

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GAIL BUTTS and DEPARTMENT OF THE ARMY,
Grafenwoehr Community, APO, AE

*Docket No. 00-1452; Submitted on the Record;
Issued August 3, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant had any disability or medical residuals requiring further medical treatment after May 22, 1999, the date the Office of Workers' Compensation Programs terminated her compensation entitlement; and (2) whether the refusal of the Office to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) constituted an abuse of discretion.

On February 28, 1993 appellant, then a 33-year-old food service worker, slipped on a patch of ice and fell on her back. Appellant experienced back pain and was two and a half months pregnant at the time. The Office accepted the claim for back contusion. Appellant has not returned to work since the injury. She complained of continual lumbar pain and radicular pain in both legs for which she received treatment. Appellant was placed on the periodic rolls and received appropriate compensation.

On September 3, 1998 appellant was referred to Dr. Graham Howorth, a Board-certified orthopedic surgeon to determine whether she had any residuals from the accepted work condition. In his report dated September 3, 1998, Dr. Howorth related that appellant complained of continual low back pain, which she asserted prevented her from performing her work activities. He reviewed appellant's regular activities and work duties, including continuous standing, walking and lifting of heavy objects. On examination, Dr. Howorth found that regarding lumbar range of motion, appellant had a forward flexion to 70 degrees with complaint of pain, backward extension to 30 degrees with complaint of pain and left and right lateral bending to 30 degrees with mild discomfort. He also indicated that appellant described pain on palpation. Dr. Howorth further reported that x-rays previously taken in Germany showed a contusion of her vertebrae, curvature of the spine and spurring of the back and a magnetic resonance imaging (MRI) scan taken March 14, 1994 was remarkable for disc bulging at L4-5 and L5-S1. He diagnosed a contusion to the lumbar spine on February 28, 1993, degenerative disc disease of the lumbosacral spine and obesity. He indicated that appellant had mild residual pain, however, it was difficult to ascertain whether the pain was from normal wear and tear

versus an aggravation of her degenerative disc condition. Dr. Howorth also stated that the contusion should have resolved within five years of her 1993 injury, that he would have expected this type of injury to resolve within three to six months. He further noted that appellant should be able to return to eight-hour workdays as a food service worker with restrictions of lifting no more than twenty-five pounds on a frequent basis with fifty pounds as a maximal basis.

In the latest report dated February 10, 1999, submitted by Dr. John Dorchak, appellant's treating physician, he indicated that appellant was seen following an MRI and computerized tomography (CT) scan. Dr. Dorchak reported that the MRI showed that appellant's back was normal; however, the CT scan showed a deep lesion within her pelvis. He further stated that he believed appellant's pain was most likely caused by the lesion, that otherwise she had reached maximum medical improvement and that she had zero percent permanent physical impairment as a result of the work injury.

By decision dated April 28, 1999, the Office terminated appellant's benefits effective May 22, 1999 on the grounds that her disability resulting from her February 28, 1993 accepted injury had ceased. In a letter dated May 20, 1999, appellant requested reconsideration. By decision dated September 8, 1999, the Office denied appellant's request for review of the merits on the grounds that the evidence submitted was found to be of an immaterial nature and insufficient to warrant review of the merit decision.

The Board finds that appellant had no disability or medical residuals requiring further medical treatment after May 22, 1999, causally related to her February 28, 1993 back injury.

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

In the present case, appellant's treating physician, Dr. Dorchak, opined on February 10, 1999 that she was at maximum medical improvement, that according to diagnostic testing her back was normal and that she had zero percent impairment as a result of the work injury. Therefore, his report does not support continuing disability due to a back condition following this examination. Dr. Dorchak further stated that the pain appellant had been experiencing was

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁴ See *Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

likely caused by a pelvic lesion unrelated to her work injury. He recommended that she see a gynecologist for this problem. The need for further medical treatment for back pain after that date was not identified.

Dr. Howorth, the referral orthopedic specialist, in a comprehensive report dated September 3, 1998, indicated that appellant's back contusion had resolved since the 1993 injury and that her pain complaints were likely related to another medical condition. He stated that appellant could return to eight-hour workdays with lifting restrictions and did not indicate that appellant required any further treatment for her original work-related back condition.

No disability or impairment due to appellant's back contusion was found after February 10, 1999, the date of Dr. Dorchak's report and no injury-related residuals were identified after that date. Further, no need for additional medical treatment for residuals of the back contusion was identified after that date. Therefore, the Office properly relied on the reports of Drs. Dorchak and Howorth as the weight of the medical evidence of record in establishing that appellant had no disability or injury residuals requiring further medical treatment after May 22, 1999 causally related to her February 28, 1993 injury. The Office has thereby discharged its burden of proof to justify termination of appellant's monetary compensation entitlement and entitlement to further medical benefits for treatment of the accepted employment injury after May 22, 1999.

The Board further finds that the Office properly refused to reopen appellant's case for further consideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a) and did not abuse its discretion.

Under section 8128(a) of the Federal Employees' Compensation Act,⁵ the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,⁶ which provides that a claimant may obtain review of the merits if his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

- “(i) Shows that [the Office] erroneously applied or interpreted a specific point of law; or
- “(ii) Advances a relevant legal argument not previously considered by [the Office]; or
- “(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office].”

⁵ 5 U.S.C. § 8128(a).

⁶ 20 C.F.R. § 10.606(b) (1999).

Section 10.608(b) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in section 10.606(b) will be denied by the Office without review of the merits of the claim.⁷

In the present case, the Office denied appellant's claim on September 8, 1999 without conducting a merit review on the grounds that appellant failed to submit any new and relevant evidence to warrant a merit review of the prior decision. In support of her May 20, 1999 request for reconsideration of the April 28, 1999 decision, appellant submitted evidence already of record including a report from Dr. Dorchak dated November 23, 1998. This report is duplicative of evidence previously considered by the Office and therefore does not warrant a merit review in this case. Appellant further submitted a narrative statement dated May 20, 1999 which does not provide any new evidence to support that she suffered from residuals or remained disabled after May 22, 1999, when compensation was terminated. Appellant also submitted a medical report and audiogram dated May 1, 1991, which are irrelevant in this case because they predate the February 28, 1993 work injury. Appellant further submitted military correspondence dated April 21, 1999 regarding the exceptional family member program, treatment notes from Dr. J. Coleman, an attending physician, dated from January 22 to April 27, 1999 and pelvic ultrasound reports dated April 22, 1999. This evidence is also irrelevant to the issue of continued disability or residuals related to the accepted injury. The military correspondence has no bearing in this case and the medical reports outlined above all relate to appellant's diagnosed pelvic condition.

Appellant neither showed that the Office erroneously applied or interpreted a point of law; advanced a point of law not previously considered by the Office; nor did she submit relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated September 8 and April 28, 1999 are affirmed.

Dated, Washington, DC
August 3, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

⁷ 20 C.F.R. § 10.608(b).