

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LISA A. DAVIE and U.S. POSTAL SERVICE
POST OFFICE, Sacramento, CA

*Docket No. 99-378; Submitted on the Record;
Issued December 13, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective October 30, 1996 on the grounds that she had no further disability causally related to her May 15, 1996 employment injury.

On March 25, 1994 appellant, then a 25-year-old city carrier, filed a claim for a traumatic injury occurring on March 23, 1994 in the performance of duty. The Office accepted that appellant sustained a sprain of the left wrist and assigned the claim Office file number A13-1040994.

Appellant returned to limited-duty employment following her injury. She experienced intermittent periods of temporary total disability until December 22, 1995, when she returned to full-time employment with restrictions.

By decision dated May 9, 1996, the Office terminated appellant's compensation benefits effective May 11, 1996 on the grounds that the weight of the evidence established that she had no further residual condition or disability due to her March 23, 1994 employment injury. The Office based its termination of benefits on the February 6, 1996 opinion of Dr. George E. Sims, a Board-certified orthopedic surgeon and Office referral physician. The Office found that appellant had no residuals of her left wrist strain and that she had no objective evidence to support her claimed condition of cervical strain.

On May 20, 1996 appellant filed a notice of recurrence of disability alleging that on May 15, 1996 she sustained a recurrence of disability causally related to her March 23, 1994 employment injury. On the reverse side of the claim form appellant's supervisor indicated that appellant had resumed her regular duties on May 15, 1996 and that after two and a half hours of delivering mail she had reported pain in her neck and arm.

The record indicates that the employing establishment terminated appellant on June 14, 1996 for irregular attendance.

By letter dated July 24, 1996, the Office notified appellant that her claim for a recurrence of disability on May 15, 1996 was being converted to a traumatic injury claim and requested additional factual and medical information. The Office assigned the claim file number A13-1096847.

Appellant submitted a report dated May 17, 1996, received by the Office on August 29, 1996, from Dr. Rita B. Bermudez, a Board-certified physiatrist and her attending physician. She noted the history of injury as appellant experiencing “intense discomfort with pain in the left shoulder and upper arm” after working for two and a half hours delivering mail on May 15, 1996. Dr. Bermudez diagnosed a repetitive strain injury of the left arm and myofascial pain syndrome, and recommended that appellant work modified duty. She further found that appellant was “likely to have recurrence of her pain syndrome if she continues casing or carrying mail” and recommended that appellant not return to her preinjury position. In reports dated August 20 and September 10, 1996, Dr. Bermudez reached substantially similar findings and conclusions.

By letter dated September 19, 1996, the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Arthur Auerbach, a Board-certified orthopedic surgeon, for a second opinion evaluation.

In a report dated October 30, 1996, based on an October 7, 1996 examination, Dr. Auerbach discussed appellant’s history of injury, reviewed the medical records and the results of objective testing and listed findings on physical examination. He noted that a computerized tomography scan revealed a “[s]mall central disc protrusion without neural compression at C5-6.” Dr. Auerbach diagnosed chronic cervical strain with pain in the left upper extremity and resolved left wrist strain and found that appellant’s subjective symptoms were unsupported by objective findings. He opined:

“The diagnosed condition as noted in the [s]tatement of [a]ccepted [f]acts of left wrist strain is medically connected to [the] work injury of March 23, 1994 by direct cause. The chronic cervical strain is not connected to the March 23, 1994 injury by direct cause, aggravation, precipitation, or acceleration. In my opinion there was no aggravation of either condition as a result of work activity on May 15, 1996.”

Dr. Auerbach further found that appellant “has no physical limitations resulting from the work-related left wrist [injury] and has no restrictions attributed to any preexisting conditions, particularly the cervical spine.” He concluded that appellant could resume her regular employment without restriction.

By letter dated January 9, 1997, the employing establishment informed the Office that appellant was not removed from employment but instead given a 30-day loss of pay due to attendance problems. On January 13, 1997 appellant accepted an offer of limited-duty employment.

On May 18, 1998 the Office issued appellant a proposed notice of termination of compensation. The Office indicated that it accepted that appellant sustained left arm strain due to her injury on May 15, 1996 but found that the medical evidence established that it had resolved no later than October 30, 1996, the date of Dr. Auerbach's report.

In a report dated September 2, 1997, Dr. Bermudez stated:

“Her current clinical status as based on her most recent examinations reveal that she continues to have myofascial pain syndrome and a repetitive strain disorder of the left shoulder girdle. This has been and is anticipated to remain a long[-]term condition. I do not expect her to be able to return to repetitive use of the left arm because it will flare up her symptoms. She does well if she avoids these activities and does not require treatment as long as she heeds her work restrictions and performs stretching exercises at home.”

By decision dated July 8, 1998, the Office terminated appellant's compensation benefits effective October 30, 1996.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective October 30, 1996 in finding that the well-rationalized opinion of Dr. Auerbach, constituted the weight of the medical evidence. In a report dated October 30, 1996, he found that appellant could resume her regular employment without restrictions.

The Board has carefully reviewed the opinion of Dr. Auerbach and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. Dr. Auerbach provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, he provided a proper analysis of the factual and medical history and findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.⁴ Dr. Auerbach included medical rationale for his opinion by explaining that the findings upon examination and diagnostic testing did not show any objective residuals of

¹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

² *Id.*

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *See Melvina Jackson*, 38 ECAB 443 (1987).

appellant's employment injury. He opined that appellant's left wrist strain had resolved and that her cervical condition was preexisting and not aggravated by the May 15, 1996 employment injury. Dr. Auerbach found that appellant had no restrictions on employment from any condition.

The remaining evidence of record prior to the Office's termination of compensation is insufficient to support that appellant had continuing disability due to her employment injury. In reports dated May 17, August 20 and September 10, 1996, Dr. Bermudez, diagnosed myofascial pain syndrome and a repetitive strain injury and recommended that appellant work with restrictions. The Board notes that the Office did not accept appellant's claim for myofascial pain syndrome and thus appellant has the burden of proof in establishing that the condition is causally related to employment factors.⁵ In the present case, Dr. Bermudez has not adequately explained how appellant's diagnosed conditions of myofascial pain syndrome and repetitive strain injury are causally related to the May 15, 1996 employment injury and thus her reports are of diminished probative value.⁶ In a report dated September 2, 1997, Dr. Bermudez opined that repetitive activities would cause a "flare-up" of appellant's left shoulder condition; however, the possibility of a future injury does not constitute an injury under the Act. This is true even if an employee were found to be medically disqualified to continue in employment because of the effect which the employment factors might have on the underlying condition. Under such circumstances, the employee's disqualification for continued employment would be due to the underlying condition, not the employment.⁷

The Board, therefore, finds that the Office met its burden of proof to terminate appellant's compensation benefits effective October 30, 1996.⁸

⁵ See *Charlene R. Herrera*, 44 ECAB 361 (1993).

⁶ *Carolyn F. Allen*, 47 ECAB 240 (1995).

⁷ *Mary A. Geary*, 43 ECAB 300 (1991).

⁸ Appellant submitted additional evidence subsequent to the Office's July 8, 1998 decision. The Board's review of a case is limited to the evidence that was before the Office at the time of its decision, and therefore the Board cannot consider the additional evidence in the present appeal; see 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated July 8, 1998 is hereby affirmed.

Dated, Washington, D.C.
December 13, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member