

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA J. KELLY and DEPARTMENT OF THE AIR FORCE,
TINKER AIR FORCE BASE, Okla.

*Docket No. 97-1247; Submitted on the Record;
Issued February 2, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation effective January 7, 1996 on the basis that the residuals of her accepted October 23, 1985 injury no longer prevented appellant from performing her usual employment; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for a merit review on February 7, 1997.

On October 24, 1985 appellant, then a 40-year-old inventory management specialist, filed a notice of traumatic injury, alleging that on October 23, 1985 she injured her back and left leg when she caught her heel on the bottom edge of a step and fell in the course of her federal employment. The Office accepted the claim for cervical strain, thoracic strain, lumbar strain and a herniated disc at L4-5. Appellant subsequently received compensation for total temporary disability.

On October 13, 1993 Dr. Siavash Nael, appellant's treating physician and a physician, Board-certified in psychiatry and neurology, stated that due to severe stress and depression, appellant remained temporarily totally disabled.

On May 3, 1995 Dr. A.J. Bisson, a specialist in physical medicine and rehabilitation, reviewed appellant's history and conducted a physical examination. He diagnosed degenerative disc disease of the lumbar spine and chronic pain syndrome. Dr. Bisson further noted that appellant was status post two lumbar spine surgeries and a previous cervical discectomy at the C5-6 level with subsequent fusion. He opined that appellant was not capable of any gainful employment and recommended medical retirement. Dr. Bisson indicated that appellant's limitations were all due to her employment injury.

On April 28, 1995 Dr. Douglas L. Polk, a Board-certified neurological surgeon, indicated that appellant remained temporarily totally disabled until at least May 10, 1995.

On July 11, 1995 the Office referred appellant to Dr. Fred Ruefer, a Board-certified orthopedic surgeon, for a second opinion examination. On August 15, 1995 Dr. Ruefer reviewed appellant's history and x-rays and he performed a physical examination. He stated that appellant suffered from post laminectomy syndrome with residual back and left leg pain, which he attributed to appellant's work injury. Dr. Ruefer, however, found that there was no disability medically connected with appellant's work injury and he stated she could perform her usual employment.

On September 22, 1995 the Office found that a conflict existed between the opinions of appellant's treating physicians, finding that appellant continued to suffer employment-related disability and the contrary opinion of Dr. Ruefer. The Office, therefore, referred the case to Dr. Donald Landstrom, a Board-certified psychiatrist and neurologist, for a referee examination.

On October 4, 1995 Dr. Polk again opined that appellant was totally disabled to return to work in her prior occupation.

On October 28, 1995 Dr. Landstrom reviewed the history of appellant's injury and the medical treatment she received. In addition, he recorded appellant's symptoms and conducted a thorough examination. Dr. Landstrom also performed an electromyography of both lower extremities and determined that the results were normal. Because there was no evidence of abnormality, he concluded that appellant was capable of performing her previous employment.

On November 20, 1995 the Office issued a notice of proposed termination of compensation on the basis that the medical evidence established that appellant did not have any injury-related residuals, which prevented her from performing her duties of her date-of-injury position. The Office indicated that it relied on the opinion of Dr. Landstrom, the referee specialist, in reaching its conclusion. Appellant was given 30 days to submit additional evidence or argument.

On December 6, 1995 Dr. Nael indicated that he treated appellant for depression and chronic intractable pain. He indicated that date of injury as October 23, 1985. He stated that appellant remained disabled and that she was not able to work and function outside of home.

By decision dated December 20, 1995, the Office ordered that compensation be terminated effective January 7, 1996 because the medical evidence established that appellant did not have any injury-related residuals, which prevented her from performing the duties of her date-of-injury position. The Office again indicated that it relied on the opinion of Dr. Landstrom, the referee specialist, in reaching its conclusion.

On January 5, 1996 appellant requested an oral hearing which was held on September 26, 1996.

On September 24, 1996 Dr. Nael indicated that he treated appellant for chronic pain and that appellant has been unable to return to work.

On October 14, 1996 Dr. Bisson indicated that appellant had previous surgeries and that she could not return to gainful employment.

By decision dated January 2, 1997, the Office hearing representative affirmed the Office's December 20, 1995 decision terminating benefits. The hearing representative found that the weight of the evidence rested with Dr. Landstrom, the referee specialist.

On January 29, 1997 appellant's representative requested reconsideration. Appellant's representative indicated that the Office hearing representative erred in stating that appellant did not suffer a cervical strain. He further stated that appellant did not know she could appeal a November 16, 1994 decision denying treatment for cervical surgery due to the advice of her representative at that time. Appellant's representative further noted that appellant could not receive compensation benefits or get her former job back. Finally, appellant's representative indicated that appellant diligently pursued her claim, but that if she could not get compensation benefits, she requested her old job back. No further medical evidence was submitted.

By decision dated February 7, 1997, the Office ordered that the request for review be denied because the evidence submitted in its support was immaterial in nature and insufficient to warrant review or the prior decision.

The Board finds that the Office properly terminated appellant's wage-loss compensation effective January 7, 1996 on the basis that the residuals of her accepted October 23, 1985 injury no longer prevented appellant from performing her usual employment.

Once the Office has accepted a claim and pays compensation, it has the burden or proof of justifying termination or modification of compensation benefits. 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.¹

In the present case, the Office accepted appellant's claim for cervical strain, thoracic strain, lumbar strain and a herniated disc at L4-5. Subsequently, appellant's treating physicians, Dr. Nael, a Board-certified psychiatrist and neurologist, Dr. Bisson, a specialist in physical medicine and rehabilitation and Dr. Polk, a Board-certified neurological surgeon, examined appellant and opined that appellant's October 23, 1985 employment disabled her from her usual employment. Dr. Ruefer, a Board-certified orthopedic surgeon, however, rendered a second opinion examination for the Office and found that there was no disability medically connected to appellant's accepted work injury. Because of the conflict between Dr. Ruefer's opinion and the opinion of appellant's treating physicians, the Office referred appellant to Dr. Landstrom, a Board-certified psychiatrist and neurologist, for an impartial medical examination pursuant to section 8123 of the Federal Employees' Compensation Act.²

In situations where there are opposing medical reports of virtually equal weight and the case is referred to an impartial specialist, the opinion of such specialist will be given special weight if the opinion is based on proper factual background and well rationalized.³

¹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

² 5 U.S.C. § 8128 *et seq.*

³ *See Jack R. Smith*, 41 ECAB 691 (1990).

Dr. Landstrom opined that appellant was capable of performing her previous employment. Dr. Landstrom reviewed appellant's entire history and performed a complete physical examination. He also performed an electromyography and based on these objective findings he indicated that there was no employment-related disability resulting from the 1985 injury. Because Dr. Landstrom's opinion was based on a proper factual background and medical rationale, his opinion, as the opinion of the impartial medical specialist, constitutes the weight of the evidence. The Board, therefore, finds that the Office met its burden to terminate appellant's compensation benefits. Moreover, the reports from Drs. Nael and Bisson submitted after the referee examination failed to outweigh Dr. Landstrom's opinion inasmuch as these reports were cumulative of the evidence previously submitted prior to the referee examination.

The Board also finds that the Office properly refused to reopen appellant's case for a merit review under 5 U.S.C. § 8128(a) of the Act.

Under 20 C.F.R. § 10.138(b)(1), a claimant may obtain review of the merits of her claim by showing that the Office erroneously applied or interpreted a point of law, advancing a point of law or fact not previously considered by the Office, or submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁴ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.⁵ Evidence that does not address the particular issue involved, in this case, whether appellant's accepted employment-related disability has ceased, also does not constitute a basis for reopening a case.⁶

In this case, appellant failed to submit any additional evidence supporting her application for review. Instead, appellant's representative argued that the Office hearing representative erred in stating that appellant did not suffer a cervical strain. The representative further urged that appellant did not know she could appeal a November 16, 1994 decision, denying treatment for cervical surgery due to the advice of her representative at that time. Appellant's representative further noted that appellant could not receive compensation benefits or get her former job back. Finally, appellant's representative indicated that appellant diligently pursued her claim, but that if she could not get compensation benefits, she requested her old job back. None of the arguments raised by appellant's representative is relevant to the issue of whether appellant's disability from her October 23, 1995 employment injury had ceased. Consequently, the Office properly found that there was no basis for reopening the case.

The decisions of the Office of Workers' Compensation Programs dated February 7 and January 2, 1997 are affirmed.

Dated, Washington, D.C.

⁴ 20 C.F.R. § 10.138(b)(2).

⁵ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Bruce E. Martin*, 35 ECAB 1090, 1093-94 (1984).

⁶ *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

February 2, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member