

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH ALVAREZ and U.S. POSTAL SERVICE,
POST OFFICE, La Puente, CA

*Docket No. 02-496; Submitted on the Record;
Issued October 17, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 5, 2001.

On March 8, 1999 appellant was injured in the performance of duty when she was struck on the right side by a jeep while gathering carts in a parking lot. The Office accepted the claim for the following conditions: cervical strain; left wrist strain; multiple contusions to right shoulder; right forearm and left thumb; right rib fracture; and contusions to the head with a history of concussion. Appellant stopped work on the date of injury and did not return. The employing establishment terminated her job on May 22, 1999.

Following her work injury, appellant was immediately seen at the local employing establishment medical emergency center where x-rays were taken and she was sent home from work. She subsequently went to her own insured medical provider, Kaiser Medical Center (Kaiser), and received treatment from various physicians over the course of the next two months.

A physician's initial report of injury was signed by Dr. Joseph Lee on March 9, 1999. Appellant complained of nausea, right-sided neck pain, right arm pain, right wrist pain and left thumb pain. A computerized tomography (CT) scan of the head was negative. The diagnosis was blunt head injury with concussion, right cervical strain, right arm contusion, mild strain of the right wrist and left thumb strain. Appellant was released to light duty with restrictions of no driving and no more than two hours of walking per day.

In a follow-up visit at Kaiser on March 31, 1999, appellant was told that she also had fractured ribs. She was placed on disability status and referred to Dr. Anthony Yang, an orthopedist, where she underwent a course of physical therapy. Dr. Yang diagnosed right-sided rib fractures, left thumb strain and right rib strain.

In a May 12, 1999 work capacity evaluation report (Form OWCP-5c), Dr. Yang indicated that appellant could return to work part time with a 10-pound lifting restriction and other work

limitations. He “estimated” that appellant would gradually return to work for eight hours a day by July 1, 1999. Dr. Yang diagnosed a left thumb contusion and indicated that appellant still suffered from back and neck pain. He further noted that he was awaiting a psychological report as to the possibility of a diagnosis of post-traumatic stress disorder.

The employing establishment was unable to accommodate appellant’s request for light duty with restrictions. Appellant was terminated from her employment effective May 22, 1999.

The record indicates that appellant was referred by Dr. Yang to a psychologist, Dr. Jane K. Jeffreys, who completed a CA-20 attending physician’s report on May 24, 1999. Dr. Jeffreys diagnosed post-traumatic stress disorder due to the March 8, 1999 work injury. She concluded that appellant was totally disabled from work.

X-rays of the chest, hip and right knee were performed on May 24, 1999 and revealed healed fracture of the ninth rib with new bone formation; mild degenerative changes of the right hip; and no significant abnormality of the right knee.

A magnetic resonance imaging scan of the lumbar spine was performed on June 2, 1999 and showed minor degenerative changes at L4-5 and L5-S1.

The Office referred appellant for a second opinion evaluation with Dr. Robert Moore, a Board-certified psychologist and neurologist, on June 14, 1999. In a report dated July 8, 1999, Dr. Moore indicated that appellant complained of headaches that were consistent with cephalgia and related to her work injury. He opined that appellant’s headaches were expected to resolve in three months.

In a June 6, 1999 report, Dr. Paul Tsou, a Board-certified orthopedic surgeon and an Office referral physician, opined that appellant could return to work for six hours per day with restrictions. Dr. Tsou noted that appellant’s rib fracture was still healing and that she needed at least two more months before she could work her full duties for an eight-hour shift. He recommended another CT scan to ascertain whether or not appellant sustained a head injury as a result of the March 8, 1999 work injury other than a concussion. Dr. Tsou noted that she had complained of persistent headaches since March 8, 1999.

The record indicates that a conference was held in February 2000 between the Office and the employing establishment in an attempt to find appellant light-duty work.

Appellant moved and was granted authorization by the Office to change her attending physician of record to Dr. Tamnane Shrikant. In an attending physician’s report (CA-20) dated January 28, 2000, Dr. Shrikant noted that appellant was struck by a vehicle in mail parking lot on March 8, 1999 and fell to the ground unconscious. He indicated that x-rays of the right shoulder cervical and lumbar spine were normal grossly with questionable small fracture at L4. Under diagnosis he listed the following: “a soft tissue injury with likely chip [fracture] of L4 area.” Dr. Shrikant check marked a box indicating that the diagnosed condition was not caused or aggravated by an employment activity. He also noted that appellant was being referred to an orthopedist for further treatment.

The Office referred appellant for a second opinion evaluation with Dr. Thomas Dorsey, a Board-certified orthopedic surgeon, on July 17, 2000. Dr. Dorsey reviewed the medical record and a statement of accepted facts. He also recorded physical findings. Dr. Dorsey diagnosed the following conditions: cervical musculoligamentous sprain/strain, resolved; right shoulder impingement syndrome; lumbar musculoligamentous sprain/strain, resolved; right carpal tunnel syndrome; mild right hip degenerative joint disease; fracture, right rib, resolved; and right hip contusion, resolved. He stated: "I see no basis on which to believe that [appellant] has any ongoing condition related to the events of March 8, 1999." Dr. Dorsey indicated that appellant could return to work for eight hours per day with certain physical restrictions. He specifically noted that appellant's physical restrictions were due to the diagnoses of shoulder impingement syndrome, carpal tunnel syndrome and right hip degenerative disease. Dr. Dorsey stated that the diagnosed conditions were preexisting and not related to the work injury or work factors.

On January 12, 2001 the Office issued a notice of proposed termination, advising appellant that the weight of the medical evidence indicated that she no longer had any disability or residuals due to her accepted work injury and that her compensation would be terminated unless she provided additional evidence or argument to establish her entitlement to continuing benefits. Appellant was given 30 days to submit additional argument or evidence if she disagreed with the proposed action.

In response, appellant submitted a letter from NCOIC, Patient Administration Division, which indicated that NCOIC was "unable to locate and make available [the claimant's] medical record." The claimant, therefore, requested that her benefits be continued for "good cause." The claimant did not submit any medical evidence.

In a decision dated March 5, 2001, the Office terminated appellant's wage-loss compensation and her right to medical benefits on the grounds that he no longer had any disability or residuals due to her accepted work injury.

On April 4, 2001 appellant responded to the Office's findings of fact, arguing that the employing establishment improperly failed to accommodate her work injury and provide her with an appropriate position to which she was entitled under the Federal Employees' Compensation Act.

On June 4, 2001 appellant requested reconsideration and submitted clinical notes from Dr. Miller dated April 12, 2001, in which the physician described appellant's history of injury and subjective complaints. A description of appellant's medical treatment also followed.

Appellant further submitted an April 13, 2001 report from Dr. Colin K. Miller, an orthopedic surgeon. In that report he repeated his narrative from the April 12, 2001 clinical notes. Dr. Miller stated that x-rays of appellant's cervical, lumbar spine and shoulders were all within normal limit, with the exception of a Grade 1 right acromioclavicular separation. He noted several points of tenderness in the claimant's upper back, neck and posterior shoulder upon physical examination. Range of motion and strength testing was painful, but otherwise normal. Dr. Miller noted on physical examination that there was evidence of rotator cuff tendinitis in the right shoulder. He found no lower extremity radiculopathy, symmetric deep tendon reflexes, a normal Babinski reflex and normal strength testing. Dr. Miller noted that appellant exhibited

signs and symptoms very common to post-traumatic patients who have sustained a blunt trauma to the upper back and shoulder region. He noted that her symptoms were due to the work-related car accident. With regard to the objective evidence, he diagnosed rotator cuff tendinitis in the right shoulder and the acromioclavicular separation.

In an August 30, 2001 decision, the Office denied modification of its prior decision.

Appellant filed another request for reconsideration on September 21, 2001 and resubmitted copies of evidence that was already of record.

In a decision dated November 15, 2001, the Office denied appellant's request for reconsideration on the merits.

The Board finds that the Office improperly terminated appellant's compensation effective March 5, 2001.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.¹ After the Office determines that an employee has a disability causally related to his or her employment, the Office may not terminate compensation without establishing that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.²

The Office accepted that appellant sustained: a cervical strain; left wrist strain; multiple contusions to right shoulder, right forearm and left thumb; right rib fracture; and contusions to the head with a history of concussion as a result of her March 8, 1999 work injury. Appellant was treated by Dr. Yang for her multiple injuries and he opined, in a May 12, 1999 report, that appellant could return to part-time work with a 10-pound lifting restriction and other work limitations. Dr. Yang indicated that appellant should gradually return to full-time regular duty by July 1, 1999.

The record indicates that appellant did not return to light duty as suggested by Dr. Yang because the employing establishment refused to accommodate her work restrictions and appellant was terminated from her job. After receiving continuing compensation for another year, the Office decided to have appellant evaluated by a qualified specialist to ascertain whether or not appellant's disability had resolved within the time frame estimated by Dr. Yang. The Office sent appellant to Dr. Dorsey who opined that appellant had no continuing disability or residuals due to the March 8, 1999 work injury. Although Dr. Dorsey placed certain restrictions of appellant's return to full-time duty for eight hours per day, those physical restrictions were stated as not being causally related to the accepted work injury. Dr. Dorsey specifically noted that appellant's physical restrictions were due to preexisting conditions of shoulder impingement syndrome, carpal tunnel syndrome and right hip degenerative disease.

¹ *Raymond W. Behrens*, 50 ECAB 221 (1999); *Martha A. McConnell*, 50 ECAB 128 (1998).

² *Id.*

Comparing Dr. Dorsey's opinion to the reports from Drs. Lee, Tsou and Yang, the Board finds a conflict in the medical record. Dr. Dorsey finds no residuals due to the accepted work injury while the remaining physicians have suggested that appellant has ongoing residuals including headaches causally related to car accident. Dr. Tsou specifically recommended that appellant have additional testing to rule out a more serious head condition than the concussion that was originally diagnosed. Dr. Yang likewise indicated that appellant had residuals from her work injury that precluded her from working more than six hours per day. He felt that appellant would gradually be able to work eight hours per day but he also noted that his opinion was contingent on a psychological evaluation for post-traumatic stress disorder. Dr. Yang sent appellant to Dr. Jeffreys who confirmed that appellant suffered from post-traumatic stress disorder and stated that she was totally disabled from work.

Section 8123(a) of the Act provides that, "If there is 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."³

Because there is a conflict in the record as to whether appellant has any ongoing residuals due to her work injury, the Board concludes that the Office failed to carry its burden of proof in terminating appellant's compensation.

The decisions of the Office of Workers' Compensation Programs dated March 5 and August 30, 2001 are hereby reversed.⁴

Dated, Washington, DC
October 17, 2002

Alec J. Koromilas
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

³ 5 U.S.C. § 8123.

⁴ Due to the Board's disposition of merit issue, it is not necessary to address whether the Office's November 15, 2001 decision properly denied a merit review.