

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDITH E. DODGE and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Minneapolis, MN

*Docket No. 99-540; Submitted on the Record;
Issued December 22, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective December 2, 1997 on the grounds that appellant no longer had any disability causally related to her March 17 and October 25, 1995 employment injuries.

The Board has duly reviewed the case record in this appeal and finds that the Office properly terminated appellant's compensation effective December 2, 1997 on the grounds that appellant no longer had any disability causally related to her March 17 and October 25, 1995 employment injuries.

On May 5, 1995 appellant, then an occupational health and safety manager, filed a traumatic injury claim (Form CA-1) alleging that on March 17, 1995 she injured her lower back when the back of her chair collapsed and she snapped forward to keep her balance. Appellant stopped work on May 24, 1995 and received continuation of pay through July 7, 1995.¹

The Office accepted appellant's claim for a lumbosacral strain.

On November 13, 1995 appellant filed a Form CA-1 alleging that she aggravated her prior condition on October 25, 1995 when the elevator car she was in dropped and jolted her back. Appellant stopped work on October 25, 1995.

The Office accepted appellant's claim for an aggravation of her lumbosacral strain.

¹ The record reveals that appellant returned to work on August 17, 1995 for four hours per day. In September 1995, appellant began working five hours per day. On March 25, 1996 appellant began working eight hours per day, five hours per day at work and three hours per day at home.

On February 23, 1997 appellant filed claims for continuing compensation on account of disability (Form CA-8) for the period January 26 through February 15, 1997 and February 16 through March 1, 1997.

By letter dated April 2, 1997, the Office referred appellant, along with a statement of accepted facts, a list of specific questions and medical records, to Dr. Robert Fielden, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether she had any continuing employment-related disability. By letter of the same date, the Office advised Dr. Fielden of the referral. He submitted an April 25, 1997 medical report revealing that appellant had a lumbar strain with chronic pain syndrome and that appellant no longer had any disability causally related to her employment injuries.

On May 2, 1997 appellant filed a Form CA-8 for compensation for the period March 2 through April 26, 1997. On May 22, 1997 appellant filed a Form CA-8 for compensation for the period April 27 through May 24, 1997.

Regarding appellant's claim for compensation for the period February 16 through March 1, 1997, the Office advised appellant by letter dated June 26, 1997 that the evidence of record was insufficient to pay her compensation for this period. The Office also advised appellant that it had not accepted her claim for an emotional condition.² The Office then advised appellant to submit additional medical evidence supportive of her claim.

Dr. Fielden submitted an August 12, 1997 supplemental medical report indicating that his diagnosis of lumbar strain with chronic pain syndrome was not based on objective findings.

In an October 30, 1997 letter, the Office proposed to terminate appellant's compensation based on Dr. Fielden's medical opinion. The Office also proposed to deny compensation for the period January 26 through May 24, 1997 on the grounds that the medical evidence of record was insufficient to establish that the claimed period of disability was causally related to the accepted employment injuries.

By decision dated December 5, 1997, the Office terminated appellant's compensation effective December 2, 1997 and denied appellant's claim for compensation for the period January 26 through May 24, 1997. By letter dated December 18, 1997, appellant, through her counsel, requested an oral hearing before an Office representative.

² The record reveals that the Office received medical evidence concerning appellant's alleged emotional condition.

By decision dated September 24, 1998, the hearing representative affirmed the Office's finding that appellant no longer had any disability causally related to her accepted employment injuries. Based on the medical evidence of record addressing a causal relationship between appellant's emotional condition and accepted employment injuries, the hearing representative remanded the case for further development of the evidence.³

Once the Office has accepted a claim and pays compensation, it has the burden of proof of justifying termination or modification of compensation benefits.⁴ 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.⁵

In this case, the Office terminated appellant's compensation based on Dr. Fielden's April 25, 1997 medical report revealing that appellant no longer had any disability causally related to her accepted March 17 and October 25, 1995 employment injuries. In this report, Dr. Fielden provided a history of the March 17 and October 25, 1995 employment injuries and appellant's medical treatment and employment. He indicated his normal findings on physical and objective examination and a review of medical records. Dr. Fielden diagnosed lumbar strain with chronic pain syndrome. He opined that there were no objective findings at this time that related to any of appellant's injuries. Dr. Fielden further opined that appellant was physically able to perform the job duties of a safety manager. He also opined that appellant's chronic pain was related to stress at work. In an accompanying work restriction evaluation, Dr. Fielden indicated that appellant could work eight hours per day with physical restrictions.

Dr. Fielden's medical report is rationalized and based on an accurate factual and medical background. Therefore, the Board finds that his medical report is sufficient to establish that appellant no longer had any disability causally related to her March 17 and October 5, 1995 employment injuries.

The Board further finds that there is a conflict in the medical opinion evidence that arose subsequent to the Office's decision to terminate appellant's compensation regarding the issue whether appellant has any continuing disability causally related to her March 17 and October 25, 1995 employment injuries. Section 8123(a) of the Federal Employees' Compensation Act provides that if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁶

³ On remand the Office referred appellant, along with a statement of accepted facts, a list of specific questions and medical records, to Dr. Thomas Gratzner, a psychiatrist, for a second opinion examination. The record, however, reveals that appellant did not appear at either her originally scheduled examination or a subsequent rescheduled examination.

⁴ *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

⁵ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁶ 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

At the oral hearing, Dr. Sara Langer, a Board-certified psychiatrist and neurologist and appellant's treating physician, testified that appellant had chronic recurring low back pain. Dr. Langer explained the use of the term annular tear that appeared in a November 21, 1995 magnetic resonance imaging (MRI) report of Dr. Daniel J. Loes, a Board-certified radiologist, and how a herniated disc may not have been demonstrated in the results of a November 30, 1996 MRI. Dr. Langer testified that this was an objective finding that correlated with appellant's complaints of pain because the tear occurred at the expected level. She further testified that having an annular tear was a prerequisite to disc herniation.

Regarding the November 30, 1996 MRI, Dr. Langer testified that this was not helpful because it did not indicate whether the degenerative disc consisted of bony changes or ligamentous thickening that can pinch a nerve root or degenerative disc changes. She responded "yes" to the hearing representative's question whether the type of injury described by appellant correlated with her condition. In response to the hearing representative's question whether there was no question in her mind that appellant's injury which occurred when she snapped forward in her chair caused this type of injury, Dr. Langer further stated:

"[M]y experience is that it is often trivial injuries, sudden changes, for instance, picking up one's socks, something like that, that causes disc herniation. Body are not using good body mechanics, guarding their posture at the time that those trivial injuries occur.

"The reason that I believe that they [a]re causally related is because [appellant's] symptoms of reticular pain were so characteristic of nerve root impingement at that level and have been consistently so for a time.

"[Appellant has] had brief remissions in her pain, not complete, but some periods of relative improvement and the kinds of activities that have precipitated recurrent exacerbations of her pain again have been very, very typical. She was n[o]t thinking about it and did not leaf raking. Was n[o]t thinking about it and kind of twisted herself. And that [i]s the sort of things that most of us who do not [have] back injuries do all the time and it does n[o]t seem to affect us.

"But people who have disc problems are acutely aware, when they [a]re caught off guard, they tend to have recurring back problems."

Inasmuch as Dr. Fielden, an Office second opinion physician, opined that appellant was no longer disabled due to her employment injuries and Dr. Langer, appellant's treating physician, opined that appellant sustained a newly developed back condition causally related to her March 17, 1995 employment injury, there is a conflict in the medical opinion evidence. On remand the Office should prepare a statement of accepted facts and refer it, together with appellant and the case record, to a Board-certified specialist in the appropriate field of medicine, to resolve the conflict pursuant to section 8123(a) of the Act. Following this and such further development as the Office deems necessary, a *de novo* decision should be issued on whether appellant has any continuing disability causally related to her March 17 and October 25, 1995 employment injuries.

The September 24, 1998 decision of the Office of Workers' Compensation Programs hearing representative is set aside and the case is remanded in part for further consideration consistent with this opinion regarding the issue whether appellant has any continuing disability causally related to her March 17 and October 25, 1995 employment injuries and affirmed in part regarding whether appellant sustained an emotional condition causally related to her March 17 and October 25, 1995 employment injuries.⁷ The Office's December 5, 1997 decision is hereby affirmed.

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

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

⁷ See *supra* note 3.