U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MINNIE FOSTER and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA

Docket No. 03-978; Submitted on the Record;
Issued June 21, 2004

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits.

On August 19, 1985 appellant, then a 42-year-old leader housekeeper, filed a traumatic injury claim alleging that on June 4, 1985 she experienced pain in the lower right side of her back while mopping a floor. On October 3, 1985 her claim was accepted for a lumbosacral strain. Appellant stopped work in 1985 and was placed on the periodic rolls.

Following her injury appellant was treated by several physicians, including Dr. John A. Donahue, a Board-certified orthopedic surgeon. On July 22, 1994 he listed his diagnostic impressions as chronic lumbar spine pain and a chronic asthmatic condition. On May 1, 1995 Dr. Donahue noted that appellant remained permanently disabled and would not recover with time. He noted that due to appellant's chronic pain, she was unable to exercise to control her weight.

The Office referred appellant to Dr. Keith E. Liberman, a Board-certified orthopedic surgeon, for a second opinion examination. In a medical report dated April 10, 1996, he opined that the residuals of appellant's June 4, 1985 injury would have resolved by September 4, 1985 and that any symptoms after that date reflected a natural progression of her preexisting osteoarthritis aggravated by her morbid obesity. He further opined that appellant was able to return to work in a full-time sedentary position. On April 7, 1998 Dr. Liberman submitted a supplemental report indicating that appellant had residuals consisting of subjective complaints of low back pain. He stated: "[Appellant's] chronic lumbosacral strain was considered temporary because there was no objective evidence of a physiologic change in her preexisting condition as a result of the bending incident of June 4, 1985."

In a report dated May 27, 1998, Dr. Donahue noted that appellant was grossly obese at the time of her accepted injury, but was working without disability prior to that time. He

indicated that she remained disabled. Dr. Donahue noted his disagreement with Dr. Liberman concerning his assessment that appellant should have recovered from her sprain injury.

The Office found a conflict of medical opinion between Dr. Liberman and Dr. Donahue. On July 7, 1998 the Office referred appellant to Dr. Anthony H. Alter, a Board-certified orthopedic surgeon, to resolve the conflict as to whether appellant had any remaining disability causally related to her accepted employment injury.

In a medical report dated July 27, 1998, Dr. Alter stated that appellant was totally disabled and, barring any surgical intervention remained totally disabled due to her back condition. He stated that appellant's total disability was injury related. Dr. Alter indicated that her back problems started at work and then deteriorated as a function of time, incomplete treatment and her marked obesity.

On January 8, 1999 Dr. Donahue conducted a physical examination of appellant to rate her permanent impairment. He indicated that he applied the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and stated:

> "Based on my physical examination, assessment at this time reveals that [appellant] has an impairment secondary to the effects from L4, L5 and S1 nerve roots based on the loss of function of approximately 19 percent for the loss of strength due to the L5 nerve root distribution in the right lower extremity. This loss of function is due to the loss of strength in the extensor hallucis longus and extensor muscles of the ankle and foot. Thus, [appellant] has a right lower extremity impairment secondary to pain and discomfort and sensory deficit of approximately 20 percent from injury to the sciatic nerve. [She] also has an impairment secondary to the loss of strength in the right lower extremity of approximately 50 percent due to impairment to the sciatic nerve.
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> "Relative to the left lower extremity, [appellant] has an impairment secondary to the injury to the sciatic nerve of approximately 10 percent due to pain, discomfort and sensory deficit and 10 percent impairment secondary to loss of strength in the left lower extremity."

On June 8, 1999 the Office requested that an Office medical adviser evaluate appellant's claim for a schedule award. On June 15, 1999 the Office medical adviser reviewed the medical reports and stated:

> "After reviewing the above-cited records and this entire voluminous file, this reviewer would note that several reports refer to right sided sciatic nerve root irritation. According to [T]able 68, page 89, Chapter 3, [f]ourth edition of the [A.M.A.,] *Guides*, this is assessed a maximal 12 percent for dysesthesias. This reviewer noting the description of slight-to-moderate pain would recommend a maximal [G]rade III as per the [g]rading [s]cheme found in Chapter 3, [f]ourth edition of the [A.M.A.,] *Guides*. This would be pain and/or altered sensation that may interfere with activity or a 60 percent grade of this 12 percent for dysesthesias. This reviewer, noting the description of slight-to-moderate pain,

would recommend a maximal [G]rade III and/or altered sensation that may interfere with activity or a 60 percent grade of this 12 percent, equivalent to a 7.2 percent impairment of the right lower extremity or leg for the subjective complaints including pain and/or altered sensation. The records do not document any loss of right hip, right knee, right ankle, right subtalar or right toe motion for a zero percent impairment. As far as any weakness is concerned, the records do describe some 4+/5 weakness involving the right toe extensors with at least one report indicating this also involves the right ankle extensors. According to [T]able 39, [G]rade IV weakness of the ankle extensors would be assessed a 12 percent impairment with [G}rade IV weakness of the great toe extension assessed a 2 percent impairment. Grade IV/V would indicate a grade between IV and V, which would be 0 and thus a mean between the 12 combined with 2 or 14 and 0 would indicate a 7 percent impairment of the right lower extremity for the weakness described.

"A second method of calculating an award would be based on the description of ¾ [inch] to 1 [inch] of calf atrophy. According to [T]able 37, this would be equivalent to a maximal 11 percent impairment noting that 1 [inch] is equivalent to 2.54 cm. The second method arrives at a higher award and should be adopted of 11 percent for weakness involving the right lower extremity.

"Utilizing the Combined Values Chart: [T]he 7 percent impairment for the pain factors and/or altered sensation combined with the 0 for loss of motion of any of the peripheral joints combined with 11 percent for the weakness would be equivalent to a 17 percent impairment of the right lower extremity or leg.

"Date of maximal medical improvement was reached years earlier with this reviewer, noting that one of the treating orthopedic surgeons indicates maximal medical improvement reached no later than May 8, 1987, approximately 2 years following the June 4, 1985 injury.

"It should be noted that this 17 percent impairment of the right lower extremity or leg represents the permanent functional loss of the right lower extremity due to the work-accepted back condition and does not represent a whole person award."

On December 2, 1999 appellant received a schedule award for a 17 percent impairment of the right lower extremity due to her 1985 work injury.

In a medical report dated January 7, 2000, Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, noted that appellant sustained an injury in June 1985, while working at the employing establishment and diagnosed sciatica. He stated:

"I have reviewed the report of [Dr.] Leonard Simpson, M.D., [the Office] Medical Consultant. [He] cited Table 68 of Chapter 3 of the fourth [e]dition of the A.M.A., *Guides*. However, this is the incorrect chart to use. The proper chart to use is Table 83 on [p]age 130. In addition, he grades [appellant's] pain as slight to moderate. [Her] pain is moderate to severe. When [she] presented herself to

this office, it was plainly obvious that she was in severe pain. This was further confirmed by the list of medications [appellant] requires for relief of her pain which included: Cyclobenzaprine, Hydrocodone/APAP, Sulindac, Naproxen and Prednisone, among her other medications.

"In summary, [appellant's] pain is severe, as documented in Dr. Simpson's own report, in which he cites Dr. Donahue's report. [She] had impairment of the L4, L5 and S1 nerve root. These are the appropriate roots, given her level of pathology. Using Table 83 on [p]age 130 of the fourth [e]dition of the A.M.A., *Guides*, [appellant] would be entitled to the maximum percent of loss of function due to sensory deficit or pain which would be five percent per root for the three roots and in addition would be entitled to a loss of function due to a strength deficit. This would be further confirmed by [her] atrophy of her right lower extremity. [Appellant] would have an impairment of her right lower extremity of 30 percent."

On January 10 2001 appellant, through her attorney, requested review of the written record.

In a decision dated February 15, 2001, the hearing representative found a conflict in the medical evidence between the opinion of Dr. Tauber and the Office medical adviser as to the percentage of appellant's impairment. The case was remanded for the Office to refer appellant for an impartial medical evaluation of her permanent impairment.

On March 30, 2001 the Office referred appellant to Dr. Clive M. Segil, a Board-certified orthopedic surgeon, as an impartial medical specialist to resolve the conflict in medical opinion. The Office requested that he provide an opinion on the percentage of permanent impairment and also addressed questions pertaining to the period of total disability due to the accepted injury. In a medical report dated March 30, 2001, Dr. Segil diagnosed severe obesity, resolved right shoulder sprain, chronic degenerative disc disease of the lumbar spine and degenerative osteoarthritis of the left knee. He stated:

"Based on my evaluation of [appellant], I could find no objective findings to substantiate her subjective complaints. She is overweight. Because of her obesity and degenerative conditions in her left knee, lower back and right shoulder, she remains symptomatic.

"The [nerve conduction threshold] [a]mplitude test showed no major abnormality in regard to any of her lumbar nerve roots. This substantiates the fact that [appellant's] stocking hypoesthesia has no anatomic or nerve root basis and is a pure exaggeration.

Dr. Segil opined that the June 4, 1985 work injury did not cause appellant's disc syndrome with right sciatic radiculopathy. He noted: "Nothing has changed the course of the underlying disease other than obesity and degenerative conditions, which tend to get worse based on the natural history of these conditions." Dr. Segil noted that the period of total disability was from June 4, 1985 to the present time, but stated: "[T]he physical limitations are essentially as a

result of [appellant's] obesity and not a work-related alleged disability." Dr. Segil noted that she could be gainfully employed if she lost some weight. He concluded: "[Appellant's] nonindustrial degenerative disc disease, osteoarthritis, right wrist fracture, knee problems, right ankle fracture, asthmas and obesity are definitely responsible for her lower extremities and back conditions." In an undated report, Dr. Segil indicated that nerve conduction threshold amplitude test showed evidence that appellant had "a right and left severe S1 radiculopathy with the right being much worse then the left."

On June 13, 2001 the Office issued a notice of proposed termination of benefits based on the report of Dr. Segil. The Office found that his report established that appellant no longer had a work-related condition and that, therefore, her benefits should be terminated.

In response appellant submitted a report dated June 20, 2001 from Dr. Donahue, who examined her on that date. He noted that it was "incredible" that Dr. Segil found no objective or subjective injury-related factors of disability. He stated:

> "It is clear that [appellant] has a lot of physical problems. Most of them have to do with her lumbar spine and the fact that she cannot exercise and has constant, severe pain affecting her right low back and right lower extremity. It is clear that [appellant's] physical limitations are not the result of obesity, but the result of her industrial injury which caused her to have increased obesity. She was functioning fine before her injury even though she had moderate obesity at that time, but since that time, due to a lack of ability to have increased activity levels, her obesity has increased. What came first, the horse or the cart? In this case, I think it was the horse and the horse is [appellant's] low back injury of 1985."

In a June 21, 2001 report, Dr. Tauber stated:

> "In summary, numerous examiners have had the objective finding of right calf atrophy and have had correlating subjective findings which would substantiate [appellant's] complaints.
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> "Dr. Segil is the only examiner out of all of these examiners, who has not had these findings. He proceeded to perform a study which is not at all an objective study. Thus, [appellant], in my opinion as well as the opinions of Dr. Alter and Dr. Donahue, has sciatica as a result of her work injury. She has objective findings on examination including, right calf atrophy. [Appellant] has subjective findings, including decreased sensation to pinprick and positive straight leg raise testing which interestingly was identified by Dr. Segil and a positive Lasegue sign which Dr. Segil himself documented. The positive straight leg raise test and Lasegue sign that Dr. Segil himself found are at the very least, subjective confirmation of [appellant's] sciatica.
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> "In summary, my conclusions are unchanged from my report of January 7, 2000. My evaluation of [appellant's] status i[s] unchanged. It is my opinion that Dr. Segil's report is in conflict with multiple other examiners. My impairment

evaluation of [appellant] is unchanged. Her continuing symptoms are directly attributable to her work injury in the course of her employment...."

By decision dated August 28, 2001, the Office terminated appellant's compensation benefits.

By letter dated September 7, 2001, appellant requested an oral hearing, which was held on February 26, 2002. She submitted a January 15, 2002 note from Dr. Samuel Braitman, a Board-certified physiatrist, who noted that a computerized tomography scan showed mild stenosis and moderate lateral recess stenosis at L4-5 with no frank herniated discs or free fragments and that the L3-4 and L5-S1 intervertebral disc spaces showed minimal degenerative changes.

By decision dated May 15, 2002, an Office hearing representative affirmed the August 28, 2001 decision terminating benefits. The hearing representative found that the weight of the medical evidence rested with the opinion of the impartial medical specialist, Dr. Segil.

The Board finds that the Office improperly terminated appellant's compensation benefits.

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.[1] Furthermore, in situations where 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.[2]

In the instant case, appellant's physician, Dr. Donahue, opined that she was still disabled due to her employment injury of June 4, 1985. The second opinion physician, Dr. Liberman, disagreed, opining that the strain from the accident of June 4, 1985 would have resolved by September 4, 1985 and that any symptoms after that reflect appellant's preexisting osteoarthritis aggravated by her morbid obesity. Due to the conflict in the opinions, the Office referred appellant to Dr. Alter to resolve the conflict. He concluded that she was totally disabled due to her work-related injury. Based on Dr. Alter's opinion, on August 24, 1998 the Office declined to terminate benefits.

In a decision dated February 15, 2001, the hearing representative determined that there was a conflict in the evidence with regard to the extent of permanent impairment, as Dr. Tauber indicated that appellant had an impairment of her right lower extremity of 30 percent and the Office medical adviser determined that this impairment was 17 percent. Pursuant to the Office's instructions, appellant was referred to Dr. Segil. The Office asked him his opinion on whether appellant terminated totally disabled due to the accepted injury. The relevant issue at the time of

[1] *See Patricia A. Keller*, 45 ECAB 278 (1993).

[2] *See Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

the referral to Dr. Segil was the extent of appellant's impairment and rating for schedule award purposes.[3] While he was properly selected as the impartial medical specialist on the issue of permanent impairment, Dr. Segil was not selected to resolve a conflict with regard to whether appellant remains totally disabled due to residuals of her accepted condition. In this regard, the opinion of Dr. Segil conflicts with that of Dr. Donahue, who supported continuing total disability due to the accepted conditions. The Office has not met its burden of proof to terminate appellant's compensation benefits.

The decision of the Office of Workers' Compensation Programs dated May 15, 2002 is hereby reversed.

Dated, Washington, DC
June 21, 2004

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[3] *See Robert Kirby*, 51 ECAB 474, 476 (2000). The Board notes that there is no final decision which addresses the issue of permanent impairment.