

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARILYN T. JARVIS and DEPARTMENT OF VETERANS AFFAIRS,
WEST LOS ANGELES MEDICAL CENTER, Los Angeles, CA

*Docket No. 98-2000; Submitted on the Record;
Issued December 22, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective March 29, 1998.

The case has been on appeal previously.¹ In a June 17, 1997 decision, the Board noted that appellant sustained an employment-related lumbosacral strain on May 28, 1993. Appellant stopped work on June 3, 1993 and received compensation for periods of total disability. In a May 10, 1994 decision, the Office subsequently terminated compensation based on the report of Dr. Vic A. Osborne, a Board-certified orthopedic surgeon, to whom it referred appellant for a second opinion. After conducting a review of the written record, an Office hearing representative affirmed the Office's termination in a decision of February 2, 1995. The Board found that Dr. Osborne did not provide a well-rationalized explanation of the mechanics of how appellant's May 28, 1993 employment injury had resolved by April 15, 1994, such that she would be able to return to her regular work and, therefore, the Office did not meet its burden of proof to terminate appellant's compensation. Accordingly, the Board reversed the Office's decisions of February 2, 1995 and May 10, 1994.

The Office subsequently referred appellant, along with the medical record, a set of questions and a statement of accepted facts, to Dr. Fredrick J. Lieb, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated September 19, 1997, Dr. Lieb opined that appellant's disability due to the employment injury had ceased. He reported his findings on examination and diagnosed a resolved lumbosacral strain and a mild degenerative disc disease of the lumbosacral spine consistent with appellant's age. Dr. Lieb stated that appellant's subjective complaints were not consistent nor commensurate with her general absence of objective findings on physical examination or radiographic examination. He stated that the diagnosed condition of lumbosacral strain was directly causally related to the May 28, 1993 work accident, but that this

¹ Docket No. 95-2021 (Issued June 17, 1997).

condition resolved within a two-month period of time following the incident and that there were no objective evidence of ongoing residuals at the time of examination. Dr. Lieb stated that the work-related condition was merely a stretching injury to the musculature of the lower back from which appellant fully recovered. He further stated that there should be no controversy as to the fact that appellant had degenerative disc disease prior to the injury in light of the fact that it was noted on magnetic resonance imaging (MRI) scan within two months of that incident. Dr. Lieb explained that, by definition, this would have been a preexisting condition as it takes close to a year for the slightest evidence of disc degeneration as a result of a specific incident to be visible on an MRI scan. He further opined that the May 28, 1993 incident did not influence appellant's degenerative disc disease in any fashion. Dr. Lieb noted that the evidence of degenerative disc disease on the MRI scan and on x-rays were consistent with appellant's age and not causally related to the work injury. He noted that aggravation, precipitation or acceleration were not issues in this case. Dr. Lieb opined that appellant has not been disabled from the employment position described in excess of six to eight weeks following the date of injury. He opined that appellant was fully physically capable of returning to her preinjury job without restrictions and on a full-time basis.

An October 29, 1997 physical therapy report noted that appellant was progressing well through the endurance and strengthening program. Appellant had demonstrated increased forward flexion with less pain and no pain was reported when returning to erect posture. Extension did not produce any pain, but side benching and rotation were still limited due to pain.

By letter dated February 4, 1998, the Office informed appellant that it proposed to terminate her compensation. The Office found that the weight of the medical opinion rested with Dr. Leib, who is Board-certified in orthopedic surgery and provided a well-rationalized opinion based on his examination and review of the medical evidence. Appellant was given 30 days within which to submit further evidence or argument relevant to the proposed reduction in her compensation benefits.

In a March 1, 1998 letter, appellant stated that she was in constant pain from her work injury and that after a couple hours of consecutive movements, she experiences severe or excruciating pain with difficulty walking. Appellant indicated that her contact with Dr. Leib was very limited and that she performed very little activity before her appointment with him. Appellant stated that after her examination with Dr. Leib and the x-ray technician whereby she underwent many body movements, she was in excruciating pain and had difficulty walking to her son's car. No additional medical evidence was received.

By decision dated March 6, 1998, the Office terminated appellant's compensation effective March 29, 1998, on the grounds that the weight of the medical evidence established that her employment-related disability had ceased.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective March 29, 1998.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally

related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.²

In the instant case, the Board finds that the weight of the medical evidence rests with the well-rationalized opinion of Dr. Lieb, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office. Inasmuch as the issue in this case is medical in nature, appellant's assertion that she experiences excruciating pain after a couple hours of consecutive movements is not enough in the absence of supportive medical evidence. Other than the physical therapy notes, no other recent medical evidence exists pertaining to appellant's current condition. The physical therapy notes, however, are of no probative value. In *Barbara Williams*,³ appellant submitted reports from a physical therapist and the Board found that the reports were of no probative value as a physical therapist is not a physician as defined under the Federal Employees' Compensation Act and is not competent to render a medical opinion. Moreover, the last report from appellant's treating physician, Dr. Osborne, is dated May 6, 1994. In that report, he performed a physical examination and diagnosed lumbosacral strain. Dr. Osborne stated that appellant reached a permanent and stationary status, would expect to have frequent minimal pain, but that there were no objective factors of disability. He further stated that no work restrictions were indicated for appellant's regular occupation. The Board notes that, although Dr. Osborne stated that appellant would expect to have frequent minimal pain, this was based on appellant's subjective complaints, as there were no objective findings of disability. Furthermore, he did not provide an explanation as to why appellant would continue to experience symptoms one year after the work injury. Dr. Lieb, however, reviewed the entire medical record, performed an examination and provided a well-rationalized explanation in his findings and conclusions that appellant could return to her preinjury job and that all residuals of the May 28, 1993 injury had ceased. He further provided a well-rationalized explanation as to why appellant's degenerative disc disease was not attributable to the May 28, 1993 work incident. The Board, therefore, finds appellant had no employment-related disability on or after March 29, 1998 and the Office met its burden of proof to terminate her compensation on that date.

² See *Patricia A. Keller*, 45 ECAB 278 (1993).

³ 40 ECAB 649 (1989).

The decision of the Office of Workers' Compensation Programs dated March 6, 1998 is hereby affirmed.

Dated, Washington, D.C.
December 22, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member