

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANGELA CLARIDA and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Doraville, GA

*Docket No 02-859; Submitted on the Record;
Issued September 5, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective August 30, 2000; and (2) whether the Office properly denied appellant's request for an oral hearing as untimely.

On March 8, 2000 appellant, then a 47-year-old seasonal clerk, filed a claim alleging that on that date she was injured when an office partition fell on her, striking her neck and upper back, and pushing her forward into her desk. She stopped work and did not return. Appellant was seen that date by a physician at DeKalb Medical Center and was diagnosed as having a cervical contusion, whiplash injury and posterior thoracic strain. She was advised to refrain from work until she had received follow-up care. Appellant returned several times to the emergency department until April 3, 2000 when she began follow-up treatment with Dr. Clifford W. Roberson, Jr., an orthopedic surgeon.

In Dr. Roberson's initial report of record dated April 3, 2000, he recounted the history of appellant's injury and noted that while she denied any previous history of injury to her neck and upper back, she did have previous history to her lower back in 1996, for which she continued to receive chiropractic manipulation. Dr. Roberson noted that appellant's x-rays were negative, diagnosed cervical thoracic strain and lumbosacral sprain, and stated that appellant would continue on full disability while she received medication and physical therapy. In a follow-up report dated April 14, 2000, he again diagnosed cervical and lumbar strains and stated that appellant was totally disabled and required continuing medication and therapy. In a narrative report dated May 5, 2000, Dr. Roberson noted that appellant still complained of rather severe pain in the cervical area and in the lower back, radiating into the extremities and that there had been essentially no change in her symptoms since the injury occurred. He diagnosed cervical and lumbosacral strains, and indicated that he suspected symptom magnification and possible malingering. Dr. Roberson recommended that appellant undergo a magnetic resonance imaging (MRI) scan and a functional capacity evaluation to determine whether or not her symptoms were secondary to lack of effort. He stated that appellant should remain on full disability until all the studies could be completed. In an accompanying attending physician's report dated May 5,

2000, Dr. Roberson recounted appellant's history of injury, diagnosed cervical and lumbosacral strains, and checked "yes" to the question of whether he believed the condition found was caused by the employment incident. He indicated that appellant's period of disability began on March 8, 2000 and would cease on June 6, 2000.

On June 19, 2000 the Office accepted appellant's claim for cervical and lumbar strains. The record, however, contains no evidence that appellant received monetary compensation benefits for wage loss at that time.

On July 20, 2001 appellant filed a CA-7 form claiming compensation for temporary total disability commencing March 8, 2000. She submitted an August 30, 2000 report from Dr. Roberson, in which he noted that appellant's cervical MRI scan showed no evidence of cervical disc or spinal stenosis or degenerative changes, and that her lumbar MRI scan also showed no evidence of lumbar disc or spinal stenosis, but did reveal some facet hypertrophy which was not significant enough to cause appellant's symptoms and was probably preexisting. Dr. Roberson stated that appellant's objective complaints were way out of proportion to the physical findings on the MRI scan, as well as on examination, and that appellant did exhibit positive Weidel signs suggesting symptom magnification and malingering. He concluded that based on the physical findings, the amount of time elapsed since the injury and the MRI findings, it was unlikely that one would anticipate the persistence of the type of pain she is complaining of. Dr. Roberson stated that he would refer appellant for a functional capacity evaluation and that after it was completed, she would be discharged. In a report dated October 25, 2000, he reiterated his earlier conclusions and indicated that appellant's functional capacity evaluation was still pending. In a report dated January 8, 2001, Dr. Roberson stated that appellant had been referred for psychiatric evaluation, and that, if she failed to follow through, she would be discharged. In a report dated March 12, 2001, he noted that, in January appellant had sustained injuries to both thumbs and her right index finger. In an attending physician's report dated May 11, 2001, Dr. Roberson recounted appellant's history of injury, diagnosed cervical and lumbosacral strains, and checked "yes" to the question of whether he believed the condition found was caused by the employment incident. On the portion of the form asking the physician to list his findings, Dr. Roberson wrote "no objective findings." Dr. Roberson indicated that appellant's period of disability began on March 8, 2000 and continued through May 30, 2001.

On January 29, 2001 appellant was initially evaluated by Dr. Richard R. Mouzon, a psychologist, who noted that appellant was a widow, with three grown children and reported that she was homeless, but was living with an aunt and had numerous financial, and other stressors in her life. Appellant further reported having recently injured her thumbs, index finger and wrists when she fell while attempting to catch a bus. On May 17, 2001 appellant underwent a complete psychological evaluation by Dr. Mouzon and his associate, Dr. D. Lazenby-Ausborn, for the purpose of examining her intellectual, perceptual and emotional functioning, secondary to her employment injury and to determine the possibility of malingering. In his report dated May 17, 2001, Dr. Mouzon stated that, clinically, appellant was experiencing symptomatology of depression secondary to chronic physical pain and diagnosed major depressive disorder, single episode and paranoid personality disorder. He further stated that "test data do not support that [appellant] could be malingering as a possible secondary gain." Dr. Mouzon concluded that appellant would benefit from cognitive behavioral therapy to help manage her depression and would further benefit from learning techniques for management of pain.

In a narrative report dated May 16, 2001, Dr. Roberson noted that appellant reported worsening chronic low back pain, radiating into her left leg and exhibited tenderness on physical examination. He further noted that appellant had started seeing Dr. Mouzon and reiterated that in order for her to continue as an orthopedic patient, she would need constant psychiatric follow-up. Dr. Roberson diagnosed chronic lumbosacral radiculopathy, indicated that appellant remained totally disabled and recommended continued medication. In a report dated June 13, 2001, he noted that he had recently spoken to Dr. Mouzon who informed him that appellant's psychiatric test results did not show any evidence of malingering, and suggested that the pain appellant was experiencing was real pain. Dr. Roberson noted that appellant continued to complain of severe pain in the left shoulder and back, and exhibited tenderness in her shoulder and lower lumbosacral spine, accompanied by restricted movement in both areas. He diagnosed chronic bursitis, left shoulder and chronic lumbosacral strain, stated that appellant remained totally disabled and recommended additional medication and therapy.

By decision dated October 16, 2001, the Office denied appellant's claim for compensation for the period from August 30, 2000 to the present as the medical evidence of record did not support that her disability was due to the March 8, 2000 injury.

On November 13, 2001 appellant telephoned the Office to inquire about her claim, and indicated to the Office that she had not received a copy of the Office's final decision. She indicated that she had submitted a written change of address to the Office and stated that therefore, any decision by the Office should have been sent to her new address. The November 13, 2001 telephone memorandum notes that the Office faxed appellant a copy of the decision on November 13, 2001 and that appellant's change of address information was received after the formal decision was issued, resulting in its delivery to the wrong address. A review of the record reveals that a facsimile from Dr. Mouzon's office containing appellant's change of address information was received by the Office on October 16, 2001, the date the Office issued its final decision.

By letter postmarked November 17, 2001 and received by the Office on November 29, 2001, appellant requested an oral hearing before an office representative.

In a decision dated January 11, 2002, the Office denied appellant's request for an oral hearing as untimely filed.

The Board initially finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective August 30, 2000.

Under the Federal Employees' Compensation Act,¹ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of

¹ 5 U.S.C. §§ 8101-8193

² *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

³ *Id.*

furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

Although the Office characterized its denial of appellant's claim for disability compensation after August 30, 2000 as a denial of a claim, the Office's actions actually constituted a termination of appellant's compensation after August 30, 2000. As noted above, the Office initially accepted that appellant sustained employment-related right cervical and thoracic strains and subsequently indicated that benefits after August 30, 2000 would be terminated. The fact that the Office accepts an employee's claim for a specified period of disability does not shift the burden of proof to the employee. The burden is on the Office with respect to the period subsequent to the date when compensation is terminated or modified.⁵

In this case, the Office accepted that appellant's March 8, 2000 employment injury resulted in cervical and lumbar strains. The Office authorized compensation for temporary total disability for the period March 8 to August 30, 2000. The Office, however, ostensibly concluded that the effects of these conditions ceased by August 30, 2000 based, apparently, upon an August 30, 2000 report from Dr. Roberson, appellant's treating physician, who noted that appellant had no objective findings which could explain her symptoms and stated that he suspected appellant of symptom magnification and malingering. The Office further noted that Dr. Mouzon's report noted financial and other stressors in addition to chronic pain, and did not specify that appellant's stressors were related to her prior work factors or to her employment injury, and in fact, was issued after appellant had sustained an additional injury in January 2001.

The Office did not adequately address, however, the fact that the record contains additional medical evidence from Dr. Roberson dated after August 30, 2000, in which he states that further testing indicated that appellant's pain is real and continued to causally relate this pain to appellant's accepted employment injuries. In addition, the Office suggested that appellant's disability after August 30, 2000 was due to her January 2001 nonwork-related injuries, but it did not provide adequate support for this position. While the record does contain evidence that appellant sustained additional injuries to her thumbs and index finger in January 2001, the record does not contain any medical evidence showing that appellant only had disability after August 30, 2000 due to nonwork-related factors or conditions. For the reasons detailed above, the Office did not establish that appellant no longer had disability after August 30, 2000 due to her employment-related cervical and lumbar strains. Once the Office determined that the medical evidence submitted by appellant was sufficient to establish that her employment incident of March 3, 2000 caused her back and neck strains and her disability for employment, the Office should have developed the medical evidence to determine the duration and extent of appellant's employment-related disability.⁶ For these reasons, the Office did not meet its burden of proof to terminate appellant's compensation effective August 30, 2000. Therefore, the Office's January 11, 2002 denial of appellant's request for an oral hearing is moot.

⁴ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *Patrick P. Curran*, 47 ECAB 247 (1995); *George J. Hoffman*, 41 ECAB 135 (1989).

⁶ See *Arthur Sims*, 46 ECAB 880, 886 (1995); *George J. Hoffman*, *supra* note 5.

The decisions of the Office of Workers' Compensation Programs dated January 11, 2002 and October 16, 2001 are reversed.

Dated, Washington, DC
September 5, 2002

Michael J. Walsh
Chairman

Alec J. Koromilas
Member

David S. Gerson
Alternate Member