U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DOROTHY B. NELMS and DEPARTMENT OF AGRICULTURE, FARMERS HOME ADMINISTRATION, Athens, Ga.

Docket No. 96-919; Submitted on the Record;
Issued July 27, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective April 1, 1995.

The Office accepted that appellant, then a 41-year-old county program assistant, sustained an injury in the performance of duty on July 11, 1989 when she moved a heavy desk. Appellant stopped work on July 14, 1989 and did not return except for a brief period in September and October 1989. The Office approved her claim for a lumbar strain and authorized appropriate compensation benefits.

In developing the medical evidence, the Office found a conflict in medical opinion between Dr. Eugener B. Pendleton, a Board-certified orthopedic surgeon, for the Office and Dr. Donald R. Taylor, a Board-certified anesthesiologist, as to whether appellant had any continuing disabling medical condition causally related to the July 11, 1989 employment injury. Dr. Taylor, appellant's treating physician, had stated that appellant's job injury triggered her development of fibromyalgia and that she could work on a light duty because of her partial disability. Dr. Pendleton, a second opinion physician, had stated that appellant's work injury aggravated her fibromyalgia, but that the aggravation had ceased by the date of his July 25, 1990 examination. He concluded that appellant could return to work with no restrictions. He also opined that there was no evidence of cervical or lumbar disc disease. The Office referred appellant to Dr. Winston Chutkin, a Board-certified orthopedic surgeon, to resolve the conflict. In a report dated November 15, 1990, Dr. Chutkin opined that appellant suffered a muscle or ligament injury to her lower back in July 1989. He stated that there were no objective physical signs to support disability from work. Dr. Chutkin stated that appellant's present condition was related to her work injury, but that she had minimal disability at the present time and should be able to return to normal activity with rehabilitation.

Appellant also began submitting reports from Dr. Marvin Brantley, a Board-certified psychiatrist, indicating that appellant had an emotional condition, anxiety and depression that resulted from her work injury.[1]

On January 27, 1992 the Office referred appellant to a second impartial medical specialist, Dr. Harold Alexander, a Board-certified orthopedic surgeon. Dr. Alexander opined that appellant sustained an acute lumbosacral strain, which crossed into a chronic lumbosacral strain along with chronic cervical strain and fibromyositis. He stated that it appeared that her present problem resulted from her work injury, but it was unusual for this to go so long without abatement.

By report dated February 20, 1992, Dr. Taylor opined that appellant was disabled for work due to the July 11, 1989 injury, that the fibromyalgia was secondary to the acute muscle sprain caused by the 1989 injury, that there was no known cure for the appellant's illness and that treatment was usually lifelong. He stated that this condition may develop after climatic changes, infection, or physical and/or emotional trauma.

By letters dated September 17, 1992, the Office requested both Drs. Chutkin and Alexander to submit supplemental reports clarifying their opinions as to whether appellant had any continuing condition or disability causally related to the July 11, 1989 employment injury. Dr. Alexander provided a supplemental report dated September 30, 1992. The letter addressed to Dr. Chutkin was returned as undeliverable.

Upon finding that the medical conflict remained, the Office selected Dr. Donald Costigan, a Board-certified neurologist, as the impartial medical specialist. The Office provided Dr. Costigan with a statement of accepted facts, a description of appellant's date-of-injury position and the entire case record.

In a report dated November 23, 1993, Dr. Costigan noted appellant's history and related findings of pain on passive flexion of the hips at 45 to 50 degrees, with a negative Laseque's, which indicated that this was not a root stretch sign. Dr. Costigan stated that despite a good range of motion, appellant complained of "capricious" pains with multiple maneuvers, such as slight rotation of the shoulder joints, voluntary turning of the neck and so forth. With the exception of mild left ptosis, Dr. Costigan found the neurological examination to be unremarkable. He further stated that there was only intermittent give-way weakness of muscles on extremity testing and opined that this could be overcome with coaxing. Dr. Costigan opined that appellant had multiple somatic complaints, which did not suggest "fibromyalgia." He noted that prominent intermittent "seizures," *i.e.*, flexion of all four extremities for hours at a time, suggested a psychogenic mechanism. Dr. Costigan stated that he did not think appellant had fibromyalgia as the dominant cause of her intermittent immobilizing episodes or "seizures." He opined that the July 1989 strain, "a simple physical mechanism," did not cause appellant's

[1] In a September 16, 1992 decision, the Office denied appellant's claim for a psychiatric condition. In a decision dated and finalized July 1, 1993, an Office hearing representative affirmed the Office's denial, but directed that the Office issue a decision regarding whether appellant's fibromyalgia was work related. Appellant did not appeal the denial of the psychiatric condition.

current complaints. He stated that there were no objective signs of disability and that appellant appeared to be in excellent condition with variable effort on strength testing. He stated that he saw no deficit, based on objective findings, which would limit the appellant in resuming her regular work. He stated that appellant might continue having intermittent episodes of muscle contraction but noted that "it remains to be seen whether these episodes are to due to malingering or a psychological disorder."

By decision dated April 18, 1994, the Office terminated compensation benefits effective May 1, 1994, on the basis of the report of Dr. Costigan.

By decision dated October 24, 1994, an Office hearing representative found Dr. Costigan's report insufficient to resolve the conflict in medical opinion with respect to whether appellant had any remaining condition or disability causally related to the July 11, 1989 employment injury, because he did not provide a sufficiently well-rationalized opinion. The hearing representative remanded the case for reinstatement of compensation benefits and to obtain a supplemental report by Dr. Costigan.

By letter dated November 16, 1994, the Office requested a supplemental report from Dr. Costigan.

In a report dated December 6, 1994, Dr. Costigan noted that there was no diagnostic test for fibromyalgia. He opined that appellant's initial symptoms were not indicative of an "important degree" of muscle strain and indicated that there was no basis on which to attribute her symptoms to serious muscle strain, or root or spinal cord injury. He noted that, in typical cases of fibromyalgia, patients report local areas of tenderness and trigger points and there is no history of involuntary and immobilizing "seizures" or spasms. He stated that "the dramatic events described by our patient appear completely discrepant with the spectrum of fibromyalgia." He also opined that appellant was not accurately reporting her real complaints. He noted that appellant stated she was immobilized for 10 to 15 minutes after straining her back and neck on July 11, 1989, but also stated that she resumed her duties for the rest of the day and was not taken to a hospital afterwards. Dr. Costigan opined that a normal individual would be frightened by 10 to 15 minutes of transient immobility and that it was only the next day that the appellant began to feel nausea and multifocal shooting pains, "a pattern which does not suggest a focal area of trouble." He noted that "the serious muscle strain, or root or spinal cord injury, would much more likely present itself with a plausible history of involvement in a particular anatomic distribution." He further noted that the fact that appellant was later able to return to work for several weeks after the injury "would also be against a relatively fixed syndrome of muscle weakness and certainly against a neurologic deficit involving cord or spinal roots." He noted that appellant's symptoms of "seizures" and involuntary flexion of the fingers, shoulder pain, burning in the spine and thighs on bending, dizziness, were "very hard to reconcile with muscle aching, fibromyalgia, myofascial strain or any synonyms for the poorly defined entities of musculoskeletal pain." Appellant's symptoms were also incompatible with spinal cord or root disease. He also noted that appellant appeared remarkably trim, which seemed discrepant with her allegedly restricted exertional pattern. He reported that appellant depicted herself as limited from virtually any physical activity because of the risk of "drawing" or "seizures," but noted that appellant reported normal sexual intercourse, which "can be quite exerting." He further pointed

out the inconsistencies demonstrated on physical examination, which forced him to think that there were psychophysiologic factors rather than organic abnormalities at work. Dr. Costigan concluded that appellant's history of symptoms and all the subsequent alleged episodes of "seizure" were very much "open to question as to their authenticity." He opined that the symptoms and findings could not be attributed to fibromyalgia and that appellant had no convincing limitation on returning to work. He stressed that "unrecognized psychiatric illness might be at work, which might stand as an alternative explanation to simple malingering in this representation."

By notice of dated January 26, 1995, the Office proposed to terminate appellant's compensation based on the opinion of Dr. Costigan.

In response, appellant submitted a February 17, 1995 medical report from Dr. Brantley. Dr. Brantley noted treating appellant since December 1990 and opined that appellant had symptoms and disability of a chronic illness like fibromyalgia. Dr. Brantley also stated that appellant had chronic depression and occasional panic attacks. He stated that all of these have significantly interfered with appellant's lifestyle and coping skills. Dr. Brantley opined that he did not feel that appellant was able to return to her full-time job and work without significant restrictions.

Appellant additionally submitted a July 28, 1994 decision, from an Administrative Law Judge finding that she had been disabled and entitled to benefits under the Social Security Act since July 11, 1989 due to generalized fibromyalgia, depression, anxiety, migraines, dizziness, fatigue and chronic pain syndrome. Also submitted were journal articles concerning fibromyalgia along with a listing of medications appellant was taking.

By decision dated March 9, 1995, the Office terminated appellant's compensation effective April 2, 1995.

At an oral hearing held on August 22, 1995, appellant testified that Dr. Costigan's examination was brief and inappropriate.[2] Appellant's representative also questioned Dr. Costigan's specialty contending that a rheumatologist was the proper medical specialist. Additional medical reports were submitted subsequent to the hearing. These included inpatient psychiatric treatment notes by Dr. Ronald Blount, a July 24, 1995 report, from Dr. Carol Aitcheson and a July 31, 1995 report from Dr. James L. Beskin These reports did not contain a specific medical opinion by a physician regarding whether appellant had any condition causally related to her 1989 work injury. Also submitted was a transcript of an interview with appellant on August 15, 1995.

In a decision dated October 23, 1995, the Office hearing representative affirmed the Office's termination of benefits. The hearing representative found that the conflict in medical opinion between Dr. Pendleton and Dr. Taylor as to whether the appellant continued to have any

[2] Appellant's mother testified that her daughter was in Dr. Costigan's office for about 5 to 10 minutes and when she came out, she burst out crying and said "all he wanted to comment on was how pretty I was and how slim I was and nothing could be wrong with a woman that looked as pretty and slim as I was."

medical condition or disability causally related to the July 11, 1989 employment injury was resolved by the opinion of Dr. Costigan. The hearing representative further found that the additional medical evidence submitted was insufficient to equal or outweigh the opinion of Dr. Costigan.

The Board finds that the medical evidence of record establishes that appellant no longer has any disabling medical condition causally related to her work injury.

Where, as here, the Office has accepted a claim, it has the burden of justifying 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]

Here the Office met its burden and properly terminated appellant's compensation for her accepted lumbar strain. Moreover, the Office properly found that appellant did not meet her burden of proof in establishing that her fibromyalgia was causally related to her work injury. Dr. Costigan's reports constitute the weight of the medical evidence on both issues, as they show that appellant had no objective signs of disability causally related to the July 11, 1989 employment injury.

In this case, Dr. Taylor, appellant's treating physician, opined that appellant's job injury triggered her development of fibromyalgia and that she was totally or partially disabled as a result.[5] Dr. Pendleton, a second opinion physician, opined that appellant's work injury aggravated her fibromyalgia, that the aggravation had ceased by July 25, 1990, the date of his examination and that appellant could return to work with no restrictions. He also opined that there was no evidence of cervical or lumbar disk disease. The Office initially referred appellant to Dr. Chutkin who found that there were no objective signs to cause appellant's not being able to return to work. Dr. Chutkin also stated that he thought appellant's present condition was related to her work injury, that she had minimal disability at the present time, but that she should be able to return to normal activity with rehabilitation. Dr. Chutkin however provided no medical rationale supporting the causal connection to the accepted employment, nor did he explain why appellant was only able to return to light-duty work.

In situations when there exists 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 upon a proper factual background, must be given special weight.[6] When the Office secures an opinion

[3] *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[5] At the time appellant began receiving treatment from Dr. Taylor and thereafter, it appears that the medical evidence did not reflect that her accepted LS strain continued as appellant's physicians, Drs. Aitcheson and Taylor, related her continuing complaints and disability to fibromyalgia or nonlumbar spine conditions.

[6] 5 U.S.C. § 8123(a); *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

from an impartial specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. Unless this procedure is carried out, the intent of section 8123(a) of the Federal Employees' Compensation Act will be circumvented when the impartial specialist's report is not sufficient to resolve the medical conflict.[7] When the impartial specialist's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate on his original report or if the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial specialist for a rationalized medical report on the issue in question.[8]

Instead of securing a supplemental report from Dr. Chutkin, the Office referred appellant to a second impartial medical specialist, Dr. Alexander. This was error as it was improper for the Office to refer appellant to a second impartial medical specialist without first requesting that Dr. Chutkin provide a supplemental report.[9] Dr. Alexander's report can not be given any weight on review by the Board[10] and will be excluded from the record.[11]

However, this error is not dispositive of this appeal as the Office subsequently wrote to Dr. Chutkin requesting a supplemental report to cure the defects in his first report. The Office's letter to Dr. Chutkin was returned as undeliverable and the Office was subsequently unable to locate a new address for him. Consequently, the Office properly referred appellant for another impartial medical examination by Dr. Costigan. The Office provided Dr. Costigan with appellant's entire file, which included a statement of accepted facts, a description of appellant's date-of-injury position and the medical evidence of record. Although Dr. Costigan's initial report of November 23, 1993 was not fully rationalized, the Office properly requested a supplemental report from him to clarify his original report and to provide medical rationale for his opinion. In his supplemental report of December 6, 1994, Dr. Costigan did not find that appellant had any continuing lumbar strain caused by the July 11, 1989 employment injury, did not have fibromyalgia and found she was capable of returning to her previous job. Dr. Costigan opined that there was no evidence that appellant initially sustained a serious muscle strain and that, on his examination, there were no objective findings consistent with organic abnormalities. In opining that appellant did not suffer from fibromyalgia, Dr. Costigan pointed out discrepancies between the symptoms appellant complained of and the symptoms generally associated with a diagnosis of fibromyalgia along with the fact that he questioned the authenticity of appellant's complaints and explained the reasons for this feeling. He pointed out appellant's inconsistent responses on the physical examination and noted the lack of objective findings on physical examination. The Board finds that Dr. Costigan's opinion is sufficiently well rationalized and is based on a proper factual background, such that it is entitled to special

[7] *Queenie Anderson*, 37 ECAB 661 (1986).

[8] *Harold Travis*, 30 ECAB 1071 (1979).

[9] *Id.*

[10] *Id.*

[11] *Terrance R. Stath*, 45 ECAB 412 (1994).

weight and is sufficient to resolve the outstanding conflict and establish that appellant did not have fibromyalgia or any other condition causally related to her employment.

Consequently the Office has met its burden of proof in terminating appellant's compensation for the accepted condition of lumbar sprain as Dr. Costigan found no basis, on which to attribute any continuing disability or residuals to this condition.

Furthermore appellant has not met her burden in establishing that fibromyalgia was caused or aggravated by her 1989 work injury.[12]

The Board notes that since appellant's fibromyalgia claim was never accepted by the Office as being employment-related, appellant retains the burden of proof. Appellant has the burden of establishing by reliable, probative and substantial evidence that the condition, for which she seeks compensation was causally related to her employment. This burden includes the necessity of furnishing rationalized medical opinion evidence showing a cause and effect relationship, based upon a proper factual and medical background. Neither the fact that the condition became apparent during a period of employment, nor the belief of the employee that the condition was caused, precipitated, or aggravated by factors of her employment, is sufficient to establish causal relation.[13] The reports of Dr. Costigan found that appellant's symptoms were not consistent with the diagnosis of fibromyalgia nor supported by objective findings in physical examination.

The Office also properly rejected appellant's argument that Dr. Costigan was not a proper medical specialist to render an opinion on the issue of fibromyalgia. There is no medical evidence submitted to establish that a Board-certified neurologist is not competent to address such condition. The Board also finds that claimant's allegations concerning Dr. Costigan's conduct during examination do not change the weight afforded to his report as the Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.[14] Dr. Costigan's conclusions regarding appellant's diagnosis and disability are premised upon his examination of appellant and record review. Appellant has not provided any evidence that Dr. Costigan was in fact biased in his examination of her.

The additional medical evidence submitted subsequent to the reports from Dr. Costigan are of insufficient probative value to outweigh Dr. Costigan's opinion.

[12] The record indicates that the Office may have initially paid certain bills for treatment of fibromyalgia and an emotional condition. However, the mere fact that the Office authorized and pays for medical treatment does not establish that the condition for which treatment was rendered is employment related. *James F. Aue*, 25 ECAB 151 (1974). Here, there is no evidence that the Office ever accepted fibromyalgia or an emotional condition as being employment related.

[13] *Joseph W. Chaddic.* 30 ECAB 1021 (1979); *Bill D. Lee:* 29 ECAB 287 (1978).

[14] *Roger S. Wilcox,* 45 ECAB 265 (1993).

Dr. Brantley's February 17, 1995 report diagnosed chronic depression and panic attacks and opined that appellant was unable to return to her full-time job. Dr. Brantley, however, did not specifically address the relationship between appellant's conditions and her 1989 work injury.

Similarly, reports from Dr. Aitcheson, Dr. Beskin and Dr. Blount did not provide a specific opinion relating any current condition of appellant to her 1989 employment injury.

The Board also notes that the finding of entitlement to benefits under Social Security Act for purposes of receiving Supplemental Security Income has no dispositive evidentiary value in this case because, as the Board has held previously, entitlement to benefits under one act does not establish entitlement to benefits under the Federal Employees' Compensation Act.[15] In determining whether an employee is disabled under the Act, the findings of the Social Security Administration are not determinative of disability under the Act. The Social Security Act and the Act have different standards of medical proof on the question of disability. Therefore, disability under one statute does not establish disability under the other statute. Furthermore, under the Act, for a disability determination, appellant's injury or occupational disease must be shown to be causally related to an accepted injury or factors of his federal employment. Under the Social Security Act, conditions which are not employment related may be taken into consideration in rendering a disability determination.[16] Furthermore, articles from medical texts and periodicals are not sufficient to show entitlement to benefits as the Board has previously held that newspaper clippings, medical texts and excerpts from publications are of no evidentiary value in establishing the causal relationship between a claimed condition and an employee's federal employment as such materials are of general application and are not determinative of whether the specific condition claimed is related to the particular employment factors alleged by the employee.[17]

As the weight of the medical evidence establishes that appellant has no continuing work-related condition or disability, the Board finds that the Office properly terminated her compensation benefits.

[15] *Daniel Deparini*, 44 ECAB 657 (1993).

[16] *See Hazelee K. Anderson*, 37 ECAB 277 (1986).

[17] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

The October 23, 1995 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
July 27, 1998

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member