

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN COLEMAN and U.S. POSTAL SERVICE,
POST OFFICE, Washington, DC

*Docket No. 98-1509; Submitted on the Record;
Issued January 4, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

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

The Office has accepted that appellant, then a 31-year-old mailhandler, sustained a chronic lumbosacral strain with radiculopathy of the right lower extremity on February 15, 1989 while pushing a PC cart. Since the injury, appellant intermittently performed light-duty work. The Office terminated appellant's compensation benefits on April 30, 1997 on the grounds that appellant was no longer disabled due to the February 15, 1989 employment injury.¹ An Office hearing representative affirmed the termination of appellant's compensation benefits by decision dated March 26, 1998.

The Board finds that the Office did not meet its burden of proof in this case.

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

¹ The Office had previously proposed terminating appellant's compensation benefits on the grounds that she neglected suitable work. By letter dated November 15, 1996, the Office advised appellant that if she did not return to work in the suitable work position, after 30 days, her compensation would not be reinstated. The Board notes, however, that the Office never finalized a decision terminating appellant's compensation benefits on the grounds that she neglected suitable work based upon her October 1996 work stoppage. While the April 30, 1997 decision noted that appellant's compensation would be adjusted pursuant to "5 U.S.C. § 8106 and 5 U.S.C. § 8115 based upon appellant's actual earnings," the claims examiner's memorandum to the Director substantiates that the basis for the termination of benefits was that appellant was no longer disabled due to the accepted injury. The record indicates that appellant was working four hours a day at the time benefits were terminated.

without establishing that the disabling condition has ceased or that it is no longer related to the employment.²

Based upon a conflict of medical opinion evidence regarding the issue of appellant's continuing disability, appellant was evaluated on November 14, 1994 by Dr. Joel L. Falik, a Board-certified neurosurgeon. In a report dated November 15, 1994, Dr. Falik reported that appellant's current back condition occurred as a result of her February 15, 1989 employment injury. He noted that it was difficult, on the basis of appellant's physical examination, to find any objective evidence of a lumbar disc herniation or a radiculopathy. Dr. Falik stated that he did believe appellant continued to suffer from low back pain, but that at this time it was of uncertain etiology. He noted that, as he was unclear as to the etiology of appellant's problem, it would be difficult to render an opinion as to whether or not her symptoms would resolve. Finally, Dr. Falik requested that appellant be evaluated with a myelogram and a postmyelogram computerized tomography (CT) scan to absolutely rule out a radiculopathy and he noted that while appellant did not appear to be a surgical candidate, a pain clinic work hardening program was recommended.

On May 6, 1996 Dr. Falik reported that he had reviewed the position description for the modified mailhandler position and that he believed appellant would be able to fulfill the duties of this position.

In a report dated July 23, 1996, appellant's treating physician Dr. Earl C. Mills, a Board-certified neurosurgeon, stated that he had recommended in the past that appellant pursue sedentary light-duty work, but that he had strongly advised that appellant undergo a period of muscle reconditioning prior to returning to work. Dr. Mills noted that the recommended modalities had not been authorized. He explained that in light of appellant's current status, he would recommend that appellant be returned to work effective September 2, 1996 with limitations pertaining to bending, sitting, lifting etc., and that she only work for four hours a day, with increased hours as her tolerance increased.

The record indicates that appellant returned to work in a sedentary position for four hours a day commencing September 14, 1996.³ On October 7, 1996 Dr. Mills reported that, while appellant was working in a very limited fashion, she was still experiencing ongoing pain, which he noted was no mystery to anyone. Dr. Mills explained that appellant lacked a period of reconditioning which he had recommended prior to her resuming any kind of work. Dr. Mills again recommended physical therapy and that appellant continue in her current work status. On October 21, 1996 Dr. Mills reported that appellant had a flare-up of her ongoing back conditions caused by a lack of a straight back chair at work and prolonged standing. He recommended that appellant not work for two weeks. On November 26, 1996 Dr. Mills reported that appellant had ongoing severe pain throughout her lumbosacral region with a radicular component and muscle spasm throughout her low back region. He opined that appellant remained temporarily totally

² *Patricia A. Keller*, 45 ECAB 278 (1993).

³ The record contains conflicting reports as to whether appellant returned to work four or six hours a day. The preponderance of evidence indicates that appellant worked four hours a day and received wage-loss benefits for four hours a day.

disabled for work in any capacity through December 31, 1996. On December 17, 1996 Dr. Mills reported that appellant was in her second week of physical therapy and that she remained temporarily totally disabled. On January 14, 1997 Dr. Mills reported that appellant was to continue physical therapy for at least four weeks, following which she would hopefully be able to return to work.

On February 8, 1997 appellant accepted a full-time modified clerk position; however, the record indicates that appellant returned to work for four hours a day. On March 24, 1997 Dr. Mills reported that appellant was physically able to work four hours a day, five days a week, if she was provided a proper ergonomic chair which would help to reduce her low back spasm. He noted that the ultimate goal was to return appellant to full-time work, but that this would have to occur gradually. Dr. Mills noted that he would reevaluate appellant in six weeks and would at that time evaluate whether appellant could work six hours a day.

The Office terminated appellant's compensation benefits on April 30, 1997. At the time the Office terminated appellant's compensation benefits, the most recent report received from Dr. Falik was dated November 21, 1996. In this report, he related that he had reviewed appellant's myelogram report which were prepared on February 21, 1995. Dr. Falik concluded that as the radiologist had interpreted appellant's myelogram and CT scans as normal studies, it was now his opinion that appellant could perform the duties of a modified mailhandler for eight hours a day as there was no evidence that appellant had a significant lumbar disc condition or compression of the exiting nerve roots which would result in a totally incapacitating back problem. Dr. Falik's reports are of limited probative value, however, in evaluating whether appellant was disabled as of April 30, 1997. Dr. Falik only examined appellant on one occasion, November 14, 1994. The myelogram and CT studies to which he deferred in his November 1996 report were performed in February 1995. The record, however, indicates that appellant's condition improved until September 1996, at which time she was returned to a light-duty position. After attempting to work in this position, the medical opinion of Dr. Mills, the only physician of record who examined appellant after she stopped work in October 1996, was that appellant was temporarily totally disabled from October 1996 until February 1997 because of a flare-up of her accepted back condition caused by her attempt to return to work. As of February 1997, appellant had returned to work in a modified position for four hours a day, with a goal of returning to full-time work. Both Drs. Falik and Mills had found that appellant still had residuals of the accepted back injury during their examinations of appellant. While Dr. Falik had opined that appellant could work with restrictions for eight hours a day, as Dr. Falik had not examined appellant after her back condition worsened in October 1996, the Office had no current medical evidence that the residuals of the accepted condition had ceased such that appellant was able to perform full-time work as of April 30, 1997, the date the Office terminated benefits. The Office did not meet its burden of proof in this case.

The decisions of the Office of Workers' Compensation Programs dated March 26, 1998 and April 30, 1997 are hereby reversed.

Dated, Washington, D.C.
January 4, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member