

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN R. BARNWELL and DEPARTMENT OF HEALTH & HUMAN SERVICES, ALASKA NATIVE MEDICAL CENTER, Anchorage, Alas.

*Docket No. 97-477; Submitted on the Record;
Issued December 24, 1998*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective February 27, 1996; and (2) whether appellant has met her burden of proof in establishing residuals of her employment injury after February 27, 1996.

On February 25, 1994 appellant, then a 43-year-old retired nurse educator, filed an occupational disease claim, alleging that beginning April 16, 1993, she sustained chronic fatigue and post menopause syndrome as a result of factors of her federal employment. Appellant resigned effective June 6, 1993. The primary causative factor in appellant's development of her claimed condition was a meeting on April 16, 1993 attended by five nurse interns, appellant's supervisor, a moderator and appellant in which she alleged she was verbally abused by the interns. The Office accepted appellant's claim for aggravation of preexisting depression. In a letter dated January 26, 1996, the Office notified appellant that it proposed termination of her compensation and medical benefits on the grounds that the weight of the medical evidence established that appellant did not have any residuals of her accepted employment injury. In a decision dated February 27, 1996, the Office terminated appellant's compensation and medical benefits effective February 27, 1996 on the grounds that the medical evidence established that any disability related to her April 16, 1993 accepted injury had ceased. In a merit decision dated July 31, 1996, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was not sufficient to warrant modification of the prior Office decision.

The Board has carefully reviewed the entire case record on appeal and finds that the Office properly terminated appellant's compensation and medical benefits effective February 27, 1996.

Under the Federal Employees' Compensation Act,¹ once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.² After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.³

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.⁴ Therefore, the Office must establish that appellant's condition was no longer aggravated by employment factors after February 27, 1996, and the Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

In the present case, the Office terminated appellant's compensation and medical benefits based on the January 5, 1996 report by Dr. Eugene E. Klecan, a Board-certified psychiatrist and Office referral physician. Dr. Klecan found that appellant had no present impairment and that a reasonable date for resolution of the aggravation of her major depression was six months after the initial event. He indicated that the aggravation of the major depression had ceased. Dr. Klecan noted that in April or May 1995 appellant's treating psychiatrist's notes reflected an absence of discussion of work-related issues and focused on medication side effects, discussion of family problems and a therapeutic focus on assertiveness. Dr. Klecan concluded that appellant's ongoing condition was not related to the accepted employment incident and was entirely related to preexisting "life-long emotional issues and medication side effects and secondary gains to illness/disability status." Although the Office had provided appellant's treating physician, Dr. Ronald K. Pollack, an osteopath specializing in psychiatry, with a statement of accepted facts and requested additional information from him by letter dated October 23, 1995, including a reasoned medical opinion addressing whether appellant had any continuing disability related to her accepted employment injury, no response was received from Dr. Pollack at that time. In response to the letter of proposed termination, appellant submitted a letter indicating that she wished to appeal the Office's decision. However, no further medical documentation was received. Consequently, the Office properly found that the report by Dr. Klecan constituted the weight of the medical evidence and met its burden of proof in terminating appellant's compensation and medical benefits based on this well-reasoned and rationalized medical report.

¹ 5 U.S.C. § 8101 *et seq.*

² *William Kandel*, 43 ECAB 1011 (1992).

³ *Carl D. Johnson*, 46 ECAB 804 (1995).

⁴ *Dawn Sweazey*, 44 ECAB 824 (1993).

⁵ *Mary Lou Barragy*, 46 ECAB 781 (1995).

The Board also finds, however, that this case is not in posture for decision with respect to the issue of whether appellant met her burden of proof in establishing that she had residuals of her accepted employment injury after February 27, 1996.

After it has been established that termination or modification of compensation benefits is clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.⁶ In order to prevail, appellant must establish by the weight of the reliable probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.⁷

A review of the record reveals that, by letter dated January 25, 1996, the Office sent Dr. Pollack a copy of Dr. Klecan's report and requested that he review and comment on Dr. Klecan's conclusions. In a report dated July 12, 1996, Dr. Pollack indicated that he disagreed with the conclusions reached by Dr. Klecan in his psychiatric evaluation of appellant. Dr. Pollack reported that this report contained internal inconsistencies as Dr. Klecan based his conclusion that appellant no longer suffered from a major depression disorder on the absence of neurovegetative symptoms of depression. Dr. Pollack noted that the lack of such symptoms was due to appellant's positive response to antidepressant medication, not the absence of the condition. Dr. Pollack also indicated that he disagreed with Dr. Klecan's assessment of a six-month recovery time to resolve the psychological trauma that led to the aggravation of her preexisting depression, finding that such an assessment might have been valid in a "healthy" individual, but did not take into consideration appellant's deterioration before she sought professional help prior to the accepted employment incident. The Board finds that Dr. Pollack's July 12, 1996 report contained rationale explaining why he disagreed with Dr. Klecan's conclusions that there was no residual disability. There is an unresolved conflict in the medical evidence concerning whether appellant had any residuals of her accepted employment injury after February 27, 1996. Section 8123(a) of the Act⁸ states that 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. Therefore, the Board remands this case to the Office for it to refer appellant to an appropriate specialist for an impartial medical examination and opinion resolving the conflict in the medical evidence. After such further development as the Office deems necessary a *de novo* decision addressing appellant's petition for modification shall be issued.

⁶ Gary R. Sieber, 46 ECAB 1-215 (1994).

⁷ *Id.*; see also Wentworth M. Murray, 7 ECAB 572 (1955).

⁸ 5 U.S.C. § 8123(a).

The decision of the Office of Workers' Compensation Programs dated February 27, 1996 is hereby affirmed. The decision of the Office dated July 31, 1996 is set aside and the case is remanded for further action consistent with this decision.

Dated, Washington, D.C.
December 24, 1998

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member