U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ESMERELDA B. HUELL and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA

Docket No. 00-2466; Submitted on the Record;
Issued November 5, 2001

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective March 10, 1998 on the basis that she no longer had residuals of her accepted June 4, 1995 employment injury.

On June 7, 1995 appellant, then a 47-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on June 4, 1995 she injured her back when she slipped and fell. The Office accepted the claim for cervical and lumbar strains and left chest wall contusion. Appellant returned to a limited-duty job on April 27, 1996.

On April 28, 1997 the Office referred appellant to Dr. Jack L. Vandernoot, a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinion evidence between appellant's attending physicians, Dr. Mehdi Habibi, Dr. Homer L. Williams and Dr. Jeffrey A. Berman, a second opinion Board-certified orthopedic surgeon, on the issue of appellant's disability status and whether she continued to suffer from residuals of her accepted employment injury. The Office also noted a conflict in the diagnosis of a soft tissue injury by Dr. Berman and an expanded diagnosis of degenerative disc disease and cervical disc bulge by the treating physicians.

In a May 22, 1997 report, Dr. Vandernoot diagnosed resolved cervical and lumbosacral strains, normal examinations of the upper extremity, hip, knee, foot and ankle and mild anterior and posterior cervical spondylosis at C3-5 with no evidence of diminution of signal intensities. A physical examination revealed limitation of motion in her lumbar and cervical spinal. In her cervical spine, appellant had extension of 30 degrees, 10 degrees of bilateral lateral flexion, 30 degrees of lateral rotation on the right and 40 degrees on the left and a normal Grade V strength in her upper extremities musculature. Regarding her lumbar spine, the physician found forward flexion while in a standing position of 40 degrees, 10 degrees of bilateral lateral flexion and 20 degrees of bilateral rotation. He also noted minimal bilateral lumbar muscle spasms and minimal bilateral sitting straight leg raising, leg raising lying straight was 45 degrees for the right and 60 degrees for the left. Dr. Vandernoot noted a 1+ positive Leaque's test on the right and a negative

test on the left. He opined that appellant's "subjective factors of disability are disproportionate to the physical examination but may be considered intermittent minimal to occasional slight for her usual and customary occupation activities with no work restrictions indicated. In concluding, the physician determined that appellant did not require any further medical treatment for her accepted employment injuries. He opined that, based upon the medical information, it appeared that appellant "was over-reaching regarding her symptom complex, there is no indication from the medical records that this patient had a similar condition" and that appellant's symptoms should have significantly improved since it was two years since her employment injury had occurred.

In a May 23, 1997 work capacity evaluation (Form OWCP-5c), Dr. Vandernoot indicated that appellant was capable of working eight hours per day and she was able to lift and carry up to 20 pounds intermittently.

By letter dated August 26, 1997, the Office requested Dr. Vandernoot to submit a supplemental report to respond to the specific issues addressed in its April 28, 1997 letter.

In a September 3, 1997 report, Dr. Vandernoot diagnosed aggravation of appellant's cervical spondylosis and lumbar spondylolisthesis by the June 4, 1995 employment injury and resolved cervical and lumbosacral strains which were directly caused by the employment injury. Regarding the aggravation of appellant's preexisting conditions, the physician opined that "one cannot make a judgment about when any aggravation will occur or cease to exist. The spondylosis and spondylolisthesis themselves are permanent unless [appellant] has surgery which is not indicated." Dr. Vandernoot agreed with Dr. Berman that appellant should have returned to work subsequent to her cervical and lumbar strains and chest wall contusion being resolved and that she did not require total disability as of December 27, 1996 per Dr. Habibi. Regarding continuing medical treatment, Dr. Vandernoot opined that appellant required no "further medical treatment to care or cure or relieve the effects of the incident in question other than a home stretching and strengthening exercise." Dr. Vandernoot also concluded that appellant had no restrictions due to her accepted employment injury or her preexisting condition and that she was capable of performing her usual employment duties.

On February 5, 1998 the Office issued a notice of proposed termination of benefits which was finalized on March 10, 1998.

By decision dated December 23, 1998, an Office hearing representative affirmed the March 10, 1998 termination decision, finding that Dr. Vandernoot provided a well-rationalized report based upon a complete and accurate factual and medical history which constituted the weight of the medical opinion evidence of record.

Appellant's counsel requested reconsideration by letter dated July 9, 1999 and submitted reports by Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon. In his report dated January 29, 1991, Dr. Tauber diagnosed cervical radiculitis with probable failed fusion with severe degenerative disc disease of the cervical spine and spondylolisthesis at L5-S1 with sciatica. Regarding the issue of radiculopathy, he concluded that this diagnosis was supported by appellant's subjective complaints since June 4, 1995 employment injury. Dr. Tauber noted that appellant was asymptomatic prior to the injury in that she had no radiating back or neck pain and

that subsequent to the injury she had radiculopathy in both the lumbar and cervical spine "certainly correlates with her history of having fallen and having injured her neck and back at work. He opined that "there is absolutely no question whatsoever that this patient's work injury caused a cervical sprain and a lumbar sprain, but it also caused a cervical radiculopathy and it caused a sciatica and it aggravated an underlying spondylolisthesis in her lumbar spine." Regarding her cervical spine, Dr. Tauber noted that appellant had underlying degenerative disease and that "[w]ithout question, the work injury caused her to have a cervical radiculitis." He indicated that appellant was asymptomatic prior to June 4, 1995 injury "[t]herefore, the work injury caused the condition, at the very least, to severely and permanently aggravate an underlying degenerative condition in her cervical spine resulting in the cervical radiculitis."

Appellant subsequently submitted a July 19, 1999 report by Dr. Tauber, a July 26, 1999 report by Dr. Williams and an August 31, 1999 report by Dr. Habibi.

In his July 19, 1999 report, Dr. Tauber noted appellant's complaints of persistent pain and concluded that she continued to be totally disabled temporarily.

In his July 26, 1999 report, Dr. Williams concluded that appellant was disabled to light-duty work by her cervical and lumbar disability. He diagnosed chronic recurrent cervical spine strain/sprain with underlying multi-level degenerative disc protrusions; chronic recurrent lumbar spine sprain/strain with radiculopathy to the lower extremities and tendinitis and left shoulder impingement.

Dr. Habibi, in his August 31, 1999 report, noted that appellant had infrequent moderate to minimal lumbar and cervical pain, which at times became severe depending upon appellant's activity. He opined that appellant was 75 percent disabled due to her employment injury and required medical treatment for her lumbar and cervical spine.

By decision dated December 23, 1999, the Office denied modification of its December 23, 1998 decision, finding that the evidence of record rested with the opinion of Dr. Vandernoot, the impartial medical examiner.

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

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[1] After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it is no longer related to the employment.[2]

[1] *John W. Graves*, 52 ECAB ___ (Docket No. 98-511, issued December 7, 2000).

[2] *Lynda J. Olson*, 52 ECAB ___ (Docket No. 00-2085, issued July 11, 2001).

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[3]

In this case, the Office properly found that there was a conflict of medical opinion evidence between appellant's physician, Dr. Habibi, who opined that appellant continued to have residuals of her employment injury and that she was totally disabled as a result of her employment-related exposure and Dr. Berman, the Office's second opinion physician, who concluded that appellant was capable of returning to work in a light-duty capacity.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, is entitled to special weight.[4]

In this case, Dr. Vandernoot's report was based upon a complete and accurate factual and medical background and review of the objective evidence. It was well rationalized, based upon the findings of Dr. Vandernoot subsequently clarified his opinion noting specifically that appellant had no disability, either preexisting or employment related, which precluded her from performing her usual employment duties.

Given Dr. Vandernoot's thorough physical examination of appellant, his review of the medical and factual evidence and Dr. Vandernoot status as an impartial medical examiner, his report represents the weight of the medical evidence and establishes that appellant had no objective evidence of any residuals of the accepted work injury.[5] Therefore, the Office properly terminated appellant's compensation.

Given that the Office properly terminated compensation, the burden of proof shifted to appellant to establish entitlement to compensation that date.[6]

Thereafter appellant submitted further reports from Drs. Habibi, Tauber and Williams. The Board notes that, since Drs. Habibi and Williams were on one side of the medical opinion evidence conflict that was resolved by Dr. Vandernoot's impartial medical examination, their additional reports are insufficient to create a new conflict with the well-rationalized report of Dr. Vandernoot.[7]

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[3] *Charles S. Hamilton*, 52 ECAB ___ (Docket No. 99-1792, issued October 13, 2000).

[4] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB ___ (Docket No. 00-743, issued February 8, 2001).

[5] *See Thomas Bauer*, 46 ECAB 257, 265 (1994).

[6] *Manuel Gill*, 52 ECAB ___ (Docket No. 99-915, issued March 2, 2001).

[7] *See Michael Hughes*, 52 ECAB ___ (Docket No. 00-1890, issued May 29, 2001); *Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Virginia Davis-Banks*, 44 ECAB 389 (1993).

Appellant submitted additional medical evidence from Dr. Tauber who described appellant's present radiculopathy symptoms. The Board finds that these reports are not sufficient to overcome the special weight accorded Dr. Vandernoot's findings as the impartial medical specialist. The reports of Dr. Tauber provided an additional diagnosis of radiculopathy not accepted as employment related. In addition, the Board has held that a medical opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relation.[8]

Thus, the opinions of Drs. Habibi, Williams and Tauber are insufficient to create a conflict in the medical opinion evidence with the well-rationalized and complete medical report by Dr. Vandernoot.[9] Consequently, Dr. Vandernoot's report remained the weight of the medical opinion evidence in this case and established that appellant had no continuing disability after March 10, 1998 causally related to her June 4, 1995 accepted employment injury. Therefore, appellant has not established that the Office erred in not modifying the termination of her benefits.

The December 23, 1999 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
November 5, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member

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

[9] *Connie Johns*, 44 ECAB 560 (1993); *see also Billie C. Rae*, 43 ECAB 192 (1991) and cases cited therein.