U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SHIRLEY G. LUCERO and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Long Beach, CA

Docket No. 03-1547; Submitted on the Record;
Issued January 9, 2004

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
DAVID S. GERSON

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective March 24, 2002 on the grounds that she had no further condition or disability due to her July 28, 1986 employment injury; and (2) whether the Office properly terminated appellant's authorization for medical treatment.

On July 28, 1986 appellant, then a 61-year-old health benefits adviser, filed a claim for a traumatic injury occurring on that date in the performance of duty. The Office accepted appellant's claim for a low back strain and a permanent aggravation of degenerative disc disease. She sustained intermittent periods of temporary total disability until July 24, 1987. Appellant voluntarily retired from the employing establishment on September 30, 1987.[1]

In a letter dated July 31, 2000, the Office informed appellant that she was entitled to medical treatment for her employment injury and that she should file a claim for compensation for wage loss. On October 17, 2000 the Office placed her on the periodic rolls effective November 8, 1998.

In a report dated February 2, 2001, Dr. Richard M. Paicius, a Board-certified anesthesiologist and appellant's attending physician, found that she had "significant low back pain from degenerative disc disease" and was unable to work.

By decision dated March 6, 2001, the Office denied appellant's claim for compensation for total disability from October 30, 1998 until November 1, 2001 on the grounds that the medical evidence was insufficient to establish that she was disabled due to her accepted employment injury. The Office rescinded its finding that she was entitled to compensation

[1] Appellant indicated, in a letter dated November 5, 2000, that she worked in private sector employment from the time of her retirement until 1998.

beginning November 8, 1998. The Office found, however, that appellant was entitled to compensation for total disability beginning November 2, 2000.[2]

On March 26, 2001 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated April 16, 2001, Dr. Dorsey reviewed appellant's history of injury, the medical reports of record and listed detailed findings on examination. He diagnosed left lower extremity radiculopathy, lumbar degenerative joint disease and lumbar degenerative spondylolisthesis. He found that the diagnosed conditions were not due to appellant's 1986 employment injury and noted that a lumbar sprain should have resolved within 30 days. Dr. Dorsey further found that appellant's employment injury had not caused an aggravation of a back condition. He stated:

> "Although the Office has accepted that [appellant] suffered a recurrence of disability, I do not see any evidence that the events of July 28, 1986 caused any disability. [Appellant] would have sustained only a lumbar musculoligamentous sprain/strain from that episode. Additional evidence of this opinion is seen in the fact that [she] went on to have numerous secretarial type positions following retirement from federal service in 1987. [Appellant's] current disability status, in my opinion, is not work related."

Dr. Dorsey listed work restrictions, but found that appellant had no "continuing residuals of the work injury."

By letter dated July 17, 2001, the Office noted that it had accepted that appellant sustained a permanent aggravation of degenerative disc disease and requested that Dr. Dorsey discuss whether this altered his opinion. In a supplemental report dated July 24, 2001, Dr. Dorsey opined that there was no evidence establishing that appellant sustained a permanent aggravation due to her employment injury.

In a report dated September 5, 2001, Dr. Mark S. Ishimaru, a Board-certified orthopedic surgeon and appellant's attending physician, related that he did not agree with the findings of Dr. Dorsey. Dr. Ishimaru noted that magnetic resonance imaging (MRI) scan studies showed "not only progressive degenerative changes which I feel are on the basis of the original trauma, but also evidence of lumbar disc injury." He found that appellant's lumbar strain had "recurrently been a problem throughout her treatment history. I do not agree that patients with lumbar injuries even as simple as a strain will resolve within 30 days."

The Office determined that a conflict in medical opinion existed between Dr. Dorsey and Dr. Ishimaru and referred appellant to Dr. Todd H. Katzman, a Board-certified orthopedic surgeon, for an impartial medical examination. The Office noted that appellant's attending physician, Dr. Ishimaru, found that appellant continued to have residuals of her accepted aggravation of degenerative disc disease while Dr. Dorsey, the Office referral physician, found

[2] On March 16, 2001 appellant requested a hearing on her claim. Appellant withdrew her request for a hearing in May 2001.

that appellant did not have an employment-related permanent aggravation of degenerative disc disease.

In a report dated November 19, 2001, Dr. Katzman summarized the medical evidence of record and provided findings on examination. Dr. Katzman diagnosed a musculoligamentous strain and degenerative disc disease of the lumbosacral spine and degenerative spondylolisthesis at L4-5. He stated:

> "The examination today reveals a pleasant woman with evidence of chronic low back pain. The examination reveals mild tenderness of the lumbar spine with diminished range of motion consistent with degenerative disc disease. This is consistent with her age of 76 years. There is no evidence of acute radicular symptoms. There is no evidence of lumbar radiculopathy or any neurologic deficit which would be consistent with an acute or chronic lumbar disc herniation. It is noted that the most recent MRI scan revealed improvement from the MRI scan performed in 1996, in that disc bulges measuring four millimeters in 1996 now measure no more than two millimeters at multiple levels. Appellant has clinical and radiographic evidence of degenerative disc disease consistent with a 76-year-old spine."

Dr. Katzman opined that appellant sustained a strain at the time of her July 1986 employment injury and "underwent significant overtreatment on an industrial basis." He related:

> "The medical records reveal that [appellant] sustained a strain of the lumbar musculature in July of 1986, when she bent forward to lift a box. Clearly, she did not sustain a disc herniation and she did not sustain a fracture or any other significant injury. [Appellant] sustained a soft tissue injury to the muscles of the lumbar spine. It is my opinion that as a result of the soft tissue injury, she underwent significant overtreatment on an industrial basis. The great and vast majority of patients who sustain a soft tissue injury to the lumbar spine require no more than several months of formal physical therapy and/or chiropractic care followed by an aggressive home exercise program. No further treatment would be required on an industrial basis, as [appellant] did not have evidence of any other significant injury as a result of the incident. Furthermore, it is noted that after the incident, she only worked for one year and then took early retirement from the [employing establishment]. [Appellant] then worked for 10 years, performing similar work duties, for a different employer. Throughout that time, she was fully capable of performing her work activities and she did so for 10 years. However, [appellant] claims that during the 10-year period that she worked for another employer, her back pain was not due to the work duties performed for her new employer but secondary to the incident that occurred in July of 1986, while employed by the [employing establishment]. It should be made clear that[,] at most, she sustained a mild strain of the lumbar musculature in July of 1986. In no way could [appellant's] ongoing symptomatology be attributed to this event."

Dr. Katzman found that the 1991 report of an Office referral physician, Dr. Robboy, on which the Office based its acceptance of a permanent aggravation of degenerative disc disease, was erroneous. He further found that appellant's current back condition was "degenerative disc disease consistent with her 76 years of age, and this condition was not caused by or aggravated by the industrial event of July 1986, an event that occurred 15 years ago and an event that predates an additional 10 years of employment with a different employer." Dr. Katzman further found that appellant had no employment-related work restrictions and required no further medical treatment due to her July 1986 employment injury. He provided work limitations due to appellant's degenerative lumbar spine which he found was unrelated to her work injury.

By letter dated January 16, 2002, the Office notified appellant that it proposed to terminate her compensation benefits on the grounds that she had no further condition or disability due to the accepted employment injury.

Appellant submitted a report dated September 19, 2001, received by the Office on January 31, 2002, from Dr. James K. Styner, a Board-certified orthopedic surgeon.[3] He diagnosed mechanical low back pain with radiculopathy to the left lower extremity, severe osteoporosis, calcification of the abdominal aorta and possible spinal stenosis. Dr. Styner noted that following appellant's employment injury she sustained intermittent periods of total disability. He disagreed with the opinion of Dr. Dorsey, the second opinion examiner, that she sustained a sprain that had since resolved. Dr. Styner opined that appellant sustained "trauma to her lumbar spine which has accelerated the disease process" as a result of her employment injury. He stated: "There has been progressive aggravation due to the progressive disc disease which has been accelerated due to the post-traumatic injury." Dr. Styner listed work restrictions "to reduce exacerbation and avoid further disability."

Appellant further submitted a report dated January 10, 2002 from Dr. Eduardo E. Anguizola, a Board-certified anesthesiologist, who diagnosed lumbar degenerative disc disease at L3-4 and L5-6, left lumbar facet arthropathy and spinal scoliosis. He noted, "It appears that [appellant's] injuries originated at work on July 28, 1986." Dr. Anguizola opined that appellant was not dependent on narcotics.

In a decision dated March 7, 2002, the Office terminated appellant's compensation benefits and authorization for medical treatment effective March 24, 2002. On March 21, 2002 appellant requested a hearing before an Office hearing representative. She submitted treatment notes from Dr. Paicius dated October 2001 through January 2002. By decision dated May 2, 2003, the hearing representative affirmed the Office's March 7, 2002 decision.

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective March 24, 2002.

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[4] The Office may not terminate compensation without

[3] At the hearing appellant maintained that she submitted Dr. Styner's report to the Office on October 24, 2001.

[4] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

establishing that the disability ceased or that it was no longer related to the employment.[5] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

Where there exists a conflict in medical opinion 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 upon a proper factual background, is entitled to special weight.[7] In this case, the Office terminated appellant's compensation based on the November 19, 2001 report of Dr. Katzman, the impartial medical specialist. The Board finds, however, that Dr. Katzman's opinion is of diminished probative value and thus does not represent the weight of the medical evidence. The Office provided Dr. Katzman with a statement of accepted facts which indicated that it had accepted that appellant sustained a low back strain and a permanent aggravation of degenerative disc disease due to her employment injury. To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information to the physician through the preparation of a statement of accepted facts.[8] The Office procedure manual provides as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[9]

Dr. Katzman found that appellant sustained only a low back strain and not an employment-related permanent aggravation of degenerative disc disease. Dr. Katzman stated, "It is clear, however, that [appellant] did not sustain anything more than a lumbar strain, and by definition, a lumbar strain is an injury to the lumbar musculature." He opined that appellant's soft tissue strain would have resolved in six to nine months. Dr. Katzman concluded that the Office's acceptance of a permanent aggravation of degenerative disc disease was erroneous. Dr. Katzman, therefore, did not find that appellant had any further residuals of her aggravation of degenerative disc disease but instead found that she had in fact never experienced the accepted condition. To the extent that Dr. Katzman's opinion is outside the framework of the statement of accepted facts, it is based on an inaccurate history and thus is insufficient to meet the Office's burden of proof on the relevant issue in a termination of whether appellant has further employment-related residuals of her accepted conditions.

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[5] *Id*.

[6] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[7] *Leanne E. Maynard*, 43 ECAB 482 (1992).

[8] *Helen Casillas*, 46 ECAB 1044 (1995).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600(3) (October 1990).

The Office noted that a conflict existed between Drs. Ishimaru and Dorsey on the issue of whether appellant sustained a permanent aggravation of degenerative disc disease and requested that Dr. Katzman address whether appellant had a continuing aggravation. It appears, therefore, that the Office was attempting to rescind acceptance of the permanent aggravation of degenerative disc disease. However, the Office did not inform appellant that it was contemplating rescission or actually rescind acceptance of appellant's permanent aggravation of degenerative disc disease in its termination decision. The Office must inform a claimant correctly and accurately of the grounds on which a rejection rests so as to afford the claimant an opportunity to meet, if possible, any defect appearing therein.[10] The Office may not, therefore, find that residuals of an accepted employment injury have ceased by a particular date when the evidence upon which the Office's decision rests tends to support that, in fact, the injury never occurred.

Accordingly, the Office did not meet its burden of proof to terminate appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated May 2, 2003 is reversed.

Dated, Washington, DC
January 9, 2004

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

[10] *John M. Pittman*, 7 ECAB 514 (1955).