

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of FRED A. L. WILSON and U.S. POSTAL SERVICE,
POST OFFICE, Dayton, OH

*Docket No. 99-2049; Submitted on the Record;
Issued February 5, 2001*

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issues are: (1) whether appellant had any disability or injury residuals requiring further medical treatment after January 4, 1997, the date the Office of Workers' Compensation Programs terminated her monetary compensation and medical benefits entitlement, causally related to her April 23, 1970 cervical strain and low back strain with herniated nucleus pulposus; (2) whether the Office properly determined that appellant received an overpayment of compensation in the amount of \$6,209.76 for the period November 14, 1993 through March 3, 1996; and (3) whether appellant is not without fault in the creation of the overpayment, such that appellant would not be entitled to consideration of waiver of recovery of the overpayment.

The Board has given careful consideration to the overpayment issues involved, the contentions of the parties on appeal and the entire case record. The Board finds that the April 30, 1999 decision of the Office hearing representative is in accordance with the facts and the law in this case and hereby adopts the findings and conclusions of the hearing representative with respect to the overpayment issues.¹

The Board, however, finds that the April 30, 1999 decision of the hearing representative must be reversed in part with respect to the termination issue, as the Office has not met its burden of proof to terminate appellant's compensation entitlement.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² After it has determined that an employee has disability

¹ The Office hearing representative found that appellant received compensation at the augmented rate when her son was no longer a full-time student, that she knew or should have been expected to know that she was not entitled to an augmented rate when he she no longer had any dependents, and that appellant's own testimony that she assumed that her compensation had been reduced to the basic rate in September 1995 after she notified the Office regarding her son's cessation of full-time student status, demonstrated that she knew she was not entitled to augmented compensation, but that because she continued to receive and keep such augmented compensation payments, she was not without fault in creating the overpayment, such that waiver of recovery of the overpayment was not an issue.

² *Harold S. McGough*, 36 ECAB 332 (1984).

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.³ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁴ 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.⁵

The Office did not meet its burden of proof to terminate monetary compensation entitlement and medical benefits in this case due to an unresolved conflict in medical opinion evidence.

In an August 24, 1994 report, Dr. Arthur F. Lee, a Board-certified orthopedic surgeon, indicated that appellant had reached maximum medical improvement, that she was capable of performing sedentary work for 4 to 8 hours per day with no prolonged lifting over 25 pounds and no infrequent lifting of over 35 pounds, and that appellant required no further specific treatment for her problem.

However, almost two years later, by report dated March 27, 1996, Dr. Lee noted that appellant demonstrated ongoing problems consistent with her 1970 lumbar strain and laminectomies at L4-5 and L5-S1 in 1973. He opined that she had ongoing irritation of the nerve roots consistent with her previous surgical intervention, that she was currently completely disabled, considering her original injury and subsequent surgery, her age and her other conditions.

By report dated April 3, 1996, Dr. Lee opined that, with respect to her lumbar strain and subsequent laminectomies at L4-5 and L5-S1, appellant could not perform any type of work on an ongoing basis. Dr. Lee opined that her workers' compensation-related problems stopped her from performing any work duties, including prohibitions on kneeling, standing, bending, twisting, reaching, lifting and on any other type of employment. He opined that she could not lift any significant weight on a regular basis in the workplace and that she was not a candidate for vocational rehabilitation.

The Office second opinion specialist, Dr. Colin Zadikoff, a Board-certified neurologist, reviewed appellant's history and present symptomatology, noted her complaints of pain radiating into both lower extremities which had worsened in the preceding three years, occasional spasms, and her inability to stoop or bend. Dr. Zadikoff noted normal strength testing results but moderately depressed muscle stretch reflexes, a normal sensory examination, normal gait and negative straight leg raising results. He opined that there were no objective findings of any residuals of appellant's 1973 lumbar procedures and no objective evidence that strain continued since 1970; he opined that the strains had resolved, that appellant's current disability was "not clearly related to work-related strains," that she had no disability due to work-related surgical

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁵ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

lumbar procedure or residuals, and that she was not totally disabled for all work. Dr. Zadikoff opined that appellant, at that time 69 years of age, could work in a sedentary position with intermittent position changes throughout the day, and he noted activity restrictions which were because of her back pain although no objective findings were present.

In this case, the second opinion neurologist, Dr. Zadikoff, disagreed with the most current reports of appellant's treating orthopedic surgeon, Dr. Lee, as to appellant's disability status and its relationship to her accepted work-related conditions and subsequent surgical procedures, and as to the presence of injury residuals requiring further treatment.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

As this was not done, the Office has not resolved this conflict in medical opinion evidence and therefore it has not met its burden of proof to terminate appellant's compensation entitlement.

Consequently, the decision of the Office of Workers' Compensation Programs dated April 30, 1999 is hereby affirmed in part with respect to the overpayment issues, but is reversed with respect to the termination of compensation.

Dated, Washington, DC
February 5, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member