U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARLAINA JEFFRIES and U.S. POSTAL SERVICE,
POST OFFICE, Albuquerque, NM

Docket No. 99-1802; Submitted on the Record;
Issued November 7, 2001

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs has met its burden of proof to terminate appellant's compensation benefits effective March 26, 1999; and (2) whether appellant has met her burden of proof to establish that she has any additional medical conditions causally related to or aggravated by her accepted employment injury.

This case is on appeal to the Board for a second time. On December 3, 1992 the Office accepted appellant's claim for right lateral epicondylitis and left medial epicondylitis related to her employment duties as a flat sorter machine operator. Appellant was off work for intermittent periods until October 7, 1993 when she returned to limited duty work, for four hours a day, as a modified clerk responding to telephone calls. On November 23, 1994, based on appellant's continuous employment for more than one year, the Office issued a decision finding that this position represented appellant's wage-earning capacity, and began paying appropriate compensation to reflect her loss in wage-earning capacity.[1] Subsequently, appellant stopped work from November 29, 1994 through January 3, 1995, and filed a claim for compensation for total disability for this period. On January 4, 1995, appellant returned to a limited duty position as a scale monitor, as approved by her physician, but stopped work again on March 22, 1995. Appellant filed a claim for a recurrence of total disability as of March 22, 1995.[2] In a decision dated August 1, 1995, the Office of Workers' Compensation Programs terminated appellant's entitlement to continuing disability compensation and medical benefits.[3] On October 29, 1996, appellant returned to work four hours a day as a scale monitor.

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[1] On prior appeal to the Board, appellant did not express any dissatisfaction with this decision, but rather specifically sought to appeal the Office's August 1, 1995 decision.

[2] Appellant's physician had recommended that appellant be provided with a lower desk, and an adjustable chair with arms. On her claim for a recurrence of disability, appellant asserted that she had never been provided with this equipment.

[3] On June 28, 1995, the Office issued a notice of proposed termination.

In the prior appeal, the Board reviewed the August 1, 1995 decision, in which the Office relied on the opinion of Dr. Emmett Altman, the Office second opinion physician, who opined that appellant had no objective findings of accepted right or left epicondylitis. In *Marlaina Jeffries*, Docket No. 96-113 (issued April 27, 1998), the Board reversed the Office's decision, finding that Dr. Altman's narrative report and accompanying work capacity evaluation contained conflicting information, and, therefore the case should be remanded for the Office to obtain clarification from Dr. Altman as to whether appellant had any residuals of her employment related injuries. The Board further found that as appellant had submitted uncontradicted evidence that she had developed myofascial pain syndrome, with reactive depression, as a result of her accepted employment injuries, on remand, the Office should obtain an opinion on this issue from Dr. Altman. Finally, as appellant had initially alleged that she could not perform her limited duty job as she was not provided with a proper desk and chair, the Board requested that the Office seek clarification from the employing establishment as to the exact nature of appellant's duties and the possible necessity for a desk and chair.

By decision dated March 26, 1999, the Office terminated benefits as of that date on the grounds that the weight of the medical evidence, represented by the supplemental reports of Dr. Altman, established that the accepted conditions had resolved.[4] The Office further found that appellant failed establish that she had any additional medical conditions causally related to her employment or her employment injuries.

The Board has duly reviewed the case on appeal and finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits effective March 26, 1999.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[5] 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.[6] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[7] To terminate authorization or medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[8]

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[4] On February 8, 1999 the Office issued a notice of proposed termination.

[5] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[6] *Id.*

[7] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[8] *Id.*

The Office, in terminating appellant's compensation benefits, relied upon the supplemental medical reports of Dr. Altman, an Office second opinion physician. In his original narrative report, dated March 6, 1995, Dr. Altman provided his findings on physical examination and indicated that he had reviewed the medical records provided. In response to the Office's inquiries, Dr. Altman stated:

> "There are no objective findings of a right lateral epicondylitis or a left medial epicondylitis. These areas are completely asymptomatic, with stress, pressure and massage. She did not complain of any discomfort.
>
> "There may well have been in the past a work-related disability, however, there are no signs of this now. I believe she should continue at the light type of work she is doing as of January as a scale monitor.
>
> "I do not see any reason for any future medical or orthopedic treatment. The findings at this time are completely within normal limits. It may well be that her original job was too arduous and she is coping with this lighter type work."

In an accompanying work capacity evaluation of the same date, Dr. Altman indicated that appellant had reached maximum medical improvement as of the date of his report, that she could not perform repetitive motions of the wrist or elbow, that she had "overuse syndrome" due to her employment, and that she could work four hours a day.

The Board found that as Dr. Altman did not opine that appellant was capable of working eight hours per day and specifically stated that this was due to her employment-related overuse syndrome, his report was not sufficient to meet the Office's burden of proof to establish that appellant had no continuing disability or medical residuals after August 1, 1995. On remand, in accordance with the Board's instructions, the Office referred appellant to Dr. Altman for a follow-up examination and clarification of his original opinion. The Office provided Dr. Altman with an updated statement of accepted facts and a list of questions to be answered.

In his follow-up report dated December 7, 1998, Dr. Altman provided his findings on physical examination and indicated that he had reviewed the medical records provided. In response to the Offices inquiries, Dr. Altman stated:

> "I again will note that there are very minimal tenderness bilaterally at the lateral epicondylar areas. Otherwise the exam is completely within normal limits. She has full strength, stability and full range of motion. There is no sign of an overuse syndrome. The patient is capable of working four hours a day and is quite happy to do so. I do not believe she requires any further orthopedic treatment. Essentially on this examination this concurs completely with my original report of March 6, 1995."

By letter dated January 13, 1999, the Office asked Dr. Altman to specifically address: (1) whether there was any objective evidence that any conditions arising out of appellant's July 1, 1992 employment injuries were active and disabling; (2) whether there was any evidence that appellant's diagnosed myofascial pain syndrome was active and disabling, and, if so, whether it was related to appellant's employment or employment injuries; (3) whether appellant

had any conditions related to her work injury, and, if so, whether these conditions prevented appellant from returning to work eight hours a day; and (4) the specific nature of any restrictions and limitations on appellant's ability to work.

In a report dated January 25, 1999, Dr. Altman responded to the Office's specific questions, stating: "(1) There is no objective evidence of any condition arising out of the work injury of July 1, 1992. There are no signs of right lateral epicondylitis or left medial epicondylitis. These areas are completely asymptomatic with stress, pressure or massage. She did not complain of any discomfort. I believe, therefore, that she completely recovered from her injury; (2) See above; (3) I do not see any condition currently related to her work injury; and (4) It seems the patient is coping well with light work and I would not suggest that she return to an arduous heavy type working. I had previously sent you a work capacity evaluation. Her complaints could represent intolerance to heavy repetitive type work."

The Board notes that Dr. Altman's supplemental reports are substantially similar to his prior reports, in that he continues to state that appellant has no objective evidence of her accepted employment related conditions, yet he opines that appellant is only capable of working four hours a day. As Dr. Altman did not clarify whether the work limitation is due to appellant's employment related condition, due to some undisclosed condition, or state that this is merely prophylactic, the Board finds that Dr. Altman's reports are insufficiently rationalized to meet the Office's burden of proof to establish that appellant had no continuing disability or medical residuals after March 26, 1999. As the Office has made several unsuccessful attempts to obtain a complete, rationalized medical opinion from Dr. Altman, the Office should have referred the case, including the case file and the statement of accepted facts, to another appropriate specialist for a rationalized opinion on the issue of whether appellant had any disabling residuals of her accepted conditions after March 26, 1999.[9] The Office did not meet its burden of proof to terminate benefits.

The Board further finds that this case is not in posture for decision on the issue of whether appellant has met her burden of proof to establish that she has any additional medical conditions causally related to or aggravated by her accepted employment injury.

The record contains numerous medical reports from appellant's treating physicians diagnosing, in addition to epicondylitis, myofascial pain syndrome and reactive depression. The record further contains reports in which appellant's treating physicians stated that they believed appellant was suffering more from a cumulative trauma problem involving, in addition to epicondylitis, multiple trigger points, myofascial pain and depression.[10] In a recent report dated

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[9] *See Raymond J. Hubenak*, 44 ECAB 395 (1993); *Walter A. Fundinger, Jr.*, 37 ECAB 200, 205 (1985) (Office referral physician's reports were insufficient to dispose of the issue to be resolved, therefore, the Office had an obligation to go further in developing the medical evidence).

[10] Dr. Balcomb, appellant's current treating physician, and Dr. David Bernstein, an orthopedic surgeon and appellant's treating physician until December 1993, frequently characterized appellant's combination of epicondylitis and myofascial pain as "overuse syndrome" or "cumulative trauma" disorder. In addition, Dr. Ben J. Klein, appellant's clinical psychologist, diagnosed appellant's condition as a prolonged depressive reaction to her chronic bilateral upper extremity pain as a direct result of trying to cope with and adjust to nearly constant musculoskeletal aches and pains.

November 20, 1998, submitted subsequent to the Board's remand of this case, appellant's treating physician, Dr. Theresa Balcomb, again diagnosed bilateral epicondylitis and myofascial pain syndrome and indicated that fibromyalgia had to be considered. In contrast, Dr. Altman, the Office physician, stated for the first time in his January 25, 1999 report, in response to the Office's inquiry as to the existence of myofascial pain syndrome and its relationship, if any, to appellant's accepted conditions, that he found "no objective evidence of any condition arising out of the work injury of July 1, 1992," Therefore, there now exists a conflict in the medical evidence between the government physician, Dr. Altman, and appellant's physicians, Drs. Balcomb, Bernstein and Klein, regarding whether the additional claimed condition of myofascial pain syndrome, which became appellant's primary medical complaint and led to the onset of reactive depression, was causally related to or aggravated by appellant's employment or her accepted employment injury.

Section 8123(a) of the 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). When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[11]

Consequently, the case must be remanded for further medical development. On remand the Office should prepare an updated statement of accepted facts [12] and refer this and appellant, together with the complete medical record, to an impartial medical specialist to resolve the conflict in the medical opinion evidence. After such further development as the Office deems necessary, the Office should issue an appropriate decision regarding appellant's claim.

[11] *William C. Bush*, 40 ECAB 1064, 1975 (1989).

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809 (June 1995).

The decision of the Office of Workers' Compensation Programs dated March 26, 1999 is hereby reversed and the case is remanded to the Office for further action consistent with this decision.[13]

Dated, Washington, DC
November 7, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Priscilla Anne Schwab
Alternate Member

[13] The Board notes that on July 19, 1994, appellant filed an additional claim for occupational disease, alleging that she developed an emotional condition due to harassment by her immediate supervisor. Subsequent to the Board's remanding of this case, by decision dated June 15, 1998, the Office denied appellant's claim for an employment related emotional condition. On June 23, 1998, the Office doubled appellant's emotional condition claim with the instant file. On appeal to the Board, however, appellant, through counsel, did not reference this decision of the Office, but specifically requested that the Board review the Office's March 26, 1999 termination of benefits.