U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHARENE M. MOUSTAFA and DEPARTMENT OF DEFENSE, DEPENDENTS EDUCATION, Arlington, VA

Docket No. 98-1715; Submitted on the Record;
Issued April 7, 2000

DECISION and ORDER

Before GEORGE E. RIVERS, BRADLEY T. KNOTT,
A. PETER KANJORSKI

The issue is whether appellant's posterior spinal decompression for stenosis performed on January 15, 1997 and epidural injections of October 24, November 1 and 19, 1996 were medically necessary for treatment of her accepted lumbar strain.

On March 15, 1996 appellant, then a 42-year-old personnel staffing assistant, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1), alleging that, on that date, she was involved in an elevator accident. She explained that due to mechanical failure, the elevator in which she was riding fell from the sixth floor to between the fourth and fifth floors, thereby causing her to suffer from cervical strain and multiple contusions to her lower spine, hip, left thigh and leg. Appellant stopped working on March 18, 1996.

In support of her claim, appellant filed a report of x-ray findings by Dr. John C. Vance, a Board-certified radiologist, dated March 16, 1996, wherein he found no fracture or subluxation, that there was a loss of the usual lordotic curve and there was mild hypertrophic spurring of the lower terminal plates. He further noted that the lumbosacral films showed no fracture or subluxation, but there was a slight narrowing of the lower back joints. Appellant also filed medical reports by her treating physician, Dr. John K. Starr, an orthopedic surgeon with the George Washington University Medical Center. He first saw appellant on March 26, 1996 at which time he opined that appellant had left-sided sciatica. Dr. Starr also noted that x-rays of her thorocolumbosacral spine were unremarkable. On March 19, 1996 he noted that appellant's major complaint was of pain that originated in her left lower back and radiated all the way down her leg. At Dr. Starr's request, Dr. Wayne J. Olan, a neuroradiologist, conducted a magnetic resonance imaging (MRI) scan of appellant's lumbar spine and concluded that there was a diffuse disc bulge at L5-S1 with no evidence of spinal or neural foraminal stenosis. He further

noted facet degenerative changes at L3-4. On April 11, 1996 after reviewing Dr. Olan's x-ray, Dr. Starr advocated steroid injections for appellant. He noted:

> "[Appellant] is eager to move forward with surgical decompression of the nerve root on the left side and, while my preference would be to proceed a bit more cautiously with some nonoperative measures, she does, in fact, have foraminal stenosis at this level, along with motor weakness as well, with positive tension signs and radicular pain without back pain. Certainly she is a surgical candidate."

Dr. Richard Riegelman, a Board-certified internist, wrote a short note dated April 29, 1996 in which he indicated that he concurred with Dr. Starr's recommendation that appellant undergo disc herniation surgery.

In response to an Office of Workers' Compensation Programs' memorandum dated April 30, 1996, the Office medical adviser noted that there were no objective findings in the medical evidence to establish a need for disc herniation surgery.

On May 3, 1996 the Office accepted appellant's claim for a lumbar strain and paid appropriate compensation benefits.

In response to the Office's May 7, 1996 request for a second opinion, appellant was seen by Dr. Thomas Ducker, a Board-certified neurosurgeon, who, in an unsigned report dated May 15, 1996, noted that appellant had direct bruising to the left greater trochanteric area and near the sciatic nerve in the left lower extremity which was not associated with any serious pathology in the lumbar spine. He opined that appellant did not need surgery but that she needed a rehabilitation program and referred her to Dr. Frederick Sutter, a Board-certified physical medicine and rehabilitation specialist. No report from him is in the record. In an attending physician's supplemental report of the same day, Dr. Ducker diagnosed traumatic trochanteric bursitis and indicated by a check mark that the condition was related to the March 15, 1996 employment injury. Additionally, he indicated by a check mark that appellant would continue to be disabled for 90 days or longer.

In an attending physician's report dated May 21, 1996, Dr. Starr diagnosed appellant as suffering from an L5-S1 disc herniation, he ordered an MRI scan and epidural injections and noted that appellant would be scheduled for surgery in July 1996 for "decompression of nerve root on the left side."

In a decision dated June 3, 1996, the Office rejected appellant's claim for surgery of decompression at L5-S1 as recommended by the treating physician, noting that this surgery was "not medically necessary and related to the accepted conditions in this case."

By letter dated June 18, 1996, received by the Office on June 20, 1996, appellant requested an oral hearing before an Office hearing representative.

In a decision dated August 26, 1996, the hearing representative found that this case was not in posture for a hearing as Dr. Ducker's opinion did not constitute a second opinion pursuant to Chapter 2.810 of the Federal Employees' Compensation Act's Procedure Manual, as neither

the medical form nor his unsigned letter dated May 15, 1996 to Dr. Sutter met the basic requirements for a second opinion. The hearing representative vacated the June 3, 1996 decision. The hearing representative directed the Office to secure a rationalized medical opinion addressing the necessity for surgical intervention. She noted that, upon receipt of such an opinion, the Office should issue a *de novo* decision regarding authorization for the surgery and explaining the reasoning therefor.

In his report dated July 15, 1996, but received after the August 26, 1996 decision, Dr. Starr noted that appellant was having the same complaints, predominantly in the left lower extremity and that he continued to believe that there was a foraminal encroachment there, although he noted his agreement with the radiologist's reading of no central spinal stenosis. He referred appellant for a second opinion, as the doctors were not in overall agreement.

In response to questions from the Office dated September 10, 1996, Dr. Ducker, in a medical report dated October 29, 1996, reiterated his advice that appellant not have surgery but rather be treated by a physical medicine and a rehabilitation specialist.

On November 8, 1996 the Office referred appellant to Dr. Stanislaw K. Toczek, a Board-certified neurosurgeon, for an impartial medical examination. In a medical report dated November 25, 1996, he noted that the configuration of the spine was well preserved and during palpatation there was no particular area of tenderness. Dr. Toczek noted that he "did not have the opportunity to review [appellant's] MRI scan of the lumbar spine but she promised that she would provide it and that Dr. Toczek would do an amendment at that time." Dr. Toczek opined that appellant had a contusion in the area of the left hip and thigh and for some reason the pain still persisted although he could not definitively determine the source responsible for pain. He concluded that there should be no surgical procedure, "particularly on the lumbar spine," as there was no clear indication of where or what to correct by surgery. Further, Dr. Toczek concluded that the only limitations appellant suffered from as a result of the March 15, 1996 employment injury is subjective pain. He pointed out that he was unable to definitively discover the source for her pain and was also unable to measure the pain. Additionally, Dr. Toczek concluded that appellant "has full capacity of function to perform her task as a staffing assistant which I understand is a desk job." He noted that appellant had quite a frightening experience and a psychiatrist would be better equipped to evaluate her stress syndrome. Dr. Toczek concluded:

> "I felt that my responsibility is to evaluate [appellant] for some pathology which could be demonstrated earlier. Analyzing the type of accident she was in, I felt obliged to rule out such pathology as post traumatic Chiari malformation syndrome, occasionally with syringomyelia or intracranial bleeding. I understood that I am authorized to perform any test to evaluate [appellant] further, therefore, I arranged to perform an MRI [scan] of the brain and upper cervical spine (I include the report of this test) and the above mentioned pathology is ruled out.
>
> "In summary, it is my opinion that [appellant] should be gradually prepared to return to the work condition: this could be accomplished by a work preparatory program (relatively short) by appropriate specialists."

By letter dated February 12, 1997, the Office forwarded Dr. Toczek's report to Dr. Starr for a reasoned medical opinion as to whether appellant remained disabled for work or whether she was capable of light duty for four hours per day. He did not submit a response.

By decision dated March 4, 1997, the Office rejected appellant's claim for benefits to cover the surgery, as the Office found that the weight of the medical evidence established that the recommended surgery, *i.e.,* the decompression at L5-S1, was not medically necessary.

Appellant then submitted medical notes evidencing that Dr. Starr performed a posterior spinal decompression for stenosis at L5-S1, laminectomy on her on January 15, 1997. She was discharged on January 17, 1997 with instructions to avoid lifting and excessive bending or sitting for long periods of time. Appellant also submitted medical records indicating that she had a left sacroiliac joint injection on November 1, 1996, L3-4 lumbar epidural steroid injections on October 24, November 1 and 19, 1996.

In a medical report dated February 28, 1997, Dr. Julia B. Frank, a Board-certified psychiatrist, diagnosed appellant as suffering from post-traumatic stress disorder caused by the accident in the elevator. He noted that appellant probably had some character traits in the histrionic or hysterical spectrum prior to the accident, but "she was clearly badly injured last March and her most recent symptoms are attributable to the accident and not to underlying character pathology."

On March 20, 1997 appellant, through her attorney, requested an oral hearing before an Office hearing representative.

Appellant submitted a medical report dated April 1, 1997, in which Dr. Starr gave the reasons he proceeded with the January 15, 1997 surgery. He noted, in part:

> "Given, in my impression, the neuroforaminal narrowing with nerve root compression and irritation at the L5-S1 level on the left which had failed to respond after months of treatment to physical therapy, nonsteroidal antiinflammatories and epidural steroid injections and which continued to produce pain in a very consistent and reliable pattern in the left lower extremity and foot, and the corresponding physical findings, it was my decision to proceed to the operating room on January 15, 1997, for nerve root decompression and decompression."

Dr. Starr noted that the operation was a success and that appellant stated that she feels "1,000 times better." With regard to the opinions of the physicians who disagreed, he stated, "the consultant's opinions were undoubtedly based upon a simple reading of the MRI scan without actually seeing the scan themselves." Dr. Starr noted that appellant was scheduled to see the psychiatrist who was treating her for post-traumatic stress and "thereafter, I am sure [she] will have clearance for return to duties." He concluded:

> "I think it is fairly straight-forward and apparent on viewing the MRI scan, examining [appellant], and noting over time the remarkable consistency of

symptoms reported by [her] and the way in which these coincide with the pathoanatomy at the L5-S1 level."

Dr. Starr added that appellant should not engage in heavy lifting, repetitive bending, kneeling or ladder climbing. He noted, however, that he was uncertain as to whether these limitations would significantly impact on her job duties.

In a medical report dated November 7, 1997, Dr. Neven A. Popovich, an Office medical consultant, reviewed appellant's medical record and determined that "the available medical evidence does not establish that appellant had a herniated disc caused by the March 15, 1996 injury."[1] He further noted that he could not find in the available record that the foraminal stenosis was related to the March 15, 1996 injury. Dr. Popovich explained that this "is usually a chronic, degenerative problem not routinely associated with acute injury" and that the MRI scan showed diffuse disc bulge at L5-S1 and facet degenerative changes at L3-4 and L4-5 with no evidence at L5-S1 of spinal or neural formaninal stenosis at these levels.

A hearing was held on June 21, 1998. Appellant testified as to how the injury occurred; that the three epidurals she received did not result in any progress and that she started having many problems with her left knee after the surgery.

By decision dated April 1, 1998, finalized April 2, 1998, the hearing representative affirmed the Office's March 4, 1997 decision denying authorization for surgery on January 15, 1997, as well as authorization for the epidurals, finding that the weight of the evidence was with Dr. Toczek's impartial medical examination which established that the surgery of January 15, 1997 was not required for treatment of the March 15, 1996 employment injury.[2] The hearing representative also found that appellant's trochanteric bursitis resulted from the March 15, 1996 employment injury.

The Board finds that the weight of medical opinion establishes that the surgery dated January 15, 1997 and the epidural injections of October 24, November 1 and 19, 1996 were not medically necessary.

The evidence of record establishes that appellant sustained an injury on March 15, 1996, while in the performance of duty that was accepted by the Office for a lumbar strain and later expanded by the Office hearing representative to include trochanteric bursitis.

The Office properly noted that there was a conflict between, Drs. Starr and Ducker. Dr. Starr concluded that the surgery and the epidural injections were necessary due to the accepted lumbar strain. However, Dr. Ducker concluded that the surgery and epidural injections

[1] Dr. Popovich noted that Dr. Starr's operative report dated January 15, 1997 noted that no extruded disc was seen.

[2] The hearing representative did accept the claim for post-traumatic stress disorder. He noted that further development of the record was needed to discuss whether appellant had any disabling physical residuals from the March 15, 1996 employment injury. The hearing representative further directed the Office to develop the issue of whether appellant's left knee condition is causally related to the employment injury.

were not necessitated, as the bruising to the left greater trochanteric area and near the sciatic nerve is not associated with any serious pathology in her spine.

Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between a physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[3] As Dr. Starr's opinion was that the injections and appellant's posterior spinal decompression for stenosis were medically necessary and Dr. Ducker was of the opinion that this surgery was not necessary, a conflict existed.

Accordingly, the Office referred appellant to Dr. Toczek for an impartial medical examination. He examined appellant, noted that she had a contusion in the area of the left hip and thigh and for some reason the pain persists. Dr. Toczek arranged for an MRI scan, which he found ruled out such pathology as post-traumatic Chiari malformation syndrome. He noted that, as he could not definitively find the source responsible for appellant's alleged pain, there should be no surgical procedure as there was no clear indication of where or what to correct by surgery.

Relying upon Dr. Toczek's opinion, the Office rejected appellant's claim for benefits to cover the surgery and injections, as the Office found that the weight of the medical evidence established that the recommended surgery, *i.e.*, the decompression at L5-S1, was not medically necessary.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[4] Accordingly, the Board finds that the weight of medical opinion is represented by the report of Dr. Toczek, the referral specialist in neurosurgery. He was provided with the case record and a statement of accepted facts and had the opportunity to examine appellant and review the various diagnostic procedures conducted since appellant's March 15, 1996 employment-related injury. In assessing medical evidence, the number of physicians supporting one position or another is not controlling; its reliability, its probative value and its convincing quality determine the weight of such evidence. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are factors which enter into this evaluation.[5] Dr. Toczek provided a thorough review of the employment injury, appellant's medical treatment and diagnostic tests and provided ample rationale for concluding that appellant should have no surgery "particularly on the lumbar spine." Accordingly, as Dr. Toczek was appointed impartial medical examiner for the purpose of resolving the conflict between the opinions of Drs. Starr and Ducker and his opinion is sufficiently well rationalized

[3] *Joseph D. Lee*, 42 ECAB 172 (1990).

[4] *Gwendolyn Merriweather*, 50 ECAB _____, Docket No. 97-2137 (issued June 3, 1999); *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

[5] *Connie Johns*, 44 ECAB 560 (1993).

and based upon a proper factual background, the Office properly gave this decision special weight.[6]

The medical evidence submitted by appellant following the Office's March 4, 1997 opinion is insufficient to overcome the weight given to the opinion of the impartial medical examiner, Dr. Toczek. Dr. Starr failed to provide any additional probative evidence to show why Dr. Toczek's premise or findings were incorrect, nor did he provide sufficient rationale to refute Dr. Toczek's conclusions; he merely reiterated his opinion regarding causal relationship and the necessity of the surgery. Further, as Dr. Starr was on one side of the conflict that Dr. Toczek resolved, the additional report from Dr. Starr is insufficient to overcome the weight accorded Dr. Toczek's report as the impartial medical specialist's report or to create a new conflict with it.[7]

The decision of the Office of Workers' Compensation Programs' hearing representative dated April 1, 1998, finalized April 2, 1998, is affirmed.

Dated, Washington, D.C.
April 7, 2000

George E. Rivers
Member

Bradley T. Knott
Alternate Member

A. Peter Kanjorski
Alternate Member

[6] *See Roger Dingess*, 47 ECAB 123, 126-27 (1995).

[7] *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).