

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL L. WATT and DEPARTMENT OF VETERANS AFFAIRS
VETERANS ADMINISTRATION MEDICAL CENTER, Buffalo, NY

*Docket No. 00-995; Submitted on the Record;
Issued April 23, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's medical and wage-loss compensation effective March 2, 1999 on the grounds that she no longer suffered from any disability or residuals from her accepted January 29, 1990 employment injury.

On January 29, 1990 appellant, then a 31-year-old licensed practical nurse, filed a traumatic injury claim, (Form CA-1) which the Office accepted for lumbosacral strain. The employing establishment terminated appellant due to her physical inability to perform her duties effective May 20, 1991. The Office subsequently placed her on the automatic rolls for temporary total disability. Appellant was referred for vocational rehabilitation services and on August 14, 1995 was placed in a part-time job within her restrictions working six hours a day.

On May 24, 1996 appellant filed a recurrence of disability claim, which the Office accepted.

In a report dated June 9, 1997, Dr. Owen W. Young, a second opinion Board-certified orthopedic surgeon, diagnosed lumbar spondylosis secondary to L4-5 disc derangement and L5, S1 spinal fusion. Dr. Young concluded that appellant had no objective findings to support that her accepted lumbosacral strain continued. He also opined that appellant had "achieved remission of the aggravation which was produced by the January 29, 1990 incident and, therefore, requires no treatment for that temporary aggravation." Dr. Young stated that appellant's accepted January 29, 1990 employment injury did not prevent her from working full time. Regarding appellant's remission, he noted that appellant had sustained a temporary aggravation due to factors of her employment and that she received appropriate treatment which "resulted in remission of symptoms caused by the aggravation secondary to factors of claimant's employment."

On August 8, 1997 the Office issued a proposed notice of termination of compensation benefits.

In a September 9, 1997 report, Dr. Eugene J. Gosy, an attending Board-certified neurologist, noted that appellant had several work injuries including a reexacerbation in May 1996. Dr. Gosy diagnosed facet arthropathy secondary to her employment injuries and stated that her “[d]isability status is mild partial disability derived from repetitious work injuries more recently 1990.” He indicated that appellant should avoid “bending and lifting weights greater than 15 [pounds]” and that her work restrictions were “likely to be permanent.”

In a November 18, 1997 report, Dr. Gosy diagnosed “facet arthropathy secondary to repeated lifting injuries in the Veterans Administration system” and stated that appellant’s current restrictions include no lifting more than 15 pounds, no prolonged standing or sitting and no working more than 6 hours.

By decision dated March 2, 1999, the Office finalized its decision to terminate benefits effective March 2, 1999 based upon the report of Dr. Young.

In a letter dated March 15, 1999, appellant’s counsel requested an oral hearing which was held on September 28, 1999.

In an undated letter received by the Office on October 26, 1999 Dr. Gosy attributed appellant’s disability due to her accepted employment injury. In support of this conclusion, he noted that appellant had previously been “able to return to work without any limitations and no restrictions prior to the January 1990 injury, but since the injury of January 1990, [appellant] has a disability which includes permanent restrictions of avoiding bending, prolonged standing and lifting weights greater than 15 pounds.”

By decision dated November 22, 1999, the Office hearing representative affirmed the Office’s March 2, 1999.

The Board finds the Office improperly terminated appellant’s compensation and medical benefits.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to 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

¹ *Barbara J. Warren*, 51 ECAB ____ (Docket No. 00-111, issued March 28, 2000); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

accepted condition is not limited to the period of entitlement for disability.³ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

The Office justified its termination of appellant's compensation benefits on the grounds that the June 9, 1997 report of Dr. Young, the Office second opinion physician, constituted the weight of the medical evidence. Although he offered a well-reasoned explanation of why any residuals of the accepted employment injuries had ceased, Dr. Young's opinion created a conflict with that given by Dr. Gosy, appellant's attending physician, who opined that appellant continued to suffer from the accepted lumbosacral condition. Furthermore, Dr. Young's opinion was almost two years old at the time that the Office terminated benefits on March 2, 1999.

Section 8123(a) of the Federal Employees' Compensation Act provides in 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

Because the Office did not appoint a third physician to address the conflict in medical opinion between Drs. Young and Gosy, the issue of appellant's entitlement to continuing compensation remains unresolved. The Office carries the burden of proof to justify its termination of compensation and the weight of the medical evidence cannot rest with the conclusion of the second opinion physician when his opinion creates an unresolved conflict under 5 U.S.C. § 8123(a). Therefore, the Board finds that the Office has not met its burden of proof.

³ *Leonard M. Burger*, 51 ECAB ____ (Docket No. 98-1532, issued March 15, 2000); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁴ *Id.*

⁵ 5 U.S.C. § 8123(a).

The November 22 and March 2, 1999 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
April 23, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member