U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BETTY C. HOPKINS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Covington, KY

Docket No. 03-26; Submitted on the Record;
Issued May 28, 2003

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's wage-loss compensation as of August 20, 2001.

On March 7, 1989 appellant, then a 31-year-old secretary, filed a traumatic injury claim alleging that she injured her lower back and neck when she slipped and fell on ice.[1] The Office accepted the claim for lumbosacral strain and multiple contusions. Appellant stopped work on March 7, 1989 and was placed on the periodic rolls for temporary total disability.

In treatment notes for the period January 7 through October 13, 2000, Dr. Richard M. Hoblitzell, an attending Board-certified orthopedic surgeon, noted appellant's complaints of increased back pain and noted treatment to the low back, coccyx and right ankle. He opined that appellant had "reexacerbated a chronic underlying back condition" in treatment notes dated January 28, 2000. A physical examination on July 7, 2000 revealed tenderness in the sacrum and lumbar spine. On August 23, 2000 Dr. Hoblitzell stated an "MRI [magnetic resonance imaging] scan of her sacrum shows no significant abnormalities" and "her lumbar degenerative disc disease is stable."

In a July 2, 2001 report, Dr. Robert L. Keisler, a second opinion Board-certified orthopedic surgeon, concluded that appellant's lumbosacral contusions and strains "would have been responsible for up to 12 weeks of additional symptoms in the chronic underlying condition" but any effect caused by these injuries had resolved. Regarding the March 3, 1989 employment injury, Dr. Keisler opined that there was no connection, "other than, that being a period of symptoms expected in the underlying preexisting condition" and any resulting effect was temporary. His current diagnosis included multiple level mild degenerative disc and facet

[1] The record contains evidence that the Office accepted a lumbar strain for the November 6, 1987 employment injury and a right shoulder strain and dorsal strain due to a November 24, 1987 employment injury. Appellant's three claims were combined under claim number 06-0460149.

disease, structural instability in the lumbosacral spine, chronic depression and chronic pain syndrome and history of additional multiple strains. He opined that appellant's current condition and symptoms were due to her preexisting condition and were unrelated to her 1987 and 1989 employment injuries. In concluding, Dr. Keisler opined:

> "Assuming the depression is treated and under control, attempts at work would be beneficial, limited to four hours a day, allowance for change of positions and restricted bending, lifting or twisting forces to the lumbar spine or even sitting for a long period."

On July 11, 2001 the Office issued a notice of proposed termination of benefits.

By decision August 17, 2001, the Office terminated appellant's medical and wage-loss compensation benefits effective August 20, 2001 on the basis that she had no further disability causally related to her accepted employment injury.

On November 23, 2001 appellant's counsel requested reconsideration and submitted an August 8, 2001 report by Dr. Hoblitzell and an August 8, 2001 report by Dr. Mark D. Sander, a Board-certified family practitioner.

Dr. Hoblitzell, based upon a history of appellant's employment injuries, a review of the medical evidence and a physical examination, concluded that appellant's March 1989 employment injury exacerbated, her "preexisting active and dormant changes in her lumbar spine." He noted that, subsequent to the March 1989 employment injury, appellant "continued with debilitating pain in her lumbar spine with frequent exacerbations" and a repeat MRI scan revealed a mild bulging disc. Dr. Hoblitzell opined that appellant could perform light-duty work with restrictions including no lifting more than 10 pounds, no walking or standing more than 1 hour and no bending more than 15 times an hour. Regarding her current impairment, he concluded that "50 percent of this is due to preexisting dormant degenerative changes, 25 percent is due to a partially active chronic underlying back condition and 25 percent is due to the work injury [i]n March of 1989."

Dr. Sander noted that he had treated appellant since her March 1989 employment injury and noted that she has been treated "with chronic narcotic pain medications in an effort to allow her to function at home" and that her activities at home have been extremely limited. He concluded that he could find "no occupation for which [appellant] would be able to do in light of her very limited activities, which leave her confined mostly to a lying or reclining position.

On January 23, 2002 the Office determined that a conflict existed in the medical opinion evidence between Dr. Hoblitzell and Dr. Keisler and referred appellant to Dr. LeRoy Shouse, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a February 25, 2002 report, Dr. Shouse, based upon a review of the medical record, physical examination and statement of accepted facts, concluded that appellant:

> "[C]ertainly does have some hysterical behavior that of not being able to move at all and complaining of a great deal of pain on touching the skin of her back with no really good solid evidence of neurologic discrepancies. [Appellant] did have a

> decreased left ankle jerk and a great deal of complaint of pain, but nothing else. Her MRI s[cans], however, have shown deterioration at the L4-5 level. According to the [r]adiologist, these do not seem severe enough to be impinging on any nerves at this level."

In response to the Office's questions, Dr. Shouse concluded that the lumbar strain had resolved, but that "it may have caused significant injury to the disc at the L4-5 that has caused the L4-5 disc to go on to further degenerative changes." Physical findings revealed a decreased left ankle jerk and positive straight leg raising at 80 degrees. Regarding appellant's capability of performing her duties as a secretary, Dr. Shouse concluded:

> "At this point, I am not sure that she will not be able to do [this]. I do not know how much of this is organic problems and how much will be due to her thinking that she could not do the job. I find secretarial work relatively easy. [Appellant] will have great freedom I am sure, in standing up and moving around at her work site. This should be the perfect situation of any individual with a back injury. She can vary either way that she sits, the way that she stands and the way she moves about; all of which should be very conducive to her being able to work. However, as I stated previously any one who has been off work for thirteen years feels that their back pain is so severe that they are unable to do even the lightest of work will be extremely difficult to get back to work."

In an attached work capacity evaluation form (OWCP-5a), dated February 25, 2002, Dr. Shouse concluded that appellant should start working two hours per day and work up to eight hours which should take six weeks. He stated that appellant should be capable of performing her duties as a secretary as she should be able to pace herself.

In an April 17, 2002 supplemental report, Dr. Shouse concluded that appellant was capable of performing her duties as a secretary. He opined that appellant "could sit up to 6 hours a day, walk 4 hours a day and stand up to 2 hours a day" and she had restrictions of no pushing, pulling or lifting more than 20 pounds. In an attached work capacity evaluation form (OWCP-5c), Dr. Shouse indicated that appellant was capable of working eight hours a day with restrictions on sitting, walking, standing, pushing, lifting and pulling.

By decision dated July 11, 2002, the Office modified the August 17, 2001 decision to terminate appellant's wage-loss compensation, but reinstated her medical compensation benefits based upon Dr. Shouse's opinion.

The Board finds that the Office met its burden of proof to terminate appellant's compensation for wage loss effective February 25, 2002.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[2] After it has been determined that an employee has disability

[2] *Fred Simpson*, 53 ECAB ___ (Docket No. 02-802, issued August 27, 2002).

causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[3]

Because the Office accepted that appellant sustained a lumbosacral strain and multiple contusions on March 7, 1989, a lumbar strain on November 6, 1987 and a right shoulder strain and dorsal strain on November 24, 1987, it bears the burden of proof to justify its termination of appellant's compensation benefits.

Section 8123(a) of the Federal Employees' Compensation Act provides in part: "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."[4] To resolve the conflict in opinion between appellant's physician, Dr. Hoblitzell and the Office second opinion physician, Dr. Keisler, the Office properly referred appellant, together with the case record and a statement of accepted facts, to Dr. Shouse, a Board-certified orthopedic surgeon. The Board notes that the conflict in the medical opinion evidence between Dr. Hoblitzell and Dr. Keisler arose prior to August 20, 2001.

On February 25, 2002 Dr. Shouse described appellant's March 7, 1989 employment injury as well as her previous employment injuries of November 6 and 24, 1987 and his findings on examination. He reviewed appellant's medical records, including the reports from Drs. Hoblitzell, Sanders and Keisler. Dr. Shouse concluded that appellant's lumbar strain had resolved, but that "it may have caused significant injury to the disc at L4-5 that has caused the L5 disc to go on to further degenerative changes." He concluded that appellant was capable of performing her date-of-injury position as a secretary, but that appellant should start to work up to eight hours a day.

In situations were there are 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 on a proper factual background, must be given special weight.[5] In this case, Dr. Shouse provided detailed factual and medical findings and concluded that appellant's employment-related condition had resolved with no residuals. The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation benefits effective February 25, 2002 based on this report.

[3] *Barbara L. Chien*, 53 ECAB ___ (Docket No. 00-1646, issued June 7, 2002).

[4] *James M. Frasher*, 53 ECAB ___ (Docket No. 01-362, issued September 25, 2002).

[5] *Adrienne L. Curry*, 53 ECAB ___ (Docket No. 01-1791, issued August 22, 2002); *Nathan L. Harrell*, 41 ECAB 402 (1990).

The July 11, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed, as modified, to reflect that the Office met its burden of proof as of February 25, 2002.

Dated, Washington, DC
May 28, 2003

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member