

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DORA A. GUTIERREZ and U.S. ENVIRONMENTAL PROTECTION
AGENCY, Denver, CO

*Docket No. 98-754; Submitted on the Record;
Issued February 7, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's wage-loss compensation effective January 5, 1997; and (2) whether appellant has met her burden of proof to establish that she is entitled to continuing compensation benefits on or after January 5, 1997.

The Board has carefully reviewed the case record and finds that the Office has failed to meet its burden of proof in terminating appellant's compensation effective January 5, 1997.

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.¹ 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 Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.³ To terminate authorization or medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

On February 13, 1990 appellant, then a 59-year-old secretary, filed a claim for a traumatic injury alleging that she sustained multiple injuries in the course of her employment when the elevator she was riding in fell from the sixth to the second floor. After a period of

¹ *Lawrence D. Price*, 47 ECAB 120 (1995).

² *Id.*

³ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁴ *Id.*

medical and factual development, the Office accepted her claim for multiple contusions, cervical and lumbar strains and post-traumatic stress disorder.

In a report dated July 1, 1993, submitted in response to the Office's request for an update on appellant's condition, Dr. Peter S. Quintero, a Board-certified neurologist and a treating physician, stated that examination had consistently revealed the presence of pain with palpation of the cervical spine and paraspinal muscle areas and decreased range of motion of the head and neck with lateral rotation and anterior flexion and extension, but added that the sensory examination had been normal. He diagnosed herniated cervical disc at C6-7, right carpal tunnel syndrome, lumbar strain and recurrent headaches complicated by post-traumatic temporomandibular dysfunction. Dr. Quintero concluded that appellant's persistent pain and symptoms were too great to allow her to work. In a follow-up report dated September 6, 1993, Dr. Quintero stated that appellant had reached physical maximum medical improvement, that her prognosis was poor and that she would not be able to return to any form of employment.

In a report dated August 24, 1993, Dr. Richard A. Cohn, appellant's treating psychiatrist, stated that appellant had reached psychological maximum medical improvement and agreed with Dr. Quintero that appellant's physical complaints prevent her from returning to work. He further stated that appellant's post-traumatic stress disorder is a chronic condition requiring continuing psychiatric treatment, although with decreased frequency. Dr. Cohn concluded that appellant was unlikely to ever be able to work again given her education, training, background and age.

On December 5, 1995 the Office referred appellant, a statement of accepted facts and a list of specific questions to Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon, for a complete medical evaluation. In a report dated April 5, 1996, Dr. Sabin reviewed the medical evidence of record and summarized the results of examinations and testing, noting that appellant had superficial tenderness on palpation and regional giving way, but no straight leg raising, Yeoman sign, Fabre sign, SI joint findings, Phalen's sign or Tinel's sign. He entered a diagnosis of "cervical lumbar strain perhaps superimposed upon a bulging C6-7 disc which in all likelihood, could be related to the elevator incident." Dr. Sabin further added:

"It should be noted that there are no objective findings for this which is the nature of the beast when it comes to strain symptoms. She does not have objective findings related to the C6-7 disc nor to the L4-5 stenosis which I noted on previous films, *i.e.*, she does not have a positive spinal Phalen's sign. As far as attributing present situations to the 1990 injury, since I cannot find good objective orthopedic neurologic findings, its really hard to answer [q]uestion [n]umber [t]hree as far as attributing it to the 1990 injury. Again, there are no good objective findings."

Dr. Sabin further stated that the best treatment for appellant was a self-directed exercise program, specifically pool treatment and recommended that she have a membership to a pool or health club. With respect to appellant's ability to return to work, Dr. Sabin stated:

"I have very severe reservations on this patient, however, ever returning to any type of work since she has not worked since 1990 and still complains of quite a bit of pain and shows some mild inorganic findings in her pain diagram as well as

her regional giving way and superficial tenderness that she will ever return back to work.”

In a September 27, 1996 supplemental report, submitted in response to the Office’s request for clarification, Dr. Sabin stated that he could not find any good orthopedic or neurologic objective findings attributable to the 1990 injury, “nothing that would explain the type of pain that she has, based on my physical examination, nor on the x-ray finding. I think that basically speaks for itself and, therefore, I cannot tell you anything that prevents her from doing her job, other than her own subjective complaints.”

As appellant’s claim was also accepted for post-traumatic stress disorder, the Office sought a psychiatric second opinion examination from Dr. William Dahlberg, a psychiatrist. In a report dated September 30, 1996, Dr. Dahlberg listed his findings on examination and diagnosed adjustment disorder with mixed emotional features attributable to the work injuries described in the statement of accepted facts. He concluded that at the time of his examination appellant was functioning psychologically quite well and that “from a strictly psychiatric point of view, this claimant could function reasonably well in a work environment.” In an October 29, 1996 follow-up report clarifying his earlier responses, Dr. Dahlberg stated that appellant currently had no disabling psychiatric residuals causally related to the work injury and that based on his findings and a review of appellant’s job description she would be able to perform appropriately without psychiatric restrictions.

Based on the medical evidence of record, the Office proposed to terminate appellant’s compensation benefits on November 8, 1996. The Office allowed appellant 30 days to submit additional evidence or argument. Appellant responded on November 30, 1996 and submitted a supplemental report from Dr. Quintero. In a December 5, 1996 report, Dr. Quintero stated that he had reviewed the reports of Drs. Sabin and Dahlberg and found their diagnoses to be incomplete. Dr. Quintero explained:

“This patient suffers from chronic neck pain secondary to a cervical strain injury as well as a bulging disc. This is superimposed on cervical arthritis which was exacerbated by her elevator accident. She also suffers from a right carpal tunnel syndrome. One of her main problems is lumbar spinal stenosis secondary to degenerative arthritis and a herniated lumbar disc. This too would be related to the elevator accident. This patient suffers from chronic muscular contraction headaches secondary to the cervical strain injury as well as a post-traumatic temporomandibular joint dysfunction which contributes to her headaches. Because of these multiple problems this patient has chronic constant ongoing pain. In spite of the fact that she does not have objective findings, the pain she is experiencing is very real. Because of this pain I feel that she is totally and completely incapacitated from working at this time.”

The Office terminated appellant’s wage-loss compensation, effective January 5, 1997, by decision dated December 11, 1996. Appellant requested an oral hearing before an Office representative and submitted additional medical evidence in support of her claim. In a decision

dated October 14, 1997, the Office hearing representative affirmed the December 11, 1996 decision terminating appellant's wage-loss compensation.⁵

With respect to the issue of appellant's psychiatric health, Dr. Dahlberg, the Office referral psychiatrist, provided detailed reports relying on the statement of accepted facts, as well as appellant's personal history and medical records, and concluded that while appellant continued to suffer residual adjustment disorder with mixed emotional features attributable to her accepted employment injuries, these residuals were not disabling and, from a psychiatric standpoint, appellant would be able to perform her job appropriately without psychiatric restrictions. The opinion of Dr. Cohn, appellant's treating psychiatrist, is essentially in accord with that of Dr. Dahlberg, in that he opined that appellant's post-traumatic stress disorder is a chronic condition requiring continuing psychiatric treatment and on the issue of disability, stated that it was appellant's physical, rather than psychiatric, complaints that would prevent her from returning to work.

With respect to appellant's physical conditions, however, the Board finds that there is a conflict in the medical evidence between Dr. Quintero, the employee's treating neurologist, and Dr. Sabin, the Board-certified orthopedic surgeon to whom the Office referred the case for a second opinion.

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."⁷ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁶

In this case, Dr. Sabin concluded that there were no objective orthopedic or neurologic findings sufficient to establish that appellant has any disabling residuals of her employment-related condition which would prevent her from performing her usual work. In contrast, Dr. Quintero, appellant's treating physician for her physical conditions, while conceding Dr. Sabin's point that appellant has few objective findings on examination, opined that appellant was nonetheless totally disabled for employment due to pain resulting from her accepted conditions. Therefore, as a conflict in medical opinion evidence remains unresolved, the Office failed to meet its burden of proof.⁷

⁵ Appellant's hearing, held on July 23, 1997, was presided over by hearing representative Joseph M. Perez. As Mr. Perez subsequently left the employment of the Office, however, appellant's case was reassigned to hearing representative Joe Baumgartner who issued the decision in this case.

⁶ *William C. Bush*, 40 ECAB 1064, 1075 (1989).

⁷ In view of the Board's disposition of the first issue, the issue of whether appellant has met her burden of proof to establish that she is entitled to continuing medical benefits on or after January 5, 1997 is moot and appellant's contentions on appeal, that the Office erred in declining to offer appellant a second hearing pursuant to the retirement of the hearing representative who presided at appellant's hearing, need not be addressed.

The decision of the Office of Workers' Compensation Programs dated October 14, 1997 is hereby affirmed, in part, and reversed, in part, and the case is remanded to the Office for action consistent with this decision.

Dated, Washington, D.C.
February 7, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member