U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL A. PULLEN and U.S. POSTAL SERVICE,
POST OFFICE, Detroit, MI

Docket No. 00-312; Submitted on the Record;
Issued November 5, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, BRADLEY T. KNOTT,
VALERIE D. EVANS-HARRELL

The issue is whether appellant had disability after May 10, 1996 due to her December 14, 1992 employment injury.

The Board finds that appellant did not have disability after May 10, 1996 due to her December 14, 1992 employment injury.

Once the Office of Workers' Compensation Programs has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[1] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[2] After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability which continued after termination of compensation benefits.[3]

On December 14, 1992 appellant, then a 50-year-old mail carrier, sustained an employment-related herniated disc at L4-5; subluxations at L4-5, T3, T8 and T9; and left hand, left hip and glutal area contusions.[4] The Office paid compensation for periods of disability. By decision dated May 10, 1996, the Office terminated appellant's compensation effective May 10, 1996 on the grounds that she had no continuing disability due to her December 14, 1992 employment injury after that date. The Office based its termination on the opinions of

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

[2] *Id.*

[3] *Wentworth M. Murray,* 7 ECAB 570, 572 (1955).

[4] Appellant indicated that while she was bent over, she hit the side of her hip on a mail case.

Dr. Wardner, an attending physician Board-certified in physical medicine and rehabilitation, and Dr. Philip Mayer, a Board-certified orthopedic surgeon, who served as an Office referral physician.

By decision dated and finalized February 27, 1997, an Office hearing representative affirmed the Office's May 10, 1996 decision with respect to the termination of appellant's compensation effective May 10, 1996. The Office hearing representative further determined that, due to the submission of additional medical evidence after the May 10, 1996 termination, there was a conflict in the medical evidence regarding whether appellant had continuing employment-related disability after May 10, 1996.[5] The Office hearing representative remanded the case to the Office for referral to an impartial medical examiner for an opinion on this issue to be followed by the issuance of an appropriate decision. On remand, the Office referred appellant to Dr. Norman Pollak, a Board-certified orthopedic surgeon, for an impartial medical examination. By decision dated November 17, 1998, the Office denied appellant's claim on the grounds that she did not have any employment-related disability after May 10, 1996.[6] By decision dated September 2, 1999, an Office hearing representative affirmed the Office's November 17, 1998 decision.

The Board initially notes that the Office terminated appellant's compensation on the opinions of Drs. Wardner and Mayer.

In a report dated March 1, 1996, Dr. Wardner detailed appellant's factual and medical history and stated:

> "I am writing to clarify my position on your ongoing pain and the issues you have raised in our discussions. I spoke with you at some length today regarding the recent magnetic resonance imaging (MRI) findings and my further recommendations. As I explained, the MRI scan, done February 27, 1996 demonstrated a shallow protrusion, not a herniation of the left side of the L4-5 disc. There was no compression of the spinal cord or the nerve roots. There was minimal change compared to the previous MRI scan.
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> "I cannot explain your ongoing complaints of back pain and left leg pain and numbness. Previous electromyogram (EMG) done in August 1995 was normal. The apparent low back strain, which you sustained in December 1992 should have resolved long ago. You have been evaluated by two spinal surgeons … both of whom have recommended no surgical intervention."
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> * * *

[5] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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." 5 U.S.C. § 8123(a).

[6] The Office based its determination on the opinion of Dr. Pollak.

"As we discussed today, we will arrange a repeat EMG of the left lower extremity, to see if we can find an explanation for your left leg numbness. If this study is normal, I will have no new recommendations.

"Based upon the MRI findings, multiple physical examinations and the recent job site assessment and job coaching … I have no basis on which to restrict you from working 28 hours per week."

* * *

"I think we could discuss your situation indefinitely, but would never reach agreement on the return to work plan or on your desire for further formal physical therapy and supervised aquatic therapy. It is my professional opinion that you can perform light work at 28 hours per week….

"In summary, if the EMG is normal, I am afraid that I will have nothing further to recommend, other than counseling. I do not think anything will be gained from further appointments from me."[7]

Dr. Wardner indicated that appellant was under considerable emotional stress regarding her situation and noted that another physician had recommended enrollment in a chronic pain treatment program, including cognitive behavioral therapy, biofeedback, relaxation training and family counseling. Dr. Wardner stated: "I believe that emotional stress is the primary contributor to your ongoing symptoms at this time. I do not have any anatomic or physiologic explanation for your ongoing symptoms."

In a report dated October 2, 1995, Dr. Mayer detailed appellant's factual and medical history and reported the findings of his examination. He indicated that the examination failed to reveal any objective abnormalities to suggest radiculopathy, myelopathy, or other spinal pathology. He noted that his review of the findings of two MRI studies showed normal spine alignment and that he saw no evidence of spondylolisthesis or subluxations. Dr. Mayer indicated that there was evidence of a herniated disc at L4-5, but that there was no way to tell if this finding was due to the employment injury. He stated that appellant exhibited nonorganic testing signs and embellishment of her symptoms.[8]

After the Office's May 10, 1996 decision terminating appellant's compensation effective that date, appellant submitted additional medical evidence which she felt showed that she was entitled to compensation after May 10, 1996 due to residuals of her December 14, 1992 employment injury. As the Office had terminated appellant's compensation effective May 10, 1996, the burden shifted to appellant to establish that she is entitled to compensation after that date.

[7] On March 8, 1996 Dr. Wardner obtained an EMG test of appellant's lower extremities. The findings of the test yielded normal results.

[8] Dr. Mayer recommended work restrictions but did not indicate that they were due to an employment-related condition.

Appellant submitted a January 13, 1997 report, in which Dr. Michael E. Holda, an attending Board-certified orthopedic surgeon, indicated that she continued to report low back symptoms. He noted that the February 1996 MRI testing continued to show a herniated disc at L4-5 and stated: "It is my impression that the disc herniation L4-5 on the left is the direct and proximate result of the injury sustained December 14, 1992."[9] In a report dated April 12, 1999, Dr. Holda indicated that appellant continued to have physical findings, subjective complaints and MRI findings of a herniated disc and that the herniated disc was "consistent" with her work injury. These reports, however, are of limited probative value on the relevant issue of the present case in that they do not contain adequate medical rationale in support of their opinions on causal relationship.[10] Dr. Holda did not provide an explanation of the medical process through which appellant could have continued to have residuals of the December 14, 1992 employment injury. He did not provide a complete picture of appellant's examination and diagnostic findings or otherwise explain how appellant's limited findings comported with his assertion that the apparent herniated disc at L4-5 continued to cause employment-related disability. Dr. Holda did not adequately explain why nonwork conditions would not be the sole cause of appellant's continuing problems.

Moreover, in a report dated December 3, 1997, Dr. Pollak determined that appellant no longer had residuals of her December 14, 1992 employment injury.[11] He indicated that appellant did not exhibit any objective findings on examination or diagnostic testing which were related to the December 14, 1992 employment injury. Dr. Pollak noted that appellant's disc at L4-5 was not clinically significant and did not impinge on the nerve roots. He indicated that there was nothing to prevent appellant from working a full day.

The reports of Drs. Holda and Pollak are not sufficient to establish appellant was disabled after May 10, 1996 due to her accepted employment injury.

[9] Dr. Holda recommended work restrictions including a limited work schedule. In a report dated November 12, 1998, he provided an opinion similar to that contained in his January 13, 1997 report.

[10] *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

[11] As noted above, the Office referred appellant to Dr. Pollak for an impartial medical examination. The Office had determined that there was a conflict in the medical evidence between Dr. Wardner, an attending physician Board certified in physical medicine and rehabilitation, and Dr. Holda, an attending Board-certified orthopedic surgeon. However, as it is not possible for a conflict to be created between two attending physicians, Dr. Pollak served as an Office referral physician rather than an impartial medical specialist; *see supra* note 5 regarding the creation of a conflict in the medical evidence.

The September 2, 1999 and November 17, 1998 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
November 5, 2001

Michael J. Walsh
Chairman

Bradley T. Knott
Alternate Member

Valerie D. Evans-Harrell
Alternate Member