

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEANNE MAHONEY and DEPARTMENT OF VETERANS AFFAIRS,
WEST ROXBURY VETERANS HOSPITAL, West Roxbury, Mass.

*Docket No. 97-361; Oral Argument Held; January 14, 1998;
Issued February 12, 1998*

*Appearances: Vincent A. Murray, Jr., Esq., for appellant; Miriam D. Ozur, Esq., for the
Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

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

The Board has duly reviewed the case record and concludes that the Office did not meet its burden of proof due to an unresolved conflict in the medical opinion evidence.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.¹

In the present case, the Office has accepted that as a result of employment-related injuries occurring on May 17, 1985 and March 1, 1986, appellant, a licensed practical nurse, sustained contusions of the left shoulder, neck and forearm, bicep tendinitis of the left shoulder, right elbow bruise and right shoulder contusion. In addition, the Office recognized that, unrelated to her federal employment, appellant suffers from the loss of one eye, seizure disorders, chronic diabetes mellitus, fibromyalgia, C5-6 joint space narrowing with osteophytes and foraminal encroachment at the C5-6 level and soft tissue calcification in the area of the subacromial bursa. Appellant stopped work on March 1, 1986 following her second employment-related injury and has not returned.

On March 3, 1986 appellant came under the care of Dr. Joseph Whalen, an internist. On March 4, 1986 Dr. Whalen, who continues to serve as appellant's treating physician, referred

¹ *David Lee Dawley*, 30 ECAB 530 (1979).

appellant to Dr. William Winchell, a Board-certified internist. As appellant's treating physician, Dr. Whalen consistently opined that appellant remained totally and permanently disabled as a result of her employment injuries.

On August 30, 1994 the Office referred appellant to Dr. Philip Salib, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Salib examined appellant on September 15, 1994 and in his report of the same date noted that appellant's elbows and wrists moved freely and painlessly, that the vertical compression test was negative and that the neurovascular examination of the upper extremities was symmetrical and normal. Dr. Salib additionally noted that appellant's range of motion in her neck was complete and painless with no muscle spasm, but that appellant complained of tenderness from the base of her skull, down the neck and continuing down her mid and lower back to the buttocks. Dr. Salib opined that soft tissue injuries and bruises recover completely, even spontaneously, within six to eight weeks at most and that the injuries sustained by appellant in her employment-related accidents should have recovered long ago. Dr. Salib further stated that appellant's symptoms at the time of his examination were essentially related to her preexisting degenerative arthritis and fibromyalgia and were totally unrelated to her work-related trauma. Dr. Salib concluded that appellant could return to work on a full-time basis in a limited-duty capacity, as she had physical restrictions based upon her underlying degenerative condition.

In response to an Office request, Dr. Salib reviewed additional medical and factual records and prepared a February 1, 1996 addendum to his prior report. In this report, Dr. Salib reiterated his earlier opinion that the injuries sustained as a result of appellant's May 17, 1985 and March 1, 1986 employment accidents had left no disabling residuals and that her continuing symptoms were due to her longstanding and preexisting degenerative arthritis and fibromyalgia.

On July 31, 1996 the Office notified appellant that it proposed to terminate her compensation for wage loss on the grounds that the weight of the medical evidence as represented by the opinion of Dr. Salib demonstrated that her employment-related disability had ceased. The Office allowed appellant 30 days to respond to this proposal or submit additional evidence.

In response to the Office's notification, appellant submitted a report dated August 20, 1996 from her treating physician, Dr. Whalen. In his report, Dr. Whalen stated that he had treated and examined appellant on a monthly basis since her March 1, 1986 injury and that over these 11 years she had always shown tenderness at her elbows, shoulders and neck and her range of motion has always been limited by pain. The physician further opined that, as appellant's symptoms were not distributed in a radicular pattern which would reflect nerve root pain from the cervical spine, he did not feel that appellant's cervical osteoarthritis was the primary cause of her pain. Dr. Whalen stated that appellant's history of accidents, her consistent symptoms and his consistent findings during his many regular examinations over the years supported the fact that appellant sustained significant soft tissue injuries at the levels of elbows, shoulders and neck and further noted that her condition and level of function had never improved above the activities of daily living. He concluded that appellant was disabled from any occupation, that this disability had been present since she sustained her employment-related injuries and that she had not shown and probably would not show, any improvement in her status.

In a decision dated September 4, 1996, the Office terminated appellant's compensation benefits effective September 15, 1996, on the grounds that the weight of the medical evidence, as represented by the well-reasoned opinion of Dr. Salib, establishes that appellant is no longer experiencing residuals from either of her work-related injuries for which she had been receiving compensation.

When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Federal Employees' Compensation Act,² to resolve the conflict in the medical opinion.

In the present case, appellant's treating physician, Dr. Whalen, repeatedly opined that appellant remained totally and permanently disabled as a result of her employment-related injuries; however, the Office referral physician, Dr. Salib, offered as a second opinion that appellant's condition was totally unrelated to her accepted employment-related injuries.

The Board finds that the opinions of Drs. Whalen and Salib are of equal weight and are in conflict on the issue of causal relationship between appellant's claimed disability and her May 17, 1985 and March 1, 1986 accepted injuries. This requires resolution by referral to a Board-certified impartial medical specialist, accompanied by a statement of accepted facts and the complete case record, for a rationalized medical opinion addressing this issue. As the Office did not refer appellant to an impartial medical specialist to resolve the conflict in the medical opinion evidence as to whether appellant remained disabled due to her accepted employment injuries, the Office did not meet its burden of proof in this case.

The decision of the Office of Workers' Compensation Programs dated September 4, 1996 is hereby reversed.

Dated, Washington, D.C.
February 12, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

² 5 U.S.C. § 8123(a); *see also Martha A. Whitson (Joe D. Whitson)*, 36 ECAB 370 (1984).