

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JANISE R. SWEATMON and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Lanham, MD

*Docket No. 00-846; Submitted on the Record;  
Issued March 14, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, A. PETER KANJORSKI,  
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective July 7, 1999 on the grounds that she had no disability due to her September 28, 1998 employment injury after that date;<sup>1</sup> (2) whether the Office properly found that appellant failed to meet her burden of proof to establish that she sustained an emotional condition in the performance of duty; (3) whether the Office properly denied appellant's request for reimbursement for the services of a personal attendant; and (4) whether the Office properly denied appellant's request for a hearing.

On September 28, 1998 appellant, then a 36-year-old secretary, aggravated a nonwork-related back injury while moving and lifting office materials. She filed a claim for benefits on October 23, 1998, which the Office accepted on December 22, 1998 for temporary aggravation of preexisting cervical and lumbar strains. Appellant received continuing compensation for temporary total disability from the Office, which placed her on the periodic rolls.

In a report dated March 2, 1999, appellant's attending physician, Dr. Hampton J. Jackson, a Board-certified orthopedic surgeon, advised the Office that appellant was not fit for any type of employment based on his most recent examination of February 19, 1999.

In handwritten letters dated March 4 and 8, 1999, appellant advised the Office that she was experiencing financial problems which caused her emotional stress. She requested reimbursement for the services of a personal attendant, which she claimed she needed to deal with her work-related disabilities and several personal problems. Appellant stated that due to her September 18, 1998 employment injury, she has had to rely on the services of her relatives to

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<sup>1</sup> Following the Office's April 29, 1999 denial of her claim based on an alleged emotional condition, appellant submitted a second emotional condition claim, which was pending before the Office during this appeal.

perform necessary household duties and care for her child, all of which resulted in emotional stress.

In a report dated March 23, 1999, Dr. Jackson stated that appellant still had significant symptoms in her back and neck. He advised that she had made some improvement with rest and physical therapy measures since her injury, but that the progress had only been fair, with a guarded prognosis. Dr. Jackson also indicated appellant had post-traumatic stress disorder.

By letter dated March 25, 1999, the Office advised appellant that she needed to submit medical evidence indicating that she continued to have residuals from her accepted September 28, 1998 employment injury and that she needed to submit additional information indicating how she sustained an emotional condition resulting from the accepted employment injury.

By letter dated March 25, 1999, the Office asked Dr. Jackson to explain how appellant's September 28, 1998 employment injury was causing her current disability, specify the aspects of her lumbar and cervical conditions which prevented her from returning to her employment and stated whether she had any residuals of the employment injury.

On March 26, 1999 the Office referred appellant for a second opinion examination with Dr. Harvinder S. Pabla, a Board-certified orthopedic surgeon. In his April 12, 1999 report, Dr. Pabla, after reviewing the statement of accepted facts, the medical records and his findings on examination, advised that appellant had sustained minor trauma at work on September 28, 1998, resulting in lumbar muscle strain, and opined that she had reached the point of maximum medical improvement. He stated:

“[Appellant's] vague, subjective complaints are associated with a normal examination of the cervical, thoracic and lumbar spine. Above all the neurological examination is intact. There is no evidence of cervical radiculopathy. Multiple Waddell's sign[s] for symptom magnification are positive. With a reasonable degree of medical certainty I do not feel her current problem is affiliated with her moving file folders and office boxes on September 28, 1998. [Appellant] is able to work and perform the duties of her normal occupation, secretary, without any limitation or restrictions.”

By decision dated April 29, 1999, the Office denied appellant benefits based on an emotional condition. The Office found that appellant failed to submit evidence sufficient to establish a causal relationship between her accepted September 28, 1998 work injury and her alleged emotional condition. The Office also denied appellant's request for an attendant's allowance.

On May 3, 1999 the Office issued a proposed notice of termination of compensation to appellant. The Office found that Dr. Pabla's report constituted the weight of the medical evidence, and stated that appellant's attending physician, Dr. Jackson, had failed to provide sufficient support for his opinion that appellant's current condition was causally related to the accepted work injury in his responses to the Office letter requesting clarification. The Office

allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

Appellant submitted reports dated April 6 and May 7, 1999 from Dr. Jackson. In his April 6, 1999 report, Dr. Jackson advised that appellant had significant findings in her lower back. He noted significant spasms, with strong evidence of significant tearing of the ligaments in the iliolumbar and sacroiliac areas. Dr. Jackson stated:

“It is my impression, indeed, that the findings in the lower back are completely related to the injury of [September 28, 1998]. There are still some findings in the neck and shoulders, however, and it is my impression that these areas are totally related to a preexisting condition, which occurred on May 16, 1998. In other words, the aggravation which occurred on September 28, 1998 of the cervical dorsal areas has now resolved.”

In his May 7, 1999 report, Dr. Jackson stated:

“We have a complex of conditions here and a terrible cycle. She has continuing pain in the back and buttock areas with continuing findings on x-ray. This seems to aggravate her anxiety level. She has had some difficulties in the past not only since her injury but also some difficulties at work in a stress type situation even before her injury. The injury has aggravated the problem.

“This is a difficult case. We have a combination of a patient injured on the job, unable to work and considerable stress associated with this type of injury such [as] financial responsibilities, family responsibilities, which have caused a significant depression associated with the stress. The only hopeful way of treating [appellant] is treating the entire patient; treat her [orthopedic] injury as well as her psychological sequela in order to successfully [treat] this patient and keep her at gainful employment.... We will await word from her psychologist. She is not fit to work at this time. Therapy is helping slowly. She is to continue with therapy until I see her [again] in three weeks.”

By decision dated June 7, 1999, the Office terminated appellant’s compensation.

In a letter received by the Office on September 13, 1999, appellant requested an oral hearing. By decision dated October 28, 1999, the Office denied appellant’s request for a hearing as untimely.

The Board finds that appellant has not established that she sustained an emotional condition in the performance of duty.

To establish that an emotional condition was sustained in the performance of duty there must be factual evidence identifying and corroborating employment factors or incidents alleged to have caused or contributed to the condition, medical evidence establishing that the employee

has an emotional condition, and rationalized medical opinion establishing that compensable employment factors are causally related to the claimed emotional condition.<sup>2</sup>

In this case, appellant has submitted no factual evidence to support her claim that she sustained an emotional condition caused by factors of her federal employment. While Dr. Jackson diagnosed post-traumatic stress syndrome, he is an orthopedic surgeon, not a psychiatrist or licensed psychologist. Further, he provides no discussion on any causal connection between appellant's emotional condition and employment factors. Appellant may be experiencing stress and anxiety, but there is no evidence that packing her personal effects and moving boxes on September 28, 1998 caused this condition. The Board therefore finds that appellant has failed to establish that she sustained an emotional condition while in the performance of duty.

The Board finds that the Office acted within its discretion by denying appellant's request for reimbursement for the services of a personal attendant.

Section 8103 of the Federal Employee's Compensation Act<sup>3</sup> provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.<sup>4</sup> In interpreting this section of the Act, the Board has recognized that the Office has broad discretion in approving services provided under the Act. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness.<sup>5</sup>

Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.

In this case, the Office accepted that appellant sustained lumbar and cervical strains in the performance of duty. In her March 8, 1999 letter, appellant claimed she needed the services of an attendant because of the difficulties caused by her work-related disabilities and several personal problems.

Appellant produced no evidence that her disability prevented her from performing essential life functions such as bathing, eating or dressing. While she was staying with her mother, who cared for her son, appellant did not allege that she required her mother's help in

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<sup>2</sup> See *Debbie J. Hobbs*, 43 ECAB 135 (1991).

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

<sup>4</sup> 5 U.S.C. § 8103.

<sup>5</sup> *Daniel J. Perea*, 42 ECAB 214 (1990).

carrying for herself. Further, there is no medical documentation that appellant needed such help because of her disability. Accordingly, the Office did not abuse its discretion in denying reimbursement for a personal attendant.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>6</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>7</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

In this case, there was disagreement between Dr. Pabla, the second opinion physician, and Dr. Jackson, appellant's treating physician, as to whether appellant still had residual disability stemming from her accepted neck and back conditions. Dr. Jackson advised the Office in his March 2, 1999 report that appellant was not fit for any type of employment, based on his most recent examination of February 19, 1999. He stated in his March 23, 1999 report that she still had significant symptoms in her back and neck, and indicated that she had made only partial improvement in her work-related conditions.

In his April 6, 1999 report, Dr. Jackson advised that appellant still had significant findings in her lower back, although he believed that the aggravation of her cervical condition, which occurred on September 28, 1998 had resolved. He noted significant lower back spasms, with strong evidence of significant tearing of the ligaments in the iliolumbar and sacroiliac areas, and opined that the findings in her lower back were completely related to the September 28, 1998 employment injury. Finally, in his May 7, 1999 report, Dr. Jackson noted that appellant had continuing pain in the back and buttock areas with continuing findings on x-ray.

By contrast, Dr. Pabla reported a normal examination of the cervical, thoracic and lumbar spine and stated that appellant's neurological examination was intact. Noting positive signs of symptom magnification, he opined that she was able to work without restrictions and that her current problem was not related to her work injury.

Due to this variance of opinion regarding the issue of whether appellant had any residual disability causally related to the September 28, 1998 work injury, the Board finds that a conflict in medical opinion existed between these two physicians prior to the Office's termination of appellant's compensation on June 7, 1999. Such a conflict requires a referral to an impartial medical specialist pursuant to section 8123(a).

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<sup>6</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

<sup>7</sup> *Id.*

<sup>8</sup> *See Mary Lou Barragy*, 46 ECAB 781 (1995); *see also Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

When such conflicts in the medical opinion arise, the Office is required to appoint a referee physician, also known as an impartial medical examiner, to resolve the conflict. The Office failed to do so in this case.

The Board finds that because the Office relied on the opinion of Dr. Pabla to terminate appellant's compensation without having resolved the existing conflict, the Office has failed to meet its burden of proof in terminating appellant's benefits on the grounds that she had no employment-related residuals.<sup>9</sup>

The June 7, 1999 decision of the Office of Workers' Compensation Programs is reversed and the Office's April 29, 1999 decision is affirmed.<sup>10</sup>

Dated, Washington, DC  
March 14, 2001

David S. Gerson  
Member

A. Peter Kanjorski  
Alternate Member

Priscilla Anne Schwab  
Alternate Member

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<sup>9</sup> *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 921 (1989).

<sup>10</sup> In view of the Board's disposition of this case, the issue of the Office's denial of appellant's request for an oral hearing is moot.