

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BONNIE J. FAILING and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Fort Lyon, CO

*Docket No. 98-471; Submitted on the Record;
Issued January 5, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's compensation benefits effective October 11, 1997.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof to terminate appellant's compensation benefits effective October 11, 1997.

Once the Office accepts a claim, it has the burden of proving that the disability has 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 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.² Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.³ To terminate authorization or medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

On May 6, 1985 appellant, then a 43-year-old food service worker, filed a claim for traumatic injury alleging that on May 3, 1985 she slipped and fell in the performance of her employment duties, injuring her back and right hip. The Office initially accepted appellant's claim for acute lumbosacral sprain and right hip sprain, and later expanded its acceptance to include herniated disk at L5-S1 and lumbar laminectomy at L5-S1.⁵ Appellant stopped work on

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

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

⁴ *Id.*

⁵ The lumbar laminectomy at L5-S1 was performed on September 11, 1991.

May 3, 1985 and returned to work four hours per day on June 17, 1985. Appellant again stopped work on October 26, 1985 and has not returned.

On March 5, 1997 the Office arranged for appellant to be examined by Dr. Robert C. Schutt, Jr., a Board-certified orthopedic surgeon, for the purpose of obtaining a second opinion. The Office provided Dr. Schutt with a statement of accepted facts and a list of issues to be addressed, in addition to the complete medical file. In his report dated April 3, 1997, Dr. Schutt reviewed the history of appellant's employment injury and treatment, listed his findings on examination and gave his impression as "history of lumbar disc excision with underlying degenerative arthritis." In response to the question of whether appellant has objective findings of active and disabling residuals of an acute lumbosacral sprain, right hip sprain, herniated disc at L5-S1 and lumbar laminectomy at L5-S1. Dr. Schutt responded:

"There are no objective findings of active or disabling residuals of the lumbosacral sprain or right hip sprain. She has no associated problems with recurrent herniated disc as a result of the lumbar laminectomy. She does have degenerative arthritis in the lower back, and she is an aging woman in poor physical condition. Evidently these conditions are not accepted as work related based on the [s]tatement of [a]ccepted [f]acts. This employee's subjective complaints are not commensurate with the objective findings and test results."

In response to the question of whether appellant is currently disabled from working as a food service worker or from all work as a result of continuing disabling residuals of her work injury, Dr. Schutt responded:

"I have reviewed the job description of a [f]ood [s]ervice [w]orker. Because of her previous lumbar disc excision, I would not want her to return to work which requires her to lift more than 25 pounds. If she did, there would be a possibility of reinjuring her back. The job description provided me indicates that she has to do frequent lifting of objects weighing up to 30 pounds and occasional lifting of up to 40 pounds. She would also be involved in constant standing, walking and stooping. It would certainly be my opinion that she could return to gainful employment with occasional bending, squatting, stooping or crawling, but I would not want her to be in any abnormal positions for prolonged periods of time. I would not want her to do any lifting over 25 pounds. Within the restrictions I have delineated, it is appropriate to return her to eight hours of work per day."

Finally, Dr. Schutt stated that appellant had no disabling residuals that need further treatment, but that her overall ability to function would be improved with a general body reconditioning and weight loss program.

On the accompanying Form OWCP-5 Dr. Schutt restricted appellant, on an indefinite basis, to lifting 25 pounds with occasional bending, squatting, stooping or crawling and indicated that within these restrictions appellant could work eight hours a day. He further indicated, however, that none of these restrictions were due to appellant's employment injury.

By letter dated April 21, 1997, the Office asked Dr. Schutt to clarify his prior opinion with respect to whether there were any indications that appellant's degenerative arthritis of the lower back, which had not been accepted by the Office, was caused, accelerated or aggravated by her accepted work injury.

In a follow-up report dated May 5, 1997, Dr. Schutt stated that there were no objective findings to support that the work injury caused, accelerated or aggravated the condition of degenerative arthritis. He further stated:

“The work injury provided this injury with a superimposed soft tissue strain that was temporary in nature. There is no permanent aggravation. The work injury did not change the underlying condition of degenerative arthritis. Certainly the arthritis that she has is disabling to the point where one would have her avoid any type of heavy manual labor or abusive occupations to the back. In doing so, I would restrict her to medium work restrictions which is frequent lifting of 25 pounds and occasional lifting of 50 pounds. There would also be only occasional bending, squatting, kneeling or crawling with no repetitive abnormal positions for prolonged periods of time. These restrictions are related to the degenerative arthritis and not the temporary soft tissue strain which she sustained from workers' compensation. As a result, on the OWCP-5, I did not place any specific restrictions on her as a result of the workers' compensation injury.”

On June 30, 1997 the Office forwarded Dr. Schutt's report, together with the statement of accepted facts, to appellant's attending physician, Dr. Kevin Boehle, a Board-certified osteopath, for his review and comment.⁶ In a report dated July 11, 1997, Dr. Boehle diagnosed lumbosacral musculoskeletal strain, chronic and stable, right hip strain, chronic and stable, post laminectomy syndrome, status post L5-S1 laminectomy, causally related to appellant's employment injury. He further diagnosed right lower extremity radiculopathy and degenerative disc disease of the lumbosacral spine, but specifically stated that these additional diagnoses were unrelated to appellant's employment. In his discussion, Dr. Boehle stated that he was “generally in agreement with Dr. Schutt's report” but sought to clarify several points, stating:

“Accepted facts include the accepted claim for acute lumbosacral sprain and hip strain with herniated disk at L5-S1 and lumbar laminectomy at L5-S1. The patient had undergone a lumbar laminectomy at L5-S1 on November 9, 1991, by Dr. Gerald Reilly. Since that time she has suffered continued degenerative disk disease of the lumbosacral spine which is not related to her reported injury of May 3, 1985. It is this nonwork related side of degenerative disk changes which most likely accounts for her continued low back and leg symptoms. There is no suggestion on x-rays or exam[ination] that the L5-S1 disk has again herniated or caused any nerve root impingement that would give her bilateral leg pain. There were degenerative changes in the higher levels of her lumbar spine, which could

⁶ At the time of the Office's inquiry, Dr. Boehle had just taken over appellant's care from her longstanding treating physician, Dr. R.J. Black Schultz, who had recently retired. The record contains many treatment reports from Dr. Schultz but does not have a current opinion on the issue of disability.

be accounting for her continued pain. These changes, however, have not been accepted as part of her work-related injury of lumbosacral musculoskeletal strain and right hip strain.”

After listing his findings on examination and the above-mentioned diagnoses, Dr. Boehle made the following remarks:

“I feel that [appellant] is currently stable. Her current treatment has allowed her to maintain her level of permanent partial impairment. She has sustained some impairment from her work-related injury due to the acceptance of the herniated disk with diskectomy and laminectomy and chronic strain. This impairment rating is not available for review.

“There are no further recommendations for treatment, or indications for further treatment for her work-related injuries. Recommendations continue to be daily exercise, stretches, continuation of medications, including Trilisate, Tylenol ES, Soma and Stresstabs....

“Her permanent restrictions will remain as no lifting greater than 25 pounds, no repetitive lifting at the waist or twisting, or repetitive carrying. No repetitive foot motions, no standing greater than 20 minutes or walking longer than 20 minutes....”

Based on the reports of Drs. Schutt and Boehle, on August 25, 1997 the Office notified appellant that it proposed to terminate her compensation for wage loss. By letter dated September 17, 1997, appellant objected to the proposed termination and submitted an additional report from Dr. Boehle, dated September 11, 1997, in which the physician primarily reiterated his prior opinion.

Subsequently, on September 29, 1997 the Office terminated appellant’s compensation benefits effective October 11, 1997. By letter received November 3, 1997, appellant requested reconsideration of the Office’s September 29, 1997 decision and submitted additional medical evidence in support of her request. In a merit decision dated November 13, 1997, the Office found the new medical evidence insufficient to warrant modification of the prior decision.

The Office properly relied on the opinions of Drs. Schutt and Boehle in terminating benefits in this case. The physicians are essentially in agreement that appellant’s continuing disability for work is causally related to her degenerative disc disease, a condition which has not been accepted by the Office as employment related and which neither Dr. Schutt nor Dr. Boehle attributes to any of appellant’s accepted employment-related conditions. Further, it appears from their opinions that the work restrictions provided were due to appellant’s nonemployment-related degenerative arthritis condition. While Dr. Schutt, in his initial report, stated that appellant could not lift more than 25 pounds due to her employment-related lumbar disc excision, and further correctly noted that appellant’s date-of-injury job as a food service worker required that she regularly lift more than 25 pounds, Dr. Schutt later clarified his opinion in his supplemental report in which he stated that appellant’s physical restrictions stemmed from her nonemployment-related degenerative disc disease and explained that this was the reason why, on

his OWCP-5, he indicated that appellant had no restrictions related to her employment injury. Similarly, Dr. Boehle specifically states that appellant's current pain and symptoms are causally related to her nonemployment-related degenerative disc disease. As both Drs. Schutt and Boehle opined that appellant's current complaints are related to her degenerative arthritis and both physicians opined that appellant's degenerative arthritis is nonemployment related, their reports are sufficient to meet the Office's burden of proof to establish that appellant has no continuing disability nor medical residual after October 11, 1997.

The decisions of the Office of Workers' Compensation Programs dated November 13 and September 29, 1997 are hereby affirmed.

Dated, Washington, D.C.
January 5, 2000

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member