

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LORI I. CHICCINO and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS MEDICAL CENTER, Canandaigua, N.Y.

*Docket No. 96-2007; Submitted on the Record;
Issued December 9, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of April 8, 1996.

Appellant, a 30-year-old temporary clerk/typist, injured her right knee, right shoulder and neck on December 7, 1992 when she slipped and fell while ascending a staircase. Appellant filed a Form CA-1 claim for benefits based on traumatic injury, which the Office accepted for sprains of the right knee and right shoulder. Appellant received continuation of pay and compensation for total disability from February 3, 1993 through August 20, 1995.

In a report dated March 11, 1993, Dr. John M. Costenbader, a Board-certified orthopedic surgeon and appellant's treating physician, noted appellant's complaints of pain in her right knee, neck and right shoulder, and found that she was totally disabled. In a report dated March 19, 1993, Dr. Costenbader indicated that appellant's present disability was the result of the December 7, 1992 employment injury.

By letters dated June 1, 1993, the Office scheduled a second opinion examination with Dr. Daniel Elstein, a Board-certified orthopedic surgeon, on June 24, 1993, to determine whether appellant was still disabled by residuals from her accepted employment injuries. In a report dated July 7, 1993, Dr. Elstein found that appellant was only partially disabled as a consequence of the December 7, 1992 employment incident and could return to her work as a clerk/typist. In a follow-up report dated November 29, 1993, he stated that appellant's right knee condition was in part due to the December 7, 1992 accident. Dr. Elstein opined that a very small percentage, perhaps 10 percent of the knee condition, was causally related to the December 7, 1992 injury and 90 percent was due to a prior motorcycle accident. He advised that arthroscopic surgery should not be performed.

In a report dated May 9, 1994, Dr. Costenbader noted that appellant was "quite concerned" about the lack of a response from the Office regarding her requests for a magnetic

resonance imaging (MRI) scan of the cervical spine and an arthroscopy of her right knee.¹ Dr. Costenbader also stated that appellant had reached maximum medical improvement and was totally and permanently disabled because of her injuries.

The Office determined there was a conflict in the medical evidence regarding causal relationship and surgery, and in letters dated June 14, 1994, referred appellant for a referee examination by Dr. Nak K. Shim, a Board-certified orthopedic surgeon, scheduled for June 28, 1994.

In a report dated June 29, 1994, Dr. Shim stated that he concurred with Dr. Elstein that there was no indication for arthroscopic surgery, and that despite the continued complaints of pain and discomfort in her right shoulder and right knee, appellant's employment-related injury of December 7, 1992 should be considered recovered. Dr. Shim opined that appellant's right knee condition was due in part to the December 7, 1992 injury, but that arthroscopic surgery of the right knee would not benefit her. He stated that her current complaints were not really related to the December 7, 1992 incident but due to residuals of a 1976 motorcycle accident. Dr. Shim further stated that appellant should be able to return to her work status prior to the December 7, 1992 incident, and that she should be able to perform her work as a clerk/typist. He advised that appellant was capable of working at least four hours a day as a typist, and could gradually increase to a full eight-hour day within two months' duration. Dr. Shim concluded that, because there was no work available at her place of employment for four hours per day, he would recommend a work hardening program for two months, at which time she could resume a full eight-hour workday.

In a July 22, 1994 supplemental report addressed to an Office medical adviser, Dr. Shim stated, "This letter is in reply to a [tele]phone call of July 21, 1994 from your office regarding [appellant]. On page six of my report I have stated that she is able to return to her previous job as a clerk-typist. I would prefer that she begin the job slowly, starting at four hours a day and gradually work up to a full eight[-]hour day over the next two months."

In a letter dated October 5, 1994, the Office referred appellant for rehabilitation services.

In a letter to the Office dated May 30, 1995, the vocational rehabilitation counselor stated that, although appellant initially cooperated with rehabilitation efforts, she became increasingly less cooperative as time went on. The rehabilitation counselor stated that when the employing establishment declined to reemploy appellant, he began to explore other options and recommended that appellant participate in a diagnostic vocational evaluation. At that point appellant declined to participate further and indicated that she could not work. The rehabilitation counselor stated that, although he reiterated to appellant that the weight of the medical evidence of the file showed otherwise and that he reviewed appellant's obligation to cooperate with

¹ The Office did eventually approve authorization for arthroscopic surgery on appellant's right knee in a letter dated December 29, 1994. In a letter to the Office dated February 3, 1995, however, Dr. Costenbader, decided to defer the surgery given his determination that appellant's right knee symptoms were not as severe as previously indicated. Dr. Costenbader noted that appellant's neck had become more troublesome at that point, and he stated that he would like to obtain an MRI of the cervical spine. In a letter dated August 24, 1995, the Office authorized the MRI.

rehabilitation efforts, she continued to assert her inability to work or continue in rehabilitation. He concluded that, at that point, sanctions were needed.

In a letter dated May 30, 1995, the Office informed appellant that it appeared she had not exhibited a good faith effort to participate in her vocational rehabilitation program, and advised that if she did not contact the Office within 30 days to continue with these efforts, it could terminate or reduce her compensation.

In response, appellant submitted to the Office a handwritten letter dated June 13, 1995 wherein she reiterated that she was not fully medically recovered from her employment injury and that therefore she was not physically ready to participate in vocational rehabilitation efforts. Appellant specifically stated that she would gladly participate when she received a release from Dr. Costenbader, her treating physician.

By decision dated July 24, 1995, the Office reduced appellant's compensation to zero based on her refusal to cooperate with its vocational rehabilitation efforts. Appellant was advised the reduction would continue until she underwent the directed vocational rehabilitation.

By letter dated August 18, 1995, appellant requested a review of the record by an Office hearing representative.

In a decision dated November 13, 1995, an Office hearing representative reversed the Office's July 24, 1995 decision, finding that the medical evidence of record was insufficient to establish that appellant was able to work or participate in a vocational rehabilitation effort. The hearing representative noted that the Office had determined that a conflict in the medical evidence had existed between appellant's treating physician, Dr. Constenbader, who had consistently indicated that she was totally disabled for work and/or vocational rehabilitation, and Dr. Elstein, who stated that she could work and engage in vocational rehabilitation, and that the Office had referred appellant to Dr. Shim to resolve this conflict. The hearing representative noted, however, that the June 29, 1995 telephone conversation was improper pursuant to Chapter 3.500(6)(c) of the Federal Procedure Manual, and that therefore Dr. Shim's reports must be excluded from the record. The hearing representative found that the conflict in medical evidence was unresolved and reversed the Office's July 24, 1995 decision.

By letters dated December 6, 1995, the Office scheduled an impartial medical examination for appellant with Dr. David Farber, a Board-certified orthopedic surgeon, to resolve the conflict in medical evidence and determine whether appellant was still disabled by residuals from her December 7, 1992 employment injury.

Dr. Farber examined appellant on January 8, 1996, and opined in a report of that date that appellant was capable of working at least four hours per day to do limited work. Dr. Farber stated, however, that he did not think appellant could resume "normal" duties for at least another two months and would advise her to seek a job that involved no lifting; *i.e.*, a sedentary-type job.

In a letter dated February 23, 1996, the Office advised Dr. Farber that appellant's regular, preinjury employment was that of a clerk who performed sedentary-type employment; *e.g.*;

typing, filing for up to 2 hours per day, and answering the telephone, with light lifting and carrying under 15 pounds, walking 2 hours, standing 1 hour, with minimal kneeling, climbing and bending. The Office requested whether appellant could return to her date-of-injury job based on the above description, after two months had elapsed.

Dr. Farber responded, in a letter dated February 27, 1996, that “I have reviewed my examination on [appellant] that was done on January 8, 1996 and her job description. I feel at this time [appellant] would be able to return to full work at 8 hours per day with no restrictions.”

On March 6, 1996 the Office issued a notice of proposed termination of compensation to appellant. In the memorandum accompanying the notice of proposed termination, the Office found that the weight of medical opinion was represented by Dr. Farber who opined that appellant was capable of returning to her date-of-injury job full time with no restrictions.

In response, appellant submitted a March 12, 1996 letter stating that the medical evidence conflicted with her daily physical and mental pains, and with Dr. Costenbader’s opinion. Appellant indicated in the letter that she had completed physical therapy and therefore requested that the Office reinstate its offer for her to participate in rehabilitation services. Appellant also submitted updated medical reports from Dr. Costenbader dated February 20, 1995 and January 18, 1996, and a consultation report from a hospital pain center dated May 10, 1995. Of these reports, the only medical evidence which the Office had not previously considered was Dr. Costenbader’s January 18, 1996 report, in which he stated that an MRI of the cervical spine failed to demonstrate any evidence of significant herniation or nerve root impingement, and that appellant now had a permanent, moderate partial disability.

By decision dated April 8, 1996, the Office terminated appellant’s compensation. The Office found that Dr. Costenbader’s January 18, 1996 report did not contribute any additional information that it had not already considered, and did not contain any opinion that appellant was unable to perform a sedentary clerical job. The Office noted that, although Dr. Costenbader diagnosed a moderate partial disability, he did not provide an opinion regarding whether she could perform any type of employment in light of this disability. The Office concluded that the weight of the medical evidence continued to rest with Dr. Farber’s opinion that appellant had no residual disability preventing her return to her date-of-injury job as a clerk/typist.

The Board finds that the Office met its burden of proof in terminating appellant’s compensation benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² After it has determined that an employee has a 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

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

In the present case, the Office based its decision to terminate appellant's compensation as of April 8, 1996 on Dr. Farber's referee medical opinion. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁴ Dr. Farber found that, based on his January 8, 1996 examination, appellant was able to return to full work at eight hours per day with no restrictions at her date-of-injury job as a clerk who performed sedentary-type employment. The Board finds that Dr. Farber's opinion is sufficiently probative and well rationalized to merit the special weight accorded a referee medical examiner. Therefore, the Office properly relied on Dr. Farber's opinion in finding that appellant no longer suffered from any residual disability resulting from the December 7, 1992 employment injuries that would preclude her from performing her regular, date-of-injury job. Appellant, therefore, is no longer entitled to compensation based on her employment-related accepted conditions.

Finally, the medical evidence appellant submitted following her receipt of the proposed notice of termination did not provide a rationalized, probative opinion that she continued to suffer residual disability from her accepted December 7, 1992 employment injuries which would preclude her from performing her regular, date-of-injury employment.⁵ The Board therefore affirms the Office's April 8, 1996 decision terminating benefits.

⁴ *Aubrey Belnavis*, 37 ECAB 206 (1985); 5 U.S.C. § 8123(a).

⁵ As appellant's physician was on one side of the conflict in medical opinion which was resolved by Dr. Farber, the additional reports are not sufficient to overcome the weight accorded his report; see *Josephine L. Bass*, 43 ECAB 929 (1992).

The decision of the Office of Workers' Compensation Programs dated April 8, 1996 is hereby affirmed.

Dated, Washington, D.C.
December 9, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member