

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGIE J. RODGERS and DEPARTMENT OF THE ARMY,
ABERDEEN PROVING GROUND, Aberdeen, Md.

*Docket No. 95-2874; Submitted on the Record;
Issued November 17, 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 in terminating appellant's compensation benefits effective January 8, 1995.

On April 23, 1984 appellant, a computer operator, filed a traumatic injury claim (Form CA-1) alleging that on April 13, 1984 she sustained a lower right back and buttock injury while unloading a 60-pound box of printed paper off a laser printer. Appellant stopped work on April 23, 1984 and did not return. She was treated by Dr. A.S. Barretto, a Board-certified orthopedic surgeon, who diagnosed an acute lumbosacral strain. Diagnostic x-rays were deferred due to appellant's pregnancy. The Office accepted appellant's claim for low back strain. Subsequent form reports from Dr. Barretto supported appellant's continuing disability for work following delivery of her child. Dr. Barretto continued conservative orthopedic treatment and physical therapy. A September 1985 neurological consultation with Dr. J.D. Rybock found no disc herniations, significant bulges and no spondylotic changes or lumbar myelogram and computerized axial tomography (CAT) scan.

The Office referred appellant for examination to Dr. Edward F. Wenzlaff, a Board-certified orthopedic surgeon and second opinion physician. In an April 18, 1986 report, he opined that appellant had no continuing disability causally related to the April 13, 1984 employment injury. Dr. Wenzlaff found no objective residuals or lumbar abnormalities on x-ray. He noted prior diagnostic testing was negative and opined appellant had recovered from the accepted back strain and could return to her date-of-injury position.

In an internal memorandum dated June 16, 1986, the Office determined that there was a conflict in the medical opinion evidence between Dr. Wenzlaff and Dr. Barretto.

By letter dated November 28, 1986, the Office referred appellant, together with a statement of accepted facts, medical records and a list of specific questions, to Dr. Robert C. Abrams, a Board-certified orthopedic surgeon, for an impartial medical examination. In a

December 17, 1986 medical report, Dr. Abrams opined that x-rays of the lumbar spine were normal; however, x-rays of the sacroiliac joints revealed a marked sclerosis of both joints. He diagnosed appellant's condition as bilateral ilii condensans which was aggravated by the April 13, 1984 employment injury and appellant's disability lasted a minimum of one year. He stated she did not require ongoing treatment. Dr. Abrams' report was accompanied by a work restriction evaluation indicating appellant's physical restrictions and that appellant could work four hours per day. By letter dated December 18, 1987, the Office requested Dr. Abrams to clarify his opinion by providing the approximate date that appellant's employment-related disability should have ceased. The Office also requested that Dr. Abrams provide rationale for his opinion that appellant could only work four hours per day. In a December 31, 1987 letter, Dr. Abrams stated that appellant's employment-related disability should have ceased six months after she delivered her baby¹ and that appellant could work eight hours per day if appellant was retrained for a position that would allow her to sit for four hours per day.

In a December 27, 1988 medical report, Dr. Barretto indicated his findings on physical and objective examination and stated that appellant had a myoligamentous injury with residual symptoms of the lumbosacral spine. Dr. Barretto further stated that due to the type of chronic pain that appellant experienced, she had been referred to a pain clinic. In a March 4, 1989 medical report, an Office medical adviser reviewed the medical records and stated that treatment at a pain clinic was not warranted for appellant. The Office medical adviser stated that appellant's disability lasted a minimum of one year and that the employment-related disability reasonably ceased six months after she delivered her baby. He stated that appellant's residual ilii condensans condition was a nonemployment-related condition, and that appellant's current back pain was not related to her accepted injury. On March 30, 1989 the Office denied authorization for treatment at the pain clinic.

On October 8, 1992 appellant's physician requested authorization for a percutaneous discectomy at the L4-5 level to relieve her chronic back pain. In response to an Office's request to respond to specific questions, Dr. Morris Sanders, a medical consultant and Board-certified neurosurgeon, submitted an August 29, 1993 medical report in which he reviewed the medical record and advised that appellant's back condition was not causally related to the accepted April 13, 1984 employment injury. He noted that a May 15, 1992 MRI scan had revealed an L4-5 disc herniation and L3-4 annular bulge. Dr. Sanders noted that diagnostic tests following the injury had been negative with no evidence of a disc herniation from 1984 to 1991.

On November 15, 1993 the Office requested that Dr. John Allen submit a reasoned medical opinion regarding the need for surgery already performed to determine whether the surgery was related to the April 13, 1984 employment injury. The Office's letter was accompanied by medical records, a statement of accepted facts and a list of specific questions.² In response, Dr. Allen submitted a December 2, 1993 medical report in which he reviewed the

¹ At the time of her April 13, 1984 employment injury, appellant was pregnant.

² In an addendum to the August 24, 1993 statement of accepted facts, the Office noted that at the time Dr. Sanders reviewed the medical records, the case record did not contain the diagnostic test results covering the period April 13, 1984 through December 20, 1991.

medical record and opined that the objective test results were insufficient to warrant the requested surgical procedure. He noted that diagnostic testing of the lumbar spine in 1985 was reported as normal and that the accepted lumbar strain had resolved many years prior.

By decision dated April 20, 1994, the Office denied appellant's request for surgery on the grounds that appellant's current back condition was not causally related to the April 13, 1984 employment injury.

In a May 16, 1994 letter, appellant requested an oral hearing before an Office representative. By decision dated October 3, 1994, the hearing representative found that the case was not in posture for decision and remanded the case to the Office to issue a reasoned decision.

In a notice of proposed termination of compensation dated November 16, 1994, the Office advised appellant that it proposed to terminate her compensation because the medical evidence of record failed to establish continued disability causally related to the April 13, 1984 employment injury. The Office also advised appellant to submit additional medical evidence supportive of her continued disability within 30 days. In an accompanying memorandum, the Office found the weight of medical opinion was represented by Drs. Sanders and Allen.

In a letter dated December 9, 1994, appellant disagreed with the Office's proposal to terminate her compensation benefits accompanied by medical evidence, a resume and correspondence from former employers. By decision dated December 16, 1994, the Office terminated appellant's compensation benefits effective January 8, 1995 finding the medical evidence of record insufficient to establish continued disability due to the April 13, 1984 employment-related injury.

In a January 10, 1995 letter, appellant requested a review of the written record accompanied by additional medical evidence, previously submitted medical evidence, correspondence between appellant's employers and the Office, and the Office's decisions. By decision dated March 14, 1995, the hearing representative affirmed the Office's December 16, 1994 decision.

In an April 4, 1995 letter, appellant requested reconsideration of the hearing representative's decision accompanied by medical evidence. By decision dated May 4, 1995, the Office denied appellant's request for modification based on a merit review of the claim.

In a May 18, 1995 letter, appellant requested reconsideration of the Office's decision. By decision dated July 25, 1995, the Office denied appellant's request for modification based on a merit review of the claim.

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not

³ *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴

In the present case, the Office accepted that appellant sustained low back strain due to factors of her federal employment. The Office terminated appellant's compensation benefits based on the medical opinions of Drs. Sanders and Allen, Office medical consultants specializing in orthopedic surgery and neurology.

In a December 2, 1993 medical report, Dr. Allen reviewed the treatment notes of Dr. Barretto which indicated that five weeks after the delivery of appellant's baby, appellant's back pain had improved to a moderate degree, that the lower extremity pain had gone and that a neurological examination was negative. Dr. Allen noted that the May 31, 1985 computerized tomography (CT) scan of the lumbar spine reported a normal study, the June 19, 1985 CT scan of the lower lumbar spine found no evidence of a herniated lumbar disc and a June 19, 1985 lumbar myelogram revealed a normal examination. Dr. Allen also reviewed the April 17, 1986 medical report of Dr. Wenzlaff which found that he was unable to detect any objective impairment and that there was a large measure of functional overlay if not frank malingering. Dr. Allen stated that functional overlay was now more commonly diagnosed as symptom magnification which would unlikely result in a good outcome from invasive procedures. Dr. Allen further noted a psychological consultation by Dr. Michael Lobb, a clinical psychologist, and stated that there was no formal testing and that it should not be regarded as a definitive assessment since the language of the consultation was essentially that of gross clinical overview rather than a comprehensive evaluation. Additionally, Dr. Allen noted that the May 15, 1992 MRI of the lumbar spine with contrast enhancement revealed a three millimeter broad based disc herniation at L4-5, a two millimeter broad based annular bulge at L3-4 and a one millimeter bulging annulus at L5-S1. Dr. Allen then noted that between Dr. Elbaor's examinations of April 24, 1992 and June 14, 1993 the normal right ankle reflex had become decreased.

In response to the Office's questions, Dr. Allen stated that appellant had a lumbar strain which resolved many years ago and that there was no causal relationship between the MRI test results noted above and the April 13, 1984 employment injury. Dr. Allen further stated that based on Dr. Elbaor's latest medical notes dated June 14, 1993 indicating appellant's failure to attend therapy and to receive rehabilitation, back surgery was not warranted. Additionally, Dr. Allen opined that neither the MRI test results nor the observation that appellant had a reduced ankle reflex were sufficient to warrant surgery. Dr. Allen concluded that even if surgery were necessary, it would not be a result of the April 13, 1984 employment injury because the strain had resolved long ago. Dr. Allen further concluded that in the absence of hard data to warrant surgery and in the presence of an adversarial mind set as documented above, not only would appellant be unlikely to benefit from spinal surgery, but also appellant would probably have increased symptoms afterwards.

In response to the Office's notice of proposed termination of compensation, appellant submitted Dr. Elbaor's December 5, 1994 medical report. In this report, Dr. Elbaor indicated

⁴ Jason C. Armstrong, 40 ECAB 907 (1989).

that he began treating appellant in April 1992 and that appellant had low back pain that was consistent with a herniated disc in the lumbar spine. Dr. Elbaor further indicated appellant's medical treatment and that MRI testing on May 15, 1992 and in June 1993 revealed a herniated disc at L4-5. Dr. Elbaor stated that over this period of time, appellant presented conditions consistent with a herniated nucleus pulposus in the lumbar spine. Dr. Elbaor stated that a follow-up MRI was reported as normal, but that this was due to the magnet being smaller and probably not as sensitive. Dr. Elbaor further stated that the October 28, 1994 sensory nerve studies were consistent with a herniated disc at L4-5. Dr. Elbaor opined that appellant had a herniated disc in the lumbar spine which required surgical intervention. Dr. Elbaor requested authorization to perform a discogram CT scan to confirm this diagnosis and if the results were positive, then he requested authorization to perform a 360 degree spine fusion.

Regarding causation, Dr. Elbaor stated that the history of the April 13, 1984 employment injury and medical records were consistent with a history of a herniated disc of the lumbar spine. Dr. Elbaor then stated there was no test that could pinpoint a diagnosis such as a herniated disc to a specific injury. Dr. Elbaor also stated that the only way this could be done would be to have an examination such as an MRI that was normal and then have it repeated immediately after an injury to see a definite abnormality on the subsequent MRI scan. Dr. Elbaor further stated that current medical practice based its decisions upon probabilities, histories and physical examinations with associated diagnostic testing. Dr. Elbaor concluded that based upon the extensive history, physical findings and objective data, appellant had a herniated disc of the lumbar spine due to the April 13, 1984 employment injury, and that appellant should have a lumbar spine 360 degree fusion. Dr. Elbaor failed to explain how appellant's claimed continued disability for work was causally related to the April 13, 1984 employment injury. Dr. Elbaor failed to address his findings in light of the diagnostic test results obtained following the employment injury and delivery of appellant's child.

The Board finds that Dr. Allen's opinion constitutes the weight of the evidence and that the Office properly terminated appellant's compensation benefits effective January 8, 1995.

The July 25, May 4 and March 14 1995 and December 16 and October 3, 1994 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, D.C.
November 17, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member