

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of RUTH R. JONES and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Houston, TX

*Docket No. 98-325; Submitted on the Record;  
Issued December 27, 1999*

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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 entitlement effective August 21, 1994, on the grounds that the effects of appellant's work-related injuries had ceased.

On October 21, 1982 appellant, a 48-year-old file clerk, injured her neck while lifting a box of perpetual records onto a cart. Her claim was accepted for neck muscle strain, and myositis of the left shoulder with subsequent acromioplasty. Thereafter appellant was placed on the periodic rolls.

On March 29, 1994 appellant was examined by Dr. Donald Nowlin, a Board-certified orthopedic surgeon and referral specialist selected by the Office, provided with a statement of accepted facts, the relevant case record, and questions to be addressed regarding the extent and continuing disability due to the accepted work-related conditions. Dr. Nowlin thoroughly examined appellant and diagnosed cervical spondylosis at C5-6 with bulging disc, degenerative rotator cuff disease and chronic acromioclavicular arthrosis, all of which predated appellant's work injuries. He found no objective evidence of a current cervical strain or myositis of the left shoulder, and he indicated that the strain resolved some time ago. Dr. Nowlin further noted that appellant's restriction of range of motion represented voluntary restriction at the time of his examination, and that he could not find evidence that appellant's current complaints were work related. He noted: "All that is found in [appellant's] examination is a healthy individual who, in my opinion, w[ill] n[o]t move her joints (specifically cervical spine and left shoulder); and her current findings are very chronic and preceded her accident." Dr. Nowlin indicated that appellant had recovered from her work-related injuries and was capable of returning to her regular-duty position as a file clerk.

On May 23, 1994 the Office sent a copy of the second opinion report to appellant's attending physician, Dr. Thaddeus Hume, a Board-certified orthopedic surgeon, for review and comment. Dr. Hume responded by letter dated May 25, 1994 agreeing that appellant's cervical strain had resolved and that she did not suffer myositis of the left shoulder. He opined that she had reached maximum medical improvement and recommended restrictions for appellant which

were due to the structural instability of her cervical spine and degenerative changes in her shoulder, conditions which were not accepted as being work related. Dr. Hume agreed that appellant could return to her file clerk position. He completed a work restriction evaluation indicating that appellant could work 8 hours per day with no lifting over 10 pounds more than 10 times per 4 hours and no repetitive pulling or pushing, and no reaching or working above shoulder level.

On June 9, 1994 the Office issued appellant a notice of proposed termination of compensation advising that the medical evidence of record supported that the effects of the October 21, 1982 employment incident had ceased. The Office noted that both the Office second opinion physician and appellant's own treating physician opined that her accepted injuries had resolved and that she was capable of returning to her former file clerk position.

Appellant objected to the proposed termination of compensation arguing that the employing establishment had never offered her a modified job and that her neck still hurt and her arm was still weak. In support of her objections, appellant resubmitted Dr. Hume's May 25, 1994 letter and an April 7, 1992 report from Dr. Justo S. Avila, Jr., a Board-certified orthopedic surgeon, who noted appellant's complaints of neck and bilateral shoulder pain, diagnosed "spondylosis of C5-6 with narrowed foraminal [sic] bilaterally, worse on the left, AC [acromioclavicular] joint arthritis, left with impaction of the head, [and] impingement syndrome," but who fail to explain how any of these diagnosed conditions were causally related to the accepted conditions of neck muscle strain or left shoulder myositis with acromioplasty. Dr. Avila also failed to provide any explanation as to how these diagnosed conditions in 1992 were due to the box lifting incident 10 years prior in 1982.

By decision dated August 11, 1994, the Office finalized its termination decision finding that the weight of the medical evidence of record established that the effects of appellant's accepted work-related injuries has ceased effective August 21, 1994.

On August 16, 1994 appellant requested an oral hearing.

A hearing was held on April 21, 1995 at which appellant testified. By decision dated July 5, 1995, the hearing representative affirmed the August 11, 1994 termination finding that the weight of the medical evidence of record established that appellant had no further disability related to the October 21, 1982 injury.

By letter dated August 15, 1995, appellant requested reconsideration and submitted an August 8, 1995 report from Dr. Hume, which stated:

"There is no doubt that osteoarthritis of the spine often is inherited. However, we also know that there is a post-traumatic degenerative change that can result due to previous injury to the involved areas. It is evident that [appellant] had no previous degenerative changes in the cervical spine prior to the injury of October of 1982. Over the years, however, it would appear that she has developed progressive degenerative changes, primarily in the cervical spine area with subsequent herniated disc. In all medical probability, her present condition is based on her injury of October 21, 1982."

By decision dated October 17, 1995, the Office denied modification of the July 5, 1995 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that Dr. Hume's opinion that appellant's cervical osteodegenerative changes and disc herniation were causally related to her 1982 soft tissue muscle strain injury was unrationalized and speculative.<sup>1</sup>

On March 19, 1996 appellant requested reconsideration claiming that she was still suffering from her injuries. She submitted a March 13, 1996 report from Dr. Hume which stated:

"We feel that the injury of October 21, 1982 aggravated her arthritis in the cervical spine; to what extent, we are uncertain, but we felt that there has been some aggravation that has persisted over the years. She has had persistent and intermittent problems for which she has been treated with conservation measures. We feel as though there has been created some structural instability in her cervical spine and subsequent degenerative changes in her shoulder that are related to the injury of October 21, 1982."

By decision dated May 8, 1996, the Office denied modification of the October 17, 1995 decision finding that the evidence submitted in support was insufficient to warrant modification.

By letter dated June 24, 1996, appellant again requested reconsideration. She submitted a June 11, 1996 report from Dr. Hume which stated, in pertinent part:

"[Appellant] also sustained a cervical strain/sprain injury which I feel has resulted in aggravation of a preexisting cervical spondylolysis or arthritis. With repetitive lifting activities, often the muscles attached to the cervical spine area are involved, particularly the trapezius muscle which spreads from the shoulder, upper back to the cervical and occiput region or with any upper extremity activities. These muscles can put stress on the cervical spine and lead to a subsequent cervical type sprain or strain injury. With a preexisting arthritic problem, this area certainly is structurally unstable and prone to aggravation with the pull of muscles attached to the surrounding area. It is conceivable to me that [appellant] could have had some aggravation of her preexisting arthritis, but again to what extent is uncertain."

By decision dated August 16, 1996, the Office denied modification of the May 8, 1996 decision finding that the evidence submitted in support was insufficient. The Office found that Dr. Hume's opinion was of diminished probative value because it was speculative.

By letter dated October 16, 1996, appellant again requested reconsideration. She submitted an August 28, 1996 report from Dr. Hume which noted: "In all medical probability her present condition is a result of her original injury and subsequent progression of that injury."

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<sup>1</sup> The Office also noted that Dr. Hume's comment that appellant had no previous cervical degenerative changes was inconsistent with his May 25, 1994 report in which he stated that "there was no doubt that she may have had some preexisting degenerative changes prior to the injury."

In support she also submitted an October 7, 1996 report from Dr. Howard Z. Finkle, a Board-certified orthopedic surgeon,<sup>2</sup> who noted appellant's degenerative disc disease at C5-6 with central disc protrusion and small bulging in other areas, and who opined:

“[Appellant's] history is that of continued, ongoing problems with her neck since her injury in October of 1982. I therefore feel that her present symptoms are directly related to that injury. Present symptoms, including neck pain, numbness in the arm and fingers, and headaches are related to her original injury in 1982.”

By decision dated January 16, 1997, the Office denied modification of the August 16, 1996 decision finding that the evidence submitted in support was insufficient. The Office found that Dr. Finkle's opinion was not rationalized and was only based upon medical records dating back to 1992, and that Dr. Hume's opinion was still speculative.

The Board finds that the Office met its burden of proof to terminate appellant's compensation entitlement effective August 21, 1994, on the grounds that residuals of appellant's work-related injury had ceased.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> 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.<sup>4</sup> The Office met its burden through the reports of its second opinion specialist, Dr. Nowlin, and appellant's own treating physician, Dr. Hume.

Dr. Nowlin opined in a detailed and well-rationalized March 29, 1994 report, based upon a complete history and statement of accepted facts, that no objective evidence of a current cervical strain or myositis of the left shoulder remained, and he indicated that the strain resolved some time ago. He found no evidence that appellant's current complaints were work related, and opined that her current findings were very chronic and preceded her accident, that appellant had recovered from her work-related injuries and that she was capable of returning to her regular-duty position as a file clerk.

This report was sent to Dr. Hume, appellant's treating physician, who responded by letter dated May 25, 1994 agreeing that appellant's cervical strain had resolved and that she did not suffer myositis of the left shoulder. He opined that she had reached maximum medical improvement and recommended restrictions for appellant which were due conditions not accepted as being work related. Dr. Hume agreed that appellant could return to her file clerk position. He completed a work restriction evaluation indicating that appellant could work 8 hours per day with no lifting over 10 pounds more than 10 times per 4 hours and no repetitive pulling or pushing, and no reaching or working above shoulder level.

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<sup>2</sup> A September 16, 1996 report from Dr. Finkle was also submitted which did not address causal relation of appellant's conditions to her employment injury.

<sup>3</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>4</sup> See *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The only other medical evidence submitted by appellant was a less current 1992 report from Dr. Avila and it did not address causal relation of the conditions he diagnosed at that time to a 1982 employment incident, and hence was not probative on the issue in question.

The weight of the medical evidence clearly supported that appellant's work-related conditions had resolved and that she was capable of returning to her former position as a file clerk. Therefore, the Office met its burden of proof to terminate compensation benefits.

After termination or modification of compensation benefits, warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.<sup>5</sup> Appellant failed to do this in the instant case.

Following termination of compensation appellant submitted multiple reports from Dr. Hume, one of which contradicted several of the others, insisting that appellant had no preexisting cervical problems, and basing his opinion on causal relation on this "fact," when his other reports indicated that she did have preexisting arthritis or spondylosis. Therefore, these reports were inconsistent with each other, which greatly diminished the probative value of his causal relationship opinion.<sup>6</sup> Dr. Hume also stated in a conclusory manner that the October 21, 1982 injury aggravated appellant's preexisting cervical arthritis, but he never explained how or why this happened or why the aggravation persisted for 15 years despite appellant not working and the cervical soft tissue muscular sprain/strain resolving. He also stated that in all medical probability her present condition is a result of her original injury, without any further explanation or analysis. Therefore, these medical conclusions are of little probative value.<sup>7</sup> Dr. Hume further stated that it was conceivable that appellant could have had some aggravation of her preexisting arthritis but to what extent was uncertain. This opinion is also of diminished probative value as it is speculative in nature and equivocal and therefore insufficient to establish causal relationship.<sup>8</sup> Finally, Dr. Hume stated that he felt that some structural instability had been created that was related to her October 21, 1982 injury which had persisted and caused progressive degenerative changes, but he failed to explain how or why the cervical soft tissue muscular strain/sprain injury caused this structural instability and led to these osteodegenerative changes of the cervical spine, even as the sprain had resolved and appellant stopped work. This medical opinion is unrationalized and of reduced probative value such that it is insufficient to meet appellant's burden of proof.<sup>9</sup>

Appellant also submitted a report from Dr. Finkle which was irrelevant to the issue of the case and a report which gave an inaccurate history which was based upon records dating only

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<sup>5</sup> *Talmadge Miller*, 47 ECAB 673 (1996); *Wentworth M. Murray*, 7 ECAB 570 (1955).

<sup>6</sup> See *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (asymptomatic state prior to an incident does not absolutely implicate causal relation; medical background also must be accurate).

<sup>7</sup> *Marilyn D. Polk*, 44 ECAB 673 (1993).

<sup>8</sup> *Alberta S. Williamson*, 47 ECAB 569 (1996); *William S. Wright*, 45 ECAB 498 (1994); *Geraldine H. Johnson*, 44 ECAB 745 (1993).

<sup>9</sup> *Jean Culliton*, 47 ECAB 728 (1996); *Carolyn F. Allen*, 47 ECAB 240 (1995).

from 1992. Dr. Finkle then concluded, without explanation or rationale, that he felt appellant's present symptoms were directly related to her original injury, without giving any evidence of knowledge that her 1982 injury was a cervical soft tissue muscular strain injury. This report is therefore, also of diminished probative value and is insufficient to meet appellant's burden of proof to establish that she had an employment-related disability which continued after termination of compensation benefits.<sup>10</sup>

Accordingly, the decision of the Office of Workers' Compensation Programs dated January 16, 1997 is hereby affirmed.

Dated, Washington, D.C.  
December 27, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

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<sup>10</sup> See *supra* notes 7 and 9.