U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JANET L. KNIGHT and U.S. POSTAL SERVICE,
POST OFFICE, Philadelphia, PA

Docket No. 01-583; Submitted on the Record;
Issued December 6, 2001

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 compensation effective December 3, 2000.

On March 20, 1998 appellant, then a 36-year-old mail processor, filed a notice of traumatic injury alleging that she experienced back pain after lifting trays of mail in the performance of duty. The Office accepted the claim for aggravation of a preexisting herniated disc at L4-5.[1] Appellant stopped work on March 20, 1998 and began receiving compensation on the periodic rolls.

Appellant has been under the care of Dr. Paul J. Sedacca, an internist, for treatment of her herniated disc. She underwent physical therapy and epidural injections for back pain without relief. In a series of attending physician reports, Dr. Sedacca found that appellant remained totally disabled from work.

The Office referred appellant for examination by Dr. Richard Mandel, a Board-certified orthopedic surgeon, on November 5, 1998. Dr. Mandel noted physical findings and discussed appellant's history of injury. He diagnosed old L3-4 and L4-5 disc herniations "with exacerbation related to the [March 20, 1998] work injury." He opined that appellant still had residuals from her work injury, but that she was not disabled from returning to work. Dr. Mandel recommended that appellant return to light duty with a 20-pound lifting restriction.

After reviewing Dr. Mandel's report, Dr. Sedacca prepared a December 15, 1998 report, stating that he agreed that appellant sustained an exacerbated herniated disc. He disagreed, however, that appellant could perform light-duty work.

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[1] Appellant filed a claim for a work injury to her back on February 5, 1997. Magnetic resonance imaging (MRI) performed on February 10 and September 25, 1997 and April 7, 1998 confirmed the presence of a left-sided herniated disc at L4-5, a right lateral herniated disc at L3-4, and multilevel degenerative disc changes. The Office accepted the claim for a lumbosacral strain but specifically denied the claim for a herniated disc.

The Office determined that a conflict existed between Drs. Sedacca and Mandel as to whether appellant was totally disabled due to her work injury. The Office referred appellant for an impartial medical examination with Dr. Martin A. Blaker, a Board-certified orthopedic surgeon, to resolve that conflict. In a report dated July 26, 1999, Dr. Blaker noted that objective findings were completely negative and opined that appellant was obese. He concluded that she had no disability or residuals causally related to her work injury.

Dr. Blaker also completed a work capacity evaluation form indicating that appellant could work 8 hours per day with a 25-pound lifting restriction and no pulling or pushing over 30 pounds.

On October 4, 1999 the Office issued a proposal to terminate compensation and medical care, finding that the weight of the evidence established that appellant was no longer disabled and had no residuals due to her work injury.

Dr. Sedacca apparently referred appellant to Dr. Donald L. Myers, a Board-certified neurosurgeon, for a consultation regarding appellant's MRI findings. Dr. Myers stated in a November 2, 1999 report that appellant should undergo further testing and maintain conservative treatment.

In a November 9, 1999 decision, the Office terminated appellant's compensation effective that date.

On April 11, 2000 appellant requested a hearing.

Appellant's counsel subsequently argued that Dr. Blaker's opinion was not credible alleging that he had been found guilty of perjury in a workers' compensation claim involving a different claimant.

In an April 12, 2000 decision, an Office hearing representative set aside the Office's November 9, 1999 decision.[2] The Office hearing representative determined that Dr. Blaker's opinion could not be given special weight based on an impartial medical examiner since there was no conflict in the medical opinion on causation and the presence of residuals related to appellant's work injury at the time the case was referred to him for evaluation. However, the Office hearing representative determined that Dr. Blaker's opinion created a conflict with appellant's treating physician on disability and residual causation that required referral to an impartial medical specialist on remand.

On remand, appellant's counsel submitted an April 7, 2000 report from Dr. Sedacca, which stated that based on a January 24, 2000 evaluation the physician concurred with Dr. Myers that appellant could return to light or sedentary type of work. He indicated, however, that appellant's lifting restrictions should be no more than 10 to 12 pounds on an occasional basis. The diagnosis was listed as "cumulative trauma syndrome with lumbar [disc] pathology aggravation as well as multilevel radiculopathy, also with aggravation."

[2] It was determined that the case was not in posture for a hearing.

In a letter dated July 7, 2000, the Office scheduled appellant for an impartial medical evaluation with Dr. John P. Salvo, a Board-certified orthopedic surgeon, on July 31, 2000.

In a report dated September 29, 2000, Dr. Salvo advised that he examined appellant on the scheduled date, that he had reviewed a copy of the medical record and a statement of accepted facts. He discussed appellant's history of injury and the medical record, noting that the April 7, 1998 MRI study "records a left herniated disc at L4-5 with no change from previous study and a right herniated disc at L3-4 with no change from previous study." Physical findings included mild limitation of the lumbar spine and normal strength in the lower extremities. Dr. Salvo reported that appellant's work injury of March 20, 1998 resulted in only a temporary lumbar disc strain that had ceased certainly by the time of his examination on July 31, 2000. He noted that he could find no objective evidence to support continuing disability. Dr. Salvo therefore concluded that appellant's work injury was no longer disabling appellant from returning to work and that any residuals from the work injury had resolved. It was his opinion that appellant had degenerative disc disease and would probably need continuing medical care, but that her preexisting condition was no longer affected by the work injury.

In a work capacity evaluation report dated September 20, 1990, Dr. Salvo indicated that appellant could work 8 hours per day with lifting restrictions of no more than 20 pounds.

On October 16, 2000 the Office issued a notice of proposed termination of compensation finding that the weight of the evidence residing with the impartial medical specialist established that appellant was no longer disabled and had no residuals causally related to the March 20, 1998 work injury.

In a November 15, 2000 letter, appellant's counsel challenged the notice of proposed termination of compensation stating that he had not been provided with a copy of the notice of examination for the impartial medical specialist in compliance with the regulations.

In a decision dated November 28, 2000, the Office terminated appellant's compensation effective December 3, 2000 finding that appellant's temporary aggravation of her underlying herniated lumbar disc sustained on March 20, 1998 had resolved and that she was no longer disabled from work.

The Board finds that the Office properly terminated appellant's compensation effective December 3, 2000.

Once the Office accepts a claim, it has the burden of proof to justify 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]

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

[4] *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979).

In this case, the Office hearing representative found that a conflict existed in the record between Dr. Sedacca and Dr. Blaker as to whether appellant had any residuals due to her work injury, whether appellant was totally disabled from work and whether she had any continuing residuals causally related to her March work injury. To resolve this conflict, appellant was referred for evaluation on remand to Dr. Salvo, a Board-certified orthopedic surgeon, who was selected as the impartial medical examiner.

Where there exists a conflict of medical opinion and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion on such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[5] The Board finds that the weight of the medical opinion in this case is represented by the September 29, 2000 report of Dr. Salvo. Based on his examination of appellant and review of the record, he concluded that appellant was no longer disabled from work and that any work-related residuals had ceased. Dr. Salvo provided an accurate history of injury and treatment, performed a complete examination and offered a reasoned explanation for his medical conclusions.

On appeal, appellant contends that Dr. Salvo should be disqualified from serving as the impartial medical examiner because the Office failed to copy appellant's counsel on the letter scheduling appellant for an examination and notifying appellant of the appointment of Dr. Salvo as the referee specialist. Under the circumstances of this case, the Board finds this argument is without merit.

The Board has held, in the case of *Henry J. Smith, Jr.*,[6] that when the Office does not notify a claimant of a physician's status as impartial medical examiner, that physician may not serve as the impartial medical examiner in that case. The Office's procedures, as noted in the *Smith* decision, are intended to assure a claimant's knowledge that a physician is an impartial medical examiner, so that he or she may then choose to exercise the procedural right to participate in the selection of the impartial medical examiner.[7]

In this case, the Board notes that appellant and his legal representative were put on notice that a new impartial medical specialist was to be selected based on receipt of the Office hearing representative's April 12, 2000 decision. Appellant's counsel at no time prior to scheduling Dr. Salvo's examination made a request to participate in the selection of the impartial medical specialist. Appellant apparently attended the examination with Dr. Salvo with no objection by his counsel in writing with the Office. It was not until after the examination that appellant's counsel challenged Dr. Salvo's appointment.

Moreover, appellant's representative did not set forth a valid reason for why he wished to participate in the selection process or raise a specific objection to the appointment of Dr. Salvo.[8]

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[5] *Aubrey Belnavis*, 37 ECAB 206 (1985).

[6] *Henry J. Smith, Jr.*, 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

[7] *See Delmom R. Rumsey*, 37 ECAB 645 (1986).

[8] Appellant's counsel only made objections with regard to Dr. Salvo's findings, which was discussed previously in this decision.

Under Office procedures, a claimant who asks to participate in the selection of an impartial medical examiner or who objects to the selected physician must provide a valid reason.[9] The procedural opportunity of a claimant to participate in the selection of an impartial medical examiner is not an unqualified right as the Office has imposed the requirement that the employee provide a valid reason for any participation request or for any objection proffered against a designated impartial medical examiner.

As appellant's representative did not state at any time the reason why he wished to participate in the selection of the impartial medical examiner or otherwise raise a specific objection to Dr. Salvo's selection, his November 15, 2000 letter does not conform with the Office's procedural requirements for participating in the selection of an impartial medical examiner.[10] Any error committed by the Office in failing to copy appellant's counsel on the letter scheduling the impartial medical examination with Dr. Salvo is deemed harmless.[11]

The decision of the Office of Workers' Compensation Programs dated November 28, 2000 is hereby affirmed.

Dated, Washington, DC
December 6, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[9] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations,* Chapter 3.500.4(b)(4) (October 1990); *see also Terrance R. Stath*, 45 ECAB 412 (1994).

[10] *See David Alan Patrick*, 46 ECAB 1020 (1995).

[11] *See Irene Williams*, 47 ECAB 619 (1996).