

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of VIRGINIA DORRIS and DEPARTMENT OF HEALTH & HUMAN SERVICES, ALASKA NATIVE MEDICAL CENTER, Anchorage, AK

*Docket No. 01-1658; Submitted on the Record;
Issued June 4, 2002*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits; and (2) whether appellant had any continuing residuals after April 19, 1999, the date the Office terminated her compensation.

On September 22, 1980 appellant, then a 39-year-old clinical nurse, filed a notice of occupational disease alleging that she suffered frequent back pain while performing her duties. The Office accepted on April 20, 1981 that appellant sustained a mild, herniated lumbar disc as a result of her federal employment and paid appellant appropriate medical and compensation benefits.

In a report dated June 10, 1981, Dr. Richard W. Garner, a Board-certified orthopedic surgeon, stated that appellant was still suffering "probable residuals of L4-5 [herniated nucleus pulposus]." In a report dated September 29, 1981, he stated that terminating appellant's benefits would be premature and said that she may be "back to essentially normal" within one year. On June 24, 1982 Dr. Garner stated that appellant still had sciatica-type pain and momentary pains in the right buttock and groin and that she could not tolerate prolonged bending. In 1983 Dr. Garner stated that appellant's back condition was essentially the same.

In a report dated June 18, 1984, Dr. John K. Pike, a Board-certified orthopedic surgeon, opined that appellant had "slowly resolving lumbar disc syndrome with some sciatica on the right side with some objective findings compatible with a mild nerve root irritation on the right." In a February 12, 1985 report, Dr. William H. Slaughter, a Board-certified orthopedic surgeon, indicated that appellant had a history of low back strain but stated that he could find no evidence of residual back strain or neurologic changes. He acknowledged appellant's subjective complaints of low back pain and opined that she had been unable to work for the past five years due to the pain. He concluded by stating: "I can find no objective physical findings suggesting residual back strain or evidence of ruptured disc or neurologic changes occurring with a ruptured disc."

Appellant was examined on July 16, 1986 by a panel of three physicians, Dr. Barry Bergen, a Board-certified psychiatrist and neurologist, Dr. James Dunlap, a Board-certified orthopedic surgeon, and Dr. David Grubb, a Board-certified psychiatrist and neurologist. The physicians diagnosed appellant with chronic lumbar strain with radicular symptoms involving the right leg and opined that her condition was related to the work injury. Appellant was again examined by these physicians on January 20, 1988, at which time they concluded that appellant still had symptomology in the lower back and had not completely recovered.

Dr. Warren J. Adams, a Board-certified orthopedic surgeon, stated in a May 12, 1989 report that there were no objective findings to substantiate appellant's subjective complaints of pain and opined that her current condition represented a natural progression of an underlying and preexisting low back and right lower extremity condition.

On March 19, 1999 the Office issued a notice of proposed termination of compensation benefits finding that the evidence of record established that appellant no longer had continuing residuals of her low back strain. The Office cited the report of Dr. Adams dated May 12, 1989. The Office terminated appellant's compensation benefits effective April 19, 1999.

Appellant requested reconsideration on May 21, 1999 and submitted a May 10, 1999 report from Dr. Patrick S. Lynch diagnosing her with degenerative disc disease and a copy of a May 15, 1999 magnetic resonance imaging.¹

In a merit decision dated November 24, 1999, the Office affirmed the April 19, 1999 termination decision.² Appellant requested reconsideration on July 12, 2000, arguing that the termination was based on outdated medical evidence.

In a merit decision dated August 11, 2000, appellant's request for modification was denied. Appellant requested reconsideration again on November 7, 2000. In a merit decision dated March 27, 2001, the Office denied modification of the April 19, 1999 decision.

The Board finds that the Office did not meet its burden of proof in this case to terminate appellant's compensation benefits.

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.³

In this case, at the time of the April 19, 1999 termination, the record did not contain any current medical evidence establishing that appellant had no further disability due to her accepted work-related injury. The Office based its decision to terminate appellant's benefits on several

¹ The other evidence submitted was duplicate evidence already in the record.

² Appellant appealed to the Board and the Board dismissed appellant's appeal on March 28, 2000 due to her own request.

³ *David W. Green*, 43 ECAB 883 (1992).

outdated reports, including the February 12, 1985 report from Dr. Slaughter, the July 16, 1986 report from the three-panel second opinion physicians,⁴ the July 27, 1988 clarification report from Dr. Dunlap and the May 12, 1989 report from Dr. Adams. At the time of the termination of appellant's compensation on April 19, 1999, these medical reports were over eight years old. The Board found in *James H. Whitton*⁵ that the Office improperly terminated appellant's compensation benefits based on medical evidence that was 12 years old. The medical reports in this case did not provide a sufficient basis for the Office to terminate appellant's compensation in view of the length of time between the reports and the Office's termination of benefits. The Office's decision to terminate compensation was therefore based on extremely dated medical evidence that did not represent appellant's current medical state. The most recent medical reports before the termination were the May 12, 1989 report from Dr. Adams and the October 15, 1991 report of Dr. Craig W. Wiesenhutter, a rheumatology specialist. Dr. Adams first stated in his report that there were no objective findings to substantiate appellant's subjective complaints and that her condition was due to natural degenerative, but then later stated that appellant had not recovered from the residuals of her work-related injury. Even if the report from Dr. Adams had been current, it is vague and contradictory and does not support the Office's burden of proof to terminate. The medical evidence of record at the time of the April 19, 1999 termination was over eight years old and not well rationalized. The Board notes that several of these reports were vague and unclear on the issue of whether appellant still suffered residuals from her work-related injury. At the time of the termination, the record also contained several medical reports from appellant's attending physicians to support appellant's contention that she continued to suffer residuals from her work-related injury.

As there was no current medical evidence in the record which would meet the Office's burden of proof to establish that appellant's accepted employment injury had resolved, the Office improperly terminated appellant's compensation benefits effective April 19, 1999.

The issue of appellant's continuing residuals after the April 19, 1999 termination need not be addressed since appellant's compensation benefits will be reinstated.

⁴ The panel included Drs. Bergen, Dunlap and Grubb.

⁵ Docket No. 97-1131 (issued February 2, 1999).

The March 27, 2001 and August 11, 2000 decisions of the Office of Workers' Compensation Programs are hereby reversed.

Dated, Washington, DC
June 4, 2002

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member