

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA HUNTER and DEPARTMENT OF DEFENSE,
SUPPLY LOGISTICS AGENCY, Philadelphia, PA

*Docket No. 00-2493; Submitted on the Record;
Issued August 9, 2001*

DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof to justify termination of appellant's compensation benefits effective July 8, 1999.

On January 24, 1992 appellant, then a 39-year-old marker, was lifting coats when she felt pain in her right shoulder and hand. Appellant stopped work immediately and did not return. The Office accepted the claim for cervical strain and right shoulder contusion. Appellant was paid appropriate compensation.

In support of her claim, appellant submitted various medical records from her treating physician, Dr. Gregory Nelson, an internist, who diagnosed appellant with a cervical strain, right shoulder contusion and dorsal strain and referred her for physical therapy for five weeks. He noted that appellant underwent an electromyogram (EMG) which was positive for carpal tunnel syndrome on the right. Dr. Nelson indicated that appellant's prognosis was guarded and that her return to work date was undetermined. X-rays of the cervical spine and right shoulder revealed no abnormalities. A magnetic resonance imaging (MRI) scan of the right shoulder was normal.

In a report dated May 21, 1997, Dr. Todd Marc Kelman, an osteopath and an Office referral physician, noted that appellant complained of tingling in the entire right arm while grip strength testing elicited discomfort in the right upper extremity. He opined that grip testing reflected inadequate effort and impingement testing produced diffuse pain in the right shoulder and pain along the biceps tendon. Dr. Kelman diagnosed cervical and thoracic deconditioning syndrome; chronic pain in the right cervical and shoulder region, etiology unknown; and diffuse paresthesias right upper extremity, etiology unknown. He stated that appellant showed no true evidence of radiculopathy or myelopathy.

Dr. Kelman opined that his findings suggested significant symptom magnification. He noted that appellant's carpal tunnel symptoms were not related to the injury of January 24, 1992, because he could not attribute her complaints to any highly repetitive lifting activity that she performed. Dr. Kelman found that appellant's deconditioning, inactivity and obesity were the

source of appellant's current complaints. He noted that she had fully recovered from her work injury and no further treatment was indicated. However, due to a long period of absence from work, appellant should work in a light-duty capacity, with no lifting more than 10 pounds with her right upper extremity and no repetitive use of the right upper extremity. Dr. Kelman stated that the work restrictions were based solely on her deconditioning and were not related to her work injury of January 24, 1992. However, on an accompanying work evaluation capacity form Dr. Kelman noted that appellant's work restrictions were related to the employment-related injury.

Thereafter, appellant submitted a work evaluation form dated June 4, 1997, prepared by Dr. Nelson which indicated that appellant was unable to perform any work duties.

In a letter dated June 27, 1997, the Office requested that Dr. Nelson review and comment on Dr. Kelman's report. The record does not reflect that Dr. Nelson responded to the Office's request.

After the Office issued an October 20, 1997 notice of proposed termination of compensation, appellant submitted additional medical evidence that did not specifically address whether she had a continuing work-related condition.

By decision dated December 10, 1997, the Office terminated all appellant's compensation benefits effective January 3, 1998.

After a hearing on June 26, 1998, a hearing representative determined that there were discrepancies between Dr. Kelman's report of May 21, 1997 and the work evaluation capacity form he prepared and remanded the case to the Office.

In a letter dated March 1, 1999, the Office requested that Dr. Kelman clarify his position with regard to the restrictions he placed on appellant. The Office specifically requested that Dr. Kelman indicate whether these restrictions were due to her employment-related injury of January 24, 1992.

In a supplemental report dated March 18, 1999, Dr. Kelman stated that appellant's restrictions were based "solely on her deconditioning and not related to the original work injury of January 24, 1992." At the time of the evaluation which was seven years from her injury, appellant "had recovered from the direct effects of her work-related injury." Dr. Kelman noted that the restrictions were based on appellant's subjective complaints which were not substantiated by objective findings and on the fact that she had not been in any gainful employment for some time. Dr. Kelman indicated that appellant "demonstrated signs of symptom magnification as her pain was a diffuse, nonanatomic nature and provocative tests did not support any known anatomic diagnosis."

Appellant submitted an MRI dated December 8, 1998 and a March 17, 1999 report from Dr. Vincent L. Ferrara, a Board-certified neurologist. The MRI revealed degenerative changes at level C6-7 with narrowing of the C6-7 neural foramina bilaterally; a disc herniation at C4-5 causing a minimal degree of cord impingement; and moderate central C3-4 herniation extending nearly to the cord but without impingement. Dr. Ferrara's report noted a history of appellant's work-related injury. He diagnosed foraminal disease at C4 and C6-7 on the right bilaterally.

On May 26, 1999 the Office issued a notice of proposed termination of compensation on the grounds that Dr. Kelman's March 18, 1999 report established no continuing disability as a result of the January 24, 1992 employment injury.

By decision dated July 8, 1999, the Office terminated appellant's compensation benefits, effective July 8, 1999, on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from her January 24, 1992 employment injury.

In a letter dated July 12, 1999, appellant requested a review of the written record. Appellant's attorney argued that appellant still had residuals from the work-related injury of January 24, 1992 and noted that Dr. Kelman's supplemental report did not accompany a recent physical examination of appellant and therefore was not probative on the issue of appellant's continuing disability. Appellant submitted additional medical records, many of which duplicated records already in the record.

She also submitted an EMG dated March 20, 1999 which revealed that appellant had C7 root irritation, right side worse than left; and mild carpal tunnel syndrome on the right. A June 23, 1999 report from Dr. Nelson related a history of treating appellant beginning in 1992 after her employment-related injury. Dr. Nelson indicated that appellant continued to suffer cervical herniated nucleus pulposus with degenerative disc disease. He noted appellant's symptomatology persisted through 1999 and she continued to be disabled and unable to return to her previous employment as a fabric worker.

In a decision dated August 2, 2000, a hearing representative affirmed the decision of the Office dated July 8, 1999.

The Board finds that the Office has met its burden of proof to terminate compensation effective July 8, 1999.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ After it has determined that an employee has a 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 this case, the Office accepted appellant's claim for a cervical strain and right shoulder contusion. The Office referred appellant for a second opinion to Dr. Kelman who issued two reports dated May 21, 1997 and March 18, 1999. In May 1997, he noted an essentially normal physical examination and indicated that the diagnostic studies were unremarkable with no evidence of radiculopathy or myelopathy. Dr. Kelman added that his findings suggested significant symptom magnification. Dr. Kelman opined that appellant had reached maximum medical improvement and that her deconditioning, inactivity and obesity were the source of her

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).

current complaints and that she had fully recovered from her work injury. Two years later, Dr. Kelman clarified that appellant's restrictions were based "solely on her deconditioning and not related to the original work injury of January 24, 1992." At the time of the evaluation, which was seven years from her injury, appellant "had recovered from the direct effects of her work-related injury." Dr. Kelman concluded that appellant had no ongoing disability or condition due to her work-related condition.

The Board finds that, under the circumstances of this case, the opinion of Dr. Kelman is well rationalized and based on a proper factual background; thus, his opinion constitutes the weight of the evidence and establishes that appellant's work-related condition has ceased.

After issuance of the pretermination notice, appellant's attorney argued that Dr. Kelman's initial report did not unequivocally conclude that appellant did not have residuals of her work-related injury of January 24, 1992 and that Dr. Kelman's supplemental report did not accompany a recent physical examination of appellant and therefore was not probative on the issue of appellant's continuing disability. However, Dr. Kelman in his May 21, 1997 and March 18, 1999 reports specifically noted that appellant did not suffer residuals from the cervical strain and right shoulder contusion and that this condition was resolved. Dr. Kelman's supplemental report elaborated on his findings at the time of his physical examination of appellant. No second examination was necessary.

After the Office properly terminated compensation benefits, the burden of proof was on appellant to show any continuing entitlement.³ However, medical evidence submitted by appellant after termination of benefits either did not specifically address how any continuing condition was due to the January 24, 1992 work injury or duplicated evidence previously considered by the Office. The Office never accepted that appellant sustained a C7 root irritation or mild carpal tunnel syndrome as a result of her January 24, 1992 work injury and there is no medical evidence to support such a conclusion.⁴ Thus, the report from Dr. Nelson and his progress notes are of no probative value.⁵

The Board finds that Dr. Kelman's opinion constitutes the weight of the medical evidence and is sufficient to justify the Office's termination of compensation.

³ See *Beverly J. Duffey*, 48 ECAB 569 (1997).

⁴ See *Arthur N. Meyers*, 23 ECAB 111, 113 (1971) (where the Board found a physician's opinion to be of diminished probative value where the physician's opinion in support of causal relationship was based on a history of injury that was not corroborated by the contemporaneous medical history contained in the case record).

⁵ See *Theron J. Barham*, 34 ECAB 1070 (1983) (where the Board found that a vague and unrationalized medical opinion on causal relationship had little probative value).

The decision of the Office of Workers' Compensation Programs dated August 2, 2000 is hereby affirmed.

Dated, Washington, DC
August 9, 2001

David S. Gerson
Member

A. Peter Kanjorski
Alternate Member

Priscilla Anne Schwab
Alternate Member