

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE GOLDEN and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Detroit, MI

*Docket No. 99-1704; Submitted on the Record;
Issued September 28, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issues are: (1) whether appellant had any disability or medical residuals requiring further treatment after August 22, 1993, the date the Office of Workers' Compensation Programs terminated her monetary compensation entitlement and entitlement to medical benefits, causally related to her December 6, 1989 bilateral knee contusions or low back muscle strain; and (2) whether the Office abused its discretion by denying appellant's request for a further review of her case on its merits under 5 U.S.C. § 8128(a).

The Office accepted that on December 6, 1989 appellant, then a 42-year-old management analyst, sustained bilateral knee contusions and a low back strain when she fell forward on her knees and chest on a ramp at work. Appellant stopped work that date and was placed on the periodic rolls for receipt of compensation.

Following her 1989 injury, appellant was treated by her family practitioner, Dr. Susan C. Zelter, an osteopath, Dr. M. David Jackson, Board-certified in physical medicine and rehabilitation, and finally, Dr. Mark F. Rottenberg, also Board-certified in physical medicine and rehabilitation, for multiple conditions including hypertension, diabetes, morbid obesity (340 pounds), right radicular pain, bilateral radiculopathy, diabetic polyradiculitis, right patellofemoral tracking problems, mild left olecranon bursitis, decreased right ankle reflex, right quadriceps insufficiency, arterial changes with mild left posterior tibial insufficiency, degenerative arthritic changes, degenerative disc disease, lateral recess stenosis, chronic pain syndrome, L5-S1 disc space narrowing, S1 right nerve root irritation, spinal osteophyte formation, facet osteoarthritis, multiple peripheral nerve compression, bilateral carpal tunnel syndrome, right ulnar neuropathy, and sleep disturbances. None of these conditions were accepted by the Office as being causally related to appellant's accepted conditions of low back muscle strain or bilateral knee contusions, or to the 1989 injury.

By report dated October 9, 1990, a second opinion examiner, Dr. Homer C. Linard, III, an orthopedic osteopath, found no objective findings to correlate with radiculopathy, and he

opined: “[A]t this time no disability has been found as she is fully able to return to work without restrictions. No further treatment is needed.”

By report dated May 30, 1991, Dr. Thomas Ditkoff, a Board-certified orthopedic surgeon and an Office second opinion examiner, reviewed appellant’s history and the statement of accepted facts, noted that physical examination revealed “very little in the way of objective findings,” and indicated that appellant’s examination was “filled with inconsistencies and exaggerations and embellishments,” and with “numerous findings which could not be accounted for on an organic basis including inconsistencies in straight leg raising, markedly exaggerated limitation of motion, exaggeration of response, etc.” Dr. Ditkoff concluded that appellant was not disabled from an essentially sedentary type of job.

By report dated August 17, 1992, Dr. Jackson opined that appellant could “begin [working] at four to five hours per day and gradually increase as tolerated” with restrictions.

On March 22, 1993 the Office referred appellant, together with a statement of accepted facts, questions to be addressed, and the relevant medical records, for another second opinion examination to Dr. Michael Krieg, a Board-certified orthopedic surgeon.

By report dated April 5, 1993, Dr. Krieg reviewed appellant’s factual and medical history and records, performed a physical examination, and concluded:

“[Appellant] has degenerative disc disease at L-5 level secondary to an injury many years ago without any aggravation or complaints as a result of the injury at the workplace. She has no complaints in her knees. She has no complaints in any other part of her body.

“After review of the records ... as well as [her] job description and accepted facts ..., it is my opinion that [appellant] could return to full active work at the job she describes she did. She needs no further medical treatment. She needs no further care. She likely had no injury of any significance at the workplace. She may have had some symptomatic changes in her knees, possibly the low back, which lasted for a few months only.

“I find no evidence of any further need for treatment. She should return to full active work without any restrictions doing the job for the [employing establishment] that she was doing.”

On July 12, 1993 the Office issued appellant a notice of proposed termination of compensation finding that the weight of the medical evidence of record, as constituted by the reports of Drs. Ditkoff and Krieg, established that any disability due to her accepted employment-related low back strain and bilateral knee contusions had ceased and that she needed no further medical treatment for these conditions.

In response, appellant submitted an August 10, 1993 letter disagreeing with the proposed termination. Appellant claimed that Dr. Krieg falsified his report, that his report was full of discrepancies and lies, that he examined her for only five minutes, and that he was not even

allowed to perform surgery anymore. Appellant claimed that her physicians supported continuing disability.

By decision dated August 16, 1993, the Office finalized the proposed reduction of compensation finding that the weight of the medical evidence of record established that appellant was no longer disabled due to her bilateral knee contusions or low back strain, and that she required no further medical treatment. The Office noted that appellant submitted no new or recent medical evidence to the record supporting that she had continuing disability due to bilateral knee contusions or low back strain, nor that she needed further medical treatment for these conditions.

By letter dated September 2, 1993, appellant, through her representative, requested an oral hearing. In support, appellant submitted a November 8, 1993 report from Dr. Jacquelyn G. Lockhart, a Board-certified specialist in physical medicine and rehabilitation, which reviewed her history and current complaints, detailed physical examination results, and diagnosed right lower lumbar radiculopathy, chronic strain/sprain, and obesity. Dr. Lockhart opined that appellant's current diagnoses were related to the December 1989 employment injury, and that she was unable to perform gainful work. Dr. Lockhart also recommended further diagnostic intervention and therapy for appellant's ongoing problems.

By decision dated July 5, 1994, the hearing representative determined that a conflict in medical opinion evidence was created and remanded the case for further development to resolve the medical conflict between Dr. Krieg and Dr. Lochkhart.

On February 14, 1996 the Office referred appellant, together with a statement of accepted facts, questions to be resolved, and the relevant case record, to Dr. Grant J. Hyatt, a Board-certified orthopedic surgeon, for an impartial medical opinion.

By report dated February 29, 1996, Dr. Hyatt reviewed appellant's factual and medical history and her current complaints, performed a thorough physical examination, and concluded that appellant had biomechanical abnormalities including right thigh atrophy, asymmetry of the Achilles reflexes, and subjective changes of sensory motor asymmetry involving the right lower extremity, which were characteristic of lumbar spinal degenerative disc disease. Dr. Hyatt opined that appellant had no evidence of any remaining residual effects of the December 1989 knee injury, but noted: "[I]t appears that the injury in question served to aggravate underlying degenerative disc disease at level L5-S1, resulting in development of lumbar radiculopathy, as reflected in electrodiagnostic testing." However, Dr. Hyatt noted that electrodiagnostic testing conducted on July 22, 1991 and September 1, 1992 revealed resolution of the electrodiagnostic abnormality and demonstrated no residuals. Dr. Hyatt further noted that in 1993 appellant's lumbar radiculopathy redeveloped independent of the December 6, 1989 work incident. He recommended activity restrictions and that appellant should be restricted to sedentary work activities with the capacity to sit, stand or change position at will, and opined that, with a properly supportive chair, appellant should be able to work restricted duty eight hours per day, five days a week. Dr. Hyatt noted that his work restrictions were not solely due to the December 6, 1989 injuries, but that based on his single evaluation, "it is impossible to quantify any aggravating effect the injury might have had on [appellant's] degenerative disc disease."

By letter dated April 11, 1997, appellant's representative claimed that Dr. Hyatt had found that appellant was disabled as a result of her employment injuries and therefore was entitled to compensation.

By decision dated April 15, 1997, the Office denied modification of the termination decision finding that the weight of the medical evidence, as constituted by Dr. Hyatt's report, established that appellant could work sedentary duty eight hours per day, five days per week. The Office found that appellant's complaints were as a result of the aging process and her morbid obesity, and that no residuals related to the December 6, 1989 injury remained.

By letter dated May 1, 1997, appellant, through her representative, requested another oral hearing. The hearing was held on April 3, 1998 at which appellant testified.

Following the hearing, on June 1, 1998 the Office received a May 11, 1998 report from Dr. Rottenberg which reviewed appellant's history and testing results, and diagnosed:

- “1. Low back pain with symptomatic lumbosacral disc pathology, facet osteoarthritis and lateral recess stenosis with lumbosacral radiculopathy including more pronounced right S1 nerve root irritation;
- “2. Right knee pain with patellofemoral tracking problems and right quadriceps insufficiency;
- “3. Left elbow pain with mild olecranon bursitis;
- “4. Diabetes mellitus with suspected diffuse peripheral neuropathy and probable upper extremity peripheral nerve compression problems;
- “5. Diabetic small vessel arterial changes with mild left posterior tibial insufficiency and decreased circulation in the left foot compared to the right;
- “6. Hypertension;
- “7. Obesity;
- “8. Sleep disturbance with depression secondary to physical injury.”

Dr. Rottenberg opined that as a direct result of appellant's December 6, 1989 fall she had ongoing problems with low back and knee pain with the diagnoses noted above. He opined that appellant had experienced continued problems with an inability to work due to the above-noted diagnoses, that she would benefit from continued treatment including weight loss, strengthening exercises, prescription nonsteroidal anti-inflammatory medication, and monitoring, and he opined that she would be disabled from any type of work that would require prolonged sitting because of the disc pathology in the lower back. Dr. Rottenberg opined that appellant would have problems with prolonged or extended standing or walking due to her knee condition and circulation problems.

By decision dated July 31, 1998, the hearing representative found that the Office had met its burden of proof in terminating appellant's compensation, effective August 22, 1993, and that the subsequently arising conflict in medical opinion evidence was resolved by the report of Dr. Hyatt. The hearing representative included a quote attributed to Dr. Hyatt which does not appear in his report. The hearing representative found that Dr. Rottenberg's report was not well rationalized.

By letter dated January 13, 1999, appellant, through her representative, requested reconsideration. In an October 1, 1998 report, Dr. Rottenberg reiterated the diagnoses in his May 11, 1998 report, and opined:

“As a direct result of [the December 6, 1989] fall, [appellant] developed symptomatic low back condition with aggravation of the lumbosacral disc pathology in her lower back and development of a symptomatic right lumbosacral radiculopathy which appears to be related to lateral recess stenosis with the jarring at the time of her fall causing [appellant] to have problems with wedging of the right S1 nerve root into a narrowed bony canal or gutter. In addition, she developed symptomatic knee pain problems which appear to be a direct result of problems with abnormal patellofemoral tracking associated with the fall at work and with [appellant] having persistent difficulties associated with some quadriceps insufficiency contributing to same.”

Dr. Rottenberg thereafter discussed appellant's need for future treatment and her continuing disability.

By decision dated February 8, 1999, the Office denied modification of the July 31, 1998 decision. The Office found that Dr. Rottenberg's opinion was essentially the same as his prior report which had been previously considered.

By letter dated March 5, 1999, appellant requested reconsideration of the February 8, 1999 decision. In support, appellant submitted a September 30, 1998 report from Dr. Rottenberg which reiterated opinions contained in his previously considered reports.

By decision dated March 17, 1999, the Office rejected appellant's request for a merit review of her case under 5 U.S.C. § 8128(a) finding that the evidence submitted was repetitive, and was therefore not sufficient to reopen the case for a further review on its merits.

The Board finds that this case is not in posture for decision.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ 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

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

that the disability has ceased or that it is no longer related to the employment.² Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.³ 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.⁴

In this case, the Board finds that the weight of the medical evidence of record at the time of the Office's August 16, 1993 termination decision was sufficient to support termination of her monetary compensation and medical benefits entitlement. At that time the record was bereft of rationalized medical evidence supporting that appellant continued to be disabled due to her accepted bilateral knee contusions or low back strain, or that she needed further medical treatment for these conditions. However, following that decision, appellant submitted further medical evidence which the Office properly found created a conflict with the medical reports of record.

The Office properly referred the case to an impartial medical examiner for a rationalized medical opinion to resolve the conflict. However, the impartial medical specialist, Dr. Hyatt, did not provide a clear or complete opinion, stating: "[I]t appears that the injury in question served to aggravate underlying degenerative disc disease at level L5-S1, resulting in development of lumbar radiculopathy, as reflected in electrodiagnostic testing." This statement addresses a causal relationship between appellant's lumbar radiculopathy and her soft tissue muscular strain injury. However, Dr. Hyatt opined that electrodiagnostic testing in 1991 and 1992 demonstrated no residuals and opined that the radiculopathy redeveloped in 1993 independent of the December 6, 1989 work injuries. Dr. Hyatt then stated that it was impossible to quantify any aggravating effect the December 6, 1989 injury might have had on appellant's degenerative disc disease. The Board finds that Dr. Hyatt's opinion is not fully rationalized or of convincing quality regarding whether any aggravation occurred, or what were its consequences.⁵ Dr. Hyatt did not address whether appellant had any injury-related residuals which required further medical treatment.

The Board has frequently explained that, when there exist 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

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁴ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

⁵ The Board notes that the weight of medical evidence is determined by its reliability, its probative value and its convincing quality. Factors which enter into such evaluation include not only the thoroughness of examination but also the accuracy and completeness of the physician's historical knowledge, the care of the analysis manifested, and the medical rationale expressed in support of the physician's opinion. *See Anna C. Leanza*, 48 ECAB 115 (1996); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996); *Clara T. Norga*, 46 ECAB 473 (1995).

rationalized and based upon a proper factual background, must be given special weight.⁶ However, the Board has also explained that when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.⁷ The Office neglected to do this in the instant case.

Dr. Hyatt's report supported that appellant's injury in question served to aggravate underlying degenerative disc disease at level L5-S1, resulting in development of lumbar radiculopathy, as reflected in electrodiagnostic testing. This opinion relates appellant's initial injury to one of her present diagnosed allegedly disabling conditions, and, although Dr. Hyatt opined that it ceased in 1991 to 1992 but reoccurred independently in 1993, no rationale for this part of his opinion was provided. Therefore, this part of Dr. Hyatt's opinion requires further clarification. Dr. Hyatt additionally stated that it was impossible to quantify any aggravating effect the injury might have had on appellant's degenerative disc disease. This statement also requires further clarification, as appellant's submitted medical evidence supports just such a relationship. Finally, Dr. Hyatt failed to discuss whether appellant required further injury-related medical treatment, such that this element of the conflict in medical opinion evidence still remains unresolved.

As Dr. Hyatt's report requires further clarification on several issues, it cannot constitute the weight of the medical opinion evidence, and the conflict in medical opinions, now including the reports of Dr. Rottenberg, remains unresolved.

Based on this determination, the issue of whether the Office abused its discretion by denying appellant's request for a further review of her case on its merits under 5 U.S.C. § 8128(a) is moot.

⁶ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁷ *April Ann Erickson*, 28 ECAB 336 (1977).

The decisions of the Office of Workers' Compensation Programs dated July 31, 1998 and February 8 and March 17, 1999 are hereby set aside and the case is remanded for further development in accordance with this decision.

Dated, Washington, DC
September 28, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member