U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHELE DANIELS and U.S. POSTAL SERVICE,
DOMINICK V. DANIELS CENTER. Kearny, N.J.

Docket No. 97-1876; Submitted on the Record;
Issued April 9, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective October 15, 1995 on the grounds that she no longer had residuals of accepted June 26, 1993 injuries as of that date.

The Office accepted that on June 26, 1993, appellant, then a 36-year-old distribution clerk, sustained a herniated nucleus pulposus at T4-5, T5-6 and T6-7 and lumbar and cervical myofascitis, when she was struck on the right elbow by a postal forklift/jeep vehicle as it backed up. She returned to light duty, stopped work on September 5, 1993 and did not return. Appellant received total temporary disability compensation and appropriate medical benefits from September 6, 1993 to October 15, 1995.

In April 30 and July 25, 1994 reports, Dr. Alan Wasserman, a radiologist, found that a magnetic resonance imaging (MRI) scan of the cervical spine showed bulging discs at C4-5, C5-6 and C6-7. July 25, 1994 MRIs of the lumbar and thoracic spines showed degenerative disc disease at L4-5 and L5-S1, and "herniated [discs at] what seems to be at T4-5, T5-6 and possibly T5-7."[1] On this basis Dr. Magdy Elamir, an attending neurologist, diagnosed herniated discs at T4-5, T5-6 and T6-7 in an August 8, 1994 report and the Office accepted the disc herniations as causally related to the June 26, 1993 incident.

In a March 6, 1995 report, Dr. Elamir found cervical and lumbar spasm with diffuse tenderness, tenderness bilaterally of the hips, gluteals, posterior thighs, tight left hamstrings, an anxious mood, and a limping gait. He found appellant to be disabled for work due to herniated discs at T4-5, T5-6 and T6-7, bulging discs at C4-5, C5-6 and C6-7, "[p]ost-traumatic headaches and vertigo" and "[c]ervical and lumbar myofascitis" causally related to" the June 26, 1993

[1] An April 30, 1994 cervical x-ray showed "no evidence of any osseous pathology." An April 30, 1994 MRI scan of the brain and internal auditory canal was normal. A July 1, 1995 laboratory report was indicative of an Epstein-Barr viral infection.

incident in which she was struck by a forklift, "injuring her right arm, head and spine." Dr. Elamir opined that appellant could not perform "excessive bending, heavy lifting and excessive reaching over the shoulders."[2]

The employing establishment referred appellant to Dr. Arthur T. Canario, a Board-certified orthopedic surgeon, who performed a March 24, 1995 fitness-for-duty examination evincing no orthopedic pathology and recommending an immediate return to unrestricted full duty.[3] The Office then prepared a statement of accepted facts and list of questions to be resolved and referred these, the medical record and appellant to Dr. Sarasavani Jayaram, a Board-certified neurologist and psychiatrist. In a May 25, 1995 report, he opined that the June 26, 1993 accident caused "soft tissue trauma to the cervical, thoracic and lower back regions … without any true residual permanent disability" or objective clinical indication of thoracic disc herniations. Dr. Jayaram stated that appellant could return to full duty with no restrictions and had no need for further treatment.[4]

The Office found a conflict of medical opinion between Dr. Elamir, who continued to support total disability and Dr. Jayaram, who found appellant capable of unrestricted full-duty work. The Office referred the statement of accepted facts, medical records and appellant to Dr. James A. Charles, a Board-certified neurologist to resolve the conflict.

In an August 10, 1995 report, Dr. Charles reviewed appellant's history of injury and treatment and performed a neurologic examination showing "no organic pathology."[5] He noted limited cervical motion without tenderness, diffuse nonorganic weakness and diminished sensation of the "entire right side of her body" and an "astasia-abasia" gait pattern," noting that appellant used a cane. Dr. Charles noted that the thoracic MRI scan demonstrated "some physiological bulging at T4-5 and T5-6 and T6-7" but no "herniation or spinal cord compromise." He stated that the June 26, 1993 accident did not cause a neurologic injury and attributed appellant's symptoms to a somatoform pain disorder.[6] Dr. Charles stated that

[2] Dr. Elamir submitted reports with the same diagnoses; finding appellant totally disabled for work, dated August 8, 1994 to October 3, 1995.

[3] In a March 24, 1995 report, Dr. Canario provided a history of injury and treatment and noted findings on examination of full cervical and lumbosacral motion and lower lumbar tenderness without spasm. He stated that he could find "absolutely no evidence of any orthopedic pathology in [his] examination" and opined that appellant's symptoms were "nonanatomic" and an "overreaction." He noted that appellant reported little change in her condition after more than 10 months of physical therapy and chiropractic manipulations totaling 6 weekly sessions." Dr. Canario stated that appellant should have been discharged from care no more than six weeks after the accident, had "absolutely no orthopedic pathology and [was] employable in any job."

[4] Dr. Jayaram noted that appellant did not have "girdle pains, abdominal muscle weakness," any "significant thoracic muscle spasm, radiculopathy or spinal cord compression." He concluded that appellant's condition had "stabilized," based on the lack of objective clinical findings.

[5] Dr. Charles also noted nonoccupational conditions of Epstein-Barr virus and hypertension by history.

[6] He noted that upon leaving his office, appellant informed his staff that she had tape recorded the interview and examination, which led Dr. Charles to believe that appellant was "malingering."

appellant should have returned to full duty six to nine weeks after the accident and recommended immediate full duty "with no further treatment or testing."

By notice dated September 7 and finalized October 17, 1995, the Office terminated appellant's compensation benefits on the grounds that she no longer had residuals of the accepted June 26, 1993 injuries based on Dr. Charles' report. Appellant then requested an oral hearing, held July 25, 1996.

At the hearing, appellant's attorney noted that the opinions of Drs. Charles and Jayaram were deficient as they were controverted by objective test results and were based on a statement of accepted facts which did not specify which herniated discs were accepted by the Office as work related. He also asserted that a recently diagnosed C4-5 herniation should also be accepted as work related.[7] Subsequent to the hearing, appellant's attorney asserted that Dr. Charles was disqualified from serving as an impartial medical examiner by Chapter 3.504(b)(3)(a) of the Federal (FECA) Procedure Manual, because he also performed a fitness-for-duty examination for the employing establishment on July 22, 1996. He enclosed an employing establishment notice, addressed to another of his clients, indicating that Dr. Charles was to perform a fitness-for-duty examination for the employing establishment on July 22, 1996. The attorney therefore requested that the October 17, 1995 decision be vacated and a new impartial medical examiner be appointed. Appellant also submitted additional evidence.[8]

In a November 9, 1995 report, Dr. Ramani R. Rao, a radiologist, compared objective test results over time. He noted that a September 15, 1995 lumbosacral MRI scan showed "no significant change" in July 25, 1994 studies demonstrating degenerative disc disease at L4-5 and L5-S1 and a minor L5-S1 disc bulge. A September 15, 1995 thoracic MRI scan was "normal." Although the July 25, 1994 thoracic study suggested a mid-thoracic "disc bulge/herniation," the image was too poor to allow accurate counting of the dorsal vertebrae. A September 19, 1995 cervical MRI scan, when compared to an April 30, 1994 study, showed an increase in disc bulges from C2-6, with "compromise of the ventral aspect of the thecal sac" at C4-6 without spinal cord compression, indicating a "progression of her cervical spondylosis … which should be correlated with clinical symptomatology."

In a December 11, 1995 report, Dr. Francis Gamache, a Board-certified neurosurgeon, diagnosed a C4-5 central disc herniation with disc bulges at other levels, recommended surgery and found appellant disabled from heavy lifting or activities that might further injure her neck.

[7] A September 15, 1995 cervical and lumbar MRI scan showed a posterior central herniation at C4-5, bulging disc at C5-6 and C6-7, a minimal posterior central herniation at L4-5 and posterior central herniation at L5-1. A November 30, 1995 myelogram and post-myelogram CT scan of the cervical and lumbosacral spines showed "[m]ultiple focal cervical disc herniations, most significant at C4-5" and "[f]ocal central and left disc bulge at L5-S1, which may reflect incomplete disc herniation. No foraminal stenosis."

[8] August 9, 1995 thermographic studies of the cervical, thoracic and lumbar spines, performed by Dr. Elamir, were interpreted by him as "abnormal," including evidence of "lumbar myofascitis." In a September 23, 1995 report, Dr. Ricardo Baldonado, a radiologist, performed a full body bone scan showing that "activity in the spine" was "unremarkable."

In a March 12, 1996 report, Dr. Elamir found appellant disabled for work due to disc herniations at C2-3, C3-4 and C4-5 and a disc bulge at L5-S1 "causally related to the work accident of June 26, 1993."[9]

By decision dated and finalized February 18, 1997, the Office hearing representative affirmed the Office's October 17, 1995 decision, finding that Dr. Charles' opinion represented the weight of the medical evidence. The hearing representative noted that current radiographic studies did not show thoracic disc herniations and thus appellant could no longer be disabled due to such herniations. The hearing representative found that, although objective studies indicated a progression of cervical spondylosis, there was insufficient rationalized medical evidence to support a casual relationship between the condition or its progression and the accepted injuries. The hearing representative also found that Dr. Charles' performance of an employing establishment fitness-for-duty examination approximately one year after his examination of appellant on August 10, 1995 did not establish a relationship with the employing establishment on or before August 10, 1995 such that he would be disqualified from serving as impartial medical examiner.

The Board finds that the Office properly terminated appellant's compensation benefits effective October 15, 1995 on the grounds that she no longer had residuals of the accepted June 26, 1993 injuries as of that date.

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.[10]

In terminating compensation in this case, the Office relied on the opinion of Dr. Charles who submitted an August 10, 1995 report explaining how and why appellant's current symptoms, in the absence of any objective clinical findings, were due to a nonaccepted somatoform pain disorder and not the June 26, 1993 incident. He found no objective findings of residuals attributable to the accepted June 26, 1993 thoracic disc herniations from T4-7 or lumbar and cervical myofascitis. Dr. Charles' report was based on the complete medical record and a statement of accepted facts, as well as a thorough clinical examination. His opinion is thus entitled to the weight of the medical evidence.

The Board notes that Dr. Charles' opinion is also in agreement with that of Dr. Canario performing a fitness-for-duty examination on March 24, 1995 and Dr. Jayaram who submitted a May 25, 1995 report who both found no objective residuals of the accepted injuries and attributed appellant's symptoms to nonorganic, nonoccupational causes.

[9] In a November 2, 1995 note, Dr. Elamir stated that appellant was disabled for work by "Cervical and Lumbar Radiculopathy." The Board notes that the Office did not accept cervical or lumbar radiculopathy as work related.

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

In support of her claims of continuing disability, appellant submitted reports from Dr. Elamir. In a March 6, 1995 report, he found appellant permanently disabled for work due to herniated discs at T4-5, T5-6 and T6-7, bulging discs at C4-5, C5-6 and C6-7, "[p]ost-traumatic headaches and vertigo" and "[c]ervical and lumbar myofascitis" causally related to" the June 26, 1993 incident. However, the Office did not accept the conditions of headaches, vertigo, or cervical disc bulges. Also, Dr. Elamir did not offer sufficient medical rationale explaining how and why appellant continued to be disabled due to the June 26, 1993 injuries. In a March 12, 1996 report, he found appellant disabled for work due to disc herniations at C2-5 and a disc bulge at L5-S1, conditions not accepted by the Office. Dr. Elamir's conclusion that the diagnosed cervical and lumbar herniations were "causally related to the work accident of June 26, 1993" does not constitute sufficient medical rationale to establish a continuing work-related disability. Thus, his reports are of greatly diminished probative value.[11]

Appellant also submitted analyses of objective test results. In a November 9, 1995 report, Dr. Rao stated a September 15, 1995 thoracic MRI scan was "normal," indicating that the accepted T4-7 disc herniations were no longer present. While he opined that a September 15, 1995 cervical MRI scan showed progression of cervical spondylosis, this condition was not accepted by the Office. Dr. Rao did not provide medical rationale attributing any of the diagnoses to the June 26, 1993 injury or indicate that appellant was disabled for work. In a December 11, 1995 report, Dr. Gamache, a Board-certified neurosurgeon, diagnosed a C4-5 disc herniation by MRI scan, a condition not accepted by the Office.

The Board also finds that appellant has failed to submit sufficient evidence to establish that Dr. Charles should be disqualified from performing the August 10, 1995 impartial medical examination due to a subsequent contractual relationship with the employing establishment. The Office's procedures provide that a physician may not serve as an impartial medical examiner if "employed by, under contract to or regularly associated with Federal agencies."[12] The Office's procedures also note the Board's requirement of "exclusion of medical reports from the case record" if the "physician selected for referee examination is regularly involved in performing fitness-for-duty examinations for the claimant's employing agency."[13] The only evidence appellant offered to prove the improper relationship was an employing establishment fitness-for-duty examination notice directing an employee to report to Dr. Charles on July 22, 1996, almost one year after he served as impartial medical examiner. Thus, appellant did not establish that Dr. Charles had any relationship with Federal agencies or the employing establishment on or before August 10, 1995 or that Dr. Charles was directed to perform a fitness-for-duty examination for the employing establishment other than on July 22, 1996. Therefore, appellant has not shown that Dr. Charles should be disqualified from serving as impartial medical examiner in this case.

[11] *Lucrecia M. Nielsen*, 42 ECAB 583 (1992).

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations* (Chapter 504(b)(3)(a)) (March 1994).

[13] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations* (Chapter 506(a)) (March 1994).

Consequently, the Office has met its burden of proof in terminating appellant's compensation effective October 15, 1995 as the weight of the medical evidence establishes that residuals of the accepted herniated thoracic discs with lumbar and cervical myofascitis had ceased as of that date.

The decision of the Office of Workers' Compensation Programs dated and finalized February 18, 1997 is hereby affirmed.

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

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member