U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORIS McMANIOUS and HOUSE OF REPRESENTATIVES, Washington, DC

Docket No. 98-646; Submitted on the Record;
Issued July 22, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether appellant's disability causally related to her September 4, 1994 employment injury ended by January 5, 1997.

The Office of Workers' Compensation Programs accepted that appellant sustained a low back strain on September 9, 1994 when she fell sideways onto a chair. Appellant received continuation of pay from September 13 to October 27, 1994, followed by compensation for temporary total disability until her return to work on March 5, 1995 and compensation for her intermittent absences from work from March 6 to May 21, 1995. Appellant again stopped work on May 22, 1995 and the Office resumed payment of compensation for temporary total disability.

On November 14, 1996 the Office issued appellant a notice of proposed termination of compensation, on the basis that the evidence established that she was not disabled for the position of telephone operator she held when injured. By decision dated December 20, 1996, the Office terminated appellant's compensation effective January 5, 1997 on the basis that the medical evidence established that her disability as a result of her September 9, 1994 injury had ceased. Appellant requested a hearing, which was held on September 23, 1997. By decision dated November 24, 1997, an Office hearing representative found that the weight of the medical evidence established that appellant's disability related to her September 9, 1994 injury had ended.

Once the Office accepts a claim, it has the burden 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] The test of "disability" is whether an employment-related impairment prevents the employee from engaging in the kind of work he or she was doing when injured. Where the medical evidence shows the employee is able to perform the duties of the position held when injured, the employee is not disabled and termination of compensation is proper.[2]

The Board finds that the weight of the medical evidence establishes that appellant's disability causally related to her September 4, 1994 employment injury ended by January 5, 1997.

There was a conflict of medical opinion in this case on the question of whether appellant continued to be disabled for the position of telephone operator she held when injured. Appellant's attending physician, Dr. David E. Couk, a Board-certified orthopedic surgeon, stated in an October 26, 1995 reply to an inquiry to a rehabilitation nurse under contract to the Office that appellant was not capable of returning to her job as a telephone operator because she could not sit. Dr. Couk also stated that appellant could not do much of anything because of her chronic pain. In a report dated October 26, 1995, Dr. Marriott C. Johnson, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation, after setting forth appellant's history and findings on examination, stated, "I see no reason with the findings that she cannot continue at her present work level of a telephone operator."

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[3] referred appellant, the case record and a statement of accepted facts to Dr. Robert S. Adelaar, a Board-certified orthopedic surgeon. In a report dated February 8, 1996, Dr. Adelaar reviewed appellant's history and the results of her magnetic resonance imaging (MRI) and computerized tomography (CT) scans, and set forth findings on physical examination. Dr. Adelaar concluded:

> "In summary, this patient has had lumbar strain and may have a facet syndrome, but there has been no objective evidence of nerve root irritation or intraspinal compression problems of the nerve root. It is my opinion that she has been treated well and reached maximum medical improvement. I would recommend that she does return to her work and I also recommend some accommodations be made at work so she can alternate sitting and standing and have proper lumbar

[1] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[2] *Roniva Brown*, 38 ECAB 338 (1987).

[3] 5 U.S.C. § 8123(a) states in pertinent part "If there is 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."

> support on her work seat. I also recommend the use of a TENS [transcutaneous electrical nerve stimulator] unit to attempt to get her back into her work station and control some of the discomfort that she has. It would be my opinion that her injury did lead to the treatment and symptom complex which occurred in her low back after her fall."

Dr. Adelaar also completed an Office work capacity evaluation form, indicating that appellant should limit prolonged sitting and heavy carrying or lifting, and that while sitting she should change positions each half hour. Dr. Adelaar indicated that, with these limitations, appellant could work eight hours per day.

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[4] In this case, the report of Dr. Adelaar is entitled to special weight and is sufficient to establish that appellant was able to perform the duties of the position held when injured.

The position of telephone operator that appellant held when she was injured on September 9, 1994 was described by the supervisor of the employing establishment's telephone exchange as requiring no lifting. This supervisor advised a rehabilitation nurse under contract with the Office that the job duties could be accommodated to allow appellant to change positions and alternate sitting and standing. This is consistent with appellant's testimony at the September 23, 1997 hearing that during her return to work from March to May 1995 she tried to perform her duties while standing, and that the employing establishment made the accommodations recommended by Dr. Adelaar, including providing three different chairs. The weight of the medical evidence, represented by the report of Dr. Adelaar, establishes that appellant could perform the duties of the job she held when injured, with the modifications already made by the employing establishment.

Following the Office's termination of her compensation, appellant submitted additional medical evidence, consisting of reports from Dr. Couk and a September 10, 1997 report from Dr. Edward N. Katz, a Board-certified rheumatologist. These reports are not sufficient to overcome the weight of the report of Dr. Adelaar or to create a new conflict with that report. Reports from a physician on one side of a conflict are generally insufficient for this purpose,[5] and Dr. Couk's April 3, 1997 and September 17, 1997 reports offered little new information. Dr. Katz stated that appellant's myofascial pain initiated from her September 1994 trauma, but did not offer an opinion on whether appellant could perform the position of telephone operator.

[4] *James P. Roberts*, 31 ECAB 1010 (1980).

[5] *Dorothy Sidwell*, 41 ECAB 857 (1990).

The decisions of the Office of Workers' Compensation Programs dated November 24, 1997 and December 20, 1996 are affirmed.

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

Michael J. Walsh
Chairman

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member