U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOANN REGAN and DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, Philadelphia, PA

Docket No. 98-1840; Submitted on the Record;
Issued April 14, 2000

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM, BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs abused its discretion in denying appellant's request to participate in the selection of an impartial medical specialist in this case; and (2) whether the Office properly terminated appellant's compensation benefits for the accepted employment injury she sustained on December 5, 1991.

On December 17, 1991 appellant, then a 41-year-old computer specialist, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that on December 5, 1991 she sustained a muscle spasm in her back when trying to remove a computer cover. She finished her day, but did not return to work. The employing establishment controverted the claim, contending that there was no evidence to substantiate that the injury occurred on the job.

In support of her claim, appellant filed a medical report dated December 26, 1991 by Dr. Philip L. Benditt, a Board-certified internist, who noted that appellant had been a patient of his for many years, that "most recently she complains of neck and low back pains starting after she lifted a computer on Friday, December 6, 1991," and that she was first seen in his office for this injury on Monday, December 9, 1991. Dr. Benditt noted that, while appellant initially responded to rest and medication, as of her visit of December 23, 1991 her pain had "gotten worse and now goes down her legs." He placed her on bed rest.

Dr. Benditt referred appellant to Dr. Robert Peyster, a Board-certified radiologist, for magnetic resonance imaging (MRI) scans of the lumbosacral and cervical spine. As a result of these MRI scans conducted on January 8, 1992, Dr. Peyster concluded that the MRI scan of appellant's cervical spine was a normal study, and that there was no evidence of disc herniation, central or lateral stenosis. With regard to the MRI scan of appellant's lumbosacral spine, Dr. Peyster, concluded that appellant had "a small central and right-sided disc herniation at L5-S1 with displacement of and possibly compression of the right S1 nerve root." He further noted that there was "mild early loss of disc signal at L2-3 and L3-4 indicated very early degenerative disc changes at these levels with perhaps very minimal bulging of the lateral aspects of these discs," but he noted that no herniation was noted at these two levels.

In statements dated January 7 and 8, 1992, two of appellant's coworkers verified that she had a problem getting a cover off the computer on which she working, but stated that she made no comment at the time of the repairs as to any personal injury she may have experienced. Furthermore, a representative of the personnel office at the employing establishment issued a statement dated January 7, 1992 noting that appellant had not informed anyone in the office of the alleged work-related injury until December 13, 1991.

In a medical report dated February 28, 1992, Dr. Benditt noted that, since the December 5, 1991 incident, appellant had been seen in his office nine times, that she had a pain in her neck and back which started shortly after lifting a computer on December 5, 1991, that it gradually worsened over the next several days to the point where she was unable to sleep due to the pain. He diagnosed herniated lumbar disc with cervical and lumbar sprain and strain. Dr. Benditt noted that appellant was showing very slow improvement. He opined "The temporal association between her lifting of the computer and the onset of … symptoms proves the causal relationship between the act and her condition." In an attending physician's report (Form CA-20) dated March 16, 1992, Dr. Benditt reiterated his impression of herniated lumbar disc caused by her employment, and further remarked that appellant may have a lasting problem with her back and the herniated disc.

On March 16, 1992 appellant filed a notice of claim on account of traumatic injury or occupational disease (Form CA-7).

By letter to the employing establishment dated April 3, 1992, the Office acknowledged the controversion of the claim by the employing establishment, but noted that a thorough review of the factual and medical evidence of record was sufficient to support that appellant sustained an injury in the time and manner reported.

On June 4, 1992 the Office accepted that appellant's herniated nucleus pulposus at L5-S1 resulted from her employment injury.

Meanwhile, appellant received treatment at the Arthritis Center of Hahnemann University from February 25 through June 29, 1992. In a medical report dated June 30, 1992, Dr. Perry Black, a Board-certified neurosurgeon, noted that appellant had been treated with pain medications, heat and physical therapy since January 1992, without relief. Dr. Black recommended that appellant consider surgery, and if she does decide to go forward with surgery, that she should have a computerized tomography (CT) scan of the lumbar spine with imaging at L2-3, L3-4, L4-5 and L5-S1 to confirm disc herniation and to evaluate the question of disc bulges or disc herniation at L2-3 and L4-5 as suggested by the MRI scan.

In a medical report dated October 6, 1992, Dr. George L. Rodriguez, a Board-certified physical medicine and rehabilitation specialist, noted that appellant's therapy had provided no relief.

At the request of Dr. Rodriguez, on October 20, 1992, Dr. Hong conducted a normal sensory nerve conduction study of the right and left lower extremities. With regard to the motor nerve condition study, he noted that the "right peroneal motor nerve's response was unable to be recorded secondary to atrophy of the extensor digitorum brevis muscle. No response obtained from the extensor digitorum brevis muscles secondary to atrophy of the left peroneal nerve." He also conducted an electromyography, which was "most consistent with chronic right S1

radiculopathy." Dr. Hong opined that this was "directly and causally related to the accident of December 5, 1991."

Appellant received further therapy at Work Habilitation of North Philadelphia commencing October 6, 1992, but was discharged on December 18, 1992 from the program for "lack of significant progress."

On December 7, 1992 appellant was examined, at the request of the Office by Dr. Stephen M. Horowitz, a Board-certified orthopedic surgeon. He opined that appellant primarily suffered lumbosacral sprain/strain as a result of the employment injury, that he believed that most of the complaints related to an injury of this type should have resolved by now, and that she should be able to return to work at the present time in a light-duty status. Dr. Horowitz noted that the reports indicate evidence of a "small right[-]sided herniated disc" of questionable significance and does not correlate with her history and physical examination and that it was "unclear why she [was] complaining of numbness in the fingers of both hands." He did not believe that appellant was permanently disabled, but did sign a work restriction evaluation limiting her to three hours of sitting and four hours of walking and standing.

In a medical report dated December 10, 1992, Dr. Rodriguez opined that appellant suffered from herniated nucleus pulposus, lumbar, radiculopathy -- leg/lumbar/thoracic (S1), "neuropathy -- entrap. NOS (B/L upper extremities)," degenerative disc disease -- lumbar and sacroiliitis as a result of the work-related injury of December 5, 1991.

In a medical report dated June 2, 1993, Dr. Benditt noted that appellant continued to have severe back pain, now radiating to her left leg as well as her right, that her diagnosis is still herniated nucleus pulposus, that her clinical course has been one of gradual deterioration and that physical therapy has had no effect on her condition and that she is afraid to have surgery. He also reiterated his belief that there was a direct cause and effect relationship between her lifting of the computer at work and this disc herniation, noting at the time of the event she had no problems with her back and now she does. In an update of appellant's medical condition, written on December 22, 1993, Dr. Benditt noted that he was continuing to see appellant every four to six weeks, that her condition was "little changed," that she continues to experience back pains with radiation to her legs and that the pain "does wax and wane but never goes away completely." In a medical report dated June 20, 1994, Dr. Benditt found that appellant continued to have severe low back pain with radiation to both lower extremities as a result of her lifting a computer, that she has pain if she walks more than ½ block and if she sits or stands longer than 20 minutes. He again noted the definite temporal relationship to the onset of her symptoms and lifting the computer, had said she continued to be unable to return to work.

As a result of a referral by the Office, appellant was seen on October 13, 1994 by Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, who opined that appellant had excessive subjective complaints, as it was almost three years from the date of the original injury. He stated that, from an orthopedic point of view, he could find no positive or objective findings. Dr. Didizian also noted that "with all the modalities of treatment one would expect at least some healing or decrease in the anatomic areas of complaint, rather she seems to have progressed into further areas beyond the back, neck and right leg." He also believed that the herniated disc could not have taken place on December 5, 1991, because she worked on that day, that she did not describe any pain on December 5 or 6, 1994 but noted it two days later when she was sleeping and suddenly felt pain. Dr. Didizian opined that, if the herniated disc had happened on

December 5, 1991, she "would have had acute symptoms not only in the back but also in the leg," that the injury would have been highly symptomatic and that the MRI scan was not performed until January 10, 1992, and the records of Dr. Benditt "clearly indicated that [her] neurologic evaluation was negative up to February 1992."

On March 4, 1995 the Office proposed terminating appellant's compensation and medical care because "the weight of the medical evidence indicates that the residual effects of the work injury have ceased."

By decision dated April 26, 1995, the Office terminated appellant's compensation as it determined that the medical evidence failed to support any current disability residuals of the accepted work injury of December 5, 1994.

In a medical report dated March 22, 1995, Dr. James Witek, a Board-certified internist with Hahnemann University, noted that he had seen appellant on February 19 and March 20, 1995, that appellant continued to complain of low back pain which radiates into her upper back as well as down her legs, that she had been treated with acetaminophen with codeine, cyclobenzaprine hydrochloride and diazepam, but that she still had significant symptomatology.

Dr. Black requested an MRI scan and Dr. Beverly Hershey, a Board-certified radiologist performed this, on July 13, 1995. Dr. Hershey found a small right-sided disc herniation at L5-S1 unchanged from the previous study, and mild degenerative disc disease at T11-12, L2-3 and L3-4. In a medical report dated July 23, 1995, Dr. Black noted that appellant was still complaining of back pain and pain in front of both legs. He explained that he did not recommend surgery since the disc herniation was on her right side, and her pain is either bilateral or mainly to the left. Dr. Black suggested further physical therapy and weight reduction.

On November 1, 1995 the Office held a hearing in the instant case. At the hearing, appellant testified that she had worked for the employing establishment since August 1989, that she was hired as a computer specialist that her work duties involved a lot of lifting, carrying, stooping, pushing and pulling and that when she was initially hired, she could perform these duties with no problem. She stated that the first time she ever had a back problem was after her December 5, 1991 injury which she sustained when trying to take a cover off a computer, that she initially felt a dull pain and thought it was a muscle spasm and returned to work, but that she still was having problems the next day and that when she sought treatment from Dr. Benditt, he discovered that she had a herniated disc. She has not worked since the date of injury. She stated that she has had no injuries since the December 5, 1991 injury and that Dr. Black has recommended surgery but that she wants to try therapy first.

Attached to the hearing as an exhibit is a medical report by Dr. Witek dated August 10, 1995. Dr. Witek noted that appellant suffered from L5-S1 disc herniation with chronic back pain, mild degenerative disc disease and osteoarthritis in her knees and that she had been "moderately compliant with her treatments, but has had poor response." He noted that plans were for continued pain medications, physical therapy and weight reduction. Dr. Witek opined that appellant's "medical condition appears to be static and has demonstrated little improvement in three and one-half years. It is probable that she will not recover or improve beyond her current state. In concluding, he noted that appellant's activity "has been restricted based on her symptoms, that she ambulates with a cane, and that the restrictions should be imposed indefinitely to accommodate her symptoms."

In a decision dated January 30, 1996, the hearing representative found that there was a conflict of medical evidence in that Dr. Didizian uncovered very few objective findings when he evaluated appellant, but that Dr. Witek, found positive straight leg raising attributed to appellant's back problem. The hearing representative instructed the Office to refer this case to an impartial, Board-certified orthopedic surgeon.

On March 15, 1996 the Office referred appellant to Dr. John T. Williams, a Board-certified orthopedic surgeon, who terminated his initial examination of appellant on April 9, 1996, due to the fact that appellant had taken medication and described herself as "drowsy" and "out of it." Appellant returned for another examination by Dr. Williams on May 23, 1996, for which she appeared without taking her medication first. In his medical report dated June 4, 1996, Dr. Williams noted that, by history, appellant incurred soft tissue injuries, which are self-resolving anywhere from a few days to a couple of months. Dr. Williams noted that on examination there were no positive objective findings to correlate her complaints, nor any evidence that she has a herniated disc that was producing any neural deficit, although there were positive, nonorganic responses, for example, the positive Waddell's sign. He opined that appellant incurred "soft tissue injuries, which have resolved and she is able to resume her normal preaccident activities and duties, without any restrictions." Dr. Williams' opinion did not change after he reviewed appellant's medical records.

By decision dated June 6, 1996, the Office denied further compensation and medical benefits, noting that appellant's current complaints were not causally related to the work injury and she had no residual effects of the injury from December 5, 1991.

At appellant's request, a hearing was conducted on July 29, 1997. At the hearing, there was no testimony, but appellant's attorney contended that Dr. Williams' report was not sufficient to show that there was no continuing disability in the matter, because it was not well rationalized. He especially questioned Dr. Williams' comment that, based on the results of the clinical examination, he can make a decision better than any kind of diagnostic testing, especially when the tests indicate disc herniations and neurologic injuries.

By decision dated November 10, 1997, the hearing representative found that the Office properly determined that residuals of the December 5, 1991 employment injury ceased by April 26, 1996 and accordingly affirmed the Office's June 6, 1996 decision. She noted that a conflict existed between the opinions of Drs. Witeck and Didizian and that the independent medical examiner, Dr. Williams, provided a rationalized opinion based on a complete factual and medical background that appellant's employment-related condition had resolved.

On November 20, 1997 appellant requested reconsideration. In support of her reconsideration request, appellant submitted a medical report by Dr. Marvin L. Rosner, an osteopath, where he noted that he reviewed the records sent to him from the Office and concluded that "appellant's symptoms did not exist prior to her accident on December 5, 1991, that her injury and symptoms that resulted from that injury have persisted and are most likely due to the injury while at work."

By decision dated February 24, 1998, the Office denied appellant's request for reconsideration, as the "evidence submitted in support of the application is not sufficient to warrant modification of the prior decision." The Office found the opinion of Dr. Rosner to be

speculative and nonconclusive, and was insufficient to create a conflict with Dr. Williams' opinion which was "sufficiently supported."

The Board finds that the Office acted within its discretion in refusing appellant's participation in picking the impartial medical examiner.

Section 8123 of the Federal Employees' Compensation Act[1] authorizes the Office to require an employee to undergo such medical examinations as it deems necessary. The determination of the need for an examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.[2]

Under Office procedures, a claimant who asks to participate in the election of an impartial medical examiner or who objects to the selected physician, must provide a valid reason.[3] The procedural opportunity for participation in the selection of an impartial medical examiner has been recognized by the Board.[4] Upon the claimant's request, the claimant will be afforded a list of three specialists acceptable to the Office, from which the claimant may choose.[5] However, this procedural opportunity is not an unqualified right under the Act. The Office has imposed limitations requiring that the employee provide a valid reason for any objection proffered against the designated impartial specialist.[6] In two instances, the Office will prepare a list of three specialists for selection by a claimant: first, when there is a specific request for participation and a valid reason for participation is provided to the Office; or when there is a valid objection to the physicians selected by the Office to serve as an impartial medical specialist. In those instances where either the request for participation or the objection to a designated impartial specialist is not deemed valid, a formal denial of the request will be issued if requested.[7] It is within the discretion of the Office to determine whether a claimant has provided a valid objection to a selected physician.[8]

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[1] 5 U.S.C. § 8123.

[2] *Anthony La-Grutta*, 37 ECAB 602, 607 (1986).

[3] The Federal (FECA) Procedure Manual states as follows:

> "A claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide his or her reason for doing so. The [claims examiner] is responsible for evaluating the explanation offered. Examples of circumstances under which the claimant may participate in the selection include (but are not limited to):
>
> (1) Documented bias by the selected physician.

Federal (FECA) Procedure Manual -- Part 3; Medical, *Medical Examinations*, Chapter 3.500.4b(4) (March).

[4] *Roger Wilcox*, 45 ECAB 265, 273-74 (1993).

[5] *Id.*

[6] *Id.*

[7] *Joseph R. Boutot*, 45 ECAB 560, 564 (1994)

[8] *Roger S. Wilcox, supra* note 4 at 274.

On February 15, 1996 appellant requested to participate in the selection of an impartial specialist pursuant to the hearing representative's remand order. Specifically, appellant requested that she be provided with the names of three qualified physicians within her geographical area from which she can choose one for the purpose of conducting the impartial examination. Furthermore, appellant requested that one of the physicians be a minority. By letter dated March 15, 1996, the Office informed appellant that she was set for an appointment with Dr. Williams to resolve the conflict in the medical evidence. Her attorney responded by stating appellant's objections to Dr. Williams, arguing that, based on his experience, Dr. Williams was biased against injured federal workers. Appellant's attorney suggested that the Office request copies of Dr. Williams' reports for the past three years and review them to determine whether or not there was a pattern of bias. She also submitted a copy of another medical report by Dr. Williams in a different case as further proof of bias. By letter dated April 10, 1996, the Office denied appellant's request, finding that appellant had not raised any valid objection to the Office's selection of Dr. Williams, as an impartial specialist, noting that one report which was not favorable does not demonstrate a pattern of bias. The Board finds that appellant was afforded full opportunity to object to Dr. Williams' selection and that her objection was not valid as bias was not demonstrated. Appellant's mere allegations of bias do not establish the fact.[9] Furthermore, the Office properly noted that one example of a prior medical opinion of Dr. Williams which was not favorable to the injured employee does not establish a pattern of bias. 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. Accordingly, the Office properly denied appellant's request to participate in the selection of the impartial medical examiner.

The Board finds that the Office properly terminated appellant's compensation benefits for the accepted condition of herniated nucleus at L5-S1.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[10] After it has been determined that a claimant has disability causally related to 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.[11] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[12] In situations where there exist 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.[13]

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[9] *Id.*

[10] *Raymond W. Behrens*, 50 ECAB ____ (Docket No. 97-1289, issued January 14, 1999); *Carolyn F. Allen*, 47 ECAB 240 (1995).

[11] *Theodore Parker*, 50 ECAB ___ (Docket No. 97-592, issued September 13, 1999).

[12] *Mary Lou Barragy*, 46 ECAB 781, 787 (1995)

[13] *Bertha J. Soule*, 48 ECAB 314 (1997).

In the present case, the hearing representative found that a conflict in medical opinion existed between Drs. Witek and Didizian. The Office properly referred the case to an impartial medical specialist to resolve this conflict. The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Williams, the impartial medical specialist selected to resolve the conflict in the medical opinion. The June 4, 1996 opinion of Dr. Williams established that appellant had soft tissue injuries which had resolved, an she is able to resume her normal preaccident activities, without any restrictions.

The Board has carefully reviewed the opinion of Dr. Williams and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Williams' opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Dr. Williams' opinion is based on appellant's history, his examination, the fact that there are no positive objective findings to correlate to her complaints, nor any evidence that she has a herniated disc that is producing any neural deficit. Appellant asserts that Dr. Williams' opinion is not rational in that two MRI scans have confirmed the existence of a herniated disc and an EMG performed on October 20, 1992 confirmed the existence of right S1 radiculopathy. Dr. Williams discussed this evidence. He questioned whether this MRI scan of July 13, 1995 actually showed a herniated disc, because based on examination there was no evidence of any neural deficit referable to the L5-S1 space on the right, and that classic herniation of a disc is one sided, which is contrary to appellant's symptoms of pain on both sides. With regard to the findings of the MRI scan of the cervical spine dated January 10, 1992, Dr. Williams noted that this was normal. He opined that the findings of "the lumbosacral spine were not caused by the accident of December 5, 1991, that the incident did aggravate the underlying pathology, but the aggravation would be of temporary and transitory nature, soft tissue injury, *i.e.*, resolving within a few days to a couple of months. In discussing the electromyography, Dr. Williams stated that it was a normal EMG of the left lower extremity, that patient's entire study results are most consistent with a chronic right S1 radiculopathy. He further noted that appellant was complaining of pain in both legs, down the front, and numbness in both legs and all of her toes. Dr. Williams noted that this cannot be explained by anything on the EMG at L5-S1, nor can it be explained on any of these studies by degenerative changes or discs at the right side at L5-S1. Dr. Williams is of the opinion that, at arriving at a medical diagnosis, the most important contributing factor is the history, which contributes about 75 percent, and physician examination which contributes about 15 percent, and that reference to diagnostic studies should be used to confirm information gathered from a thorough history and physical examination, not to make the primary diagnosis. Dr. Williams concluded that, after reviewing the medical documents, he saw nothing to alter his opinion. Accordingly, as Dr. Williams opinion is sufficiently well rationalized and provided a proper analysis of the factual and medical history and the findings on examination, including the results of earlier testing, and determined that appellant's soft tissue injuries had resolved, this opinion, must be given special weight on the issue of whether appellant's injuries sustained on December 5, 1991 had resolved. As the weight of the medical opinion evidence supports that appellant no longer suffered from any residual disability, the Office discharged its burden of proof to justify the termination of appellant's compensation benefits.

The record contains a report by Dr. Marvin L. Rosner, an osteopath, submitted for the first time on reconsideration, which suggested that "it was most likely" that her symptoms were

due to the work injury of December 5, 1991. Dr. Rosner's opinion is too speculative to be considered persuasive evidence.[14] Furthermore, Dr. Rosner did not discuss what symptoms appellant had, and did not detail the specific incidents or conditions at work which he suggested aggravated appellant's nonspecified condition. Furthermore, the Office's decision continues to be supported by the well-rationalized opinion of the independent medical examiner, Dr. Williams.

The decisions of the Office of Workers' Compensation Programs dated February 24, 1998 and November 10, 1997 are hereby affirmed.

Dated, Washington, D.C.
April 14, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[14] *See Elizabeth W .Esnil*, 46 ECAB 606, 621 (1995).