

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GENEVA SHEPPERT and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, East Orange, NJ

*Docket No. 00-1964; Submitted on the Record;
Issued May 14, 2001*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective October 12, 1999 on the grounds that she had no further condition or disability causally related to her accepted employment injury; and (2) whether the Office properly denied appellant's request for reconsideration under 5 U.S.C. § 8128.

The Office accepted that on February 21, 1994 appellant, then a 58-year-old licensed practical nurse, sustained a lumbosacral strain in the performance of duty. Appellant stopped work on February 23, 1994.

Following her injury, appellant received treatment from Dr. Robert W. Morrison, a Board-certified orthopedic surgeon, who released appellant to return to light-duty work for four hours per day on July 5, 1994 and for six hours per day on August 22, 1994. He found that appellant could return to full-time employment on October 17, 1994, with prohibitions against lifting or pushing heavy objects.

On April 14, 1997 appellant filed a claim for a recurrence of disability on April 5, 1997 causally related to her February 21, 1994 employment injury. In support of her claim, appellant submitted a medical report from Dr. Morrison dated April 9, 1997, who found that she had sustained a new lumbosacral sprain and left sciatica after she was assigned to an area of the employing establishment that required heavy lifting. In a form report dated April 21, 1997, Dr. Morrison checked "yes" that the diagnosed conditions of lumbosacral sprain and sciatica were causally related to her employment injury and found that appellant was totally disabled from April 9, 1997 to the present.

The Office accepted that appellant sustained a recurrence of disability due to a change in the nature of her limited-duty assignment. In an office visit note dated January 20, 1998, Dr. Morrison listed findings on physical examination of appellant's back of tenderness, spasm

and limitations of motion. He discussed appellant's magnetic resonance imaging (MRI) study obtained on January 3, 1998, which, he found showed "spondylolisthesis of L3-4 with moderate to severe disc space narrowing. [Appellant] has a large broad-based disc extending into the neural foramina bilaterally indenting the thecal sac and obliterating the epidural fat. At L4-5 there is a disc bulge which has minimal indentation of thecal sac." Dr. Morrison noted that appellant would need extensive surgery to correct the problem. He recommended against the surgery and found that appellant could not "return to normal nursing." In form reports and work restriction evaluations beginning January 27, 1998, Dr. Morrison opined that appellant could perform eight hours of sedentary work per day. In a form report dated February 9, 1998, he checked "yes" that the condition was caused by the injury for which compensation was claimed.

In response to an inquiry from the Office, the employing establishment indicated that it could not accommodate appellant's sedentary work restrictions. The Office placed appellant on the periodic rolls beginning November 12, 1997.

By letter dated June 21, 1999, the Office referred appellant, together with the case record, questions and a statement of accepted facts, to Dr. Albert Thrower, a Board-certified orthopedic surgeon, for a second opinion evaluation. In the statement of accepted facts, the Office specified that appellant returned to four hours per day of light-duty employment on July 15, 1994. The Office then noted that appellant increased her hours to six per day on August 22, 1994 and to eight hour per day on October 17, 1997. The Office stated that appellant filed a claim for a recurrence of disability on April 13, 1997 after she stopped work on April 5, 1997 and did not return. The Office further indicated that appellant injured her left knee and cervical, thoracic and lumbar spine in a motor vehicle accident on January 7, 1999.

In a report June 29, 1999, Dr. Thrower discussed appellant's history of injury and reviewed the evidence of record. He noted that appellant "returned to light duty in July of 1994. She gradually increased this to full duty as of October of 1997." Dr. Thrower listed findings on examination and stated:

"My current impression is that the claimant suffered a lumbosacral strain as a result of the injury of February 21, 1994. The claimant had preexisting spondylolisthesis at the L3-4 level, with findings of associated degenerative disc disease at multiple levels throughout the lumbar spine, as well as facet joint disease, a preexisting condition, not related to the accident.

"Currently, [appellant] has no residual affects from the lumbosacral strain that I can see. She has no evidence of muscle spasm. [Appellant] has a mild limitation of lumbar motion. This is likely related to the recent lumbar strain from the motor vehicle accident and also the underlying lumbar degenerative disc disease and spondylolisthesis."

Dr. Thrower further stated:

“As regards the difference between the injury of February 21, 1994 and the motor vehicle accident of January of 1999, it is very difficult to separate the current lumbosacral findings from those related to the prior injury. However, in my opinion, based on the medical records that I have reviewed, it appears that [appellant] did make a rapid, good recovery from the February of 1994 accident. She was working satisfactorily in 1997 until she had a reinjury while lifting, according to Dr. Martin’s office notes. It appears that the claimant was never capable of returning to work subsequent to that time.”

Dr. Thrower found that appellant’s current problem was degenerative disc disease unrelated to her employment and that she could return to work as a nurse with restrictions on lifting over 50 pounds. In a supplemental report dated August 15, 1999, Dr. Thrower opined that appellant had “fully recovered from the lumbosacral strain” and that her injury did not affect her “underlying spondylolisthesis and degenerative disc disease.”

On September 10, 1999 the Office issued appellant a proposed notice of termination on the grounds that the weight of the medical evidence, as represented by the report of Dr. Thrower, established that she had no further condition or disability causally related to her employment injury.

In an office visit note dated June 28, 1999, Dr. Morrison noted that appellant related increased symptoms since her motor vehicle accident. He noted that an MRI showed disc herniations at L3-4 and L4-5 and foraminal stenosis at L3-4. Dr. Morrison found that, without authorization for epidural steroids and with the contribution from the motor vehicle accident it was “unlikely she will ever return to meaningful work.”

In an office visit note dated September 22, 1999, Dr. Morrison related that he had reviewed Dr. Thrower’s opinion. He listed findings on examination and stated:

“Essentially, [appellant’s] main problem is a lumbosacral sprain [and] degenerative arthritis of her lumbosacral spine. She has had more in the way of objective neurological findings but still seems to have evidence of a lumbar radiculopathy. [Appellant] has on her MRI, changes that would predispose her to having these symptoms.”

Dr. Morrison noted that he agreed with Dr. Thrower that appellant could return to work but only with a restriction against lifting patients.

In a decision dated October 12, 1999, the Office finalized its termination of appellant’s compensation and entitlement to medical benefits effective that date. In a letter dated January 4, 2000, appellant, through her representative, requested reconsideration of her claim. By decision dated March 18, 2000, the Office denied merit review of its prior decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits on the grounds that the weight of the medical established that she had no further condition or disability causally related to her accepted employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. The Office may not terminate or modify compensation without establishing that the disabling condition ceased or that it was no longer related to the employment.¹ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.²

The Office terminated appellant's compensation based on its finding that the opinion of Dr. Thrower, a Board-certified orthopedic surgeon, who conducted a second opinion evaluation, constituted the weight of the medical evidence. However, in reaching his conclusions, Dr. Thrower found that appellant returned to her full-time regular employment in October 1997. Instead, appellant returned to full-time limited-duty employment on October 17, 1994. Dr. Thrower also noted that appellant stopped work in April 1997 but appeared unaware that she stopped work due to a recurrence of disability accepted by the Office. A review of the statement of accepted facts reveals that, while the claims examiner noted that appellant stopped work on April 5, 1997 and filed a claim for a recurrence of disability on April 14, 1997, the claims examiner did not report that the Office accepted the recurrence of disability as employment related. The statement of accepted facts also is ambiguous regarding whether, after her initial employment injury, appellant returned to eight hours of regular or limited-duty employment and specifies that she resumed full-time work in October 1997 rather than October 1994. Therefore, Dr. Thrower's report is based on an incomplete factual history as he believed that appellant returned to her regular employment following her February 21, 1994 employment injury rather than limited-duty employment. Further, Dr. Thrower did not discuss the effect of appellant's accepted employment-related recurrence of disability on April 5, 1997 or address whether she had fully recovered from her recurrence of disability. The claims examiner is responsible for ensuring that the statement of accepted facts is correct, complete, unequivocal and specific. When a second opinion specialist renders a medical opinion based on an incomplete or inaccurate statement of accepted facts, the probative value of the opinion is seriously diminished or negated altogether.³

¹ *David W. Green*, 43 ECAB 883 (1992).

² *See Del K. Rykert*, 40 ECAB 284 (1988).

³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see also James A. Wyrich*, 31 ECAB 1805 (1980).

Therefore, Dr. Thrower's opinion is insufficient to establish that appellant had no further residuals of her accepted employment injury because it was based on an inaccurate statement of accepted facts. Consequently, the Office did not meet its burden of proof to terminate appellant's compensation.⁴

The decision of the Office of Workers' Compensation Programs dated March 18, 2000 is set aside and the decision dated October 12, 1999 is reversed.

Dated, Washington, DC
May 14, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

A. Peter Kanjorski
Alternate Member

⁴ In view of the Board's disposition of the merits, the issue of whether the Office properly denied appellant's request for reconsideration under section 8128 is moot.