

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ESTHER M. SMART and DEPARTMENT OF JUSTICE,
Miami, FL

*Docket No. 97-2417; Submitted on the Record;
Issued September 28, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective November 28, 1995.

The Office accepted appellant's claim for a cervical, lumbar and left knee sprain. Appellant received continuation of pay from March 2, 1994 through April 15, 1995 and began receiving temporary total disability benefits on April 18, 1994.

In a report dated May 9, 1994, Dr. Vaughn D. Cohan, a Board-certified psychiatrist and neurologist, reexamined appellant, reviewed x-rays and diagnosed preexisting chronic cervical osteoarthritis, improved acute cervical sprain, preexisting carpal tunnel syndrome, improved lumbar sprain and knee contusion. He stated that appellant could return to full work at that time but he would defer to Dr. Hugh S. Unger, a Board-certified orthopedic surgeon, regarding her orthopedic condition. In a disability note dated June 3, 1994, Dr. Unger stated that appellant could return to light-duty work with no excessive bending or lifting more than 40 pounds. In an attending physician's report dated June 10, 1994, he diagnosed cervical and lumbar degenerative disc disease, checked the "yes" box that it was work related and returned appellant to light-duty work. In a work restriction evaluation dated July 29, 1994, Dr. Unger indicated that appellant could work 8 hours, could not lift more than 10 to 20 pounds and must avoid bending, kneeling, squatting and climbing.

In progress notes dated September 22 through October 20, 1994, Dr. Unger stated that appellant was examined by Dr. Gary A. Belega, a Board-certified psychiatrist and neurologist and an electroencephalogram (EEG) performed on September 30, 1994 was normal. On October 20, 1994 Dr. Unger stated that appellant should continue on light duty.

In a report dated August 19, 1994, Dr. Frederick B. Seley, a Board-certified orthopedic surgeon, stated that appellant was unable to work due to the March 1, 1994 employment injury. He stated that he felt that her knee was too unstable for her to continue working.

By letter dated November 22, 1994, the Office requested that Dr. Seley inform the Office as to when appellant could perform light duty and if so, describe her restrictions, if any.

In a report dated January 10, 1995, Dr. Karl W. Green, a Board-certified orthopedic surgeon and a second opinion physician, considered appellant's history of injury, performed a physical examination and reviewed diagnostic tests including magnetic resonance imaging (MRI) scans dated July 6, 12 and 25, 1994, and x-rays of the lumbosacral spine, cervical spine and the knee. He stated that appellant's primary problem was osteoarthritis and degenerative disc disease involving the cervical and lumbosacral spine and the knee. Dr. Green further stated that "[i]n view of the three[-]week hiatus prior to the onset of spinal symptoms I do not feel that these symptoms are related to [appellant]'s accident." Regarding appellant's knee, he opined that appellant's primary problems are "osteoarthritic in nature." Dr. Green further opined that appellant did not have any permanent injury to her knee as a result of the March 1, 1994 employment injury and that she could return to work without restrictions.

By letter dated January 26, 1995, the Office reiterated its request to Dr. Seley for his opinion on whether appellant could return to work and required restrictions.

In a report dated February 14, 1995, Dr. Green stated that he had reviewed additional medical records including an EEG and MRI scan of the brain. After reviewing these records, he still opined that appellant did not have "any permanency" resulting from her March 1, 1994 employment injury.

In a report dated March 17, 1995, Dr. Seley reviewed Dr. Green's January 10, 1995 report and stated that he agreed with Dr. Green's examination but disagreed with his conclusion. He stated that whereas Dr. Green concluded that all of appellant's aches, pains and problems preexisted the March 1, 1994 employment injury, he concluded that appellant's aches and pains resulted from her preexisting problems but were exacerbated by the March 1, 1994 employment injury. Dr. Seley agreed that appellant had multi-level degenerative disease in her neck and back and some positive findings on the MRI scan of possible ligament attenuation and stretch and a small effusion which was abnormal. He reiterated that a small portion of appellant's present problems were related to the March 1, 1994 employment injury which exacerbated a preexisting disease.

Appellant submitted statements dated January 14, February 4, March 28 and 29, 1995 documenting her ongoing health problems.

By decision dated November 28, 1995, the Office terminated appellant's compensation effective the date of the decision, stating that the medical evidence did not explain how appellant's present disability is causally related to the March 1, 1994 employment injury.

By letter dated August 31, 1996, appellant requested reconsideration of the Office's decision.

By decision dated October 2, 1996, the Office denied appellant's reconsideration request.

By letter dated October 13, 1996, appellant requested reconsideration of the Office's decision and submitted additional evidence including medical reports dated October 26, 1994 and March 20, 1996, from Dr. Craig S. Shapiro, an osteopath, in which he diagnosed tinnitus,

eustachian tube dysfunction, allergic rhinosinusitis and foreign body of the left ear. Appellant also submitted a medical report dated September 27, 1994, from Dr. Belaga who considered appellant's history of injury, performed a physical examination and diagnosed possible vascular headaches. The EEG dated September 30, 1994 was normal. Further, appellant submitted notes from Dr. Joseph F. Seber, a Board-certified dermatologist, dated from October 30, 1993 through September 30, 1996 documenting that she was treated for a pilar cyst.

By letter dated November 6, 1996, appellant enclosed additional medical evidence consisting of numerous progress notes from Dr. Seley dated August 21 and March 6, 1995 and from Dr. Paul Breslow dated from September 30 through November 1, 1996.

By decision dated November 14, 1996, the Office denied appellant's request for reconsideration.

By letter dated November 25, 1996, appellant requested reconsideration of the Office's decision and submitted medical evidence which was either duplicative of previously submitted evidence or consisted of progress notes dated from October 22 through November 20, 1996.

By decision dated December 17, 1996, the Office denied appellant's reconsideration request.

On November 29, 1996 appellant filed an appeal with the Board for review of the Office's decision dated November 28, 1995, which was docketed as No. 97-658. Appellant also attempted to submit additional evidence. On March 27, 1997 the Board gave appellant the option to resubmit the evidence to the Office for reconsideration or proceed with the appeal. Appellant chose to resubmit the evidence to the Office with a request for reconsideration pursuant to 5 U.S.C. § 8128. In an order dated May 15, 1997, the Board dismissed appellant's appeal.

By letter dated April 9, 1997, appellant requested reconsideration of the Office's decision and submitted additional medical evidence. The evidence included additional progress notes from Dr. Breslow dated from November 22, 1996 through January 17, 1997 and a report from Dr. Seley dated June 30, 1994. In his report, Dr. Seley considered appellant's history of injury, performed a physical examination, reviewed x-rays and diagnosed that appellant had "multiple areas of wear and tear in the neck, back and knee which were exacerbated and aggravated by the slip and fall injury and she just does not seem to be getting better." In a report dated August 4, 1994, Dr. Seley stated that he had been treating appellant since June 30, 1994 and that she had informed his office that she would be taking leave without pay for office visits and physical therapy.

By decision dated June 30, 1997, the Office denied appellant's reconsideration request.

The Board finds that the Office has not met its burden of proof to terminate compensation benefits.

Once the Office has accepted 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 Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.²

In the present case, a conflict exists between the opinion of the referral physician, Dr. Green, that appellant could return to work without any restriction, and the opinion of Dr. Seley, a treating physician, that appellant was unable to work. In his January 10, 1995 report, Dr. Green stated that the reason for his opinion that appellant's spinal symptoms were not related to the March 1, 1994 employment injury was that there was a three-week interval between the employment injury and the onset of appellant's spinal symptoms. In his June 30, 1994 and March 17, 1995 reports, Dr. Seley, a treating physician, consistently opined that appellant's preexisting problems were exacerbated or aggravated by the March 1, 1994 employment injury. As the conflict in the evidence between Dr. Green's and Seley's opinions as to whether appellant could return to work as a result of the March 1, 1994 employment injury is unresolved, the Office has not met its burden of proof to terminate benefits.

The decisions of the Office of Workers' Compensation Programs dated June 30, 1997, December 17, November 14 and October 2, 1996 and November 28, 1995 are hereby reversed.

Dated, Washington, D.C.
September 28, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member

¹ *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

² *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).