

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORETHA R. DAVIS and DEPARTMENT OF HEALTH & HUMAN SERVICES, OFFICE OF HUMAN DEVELOPMENT SERVICES, Philadelphia, PA

*Docket No. 98-627; Submitted on the Record;
Issued November 12, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden to terminate appellant's compensation effective March 31, 1996; and (2) whether the Office abused its discretion by refusing to reopen appellant's claim for a merit review on June 23, 1997.

On October 24, 1983 appellant, then a 54-year-old program specialist, filed a notice of traumatic injury alleging that on September 30, 1983 she injured her back, neck and right shoulder when the car she was entering began moving before she was inside it while in the course of her federal employment. The Office accepted the claim for cervical and lumbar strain, and a herniated disc L4-5. Appellant subsequently received compensation for temporary total disability.

On March 24, 1994 Dr. Stephen D. Silberstein, appellant's treating physician and a Board-certified psychiatrist and neurologist, completed a work evaluation form indicating that appellant was totally disabled from all work.

The Office subsequently referred appellant to Dr. Stephen M. Horowitz, a Board-certified orthopedic surgeon, for a second opinion examination. On August 22, 1994 Dr. Horowitz recorded the history of the injury and reviewed the treatment records. He stated that appellant complained of intermittent back discomfort. Dr. Horowitz noted that appellant suffered a herniated disc as a result of her motor vehicle accident, but that she had significantly recovered. He indicated that appellant's neurological examination was unremarkable. Dr. Horowitz stated that appellant could return to work. He completed a functional capacities form indicating that appellant could sit for two hours at one time and that she could stand or walk for four hours at one time. Dr. Horowitz stated that appellant could occasionally lift 0 to 10 pounds, but never more than that amount. He stated that appellant could carry up to five pounds occasionally, but never more. Dr. Horowitz indicated that appellant could not push or pull arm controls. He stated that appellant could occasionally bend, squat, crawl, climb and reach. Dr. Horowitz

indicated that there were mild restrictions around moving machinery and driving automotive equipment.

On March 16, 1995 Dr. Silberstein completed another work restriction evaluation. He stated that appellant could intermittently sit for two hours per day and intermittently walk, stand or lift for one hour per day. Dr. Silberstein indicated that appellant could not bend, squat, climb, kneel or twist. He stated that appellant could lift 0 to 10 pounds and that she could not lift above the shoulder or use her feet to operate foot controls or for repetitive movement. Dr. Silberstein stated that appellant could work zero to two hours per day.

Due to the conflict between appellant's treating physician, Dr. Silberstein, and the second opinion physician, Dr. Horowitz, the Office referred appellant to Dr. Herbert Stein, a Board-certified orthopedic surgeon, for a referee examination. On April 12, 1995 Dr. Stein reviewed appellant's history of injury and the history of the treatment she received. He also reviewed several magnetic resonance imaging (MRI) scans and conducted a thorough physical examination. Dr. Stein diagnosed chronic cervical spine sprain with degenerative disc disease. He also diagnosed chronic lumbosacral spine pain secondary to disc degenerative disease with right radiculitis. Dr. Stein indicated that appellant's symptoms exceeded the results of the recent MRI and the computerized axial tomography (CAT) scans. He indicated that appellant's degenerative changes were present early on, particularly in the cervical area. Dr. Stein stated that appellant's accepted injury may have exacerbated these symptoms, but that most of the symptoms were now related to the degenerative process. He restricted appellant to lifting and carrying 15 to 20 pounds and disallowed repetitive bending, stair climbing or prolonged walking. Dr. Stein diagnosed degenerative disc disease. On May 19, 1995 he indicated that all of appellant's symptoms stemmed from degenerative disc disease.

On October 9, 1995 the Office issued a notice of proposed termination of compensation. The Office indicated that the weight of the medical evidence rested with the opinion of Dr. Stein, the referee examiner, who stated that appellant's employment-related disability had resolved. Appellant was allowed 30 days to submit additional evidence or argument.

By decision dated March 11, 1996, the Office terminated appellant's compensation effective March 31, 1996. In an accompanying memorandum, the Office found that the weight of the medical evidence rested with the opinion of Dr. Stein, the referee examiner.

On December 11, 1996 appellant requested reconsideration. In support, she submitted an October 11, 1996 report from Dr. Silberstein stating that appellant presented with back pain. Dr. Silberstein stated that appellant continued to have cervical and lumbar disease. He indicated that appellant was totally and permanently disabled. On December 19, 1996 Dr. Silberstein indicated that appellant continued to suffer from constant low back pain and radiating symptoms down her right leg and arms. He stated that appellant, "...continues to have lumbar and cervical problems stemming from her injury, along with nerve damage." Dr. Silberstein stated that appellant remained totally and permanently disabled.

By decision dated February 14, 1997, the Office reviewed the claim on its merits and found that the evidence submitted in support of the application was not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office noted that

Dr. Silberstein's reports dated November 21 and December 12, 1996 were of diminished value because he failed to present a history of the injury or offer an opinion of the relationship between appellant's current condition and the accepted injury. The Office indicated that the weight of the medical evidence remained with the opinion of Dr. Stein, the referee examiner.

On March 17, 1997 appellant again requested reconsideration. In support, she submitted a February 26, 1997 report from Dr. Silberstein. Dr. Silberstein again stated that appellant had lumbar and cervical problems stemming from her injury and that she remained totally disabled. Appellant also submitted a report from her physical therapist dated January 20, 1996.

By decision dated June 23, 1997, the Office denied appellant's request for review inasmuch as the evidence submitted in its support was cumulative and not sufficient to warrant modification of the prior decision. In an accompanying memorandum, the Office indicated that Dr. Silberstein's February 26, 1997 report was the same as his previous reports and that the report from the physical therapist failed to constitute medical evidence.

The Board finds that the Office met its burden in terminating appellant's compensation effective March 31, 1996.

Once the Office accepts a claim, it has the burden of proving that the disability ceased or lessened in order to justify termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to employment.² Furthermore, the right to medical benefits for the accepted condition is not limited to the period of entitlement to disability.³ To terminate authorization or medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which no longer requires medical treatment.⁴

In the present case, the Office accepted the claim for cervical and lumbar sprain, and for a herniated disc L4-5. Appellant subsequently received compensation for total temporary disability. In his report dated August 22, 1994, Dr. Horowitz, a second opinion physician and a Board-certified orthopedic surgeon, indicated that appellant was no longer totally disabled due to her accepted injuries. This opinion was contradicted, however, by the opinion of Dr. Silberstein, appellant's treating physician and a Board-certified psychiatrist and neurologist, who continued to find that appellant was totally disabled. Because of the conflict of opinion between these physicians, the Office properly referred appellant to an impartial medical examiner pursuant to section 8123 of the Federal Employees' Compensation Act.⁵

¹ *Frederick Justiniano*, 45 ECAB 491 (1994).

² *Id.*

³ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁴ *Id.*

⁵ 5 U.S.C. § 8101 *et seq.*

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 a specialist will be given special weight if the opinion is based on a proper factual background and is well rationalized.⁶ In this case, Dr. Stein provided the referee opinion. Dr. Stein reviewed appellant's symptoms, the history of the injury, and all the medical treatment appellant received. He also conducted a thorough physical examination. Upon reviewing appellant's MRI and CAT scans, Dr. Stein indicated that appellant's symptoms exceeded the results of these objective tests. He further stated that appellant's degenerative process was present early on and that most of appellant's symptoms were related to the degenerative process. Based on the objective testing, Dr. Stein concluded that all of appellant's complaints stemmed from degenerative disc disease rather than her accepted employment injury. Because Dr. Stein's opinion was based on a proper factual background and supported by medical rationale, his opinion, as that of the impartial specialist, constitutes the weight of the evidence.

The Board further finds that the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review on June 23, 1997.

Under section 8128(a) of the Act,⁷ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.138(b)(1) of the implementing federal regulations,⁸ which provides that a claimant may obtain review of the merits of the claim by:

“(i) Showing that the Office erroneously applied or interpreted a point of law; or

“(ii) Advancing a point of law or a fact not previously considered by the Office;
or

“(iii) Submitting relevant and pertinent evidence not previously considered by the Office.”

Section 10.138(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.⁹

In the instant case, appellant's request for reconsideration rests on the February 26, 1997 report of Dr. Silberstein and on a January 20, 1996 report from her physical therapist. Dr. Silberstein's February 26, 1997 report, however, is substantially similar to his December 19, 1996 report which the Office properly found was outweighed by the report of the referee examiner. In both reports Dr. Silberstein briefly concludes that appellant remained totally disabled from lumbar and cervical problems which stemmed from her accepted injury. Inasmuch

⁶ See *Jack R. Smith*, 41 ECAB 691 (1990).

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.138(b)(1).

⁹ 20 C.F.R. § 10.138(b)(2).

as this evidence is cumulative, the Office properly did not rely on this report to reopen appellant's claim for a review of the merits. Moreover, the report of appellant's physical therapist fails to constitute medical evidence and is therefore irrelevant to this claim.¹⁰ Consequently, because appellant failed to submit any new relevant and pertinent evidence, the Office did not abuse its discretion by refusing to reopen appellant's claim for a merit review.

The decisions of the Office of Worker's Compensation Programs dated June 23 and February 14, 1997 are affirmed.

Dated, Washington, D.C.
November 12, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹⁰ *Jerre R. Rinehart*, 45 ECAB 518 (1994); *George E. Williams*, 44 ECAB 530 (1993)