U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of BRENDA L. MARCINISZYN and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER Wilmington, DE

*Docket No. 03-1915; Submitted on the Record;*
*Issued December 23, 2003*

---

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to justify termination of appellant's compensation benefits effective June 1, 2001; and (2) whether appellant established that she had any continuing disability after June 1, 2001.

On January 27, 1999 appellant, then a 51-year-old radiology technician, filed a claim alleging that on January 23, 1999 as she was lifting a patient, she injured her neck and upper back. Her claim was accepted for exacerbation of bilateral carpal tunnel syndrome and cervical sprain and the Office authorized bilateral carpal tunnel releases which she underwent on April 14 and September 15, 1999. Appellant returned to full-time light duty in October 1999.[1]

Appellant submitted reports from Dr. Barry Bakst, an osteopath Board-certified in physical medicine and rehabilitation, who noted a history of appellant's work-related injury of January 23, 1999 and her subsequent treatment for cervical spine pain secondary to strain and sprain, myofascial pain syndrome, somatic dysfunction and bilateral carpal tunnel syndrome. In his reports dated August 3 to November 5, 1999, he noted that appellant's cervical condition improved following rehabilitation and chiropractic treatment; however, physical examination revealed limited flexion and extension of the cervical spine. Dr. Bakst advised that appellant could not return to her position as an x-ray technician and could not work with her arms elevated above her head, extend her neck, lifting over 15 pounds and avoid repetitive motions involving the upper extremities. His reports from January 13 to August 17, 2000 noted appellant's continued symptoms of cervical spine pain, myofascial type pain in the trapezius and history of intercostal neuralgia. Dr. Bakst advised that appellant had undergone a key functional assessment on January 13, 2000 which determined that she could work eight-hours limited duty a day subject to various restrictions and nerve conduction studies and an electromyogram (EMG)

[1] The record reflects that appellant underwent a C6-7 discectomy and fusion on March 31, 1994 for a nonwork-related injury.

dated February 10, 2000, which revealed no abnormalities. His reports of August 17 to November 30, 2000 noted that appellant was working as a switchboard operator and continued to experience intermittent episodes of pain in the neck and trapezius region, left C8 cervical radiculopathy, myofascial type pain and left medial nerve irritation with restricted range of motion of the cervical spine and rotation. Dr. Bakst's report of January 18, 2001 advised that the EMG and nerve conduction tests were normal and that there was no evidence of cervical radiculopathy; however, appellant still experienced cervical pain and pain in the left trapezius region. He noted limited range of motion, flexion and extension of the cervical spine.

On January 16, 2001 the employing establishment offered appellant a permanent full-time position as a telephone operator, which was in compliance with the medical restrictions set forth by Dr. Bakst. On February 21, 2001 appellant accepted the position.

On February 12, 2001 the Office referred appellant for a second opinion evaluation by Dr. Dewey A. Nelson, a Board-certified psychiatrist and neurologist. In a report dated February 15, 2001, he indicated that he reviewed the records provided to him and performed a physical examination of appellant. Dr. Nelson noted findings on physical examination included tenderness in the left trapezius muscle that palpated within normal limits, no atrophy or spasms of the cervical muscles, trunk, thorax and abdomen. The proximal and distal muscles of the arms and legs were normal except for give-way weakness in the left wrist and hand. The interosseous muscles of the hands and feet showed no atrophy; the deep tendon reflexes were 2+ except that of the right triceps was 1+. Tinel sign was negative on the right. On the left appellant had an electric feeling radiating into the ring finger. Dr. Nelson noted appellant's neurological examination was normal except for a suppressed right triceps jerk that was probably secondary to her nonwork-related original herniated nucleus pulposus with discectomy. He indicated that appellant had a glove-type sensory deficit, which was consistent with conversion disorder or malingering. Dr. Nelson further indicated that appellant did not suffer residuals of carpal tunnel syndrome or from her discectomy. He advised that she could not return to a position which required more than 35 pounds of lifting, grasping or repetitive wrist and hand motions. Dr. Nelson noted that, based on the predominance of nonorganic findings, she should be referred for a psychiatric evaluation.

Thereafter, appellant submitted a report from Dr. Bakst dated March 5, 2001, who advised that she continued to have constant cervical pain and episodes of a cold sensation in her upper extremities. Upon physical examination he noted restricted flexion, extension and rotation of the cervical spine secondary to cervical and trapezius discomfort, with several areas of ropiness and tenderness from the occipital to the T1 area, tenderness in the trapezius and levator scapulae region and tenderness in the left forearm extensor muscles with minimal discomfort in the left lateral epicondyle area. Dr. Bakst diagnosed appellant with chronic cervical spine pain secondary to strain and sprain with degenerative disc disease and previous spine fusion; myofascial pain and somatic dysfunction, myofascial type pain involving the left forearm with symptoms suggestive of lateral epicondylitis.

On April 13, 2001 the Office issued a notice of proposed termination of compensation on the grounds that Dr. Nelson's February 15, 2001 report established no continuing disability due to her employment injury.

Appellant, through her attorney, indicated that she still had residuals of her cervical condition and carpal tunnel syndrome and advised that she now suffered from a psychiatric overlay condition, which should be evaluated. She also submitted a report dated April 12, 2001 from Dr. Bakst, who noted physical examination findings of decreased sensation in her left upper extremity, tenderness in the lateral epicondyle region bilaterally and mildly restricted range of motion for the cervical spine. Rotation of right and left was 70 degrees, with pain and extension was 10 degrees, with posterior cervical spine pain. He diagnosed appellant with chronic intermittent cervical spine pain secondary to strain and sprain with degenerative disc disease, myofascial type pain and myofascial type discomfort in the forearm bilaterally. In a May 14, 2001 report, Dr. Bakst reiterated his diagnosis and noted that appellant continued to have musculoskeletal symptomologies that were directly related to her work-related injury of January 23, 1999, which were permanent in nature. He noted that her left arm fatigued easier than the right and that she was still symptomatic despite medication and physical therapy. Dr. Bakst, however, agreed with Dr. Nelson that appellant did not have evidence of carpal tunnel syndrome and advised that she could not return to her work as a radiologic technician because it required wearing an apron, which weighed 10 pounds and advised that she could not perform duties which required her to extend her arms above her head and neck or were repetitive in nature, which would aggravate her bilateral carpal tunnel syndrome. Dr. Bakst noted that these restrictions were directly related to her employment injury of January 23, 1999.

By decision dated June 1, 2001, the Office terminated appellant's benefits effective the same date on the grounds that Dr. Nelson's report constituted the weight of the medical evidence and established that appellant had no continuing disability resulting from her employment injury.

In a letter dated June 5, 2001, appellant requested a hearing before an Office hearing representative and submitted additional medical evidence.[2] In reports dated June 20, 2001 and March 14, 2003, Dr. Randeep S. Kahlon, a general practitioner, diagnosed work-related right medial and lateral epicondylitis and noted that he performed a right medial epicondyle injection, which provided immediate relief for appellant's symptoms. In reports dated January 22 and August 7, 2002, Dr. William Sommers, an osteopath and Board-certified psychiatrist and neurologist, noted treating appellant for vascular headaches and intercostal neuralgia. In a report of May 9, 2002, Dr. Michael G. Sugarman, a Board-certified neurologist, noted treating appellant for low back pain which developed after she participated in step aerobics. Also submitted was a report from Dr. Bakst dated March 6, 2003 who, noted treating appellant for right hip pain. He diagnosed her with right hip and gluteal pain; right greater trochanteric bursitis, myofascial type pain, right sacroiliac joint dysfunction and status post bilateral cubital tunnel syndrome.

In a decision dated May 1, 2003, the hearing representative affirmed the decision of the Office dated June 1, 2001, noting that Dr. Nelson's report was the weight of the medical evidence and established that appellant had no continuing disability resulting from her employment injury.

[2] On January 20, 2003 appellant requested a postponement of the hearing, which was scheduled for January 24, 2003. In a letter dated January 29, 2003, the Office denied appellant's request for a hearing postponement in accordance with section 10.622 of the Federal Employees' Compensation Act. Thereafter, the Office conducted a review of the written record.

The Board finds that the Office has not met its burden of proof to terminate benefits effective June 1, 2001.

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]

In this case, the Office accepted that appellant sustained an exacerbation of bilateral carpal tunnel syndrome, cervical sprain and authorized bilateral carpal tunnel releases and paid appropriate compensation. Appellant returned to full-time light duty in October 1999. The Office terminated appellant's compensation effective June 1, 2001 based on Dr. Nelson's examination and report. The Board finds, however, that there is a conflict in medical opinion between Dr. Nelson, the Office referral physician and Dr. Bakst, appellant's treating physician, both of whom are Board-certified specialists in their respective fields.

In his report, Dr. Nelson opined that appellant suffered no residuals of the work injury and all accepted conditions had resolved. He noted that her neurological examination was normal except for a suppressed right triceps jerk, which was probably secondary to her original herniated nucleus pulposus with discectomy. Dr. Nelson indicated that appellant had a glove-type sensory deficit he thought was consistent with conversion disorder or malingering. He further indicated that appellant did not suffer residuals of carpal tunnel syndrome and advised that she could not return to a position which required more than 35 pounds of lifting, grasping or repetitive wrist and hand motions. By contrast, in reports dated April 12 and May 14, 2001, Dr. Bakst, appellant's treating physician, noted positive physical findings upon examination and that appellant continued to have residuals of her work-related cervical condition. He indicated that appellant's musculoskeletal symptomologies were directly related to the sprain and strain injury of January 23, 1999 and was permanent in nature. Dr. Bakst advised that appellant could not return to work to her preinjury position as a radiologic technician due to her physical restrictions and noted that these restrictions were directly related to her injury of January 23, 1999. He has consistently supported work-related disability, related to appellant's exacerbation of bilateral carpal tunnel syndrome and cervical sprain, while Dr. Nelson found that appellant has no work-related residuals of the accepted injury. The Board, therefore, finds that a conflict in medical opinion has been created.

Section 8123 of the Act[5] provides that if there is a disagreement between the physician making the examination for the United States and the employee's physician, the Office shall appoint a third physician who shall make an examination.[6] The Board finds that because the Office relied on Dr. Nelson's opinion to terminate appellant's compensation without having

[3] *Eddie Franklin*, 51 ECAB 223 (1999); *Jeff M. Burns*, 52 ECAB 241 (1999).

[4] *Id*.

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 39 (1994).

resolved the existing conflict,[7] the Office has failed to meet its burden of proof in terminating appellant'scompensation on the grounds that disability had ceased.[8]

The decision of the Office of Workers' Compensation Programs dated May 1, 2003 is hereby reversed.

Dated, Washington, DC
December 23, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[7] *See Craig M. Crenshaw, Jr.,* 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

[8] In light of the Board's finding regarding the first issue, the question of whether appellant established any continuing disability is moot.