

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of [REDACTED] and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Dallas, Tex.

*Docket No. 97-1502; Submitted on the Record;  
Issued April 9, 1999*

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DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's wage-loss compensation benefits effective April 27, 1996.

The Board has duly reviewed the case record and finds that the medical evidence of record supported the Office's finding that appellant was no longer disabled as of February 6, 1996. The Board also finds that the case is not in posture for decision regarding whether appellant's L2-3 disc condition is causally related to her accepted employment injury.

In the present case, the Office has accepted that appellant, a teleservice contact representative, fell on April 1, 1994 in the performance of her federal employment and sustained contusions to the left knee, right hip and left brow; lumbar strain and L4-5 herniated disc.<sup>1</sup> Appellant underwent an L4-5 laminectomy on February 28, 1995, which the Office also accepted was causally related to the employment injury.

On April 26, 1996 the Office terminated appellant compensation benefits effective April 27, 1996 on the grounds that the medical evidence of record established that the injury-related disability ceased as of February 6, 1996, the date Dr. Anthony P. Reese provided work restrictions consistent with the position held at the time of injury. The Office denied modification of the prior decision, after merit review, on February 6, 1997.

On June 5, 1995 Dr. Mark D. Erasmus, appellant's treating physician Board-certified in neurosurgery, reported that he would return appellant's medical care to Dr. Reeve as he expected appellant to reach maximum medical improvement within the next four to six weeks. Dr. Erasmus opined that it was likely that after he worked with appellant during the next four to

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<sup>1</sup> The record indicates that appellant has also received medical treatment for a cervical condition. Appellant has not claimed that she sustained a cervical condition in the performance of her federal employment.

six weeks, that she could return to her previous occupation as a teleservice representative. He noted that it would be helpful if appellant could change positions frequently during work, if not, he stated that a work hardening program could be tried and if that failed a functional capacity evaluation could be performed to determine appellant's ability to return to any sort of future work.

In a report dated July 12, 1995, Dr. Reeve noted that appellant did not believe she was capable of returning to work, however, he believed appellant would probably be able to perform light to sedentary work. He noted that appellant had difficulty with long-term ambulating, sitting and standing. Dr. Reeve stated that he had requested that appellant undergo a functional capacity evaluation, but that appellant had stated that she was not capable of paying for this and had refused to undergo the examination. On August 28, 1995 he prepared a progress note wherein he indicated that appellant had reached maximum medical improvement as of that date. Dr. Reeve noted that appellant was status post spinal stenosis with decompression and that appellant's physical examination was not remarkably changed. He noted that appellant continued to have pain and tenderness in the lumbosacral spine, radiating to the legs and that appellant was limited in sitting and standing and overall ADL activities. On February 6, 1996 Dr. Reeve completed a work capacity evaluation form wherein he indicated that appellant could work eight hours a day, with limited kneeling, standing, bending and twisting and no lifting over 20 pounds. He stated that maximum medical improvement had been reached on September 11, 1995.

Appellant was again seen by Dr. Erasmus on March 20, 1996. At this time he noted that appellant had stated that her right leg was not much better after her surgery. He commented that he had not studied appellant postoperatively because of her previous seeming success. Dr. Erasmus stated that he would now obtain a magnetic resonance imaging (MRI) scan to assess her lumbar spine. On March 28, 1996 he noted that a repeat MRI scan showed a L2-3 disc rupture, at the lower aspect of the laminectomy site. Dr. Erasmus noted that this was a new finding since her previous MRI scan. He also explained that as appellant had not had any episode since her surgery which would suggest that she ruptured a disc, he would have to assume that this disc rupture had occurred before the surgery, but that he had not looked at this disc at the L2-3 level at the time of surgery. Dr. Erasmus concluded that this condition was a progression from her previous back injury, in view of the fact that the surgery had not helped her. He did not comment in this report whether appellant was disabled.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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 injury related condition or disability has ceased or that it is no longer related to the employment.<sup>2</sup>

At the time of her injury, appellant was employed as a teleservice representative. The position description for this position indicates that the physical demands are primarily sedentary. The medical evidence from appellant's own physicians, Drs. Erasmus and Reeve supports the

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<sup>2</sup> *Patricia A. Keller, 45 ECAB 278 (1993).*

Office's determination that appellant was no longer disabled from this position as of February 6, 1996. Dr. Erasmus returned appellant to Dr. Reeve's care in June 1995 commenting that with four to six weeks of conservative care appellant could probably be returned to work status. On July 12, 1995 Dr. Reeve noted that while appellant believed she was unable to return to work, appellant would probably be able to perform light or sedentary work. On February 6, 1996 he completed a work restriction evaluation wherein he indicated that appellant could work 8 hours a day, with restrictions and no lifting over 20 pounds. On May 20, 1996 Dr. Reeve noted that appellant had a diagnosis of spinal stenosis and had undergone surgical decompression. He noted that appellant had stated that she could not sit at all and that she had limited standing tolerances. Dr. Reeve noted that to determine exactly what appellant's tolerances were, he could order a functional capacity evaluation, however, appellant had refused to do this. He noted that appellant's physical examination had not changed remarkably and his overall opinion had not significantly changed. Dr. Reeve concluded that although appellant had reported that because she was released to light duty her entire workers' compensation claim had been denied, he did not fully understand this and his impression remained that appellant remained at a light-duty status. On May 20, 1996 he completed a work restriction evaluation wherein he indicated that appellant could work 8 hours a day at light duty, with no lifting over 10 pounds.

The Office found that as of Dr. Reeve's February 6, 1996 work evaluation, appellant was able to return to her former sedentary employment. The Office terminated appellant's compensation benefits effective April 27, 1996. The Board finds that appellant's treating physician's opinions regarding her ability to return to work were not ambiguous and clearly supported appellant's ability to perform sedentary work as of February 6, 1996. Furthermore, there is no medical opinion of evidence that appellant could not perform her former work duties as of the date the Office terminated wage-loss benefits. The Office thus did meet its burden of proof in this case to terminate appellant's wage-loss benefits.

The Office also received additional reports from Dr. Erasmus and Dr. Thomas G. Cohn, Board-certified in physical medicine and rehabilitation, documenting appellant's L2-3 disc condition, which had not been accepted by the Office as causally related to the employment injury. The medical evidence of record from Drs. Erasmus and Cohn submitted in 1996 suggests that appellant's L2-3 disc condition was causally related to appellant's accepted injury. While neither Drs. Erasmus nor Cohn related that appellant's L2-3 disc condition caused disability, they did note a progression of the condition and a need for further medical evaluation and treatment.

On September 11, 1996 Dr. Cohn reported that he had evaluated appellant on that day for continued low back pain. Dr. Cohn stated that appellant had spondylosthesis with fusion and decompression at the L4-5 level, secondary to a work-related fall; and that appellant currently had a herniated disc at the L2-3 level. He stated that he had reviewed x-rays and MRI scans. Dr. Cohn stated that appellant's April 19, 1994 x-rays showed no significant problems at the L2-3 level, but did show changes at the L4-5 level. Further, he noted that an MRI scan on June 19, 1994 showed slight bulging at L2-3. Also Dr. Cohn stated that x-rays of February 27, 1995 showed slight loss of L2-3 disc space. He commented that there was a difference between appellant's April 19, 1994 and February 27, 1995 x-rays at the L2-3 level. Dr. Cohn concluded

that appellant had an active lumbar radiculopathy at the L2-3 level and a herniated disc at this level. He explained that at the time of her original injury, the fall probably had sufficient force to cause a tear of the annulus at the L2-3 level. Dr. Cohn stated that it was normal that the original x-rays showed no loss of disc space as everyday activities such as coughing, using the bathroom, occasional bending and sitting caused sufficiently increased pressure in the lumbar spine to subsequently slowly herniate the disc. He noted that subtle changes were apparent on the first MRI scan and that on x-rays prior to surgery indicated developing difficulties. With further changing of the mechanics with fusion, he explained that increased load was further added to the higher segments and appellant then probably further herniated the disc. Dr. Cohn noted that Dr. Erasmus performed surgery at the appropriate level initially and there was no indication initially that there were difficulties at a lighter level. He did not comment as to appellant's disability status.

It is well established that proceedings under the Federal Employees' Compensation Act are not adversarial in nature, and while the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence.<sup>3</sup>

Dr. Erasmus has now generally supported that appellant's L2-3 disc condition was causally related to the accepted injury. Dr. Cohn has offered an explanation of the causation of appellant's L2-3 disc condition, premised upon an assumption that appellant sustained a tear of the annulus as a result of the accepted injury. He did not fully explain how he had concluded that appellant had sustained such a tear at that time. Therefore, while the reports from Drs. Erasmus and Cohn are not entirely sufficient to meet appellant's burden of proof to establish her claim, they raise an uncontroverted inference between appellant's claimed L2-3 condition and the accepted employment injury, and are sufficient to require the Office to further develop the medical evidence and the case record.<sup>4</sup>

On remand the Office shall prepare a statement of accepted facts and shall refer appellant to a second opinion physician for evaluation as to whether appellant's current L2-3 disc condition is causally related to her accepted employment injury. After such further development as necessary, the Office shall issue a *de novo* decision.

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<sup>3</sup> *Richard E. Konnen*, 46 ECAB 388 (1996).

<sup>4</sup> *See Robert A. Redmond*, 40 ECAB 796 (1989).

The decision of the Office of Workers' Compensation Programs dated February 6, 1997 is affirmed regarding the termination of disability benefits effective April 27, 1996, and the case is remanded for further development as to whether appellant's L2-3 disc condition is causally related to the accepted employment injury.

Dated, Washington, D.C.  
April 9, 1999

Michael J. Walsh  
Chairman

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member