U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DENISE P. BLACKBURN and U.S. POSTAL SERVICE,
WESTWOOD BRANCE, Kalamazoo, Mich.

Docket No. 95-2976; Submitted on the Record;
Issued April 3, 1998

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 compensation effective March 8, 1993.

On December 31, 1991 appellant, then a 39-year-old CFS clerk, was lifting a tub of mail from the top of a cage when she felt a pull in her back. The Office accepted appellant's claim for low back strain and a protruding L4-5 disc. Appellant received continuation of pay for the periods February 28 through March 9, 1992 and April 21 through May 26, 1992. The Office began payment of temporary total disability compensation effective May 27, 1992. In a March 8, 1993 decision, the Office denied appellant's claim for continuing compensation on the grounds that the evidence of record failed to demonstrate a causal relationship between the employment injury and her claimed condition. In a March 25, 1994 decision, an Office hearing representative found that the weight of the medical evidence established that appellant was no longer suffering from an employment-related medical condition or disability effective January 20, 1993 when she was examined by Dr. George Fuksa, a Board-certified orthopedic surgeon. He therefore affirmed the Office's March 8, 1993 decision. In a June 19, 1995 merit decision, the Office denied appellant's request for modification of its prior decision.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits.

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 disability has ceased or that it is no longer related to the employment.[1]

[1] *Jason C. Armstrong*, 40 ECAB 907 (1989).

In a December 31, 1991 duty status report, a physician with an illegible signature diagnosed low back strain and muscle spasm. In a January 6, 1992 duty status report, a second physician with an illegible signature diagnosed paraspinal muscle spasm of the right lumbar region with no sign of radiculopathy. A March 2, 1992 myelogram and post-myelogram computerized tomography (CT) scan showed a right hemivertebra between the L3 and L4 vertebrae, fused to both vertebrae, associated with moderate scoliosis and mild pelvic tilt. The myelogram also showed a mild diffuse disc bulge at L4-5 with no sign of any focal herniation. Appellant also had a narrowed left lateral recess related to the disc bulge and the bony maldevelopment. It was unclear whether there was any impingement on the L5 nerve root. The report indicated that any further bulging of the L4-5 disc with upright activity could cause intermittent impingement even though there was no definite direct impingement shown on examination.

In an April 6, 1992 report, Dr. R. Harris Russo, a Board-certified neurosurgeon, stated that appellant was born with an abnormal back vertebra in the lumbosacral area which was only a radiographic anomaly but might be associated with a tendency to develop back instability with injury. He commented that the disc protrusion appellant had was not related to a congenital problem but was a natural reaction to it and narrowed the left lateral recess to the point where it was compressing the L5 nerve root. He indicated the bulging disc and the compressed nerve was related more to appellant's work than to the developmental nature of her problem.

In a July 29, 1992 report, Dr. David A. Muzljakovich, a Board-certified physiatrist, stated that manual motor testing of the legs revealed no focal deficits. He indicated that sensory examination was within normal limits. He reported that an electromyogram (EMG) showed L4-5 irritability in the lumbosacral paraspinal region and coinciding irritability in the legs in the same locale. Nerve conduction studies were normal in the right leg. Dr. Muzljakovich diagnosed recalcitrant lower back pain associated with multilevel radiculopathy in a patient with known congenital spine deformity and diffuse disc bulging.

The Office referred appellant to Dr. Franklin D. Wade, a Board-certified surgeon, for an examination and a second opinion. In a September 16, 1992 report, Dr. Wade noted that appellant's EMG was essentially normal. He reported that a magnetic resonance imaging (MRI) scan showed some diffuse bulging of the L4-5 disc, a myelogram showed definite L4-5 encroachment and a CT scan revealed marked distortion of the lumbar spine with a right lumbar scoliosis, the apex approximately at the L4-5 interspace and the concavity on the left side. He indicated that there was definitely encroachment on the left side with narrowing of the foramina and at least some intermittent encroachment on the nerve roots in the area. Dr. Wade concluded that appellant had a congenital abnormality in her spine, most likely a hemivertebra at the L4-5 level with secondary acquired scoliosis and encroachment of the nerve roots and foramina on the left side. He stated that the employment injury was probably the initiating factor causing the onset of these symptoms. He discussed appellant's treatment and concluded that appellant could work four hours a day with restrictions.

In a September 28, 1992 report, Dr. Jonathan W. Hopkins, a neurologist, stated that the myelogram and MRI scans that appellant had in the past showed a rather marked rotoscoliosis with a congenital hypoplastic L3-4 disc and possible partial fusion of L3 to L4. He indicated

that he could not be certain that there was nerve root compression at any level on either side of the low back. He commented that the most suspicious area would be the L5 nerve root on the left which was certainly consistent with appellant's pain.

In an October 7, 1992 report, Dr. James R. Boswell, an osteopath, diagnosed neck pain of unknown etiology which was not work related, a herniated disc at L4-5 which probably was work related and a congenital back condition which was not work related. He expressed concern on the prospect of appellant returning to work four hours a day, stated that he was afraid appellant would come back having hurt herself again. He commented that appellant may then have an exacerbated condition leading to payment for the congenital problem as well as the herniated disc.

In an October 19, 1992 report, Dr. D. Eugene Wiley, a Board-certified neurologist, reviewed the medical evidence, indicating that appellant had some scoliosis with convexity to the right. He noted that the L4 vertebra appeared to be wedged to the left. He reported that other studies showed a fusion of the L3-4 on the right side with some question of compression of the L5 nerve root on the right. He indicated that Dr. Muzljakovich's electrical studies appeared to demonstrate some evidence of denervation in the L5 distribution. He concluded that most of appellant's back pain was related to her congenital abnormality in the lumbar spine and the associated scoliosis. He stated, however, that he could not totally exclude that appellant might not also have a superimposed element of L5 radicular trouble. He diagnosed back and leg pain, right greater than left, of unknown etiology.

In a November 16, 1992 memorandum, an Office medical adviser commented that the evidence showed appellant had a diffuse bulge at L4-5. He stated that the issue of whether the L4-5 bulge was work related was not easily determined in the face of appellant's preexisting L3-4 condition. He noted that the issue had not been addressed objectively by a spine surgeon. He recommended an evaluation of appellant by a Board-certified surgeon experienced in congenital anomaly problems.

The Office referred appellant to Dr. Fuksa for an examination and second opinion on whether the evidence supported whether appellant had a work-related herniated disc at L4-5 and whether surgery for such a herniated disc would be warranted.[2] In a February 8, 1993 report, Dr. Fuksa diagnosed a right hemivertebral at L3-4 and central disc bulging at L4-5 without any encroachment of the nerve roots and a lumbar scoliosis caused by anatomical development. He reported that appellant had no decreased sensitivity to touch on either side and motor denervation on either side was within normal limits. He commented that on the basis of his examination no nerve root irritation or radiculopathy on either side could be demonstrated. He concluded that appellant's current condition was mainly caused by her developmental anomaly in the lumbar spine. He indicated that this type of anomaly caused scoliosis and could very easily increase the pressure on the discs and could speed the degeneration of those structures. He stated that the reported work incident just temporarily aggravated a preexisting condition and

[2] The Board notes that, although appellant's attorney has argued on appeal that Dr. Fuska was an impartial medical specialist selected to resolve a conflict in the medical evidence, the record shows that the Office officially regarded Dr. Fuska as a second opinion examiner.

the present complaints of pain were not really work related but rather related to her developmental problem. He reported that appellant could easily return to light-duty work with a limitation of lifting 30 pounds and limited bending and twisting on a prophylactic basis.

In a January 31, 1995 report, Dr. Sherwin Goldman, a Board-certified orthopedic surgeon, diagnosed lumbar strain, resolved, superimposed on a preexisting congenital anomaly of the lumbar spine and superimposed chronic pain syndrome with elements of depression. In a March 7, 1995 report, Dr. Goldman indicated that he had reviewed information on appellant's employment injury as provided by appellant's attorney. Dr. Goldman stated that in reviewing all of the information it would appear that appellant's current problems were related to the employment injury, based on the history given by appellant. He noted that his impression at the time he examined appellant was that the lumbar strain had resolved. He stated that as far as the chronic back strain was concerned, appellant's underlying congenital problems could have an aggravating effect but historically the substantial injury occurred at work. In a March 14, 1995 report, Dr. Goldman stated that the chronic pain syndrome was not considered a physical impairment as all the symptoms were subjective and therefore any restrictions would be imposed by her chronic pain and depression. In a February 1, 1995 report, Dr. Carl W. Chan, a Board-certified physiatrist, diagnosed mechanical pain superimposed on degenerative changes of the lumbar spine. He noted that there was no clinical, radiological, or electrophysiologic evidence of a myelopathy, neuropathy or radiculopathy.

The medical evidence of record shows that appellant had a preexisting congenital condition of the back. However, the medical evidence differed substantially on what other conditions appellant might have. Dr. Boswell stated that appellant had a herniated L4-5 disc which he related to the December 31, 1991 employment injury while the March 2, 1992 myelogram report indicated that there was no focal herniation of the L4-5 disc, only diffuse bulging. Dr. Muzljakovich stated that an EMG showed irritability of the L5 nerve. Dr. Russo and Dr. Wade stated that appellant had a compressed nerve root while Dr. Fuksa found that appellant did not have any compression of a nerve root. The March 2, 1992 myelogram report indicated that appellant would have intermittent compression of the nerve root while standing. Dr. Hopkins stated that he could not be sure appellant had a compressed nerve root but noted that appellant's pain was consistent with a compressed L5 nerve root.

Drs. Wade, Russo and Boswell related appellant's condition to the employment injury while Dr. Fuksa concluded that the employment injury caused only a temporary aggravation of a preexisting lumbar condition which had ceased. The Office terminated appellant's compensation solely on the basis of Dr. Fuksa's report that the employment injury had caused a temporary aggravation of the preexisting condition that had ceased. However, Dr. Fuksa did not explain how he had reached that conclusion. In particular, Dr. Fuksa had concluded from his own examination that appellant had no evidence of nerve irritation or radiculopathy even though an EMG taken six months previously showed nerve irritability. Dr. Fuksa did not discuss why his findings differed from that of the EMG. Dr. Fuksa's report, therefore, did not have sufficient probative value to definitively determine that the effects of appellant's employment injury had ceased by the time of his report.

The Board concludes that the medical opinion evidence of records as reported by Drs. Wade, Russo and Boswell tends to show that appellant continues to suffer from residuals of her employment injury. On the other hand the medical opinion of Dr. Fuksa, which was relied on by the Office to terminate benefits, tends to show that appellant only suffered a temporary aggravation of a preexisting lumbar condition which has ceased. Because of the existing conflict in medical opinion evidence as to whether residuals of appellant's employment-related injury have ceased, the Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits effective March 8, 1993. This being the case, the Office of Workers' Compensation Programs' decision dated June 15, 1995 is hereby reversed.

Dated, Washington, D.C.
April 3, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member