

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PAULA Y. WILLIAMS and DEPARTMENT OF ENERGY,
NUCLEAR & FOSSIL ENERGY BRANCH, Washington, DC

*Docket No. 99-1022; Submitted on the Record;
Issued July 20, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective February 1, 1998.

On May 16, 1989 appellant, then a 39-year-old budget analyst, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that on that date she slipped and fell, causing injuries to her left leg, back, shoulder and knees. Appellant stopped work on that date. On June 13, 1989 the Office accepted the claim for left shoulder contusion, bilateral knee contusion, low back sprain and injuries to the left hip and both knees.

Appellant returned to her duties as a budget analyst effective June 1, 1993, but appellant filed a notice of recurrence (Form CA-2a) on April 9, 1997, alleging that said recurrence occurred on February 24, 1997. Appellant stopped work on February 24, 1997 and has not returned to work since. In support of her claim, appellant filed an attending physician's report (Form CA-20), wherein Dr. Steven L. Taub, a Board-certified internist and physical medicine and rehabilitation specialist, stated that appellant was disabled from March 10 through April 30, 1997 due to back and leg pain that was caused by her employment.

A note to the file dated July 15, 1997 stated that there is no medical report showing causal relationship, but continued, "nevertheless, since the case file was accepted for prior back surgery, I am accepting the recurrence. However, no compensation for disability will be paid until claimant submits the requested medical documents."

By letter dated July 16, 1997, the Office accepted that appellant suffered a recurrence on February 24, 1997.

In response to a request by the Office for further information, appellant submitted an April 1, 1997 medical report by Dr. Taub, wherein he noted that appellant had very little relief from her symptoms of chronic back and leg pain. In an attending physician's report dated

August 7, 1997, Dr. Taub indicated that appellant suffered from failed back surgery, degenerative lumbar spine disease and pseudomeningocele. He opined that this condition was related to her work and that she could not return to her employment.

On August 12, 1997 the Office paid appellant compensation for the period May 3 through September 13, 1997.

By medical opinion dated August 28, 1997, Dr. Louis Levitt, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion, found that, although appellant's physical examination was compatible with an individual who had residuals following previous back surgery, he could find no evidence of gross neurologic abnormalities. Dr. Levitt further found no evidence of an active lumbar radiculopathy and no evidence of any additional discogenic back disease. He suggested a brief period of physical therapy for a period of 2 to 3 weeks. With regard to her employment, Dr. Levitt opined:

“It is further my opinion that there is no justification for her remaining out of gainful employment. Based on her evaluation today, she has the capacity to return to work as a budget analyst, restricting her lifting not to exceed 25 pounds and she should avoid frequent bending and working in awkward postures. Over the next month, the patient should be permitted time off from work in order to attend the requisite physical therapy. Based on her previous back surgery from the 1989 work trauma, *i.e.*, a level two compression, the patient would be entitled to a 12 percent permanent impairment to the whole body according to the American Medical Association (A.M.A.), *Guides to the Evaluation of Permanent Impairment*.... I believe her current flare-up of back discomfort is causally connected to her original work injury of 1989. However, I do not see any justification for the patient remaining out of work based on her examination today. She has the capacity to return to gainful employment immediately, while completing her rehabilitation.”

On November 20, 1997 the Office issued a proposed termination of compensation benefits, wherein it noted that the weight of the medical evidence from the second opinion failed to support that the claimant continued to be disabled or require medical treatment due to the effects of her May 16, 1989 work injury or recurrence of February 25, 1997.

Thereafter, appellant submitted medical reports by Dr. Fraser C. Henderson, a Board-certified neurosurgeon. In a report dated September 25, 1997, Dr. Henderson noted that he examined appellant for low back and leg pain, which appellant noted had been more severe since February 26, 1997 when she fell at work. Dr. Henderson conducted an L4 discogram, which reproduced the more severe pains that she experienced in the back and leg. He opined that there was “a reasonable chance of endoscopically removing the remaining disc bulge and perhaps ameliorating her pain somewhat.”

By decision dated January 13, 1998, the Office terminated appellant's compensation effective January 4, 1998, for the reason that appellant no longer suffered from residual disability related to her May 16, 1989 work injury.

By letter received by the Office on February 12, 1998, appellant requested a hearing.

Appellant also submitted a medical report dated August 18, 1998, in which Dr. Taub stated:

“In summary, the patient persists with chronic back and leg symptoms that have been unchanged since the onset of symptoms following the fall in 1989. She has not improved with surgery or with conservative treatment.

“My medical opinion is that her chronic low back condition associated with lower extremity pain is related to the fall she sustained in 1989, as described. The problem is a chronic one that will not resolve with conservative management. The prognosis for recovery is poor and my opinion is that given the chronicity of symptoms she will be left with some degree of pain resulting in disability on a permanent basis.”

At the hearing held on August 25, 1998, appellant testified that she was injured when she slipped and fell hard on the floor in May 1989 and that she returned to work but suffered a recurrence on February 26, 1997. She further testified that she continues to do her exercises and take medications, but that Dr. Taub told her that “there [i]s nothing he can do.” She noted that she could possibly get some relief from surgery. Finally, appellant described her duties as a budget analyst, which she noted involved sitting at a computer or in meetings, that it was difficult for her to sit this long and that she was “not given any flexibility to move around.”

On October 2, 1998 the hearing representative issued a decision in which he held that, while the medical evidence of record substantiates that appellant had a continuing back condition related to the 1989 accepted employment injury, this condition was not totally disabling. The hearing representative based his opinion on the opinion of Dr. Levitt, which he found to be the most well rationalized with respect to discussing appellant’s current work capacity. Accordingly, the hearing representative affirmed the Office’s January 13, 1998 decision, with the exception that he changed the date for termination of compensation to February 1, 1998.

The Board finds that the Office improperly terminated appellant’s compensation.

Once the Office accepts a claim, it has the burden of justifying 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

In the present case, the Office accepted appellant’s claim for left shoulder contusion, bilateral knee contusion, low back sprain, injuries to the left hip and both knees and the

¹ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

² *Gwendolyn Merriweather*, 50 ECAB ____ (Docket No. 97-2137, issued June 3, 1999); *Beverly J. Duffey*, 48 ECAB 569 (1997).

recurrence, which occurred on February 24, 1997. Afterwards, there developed a conflict in the medical evidence. Dr. Taub, appellant's treating physician, opined that appellant continued to be disabled, that her symptoms of chronic back and leg pain had continued despite surgery and that this condition caused her to be disabled from her job. However, Dr. Levitt, the physician obtained by the Office for the purpose of a second opinion, opined that appellant had the capacity to return to gainful employment. Where there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.³

In the case at hand, the Board finds that an outstanding conflict in medical opinion exists. Since the Office has not resolved the existing conflict in the medical evidence, it has failed to meet its burden of proof in terminating appellant's benefits.⁴

The decisions of the Office of Workers' Compensation Programs dated October 2 and January 13, 1998 are hereby reversed.

Dated, Washington, D.C.
July 20, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

³ 5 U.S.C. § 8123(a); *see also Gertrude T. Zakrajsek*, 47 ECAB 770, 773 (1996).

⁴ *Mary A. Moultry*, 48 ECAB 566, 568-69 (1997).