United States Department of Labor
Employees' Compensation Appeals Board

ELSA E. VERNON, Appellant	)	
and	)	**Docket No. 06-13**
	)	**Issued: May 1, 2006**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Sepulveda, CA, Employer	)	

Appearances:
Elsa E. Vernon, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 28, 2005 appellant filed at timely appeal from an August 9, 2005 merit decision of an Office of Workers' Compensation Programs' hearing representative affirming the termination of appellant's compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of these issues.

ISSUES

The issues are: (1) whether the Office met its burden of proof in terminating appellant's compensation and medical benefits effective October 12, 2004; (2) whether appellant had disability on or after October 12, 2004 causally related to the September 18, 1987 and February 16, 1988 employment injuries; and (3) whether the Office hearing representative properly denied appellant's request for subpoenas.

FACTUAL HISTORY

On September 24, 1987 appellant, a 46-year-old medical clerk, filed a traumatic injury claim alleging that she injured her lower back and buttocks on September 18, 1987 when she tripped on an electrical cord. The Office accepted the claim for a lumbosacral strain and appellant returned to work on January 25, 1988.

On February 16, 1988 appellant filed a traumatic injury claim alleging that she injured her back on that date when she slipped on a floor.[1] The Office accepted the claim for a lumbar strain. Appellant stopped work on February 17, 1988 and was subsequently placed on the period rolls in receipt of compensation for temporary total disability.

In a letter dated June 8, 2004, the Office referred appellant for a second opinion evaluation to Dr. Patrick N. Bays, an osteopathic orthopedic surgeon.

On July 16, 2004 the Office received a June 29, 2004 report by Dr. Keith V. Anderson, a treating Board-certified orthopedic surgeon. He diagnosed chronic low back pain with evidence of a Grade 1 lower lumbar vertebra anterolisthesis and significant facet arthropathy, lumbar spinal stenosis symptoms, transitional lumbosacral segment, obesity, heartburn, hypertension and history of myocardial infarction and nephrectomy. Dr. Anderson noted that appellant injured herself when she slipped at work in 1988, "developed a diaphoresis at the time of the injury," and has had low back pain since then. A physical examination revealed tenderness in the lumbar spine from L1 to S1 and "bilateral S1 joint tenderness and sciatic notch tenderness." An x-ray interpretation revealed "transitional lumbosacral segment and considerable facet arthritis in the lower spine. She has a Grade 1 anterolisthesis in the lower lumbar vertebra and mild scoliosis."

On July 26, 2004 the Office received the July 15, 2004 report of Dr. Bays. He diagnosed degenerative disc disease at S1-2, bulging disc at L4-5 "with some degenerative hypertrophy of the posterior facet joint," preexisting sacralization at L5, chronic low back pain, hypertension, morbid obesity, pulmonary disease by history and left knee degenerative arthritis. A physical examination revealed range of motion of the lumbar spine as 90 degrees forward flexion, 15 degrees extension, 35 degrees right and left bending, 65 degrees right and left rotation. Dr. Bays reported tenderness upon palpation in the "mid thoracic spine, into the lumbar spine from L1 through the lumbosacral junction into the right and left sacroiliac joints." He opined that appellant's back conditions were unrelated to the employment injury. In support of this conclusion, Dr. Bays noted that appellant "at most had a lumbar strain/sprain in September 1987 and February 1988" which would have resolved within three months. He stated that appellant "would have been left with her preexisting degenerative changes to the lumbar spine." Dr. Bays noted that appellant had a normal lumbar spine examination and excellent range of motion. He opined that her employment injury temporarily aggravated her preexisting degenerative disc disease. As to her current disability, Dr. Bays attributed it to her preexisting left knee and lumbar degenerative disease, which were unrelated to her 1987 and 1988 employment injuries. He opined that appellant had no remaining employment-related medical conditions or residuals from her accepted employment injuries.

[1] This was assigned claim number 13-849795.

On September 7, 2004 the Office issued a notice of proposed termination of compensation on the grounds that the July 15, 2004 report of Dr. Bays established no continuing residuals of the accepted injuries. The Office explained that appellant's objective and disabling findings were the result of the natural progression of her preexisting degenerative disease process.

The Office received medical evidence, including an August 19, 2004 report regarding appellant's left knee from Dr. Carl R. Birchard, a treating Board-certified orthopedic surgeon; a September 2, 2004 treatment note and a September 21, 2004 report from Dr. Anderson; and a July 27, 2004 magnetic resonance imaging (MRI) scan of Dr. Jana M. Crain.

Dr. Anderson reported that appellant had been seen for back and leg pain previously and diagnosed left knee osteoarthritis. On a September 21, 2004 he noted that he agreed with Dr. Bays' "findings throughout the report," but that he would review the most recent MRI scan to see if there should be any change in her outcome. Dr. Anderson diagnosed lumbar spinal stenosis symptoms, lower extremity osteoarthritis, obesity and "significant facet arthropathy and Grade 1 anterolisthesis of the lumbar spine."

The July 27, 2004 MRI scan revealed severe facet arthropathy with degenerative Grade 1 anterolisthesis at L4-5 with moderately severe central canal stenosis at this level and severe narrowing of the entrance zone of the left neural foramen. There was also severe degeneration at the L4-5 disc and L3-4 disc degeneration.

In a letter dated October 2, 2004, appellant contended that Dr. Bays' report was conclusory, speculative and based on an inaccurate history. She contended that the August 19, 2004 report of Dr. Birchard supported her claim of continuing total disability due to her employment injury.

In a September 27, 2004 report, Dr. Paul Bunge, a Board-certified internist, addressed appellant's history of injury and reported diffuse tenderness in the lumbar paraspinal area on very light palpation. He diagnosed low back pain secondary to osteoarthritis and that it would be conjecture to whether appellant's pain was due in part or in total to the accepted employment injury.

On August 5, 2004 Dr. Birchard noted a history of chronic low back pain and diagnosed degenerative spinal changes and chronic low back pain, lumbar stenosis and degenerative left knee joint disease. An MRI scan revealed severe faced arthropathy.

By decision dated October 7, 2004, the Office terminated appellant's compensation benefits effective October 12, 2004 on the grounds that the weight of the medical evidence rested with Dr. Bays, who established that she had no continuing disability resulting from her accepted employment injuries.

On October 18, 2004 the Office received a September 28, 2004 report by Dr. Scott C. Slattery in which he diagnosed lumbar stenosis and left knee degenerative joint disease.

On November 26, 2004 the Office received appellant's November 1, 2004 request for an oral hearing before an Office hearing representative, which was changed to a request for review

of the written record. In a letter dated December 11, 2004, appellant requested subpoenas for Dr. Erika Hassan, a former treating Board-certified physiatrist and Dr. John Gruen, a Board-certified neurologist.

In a letter dated March 10, 2005, the Office hearing representative informed appellant that her request for subpoenas was denied because the jurisdiction for subpoenas was limited to a 100 miles from the hearing location and attending physicians are not subpoenaed.

In a letter dated March 21, 2005, appellant requested a subpoena for Dr. Bays.

In a June 2, 2005 report, Dr. Birchard opined that appellant was totally disabled. A physical examination revealed 45 degrees flexion, full extension, 90 degrees flexion, 10 degrees extension and 10 degrees right and left lateral bending. Dr. Birchard found tenderness to palpation over the lumbar and thoracic spine both over spinous processes and paravertebral muscles. He informed appellant that he was unable to "determine one way or the other whether or not her current symptoms are directly and causally related to" her accepted 1988 employment injury. Dr. Birchard opined that appellant was "currently disabled and unable to return" to work due to lumbar spondylosis, facet arthrosis, degenerative disc disease and spinal stenosis with associated Grade 1 spondylolisthesis.

In an August 9, 2005 decision, the hearing representative affirmed the October 7, 2004 termination decision and denied her request to issue subpoenas. He noted that appellant did not provide an explanation as to why the testimony was the preferred method of obtaining the medical opinions. The hearing representative found that the weight of the medical evidence rested with the well-rationalized opinion of Dr. Bays.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[2] After it has determined that an employee 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.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[5]

[2] *Paul L. Stewart*, 54 ECAB 824 (2003).

[3] *Elsie L. Price*, 54 ECAB 734 (2003).

[4] *See Del K. Rykert*, 40 ECAB 284 (1988).

[5] *James F. Weikel*, 54 ECAB 660 (2003).

ANALYSIS -- ISSUE 1

The Office accepted appellant's claims for lumbosacral strains due to her September 18, 1987 and February 16, 1988 employment injuries. In June 2004, the Office referred appellant to Dr. Bays, an osteopathic orthopedic surgeon, to determine whether she continued to have residuals from her accepted employment injuries. In a July 15, 2004 report, Dr. Bays reviewed her history, noted findings on examination and opined that appellant did not have any ongoing residuals due to her accepted September 1987 and February 1988 employment injuries. He noted that appellant had sustained lumbar strains as a result of her employment injuries, which resolved within three months. Dr. Bays noted that the employment injuries temporarily aggravated her underlying degenerative disc disease. He attributed appellant's current back condition to her preexisting degenerative disc disease, which was unrelated to the employment injuries. Dr. Bays also reported a normal lumbar spine examination with an "excellent range of motion."

Appellant submitted reports from Drs. Anderson, Bunge and Birchard and an MRI scan report by Dr. Crain. In a June 29, 2004 report, Dr. Anderson diagnosed chronic low back pain with evidence of a Grade 1 lower lumbar vertebra anterolisthesis and significant facet arthropathy, lumbar spinal stenosis symptoms, transitional lumbosacral segment, obesity, heartburn, hypertension and history of myocardial infarction and nephrectomy. He noted that appellant injured herself when she slipped at work in 1988. Dr. Anderson stated that she developed a diaphoresis at the time of the injury and had experienced low back pain since then. On September 21, 2004 Dr. Anderson reviewed the July 26, 2004 report of Dr. Bays and stated that he agreed with Dr. Bays' findings but recommended further review of MRI scan testing. The Board notes that Dr. Anderson did not specifically address the accepted lumbar strain conditions accepted by the Office or attribute her ongoing disability as a result of the accepted conditions in any of his reports. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[6] Moreover, Dr. Anderson reviewed the July 26, 2004 report of Dr. Bays and agreed with his stated findings. Thus, Dr. Anderson's reports are insufficient to create a conflict with Dr. Bays.

Dr. Birchard addressed appellant's nonemployment-related knee condition. He did not discuss her accepted back condition. The July 27, 2004 MRI scan revealed severe facet arthropathy with degenerative Grade 1 anterolisthesis at L4-5 with a moderately severe central canal stenosis at this level and severe narrowing of the entrance zone of the left neural foramen. It also revealed severe degeneration at the L3-4 and L4-5 discs. Dr. Birchard did not address the degenerative disc disease or the cause of this condition. In a September 27, 2004 report, Dr. Bunge diagnosed low back pain secondary to osteoarthritis. Dr. Bunge stated that it would be conjecture on his part as to whether appellant's back condition was causally related to the accepted employment injuries. As none of these physicians provided any opinion attributing appellant's continuing disability to her accepted employment injuries, they are insufficient to

[6] *Ellen L. Noble*, 55 ECAB ___ (Docket No. 03-1157, issued May 7, 2004).

create a conflict in the medical opinion evidence with the findings of Br. Bays.[7] Dr. Bunge specifically stated that he could not provide an opinion as to the cause of appellant's condition.

The Board finds that the opinion of Dr. Bays is sufficiently well rationalized and based upon a proper factual background. It represents the weight of the evidence and is sufficient to support the Office's termination of benefits.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant.[8] 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.

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's diagnosed condition and the implicated employment factors.[9] The opinion of the physician must be based on a complete factual and medical background of appellant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[10]

ANALYSIS -- ISSUE 2

Subsequent to the October 7, 2004 termination decision, the Office received additional reports from Dr. Slattery and Dr. Birchard. Neither physician provided adequate support to establish that she has continuing disability due to her accepted employment injuries. Dr. Slattery diagnosed lumbar stenosis and left knee degenerative joint disease in a September 28, 2004 report, but provided no opinion as to whether appellant's ongoing bad condition was causally related to the accepted 1987 and 1988 employment injuries. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[11]

Dr. Birchard opined that appellant was totally disabled. He listed findings on physical examination of revealed 45 degrees flexion, full extension, 90 degrees flexion, 10 degrees

---

[7] *Id.*

[8] *See Joseph A. Brown, Jr.*, 55 ECAB ___ (Docket No. 04-376, issued May 11, 2004); *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

[9] *Juanita Pitts*, 56 ECAB ___ (Docket No. 04-1527, issued October 28, 2004).

[10] *Bobbie F. Cowart*, 55 ECAB ___ (Docket No. 04-1416, issued September 30, 2004); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[11] *Ellen L. Noble*, *supra* note 6.

extension and 10 degrees right and left lateral bending. Dr. Birchard reported that she experienced tenderness to palpation over the lumbar and thoracic spine both over spinous processes and paravertebral muscles. However, Dr. Birchard noted that he told appellant that he was unable to determine whether or not her current symptoms were causally related to her accepted 1988 employment injury. The Board has held that medical opinions which are speculative or equivocal are of diminished probative value.[12] Thus, Dr. Birchard's opinion is insufficient to create a conflict in the evidence or establish any continuing disability as his opinion is equivocal with regards to the cause of appellant's condition or disability.

LEGAL PRECEDENT -- ISSUE 3

Section 8126 of the Federal Employees' Compensation Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles.[13] The implementing regulations provides that a claimant may request a subpoena, but the decision to grant or deny such a request is within the discretion of the hearing representative, who may issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other relevant documents.[14]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained. Section 10.619(a)(1) of the implementing regulations provides that a claimant may request a subpoena only as part of the hearings process and no subpoena will be issued under any other part of the claims process. To request a subpoena, the requestor must submit the request in writing and send it to the hearing representative as early as possible, but no later than 60 days (as evidenced by postmark, electronic marker or other objective date mark) after the date of the original hearing request.[15] The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[16]

ANALYSIS -- ISSUE 3

In the present case, appellant requested that a subpoena be issued to Drs. Hassan and Gruen, physicians, who treated her when she lived in California. She did not clearly explain why

[12] *Cecelia M. Corley*, 56 ECAB ___ (Docket No. 05-324, issued August 16, 2005).

[13] 5 U.S.C. § 8126(1).

[14] 20 C.F.R. § 10.619; *see Lottie M. Williams*, 56 ECAB ___ (Docket No. 04-1001, issued February 3, 2005).

[15] 20 C.F.R. § 10.619(a)(1); *see Jon Louis Van Alstine*, 56 ECAB ___ (Docket No. 03-1600, issued November 1, 2004).

[16] *Martha A. McConnell*, 50 ECAB 129 (1998).

a subpoena was the best method to obtain such evidence as opposed to, for example, securing a medical report or deposition. The hearing representative found that there was no evidence submitted as to why Drs. Hassan and Gruen should be present at an oral hearing. As noted above, the Board reviews the hearing representative decision to determine if there was an abuse of discretion. The Board finds that the record does not establish an abuse of discretion in this case.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation and medical benefits effective October 12, 2004. The Board also finds that appellant failed to establish any continuing disability on and after October 12, 2004. The Board further finds no abuse of discretion in the denial of a subpoena request.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 9, 2005 is affirmed.

Issued: May 1, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board