

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DAISY P. PEARSON and DEPARTMENT OF THE ARMY,
U.S. ARMY TRAINING & DOCTRINE COMMAND, FORT BENNING, GA

*Docket No. 98-1692; Submitted on the Record;
Issued March 17, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's monetary compensation entitlement effective December 10, 1995 on the grounds that she had no further employment-related disability.

The Office accepted that on May 16, 1986 appellant, then a 44-year-old cook, sustained lumbosacral strain in the performance of duty.¹ Concurrent disability noted at that time included depression and mild mental retardation.² Appellant stopped work following the injury and was placed on the periodic rolls for receipt of compensation for temporary total disability.

By report dated February 23, 1989, Dr. Kishor Desai, a Board-certified psychiatrist, opined that most of appellant's depression "appears to have been [sic] resulted from her back injury that she sustained while performing usual job duties at her job on May 16, 1986." He noted that appellant was depressed with both endogenous and reactive features, which prevented her from returning to work. On June 7, 1990 Dr. Desai diagnosed adjustment disorder with mixed emotional features, low backache and psychological factors affecting appellant's physical condition.

On June 11, 1990 Dr. Thomas N. Bernard, Jr., a Board-certified orthopedic surgeon, completed a work restriction evaluation noting that appellant could work 8 hours per day at light duty with no lifting over 20 pounds.

¹ While carrying cans, appellant slipped on a broken-down box and fell in a storeroom, injuring her lower back, right hip and right leg. No emotional condition was accepted as a consequence of this injury.

² In a November 30, 1989 neuropsychiatric evaluation, Dr. Chester W. Jenkins, a Board-certified neuropsychiatrist, noted that appellant reported a history visual, auditory and tactile hallucinations, one incident of persecutory delusions and obsessions concerning her behavior, however, he failed to identify when these manifestations occurred. He diagnosed depression and mild mental retardation.

By report dated July 25, 1991, Dr. Desai noted that appellant was under his treatment for depression related to her back injury, that soon after her May 16, 1986 injury she stayed in a period of depression and numerous times experienced severe psychiatric distress requiring crises intervention. He diagnosed dysthymia (chronic depression), low back pain, and psychological factors affecting her physical condition and noted appellant's favorable response to medication. Dr. Desai opined that it was very clear that due to the back pain related to the injury sustained on May 16, 1986, appellant had remained in a state of depression "as this injury has left her with severe social and permanent disability, as far as her occupation is concerned."

By report dated September 11, 1991, Dr. Bernard opined that appellant's depression was as big of a problem as her orthopedic conditions and he opined that she might be psychiatrically disabled from her employment, but not orthopedically disabled.

By report dated February 25, 1993, Dr. Desai diagnosed an adjustment disorder with mixed emotional features "which was a result of [appellant's] back injury of May 16, 1986."

By report dated October 27, 1993, Dr. Derrick D. Phillips, a Board-certified orthopedic surgeon, examined appellant, noted that it was very difficult to carry out due to her lack of effort and opined that there was no objective evidence that she had any residual lumbar strain. Dr. Phillips noted that appellant's pain pattern was out of proportion to the original injury as reported and he opined that the soft tissue injury she sustained should have healed within a reasonable amount of time and would not have led to her current myriad pattern of complaints at this point. Dr. Phillips opined that appellant's current mental situation had a much greater influence on her present capabilities or lack of capabilities than any lumbar injury sustained several years before. He opined that appellant should have recovered from her lumbar muscular injury and Dr. Phillips doubted that the lumbar muscular injury had left her with any residual problems involving her back which would limit her ability to work and function.

On December 15, 1994 the Office referred appellant, with a statement of accepted facts, the relevant case record and questions to be answered, to Dr. George Zubowicz, a Board-certified psychiatrist, for a second opinion evaluation on whether appellant developed an emotional condition causally related to her 1986 accepted lumbosacral muscle strain injury.

By report dated January 9, 1995, Dr. Zubowicz, reviewed appellant's history, performed a complete psychological examination, noted that it revealed normal perception and intellection, normal thought process and content, normal affect and mood, intact insight and judgment and the ability to conduct normal daily activities and he diagnosed dysthymic disorder, by history, now in substantial remission. Dr. Zubowicz recommended that appellant continue on her anti-depressive maintenance medication of Prozac and Mellaril. Attached to the narrative report was an addendum directly addressing the Office's first question, noting that appellant's "psychiatric condition [was] not directly related to her 1986 back injury."

By report dated March 31, 1995, Dr. J. Kenneth Burkus, a Board-certified orthopedic surgeon and appellant's treating physician, noted appellant's complaints of localized low back pain intermittently radiating into her buttocks, he performed an examination and reported that she had no palpable muscle spasm, that she had full and unrestricted range of back motion, that she was neurologically intact without focal deficits, that motor strength and deep tendon reflexes

were symmetric, that sensation was intact and that toes were downgoing without evidence of clonus. Dr. Burkus did note, however, that appellant did have symptoms of symptom magnification with positive Waddell's signs. He opined that appellant could return to work without restrictions.

A May 11, 1995 report from Dr. Kenneth Barngrover, an osteopath, noted that appellant was not experiencing back or other pain at the time of that examination; he diagnosed chronic lumbar neuritis, chronic lumbar muscle spasm and sciatica by history.

By report dated December 4, 1995, Dr. Desai, noted that appellant was seen for depression related to her 1986 back injury, that it was very clear that due to the back pain related to the 1986 injury, she has remained in a state of depression as this injury had left her with severe social and permanent disability. He noted that appellant was severely depressed, in a chronic state of depression with periods of exacerbation and remission and that her psychological condition prevented her from returning to any kind of work; he opined that appellant would likely remain permanently disabled.

By report dated February 16, 1996, Dr. Barngrover noted that he had treated appellant for a persistent chronic pain syndrome characterized by low back and leg pain from her 1986 injury.

On June 19, 1995 the Office issued appellant a notice of proposed termination of compensation finding that Dr. Phillips, the Office second opinion specialist, found no objective evidence upon examination that appellant had any residuals of her lumbar muscular strain injury, that her pain pattern was out of proportion to the injury, that her soft tissue injury should have healed within a reasonable amount of time and that such an injury would not lead to the myriad of complaints appellant now manifested. Dr. Phillips opined that he doubted that appellant's lumbosacral soft tissue muscular strain injury had left her with any residual problems involving her back that would limit her ability to work.

The Office further noted that appellant's own treating physician, Dr. Burkus, had opined on March 31, 1995, that she had no objective findings of injury residuals, but that she did manifest symptoms of symptom magnification with positive Waddell's signs and that he opined that appellant could return to work without restrictions.

The Office additionally noted that Dr. Zubowicz, after reviewing the statement of accepted facts, the complete case record and the questions to be answered and after conducting a thorough psychiatric examination and evaluation, opined that appellant's psychiatric condition was not directly related to her 1986 back injury.

The Office, therefore, found that appellant had no further orthopedic disability due to her 1986 lumbosacral soft tissue muscular strain injury and that her psychiatric condition was not causally related as a consequential injury to her 1986 muscular strain.

Appellant responded to the notice of proposed termination in an undated letter, which stated that she was still disabled, that she required medication every day, that she had pain every day, that she relied on a heating pad and a hot tub for her back and legs and that she was not able

to return to any kind of work physically or mentally. In support of her arguments, appellant submitted medical reports from 1991 and 1992 which were already of record.

By decision dated November 30, 1995, the Office finalized the termination of appellant's compensation finding that she did not provide any current medical evidence or argument to refute the findings of Drs. Burkus, Phillips and Zubowicz.

By letter dated December 5, 1995, appellant requested reconsideration and in support she submitted two medical reports previously submitted to the record and considered by the Office. Also submitted was a December 4, 1995 report from Dr. Desai, which restated his opinions first offered in his report dated July 25, 1991, which noted that it was very clear that due to the back pain related to the 1986 injury she had remained in a state of depression, which left her with severe social and permanent disability. Dr. Desai opined that appellant's current psychiatric problems were clearly related to her back injury.

By decision dated January 11, 1996, the Office denied modification of the November 30, 1995 decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that the evidence was duplicative of that already of record.

Appellant requested a hearing through the office of her Congressional representative and by letter dated February 28, 1996, the Office advised her that, following reconsideration under section 8128, she was only entitled to request reconsideration by the Office or to request an appeal before the Board. Appellant's appeal rights were attached.

By letter dated October 24, 1996, appellant through her representative, requested reconsideration. Appellant's representative argued that appellant had established that she developed an emotional condition as a consequence of her 1986 lumbosacral strain injury and that she was still totally disabled due to that condition. In support, appellant's representative submitted an August 31, 1998 report from Dr. Desai, which noted that appellant sustained a permanent injury to her back and that, thereafter, she developed various psychiatric symptoms. He did not provide a rationalized discussion of causal relation. Appellant's representative also summarized Dr. Desai's sworn statement, claiming that the anxiety, depression and stress associated with coping with chronic pain actually caused appellant's perceived pain to increase, which resulted in a vicious cycle with the pain causing anxiety and depression and which caused increased pain. The addendum to Dr. Zubowicz's report dated January 9, 1995 was also submitted.

By decision dated January 28, 1997, the Office denied modification of the January 11, 1996 decision, finding that the evidence and argument submitted in support was insufficient to warrant modification. The Office found that Dr. Desai's opinions were not based upon a complete and accurate history, noting that Dr. Desai reported that appellant stayed home unable to do things for herself, yet the record supported that she worked as a volunteer cooking for her church, she tended plants as a hobby and cooked, cleaned, washed and grocery shopped for herself and that she walked on a daily basis, attended church, visited with her mother and received visits from her friends. The Office found that when a physical injury no longer had any physical effect, any persisting psychiatric disorder could not continue to be related to it, but must be considered to be related to an underlying, possibly preexisting problem.

By letter dated January 26, 1998, appellant through her representative, requested reconsideration and in support argued that Dr. Zubowicz's reports were not entitled to any weight. The representative also submitted a statement from Dr. Desai, which claimed that the "allegations" contained in the Office's January 28, 1997 decision regarding appellant's activities did not effect his opinions as stated in his sworn statement and a report dated December 1, 1987, from Dr. Jagdish R. Sidhpura, a Board-certified neurologist, which diagnosed chronic uncontrolled low backache and right facial twitching, but which did not discuss causal relation.

By decision dated February 5, 1998, the Office denied modification of the January 28, 1997 decision, finding that the evidence submitted in support was insufficient to warrant modification. The Office found that since appellant had no objective physical findings, no basis for an emotional condition due to that physical injury existed. The Office also noted that Dr. Sidhpura's report was irrelevant to the termination of appellant's compensation and that Dr. Desai's addendum was irrelevant as the fact that an emotional condition arose out of appellant's accepted physical injury had not been substantiated.

The Board finds that the Office properly terminated appellant's monetary compensation entitlement effective December 10, 1995 on the grounds that she had no further employment-related physical disability, but finds that there is a conflict in the medical evidence as to whether appellant's 1986 lumbosacral soft tissue muscular strain injury precipitated development of an emotional condition.

Once the Office accepts a claim, it has the burden of justifying 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

The Office met that burden with the reports of both appellant's treating physician and the Office second opinion specialist.

In this case, appellant's own treating physician, Dr. Burkus, noted that appellant had no objective signs or symptoms related to her 1986 lumbosacral strain injury, indicating that she had no palpable muscle spasms, that she had full and unrestricted range of back motion, that she was neurologically intact without focal deficits, that motor strength and deep tendon reflexes were symmetric, that sensation was intact and that toes were downgoing without clonus. He opined that appellant had symptoms of symptom magnification with positive Waddell's signs and that appellant could return to work without restrictions. Therefore, appellant's own treating physician's report does not support that she had any continuing disability, causally related to her 1986 lumbosacral soft tissue muscular strain injury.

³ *Harold S. McGough*, 36 ECAB 332 (1984); *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812, para. 3 (March 1987).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

The Office second opinion specialist, Dr. Phillips, further noted that appellant demonstrated a lack of effort in testing and opined that there was no objective evidence that she had any residual lumbar strain. He noted that appellant's pain pattern was out of proportion to the original injury and that the soft tissue injury should have healed within a reasonable amount of time following the 1986 injury and he opined that she should have recovered from her injury without any residual problems.

As both appellant's treating physician and the Office second opinion specialist opined that appellant had no continuing disability causally related to her 1986 soft tissue muscle strain injury and because no other physician of record provided rationalized medical evidence reporting any continuing injury-related objective symptomatology or disability, the weight of the medical evidence clearly supports that appellant had recovered from her 1986 lumbosacral strain injury.⁵

Accordingly, the Office properly terminated appellant's compensation entitlement on that basis.

The Board further finds that the case is not in posture for decision regarding whether appellant developed an emotional condition as a consequence of her 1986 accepted lumbosacral soft tissue muscular strain injury.

In several reports, Dr. Desai clearly supports appellant's contention that she developed an emotional condition, at least in part consequential to her May 16, 1986 lumbosacral strain injury. However, the Office referral physician, Dr. Zubowicz, after reviewing the statement of accepted facts and the relevant case record opined that appellant's psychiatric condition was not related to her 1986 lumbosacral strain injury.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "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."

Therefore, the case must be remanded so that the Office may refer appellant, together with the case record and a statement of accepted facts, to an appropriate Board-certified psychiatric specialist for an examination and a rationalized medical opinion to resolve the medical conflict regarding whether or not appellant developed an emotional condition as a consequence of her 1986 lumbosacral soft tissue muscular strain injury which had completely resolved by December 10, 1995.

Consequently, the decision of the Office of Workers' Compensation Programs dated February 5, 1998 is affirmed in part with respect to the termination of compensation due to the resolution of her lumbosacral muscular strain injury, but is set aside in part with respect to whether or not appellant developed an emotional condition as a consequence of her 1986

⁵ Dr. Barngrover, an osteopath, merely conclusorily stated that he treated appellant for persistent chronic pain syndrome from her 1986 injury. No medical rationale was presented, and no objective evidence was identified and the Board notes that chronic pain syndrome was not an accepted injury-related condition.

lumbosacral strain injury, which resolved completely by December 10, 1995, and the case is remanded for further development in accordance with this decision of the Board.

Dated, Washington, D.C.
March 17, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member