

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA BYNUM and GENERAL SERVICES ADMINISTRATION,
Philadelphia, PA

*Docket No. 98-49; Submitted on the Record;
Issued March 20, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective August 27, 1997 on the grounds that she had no disability due to her February 18, 1988 employment injury after that date.

On February 18, 1988 appellant, then a 40-year-old custodial worker, injured her neck, left arm and left shoulder while bending over to pick up trash. She filed a claim for benefits on the date of injury, which the Office accepted for cervical strain. Appellant received continuing compensation for temporary total disability from the Office, which placed her on the daily rolls. Appellant returned to work in a temporary, light-duty job as a voucher examiner on April 18, 1994. Appellant worked at this job until May 10, 1996, when she was separated from the position due to a reduction in force.

On May 22, 1996 appellant, filed a Form CA-2 claim for benefits, alleging that she sustained a recurrence of disability, which was caused or aggravated by her February 18, 1988 employment injury. The Office accepted this claim and commenced payment for continuing compensation of temporary total disability.

By letter dated August 26, 1996, the Office asked appellant's attending physician, Dr. Mario J. Arena, a Board-certified orthopedic surgeon, to explain how her February 18, 1988 employment injury was causing her current disability, to specify the work restrictions, which were preventing her from returning to her regular duties as a custodial worker and to indicate whether these work restrictions, if any, resulted from residuals of the employment injury.

In a report dated December 9, 1996, Dr. Arena advised the Office that he was not appellant's treating physician at the time of her February 18, 1988 employment injury and had no records concerning her treatment prior to his initial examination of March 23, 1992.

In a report dated January 6, 1997, Dr. Arena informed the Office that he had met with appellant's vocational rehabilitation counselor, who requested clarification regarding appellant's medical condition. Dr. Arena stated that he completed a May 2, 1996 work capacity evaluation form which outlined appellant's work restrictions, which were based on her current condition and recommended to prevent further injury. Dr. Arena further stated that, based on her current restrictions and current condition, he did not believe she was capable of performing her regular duties as a custodial worker.

On February 3, 1997 the Office issued a proposed notice of termination of compensation to appellant. The Office stated that appellant's attending physician, Dr. Arena, had failed to provide sufficient support for his opinion that appellant's current condition was causally related to the accepted work injury in his responses to the Office letter requesting clarification. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In response to the proposed notice of termination, appellant's attorney submitted a letter dated March 5, 1997, in which he contended that the Office's February 3, 1997 notice of termination was improper because it erroneously shifted the burden of proof in termination cases to appellant.

By decision dated July 31, 1997, the Office terminated appellant's compensation effective August 27, 1997.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation benefits.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

In the present case, the Office accepted that appellant sustained a recurrence of her February 18, 1988 cervical strain in June 1996, and commenced payment for temporary total disability as of May 11, 1996. The Office requested clarification of appellant's current condition and an opinion as to whether appellant still had residuals from the work injury from Dr. Arena, her attending physician, by letter dated August 26, 1996. In response, he submitted reports dated December 9, 1996 and January 6, 1997, in which he referred the Office to his May 2, 1996 work restriction evaluation. The Office considered these reports insufficient to demonstrate a continuing causal relationship to the employment injury, and issued its proposed notice of termination on February 3, 1997 and its decision terminating compensation on July 31, 1997.

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

² *Id.*

³ *See Mary Lou Barragy*, 46 ECAB 781 (1995); *see also Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

This was improper, as the burden in termination cases rests with the Office to submit probative, rationalized evidence, to justify termination.⁴

In addition, the Federal (FECA) Procedure Manual sets forth the procedure to be followed when a claim that has been accepted is subject to review by the Office:

“Having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration, by the weight of evidence, that entitlement to benefits has ceased....”⁵

In cases where the Office determines that the attending physician has not provided a report that is complete, adequate and affords a clear picture of the claimant’s condition, the procedure manual recommends that appellant be referred for a second opinion examination.⁶ In the instant case, however, the Office, after finding Dr. Arena’s reports to be insufficiently thorough and probative on the issue of whether appellant’s current condition/disability was causally related to his current condition, terminated appellant’s compensation after erroneously shifting the burden of proof to appellant to show her continuing entitlement to compensation for total disability. Therefore, the Office failed to act in accordance with Board precedent and the procedures outlined in the procedure manual and improperly terminated appellant’s compensation. Accordingly, the Board finds that the Office improperly terminated appellant’s compensation benefits effective August 27, 1997.

⁴ *Id.*

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, 2.812.3 (July 1993).

⁶ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Early Management of Disability Claims*, Chapter 2.811.10.a.1 (April 1993).

The decision of the Office of Workers' Compensation Programs dated July 31, 1997 is hereby reversed.

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

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member