U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE L. RAIMONDI and DEPARTMENT OF THE NAVY, MILITARY SEALIFT COMMAND, Bayonne, NJ

Docket No. 98-1168; Submitted on the Record;
Issued December 17, 1999

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 compensation benefits effective July 11, 1997.

On August 15, 1995 appellant, then a 33-year-old personnel management specialist, sustained an injury to her head when a cabinet fell and struck her. Appellant stopped work on the date of injury and returned to work on September 18, 1995. She again stopped work on October 26, 1995 and returned to limited duty for four hours per day on October 28, 1996. Appellant filed a recurrence of disability on November 14, 1996, which the Office accepted. Appellant has not worked since November 14, 1996. The Office accepted the claim for cervical sprain and postconcussion syndrome.

In order to determine the nature and extent of disability, appellant underwent an evaluation on January 17, 1997 by Dr. Richard Lebovicz, a Board-certified orthopedic surgeon and an Office referral physician. In his report of January 17, 1997, Dr. Lebovicz noted that he originally examined appellant in July 1996 for the Office.[1] He listed appellant's present complaints, reviewed the objective studies of record and presented his findings upon examination. Dr. Lebovicz found appellant's examination to be similar to that found in July 1996 and stated that appellant's symptoms were related to the original accident of August 15, 1995. He stated that there also appeared to be an element of depression and it was his understanding that appellant was undergoing treatment for that condition. Dr. Lebovicz recommended that appellant attend a pain clinic and a work hardening program. He stated "anatomically, I cannot explain her symptoms, however, her complaints and her physical examination have been consistent." He opined that appellant was partially disabled and recommended that appellant attempt to return to work four hours per day with restrictions.

[1] In his July 17, 1996 report, Dr. Lebovicz stated that, based on the clinical examination as well as diagnostic tests available, it appears that appellant sustained a cervical strain to her back and may have developed a mild form of reflex sympathetic dystrophy (RSD). Lumbar strain was also diagnosed. Dr. Lebovicz recommended that appellant continue with physical therapy and, if necessary, consider local injections in trigger point areas. He stated that appellant's symptoms should continue to improve over the next two months.

In treatment notes of January 29 and February 26, 1997, appellant's treating physician Dr. Robin R. Innella, an osteopath, maintained that appellant was totally disabled. It was noted that appellant was being seen by a rheumatologist for fibromyalgia.

In an undated letter, the employing establishment offered appellant a part-time light-duty position of assisting the Drug and Alcohol Program Coordinator effective April 7, 1997. Appellant would not be assigned any travel or physical activities such as reaching above the shoulder, lifting over 10 pounds, twisting or bending. The position was based on Dr. Lebovicz report of January 17, 1997.

By letter dated March 25, 1997, the Office advised appellant that the offered position was suitable and within her work capabilities and notified appellant that if she refused the position without reasonable cause, her compensation could be terminated pursuant to 5 U.S.C. § 8106(c) of the Federal Employees' Compensation Act. The Office allowed appellant 30 days to provide an explanation if she refused the offer.

By letter dated March 31, 1997, appellant informed the Office that she was not able to report to work on April 7, 1997. Medical documentation was submitted.

In a February 11, 1997 report, Dr. Jill Ritter, a Board-certified internist specializing in rheumatology, stated that appellant presented with a clinical syndrome consistent with fibromyalgia, although, in light of her signs of carpal tunnel syndrome, hypothyroidism should be excluded. Before adding any medications, Dr. Ritter suggested that appellant have a gastrointestinal evaluation. On February 20, 1997 appellant underwent a biopsy of the antrum, which revealed a chronic antral gastritis.

A February 25, 1997 attending physician's report from a physician whose signature is illegible checked off a box which indicated that appellant was disabled from her regular occupation. Also checked off was a box which stated that appellant was not disabled from any occupation. No further details were provided.

A disability certificate of March 26, 1997 from Dr. Innella diagnosed fibromyalgia involving the cervical, dorsal and lumbar spine, small spur in the cervical as well as magnetic resonance imaging of the lumbar spine showing disc bulge at L4-5. Appellant's prognosis was reported as guarded.

The Office referred appellant to Dr. Robert G. Greene, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence between Dr. Inella and Dr. Lebovicz on the issue of continuing disability. In a May 16, 1997 report, Dr. Greene stated that appellant had no objective evidence of cervical strain and has full range of motion of the cervical spine in all directions without tenderness or spasm. A limited neurological examination revealed no residuals of a postconcussion syndrome. Dr. Green stated that if both these conditions were present, they had resolved. Dr. Green noted that the only objective finding appellant had was a slight limitation of motion in the left shoulder with no obvious impingement or evidence of a rotator cuff tear. There was no evidence found of radicular problems to either the right or left upper extremity. Dr. Greene opined that appellant was able to do her regular job as a personnel manager specialist, as described, noting that she may have some residual discomfort and

limitation of wide range of motion in the shoulder, but opined that this would not stop her ability to do her full and regular job.

By letter dated June 9, 1997, the Office advised appellant that it proposed to terminate her benefits on the basis that the weight of the medical evidence established that there were no disability residuals due to her work-related injury. Appellant was afforded 30 days within which to submit additional evidence or argument.

Appellant submitted a progress note dated June 4, 1997 from Dr. Innella, which stated that appellant was continuing to show improvement. Dr. Innella concluded that appellant would be able to return to work in six weeks. An OWCP-5 form dated June 16, 1997, stated that appellant was disabled from November 15, 1995 and would continue to be disabled until July 28, 1997.

By decision dated July 11, 1997, the Office terminated benefits effective that day finding that Dr. Greene's impartial medical report constituted the weight of medical opinion.

Appellant requested reconsideration and resubmitted copies of treatment notes from Health South for the period September 13 through October 10, 1996, which were previously of record.

In a November 24, 1997 report, Dr. Innella provided a history of appellant's injury and presented a chronology of appellant's treatment since being evaluated on December 4, 1996 for pain in the left shoulder, cervical and dorsal and lumbar spine, with pain radiating down her right leg. On appellant's most recent visit of October 29, 1997, she was still symptomatic. Dr. Innella diagnosed fibromyalgia of the cervical dorsal and lumbar spine; exacerbation of mild degenerative joint disease and posterior ridge C5-6; bulging annulus L4-5, L5-S1 with right lumbar radiculopathy; and intermittent synovitis left shoulder. She recommended continued heat to the area and symptomatic treatment. Dr. Innella opined that the injuries appellant sustained were permanent in nature, due to the persistent symptoms and the limitations which appellant has been left with and were causally related to the events which occurred when she was struck by the filing cabinet on August 15, 1995.

Progress notes from Dr. Innella dated July 30, September 10, October 29 and December 3, 1997 were also provided along with a disability certificate dated July 30, 1997. Each treatment note chronicles appellant's subjective complaints, the objective testing provided and the mode of treatment provided to appellant. The July 30, 1997 disability certificate states that appellant will not be able to return to work until further evaluation. No explanation is provided.

By decision dated February 4, 1998, the Office denied modification of the July 11, 1997 decision on the grounds that the evidence submitted was insufficient to change the determination that the weight of the medical evidence belonged to the impartial medical specialist.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective July 11, 1997.

Where the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[2] 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.[3]

In this case, a conflict in medical opinion was created when Dr. Lebovicz, a second physician and Dr. Inella, appellant's treating physician, disagreed on the extent of appellant's continuing disability. The Office properly referred appellant to Dr. Greene for an impartial evaluation. Dr. Greene indicated that appellant's conditions of cervical strain and postconcussion syndrome had resolved and, although there was a limitation of motion in appellant's left shoulder, she was capable of returning to her date-of-injury job.

In situations when there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[4]

The Board finds that the weight of the medical evidence rests with the May 16, 1997 report of Dr. Greene, to whom the Office referred appellant, who determined that appellant was capable of returning to her date-of-injury job. Dr. Green's May 16, 1997 report is sufficiently rationalized and responsive to the Office's inquiries to be entitled to special weight. He was provided with a statement of accepted Facts, the entire medical record with treatment notes and diagnostic findings and performed his own examination of appellant. Based on his findings, Dr. Greene opined that appellant's conditions of cervical sprain and postconcussion syndrome had resolved and, although there was a slight limitation of motion in her left shoulder, this would not stop appellant from performing her full and regular job as a personnel manager specialist as described. His report was based on accurate facts, thorough examination and all medical records and diagnostic results available. Dr. Greene's conclusion is supported by medical rationale and is fully responsive to the inquiries of the Office. Thus, the Board finds that the Office properly relied on Dr. Greene's report that appellant was no longer disabled and was capable of returning to her regular work when it terminated appellant's compensation effective July 11, 1997.

Appellant subsequently submitted a June 4, 1997 progress note of Dr. Innella, which stated that appellant was continuing to show improvement and should be able to return to work in six weeks. A June 16, 1997 OWCP-5 form stated that appellant would continue to be disabled until July 28, 1997. However, neither of these reports provides any findings or rationale to indicate why appellant is disabled or why the disability will cease on or either within six weeks or July 28, 1997. Without any rationale or explanation for the conclusion reached, these reports

[2] *Harold S. McGough*, 36 ECAB 332 (1984).

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

[4] 5 U.S.C. § 8123(a); *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

are not sufficient to create a conflict in the medical evidence or to overcome the weight of the medical evidence as represented by the report of Dr. Greene.[5]

Furthermore, the evidence submitted in support of appellant's reconsideration request which was not previously of record is insufficient to create a conflict in the medical evidence or to overcome the weight of the medical evidence as represented by the report of Dr. Greene. Although Dr. Innella opined that appellant's current conditions were permanent in nature and causally related to the work injury of August 15, 1995, her November 24, 1997 report and treatment notes reflect that her opinion is based upon appellant's subjective complaints without any supporting objective findings. Dr. Innella specifically opined that appellant's injuries were permanent in nature "due to the persistent symptoms and limitations which appellant has been left with." Subjective complaints of symptoms unsupported by objective physical findings of disability diminish the probative value of the medical report.[6] Moreover, as Dr. Innella was on one side of the conflict, which was resolved by Dr. Greene, her additional reports and treatment notes are insufficient to create a conflict in the medical evidence or to overcome the weight of the medical evidence as represented by the report of Dr. Greene.[7]

The decisions of the Office of Workers' Compensation Programs dated February 4, 1998 and July 11, 1997 are affirmed.

Dated, Washington, D.C.
December 17, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[5] *Lucrecia M. Nielsen*, 42 ECAB 583, 594 (1991).

[6] *John L. Clark*, 32 ECAB 1618 (1981); *Charles D. Wallace*, 21 ECAB 347 (1970).

[7] *See Virginia Davis-Banks*, 44 ECAB 389 (1993).