U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHARLENE BUREMS and VETERANS ADMINISTRATION, MEDICAL CENTER, Philadelphia, Pa.

Docket No. 95-2196; Submitted on the Record;
Issued January 16, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden to terminate appellant's compensation benefits.

This case has previously been before the Board. In the prior appeal, the Board reversed a May 17, 1988 Office decision terminating appellant's compensation effective August 29, 1987, finding that she no longer had any disability causally related to her employment injury. The facts and circumstances of the case are completely laid out in the May 30, 1989 decision by the Board. In its decision, the Board found that the medical evidence the hearing representative relied upon was insufficient to meet the Office's burden to terminate appellant's benefits. The Board thus reversed the Office's decision and remanded the case to the Office for reinstatement of benefits.

By letter dated June 15, 1989, the Office advised appellant that she was entitled to a resumption of benefits based on the Employees' Compensation Appeals Board's May 30, 1989 decision which found that the Office had not met its burden in terminating benefits. The Office placed appellant on the periodic rolls.

By letter dated August 7, 1989, the Office referred appellant to Dr. Leonard Klinghoffer, a Board-certified orthopedic surgeon, to clarify the cause and extent of her employment-related impairment.

In a report dated September 30, 1989, Dr. Klinghoffer, based upon a review of the medical records, a statement of accepted facts, history of the employment injury and a physical examination of appellant, opined "that the physical effects of her fall in March 1978 cleared up many years ago." Dr. Klinghoffer noted:

> "[Appellant's] examination reveals normal physical findings, the x-rays of her neck and her low back are normal for a woman of her age, she has had multiple studies including an EMG [electromyogram], bone scan and a myelogram all of

> which were normal, none of the multiple doctors who have examined her had noted any neurological deficit or significant physical abnormality capable of causing symptoms for more than 10 years and I believe that the physical effects of her fall in March 1978 cleared up many years ago."

Dr. Klinghoffer further noted that "some intermittent symptoms may have lingered for a while" and opined that her pregnancy three years subsequent to the injury "may have produced a flareup of symptoms for a while." In conclusion, Dr. Klinghoffer opined that appellant had no physical disability and "should be encouraged to try to return to work."

On February 7, 1990 the Office issued a notice of proposed termination of compensation based upon the medical evidence which established that appellant did not have any disability related to her employment injury. The Office based its decision to terminate benefits upon the December 12, 1989 report by Dr. Klinghoffer which found appellant was no longer disabled due to her employment injury.

In a letter dated March 7, 1990, appellant disagreed with the Office's proposal to terminate her benefits. Appellant submitted a February 16, 1990 attending physician's report (Form CA-20) from Dr. Elizabeth Hughes, a work restriction evaluation (Form OWCP-5) and a March 8, 1990 thermogram from Dr. Philip Getson.

In the February 16, 1990 attending physician's report, Dr. Hughes noted that appellant was totally disabled from March 1978 to the present due to her employment injury. Dr. Hughes diagnosed an unstable back and LS strain and that appellant is unable to sit for over two hours. In a work restriction form dated February 16, 1990, Dr. Hughes checked that appellant was unable to work eight hours per day. Dr. Hughes also listed restrictions for activities appellant could perform during the day and listed a lifting restriction of 0 to 10 pounds.

In a March 3, 1990 thermogram, Dr. Getson diagnosed an abnormal lumbar thermogram. Dr. Getson noted that "the black and white views are suggestive of a fifth nerve fiber irritation. There is some possibility of an overlap to the fourth lumbar nerve fiber."

In a decision dated April 3, 1990, the Office issued an order terminating appellant's compensation benefits. The Office relied upon Dr. Klinghoffer's opinion to find that the medical evidence with the most probative value established that appellant was no longer disabled due to her employment injury.

In a letter dated April 1, 1991, appellant requested reconsideration of the April 3, 1990 decision to terminate her benefits. Appellant submitted a February 12, 1991 report by Dr. Joseph M. Hassman in support of her request.

In a February 12, 1991 report, Dr. Hassman diagnosed chronic strain and sprain of the cervical dorsal and lumbar spine and paravertebral muscle spasms. Dr. Hassman noted:

> "I have reviewed all previous medical records since March 1978 until present day from all treating physicians as outlined in the U.S. Depart of Labors (sic) Employees' Compensation Appeals Board report. Although there is subjective

> complaints of aches and pains throughout her muscles, back and neck, along with objective findings of minimal limitation in the range of motion in her cervical dorsal and lumbar spine, there is no support that this patient is unable to return to full work duties. It is true that she did have strain and sprain of her cervical dorsal spine, along with soft tissue injury, but no permanent damage to cause her disability for over [10] years."

In a work restriction form dated April 22, 1991, Dr. Hassman opined that appellant could work four hours per day and that appellant had reached maximum medical improvement at this time.

In a report dated April 23, 1991, Dr. Hassman diagnosed chronic strain and sprain of the cervical dorsal and lumbar spine and paravertebral muscle spasms. Dr. Hassman opined that due to these conditions appellant could only perform her work duties for four hours per day.

In a report dated September 5, 1991, the Office medical adviser opined that Dr. Hassman's February 12, 1991 report was insufficient to consider reconsideration of the prior decision.

In a decision dated September 10, 1991, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was not sufficient to warrant modification of the prior decision.

In a letter dated September 9, 1992, appellant requested reconsideration of the September 10, 1991 decision denying her request for reconsideration. In support of her request for reconsideration, appellant submitted May 5 and 26 and July 15, 1992 reports from Dr. Todd Marc Kelman, a July 1, 1992 magnetic imaging resonance (MRI) test by Dr. Joshua Barnett and an August 5, 1992 report by Dr. David Lopresti, a Board-certified anesthesiologist.

In a May 5, 1992 report, Dr. Kelman diagnosed chronic lumbar and cervical strain and sprain and probable lumbar and cervical deconditioning syndrome. Dr. Kelman noted the following upon physical examination:

> "[R]ange of motion of the cervical spine was full. There was a negative Adson's and Wright maneuver. Negative shrug test and no scapular winging. Her shoulder range of motion, forward flexion and abduction, was up to 160 degrees with pain in the upper third trapezius bilaterally. Internal/external rotation was 35/45 bilaterally and extension was 40/40. She had a negative dropped arms test and no instability. Her roos test was negative. Elbow revealed full and symmetrical range of motion with a negative repetitive elbow flexion.… Motor strength of the upper extremities was great 5/5. Reflexes were +2/4."

In a report dated May 26, 1992, Dr. Kelman noted that appellants "examination remains essentially unchanged" and that "she has a negative Hoffman's and no clonus or toe signs."

In an MRI scan dated July 1, 1992, Dr. Barnett diagnosed "mild left paracentral disc protrusion at the C5-6 and C6-7 levels, possibly representing bulging annula fibrosus."

In a July 15, 1992 report, Dr. Kelman noted that appellant's "range of motion of the cervical spine is full and symmetric."

In an August 5, 1992 report, Dr. Lopresti opined that appellant "seems to be suffering from a herniated disc at the C5-6 and C6-7 level."

In a decision dated November 24, 1992, the Office denied appellant's request for reconsideration on the basis that the evidence submitted was not sufficient to warrant modification of the prior decision.

Appellant, through her attorney, requested reconsideration of the November 24, 1992 decision and contended that the Office failed to meet its burden of proof in terminating her benefits. Appellant also submitted an MRI scan dated July 1, 1992 and a January 28, 1993 report from Dr. Kelman.

In the January 28, 1993 report, Dr. Kelman noted that appellant's "range of motion of the lumbar spine is full with subjective complaints of pain only." Dr. Kelman then opined that appellant "may, indeed, have a chronic pain syndrome and the possibility of fibromyositis could not be fully excluded." As to the cause of appellant's current symptoms, Dr. Kelman noted:

> "[W]ith regard to the relationship of her present symptoms to her injury, based on review of the records and her history, she did, at the time of the initial injury, complain of both neck and low back pain. She denied previous history of injury or symptoms with regard to her neck and back and, therefore, it is my medical opinion that her present complaints are related to her injury of March 1, 1978."

By decision dated February 17, 1994, the Office denied appellant's request for reconsideration. The Office found appellant's legal arguments to be without merit. The Office also found the medical evidence submitted to be of diminished probative value and the weight of the probative medical evidence rested with Dr. Klinghoffer's report.

In a letter dated February 11, 1995 appellant, through her attorney, requested reconsideration of the February 17, 1994 decision denying appellant's request for reconsideration giving legal arguments and submitting medical evidence in support of her request. Appellant submitted a February 6, 1995 report by Dr. William M. King and an MRI scan by Dr. Joel D. Swartz, a Board-certified radiologist. Appellant subsequently submitted a February 8, 1995 report by Dr. Jennifer Chu, a Board-certified physiatrist.

In an MRI scan dated February 1, 1995, Dr. Swartz diagnosed "herniated nucleus pulposus to the left of midline at C5-6 and C6-7. Midline herniated nucleus pulposus is identified at C4-5 and perhaps to some degree focally in the midline at C3-4 as well."

In a report dated February 6, 1995, Dr. King diagnosed residuals of chronic cervical and lumbosacral strain and sprain with myofascitis, possible cervical herniated nucleus pulposus at C5-6 and C6-7 and possible left cervical radiculpathy at C5-6 and C6-7.

In a report dated February 8, 1995, Dr. Chu noted:

> "The EMG findings are abnormal. The abnormal findings related to the fall at work on March 1, 1979 are the findings of ongoing current involvement of the bilateral C3 through C6 nerve roots as well as the left C7 nerve root. The bilateral C5 and C6 nerve roots are more involved, more active on the left side, especially along the left C5 nerve root. These recent onset EMG changes suggest that there is still evidence of low grade ongoing involvement of these nerve roots due to continued irritation. The original injury seemed to have been a stretch injury or compression of these nerve roots against underlying bone either at the level of the disc or laterally at the level of the facets, foramina or lateral recesses. The ongoing involvement of these nerve roots is from continued irritation, likely against bone or presence of chronic muscle spasms at multiple myotomal levels. The chronic muscle spasms would put a traction effect on the multiple cervical nerve roots causing more nerve root irritation and more muscle spasm. This vicious cycle is the chief cause of the chronic neuropathic pain that she continues to experience."
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> In a report dated May 2, 1995, the Office medical adviser reviewed the medical evidence submitted by appellant. The Office medical adviser noted that the objective tests performed closest to appellant's employment injury were all reported as negative so that the current abnormal results noted by Dr. Chu "reflect a different state than that of the earlier test, nearest following the injury."

By decision dated May 10, 1995, the Office denied appellant's request for modification of its prior decision. The Office found the evidence submitted by appellant with her request for reconsideration insufficient to warrant modification of the prior decisions which found that appellant's work-related disability had ceased.

The Board finds that the Office met its burden to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[1] After it has been determined that an employee has disability causally related to employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[2] The Office accepted that

[1] *Harold S. McGough*, 36 ECAB 332 (1984); *see* Federal (FECA) Procedure Manual, Chapter 2.812.3 (March 1987).

[2] *Pedro Beltran*, 44 ECAB 222 (1992); *Henry P. Eanes*, 43 ECAB 510 (1992); *Mary E. Jones*, 40 ECAB 1125 (1989).

appellant sustained a cervical and lumbosacral muscle strain as a result of her March 1, 1978 employment injury.

The Board finds that the weight of the medical evidence rests with the December 12, 1989 report by Dr. Klinghoffer, to whom the Office referred appellant, who determined that appellant ceased to have residuals of her March 1, 1978 employment injury. The report of Dr. Klinghoffer is well rationalized and based on a complete and accurate factual and medical history. Rationalized medical opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's presently diagnosed condition and the implicated employment injury. Such an opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[3] The Board finds that the Office properly relied on this report when it terminated appellant's compensation effective April 8, 1990.

Appellant submitted reports from Drs. Chu, Hassman, Hughes, King, Lopresti and Kelman.

In an attending physician's report dated February 16, 1990, Dr. Hughes noted that appellant was totally disabled from March 1978 to the present due to her employment injury. Dr. Hughes offered no rationale for opining that appellant was totally disabled. This report is of diminished probative value in that it is lacking in medical rationale in support of his conclusion. Therefore, this report is not of sufficient weight and rationale to create a conflict in the medical evidence or to overcome the weight of the medical evidence as represented by the report of Dr. Klinghoffer.[4]

Similarly, Dr. Hassman's February 12, 1991 report is insufficient to establish that appellant is totally disabled. In his report, Dr. Hassman opined that appellant sustained no permanent damage from her employment injury which would cause her disability for over 10 years. Thus, this report does not support that appellant continued to be totally disabled due to her March 1, 1978 employment injury.

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

[4] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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." 5 U.S.C. § 8123(a). A case must be referred to an impartial medical specialist to resolve a conflict in the medical evidence only when there are opposing reports of virtually equal weight and rationale. *William C. Bush*, 40 ECAB 1064 (1989).

Dr. Kelman, in his May 5, 1992 report, noted that appellant's range of motion for the cervical spine was full and that she had negative Hoffman's and no clonus or toe signs. This report does not support that appellant continued to be totally disabled due to her March 1, 1978 employment injury.

In a report dated February 8, 1995, Dr. Chu, an attending Board-certified physiatrist, indicated that appellant was totally disabled due to her March 1, 1978 employment injury. Dr. Chu's report also is of limited probative value on the pertinent issue of the present case in that she did not provide adequate medical rationale in support of her conclusion regarding causal relationship. Dr. Chu expressed the opinion that the original employment injury either stretched or compressed the nerve roots of the bilateral C3 through C6 as well as the left C7 nerve root which has caused appellant's total disability. The Office accepted that appellant sustained a cervical and lumbosacral muscle strain which has resolved and Dr. Chu has not provided sufficient medical rationale to establish the occurrence of this type of employment-related nerve root condition, especially in light of the fact that she appears to have based this opinion on diagnostic testing obtained some time after the March 1, 1978 injury.[5] Dr. Chu's report essentially consists of an opinion that appellant's disability was employment related because of appellant's chronic neuropathic pain.

As none of the medical evidence appellant submitted directly addressed how long appellant remained disabled due to residuals of her March 1, 1978 employment injury and as several of the reports are of greatly reduced probative value because the reports are unrationalized, there is no medical evidence of record which contradicts Dr. Klinghoffer's findings, opinions and conclusions.

Because Dr. Klinghoffer's report was well rationalized, the Board finds that it represents the weight of the medical opinion evidence and establishes that appellant's employment-related disability had ceased by the date of the report and that any continuing medical condition is not related to her employment. Accordingly, the Office discharged its burden to justify termination of appellant's compensation after April 8, 1990.

[5] *See generally, Linda L. Mendenhall*, 41 ECAB 532, 536-40 (1990).

Consequently, the decision of the Office of Workers' Compensation Programs dated May 10, 1995 is hereby affirmed.

Dated, Washington, D.C.
January 16, 1998

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member