

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY P. BEARD and DEPARTMENT OF THE AIR FORCE,
AIR TRAINING COMMAND, SHEPPARD AIR FORCE BASE, Tex.

*Docket No. 95-1841; Submitted on the Record;
Issued March 5, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's acupuncture treatments effective March 1, 1995.

On September 27, 1976 appellant, then a 51-year-old ward clerk, filed a notice of injury or occupational disease (Form CA 1 & 2) alleging that she bruised her right elbow and right leg and that the incision on her back broke open and she bit her tongue when she stepped in a slick substance on the floor and fell on her back on September 23, 1976. The Office accepted the claim for acute cervical strain, aggravation of degenerative osteoarthritis, C5, C6 and temporary aggravation of stomatitis. Appellant returned to work on November 8, 1976 after the original injury.

On November 29, 1976 appellant filed a notice of recurrence of disability (Form CA-2a) alleging that on November 12, 1976 the pain in her neck and head worsened. Appellant stopped work on November 12, 1976 and has not worked since that date. The employing establishment placed appellant on disability retirement effective November 12, 1976.¹ Appellant retired in December 1976.²

In progress notes dated June 2, 1994, Dr. Jaime C. Lim, appellant's treating physician, noted that appellant received acupuncture treatments on March 24 and 31, April 21, May 5 and 19 and June 2, 1994. He noted:

¹ Appellant noted on the form that she had filed for workers' compensation retirement instead of disability retirement.

² In a letter dated January 3, 1979, the Office advised appellant that her benefits were being terminated effective January 31, 1979 as the evidence of record indicated that her disability had ceased. Appellant requested reconsideration of the decision to terminate her benefits in a letter dated January 8, 1979. In a letter dated May 22, 1979, the Office reinstated appellant's compensation.

“So far, her symptom is more or less stable. She continues to experience recurrent neck and low back pain and frequently aggravated by increased activity. However, overall she states that the acupuncture combined with use of medication have adequately controlled any exacerbation of her symptoms.”

In progress notes dated August 11, 1994, Dr. Lim noted that appellant received acupuncture treatment on June 16 and 30, August 4, 5 and 11, 1994. He stated:

“Her symptoms are more or less stable except for a month ago when she could not make it for treatment on account of some family problems. Her neck pain and low back pain then has gotten worse with increased intensity of her symptoms.”

In a letter dated August 17, 1994, Dr. Dan H. Bolin, appellant’s treating physician, opined:

“[Appellant] continues to have severe bilateral trapezoid muscle spasm from previous occipital nerve root compression. This injury was obviously sustained many years ago and the patient continues stable but generally unimproved, these physical findings are a direct result of her initial injury.

“It is my opinion that she continues to be 100 [percent] disabled and is unemployable at this time. She continues to see Dr. Lim, for additional therapy and acupuncture. It is not likely she will improve from this condition.”

In progress notes dated September 2, 1994, Dr. Lim noted that appellant was given acupuncture treatments on August 25 and 26, September 1 and 2, 1994. He then stated that appellant’s “pain symptoms continues to improve to some degree. She reports of better tolerance to strenuous activity and denies any recent acute exacerbation of her pain.”

In a letter dated October 5, 1994 to Dr. Dan Bolin, the Office requested the physician to provide answers to several questions regarding appellant’s disability.

In a report dated December 15, 1994, Dr. Don W. Vanderpool, a Board-certified orthopedic surgeon and Office medical adviser, opined, based upon the statement of accepted facts and the medical evidence of record, that “continuation of acupuncture is not likely to meet the criteria for treatment services.” Dr. Vanderpool opined the acupuncture “treatment has not cured appellant, given relief or reduced the degree of disability” and that the “4 years of acupuncture treatments do not meet the criteria for treatment services.

In progress notes dated January 5, 1995, Dr. Lim noted that appellant was given acupuncture on December 2 and 14, 1994 and January 5, 1995. Dr. Lim noted that appellant claimed “that even acupuncture which has helped before in easing her acute exacerbation of the pain has not helped a great deal in decreasing her symptoms.”

On January 12, 1995 the Office issued a notice of proposed termination of medical benefits for termination of appellant’s acupuncture treatments. The Office relied upon the opinion of Dr. Vanderpool, the Office medical adviser, to terminate appellant’s acupuncture

treatments. The Office noted that the evidence was sufficient to establish that appellant's acupuncture treatments had not cured, given relief or reduced appellant's degree of disability and thus, issued a proposal to terminate authorization for continuing acupuncture treatments.

In a letter dated January 20, 1995, Dr. Lim disagreed with the Office that the acupuncture treatment was not providing appellant any relief from her pain. He stated:

“A few days ago, [appellant] provided me a copy of your letter to her proposing to terminate acupuncture treatments. You have indicated that ‘continued acupuncture treatments is not likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of monthly compensation.’ Given the chronic condition of [appellant] and the degree of her injury and the consequent structural abnormalities that she sustained as a result of the injury, I agree that acupuncture will not cure her condition. However, I must disagree with your claim that acupuncture does not give [appellant] relief of pain. In the past, [appellant] has been tried with all forms of nonsurgical procedures or treatment for control of pain including the use of different anti-inflammatory medications as well as narcotics and muscle relaxants. None of these treatments have provided any degree of relief of her pain. It is only with acupuncture treatments that [appellant] is able to experience lessening of her symptoms. I would not argue the fact that the relief is transient but for people with chronic pain syndrome, any degree of pain relief over any period of time is most definitely welcomed with regards to improvement in the quality of their life or improvement in their daily activity. Over the years, acupuncture has provided her with acceptable degree of relief over a period of weeks and sometimes months. It is primarily for this reason that acupuncture has been continued all through these years. One of the major roles of a physician is to ‘provide treatment for relief of pains and sufferings’. (sic) [Appellant] is considered to be permanently impaired and no amount of treatments, be it surgery or otherwise, can cure her condition. However, as her physician this doesn't mean that I would let her suffer with pain and deny her of the only treatment that can provide her the degree of relief that she has experienced all through these years. Doing so would invalidate one of the major role that a physician must fulfill in terms of relieving the pains and sufferings of a patient.”

Therefore, I would consider your proposal to terminate acupuncture treatments as cruel and inhumane, depriving [appellant] of the only treatment that can provide acceptable degree of pain relief from her chronic condition. I hope that you would reconsider your decision.”

By letter dated February 21, 1995, the Office informed appellant that further acupuncture treatment was not authorized subsequent to March 1, 1995. The Office found that Dr. Lim's report of January 20, 1995 was not supported by his progress reports dated August 11, 1994 and January 5, 1995.

In a letter dated February 24, 1995, appellant responded to the Office's decision to terminate her acupuncture treatment and requested reconsideration. Appellant stated:

“I am in complete disagreement with the statement that it does not give relief as I have taken it over a period of four years and am well aware that it does give relief. I do also understand that it is not a cure.

“It appears that you are basing your decision around a very close time frame of June and August 1994, at which time I was under much increased stress over the loss of my husband in April 1994 and of trying to get personal matters under control and of being unable to get my acupuncture as I really needed it. Prior to ever being referred to and getting acupuncture treatments I have lived with critical pain for many weeks without relief.”

By nonmerit decision dated March 28, 1995, the Office denied appellant’s request for reconsideration as she had not submitted new evidence in support of her claim or raised a substantive legal question.

The Board finds that the case record is not in posture for a decision due to a conflict in the medical evidence as to whether acupuncture treatments meet the criteria of section 8103 of the Federal Employees’ Compensation Act, that is “the services, appliances and supplies prescribed by a qualified physician” which the Office “considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of monthly compensation.”³ A referral to an impartial medical specialist pursuant to 5 U.S.C. § 8123 is therefore required to resolve this conflict in the medical evidence.⁴

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁵ After it has been 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.⁶ To terminate authorization for acupuncture treatment, the Office must establish that the treatment cannot cure appellant’s condition, provide relief or reduce the degree of disability as provided for under section 8103 of the Act.

Section 8103(a) of the Act provides for furnishing to an injured employee “the services, appliances and supplies prescribed by a qualified physician” which the Office “considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of

³ 5 U.S.C. § 8103.

⁴ 5 U.S.C. § 8123 states: “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.”

⁵ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁶ 5 U.S.C. § 8103(a).

monthly compensation.”⁷ The Board has found that the Office has great discretion in determining whether a particular type of treatment is likely to cure or give relief.⁸

However, section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁹

The Office referred the claim to Dr. Vanderpool, its Office medical adviser, for an opinion regarding the efficacy of continued acupuncture treatment. A disagreement arose between the Office’s medical adviser, Dr. Vanderpool, and appellant’s physician, Dr. Lim on the issue of whether appellant is entitled to continued acupuncture treatments. To resolve this conflict, the Office should refer appellant, together with a new statement of accepted facts and the complete case record to an appropriate medical specialist together with the definition contained in section 8103 of the Act for a rationalized opinion as to whether continued acupuncture treatment satisfies the criteria contained therein.

The decisions of the Office of Workers’ Compensation Programs dated March 28 and February 21, 1995 are reversed and the case is remanded for further development not inconsistent with this opinion.

Dated, Washington, D.C.
March 5, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

⁷ *Id.*

⁸ *James E. Archie*, 43 ECAB 180 (1991); *William F. Gay*, 38 ECAB 599 (1987).

⁹ *Robert W. Blaine*, 42 ECAB 474 (1991); *Joseph D. Lee*, 42 ECAB 172 (1990).