U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS P. CAPANNA and DEPARTMENT OF THE NAVY, PHILADELPHIA NAVAL SHIPYARD, Philadelphia, PA

Docket No. 98-1914; Submitted on the Record;
Issued March 2, 2000

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to monetary compensation and medical benefits effective August 28, 1997 on the grounds that appellant had no further disability or injury residuals, causally related to his May 18, 1995 low back muscular soft tissue strain injury.

On May 18, 1995 appellant, then a 30-year-old boilermaker, filed a claim alleging that he sustained a back injury that date while lifting steel plates. He stopped work on May 22, 1995, received continuation of pay through July 5, 1995 and thereafter was placed on the periodic rolls. The Office accepted that appellant sustained a lumbosacral strain.

Following his injury appellant submitted multiple form reports, office notes and disability slips from Dr. Herman W. Palat, an osteopathic family practitioner and geriatrician, and Dr. Maxwell Stepanuk, Jr., an osteopathic orthopedist in practice with Dr. Palat, which noted appellant's complaints of continuing pain, and which opined that he was totally disabled from work due to his May 18, 1995 back injury. Appellant's diagnoses were noted by Dr. Palat as lumbosacral strain, herniated nucleus pulposus at L4-5, degenerative disc disease, L3-S1 and spinal stenosis.

On July 19, 1995 appellant was referred to a private rehabilitation nurse for vocational rehabilitation. At the rehabilitation nurse's suggestion, the Office referred appellant, together with a statement of accepted facts and the complete case record, to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon of professorial rank, for a second opinion evaluation regarding the extent of his current employment-related disability. However, due to inclement weather on the morning of appellant's December 19, 1995 appointment, Dr. Didizian's office canceled that appointment and rescheduled appellant's second opinion evaluation for January 29, 1996.

On January 29, 1996 appellant was seen by Dr. Stephen M. Horowitz, a Board-certified orthopedic surgeon asociated with Dr. Didizian. By report that date, Dr. Horowitz recounted appellant's history, conducted a physical examination and provided his findings. He noted that earlier diagnostic procedures revealed small disc protrusions at L3-4 and L4-5 which caused no displacement of the thecal sac and indicated that there were no objective findings in support of a diagnosis of radiculopathy. Dr. Horowitz diagnosed strain/sprain of the lumbar spine and concluded that appellant could return to full-time light-duty work at that time within certain restrictions and could return to regular-duty work within a few months.

On May 23, 1996 Dr. Stepanuk submitted a follow-up report in which he related appellant's continuing complaints of pain and his findings made upon physical examination. Dr. Stepanuk diagnosed lumbar strain/sprain and herniated nucleus pulposus at L4-5 with left lower extremity radiculopathy, and he restricted appellant to part time, six-hour per day light-duty work at that time, with the possibility that he might be able to return to work on a full-time basis in the future with permanent light-duty work restrcitions.

The Office then determined that a conflict had arisen in the medical opinion evidence between Drs. Horowitz and Stepanuk, regarding the nature and extent of appellant's continuing injury-related disability and it referred appellant, together with a statement of accepted facts, specific questions to be addressed and the complete case record, to Dr. Bong S. Lee, a Board-certified orthopedic surgeon of professorial rank, for an impartial medical examination.

By report dated August 26, 1996, Dr. Lee reviewed appellant's history and recounted his findings upon physical examination conducted on August 19, 1996. He reviewed appellant's October 24, 1995 magnetic resonance imaging (MRI) scan and noted, in a thorough and well-rationalized report, that it showed "a very small, extradural indentation in the center of the interspace between L3-4 and L4-5" with "no evidence of any compression or displacement of the thecal sac or compression of the nerve roots." He diagnosed "resolved sprain of the lumbosacral spine superimposed on underlying degenerative discogenic disease of the lumbar spine," and commented that the degenerative discogenic disease reflected on the MRI scan existed prior to May 18, 1995. Dr. Lee concluded that, although appellant's soft tissue injury may have temporarily aggravated his preexisting degenerative disease, there was "no evidence of permanent effect," and that "his soft tissue injuries as a result of the incident on May 18, 1995 have resolved." He therefore opined that appellant was "no longer disabled from the injuries at this time."

On June 12, 1997 the Office issued a notice of proposed termination of compensation, indicating that Dr. Lee's August 26, 1996 report established that appellant's employment-related soft tissue muscular strain injury had resolved without residuals. Appellant was advised that if he objected to the proposed termination, he had 30 days within which to submit additional evidence or relevant argument.

On August 11, 1997 appellant, through his representative, objected to the proposed termination and submitted several form reports from Dr. Palat. In these reports Dr. Palat diagnosed lumbosacral strain, herniated nucleus pulposus at L4-5 and spinal stenosis, and checked "yes" to the question of whether appellant was disabled for his usual work. Also submitted was a narrative report from Dr. Thomas A. Corcoran, a Board-certified orthopedic

surgeon, which noted appellant's diagnoses as lumbar spondylosis and lumbar radiculopathy. Appellant's accepted work-related condition was not addressed.

In addition to disagreeing with Dr. Lee's opinion, appellant's representative argued that Dr. Horowitz's report could not be used to form a conflict of medical opinion because the Office had referred appellant to Dr. Didizian and not Dr. Horowitz for a second opinion. In a supplemental argument dated August 14, 1997, appellant's representative argued that appellant had sustained a prior employment-related back injury in 1987 and he concluded that appellant was entitled to further compensation benefits based upon this earlier injury.

By decision dated August 27, 1997, the Office terminated appellant's compensation effective August 28, 1997 on the grounds that the weight of the medical evidence established that his May 18, 1995 employment-related soft tissue muscular strain injury had resolved. The Office found that Dr. Palat's reports were of diminished probative value as he was not a specialist in orthopedics, and it considered and rejected the arguments put forward by appellant's representative regarding Dr. Horowitz's appropriateness as a second opinion specialist.

On September 2, 1997 appellant's representative requested an oral hearing which was set for March 23, 1998. However, by letter dated March 10, 1998, appellant's representative changed his request to a review of the written record by an Office hearing representative. By letter dated April 7, 1998, appellant's representative argued as follows: (1) Dr. Horowitz was not a valid second opinion physician to examine appellant on behalf of the Office;[1] (2) Dr. Lee wrongly considered the issue of causal relationship when the conflict he was resolving only involved the nature and extent of appellant's disability;[2] (3) the Office should have found that a conflict existed regarding the issue of causal relationship under the pre-1966 codification version of section 8123(a) of the Federal Employees' Compensation Act without "weighing" the probative value of the opposing medical evidence pursuant to the policy it first announced in FECA Bulletin No. 83-56 (issued November 9, 1983); and (4) Dr. Lee did not review all the medical evidence in appellant's case record and ignored his prior accepted back injury.

By decision dated May 6, 1998, the hearing representative affirmed the Office's August 27, 1997 decision terminating appellant's compensation for his May 18, 1995 injury on the grounds that the weight of the medical evidence established that his employment-related disability had ceased. The hearing representative specifically found that a conflict in medical opinion evidence on the issue of continuing employment-related disability arose between Dr. Horowitz, a valid second opinion examiner, and appellant's attending orthopedist, Dr. Stepanuk, and was resolved by Dr. Lee's impartial medial report which established that appellant's accepted soft tissue muscular strain injury of May 18, 1995 had resolved as of the date of his examination on August 19, 1996.

[1] Appellant's attorney also alleged that the Office misplaced Dr. Didizian's second opinion report; however, the Board notes that the record supports that appellant was never examined by Dr. Didizian after his office canceled the December 19, 1995 appointment due to inclement weather.

[2] The Board notes that this argument disregards the specific questions to be addressed that were submitted to Dr. Lee with the referral, which included the issue of causal relation.

The Board finds that the Office properly terminated appellant's entitlement to monetary compensation and medical benefits effective August 28, 1997 on the grounds that appellant had no further disability or injury residuals, causally related to his May 18, 1995 low back muscular soft tissue strain injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] 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.[4] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.[5] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[6] The Office met its burden to terminate both in this case through the well-rationalized impartial medical evaluation of Dr. Lee.

When there exist, as in this case, 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.[7] As Dr. Lee's report was based upon a proper factual and medical background as set out in the statement of accepted facts, the entire case record and a thorough examination of appellant, and as it was complete and well rationalized, addressing all of the questions put forth, it is entitled to this special weight.

Dr. Lee found that appellant's degenerative discogenic problems, including but not limited to disc herniations, bulges, radiculopathy and spinal stenosis, preexisted appellant's May 18, 1995 low back soft tissue muscular strain injury. He found that appellant's accepted May 18, 1995 injury, low back soft tissue muscular strain, had resolved with no permanent residuals. Based upon this finding, Dr. Lee concluded that appellant was no longer disabled from his May 18, 1995 accepted employment injury. This complete and well-rationalized report is entitled to special weight and constitutes the weight of the medical opinion evidence on the issues posed, and therefore the Office met its burden of proof to terminate appellant's compensation and medical benefits entitlement in reliance upon this report.

The Board notes that the medical evidence submitted following Dr. Lee's report is of insufficient probative value to overcome the weight of the well-rationalized report of the impartial medical examiner. Dr. Corcoran did not even address appellant's accepted

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

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

[5] *Marlene G. Owens*, 39 ECAB 1320 (1988).

[6] *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

[7] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

employment injury and his diagnoses were unrelated to the accepted employment incident. This report, therefore, is irrelevant to the issue at hand and therefore has no probative value. The reports of Dr. Palat lack any rationale for the expressed opinions,[8] and contain diagnoses of unaccepted conditions which are irrelevant. Further, Dr. Palat is merely a family practitioner and not an orthopedic specialist, which diminishes his report's probative value further.[9]

The Board further notes that appellant's representative's arguments regarding the second opinion report of Dr. Horowitz are without merit. The Board recognizes that appellant had been originally referred to Dr. Didizian for his second opinion evaluation, but finds that this is not an impairment to accepting Dr. Horowitz's report as a probative second opinion evaluation for the government. The Board notes that this sort of substitution is not allowed when the Office refers a claimant to an impartial medical specialist selected by the rotational system to ensure impartiality, to resolve a conflict in medical opinion evidence; however, it notes that the FECA Procedure Manual, Chapter 3.500.3[10] does not contain a similar prohibition for second opinion referrals.[11] The Board, therefore, finds that Dr. Horowitz was an appropriate second opinion physician who examined appellant for the United States, and that his January 29, 1996 report properly gave rise to a conflict in medical opinion evidence with the reports of appellant's physicians.

Regarding appellant's representative's second argument, the Board has already noted that the specific questions posed to Dr. Lee addressed, among other things, the issue of causal relation, and that therefore his responses were appropriate to the inquiry and to the resolution of the medical opinion evidence conflict as determined by the Office.

As for appellant's representative's third argument that the Office may not first weigh the probative value of the opposing medical opinions in this case before deciding whether a conflict in the medical evidence had arisen because the word "any" was erroneously dropped from the phrase "any disagreement" when the former 5 U.S.C. § 772 was codified in 1966 as the third sentence of the current 5 U.S.C. § 8123(a), the Board does not agree that this particular deletion altered the meaning of the former 5 U.S.C. § 772 in any substantive, and therefore prohibited, manner. The Board notes that in its decisions issued both before and after 1966 has always weighed the relative probative value of opposing medical reports to see if there is an actual

[8] The Board has held that a form report box merely checked "yes" to a form question, has little probative value where there is no explanation or rationale supporting the opinion on causal relationship between the diagnosed condition and the employment related injury; *see Lillian M. Jones*, 34 ECAB 379, 381 (1982.)

[9] *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (Opinions of physicians who have training and knowledge in a specialized medical field have greater probative value concerning questions peculiar to that field than the opinions of other physicians)

[10] Federal (FECA) Procedure Manual, Part -- 3, Medical, *Second Opinion Examinations*, Chapter 3.500.3(b) (December 1994).

[11] *See, e.g. Harold Burkes*, 42 ECAB 199 (1992) (the reasons for using a referral physician and an impartial medical examiner are distinguishable. Referral physicians are investigatory, and need not be free of any possible relationship with either party, absence the demonstration of bias.) *See Pierre W. Peterson*, 39 ECAB 955 (1988) (the Board has not extended proscriptions attendant to the selection of an impartial medical specialist to Office referral physicians).

disagreement among opposing reports of equal probative value, rather than automatically finding a conflict in the medical evidence whenever two physicians disagree with each other.[12] Consequently, appellant's representative's third argument is without merit and fails to establish that the Office wrongly weighed the medical evidence in appellant's claim.

With respect to appellant's representative's fourth argument, the Board notes that this claim is about appellant's May 18, 1995 soft tissue muscular strain injury and any resulting disability or residuals due discreetly to that accepted condition, and not about any other prior injury, condition or residuals.

Accordingly, the decisions of the Office of Workers' Compensation Programs dated May 6, 1998 and August 27, 1997 are hereby affirmed.

Dated, Washington, D.C.
March 2, 2000

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[12] *See Connie Johns*, 44 ECAB 560 (1993); *Joseph Mignosa*, 11 ECAB 164 (1959). Despite the attorney's belief to the contrary, the FECA Bulletin 83-56 did not require that the probative value of all medical evidence be weighted in 1983, but rather the concepts involved in weighing the probative value of medical evidence have been consistent with the Board since the 1950s; *see, e.g., Naomi A. Lilly*, 10 ECAB 560 (1959); *Doris E. Thompson (Walter A. Thompson)*, 4 ECAB 75 (1950).