

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NICOLE A. FUSCO and DEPARTMENT OF VETERANS AFFAIRS,
MEDICAL CENTER, Decatur, Ga.

*Docket No. 96-2107; Submitted on the Record;
Issued October 6, 1998*

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's disability compensation, effective July 23, 1995, on the grounds that she had no work-related residuals of her accepted conditions.

The Board has carefully reviewed the case record and finds that the Office met its burden of proof in terminating appellant's compensation on the grounds that the medical evidence establishes that her neck strain and emotional condition have resolved.

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 Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing either 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 The Office's burden

¹ 5 U.S.C. § 8101 *et seq.*

² *William Kandel*, 43 ECAB 1011, 1020 (1992).

³ *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

⁴ *Dawn Sweazey*, 44 ECAB 824, 832 (1993).

includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁶

In this case, appellant, then a 47-year-old health technician, filed a notice of traumatic injury, claiming that she experienced severe pain in her right shoulder and arm on May 31, 1991 while helping to position a patient for an endoscopy. The Office accepted her claim for a herniated disc at C6-7, based on the reports of Dr. Howard L. Hecht, a Board-certified orthopedic surgeon, and Dr. Lance H. Perling, Board-certified in neurological surgery. The Office also accepted the condition of post-traumatic stress disorder (PTSD) and depression, single episode, as related to the May 31, 1991 incident.

On May 4, 1995 the Office issued a notice of proposed termination, permitting appellant 30 days to respond. Appellant submitted a report from Dr. Joseph N. Saba, a Board-certified neurologist, who examined appellant on May 4 to 5, 1995.

On July 13, 1995 the Office terminated appellant's compensation, effective July 23, 1995, based on the medical report of Dr. Howard J. Colier, a Board-certified orthopedic surgeon, to whom appellant had been referred to resolve a conflict of opinion between her treating physician, Dr. Perling, and the second opinion specialist, Dr. Douglas Smith, a Board-certified orthopedic surgeon, regarding whether appellant was restricted from performing the duties of the position she held at the time of injury.

Appellant timely requested a hearing, which was held on January 25, 1996. Appellant described the onset of her injury and subsequent treatment. On April 10, 1996 the hearing representative determined that appellant was not entitled to compensation because the medical evidence established that her work-related disability had ceased and that she was able to return to her usual job.

The Board finds that Dr. Colier's April 6 and February 20, 1995 reports, bolstered by Dr. Hilton's September 8, 1994 opinion, as well as Dr. Smith's November 21, 1994 report represents the weight of the medical evidence and thus meets the Office's burden of proof in terminating compensation.

Dr. Colier examined appellant on February 13, 1995 and found a "fairly normal rotation of the cervical spine," with some tenderness but no atrophy or motor or sensory deficit. He

⁵ *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

⁶ *Connie Johns*, 44 ECAB 560, 570 (1993).

related that appellant had cervical radiculopathy as well as degenerative changes and bulging at the C5-6 and C6-7 levels. He noted that these preexisting changes were exacerbated by the 1991 injury but there was no reason why she could not do her previous job without any restrictions. In response to an Office inquiry, Dr. Colier reviewed appellant's job description and stated that she was able to return to her previous employment as a health assistant in the gastrointestinal laboratory.

Dr. Smith stated that appellant's orthopedic examination was "basically completely normal," other than some limited range of motion in the cervical spine and the chronic degenerative changes at C5-6 and C6-7 shown by recent x-rays. He emphasized that the degenerative disc disease in appellant's neck was a long-term process that certainly preexisted the 1991 incident. He found no nerve root irritation, no muscle weakness, no atrophy, no sensory disturbance, and perfectly normal reflexes.

Dr. Smith concluded that appellant's subjective symptomatology was not supported by any objective findings and that there was no reason why she should not engage in any and all types of activity. He added that appellant was wise to refuse surgery because the result might well be only a magnification of her subjective symptoms and that she could be gainfully employed if she wished.

Dr. Hilton, the second opinion psychiatrist, interviewed appellant for more than an hour, administered psychological testing, and reviewed a statement of accepted facts as well as physical therapy records, orthopedic evaluations, and medical reports of neurologists and psychologists. He diagnosed adjustment disorder with mixed emotional features and disagreed with the diagnosis of PTSD. Dr. Hilton stated that, while appellant talked about wanting to get well and return to her former life-style, she adamantly refused neck surgery, first recommended in 1992, which represented her only hope of alleviating her pain symptoms.

Dr. Hilton concluded that appellant was no longer "psychiatrically disabled from any form of employment" and that a return to some form of productivity would be helpful in establishing a more positive and consistent self-esteem for appellant. He added that appellant's psychological state had reached maximum medical improvement and that further treatment was not indicated.

By contrast, the record contains no psychiatric evidence that appellant is unable to work. The March 8, 1993 report from two psychologists was the basis of the Office's acceptance of a single episode of depression, and the record reflects from other physicians' treatment notes that appellant had psychotherapy, but there is no evidence that her mental condition prevented her from working.

The reports from Dr. Saba disagreed with Dr. Smith's opinion that there was nothing wrong with appellant's neck, but Dr. Saba did not address appellant's capability for work and released her from his care after recommending a functional capacity evaluation.

Dr. Perling stated on February 16, 1993 that he did not know whether appellant would ever be able to return to her usual job unless she underwent surgery, but he released her for sedentary work after reviewing a functional capacity evaluation on September 28, 1993 and a

rehabilitation counselor's job placement plan. Further, in a report dated April 6, 1995, Dr. Perling stated that, while appellant was not capable of returning to her previous job because of its physical demands, she was not totally disabled. He added that appellant "would rather not work and [thus] maintain her disability benefits."

Inasmuch as Drs. Colier, Hilton, and Smith reviewed the case record and a statement of accepted facts, examined appellant thoroughly, found no objective evidence to support appellant's complaints of pain or a work-related mental disorder,⁷ and provided a detailed and well-rationalized medical explanation of why the accepted conditions had resolved, the Board finds that their conclusions represent the weight of the medical evidence⁸ and are sufficient to carry the Office's burden of proof.⁹ Therefore, the Board finds that the Office properly terminated appellant's compensation.

The April 10, 1996 and July 13, 1995 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.

October 6, 1998

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

⁷ See *Anna Chrun*, 33 ECAB 829, 835 (1982) (finding that the absence of objective evidence of disability is more compatible with the absence of disability than with its presence).

⁸ See *Cleopatra McDougal-Saddler*, 47 ECAB ____ (Docket No. 95-2634, issued March 20, 1996) (finding that the Office referral physician provided convincing rationale, bolstered by the opinion of another Board-certified specialist, that appellant's continuing disability was not work related).

⁹ See *Thomas Bauer*, 46 ECAB 257, 265 (1994) (finding that the additional report from appellant's physician concerning his emotional condition was insufficient to overcome the special weight accorded to the impartial medical examiner's opinion).