

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CHERYL E. VANCE and U.S. POSTAL SERVICE,  
POST OFFICE, Dallas, TX

*Docket No. 02-1373; Submitted on the Record;  
Issued May 6, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation effective July 20, 2001 on the basis that her injury-related disability had ceased.

On July 12, 2000 appellant, a 39-year-old flat sorting machine operator, sustained a traumatic injury to her lower back while in the performance of duty. She stopped work the day of her injury. The Office accepted appellant's claim for lumbar strain and paid appropriate wage-loss compensation.<sup>1</sup>

On January 25, 2001 appellant's treating physician, Dr. Benigno V. Buentipo Jr., completed a work capacity evaluation (Form OWCP-5) indicating that appellant was capable of resuming limited-duty work starting at four hours per day and progressing to eight hours a day over a four- to eight-week period.

On February 16, 2001 the employing establishment offered appellant a limited-duty assignment as a modified flat sorting machine operator, which appellant accepted on February 26, 2001.

Appellant returned to work on March 12, 2001 in a part-time, limited-duty capacity. On May 1, 2001 Dr. Buentipo released appellant from his care and indicated that she could immediately return to her full duties without restrictions.

In a decision dated July 20, 2001, the Office found that appellant was no longer disabled due to her accepted work injuries. The Office terminated appellant's wage-loss compensation.<sup>2</sup>

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<sup>1</sup> Appellant was placed on the periodic compensation roll effective December 3, 2000.

<sup>2</sup> The Office issued a notice of proposed termination of compensation on May 14, 2001.

Appellant requested reconsideration on three occasions. In each instance, the Office reviewed the claim on the merits and denied modification. The Office issued its most recent decision denying modification on March 13, 2002.

The Board finds that the Office improperly terminated appellant's wage-loss compensation effective July 20, 2001.

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>3</sup> Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>4</sup>

In the instant case, the Office terminated wage-loss compensation effective July 20, 2001 based on evidence that appellant's then-treating physician, Dr. Buentipo, released her to resume her full-time duties without restriction effective May 1, 2001. Appellant contends that Dr. Buentipo released her to return to her full duties because she requested him to do so and not because she was capable of resuming her regular duties. Appellant indicated that she requested a release from Dr. Buentipo's care because she was dissatisfied with the treatment she had received and wanted to obtain a second opinion, particularly in light of the pain she had been experiencing in her left leg. Appellant also stated that she was advised that she needed to obtain a release from Dr. Buentipo before she could change physicians.

In a letter dated October 26, 2001, Dr. Buentipo stated that "[appellant], at her request, was released by me to return to work full duty on [May 1, 2001]." In an earlier report dated May 7, 2001, Dr. Buentipo stated that when he last saw appellant on May 1, 2001 she complained that she had not improved at all from all the therapy she had received and wanted a change of treating physicians. He further stated that appellant telephoned on May 3, 2001 to advise him that she had chosen Dr. Pierre Harding, as her new treating physician and, therefore, she was given a release to her new physician. Dr. Buentipo also stated that he notified appellant's case manager, Patricia Brown.

In a nursing progress report for the period April 7 to May 7, 2001, Ms. Brown reported the substance of a May 1, 2001 telephone conversation with Dr. Buentipo. Ms. Brown noted the following:

"Reportedly, [Dr. Buentipo] attempted to return the [appellant] to 8 hours of *restricted* work. The [appellant] did not want to return to work stating her symptoms were too great. Dr. Bueneito (sic) informed the [appellant] she needed to try to work 8 hours. All her diagnostic testing was negative and she had been through a lot of therapy/work hardening programs. The [appellant] left the office angry stating she desired a new treating physician. Dr. Bueneito (sic) informed me he planned to fax a full duty work release for the [appellant]. He relayed he has done everything he knew to do for her. Also, Dr. Bueneito (sic) informed me

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<sup>3</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>4</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

the [appellant] had positive Wadell signs. This would be included in the office note he would fax me.” (Emphasis added).

Ms. Brown’s progress report also noted that Dr. Buentipo had previously advised appellant on April 10, 2001 to continue working only four hours per day and that he anticipated increasing appellant to six-hour workdays at her next appointment. Thus, at the time of appellant’s May 1, 2001 appointment, she had not yet begun working six-hour days as initially projected by Dr. Buentipo in his January 25, 2001 Form OWCP-5.

It appears that, but for appellant’s request, Dr. Buentipo would not have released her to return to her regular duties on May 1, 2001. He indicated in his October 26, 2001 letter, that he released appellant to return to work full duty “at her request.” Ms. Brown’s progress report also supports this conclusion in that she noted that “[Dr. Buentipo] attempted to return the [appellant] to 8 hours of *restricted* work” on May 1, 2001 but appellant objected and requested a release. (Emphasis added). Furthermore, there is no apparent explanation in the record for Dr. Buentipo’s transition from four hours of restricted duty to eight hours of unrestricted work over a period of approximately three weeks. Absent from Dr. Buentipo’s May 7, 2001 narrative report is any mention of appellant’s ability to resume her regular duties or that she had been released to perform such duties. Dr. Buentipo only referenced that he had released appellant to a new treating physician on May 3, 2001.

The medical evidence the Office relied upon in support of its decision to terminate appellant’s wage-loss compensation does not clearly establish that appellant was in fact capable of resuming her former duties as of May 1, 2001. Accordingly, the Office failed to meet its burden to justify termination of benefits.<sup>5</sup>

The March 13, 2002 decision of the Office of Workers’ Compensation Programs is hereby reversed.

Dated, Washington, DC  
May 6, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member

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<sup>5</sup> *Curtis Hall*, *supra* note 3.