

**United States Department of Labor
Employees' Compensation Appeals Board**

L.R., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
FEDERAL EMERGENCY MANAGEMENT
AGENCY, Denton, TX, Employer**

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**Docket No. 08-390
Issued: November 18, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 19, 2007 appellant filed a timely appeal from the March 28, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative, which affirmed the termination of compensation for wage loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office's September 11, 2007 merit decision denying continuing compensation.

ISSUE

The issue is whether the Office properly terminated appellant's compensation for wage loss, and if so, whether appellant has met her burden to show that she is entitled to continuing compensation beginning September 2, 2006.

FACTUAL HISTORY

On December 19, 2003 appellant, then a 62-year-old human service specialist, sustained an injury in the performance of duty when she slipped in the break room and fell to the ground. The Office accepted her claim for bilateral epicondylitis, cervical and thoracic strain, left knee sprain and post-traumatic headache. It later accepted a torn left medial meniscus. Appellant received compensation for temporary total disability on the periodic rolls.¹ Preexisting medical conditions not accepted as work related included cardiac disease, hypertension, a thyroid condition and a previous anterior fusion at C5-6.

After a comprehensive chronic pain management program, the Office referred appellant, together with a copy of her medical records and a statement of accepted facts, to Dr. John A. Sklar, a Board-certified physiatrist, for a second opinion. Dr. Sklar evaluated appellant on June 6, 2006. He related her history of injury and current complaints, including pain in the back of the head and neck and lower back, with numbness and tingling in the extremities. Appellant also complained of double vision since the fall. Dr. Sklar noted the accepted conditions, including post-traumatic headache. He reviewed appellant's job description, medications and the results of diagnostic studies. "All of these diagnostic studies," he stated, "show mainly degenerative conditions not acute work[-]related injuries." Appellant advised that she was not working due to her inability to sit for prolonged periods: "She did try to work on two occasions and was unsuccessful at making it more than an hour or two at work on both occasions."

After describing his findings on physical examination, Dr. Sklar reported that appellant was disabled by nonwork-related conditions. He noted that appellant suffered from generalized chronic pain, which might be described as fibromyalgia or possibly an undifferentiated somatoform disorder. Appellant had degenerative disease affecting multiple joints. She demonstrated clear symptom magnification. Appellant also had significant cardiac disease. Dr. Sklar explained:

"In my opinion, these nonwork-related conditions are the disabling factor here. The claimant's injuries on the date of injury in question were rather minor and would be appropriately described as strains, sprains and contusions. In my opinion, those work-related injuries have resolved long ago with the claimant's ongoing complaints due to diseases of life from which she suffers."

Asked what treatment he would recommend to further assist appellant in recovering from any residuals of her December 19, 2003 work injury, Dr. Sklar explained that appellant's work injury had resolved and that her ongoing complaints were due to diseases of life, from which he expected no further recovery.

On July 17, 2006 Dr. Ed Wolski, appellant's treating family physician specializing in pain management, completed a work status report stating that the medical condition resulting from appellant's workers' compensation injury "will allow the employee to return to work as of July 18, 2006 without restrictions."

¹ Appellant sustained a previous employment injury on February 16, 2000 when she slipped on water in the bathroom. The Office accepted that claim for right knee and ankle sprain.

On July 25, 2006 the Office issued a notice of proposed termination of compensation for wage loss. It found that Dr. Sklar's opinion represented the weight of the medical evidence, together with the treating physician's agreement, and established that appellant was no longer disabled from work due to her accepted conditions. The Office explained that medical benefits would remain open if still necessary for the accepted injury.

Appellant tried to work her full-time shift, but on August 1, 2006 she advised that she was unable due to illness. She submitted Dr. Wolski's August 1, 2006 duty status report indicating that she was unable to perform light duty.

In a decision dated August 25, 2006, the Office terminated appellant's compensation for wage loss effective September 2, 2006.

Appellant requested an oral hearing before an Office hearing representative, which was held on February 13, 2007. She submitted a February 14, 2007 report from Dr. Wolski, who explained that appellant went back to work but did not have the sitting tolerance to do her job. Appellant was able to work only three days. Dr. Wolski noted her accepted medical conditions and offered the following opinion:

"When [appellant] went back to work, prolonged sitting flared up her neck and back. [She] was working on the computer. This flared up her lateral epicondylitis. [Appellant] was also having to take medications on the job for her post-traumatic migraines. [She] is also restricted from driving when she takes her nausea medication and pain medication for her headaches. These medications make her drowsy and a risk to herself and others when driving."

In a decision dated March 28, 2007, the Office hearing representative affirmed the termination of appellant's compensation for wage loss. The hearing representative found that Dr. Sklar's opinion represented the weight of the medical evidence and was sufficient to justify the termination of compensation. The hearing representative found deficiencies in Dr. Wolski's February 14, 2007 report.

Appellant requested reconsideration. She submitted a May 17, 2007 report from Dr. Wolski, who stated that she was still disabled as a result of her December 19, 2003 work injury. Dr. Wolski explained that appellants' current headaches and left knee pain were related to her fall in 2003. He stated that appellant also injured her neck in the fall and that her current neck pain was also related to the accepted work injury. Dr. Wolski reported that appellant continued to have pain from her work-related injury that was causing inability to work: "In my medical opinion the patient is unable to work as a result of her work injury."

On September 11, 2007 the Office reviewed the merits of appellant's claim and denied modification of its prior decision. It found that Dr. Wolski's report did not overcome appellant's burden to support that she was still disabled due to the accepted work injury.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ After determining that an employee has disability causally related to her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ Having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration by the weight of evidence that entitlement to benefits has ceased.⁵ The inadequacy or absence of a report in support of continuing benefits is not sufficient to support termination, and benefits should not be suspended for that reason.⁶

Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the accepted employment injury.⁷

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.⁸

ANALYSIS

When the Office issued its August 25, 2006 decision terminating compensation for wage loss, the weight of the medical evidence supported that appellant's disability for work was a result of nonwork-related conditions. Dr. Sklar, a Board-certified physiatrist and second opinion physician, examined appellant, related her history of injury and current complaints and reviewed the results of diagnostic studies. It was his opinion that all of these diagnostic studies showed mainly degenerative conditions, not acute work-related injuries and it was these nonwork-related conditions, including her generalized chronic pain and the degenerative disease affecting her joints, that currently disabled appellant from work. Dr. Sklar offered rationale to support his

² 5 U.S.C. § 8102(a).

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

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.0812.3 (July 1993).

⁶ *Id.* at Chapter 2.0812.8(c)(1) (June 2003).

⁷ *Wentworth M. Murray*, 7 ECAB 570 (1955) (after a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation, he had a disability causally related to the employment resulting in a loss of wage-earning capacity); *Maurice E. King*, 6 ECAB 35 (1953).

⁸ 5 U.S.C. § 8123(a).

opinion. He explained that the nature of the accepted conditions was rather minor and, in his opinion, resolved long ago. Appellant's ongoing complaints, he explained, were simply due to the diseases of life that she currently suffered.

The Board finds that Dr. Sklar based his opinion on a proper factual and medical history. The Office provided him a copy of appellant's medical records and a statement of accepted facts. The Board also finds that his rationalized opinion constituted the weight of the medical evidence when the Office issued its August 25, 2006 decision terminating compensation for wage loss. Further, appellant's treating physician, Dr. Wolski, a family practitioner, appeared to support Dr. Sklar's opinion when he reported on July 17, 2006 that the medical condition resulting from appellant's workers' compensation injury would allow her to return to work as of July 18, 2006 without restrictions. Strictly speaking, he did not report that appellant was fully capable of returning to work; he merely indicated that the accepted employment injury was no longer preventing her from doing so. When Dr. Wolski later reported on August 1, 2006 that appellant was, in fact, unable to perform light duty, he did not state anything that was inconsistent with the opinion given by Dr. Sklar, who found that she was disabled by other, nonwork-related conditions.

The Board finds that the Office met its burden to justify the termination of appellant's compensation for wage loss effective September 2, 2006. It appeared from the medical evidence that whatever disabling medical conditions appellant currently suffered, those conditions were unrelated to her slip and fall on December 19, 2003. There was no contemporaneous medical opinion to the contrary.

The Office having met its burden of proof, the burden shifted to appellant to establish that the accepted employment injury continued to disable her from work. Appellant submitted two reports from her treating physician. On February 14, 2007 Dr. Wolski noted that when appellant went back to work, working on the computer flared up her lateral epicondylitis, an accepted employment injury. He also noted that appellant was taking medications for another accepted employment injury, her post-traumatic headaches. This, in turn, restricted her from driving. On May 17, 2007 Dr. Wolski left no doubt where he stood on the issue of disabling residuals appellant was still disabled as a result of her December 19, 2003 work injury. He explained how appellant still suffered from accepted medical conditions and how they continued to produce disabling pain. This opinion is directly contrary to the opinion of the Office referral physician, Dr. Sklar, who felt the accepted conditions had resolved long ago. Given the disagreement between these two physicians, the Board finds that further development of the evidence is warranted. The Board will set aside the Office's September 11, 2007 decision denying modification and will remand the case to the Office for referral to an impartial medical specialist to resolve the conflict. Following such further development as may be necessary, the Office shall issue an appropriate final decision on appellant's entitlement to continuing compensation for wage loss.

CONCLUSION

The Board finds that the Office met its burden to justify the termination of appellant's compensation for wage loss. Subsequent medical evidence created a conflict on whether the

accepted employment injury continued to disable appellant from work. Further development of the medical evidence is therefore warranted.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2007 decision of the Office of Workers' Compensation Programs is affirmed. The Office's September 11, 2007 decision is set aside and the case remanded for further action consistent with this opinion.

Issued: November 18, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board