

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RENEE WESLEY and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 98-592; Oral Argument Held May 11, 2000;
Issued September 25, 2000*

Appearances: *Renee Wesley, pro se; Miriam D. Ozur, Esq.,
for the Director, Office of Workers' Compensation Programs.*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in rescinding its acceptance of appellant's claim for a recurrence of disability from August 15 through 19, 1994.

The Board finds that there exists an unresolved conflict in the medical opinion evidence and, therefore, the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim.

On November 23, 1993 appellant, then a 28-year-old security clerk (typing), filed a claim for compensation benefits for an injury sustained at work on November 22, 1993 when she slipped and fell. The Office accepted her claim for a lumbar strain. Appellant returned to light duty on June 1, 1994.

On August 29, 1994 appellant filed a claim for a recurrence of disability on August 19, 1994 which she attributed to her November 22, 1993 employment injury. By decision dated August 11, 1995, the Office accepted appellant's claim for compensation for the period August 15 through 19, 1995 on the grounds that the evidence of record established that she sustained a lumbosacral strain due to the use of an appropriate chair for that time period.

By decision dated November 6, 1995, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that she had any residual disability or medical condition causally related to the August 19, 1994 employment injury. By letter dated December 4, 1995, appellant requested an examination of the written record by an Office hearing representative. By decision dated February 22, 1996, the Office

hearing representative rescinded the Office's acceptance of appellant's claim for a recurrence of disability for the period August 15 through 19, 1994.

By letter dated July 13, 1996, appellant requested reconsideration and submitted additional evidence. By decision dated October 31, 1996, the Office denied modification of its February 22, 1996 decision.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Federal Employees' Compensation Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.¹ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.² It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.³ This holds true where, as here, the Office later decides that it has erroneously accepted a claim for compensation. To justify rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.⁴

In a report dated August 30, 1994, Dr. Gregory M. Coe, appellant's attending family practitioner, related that appellant was doing well on August 9, 1994 with a diagnosis of lumbosacral strain, which had improved and was tolerating lifting her children up to approximately 25 pounds. He stated that she was instructed to return to work with a 25-pound weight limitation. Dr. Coe related that appellant was seen on August 19, 1994 for a complaint of lower back pain for approximately three days, which she attributed to her chair at work which was minimally padded with an open lower back support and little or no lumbar support. He provided findings on examination which included reasonably good range of motion but general stiffness throughout all activities, tenderness in the paraspinal muscles bilaterally in the lumbar area and upper sacral area. Dr. Coe indicated his opinion that appellant's use of an ergonomically inappropriate chair had aggravated her November 22, 1993 employment injury. In a report dated May 8, 1995, he stated his opinion that in August 1994 appellant had sustained a re-inflammation of her 1993 employment-related lumbosacral strain caused by the extensive amount of time she spent sitting in a chair with poor ergonomic design.

¹ *Eli Jacobs*, 32 ECAB 1147, 1151 (1981).

² *Shelby J. Rycroft*, 44 ECAB 795 (1993).

³ *See Frank J. Meta, Jr.*, 41 ECAB 115, 124 (1989).

⁴ *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987, 994 (1993).

In a narrative report dated October 26, 1995, Dr. Howard Sturtz, a Board-certified orthopedic surgeon and Office referral physician, provided a history of appellant's condition, findings on examination and a summary of the medical evidence. He stated:

“It is my opinion that [appellant] sustained a lumbar strain ... as a result of the injury of November 22, 1993. I feel that this condition completely resolved and did so shortly after the accident despite the prolonged period of symptomatology and time off work.... As to the period of August 15 through 19, 1994 I do not believe that [appellant] sustained a reoccurrence [sic] of the previous injury, since that had already resolved.... The reason for this opinion is the absence of adequate evaluations by [Dr. Coe] in any of his reports.

“I do not believe that [appellant's] alleged diagnosed condition is medically connected to the factors of light-duty employment under the Statement of Accepted Facts. The reason being that sitting in a chair and having back pain is not sufficient to make a diagnosis of lumbosacral strain....

“[R]egarding a period of disability related to the ‘work injury’ sustained during the week of August 14, 1994 I note that [appellant] has children at home at various ages. It is my opinion that [appellant] did not have any disability related to the ‘work injury.’ It should be noted that caring for children requires lifting and bending, which in themselves can produce back pain. Consequently her allegation that sitting in an unacceptable chair was productive of back symptomatology is not credible.

“[I]t is my opinion that [appellant] is fully capable of performing all of her regular duties.... I believe she was capable of doing so on August 14, 1994 and I seriously doubt that she was incapable of doing so at any time.

“[I]t is my opinion that [appellant] has no objective residuals of the August 1994 ‘injury.’ Despite any administrative decision that [appellant] did sustain a work injury on that date, I believe otherwise. However, since the Office has accepted this as a lumbosacral strain, it is still my opinion that [appellant] has no objective residuals from that incident. As to when these residuals ceased, this is speculative, since it is my opinion that they never existed.

“In conclusion, it is my opinion that [appellant] sustained at most a minor injury as a result of the 1993 episode. I believe she had a prolonged period of time loss, mostly because of her pregnancy, delivery and the need to care for her children. I feel that she made a full and complete recovery without permanent disability nor need for additional treatment....”

In a report dated June 14, 1996, Dr. Coe stated:

“My opinions differ sharply from those of Dr. Sturtz. He stated that he did not believe that sitting could cause an injury to [appellant's] lumbar spine. It is well documented that sitting causes some of the strongest forces to be applied to the

lumbar area. [Appellant's] back had previously been strained in the same area. She had recently recovered from a pregnancy and delivery. She described using a chair which provided no lumbar support, resulting in hyperkyphosis and loss of the normal lumbar architecture which would result in a strain of the posterior ligaments and tendons in the lumbar region.

“Dr. Sturtz also felt that there were no objective physical findings and neurologic examination was never done. However, on the visits it is well documented that she had negative straight leg raising and normal deep tendon reflexes at the patellar and Achilles tendons bilaterally. In addition, although her range of motion was within functional limits, it is documented that she had marked stiffness throughout her range and that there was spasm in the paraspinal musculatures bilaterally. I find it wholly inadequate that Dr. Sturtz could conclusively give any opinion as to the presence [or] absence of an injury one year prior to his exam[ination] when [appellant] had fully recovered by the time he examined her.

“[Appellant] may have been engaging in other activities outside of work, *i.e.*, raising her children. However, these activities did not cause her to be symptomatic with her pain. As a result, I find it highly suspect that one could account for her symptoms as caused by these activities, whereas she clearly was symptomatic during and subsequent to her engagement in the workplace, using the ergonomically inappropriate furniture.

“[Dr. Sturtz] also comments on her prolonged symptomatology. The bulk of this prolonged period of recovery stems mainly from the fact that she did not receive adequate treatment during that time, since her claim was pending until a conclusive decision could be made as to whether to accept it or not.”

Section 8123(a) of the Act provides, in pertinent part, “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”⁵ As there exists an unresolved conflict of medical opinion between Drs. Coe and Sturtz as to whether appellant sustained an employment-related recurrence of disability on August 15, 1994, the Office did not meet its burden of proof in rescinding its acceptance of appellant's claim.

⁵ 5 U.S.C. § 8123(a).

The decision of the Office of Workers' Compensation Programs dated October 31, 1996 is reversed.

Dated, Washington, DC
September 25, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member