

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA ELKINS and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION HOSPITAL, Allen Park, Mich.

*Docket No. 96-1593; Submitted on the Record;
Issued June 24, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective March 22, 1995.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective March 22, 1995.

Appellant filed a claim alleging that on November 16, 1984 she injured her right leg and back in the performance of duty. The Office accepted appellant's claim for lumbosacral strain, aggravation of lumbar disc disease at L5, psychogenic pain and chronic pain syndrome. The Office notified appellant of its proposal to terminate her compensation benefits on February 13, 1995. By decision dated March 20, 1995, the Office terminated appellant's compensation benefits effective that date. Appellant, through her attorney, submitted additional information which the Office received on March 20, 1995 and the Office reopened appellant's claim to consider this evidence and issued an amended decision on March 22, 1995 terminating appellant's compensation benefits on that date. Appellant requested an oral hearing on April 18, 1995 and by decision dated March 14 and finalized March 19, 1996, the hearing representative affirmed the Office's decision.

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.¹ 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.² Furthermore, the right to medical

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

benefits for an accepted condition is not limited to the period of entitlement for disability.³ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

In this case, the Office referred appellant to Dr. L. James Roy, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated March 3, 1993, Dr. Roy diagnosed suspected direct contusion and sprain low back with probable aggravation of a preexisting degenerative intervertebral disc disease process of the lumbosacral spine. He found that significant orthopedic treatment was not indicated, but that appellant could not return to unrestricted employment. He provided work restrictions and indicated that appellant could return to work on March 3, 1993.

Appellant's attending physician, Dr. Eugene B. Purmell, an osteopath, submitted a report dated November 4, 1993 and opined that appellant was totally disabled. In a report dated November 27, 1993, Dr. Purmell stated that appellant was not capable of full nor part time sedentary work.

Section 8123(a) of the Federal Employees' Compensation Act,⁵ provides: "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." The Office properly found that there was a conflict of medical opinion between appellant's attending physician, Dr. Purmell, who stated that appellant could not work, and Dr. Roy, the Office referral physician, who found that appellant could perform restricted duty for eight hours a day. The Office referred appellant for an impartial medical examination with Dr. Louis P. Kivi, a Board-certified orthopedic surgeon.

In a report dated May 24, 1994, Dr. Kivi noted appellant's history of injury and medical history and performed an orthopedic evaluation. He found no muscle spasm or rigidity in appellant's spine and reviewed past and current x-rays. Dr. Kivi stated previous lumbar x-rays showed mild scoliosis, a loss of the disc space at L5-S1 with moderate anterior spurring slightly increasing from 1987 to 1989. The current x-rays demonstrated the same reduction of the L5-S1 disc space with the same degree of anterior spurring. Dr. Kivi stated that none of the findings were of clinical significance in view of appellant's physical findings. He concluded that appellant had no objective evidence of impairment except for a severe degree of obesity. Dr. Kivi stated that findings of degenerative disc changes at L5-S1 did not have any clinical significance and that appellant's complaints were not related to this area specifically. He also found that there was no indication for treatment other than weight loss. Dr. Kivi suggested restrictions but clearly stated that his limitations were "prophylactic" measures due to appellant's obesity.

³ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁴ *Id.*

⁵ 5 U.S.C. §§ 8101-8193, 8123(a).

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.⁶ The Board finds that Dr. Kivi's report is sufficiently well rationalized to be given special weight in regard to appellant's continuing disability due to orthopedic conditions. Dr. Kivi reviewed appellant's history of injury, provided his findings from physical examination and reviewed past and current x-rays in determining that appellant was no longer orthopedically disabled due to her accepted employment injury.

Appellant submitted an additional report from Dr. Purmell dated April 4, 1995 diagnosing right low back, buttock and leg pain and lumbosacral strain secondary to her work injury of November 16, 1984. Dr. Purmell opined that appellant was totally disabled. Dr. Purmell was on one side of the conflict that Dr. Kivi resolved, and the additional report from Dr. Purmell is insufficient to overcome the weight accorded Dr. Kivi's report as the impartial medical specialist or to create a new conflict with it.⁷

In a report dated July 10, 1995, Dr. Steven N. Gross, an osteopath, noted appellant's history of injury and medical history. He diagnosed degenerative disc disease based on her physical examination included limited range of motion and her previous x-rays. Dr. Gross stated that appellant was unable to perform her date-of-injury position and that it was questionable whether she could return to sedentary work. This report is not sufficient to overcome the weight attributed to Dr. Kivi's report or to create a conflict with it as Dr. Gross did not offer any medical rationale supporting that appellant's current condition is causally related to her accepted employment injuries.

Therefore, the Board finds that the Office properly determined that appellant was not disabled due to her orthopedic conditions. However, the Office did not meet its burden of proof to terminate appellant's compensation benefits as there is no medical evidence of record establishing that appellant's accepted psychiatric conditions of chronic pain syndrome and psychogenic pain causally related to her accepted employment injury have ceased. The most recent report addressing appellant's psychiatric disability, a September 7, 1989 report from Dr. Lynn W. Blunt, a Board-certified psychiatrist, continued to support disability for work due to psychiatric reasons which Dr. Blunt attributed to appellant's employment injury.

⁶ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

⁷ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

The decision of the Office of Workers' Compensation Programs dated March 14 and finalized March 19, 1996 is hereby reversed.

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

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member