U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOEANN M. SMITH and FEDERAL JUDICIARY, REFEREES IN BANKRUPTCY, Washington, DC

Docket No. 99-1543; Submitted on the Record;
Issued February 3, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective April 17, 1996.

The Office accepted that appellant, a 27-year-old deputy clerk, sustained a contusion to her low back, left shoulder and left side of her neck while in the performance of duty on December 2, 1987. Appellant was terminated from the employing establishment on January 8, 1988 for unsatisfactory job performance. She received appropriate compensation and was placed on the periodic rolls. The Office terminated appellant's compensation benefits by decision dated March 28, 1996 effective April 17, 1996. The Office denied modification of that decision on July 18 and November 19, 1996, March 12 and May 2, 1997, July 1, August 11 and December 11, 1998 and February 16, 1999.

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

Following an injury on December 2, 1987, appellant underwent a computerized tomography scan of the cervical and lumbar spine which was reported as showing no evidence of stenosis facet atrophy, destructive lesions of the bone or any disc disease.

Appellant was treated with facet injections by her treating physicians, Dr. Bernard A. Wilkens and Dr. David K. Fletcher, a rheumatologist. In an October 5, 1989 report, Dr. Wilkens stated that appellant was experiencing a great deal of pain in her lower back with radicular

[1] *Patricia A. Keller*, 45 ECAB 278 (1993).

symptoms. He recommended a diskocat and a magnetic resonance imaging (MRI) scan be performed. A January 1, 1989 x-ray analysis summary revealed a loss of cervical lordosis.

The Office referred appellant to Dr. L. David Hubler, a Board-certified orthopedist, for a second opinion evaluation on April 23, 1991. In a report of the same date, he examined appellant, diagnosed a lumbar strain and stated that appellant was not totally disabled from performing her previous occupation so long as the amount of squatting and lifting was limited. Dr. Hubler recommended that appellant undergo an exercise program.

In a report of July 26, 1992, Dr. C.D. Burda, a rheumatogist and an Office referral physician, reviewed a statement of accepted facts and prior medical records and provided the results of her examination. Dr. Burda opined that appellant had traumatic (reactive) fibromyalgia or myofascial pain syndrome, as a result of the 1987 work-related injury on the basis that there were no musculoskeletal complaints prior to the work injury. She opined that appellant would be able to perform work on a restricted basis, at least four to six hours of her previous work duties as a deputy clerk. Dr. Burda recommended a repeat cervical and lumbar spine x-rays along with a serum CPK and antinuclear antibody. A June 9, 1994 MRI scan of the lumbar spine revealed a mild facet arthrosis at the L5 level, but was otherwise normal for appellant's age group.

In a June 21, 1994 medical report, Dr. David W. Duffner, a Board-certified orthopedist, diagnosed bursitis of the right hip, which is not an accepted condition. He stated that the MRI scan of the lumbar spine showed mild facet arthrosis, otherwise unremarkable and no disc herniation. Plain films done the same day of the spine were within normal limits. A previous bone scan was negative. Dr. Duffner stated that he was unable to determine an exact source of appellant's pain and recommended a referral to a pain treatment program.

The Office referred appellant to Dr. James G. Guillebeau, a Board-certified orthopedist, for a second opinion. He was provided with a statement of accepted facts dated June 20, 1995 and appellant's medical records. In a July 3, 1995 medical report, Dr. Guillebeau set forth the results of his examination and discussed the medical evidence of record along with the diagnostic studies, including the most recent studies of June 9, 1994. He provided an impression of chronic neck and low back pain and found no objective medical evidence of current disability as related to the work incident of December 2, 1987. Dr. Guillebeau stated that there was no objective evidence that the accepted conditions of contusions of the low back, left shoulder and left side of the neck were still active and causing symptoms. He noted that contusions were self-limited and would not be expected to be present and symptomatic four and a half years after the work incident. Dr. Guillebeau opined appellant was physically capable of sedentary work, such as she was doing at the time of injury, with restrictions imposed on repetitive bending and lifting.

On August 2, 1995 the Office issued a notice of proposed termination of compensation which recommended that appellant's compensation be terminated. The Office found that Dr. Guillebeau's report represented the weight of the medical evidence of record and established that appellant had no continuing work-related disability. Appellant was advised that if she disagreed with the proposed action she should submit additional evidence or argument within 30 days.

In an August 18, 1995 letter, appellant stated that she opposed the termination action as she suffered from continued pain. No medical evidence was submitted.

By decision dated March 28, 1996, the Office terminated appellant's compensation benefits, effective April 17, 1996, on the grounds that the weight of the medical evidence of record established that her injury-related disability had ceased without residuals.

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

As neither Drs. Wilkens or Fletcher identified any objective findings relating to the accepted conditions of low back, left shoulder and left side of the neck contusions or offered any medical rationale explaining how appellant's symptoms continued to be causally related to the accepted conditions, the Office properly referred appellant to Dr. Guillebeau for a second opinion evaluation. He was provided with a statement of accepted facts and copies of all the medical evidence of record. Dr. Guillebeau opined that appellant was not totally disabled for work due to residuals of her accepted contusions. His, July 3, 1995 report, reviewed the entire medical record, examined appellant and thereafter concluded that while appellant complained of chronic neck and low back pain, there was no objective evidence that any of the accepted contusions of the low back, left shoulder and left side of the neck were still active. Dr. Guillebeau noted no muscle spasms, negative straight leg raising and found a full range of motion. He provided an explanation that the nature of contusions was self-limiting. Dr. Guillebeau addressed appellant's treating physicians reports and noted the results of various diagnostic tests, stating his agreement that appellant was not currently disabled due to the accepted injury. The Office properly determined that Dr. Guillebeau's July 3, 1995 report, which was based upon a proper factual background and was well rationalized, constituted the weight of the medical evidence. The Board has held that in assessing medical opinion evidence, the weight to be accorded such medical evidence is determined by its reliability, its probative value and its convincing quality. 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.[2] The Office therefore met its burden of proof to terminate appellant's compensation benefits effective April 17, 1996 on the grounds that Dr. Guillebeau's report constituted the weight of the medical evidence.

The record reflects that subsequent to the Office's March 28, 1996 termination decision, appellant requested reconsideration eight times and submitted additional medical evidence.

In an April 24, 1996 affidavit, appellant attested as to why she is unable to work. This is immaterial as the issue in this case is medical in nature and her lay opinion as to her disability is not probative.

[2] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

In an April 22, 1996 medical report, Dr. Leroy Collum, a psychologist, related that appellant was being seen for psychotherapy for depression. The condition of depression is not an accepted condition and thus has no relevance to appellant's claim.

In an undated report, Dr. King Barnes, a chiropractor, stated that he first saw appellant on April 19, 1996 for her low back, cervical and mid-thoracic pain which she attributed to her 1987 fall at work. As Dr. Barnes is a chiropractor, he is considered a "physician" under the Federal Employees' Compensation Act if he is treating a subluxation, as shown by x-rays to exist.[3] Without diagnosing a subluxation from x-ray, a chiropractor is not a "physician" under the Act and his opinion does not constitute competent medical evidence.[4] As Dr. Barnes failed to diagnose a subluxation as demonstrated by x-ray to exist, his reports do not constitute competent medical evidence in support of appellant's claim of continuing disability.

In a September 30, 1996 letter addressed to appellant's representative, Dr. Fletcher responded to the question, "based on your examination and treatments, can you say in all medical probability that [appellant]'s medical condition is directly related to her on-the-job injury of [December] 2[,] [19]87?" He replied: "yes, by history." As Dr. Fletcher merely responded to a question posed by appellant's representative and did not provide any medical rationale or discussion to supplement his answer, this report is of diminished probative value and is not sufficient to overcome the weight of the medical evidence as represented by Dr. Guillebeau.

In an April 10, 1997 report, Dr. Aaron Calodney, a Board-certified anesthesiologist, noted appellant's history of injury and performed a physical examination. He found marked mechanical lumbar spine pain with injection proven lumbar facet syndrome and sacroiliitis bilaterally. Progress reports dated May 30 and July 25, 1997 were also submitted. However, as Dr. Calodney failed to provide a medical explanation as to how appellant's conditions were related to her employment injury or address whether appellant was disabled for work. His reports are of diminished probative value.

In a May 29, 1997 report, Dr. Fletcher stated that appellant had marked mechanical lumbar spine pain with injection proven lumbar facet syndrome as well as sacroiliitis bilaterally. He stated that appellant was grossly deconditioned secondary to her injury. Regarding her neck pain, Dr. Fletcher stated that she has facet joint mediated pain. He opined that appellant's chronic neck and low back pain rendered her totally disabled as her pain was chronic in nature. Although a November 6, 1996 functional assessment of appellant was provided, Dr. Fletcher did not furnish sufficient medical rationale to support his opinion as to how appellant's disability was related to her work injury.

In a November 5, 1997 report, Dr. Fletcher reiterated the treatment provided to appellant and stated that appellant had not been seen since November 6, 1996, but was referred to Dr. Calodney for medial branch blocks to see whether a rhizotomy would help alleviate her

[3] *See* 5 U.S.C. § 8101(2) (defining the term physician); *see also* 20 C.F.R. § 10.400(e) (defining reimbursable chiropractic services).

[4] *See generally Theresa K. McKenna*, 30 ECAB 702 (1979).

complaints of pain. A medial branch block, lumbar at L3, L4, L5 and S1 was performed on June 25, 1997. Progress reports from Dr. Calodney were submitted. In a July 24, 1998 report, Drs. Fletcher and Calodney again noted appellant's extensive course of treatment. Appellant was last seen in July 1997 by Dr. Calodney for a follow up after medial branch block injections that were from L3-4 to S1, when it was determined to hold off on medial branch rhizotomy. The physicians opined that appellant had cervical and lumbar facet joint pain which is the direct result of the work-related injury of December 2, 1987. They noted that although appellant responded to conservative treatment, she continued to be symptomatic. Although both physicians opined that appellant's pain was directly related to her work injury, they failed to provide any medical rationale to support such opinions. Accordingly, their reports are of diminished probative value.

In an October 16, 1998 report, Dr. Grover C. Loughmiller, a psychologist, stated that he was seeing appellant primarily for pain relief through hypnosis and other psychotherapeutic interventions. He provided a description of what appellant alleged were changes in her life which seemed to ripple from her injury. However, Dr. Loughmiller did not offer an opinion or provide a discussion pertaining to the causal relation of appellant's symptoms and her work injury. His report is of diminished probative value.

In an October 2, 1998 medical report, Dr. Calodney stated that appellant was still symptomatic from her work injury. He noted that "a traumatic injury can present a set of problems that persist for years and years and even decades [and] that it does n[o]t take a leap of faith or a leap of logic to see how a traumatic spine injury can begin a cascade of degenerative changes that can last for a very long time. This is particularly true in individuals who have 'mechanical' type pain with mostly axial back symptomatology." Dr. Calodney stated that appellant's pain was "likely predominantly mediated by the lumbar facets joints." He noted that appellant was significantly obese and deconditioned which made recovery from her back injury extremely difficult. Dr. Calodney opined that on the basis of her lumbar spine injury, appellant developed a chronic pain syndrome involving the mechanical elements in the lumbar spine, predominantly the facet joints and had become deconditioned. He further stated that he read Dr. Guillebeau's report and disagreed with it. While Dr. Calodney addressed a causal relationship between appellant's back symptoms and her 1987 work injury, he has failed to provide sufficient rationale explaining how the accepted soft tissue injuries would cause or contribute to appellant's lumbar facet joint condition. He did not provide a review of the diagnostic tests or explain how the injury would still cause appellant symptoms or how appellant developed the problem with her lumbar facet joints. Dr. Calodney's general statement that a traumatic spine injury can begin a cascade of degenerative changes which may last for a long period of time is not well rationalized. He does not adequately explain appellant's current back condition in terms of the 1987 injury other than asserting a general proposition. Dr. Calodney's report, is therefore, of diminished probative value.

Appellant's own allegation in her November 3, 1998 statement that Dr. Guillebeau did not perform an adequate examination is of no probative value.

As the evidence appellant submitted with her reconsideration requests is insufficient to overcome the weight of the medical opinion evidence, as represented by Dr. Guillebeau's opinion, the Office properly denied modification of its March 28, 1996 termination decision.

The decisions of the Office of Workers' Compensation Programs dated February 16, 1999, December 11, August 11 and July 1, 1998 are affirmed.

Dated, Washington, D.C.
February 3, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member