United States Department of Labor
Employees' Compensation Appeals Board

JANE JONES, Appellant	)	
and	)	**Docket No. 05-442**
	)	**Issued: May 2, 2005**
U.S. POSTAL SERVICE, MAGNOLIA STATION, Wilmington, NC, Employer	)	

Appearances:
Ernest J. Wright, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 14, 2004 appellant filed a timely appeal of an August 23, 2004 merit decision of the Office of Workers' Compensation Programs, terminating her compensation and a nonmerit November 2, 2004 Office decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merit and nonmerit decisions.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation on August 23, 2004 on the basis that she had no residuals of her August 1, 2003 employment injury; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim.

FACTUAL HISTORY

On August 3, 2003 appellant, then a 56-year-old rural carrier, filed a claim for a traumatic injury to her low back sustained on August 1, 2003 while loading mail into her vehicle. She stopped work on August 1, 2003. In an August 5, 2003 report, Dr. R. Wheeler, an internist,

diagnosed lumbosacral strain with radiculopathy and stated that appellant's injury and pain prevented her from even light duty.

The Office accepted that appellant sustained a lumbosacral sprain/strain and lumbosacral radiculitis. The employing establishment paid continuation of pay from August 2 to September 14, 2003 and the Office began payment of compensation for temporary total disability on September 15, 2003.

In a September 26, 2003 report, Dr. John C. Liguori, a Board-certified physiatrist, noted that x-rays and a magnetic resonance imaging scan were negative, diagnosed left sacroiliitis with asymmetric pelvis and stated that appellant was able to return to light duty at four hours per day. In an October 8, 2003 report, Dr. Liguori noted that he disagreed with Dr. Wheeler's assessment of her ability to work. In October 22, 2003 reports, Dr. Liguori stated that appellant still complained of pain and limitations despite a normal examination, with completely normal strength and sensation, completely normal lumbar spine movement in all directions and completely normal and symmetric deep tendon reflexes. He stated, "I believe [appellant] is magnifying her symptoms for secondary gain." In a December 10, 2003 report, Dr. Liguori reviewed the results of a functional capacity evaluation done on November 18, 2003, noting that she fully participated in 5 of 19 tasks and went to the emergency room where she received an injection of Morphine because her pain was so severe. He noted that, if appellant's lower extremities were as weak as she demonstrated on examination, she would not be able to stand independently from the table or walk without knee buckling and dropping to the floor. Dr. Liguori concluded that there were no significant objective findings that would prevent appellant from returning to her full duties, that she had no work restrictions and that she was "symptom magnifying, if not outright malingering." He stated that he would discharge her and did not plan on seeing her again.

In a December 18, 2003 report, Dr. James A. Maultsby, a Board-certified orthopedic surgeon, stated that appellant was seen with pain in her low back and down both hips of a burning nature and noted that he previously saw her "with somewhat similar complaints on February 18, 2002 at which time she was also having pain in her right hip region," which was significantly relieved by an injection of Xylocaine in the trigger point area. On examination he noted pain with motion of the low back, an antalgic gait, well localized trigger points in the bilateral sacroiliac region and signs of symptom magnification. Dr. Maultsby stated that appellant "by history, had a sprain to lumbosacral region with second[ary] subsequent myofascial pain syndrome." In a January 7, 2004 report, he stated that he agreed with her prior treating doctor that she could be released to modified work. Dr. Maultsby's January 8, 2004 report of appellant's work tolerance limitations indicated that she could work 4 hours per day, with lifting up to 10 pounds, sitting or walking 1 hour, standing 3 hours and no twisting, kneeling or reaching above the shoulder.

On January 13, 2004 the employing establishment offered appellant limited-duty work consisting of casing mail for two hours, answering the telephone and performing other administrative duties. The physical requirements were no lifting over 10 pounds, no more than 1 hour of sitting and standing for 1 hour while performing clerical duties not requiring lifting or twisting. In a January 15, 2004 note, Dr. Maultsby stated that there was no physical reason appellant could not work.

On March 3, 2004 the Office advised appellant that it had found the offered job was suitable, that she had 30 days to accept the offer or provide reasons for not doing so and that, if she failed to justify a failure to accept the offered position, her compensation would be terminated. In a March 25, 2004 letter, she stated that her pain was too great to drive and that she was unable to perform the offered position. On April 20, 2004 the Office advised appellant that her reasons for refusing the offered job were unacceptable and that she had 15 days to accept the position. She submitted a July 1, 2004 report from Dr. Patrick M. Curlee, a Board-certified orthopedic surgeon, diagnosing cervical stenosis and indicating that she needed cervical spine surgery and was disabled.

On July 5, 2004 the Office issued a proposed termination of compensation on the basis that appellant had no residuals of her August 1, 2003 employment injury. She submitted two reports from Dr. Curlee. In a June 15, 2004 report, he noted that appellant had done well after a C5 and C6 corpectomy with anterior fusion from C4-7 on April 27, 2004, with significant reduction in her neck and upper extremity radicular pain, but that she continued to have debilitating low back pain. Dr. Curlee concluded that she was permanently and totally disabled from her previous employment as a rural mail carrier secondary to her cervical and lumbar disease. In a July 1, 2004 report, he stated that appellant's work injury to her lower back "caused exacerbation of underlying cervical and lumbar disease," that she was doing reasonably well postoperatively with regard to her neck, that she was continuing to undergo treatment of the lumbar spine and that she had permanent restrictions against lifting more than 10 pounds, sitting more than 2 hours and standing or walking more than 1 hour per day and more than a ½ hour of sitting, standing or walking consecutively.

By decision dated August 23, 2004, the Office terminated appellant's compensation on that date on the basis that she had no residuals of her August 1, 2003 employment injury.

By letter dated September 18, 2004, appellant requested reconsideration, stating that she was unable to return to work and that her cervical spine surgery resulted from manipulation by Dr. Liguori. By decision dated November 2, 2004, the Office found her request for reconsideration insufficient to warrant review of its prior decision, as no legal questions or new evidence were submitted.

LEGAL PRECEDENT -- ISSUE 1

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.[1]

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

ANALYSIS -- ISSUE 1

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation. Dr. Liguori, a Board-certified physiatrist, was of the opinion expressed in his December 10, 2003 report, that appellant was magnifying her symptoms if not outright malingering and that she had no significant objective findings to prevent her from returning to work at her full duties without restriction. If this were the only medical evidence addressing the residuals of the employment injury and appellant's ability to work, it might justify the termination of her compensation on the basis that she had no residuals of her employment injury.

However, eight days after Dr. Liguori discharged appellant, she was examined by Dr. Maultsby, a Board-certified orthopedic surgeon, who reported findings on examination of an antalgic gait and well localized trigger points. Like Dr. Liguori, Dr. Maultsby noted signs of symptom magnification on examination, but unlike Dr. Liguori, Dr. Maultsby concluded that appellant needed further treatment and that she had limitations for work, including the ability to work only four hours. The contrary reports of Dr. Liguori and Dr. Maultsby cannot create a conflict of medical opinion under the Federal Employees' Compensation Act, as both are from her attending physicians.[2] Nonetheless, the reports of Dr. Maultsby cast sufficient doubt on the conclusions of Dr. Liguori to lead the Board to find that the Office did not meet its burden of proof to terminate appellant's compensation on the basis that she no longer had residuals of her August 1, 2003 employment injury.[3] The reports of Dr. Curlee have little probative value because they contain no low back findings on examination and because they do not provide rationale for the physician's opinion that her neck condition, which was not accepted by the Office, is related to her August 1, 2003 employment injury.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation. This decision on the merits of appellant's claim obviates the need to decide the second nonmerit issue.

[2] Section 8123(a) of the Act (5 U.S.C. § 8123(a)) states that, when there is disagreement between the employee's physician and the government's physician, the Office will refer the employee to a third physician.

[3] Despite the Office's development of the refusal of suitable work issue, its July 15, 2004 proposal and its August 23, 2004 decision to terminate appellant's compensation were not based on her refusal of suitable work.

ORDER

IT IS HEREBY ORDERED THAT the August 23, 2004 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 2, 2005
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

A. Peter Kanjorski
Alternate Member