

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GOLDIE BOOTH and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS AFFAIRS MEDICAL CENTER, North Chicago, Ill.

*Docket No. 98-1827; Submitted on the Record;
Issued May 4, 1999*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits as of April 26, 1998.

On January 26, 1997 appellant, a 46-year-old food service worker, injured her lower back when she fell and hit the middle of her back against a chair. Appellant filed a Form CA-1 claim for benefits based on traumatic injury on January 26, 1997, which the Office accepted for lumbar strain by letter dated March 10, 1997.

Appellant returned to duty without restrictions on January 27, 1997, and consulted Dr. Shakuntala P. Chhabria, Board-certified in psychiatry and neurology, on January 28, 1997. In a report dated January 28, 1997, Dr. Chhabria advised that appellant had "signs and symptoms" from an injury at work. He stated that appellant had been experiencing moderate to severe low back pain, and diagnosed a lumbosacral strain with no sciatica. Appellant returned to work, stopped working on February 4, 1997, and was reexamined on that date by Dr. Chhabria, who placed her off work until February 10, 1997.

Dr. Chhabria, in a report dated February 10, 1997, examined appellant, made findings on examination and stated that appellant continued to have low back pain, with no radicular symptoms but with a spasm across her back. Dr. Chhabria continued to treat appellant and submitted several updated medical reports. Appellant returned to work on light duty on March 24, 1997, until stopping work again on August 29, 1997. Appellant again returned to work on light duty on October 20, 1997.

Appellant subsequently submitted Forms CA-8 for continuing compensation dated November 7 and November 28, 1997, seeking total disability from October 12 to 25, 1997 and from October 30 through November 22, 1997.

In a letter to appellant dated December 9, 1997, the Office requested additional medical information in support of her claim. The Office, in a memorandum dated December 9, 1997, indicated that it would develop appellant's case as a recurrence claim.

In response to the Office's request, appellant submitted a November 14, 1997 report and a Form CA-20 dated November 26, 1997. In the Form CA-20, Dr. Chhabria indicated appellant had sustained a herniated disc at L5-S1.¹

By letters dated January 14, 1998, the Office, because it had only accepted a lumbar strain and had not received medical evidence from Dr. Chhabria explaining the relationship between her herniated disc at L5-S1 and her January 26, 1997 employment injury, scheduled a second opinion examination for appellant with Dr. Avi J. Bernstein, a Board-certified orthopedic surgeon. The Office requested that Dr. Bernstein review an attached statement of accepted facts and respond to several questions pertaining to whether appellant had a continuing disability due to the January 26, 1997 employment injury, and, if so, the approximate date on which he expected the disability to cease.

In a letter dated January 29, 1998, the Office indicated to appellant that it had accepted her recurrence claim.²

In a report dated January 29, 1998, Dr. Bernstein stated that appellant underwent a magnetic resonance imaging (MRI) scan on October 28, 1997 which revealed degenerative changes and a minuscule, almost imperceptible disc herniation. Dr. Bernstein advised that a CAT scan/myelogram dated November 6, 1997 was normal, except for some bulging of the L5-S1 disc, and lateralization to the left side. He found no evidence of nerve root compression or spinal stenosis. Dr. Bernstein advised that appellant's objective findings were not supportive of her subjective complaints, and he noted inconsistencies and significant exaggeration on her examination. He found that appellant was capable of performing full-time, full-duty work without restriction, that no further therapeutic modalities or diagnostic work-ups were indicated, and concluded that she was at maximum medical improvement.

In response to the Office's request of February 25, 1998, Dr. Bernstein submitted two follow-up statements which clarified his previously submitted opinion. When asked to explain how he arrived at the date appellant's employment-related injury had resolved, Dr. Bernstein replied that "these injuries typically take [six] weeks to improve to the extent that no significant care is required." Dr. Bernstein further stated that appellant's herniated disc was clinically insignificant and most likely related to her degenerative condition, and that her herniated nucleus pulposus did not correlate with her physical examination.

In a notice of proposed termination dated March 6, 1998, the Office advised appellant that the evidence of record established that she no longer had residuals from her January 26,

¹ Appellant underwent a computerized axial tomography (CAT) on November 6, 1997 which indicated a bulging disc at the L5-S1 level.

² In a follow-up letter dated February 25, 1998, the Office specifically stated that it had accepted her recurrence claim of November 6, 1997.

1997 employment injury. In a memorandum accompanying the notice, the Office indicated that it was relying on Dr. Bernstein's opinion that appellant's employment-related back condition had resolved, stating that he provided a thorough history of the condition and submitted a well-rationalized opinion concerning the relationship between her current medical condition and the January 26, 1997 employment injury. The Office stated that although Dr. Chhabria submitted objective medical evidence to support her current back condition, he failed to provide an explanation regarding the causal relationship between the results of her objective tests and her employment injury. The Office stated that appellant had 30 days in which to submit additional evidence or argument before finalizing its termination decision.

In response to the Office's notice of proposed termination, appellant submitted medical reports dated March 10 and March 26, 1998 from Dr. Chhabria. In his March 26, 1998 report, Dr. Chhabria provided a brief summary of appellant's current condition and stated that she did have findings consistent with a herniated disc, which had been documented by MRI and a myelogram. Dr. Chhabria noted on examination that appellant continued to have tender and stiff low back with diminished range of motion, and indicated she might require work hardening in order to return to normal strength.

In a decision dated April 9, 1998, the Office, relying on Dr. Bernstein's opinion, found that any residual disability appellant sustained as a result of the January 26, 1997 employment injury had resolved, and that appellant's entitlement to compensation should therefore be terminated as of April 26, 1998.

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits as of April 26, 1998.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ 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.⁴

In the present case, the Office based its decision to terminate appellant's compensation as of April 26, 1998 on the opinion of Dr. Bernstein, who found that appellant's objective findings were not supportive of her subjective complaints, and that appellant was capable of performing full-time, full-duty work without restrictions. Dr. Bernstein advised that an injury such as that sustained by appellant normally took six weeks to improve to the extent that "significant" care was no longer necessary, and opined that appellant's herniated disc, as revealed by diagnostic test results, was "clinically insignificant" and most likely related to her degenerative condition. Dr. Bernstein further opined that appellant's herniated nucleus pulposus did not correlate with her physical examination. The Board finds that Dr. Bernstein's opinion is in conflict with that of appellant's treating neurologist, Dr. Chhabria, which presented countervailing, probative medical

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *Id.*

evidence that appellant continued to have residual disability from her accepted January 27, 1997 employment injury. Dr. Chhabria's March 26, 1998 report summarized appellant's current condition and indicated that she continued to have findings consistent with a herniated disc, as manifested by MRI and a myelogram. Dr. Chhabria also noted on examination that appellant continued to have tender and stiff low back with diminished range of motion, and might need work hardening in order to return to normal strength. The Office therefore erred in ignoring that a conflict in the medical evidence existed when it issued its April 9, 1998 decision terminating benefits as of April 26, 1998. Accordingly, the Office's April 9, 1998 decision terminating benefits is reversed.

The decision of the Office of Workers' Compensation Programs dated April 9, 1998 is therefore reversed.

Dated, Washington, D.C.
May 4, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member