

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of AUDREE G. SANTANA and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Ocala, FL

*Docket No. 03-618; Submitted on the Record;  
Issued May 27, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issues are: (1) whether appellant has established that she sustained a recurrence of disability on May 16, 2000 causally related to her April 28, 1993 employment injury; (2) whether the Office of Workers' Compensation Programs properly terminated appellant's entitlement to monetary compensation and medical benefits finding that her accepted work-related conditions had resolved by April 12, 2001; and (3) whether appellant met her burden of proof to establish that she had any disability after April 12, 2001.

Appellant, then a 44-year-old revenue agent, was involved in a work-related motor vehicle accident on April 28, 1993. The Office accepted the conditions of cervical strain and left knee contusions as being work related. The case was later expanded to include the condition of aggravation of cervical spondylosis. Appellant was noted to have preexisting conditions of cervical spondylosis and degenerative disc disease at C5-6. Appellant returned to full-time work status as a revenue agent eventually moving from work in the field to work in the office.<sup>1</sup> On May 16, 2000 appellant filed a claim for recurrence of disability commencing May 16, 2000.<sup>2</sup> Form CA-7s for time off of work were subsequently submitted. In a letter of June 13, 2000, the Office advised appellant of the type of evidence needed to support her recurrence claim. It additionally noted that as appellant had a third-party surplus, that amount must be exhausted or absorbed prior to the Office paying monetary or medical benefits.

The relevant medical evidence in the instant case includes numerous chart notes and reports from appellant's treating Board-certified internist, Dr. Michael Gordon. In a June 19, 2000 report, Dr. Gordon advised that appellant had been a patient since April 7, 1997 and had

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<sup>1</sup> The record reflects that appellant received a third-party settlement as a result of the injury and compensation benefits were suspended due to the third-party surplus.

<sup>2</sup> At the time of the claimed recurrence, appellant was working for the employing establishment in Maitland, Florida.

been treated for chronic neck pain. He related that a review of her medical records indicated that appellant's pain developed shortly after a motor vehicle accident on April 28, 1993. The findings of various objective studies along with the types of medical interventions appellant underwent through the years were noted. Dr. Gordon advised that appellant had a very poor response to the medical interventions and her pain continued to be intractable. He further stated that appellant had also experienced depression due to the decline in her work performance and intractable pain. He advised that, in spite of best efforts to provide adequate medical care for appellant's cervical disc disease with evident nerve root compression, they have been unable to successfully control her chronic pain. He advised that appellant was no longer able to continue her current employment due to her declining function from intractable pain. Requests for medical leave absences due to multiple problems were provided.

In a June 20, 2000 report, Dr. Marc R. Gerber, Board-certified in physical medicine and rehabilitation, opined that, after review of the medical records, objective findings and his assessment of appellant, she was no longer able to function at her current capacity. He advised that, after the motor vehicle accident, appellant had sustained significant aggravations of some degenerative changes as well as continued chronic pain. He advised that appellant has objective findings of cervical degenerative disc disease, moderate right carpal tunnel syndrome, degenerative changes and disc bulges in the lumbar spine at L4-5 and L5-S1 and advised how each condition limited appellant from performing certain duties. He further noted that appellant's supervisor noted a decline in appellant's performance due to her medical problems. Based on those factors, Dr. Gerber opined that appellant was totally disabled. In a report of September 19, 2000, Dr. Gerber noted that the objective studies showed extensive osteoarthritis changes as well as disc protrusion and central stenosis. He stated that the steady progression of appellant's symptoms over the years has rendered her unable to perform her usual duties. Dr. Gerber opined that it was reasonable to assume that appellant's present symptoms were related to the 1993 accident. Requests for a medical leave absences due to multiple problems were provided.

In a January 3, 2001 report, Dr. Jack L. Gresham, a Board-certified orthopedic surgeon and Office referral physician, provided a history, reviewed the medical evidence and provided results on examination. Diagnoses of status post contusion of the left knee, resolved and cervical spondylosis were provided. Dr. Gresham stated that the diagnosis of cervical spondylosis was not medically connected to the work injury by any direct cause, aggravation, precipitation or acceleration. He further noted that appellant's subjective symptomatic complaints, as described in the physical examination, seemed out of proportion to the objective clinical findings and the history of injury. Dr. Gresham opined that the accepted condition of cervical strain and aggravation of cervical spondylosis resolved with no measurable degree of increased cervical spondylosis as a result of the work injury. He advised that any aggravation to the cervical spondylosis was temporary in nature and ceased well prior to the date of his evaluation. Dr. Gresham noted that appellant's present symptomology was consistent with a degree of spondylosis even greater than was evident on diagnostic x-ray studies and magnetic resonance imaging (MRI) scan. He noted that the degree of degenerative changes present on the plain x-ray studies and MRI scan was one that might be considered usual and customary for a patient of this age and did not indicate any progressive nature beyond that, which would be normally expected without any other undue cause, other than the activities of daily living. Dr. Gresham

opined that appellant reached maximum medical improvement within two to four months of the work injury. He further opined that appellant was capable of working eight hours a day. He advised that appellant's work history following the accident was colored by multiple complex factors, both physical and psychological, which produced the present clinical picture. He stated that appellant's present inability to work related least of all to any physical impairment, for which she requires any definitive treatment or further diagnostic evaluation. Dr. Gresham, therefore, opined that he would place no restrictions on appellant's physical capacity at work as a result of the motor vehicle accident of 1993. He further opined that appellant most likely would be experiencing the same medical conditions she was currently experiencing if she were not involved in the 1993 accident. He opined that appellant was only suffering from the natural progression of the mild cervical spondylosis as indicated above. This opinion was based principally upon the nonprogressive nature of her physical complaints and the nonspecific complaints of pain and limitation of motion without any objective findings of nerve dysfunction or other symptoms that might relate to a progressive problem in the cervical spine beyond the degree that could be expected from the natural progression of appellant's cervical spondylosis, which was not aggravated or increased to any measurable degree by any of the injuries sustained in the accident of 1993. Dr. Gresham opined that appellant's subjective complaints were out of proportion to the objective physical findings as well as the diagnostic studies. He further opined that no further medical treatment was needed for the accepted work injuries, but appellant should have some conservative symptomatic treatment for her mild cervical spondylosis.

On March 9, 2001 the Office issued a notice of proposed termination of compensation finding that the weight of the medical evidence, as evidenced by the report of Dr. Gresham, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office, established that appellant had no residuals remaining from the work injury of April 28, 1993 and that she did not sustain a recurrence of disability.

By decision dated April 12, 2001, the Office determined that the weight of the medical evidence established that residuals of the employment injury had ceased and that appellant was able to work an eight-hour day. The Office advised that, as the weight of the medical evidence demonstrated that appellant no longer had any current work-related conditions, appellant did not sustain a recurrence of disability due to the work injury. The Office advised appellant that the proposed termination of her compensation benefits would be final effective April 12, 2001. This decision was affirmed by an Office hearing representative in a decision dated February 20, 2002.

Following the Office's decisions, appellant submitted additional medical evidence. In a November 29, 2001 report, Dr. Sheryl Lavender, a neurologist, noted the history of injury and that appellant had not worked since the accident and presented her findings on examination. She further noted that the MRI scan of the cervical spine revealed bulging discs at levels C4-5, C5-6 and herniated discs at C6-7 and C4-T1 and an MRI scan of the lumbar spine revealed bulging discs at L4-5 and L5-S1. An impression of chronic cervical herniated nucleus pulposus with evidence for radiculopathy, chronic lumbar bulge with evidence for radiculopathy and depression secondary to pain were provided. Dr. Lavender provided a treatment plan, which noted work restrictions related to appellant's injury.

In a September 21, 2001 report, Dr. John Jenkins, Board-certified neurological surgeon, advised that appellant continues to complain of neck and back pain. Lumbosacral and cervical MRI scans were noted to show degenerative changes without any significant herniation. A bone scan revealed some nonspecific activity consistent with arthritis. Other tests revealed findings consistent with arthritis. No evidence of multiple myeloma was found. Conservative therapy was recommended. No opinion was provided with regard to causal relationship with appellant's employment injury.

In a December 18, 2001 report, Dr. Gordon stated that appellant was still experiencing cervical strain and permanent aggravation of cervical spondylosis and that this was sufficient to cause her to no longer be able to fulfill her job duties and, therefore, to stop working. Dr. Gordon noted that a recent MRI scan of the cervical spine revealed C7-T1 disc herniation. Persisting chronic pain due to cervical disc disease with radiculopathy and spasm of cervical, right trapezius muscle. Refractory to multiple medications and physical therapy was indicated. In a September 28, 2001 report, Dr. Gordon reiterated his findings from December 18, 2001 and advised her current diagnosis continued to be cervical discogenic disease with disc herniation at C6-7 and C7-T1, from which she is medically disabled. In an April 10, 2002 report, Dr. Gordon advised that, since 1994, there had been multiple objective studies, which are supportive of significant disease of the cervical spine. He indicated that the objective findings, which he listed, clearly document the presence of cervical discogenic disease, subsequent to appellant's motor vehicle accident with neck injuries. Dr. Gordon advised that it was not unusual for patient's to experience chronic neck pain with waxing and waning of symptoms and progression of symptoms due to the type of injury appellant sustained. Although multiple conservative measures have been attempted to provide adequate management of appellant's pain, he stated that appellant has experienced a significant decline in her overall functioning both at work and in activities of daily life over the past several years. Dr. Gordon opined that, having observed appellant over the past several years, the chronic pain syndrome and the objective findings on multiple studies are linked to appellant's motor vehicle accident in 1993.

By decision dated November 12, 2002, the Office denied modification of its previous decision.

The Board has reviewed the record and finds that appellant failed to establish a recurrence of disability on May 16, 2000 causally related to her April 28, 1993 employment injury.

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability, for which she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.<sup>3</sup>

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<sup>3</sup> *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

Causal relationship is a medical issue<sup>4</sup> and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence, which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>5</sup>

The Board finds that the opinion of Dr. Gresham represents the weight of the medical evidence. He provided a reasoned medical opinion, based on a complete background, that residuals of the employment injury had ceased. He found that the aggravation of appellant's cervical spondylosis was temporary and had not increased to any measurable degree beyond that, which could be expected from the natural progression of her cervical spondylosis. This was based on the nonprogressive nature of appellant's physical complaints and the nonspecific complaints of pain and limitation of motion without any objective findings of nerve dysfunction or other symptoms, which might relate to a progressive problem in the cervical spine. He opined that no continuing medical treatment was needed for the accepted conditions and appellant was capable of working eight hours a day without restrictions. The remainder of the medical evidence does not provide a reasoned opinion on the issues presented. Dr. Gordon failed to provide a medical explanation for his opinion that appellant's intractable pain from cervical disc disease and secondary depression was caused or aggravated by the employment injury. He further failed to relate appellant's current conditions to the accepted work injury to establish that the resultant disability is causally related to the accepted work injury. Although Dr. Gerber opined that it was reasonable to assume appellant's current symptoms and condition were related to the work injury, he did not clearly explain, with medical rationale, how this would arise.

The Board notes that appellant's attorney argued that Dr. Gresham's opinion had limited probative value due to questions of bias. The Office noted that the physicians selected as Office referral physicians have a contractual obligation to provide a clear, detailed and an unbiased report since their second opinion scheduling was done through an independent group, which selects the physicians based on their area of expertise, their proximity to appellant and their agreement to perform independent medical examinations. The Board notes that the Office procedure manual<sup>6</sup> does not contain any prohibitions for second opinion referrals.<sup>7</sup> Appellant's attorney further argued that Dr. Gresham received a reprimand in 1994. In an April 12, 2001

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<sup>4</sup> *Mary J. Briggs*, 37 ECAB 578 (1986).

<sup>5</sup> *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>6</sup> Federal (FECA) Procedure Manual, Part -- 3, Medical, *Second Opinion Examinations*, Chapter 3.500.3(b) (March 1994).

<sup>7</sup> *See, e.g., Harold Burkes*, 42 ECAB 199 (1992) (the reasons for using a referral physician and an impartial medical examiner are distinguishable. Referral physicians are investigatory and need not be free of any possible relationship with either party, absent the demonstration of bias). *See Pierre W. Peterson*, 39 ECAB 955 (1988) (the Board has not extended proscriptions attendant to the selection of an impartial medical specialist to Office referral physicians).

memorandum, the Office noted that the fact that Dr. Gresham had received a minimal administrative fine approximately seven years prior would not damage his credibility on the current report. Moreover, as appellant's attorney failed to provide any documentation pertaining to the matter of concern, from which the reprimand resulted, the exact nature of what Dr. Gresham did (or did not do) could not be determined. It was further noted that he remained Board-certified in orthopedic surgery. Accordingly, the Board finds that Dr. Gresham was an appropriate second opinion physician and the Office properly relied on his opinion in resolving the issues at hand.

The Board, therefore, finds that the probative evidence of record is represented by the opinion of Dr. Gresham, who found that the residuals of the employment injury had ceased. Accordingly, appellant has not established that she sustained a recurrence of disability causally related to her April 28, 1993 employment injury.

The Board further finds that the Office properly terminated compensation benefits effective April 12, 2001.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.<sup>8</sup>

In this case, the Office accepted that appellant's April 28, 1993 employment injury caused a left knee contusion, cervical strain and an aggravation of her preexisting cervical spondylosis. The Office, therefore, has the burden of proof to justify any termination of compensation benefits for the accepted conditions and aggravation.

The Office terminated appellant's compensation, effective April 12, 2001, on the grounds that the weight of the medical evidence rested with Dr. Gresham, a Board-certified orthopedic surgeon and second opinion physician, who opined that appellant had no residuals remaining from the work injury of April 28, 1993. In her February 20, 2002 decision, the Office hearing representative agreed that the weight of the medical opinion evidence was represented by Dr. Greshman's well-rationalized opinion that appellant no longer had any residuals of the work-related injury.

For the same reasons enunciated above, the Board finds that the opinion of Dr. Gresham represents the weight of the medical evidence. He provided a reasoned medical opinion, based on a complete background, that residuals of the employment injury had ceased. He found that the aggravation of appellant's cervical spondylosis was temporary and had not increased to any measurable degree beyond that, which could be expected from the natural progression of her cervical spondylosis. This was based on the nonprogressive nature of appellant's physical complaints and the nonspecific complaints of pain and limitation of motion without any objective findings of nerve dysfunction or other symptoms, which might relate to a progressive problem in the cervical spine. As previously discussed, appellant's treating physicians failed to

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<sup>8</sup> See *Patricia A. Keller*, 45 ECAB 278 (1993).

provide a reasoned opinion based on medical rationale as to why appellant's current condition was causally related to her work injury of 1993. Dr. Gordon failed to provide a medical explanation for his opinion that appellant's intractable pain from cervical disc disease and secondary depression was caused or aggravated by the employment injury. He further failed to relate appellant's current conditions to the accepted work injury to establish that the resultant disability is causally related to the accepted work injury. Although Dr. Gerber opined that it was reasonable to assume appellant's current symptoms and conditions were related to the work injury, he did not clearly explain with medical rationale how this would arise.

Accordingly, the Office properly relied on the opinion of Dr. Gresham in terminating compensation benefits on the grounds that the medical evidence established that the residuals from the employment injury had ceased.<sup>9</sup>

Lastly, the Board finds that the case is not in posture with regard to whether appellant has any disability causally related to her employment injury after April 12, 2001.

The Board initially notes that, although Dr. Lavender did not directly opine that appellant's conditions were causally related to the work injury, this is implicit in her opinion that appellant's work restrictions are related to her work injury. It is noted that Dr. Lavender's report is based on an inaccurate factual history as it is based on the fact that appellant has not worked since the employment injury, while appellant had worked for seven years prior to her claim of recurrence. As Dr. Lavender's opinion does not indicate that it was based on a complete and accurate factual history and did not contain adequate medical rationale supporting her conclusion that appellant's current conditions are employment related, the Board finds that her opinion is of decreased probative value.<sup>10</sup> Thus, Dr. Lavender's report is insufficient to support the recurrence claim or to cause a conflict with Dr. Gresham's opinion that the residuals of the accepted employment injury had ceased. As Dr. Jenkins provided no opinion as to causal relationship with employment, Dr. Jenkins' report is insufficient to support the claim for recurrence or to cause a conflict with Dr. Gresham's opinion.

The Board notes, however, that the new medical evidence submitted from Dr. Gordon is sufficient to cause a conflict with Dr. Gresham's opinion that the residuals from the employment injury had ceased. In his April 10, 2002 report, Dr. Gordon noted that, since 1994, the objective studies had documented the presence of cervical discogenic disease, which arose subsequent to appellant's motor vehicle accident with neck injuries. He stated that it was not unusual for patient's to experience chronic neck pain and waxing and waning of symptoms and progression of symptoms due to the type of injury appellant sustained. Based on the type of injury appellant sustained, along with his observation of appellant's decline in function over the years and the objective findings on multiple studies, Dr. Gordon opined that appellant's chronic pain syndrome was linked to appellant's motor vehicle accident in 1993.

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<sup>9</sup> *Patricia A. Keller, supra* note 8. The April 12, 2001 and February 20 and November 12, 2002 decisions, properly placed the burden of proof on the Office.

<sup>10</sup> *See Elizabeth W. Esnil, 46 ECAB 606 (1995).*

Inasmuch as Dr. Gordon was appellant's physician and Dr. Gresham was the Office's referral physician, their opinions have created a conflict in the medical opinion evidence, which must be resolved pursuant to section 8123(a) of the Federal Employees' Compensation Act.<sup>11</sup> Thus, the Board will remand this case to the Office to resolve the conflict.

The decisions of the Office of Workers' Compensation Programs dated November 12 and February 20, 2002 are hereby affirmed with regard to the denial of the recurrence claim and termination of compensation benefits effective April 12, 2001. The case, however, is remanded for further development to resolve the issue of whether appellant has any disability causally related to her employment injury after April 12, 2001.

Dated, Washington, DC  
May 27, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>11</sup> 5 U.S.C. § 8123(a) (if there is disagreement between the physician making the examination for the government and the physician of the employee, the Office shall appoint a third physician who shall make an examination).