

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLE E. WILBUR and DEPARTMENT OF THE NAVY,
U.S. MARINE CORPS, CAMP LEJEUNE, NC

*Docket No. 99-2267; Submitted on the Record;
Issued October 18, 2000*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
PRISCILLA ANNE SCHWAB

The issue is whether appellant had any disability or medical residuals after November 25, 1997, the date the Office of Workers' Compensation Programs terminated her compensation benefits.

The Office accepted that on October 16, 1995 appellant, then a 52-year-old supply clerk, sustained a right hip contusion, a right knee contusion, a right ankle contusion, and right lumbar radiculopathy when she fell over a rubber mat at work. Appellant received appropriate monetary compensation and medical benefits.

In several reports, dated in 1996 and early 1997, appellant's treating physician, Dr. Noel B. Rogers, a Board-certified orthopedic surgeon, noted that appellant's condition was unchanged and that she continued to complain of right leg pain which might be getting worse. He diagnosed "persistent right leg pain, piriformis syndrome questionable."

A functional capacity evaluation was performed on March 13, 1997, which revealed that appellant was able to perform sustained work activity without a break for 100 minutes, and was able to stand without restrictions or break for 60 minutes. Appellant could work at a sedentary position with occasional lifting of no more than 10 pounds and she had limitation of trunk motion, right lower extremity persistent pain, and high pain scores.

By report dated March 26, 1997, Dr. Rogers noted that appellant's condition was unchanged, and that she continued to have pain and tenderness in the right buttocks and down the right leg. He diagnosed "persistent radiculopathy right lower extremity [and] piriformis syndrome, right."

The Office referred appellant, together with a statement of accepted facts and the relevant case record, for a second opinion examination.

By report dated April 2, 1997, Dr. Thomas E. Melin, a Board-certified neurosurgeon, reviewed the record, examined appellant, and opined, based upon the March 13, 1997 functional capacity results, that she could return to work in a sedentary capacity with restrictions on bending, squatting, stooping, crawling and/or climbing, and on lifting no more than 10 pounds.¹

In a medical progress note dated April 18, 1997, Dr. Rogers noted that appellant had been evaluated by Dr. Melin who stated that she was able to work eight hours a day, and that he did not agree. Dr. Rogers noted that appellant's condition was unchanged and that she had persistent radiculopathy in the right lower extremity and right piriformis syndrome.

On May 12, 1997 Dr. Rogers opined that at that time he doubted whether appellant could be vocationally retrained because he did not believe that there realistically was anything she could do in her current condition. Dr. Rogers stated that appellant demonstrated weakness in the extensor hallucis longus and ham strings which was consistent with radiculopathy and had a positive straight leg raising test, and he opined that someone with these findings was not realistically going to work an eight-hour day, and he questioned whether she could even work four hours.

On June 11, 1997 the Office determined that a conflict in medical opinion evidence was created between Dr. Rogers and Dr. Melin. Appellant was referred, together with a statement of accepted facts, questions to be answered, and the complete case record, to Dr. Ellis F. Muther, a Board-certified neurologist, for an impartial medical examination on whether appellant remained disabled due to her accepted employment-related conditions.

By report dated July 2, 1997, Dr. Muther noted that, upon examination, appellant demonstrated an unusual history of a pain syndrome and nonanatomical motor and sensory deficits of the right lower extremity. Dr. Muther recommended electromyographic (EMG/NCV) testing and that a Minnesota Multiphasic Personality Inventory (MMPI) be performed.

An MMPI performed on July 9, 1997 which noted that appellant omitted multiple answers and was therefore of marginal validity. It noted that her clinical profile was that of someone who admitted to few psychological problems.

In a July 18, 1997 analysis of July 16, 1997 EMG/NCV testing results, Dr. Muther noted that appellant complained of much pain during testing. She was unable to elicit full motor contractions of her right lower extremity due to increased pain, even when Dr. Muther resisted full effort on the uninvolved extremity, and he opined that there was no electrical data to suggest the presence of a radiculopathy.

By report dated August 4, 1997, Dr. Muther indicated that his physical examination revealed limited range of motion and noted:

¹ Prior to this report, Dr. Melin had examined appellant on January 15, 1997 when he found no operative lesions, no evidence of nerve root impingement, and no evidence of disc herniation on the right side to explain her symptomatology. He opined that appellant's symptoms were referable to her right sacroiliac joint where she had point tenderness, "possibly secondary to a direct sciatic nerve contusion as a result of her fall." Conservative therapy was recommended.

“Graded muscle testing, I felt was invalid because of an inconsistent effort and complaints of pain. [Appellant] had diffuse weakness involving all muscles of the right lower extremity. However, on sensory exam[ination], [appellant] had a nonanatomical decrease in pain perception of the right lower extremity up to the groin. A similar decrease in vibratory sense on the right was also found. These symptoms I felt were nonanatomical motor and sensory deficits and, therefore, not related to the October 16, 1995 accident.”

Dr. Muther noted that he could find no objective electrophysiological data that would suggest the presence of a piriformis syndrome, that he could find no physical evidence of the right hip, knee and ankle contusion that appellant sustained on October 16, 1995, and that it had resolved. Dr. Muther opined that appellant was not totally disabled and concurred with the physical capacity findings indicating that appellant could work in a sedentary position. He noted that, due to appellant’s prolonged period of inactivity, she should return to work in a sedentary position for four hours per day after a month of work hardening, with a five-pound lifting limit.

In response to the Office’s request for clarification, on September 4, 1997 Dr. Muther noted:

“My statement regarding nonanatomical motor and sensory deficits not being related to her accident of October 16, 1995 means that she has no objective residua from this work injury other than deconditioning due to inactivity.

“I do not feel that [appellant] has a right lumbar radiculopathy sustained in her work injury.”

Dr. Muther prescribed work hardening, followed by another FCE to determine appellant’s work capacity after the work hardening.

By notice dated October 9, 1997, the Office proposed the termination of appellant’s monetary compensation and medical benefits entitlement, finding that Dr. Muther’s impartial medical reports constituted the weight of the medical opinion evidence and established that appellant had no further disability causally related to her accepted employment injuries, and no further residuals requiring continuing medical treatment. The Office advised appellant that, if she disagreed with the proposed termination, she should submit additional evidence or argument within 30 days.

By letter dated November 3, 1997, appellant disagreed with the proposed termination claiming that four doctors had diagnosed right lumbar radiculopathy and lumbosacral strain, and that Dr. Muther did not even spend 10 minutes examining her. Appellant claimed that she had piriformis syndrome, and that she had seen six doctors but had never gotten relief from her October 16, 1995 injuries. Appellant submitted excerpts from medical publications, physical therapy records, and several reports from Dr. Rogers noting the diagnoses of chronic lumbosacral strain, right radiculopathy, and possible piriformis syndrome. In a report dated November 4, 1997, Dr. Rogers opined that appellant “does have a radiculopathy. Because of this she is unable to sit or stand for long periods of time and I personally and professionally think that she is still out of work.”

By decision dated November 25, 1997, the Office finalized its termination decision finding that Dr. Muther's impartial medical examination report constituted the weight of the medical opinion evidence and established that appellant had no further disability causally related to her accepted employment injuries, and no further residuals requiring continuing medical treatment.

By letter dated December 18, 1997, appellant, through her representative, requested an oral hearing. In support she submitted medical reports from January and February 1996 which diagnosed right lumbar radiculopathy and right sacroiliitis, and a February 7, 1996 electrodiagnostic report which indicated: "EMG changes are quite minimal and one cannot diagnose a clear-cut ventral radiculopathy." An August 20, 1996 report from Dr. John C. Liguori, Board-certified in physical medicine and rehabilitation, noted as diagnoses: "I suspect that the right sacroiliac joint is inflamed and maybe even slightly malpositioned. If that is the case, it is only slight, because the exam[ination] is fairly symmetrical. I suspect that there is a possibility of symptom magnification." A duplicate copy of Dr. Rogers' November 18, 1996 report was also resubmitted to the record.

In a November 6, 1997 report, Dr. Rogers reiterated his opinion that appellant had a right radiculopathy. He indicated that appellant could have a piriformis syndrome and stated that on October 31, 1995 appellant had symptoms consistent with a herniated nucleus pulposus at L4-5.

A hearing was held on June 30, 1998 at which appellant testified.

By decision dated September 30, 1998, the hearing representative affirmed the prior November 25, 1997 termination finding that, since Dr. Muther was an impartial medical examiner who provided a well-rationalized report based upon a complete and accurate factual and medical history, his report was entitled to special weight and therefore constituted the weight of the medical opinion evidence of record. The hearing representative noted that Dr. Muther found an absence of objective findings and concluded that appellant had no further injury residuals.

By letter dated December 4, 1998, appellant, through her representative, requested reconsideration, and in support she submitted an October 20, 1998 report from Dr. Robert E. Abraham, a Board-certified neurosurgeon.

Dr. Abraham noted that appellant was having problems with workers' compensation, that she had chronic pain with increased pain in the right lower extremity, that she was taking the narcotic medication Percocet, that she had moderate lumbar muscle spasms in the paraspinal musculature, and that she had moderate to severe tenderness in the lumbar spine. Dr. Abraham noted that appellant's "motor function was decreased in the right extensor hallucis longus and biceps femoris" and that an "EMG showed a positive decrease in recruitment in the L4-S1 root." Dr. Abraham diagnosed "right lumbar radiculopathy," and recommended "hold on work indefinitely."

In an electrodiagnostic study report dated November 10, 1998, nerve conduction velocity was normal for the right peroneal, the right tibial, and the right sural nerves, and EMG results revealed "positive sharp waves in the right tibialis anterior and a few questionable ones in the

right peroneus longus and a few in the right extensor hallucis longus with decreased recruitment in these muscles.” Some decreased recruitment was also seen in the right gluteus maximas and biceps femoris, and the test was felt to be “indicative of some denervation in mostly the right L5 and S1 distribution.”

By decision dated January 7, 1999, the Office denied modification of the prior decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that Dr. Abraham’s report did not provide a rationalized medical opinion causally relating his findings to the accepted employment injuries.

By letter dated February 18, 1999, appellant, through her representative, requested reconsideration, and in support she submitted a February 8, 1999 letter from Dr. Abraham.

Dr. Abraham stated that he initially saw appellant on January 24, 1996 and she gave a history of problems that began after an October 1995 accident when she fell on a mat. He noted:

“Since that time, [appellant] has been having definite difficulties with her lumbar spine. She has been seen in my office on multiple occasions after that.

“It should be noted that, from my records, and the history that [appellant] gave, she definitely has abnormalities in her lumbar spine and right lower extremity. [Appellant’s] present difficulties are definitely related to her October 1995 accident and it is felt that the causal factors of her present difficulties are related to the accident.”

By decision dated March 19, 1999, the Office denied modification of the prior decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that the new evidence from Dr. Abraham was not rationalized and was not sufficiently detailed to overcome the weight of Dr. Muther’s report.

By letter dated April 14, 1999, appellant, through her representative again requested reconsideration, and argued that Dr. Abraham disagreed with Dr. Muther’s interpretation of the July 16, 1997 EMG/NCV.

In support of the request, appellant submitted an April 8, 1999 report from Dr. Abraham which noted that appellant was seen on March 24, 1999 with right sacroiliac joint pain, for which she received trigger point injections with fair results. Dr. Abraham noted that appellant had “decreased range of motion with moderate muscle spasm and tenderness.” Dr. Abraham stated that appellant had “a decrease in her right extensor hallucis longus and dorsiflexors of the right foot,” and he diagnosed right lumbar radiculopathy and right sacroiliitis. Dr. Abraham opined that appellant would probably need to limit her activities, that her condition was static, that she had chronic pain syndrome which was aggravated by any one position for prolonged periods of time, and that she could not sit, stand and walk in any combination for a six- to eight-hour period of time without continual aggravation of her right lumbar radiculopathy. He opined that appellant’s 1995 injury was the causative factor of her problem.

By decision dated May 12, 1999, the Office denied modification of the prior decision finding that the evidence submitted in support was insufficient to warrant modification. The Office found that Dr. Abraham provided two diagnoses which had not been accepted by the Office as being employment related, that of right sacroiliitis and chronic pain syndrome, that he did not provide any discussion of what the July 16, 1997 EMG, with which he disagreed, demonstrated, and that his work restrictions were couched in prophylactic terms.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² 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.³ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁵

The Board finds that in this case the Office met its burden of proof to terminated appellant's entitlement to both monetary compensation and medical benefits.

In the instant case, appellant's treating physician, Dr. Rogers diagnosed persistent right lower extremity radiculopathy and right piriformis syndrome, a condition not accepted by the Office as being employment related, and he disagreed with Dr. Melin regarding appellant's ability to return to work, opining that she could not realistically return to work, even for four hours per day. Dr. Melin reviewed the statement of accepted facts and the complete case record, examined appellant, and opined, based upon the March 13, 1997 functional capacity results, that she could return to work in a sedentary capacity with enumerated activity restrictions.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."

In this case, the Office properly determined that a conflict in medical opinion evidence now existed between appellant's treating physician, Dr. Rogers and the second opinion specialist, Dr. Melin, and it referred appellant, together with a statement of accepted facts, questions to be resolved, and the complete case record, to an impartial medical examiner, Dr. Muther, for resolution of the conflict.

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁵ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual and medical background, is entitled to special weight.⁶

In this case, Dr. Muther's report was based upon a complete and accurate factual and medical background and on his testing results, including the July 16, 1997 electrodiagnostic testing results. It was well rationalized, based upon the findings of nonanatomical right-sided motor and sensory deficits, inconsistent effort on muscle testing, no objective electrophysiological evidence of piriformis syndrome, and no physical evidence of the accepted contusions, and clearly concluded that appellant's accepted employment injuries had resolved. Dr. Muther subsequently clarified his opinion noting specifically that appellant had no objective residua from her work injuries and no right lumbar radiculopathy.

As Dr. Muther's reports are based upon a proper factual and medical background and on objective testing results, and are sufficiently well rationalized, they are entitled to special weight. According to his reports that special weight results in his reports constituting the weight of the medical evidence or record. Therefore, based upon Dr. Muther's findings and conclusions, the Office met its burden of proof to terminate both monetary compensation and medical benefits entitlement.⁷

Thereafter appellant submitted further reports from Dr. Rogers. The Board notes that since Dr. Rogers was on one side of the medical opinion evidence conflict that was resolved by Dr. Muther's impartial medical examination, his additional report is insufficient to create a new conflict with the well-rationalized report of Dr. Muther.⁸

Appellant submitted additional medical evidence from Dr. Abraham who described appellant's present radiculopathy symptoms and provided electrodiagnostic testing results. The Board finds that these reports are not sufficient to overcome the special weight accorded Dr. Muther's findings as the impartial medical specialist. The reports of Dr. Abraham provided additional diagnosis not accepted as employment related. The Board notes that Dr. Abraham did not provide sufficient rationale to establish his findings as related to the October 16, 1995 injury.

⁶ *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

⁷ Dr. Muther explained that his work restriction of a four-hour day following work hardening was based upon appellant's deconditioning due to inactivity and not due to her work injuries.

⁸ See *Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Virginia Davis-Banks*, 44 ECAB 389 (1993).

The decisions of the Office of Workers' Compensation Programs dated May 12, March 19 and January 7, 1999 and September 30, 1998 are hereby affirmed.

Dated, Washington, DC
October 18, 2000

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member