U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANITA L. HAGEY and U.S. POSTAL SERVICE,
POST OFFICE, Pittsburgh, PA

Docket No. 98-677; Submitted on the Record;
Issued March 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's benefits effective May 25, 1997.

Appellant sustained employment injuries on September 30, 1989 by lifting mail and on November 14, 1989 in a motor vehicle accident while on her way to physical therapy for the earlier injury. At the time of the November 14, 1989 injury, appellant was on limited duty for effects of the September 30, 1989 injury. The Office accepted that these injuries resulted in a cervical sprain and a lumbar sprain. Appellant received continuation of pay from November 15 to December 29, 1989, after which the Office began paying compensation for temporary total disability. Appellant returned to limited duty on November 4, 1991, and again stopped work on April 27, 1992, whereupon the Office resumed payment of compensation for temporary total disability.

On June 1, 1993 the Office referred appellant, her medical records and a statement of accepted facts to Dr. Francis X. Plunkett, a Board-certified orthopedic surgeon, for a second opinion on her condition and its relationship to her employment injuries. In a report dated June 16, 1993, Dr. Plunkett stated that he could "find no objective evidence to support a continuing disability," that he "could return to her normal unrestricted job activities," and that he saw "no evidence whatsoever of continuing effects of the injury from either [September 30, 1989] or [November 14, 1989.]" The Office determined that this report created a conflict of medical opinion with appellant's attending physician, Dr. Andrew D. Kranik, a Board-certified orthopedic surgeon, who stated in a March 4, 1994 report that appellant could "not return to work without a work conditioning program and continuation of physical therapy while working for some period of time depending on her ability to perform. She has significant limitations."

To resolve this conflict of medical opinion, the Office referred appellant, the case record and a statement of accepted facts to Dr. Leland S. Blough, a Board-certified orthopedic surgeon, who, in a report dated July 29, 1994, diagnosed: "(1) Chronic right neck pain following motor

vehicle accident November 1989 with no demonstrable objective abnormalities of neck joint, nerve, muscles, or any nerve root abnormalities detected in upper extremities; (2) Low back discomfort with lower extremity radiation with left lower extremity radiation symptoms compatible with S1 radiculopathy but with no detected persistent nerve tethering on the basis of straight leg raising, or any detected abnormalities of reflexes, sensory or motor function." He stated that, although there was "no objective neuromuscular or spine joint abnormality detected to explain her symptomatology," after several years of reduced activity as a result of her work injuries, appellant was sufficiently deconditioned to require three to four months of reconditioning doing part-time sedentary work progressing to full-time light to medium work. Dr. Blough indicated appellant could work only 4 hours per day progressing to 8 hours within 3 months and that she could lift or carry a maximum of 10 pounds progressing to occasional lifting and carrying of up to 35 pounds within 4 months of returning to work. In an undated report received by the Office on April 7, 1995, Dr. Kranik stated that he disagreed with Dr. Blough's opinion that appellant had no objective physical findings and with Dr. Blough's "insinuation that all patients heal within the prescribed period of time."

On September 23, 1994 appellant returned to work for 4 hours per day as a limited-duty letter carrier with a lifting restriction of 10 pounds. Although the employing establishment's limited-duty offer indicated appellant's hours and lifting would progressively increase over three months, appellant continued to work four hours per day with a lifting restriction of ten pounds, as recommended by Dr. Kranik.

By telephone call on November 18, 1996 the Office ascertained that Dr. Blough had retired. On December 12, 1996 the Office referred appellant, the case record and a statement of accepted facts to Dr. Robert Durning, a Board-certified orthopedic surgeon, and advised appellant and Dr. Durning that this referral was for the purpose of resolving a conflict of medical opinion. In a report dated January 6, 1997, he set forth appellant's history and symptoms, noting that appellant told him that her neck did not bother her much and did not interfere with activity. Dr. Durning described his findings on examination, but did not examine appellant's neck or upper extremities. After diagnosing low back pain by history with tenderness to palpation and subjective restriction in motion, Dr. Durning concluded:

> "In my opinion, the absence of symptoms indicates that there are no important residual effects of the cervical sprain sustained at the time of the November 14, 1989 motor vehicle accident.
>
> "In my opinion, there are no objective abnormalities of [appellant's] low back or lower extremities that could be traced to the September 30, 1989 injury at work, nor to the November 14, 1989 motor vehicle accident.
>
> "In my opinion, there are no important residual abnormalities of the low back or lower extremities from the September 30, 1989 work injury.
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> "In my opinion, if there are restrictions in [appellant's] activity, they are self-imposed and are not based on any objective musculoskeletal or neuromuscular abnormality.

"I reviewed the Job Description of Limited-Duty Letter Carrier. In my opinion, [appellant] is able to perform the duties of that position on an eight-hour per day basis.

"In my opinion, there is no physical abnormality that precludes [appellant] from returning to unrestricted work as a letter carrier."

In a report dated January 15, 1997, Dr. Kranik stated that appellant's "physical examination showed the following: muscle spasm, loss of motion, swelling, tenderness to palpation, intermittent neurological loss and multiple trigger points." He diagnosed cervical and lumbosacral sprain-strain syndromes, and cervical and lumbosacral radiculitis and stated that these conditions were caused by her November 14, 1989 injury. In reports dated January 20, March 4 and April 23, 1997, Dr. Kranik indicated appellant could perform only light duty for four hours per day.

On March 12, 1997 the Office issued a notice of proposed termination of compensation, on the basis that the weight of the medical evidence, Dr. Durning's January 6, 1997 report, showed she no longer suffered from any residuals of her September 30 or November 14, 1989 employment injuries. By decision dated May 13, 1997, the Office terminated appellant's compensation, including her authorization for medical treatment at the Office's expense, on May 25, 1997 on the basis that the weight of the medical evidence established that her work-related disability had ceased.

Appellant requested reconsideration, and submitted additional medical evidence including the results of a magnetic resonance imaging scan done on January 24, 1997 and a June 9, 1997 report from Dr. Kranik setting forth work tolerance limitations and stating that appellant could perform sedentary work four hours per day. By decision dated October 3, 1997, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision.

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.[1] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further treatment.[2]

The Board finds the Office has not established that appellant's disability and need for medical treatment related to her September 30 and November 14, 1989 employment injuries ended by May 25, 1997.

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

[2] *Furman G. Peake*, 41 ECAB 361 (1990).

There was a conflict of medical opinion between the Office's referral physician, Dr. Plunkett, and appellant's attending physician, Dr. Kranik, both Board-certified orthopedic surgeons, on the question of whether appellant, who was not working, continued to be disabled due to residuals of her September 30 and November 14, 1989 employment injuries. To resolve this conflict of medical opinion, the Office referred appellant, the case record and a statement of accepted facts to Dr. Blough, a Board-certified orthopedic surgeon. In a report dated July 29, 1994, Dr. Blough concluded that there was "no objective neuromuscular or spine joint abnormality detected to explain her symptomatology," but that after several years of reduced activity as a result of her work injuries, appellant was sufficiently deconditioned to require three to four months of reconditioning doing part-time sedentary work progressing to full-time light to medium work. Appellant then returned to work consistent with the recommendations of Dr. Blough and continued to perform such work for two and one-half years.

After appellant had performed part-time sedentary work for over two years, the Office contacted Dr. Blough to obtain a supplemental report. Upon learning Dr. Blough had retired, the Office referred appellant to Dr. Durning, a Board-certified orthopedic surgeon, for an evaluation of her condition and its relation to her employment injuries. The Office indicated this referral was for the purpose of resolving a conflict of medical opinion. The conflict, however, had already been resolved by Dr. Blough and Dr. Durning's report almost two and one-half years later cannot be considered the report of an impartial medical specialist. Even though the report of Dr. Durning is not entitled to the special weight afforded the opinion of an impartial medical specialist resolving a conflict of medical opinion,[3] his report can still be considered for its own intrinsic value and can still constitute the weight of the medical evidence.[4]

The Board finds that Dr. Durning's January 6, 1997 report conflicts with the January 15, 1997 report of Dr. Kranik. Based on the lack of objective abnormalities on examination, Dr. Durning concluded that any restrictions on appellant's activities were self-imposed, that there were no important residuals of her injuries and that there was "no physical abnormality that precludes [appellant] from returning to unrestricted work as a letter carrier." Dr. Kranik found that appellant could perform only part-time limited duty and in his January 15, 1997 report noted objective findings on examination of muscle spasm and swelling pertaining to appellant's cervical and lumbar spine. The reports of Drs. Durning and Kranik are in conflict regarding whether appellant has objective findings on examination and whether appellant can work with or without restrictions. Because of this conflict of medical opinion, the Office did not meet its burden of proof to terminate appellant's compensation.

[3] In situations where there are 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 on a proper factual background, must be given special weight. *James P. Roberts*, 31 ECAB 1010 (1980).

[4] *See Leanne E. Maynard*, 43 ECAB 482 (1992). (The Board found that a physician's "opinion is probative even though he was not an impartial medical examiner" and that the opinion of this physician and another physician were sufficient to establish causal relation.); *Rosa Whitfield Swain*, 38 ECAB 368 (1987). (The Board found that a physician was improperly designated as an impartial medical specialist, but that his opinion nonetheless constituted the weight of the medical evidence.)

The decisions of the Office of Workers' Compensation Programs dated October 3 and May 13, 1997 are reversed.

Dated, Washington, D.C.
March 14, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member