10, 2000, the Office terminated appellant's wage-compensation benefits effective the same date on the grounds that the weight of the medical evidence rested with Drs. Ayars and Friedman who determined that appellant had no continuing disability resulting from her August 5, 1991 employment injury. The Office noted that the evidence of file was insufficient to support that appellant was denied the right to have her physician present at the second opinion examination. The Office indicated that appellant was notified of the appointment on February 8, 1999 and had two months to advise the Office that her physician would be attending the examination but she failed to do so. The Office further indicated that appellant corresponded several times with them prior to the examination and had not requested that her physician be present. Additionally, the Office noted that appellant did not protest the examination until after the notice of proposed termination.

By letter dated January 13, 2000, appellant requested a hearing before an Office hearing representative. The hearing was held on June 29, 2000. Appellant testified that she knew she could always bring her doctor to a second opinion examination. She submitted a report from Dr. Chandler dated November 30, 1999 and Dr. Geronimo Sahagun, an internist, dated December 3, 1999. Dr. Chandler noted a history of his treatment of appellant. He indicated that appellant had residual breast pain and scarring secondary to the infection. Dr. Chandler noted that "some part of this pain and the depression and the anxieties related to it are due to her original injury that was the infection that she sustained while working with the microbacterium." He further noted that appellant could return to work if the job was tailored to her abilities.

Dr. Sahagun's report dated December 3, 1999 indicated that appellant was treated for chronic active hepatitis C with mild liver function abnormalities and a coinfection with mycobacterium chelonae. He noted that it was unlikely that this bacteria invaded appellant's liver. Dr. Sahagun stated that "I cannot comment on the mycobacterium chelonae because this is not the area of my expertise...."

Thereafter appellant's attorney submitted a posthearing statement dated June 30, 2000 indicating that the Office did not meet its burden of proof when terminating appellant's benefits based on the opinions of Drs. Ayars and Friedman because these opinions were improperly obtained. He noted testimony elicited at unrelated hearings of other clients revealed a pattern where claimants were denied the right to have their physicians present at second opinion examinations.

By decision dated November 13, 2000, the hearing representative affirmed the decision of the Office dated January 10, 2000 and determined that appellant had no continuing disability causally related to her employment-related injury of August 5, 1991.

The Board finds that the Office has met its burden of proof to terminate benefits effective January 10, 2000.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² 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.³

In this case, the Office accepted that appellant sustained a microbacterium chelonae; cold abscess formation of the left breast and paid appropriate compensation. On February 8, 1999 the Office referred appellant for second opinions to Drs. Ayars and Friedman. In Dr. Ayars' report dated March 30, 1999, he diagnosed appellant with mycobacterium chelonae breast infection, chronic pain of the left breast, neck and shoulders, hepatitis C and chronic fatigue. He noted that there was no evidence appellant had continuing mycobacterium chelonae infection. Dr. Ayars indicated that appellant had disproportionate symptoms to the findings on examination and indicated that there was an element of opiate addiction which confused the issue. He concluded that it was unlikely appellant contracted hepatitis C from a work-related problem. Dr. Ayars indicated that appellant's chronic fatigue and fibromyalgia were not related to her mycobacterium infection but possibly a result of the hepatitis C. He further noted that appellant's dental infections were the result of poor oral hygiene and lack of fluoride in the water with no relation to an infectious disease. Dr. Ayars concluded that he did not believe appellant's fibromyalgia, chronic fatigue or dental disease was related in any way to the original infection. He noted that appellant's infection was not disabling and noted that he would not recommend any work restrictions other than to avoid excessive physical activity.

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Vivian L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

In a medical report dated March 30, 1999, Dr. Friedman diagnosed appellant with a history of narcotic analgesic dependency; probable mixed personality disorder with histrionic and narcissistic features; and history of chronic left breast infection. He concluded that appellant did not have a psychological disorder as a result of her infection or the treatment she has received but suffered from a preexisting psychological disorder which stemmed from a long-standing personality disorder which is unresolved. Dr. Friedman concluded that appellant did not have a work-related psychological disorder. He indicated that appellant's behavior was consistent with individuals with somatoform disorders and noted that appellant may be obtaining secondary gain through the attention or services she receives from her complaints.

The Board finds that, under the circumstances of this case, the opinions of Drs. Ayars and Friedman are sufficiently well rationalized and based upon a proper factual background such that they are the weight of the evidence and established that appellant's work-related condition has ceased. Drs. Ayars and Friedman indicated that appellant did not suffer residuals from her work-related injury of August 5, 1991. They noted that the condition was resolved.

After issuance of the pretermination notice, appellant submitted a letter dated October 28, 1999 and a memorandum date stamped November 25, 1999. Her letter dated October 28, 1999 indicated that she sought treatment from a physician in Anchorage and was seeking reimbursement for her travel expenses. In her memorandum to her attorney date stamped November 25, 1999, appellant noted that she contacted MCN on March 23, 1999 to confirm her second opinion appointments and requested to bring her physician with her to the examinations. She indicated that the MCN representative indicated that she could not bring her physician with her to the evaluation. Appellant noted that neither Dr. Friedman nor Dr. Ayars would permit her family physician to observe the second opinion examination.

The Board finds appellant's argument that she was denied her right to have her physician present at the second opinion examination nonpersuasive and not substantiated by the facts in this case.

Section 5 U.S.C. § 8123 provides in pertinent part:

“(a) An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required. The employee may have a physician designated and paid by him present to participate in the examination. 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.”⁴

Section 20 C.F.R. § 10.320 provides:

“[The Office] sometimes needs a second opinion from a medical specialist. The employee must submit to examination by a qualified physician as often and at

⁴ 5 U.S.C. § 8123(a).

such times and places as [the Office] considers reasonably necessary. The employee may have a qualified physician, paid by him or her, present at such examination. However, the employee is not entitled to have anyone else present at the examination unless [the Office] decides that exceptional circumstances exist....”⁵

The record establishes that appellant was notified on February 8, 1999 that two second opinion physician evaluations were scheduled for March 30, 1999 and had approximately six weeks to advise the Office that her physician would be attending the examination but she failed to do so. The record reflects that appellant corresponded several times prior to the examination with the Office in letters dated February 23 and March 18, 1999 and had not requested that her physician be present. Additionally, appellant did not protest the examination until after the notice of proposed termination. The record further reflects that on March 24, 1999 the Office specifically informed appellant that, pursuant to section 10.320 of the Code of Federal Regulations, she was entitled to have a qualified physician paid by him or her, present at such examination, however, appellant never raised this issue prior to the examinations. The Board finds that the evidence does not support appellant’s allegation that her rights under 5 U.S.C. § 8123 or 20 C.F.R. § 10.320 were violated.

Therefore, the Board finds that Drs. Ayars and Friedman’s opinions constitute the weight of the medical evidence and are sufficient to justify the Office’s termination of benefits. For these reasons, the Office met its burden of proof in terminating appellant’s compensation benefits.

After the Office properly terminated appellant’s benefits the burden of proof shifted to appellant.⁶ Appellant submitted a November 30, 1999 report from Dr. Chandler and a December 3, 1999 report from Dr. Sahagun. Dr. Chandler indicated that “some part” of appellant’s pain and depression were related to her original injury that was the infection that she sustained while working with the microbacterium. Dr. Chandler further noted that appellant could return to work if the job was tailored to her abilities. The Board held that medical opinions which are speculative or equivocal in character have little probative value.⁷ The Board further notes that Dr. Chandler couched his opinion in speculative terms and he did not reference any particular employment factors as causing appellant’s condition. Without any further explanation or rationale, such report is insufficient to establish that appellant had a continuing disability causally related to his employment.⁸ Dr. Sahagun indicated that appellant was treated for chronic active hepatitis C with mild liver function abnormalities and a coinfection with mycobacterium chelonae and noted that it was unlikely that this bacteria invaded appellant’s

⁵ 20 C.F.R. § 10.320.

⁶ After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits; *see Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

⁷ *See Leonard J. O’Keefe*, 14 ECAB 42, 28 (1962).

⁸ *Lucrecia M. Nielson*, 41 ECAB 583, 594 (1991).

liver. He provided no opinion on whether appellant sustained residuals of her work-related injury stating “I cannot comment on the mycobacterium chelonae because this is not the area of my expertise....” Therefore, this report is insufficient to meet appellant’s burden of proof.

Appellant again alleged that she was denied the right to have her physicians present at second opinion examinations. However, the record does not support appellant’s contention. Rather, appellant testified that she knew she could always bring her doctor to a second opinion examination. The Board finds that the evidence does not support appellant’s allegation that her rights under 5 U.S.C. § 8123 or 20 C.F.R. § 10.320 were violated.

The Board finds that there is no medical evidence which supports disability in this case. Drs. Ayars and Friedman had full knowledge of the relevant facts and evaluated the course of appellant’s condition. They are specialists in the appropriate fields. At the time wage-loss benefits were terminated they clearly opined that appellant’s accepted condition of microbacterium chelonei; cold abscess formation of the left breast had ceased. Their opinion is found to be probative evidence and reliable. The Board finds that Drs. Ayars and Friedman’s opinions are probative on the issue of appellant’s ability to work.⁹ As the record contains no medical evidence to the contrary, the Board further finds that Drs. Ayars and Friedman’s opinions constitute the weight of the medical evidence and are sufficient to justify the Office’s termination of benefits.

Consequently, the Office properly met its burden of proof in terminating appellant’s compensation benefits.

The decisions of the Office of Workers’ Compensation Programs dated November 13 and January 10, 2000 are hereby affirmed.

Dated, Washington, DC
September 9, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

⁹ See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions).