

**United States Department of Labor
Employees' Compensation Appeals Board**

CAROLYN L. MONTI, Appellant)

and)

DEPARTMENT OF AGRICULTURE, SOIL)
CONSERVATION SERVICE, Warwick, RI,)
Employer)

**Docket No. 04-1135
Issued: September 24, 2004**

Appearances:
Carolyn L. Monti, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On March 22, 2004 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated March 1, 2004 terminating her wage-loss compensation and medical benefits effective March 21, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof in terminating appellant's compensation and medical benefits effective March 21, 2004.

FACTUAL HISTORY

On May 23, 1985 appellant, then a 39-year-old secretary, filed a traumatic injury claim alleging that she was involved in an automobile accident on May 2, 1985 while in the performance of duty. The Office accepted the claim for lumbosacral and cervical strain, placed her on the periodic rolls and paid appropriate compensation benefits. On January 27, 1989 the

employing establishment separated appellant effective February 1, 1989 based on her inability to work.

On June 14, 1999 Dr. Norbert Fleisig, appellant's attending physician and a Board-certified surgeon, found no objective findings concerning her lower back, and released her to return to regular duty as a secretary without restrictions. The Office thereupon referred appellant to vocational rehabilitation and, on April 24, 2000, a vocational rehabilitation specialist advised the Office that appellant returned to a full-time secretarial position effective April 10, 2000.¹ Appellant also notified the Office of her employment in a letter dated April 11, 2000. In a memorandum for the record dated May 4, 2000, the Office noted that appellant returned to a 40-hour work week on April 10, 2000 at an hourly wage of \$9.50 and, on May 9, 2000, paid her compensation at an adjusted rate to reflect actual earnings. On October 10, 2000 the Office issued a decision adjusting her compensation to reflect her wage-earning capacity based on her actual earnings as a secretary, retroactive to April 23, 2000.

On April 10, 2001 appellant advised the Office that she was no longer under the care of a physician and had returned to full-time work. On May 18, 2001 she advised the Office that she had been working for the Rhode Island Health Care Association since March 3, 2001, that she was now a permanent, full-time employee, working 40 hours a week at \$10.00 an hour. On March 31, 2003 appellant updated her status, advising the Office that she was earning \$12.07 an hour in a full-time position and was not under a physician's care.

On August 7, 2003 the Office referred appellant, her medical records, a statement of accepted facts and a list of specific questions to Dr. William S. Buonanno, a Board-certified orthopedic surgeon, for a second opinion evaluation.²

On August 8, 2003 appellant advised the Office that her hourly wage was increased to \$12.59 effective July 1, 2003.

In a report dated September 11, 2003, Dr. Buonanno noted a familiarity with appellant's history of injury and treatment, including a review of her magnetic resonance imaging (MRI) scans and other neurological tests which were read as negative,³ a review of her nonwork-related conditions including her seizure-like symptoms and a heart condition, for which she was no longer treated. He noted her subjective complaints along the lumbar spine upon standing or sitting for long periods of time. However, Dr. Buonanno found a normal lumbosacral and cervical spine and noted no radicular symptoms. He noted that appellant stated that her current secretarial job which she had held for three years had the same type of physical requirements as her 1985 federal secretarial job, both of which involve sitting and standing. He opined that

¹ Appellant enrolled in a refresher course as recommended by the vocational rehabilitation plan to update her computer program skills.

² The statement of accepted facts incorrectly noted that appellant was out of work from June 17 to present. However, Dr. Buonanno stated that appellant had returned to work in 2000 and was currently employed by the Rhode Island Health Care Association.

³ Dr. Buonanno noted a 1986 study revealing an abnormality at L3 although he found no radicular symptoms.

appellant could work her normal job with normal hours similar to her 1985 federal position without restrictions. In an attached work capacity evaluation form, Dr. Buonanno stated that appellant was capable of working an eight-hour day with no restrictions.

On October 7, 2003 the Office notified appellant that it proposed terminating her compensation for wage-loss and medical benefits based on the opinion of Dr. Buonanno, the Office second opinion physician, who found that she no longer had medical residuals of her May 2, 1985 work-related injury.

By letter dated October 15, 2003, appellant stated that she has back and joint pain every day which she treats with a bath for at least 20 minutes every morning and evening, daily and frequent aspirin, Motrin and joint cream to relieve pain. She stopped seeking medical treatment when she realized she would never be pain free and has resigned herself to living with pain. She stated that she could not stand or sit without feeling pain and discomfort. With respect to her examination with Dr. Buonanno, appellant stated that she was only required to stand up and bend once, and that his examination took only 30 seconds. Appellant added that she could perform the type of work she did in 1985, as long as she did not stand or sit for too long. She also stated that her wage-earning capacity would be what it would have been had she not been injured and out of work from 1985 until 2000. Appellant stated that she believed she should continue to receive wage loss for the difference between what she is earning and what she would be earning as a Grade 7, step 7 federal employee had she not had the May 2, 1985 work-related accident and had she been employed continuously since 1985.

By decision dated March 1, 2004, the Office terminated appellant's wage-loss compensation and medical benefits effective March 21, 2004.⁴

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ After it has determined that an employee has disability 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.⁶ In this case, the Office accepted that appellant sustained work-related lumbosacral and cervical strain on May 2, 1985. The Office, therefore, has the burden of proof to establish that these conditions have ceased.

⁴ The Board notes that this case record contains evidence which was submitted subsequent to the Office's March 1, 2004 decision. The Board has no jurisdiction to review this evidence for the first time on appeal; *see* 20 C.F.R. § 501.2(c); *James C. Campbell*, 5 ECAB 35, 36 n.2 (1952).

⁵ *Jorge E. Sotomayer*, 54 ECAB 105 (2000).

⁶ *Mary E. Lowe*, 52 ECAB 223 (2001).

ANALYSIS

The Office accepted that appellant sustained a lumbosacral and cervical strain on May 2, 1985 and awarded her appropriate benefits. In a decision dated March 1, 2004, the Office terminated appellant's compensation and medical benefits effective March 21, 2004 finding that the weight of the medical evidence was represented by the opinion of the Office second opinion physician, Dr. Buonanno, which established that appellant had no further employment-related disability of her lumbosacral or cervical spine attributable to her May 1985 work-related injury. The Board has carefully reviewed the opinion of Dr. Buonanno and notes that, it has reliability, probative value and convincing quality with respect to the conclusions reached regarding the relevant issue of the present case. He found that appellant had no physical condition which could be causing her subjective complaints of pain in the back and joints. Dr. Buonanno provided medical rationale for his opinion by explaining that, based on appellant's history and his physical examination, she had a normal lumbosacral and cervical spine with no radicular symptoms which was consistent with prior MRIs and other diagnostic studies. He also noted that appellant was currently working in a full-time position with no restrictions which she related was similar to her federal position at the time of her 1985 injury. The Board also notes that appellant's prior attending physician, Dr. Fleisig, released her with no restrictions to a secretarial position on June 14, 1999. There is no concurrent medical evidence indicating that appellant has any residuals of her 1985 employment injury.

Appellant's October 15, 2003 narrative, submitted in response to the Office's notice of proposed termination, notes her subjective complaints of a continuing back and joint pain condition but has no probative medical value inasmuch as it is not a medical report.⁷

In this case, appellant returned to work in April 2000 and has been working full time with no restrictions in a position which the second opinion physician and she have stated is similar to her prework-related injury position as a secretary. She has been working without restrictions from at least May 2001 and has not been under the care of a physician since at least April 2001.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective March 21, 2004.

⁷ 5 U.S.C. § 8101(2); *see also* *Barbara J. Williams*, 40 ECAB 649, 657 (1988).

ORDER

IT IS HEREBY ORDERED THAT the March 1, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 24, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member