United States Department of Labor
Employees' Compensation Appeals Board

MARILYN A. KISER, Appellant	)	
and	)	**Docket No. 05-521**
	)	**Issued: July 12, 2005**
U.S. POSTAL SERVICE, STEPHEN HOLSTEN STATION, Bristol, TN, Employer	)	

Appearances:
Marilyn A. Kiser, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member

JURISDICTION

On December 28, 2004 appellant filed a timely appeal of a November 29, 2004 merit decision of the Office of Workers' Compensation Programs, that terminated her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation effective November 29, 2004.

FACTUAL HISTORY

On October 12, 2002 appellant, then a 56-year-old window technician, filed a claim for compensation for a traumatic injury sustained on October 1, 2002. She claimed that lifting about 200 parcels that day created a ventral hernia. On October 23, 2002 appellant filed a claim for compensation for an occupational disease, claiming that repetitive lifting of a limit of 15 pounds caused a ventral hernia.

Appellant stopped work on October 28, 2002 and on that date underwent surgical repair of a ventral incisional hernia, performed by Dr. Robert H. Blanton, a Board-certified surgeon. In a November 8, 2002 report, he noted that she felt that repetitive lifting of small objects contributed to the creation of the ventral hernia he repaired. Dr. Blanton then stated: "From a medical perspective, patients with recurrent hernias or difficult to control abdominal wall problems are certainly subject to further herniation if they continue to lift heavier objects. Given the difficult nature of [appellant's] hernia, a lifetime restriction from heavy lifting would be appropriate." In a November 22, 2002 report, Dr. David P. Russell, an obstetrician and gynecologist, noted appellant's prolonged complaints of lower abdominal and pelvic pain and her "known history of pelvic adhesion disease due to multiple surgeries in the past," including a diagnostic laparoscopy with lyses of adhesions in April 2002, followed by surgery for a bowel perforation, during which she was noted to have chronic adhesions in the upper and lower abdomen.[1] Dr. Russell noted that she had significant abdominal pain particularly with heavy lifting or straining, which was expected in a person with multiple abdominal adhesions and stated, "The unfortunate part of an open lyses of adhesions is the fact that at least 50 percent of [the] time these adhesions will recur often as bad or worse than they were at the time of initial surgery."

By decision dated March 27, 2003, the Office found that the medical evidence did not establish that appellant's claimed medical condition resulted from accepted event(s).

By letter dated May 26, 2003, appellant requested reconsideration and submitted additional medical evidence. In an April 25, 2003 report, Dr. Blanton stated that she was at some increased risk for herniation, given that she underwent multiple surgical procedures through the same incision resulting in an incision "that would invariably be somewhat weaker than it would if only one procedure had been performed through it." After noting that appellant presented a history that she began to feel worse after repetitive lifting of less than 15 pounds on October 1, 2002 Dr. Blanton concluded: "One would be remiss to say that there was absolutely no chance of this action causing the hernia or to say that it definitely caused the hernia. I can say, however, that it could have contributed to the injury resulting in the hernia, as could a number of physical activities." In a May 28, 2003 report, Dr. Russell stated that on each of her April 2002 surgeries appellant "was noted to have very dense adhesions essentially throughout the entire abdomen. Despite multiple surgeries in an attempt to resolve these adhesions, there appeared to be no significant decrease in their number. Patient lives with essentially daily and hourly pain as a result of these adhesions." In a May 30, 2003 report, prepared for appellant's application for disability retirement, Dr. Blanton noted her history of abdominal surgeries beginning in 1988, described the surgeries he performed in April 2002 and on October 28, 2002 concluded:

> "[T]his patient has undergone extensive abdominal surgical procedures complicated by various situations, outlined above, that would predestine her to poor healing characteristics and the development of a hernia. Although the hernia has been fixed with mesh, [appellant's] previous history with poor healing would

[1] These first of these three April 2002 surgeries was performed by Dr. Russell; the later two were performed by Dr. Blanton.

> suggest that she is likely to develop further herniation depending upon the type of work for which she is chosen.… I note that she had been placed on 15-pound lifting restrictions postoperatively (prior to her hernia repair) and that she still developed a ventral hernia. This would suggest that [the] lifting restriction was inadequate and that she should not do any repetitive lifting or straining of any sort, whether it be at work or at nonwork activities."

By decision dated August 12, 2003, the Office vacated its March 27, 2003 decision rejecting appellant's claim and accepted that her ventral incisional hernia and the surgery to repair this condition were causally related to her employment. She elected benefits under the Federal Employees' Compensation Act in preference to retirement benefits effective October 28, 2002 and the Office, after reimbursing the Office of Personnel Management, began paying her compensation for temporary total disability.

On July 13, 2004 the Office referred appellant, her medical records and a statement of accepted facts to Dr. John F. Robertson, a Board-certified surgeon, for a second opinion evaluation on the residuals of her employment-related condition. In a July 15, 2004 report, he set forth her history, noting that since her October 28, 2002 incisional surgical repair she had continued to have diffuse sharp abdominal pain related to lifting or increased physical activity. Dr. Robertson diagnosed diffuse abdominal pain probably related to intra-abdominal adhesions and stated that the ventral incisional hernia was not still active, as it appeared to have been adequately repaired on October 28, 2002. In answer to the Office's questions, he stated that appellant was not able to perform the duties of a window technician, as she was "in a fair amount of pain from her surgery related to the injury of October 8, 2002" and, with regard to continuing causal relation, stated: "I think her pain and disability is related to adhesions from her previous surgeries and the repair of the injury of October 8, 2002. Again, [appellant] is also at high risk for recurrence of the hernia if she continues to work." In response to an Office request for a supplemental report addressing the objective basis for appellant's pain and whether his restrictions were preventive, Dr. Robertson stated in a September 27, 2004 report, that she did not have an active hernia at the time he examined appellant, but that appellant was at an increased risk of developing another hernia if she continued to work. He concluded:

> "[Appellant] continues to complain of severe abdominal pain with continued movement or standing. This pain is subjective and according to the patient is severe enough to prevent her performing her duties. Adhesions are very difficult to diagnose and generally require surgery to document their existence. It is usually a diagnosis of exclusion when dealing with chronic abdominal pain. As such, I can see no other reason for [appellant's] continued abdominal pain."

On October 18, 2004 the Office issued a notice of proposed termination of compensation on the basis that the weight of the medical evidence demonstrated that appellant had no disability or residuals due to her accepted work-related condition. She disagreed with this proposal and submitted a November 3, 2004 report from Dr. Robinson stating that he did think she was at increased for a recurrent hernia.

By decision dated November 29, 2004, the Office terminated appellant's compensation effective that day, on the grounds that her compensable disability had resolved and that her current disability was the result of nonoccupational medical conditions.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.[2]

ANALYSIS

The Office's October 18, 2004 proposal to terminate appellant's compensation and its November 29, 2004 decision terminating compensation found that the reports of Dr. Robertson, the Board-certified surgeon, established that she had no residuals of her employment-related condition. The Board finds that not only do Dr. Robertson's reports not establish that appellant has no residuals of her employment-related condition, these reports actually support that she does have residuals of her accepted condition of ventral hernia and the surgery performed, with the Office's authorization, to repair the hernia.

In his July 15, 2004 report, Dr. Robertson stated, "I think [appellant's] pain and disability is related to adhesions from her previous surgeries and repair of the injury of October 8, 2002." Clearly here, he is attributing appellant's continuing disability, at least in part,[3] to the effects of the October 28, 2002 surgery authorized by the Office.[4] Even though the hernia itself was successfully surgically repaired, she was left with residuals of the surgery, namely intra-abdominal adhesions. Dr. Robertson's opinion on this point is supported by Dr. Russell, who in a November 22, 2002 report, attributed appellant's adhesive disease to multiple surgeries and stated in a May 28, 2003 report that, on every surgery, despite attempts to repair them, very dense adhesions were found. Dr. Russell also corroborated Dr. Robertson's opinion that appellant's pain was related to her intra-abdominal adhesions and that the pain was disabling for work.

CONCLUSION

The Board finds that the medical evidence does not establish that appellant had no residuals of her employment-related condition and the surgery for this condition and that the Office did not meet its burden of proof to terminate her compensation.

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[2] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[3] Contribution in any way is compensable under the Act. *Beth P. Chaput*, 37 ECAB 158 (1985); *Henry Klaus*, 9 ECAB 333 (1957).

[4] Disability related to surgery performed for an employment injury is compensable. *Harry D. Nelson*, 33 ECAB 1122 (1982).

ORDER

IT IS HEREBY ORDERED THAT the November 29, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 12, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member