U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE J. NIHART and DEPARTMENT OF VETERANS AFFAIRS, DORNS VETERANS HOSPITAL, Columbia, S.C.

Docket No. 96-614; Submitted on the Record;
Issued April 27, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that she sustained a recurrence of disability causally related to her accepted employment injury.

On July 29, 1990 appellant, then a 43-year-old registered nurse, filed a notice of traumatic injury, claiming that she injured her left arm and neck when she caught a patient who was falling out of his wheelchair. The Office of Workers' Compensation Programs accepted a cervical sprain, and appellant underwent surgery for a herniated cervical disc at C5-6. The Office also accepted a consequential fracture of thoracic vertebra T6. Subsequently, appellant returned to work full time in a light-duty position as an admissions/discharge nurse.

On December 3, 1993 appellant filed a second notice of traumatic injury, claiming that she hurt herself in a collision with a coworker during a medical emergency. The Office accepted a cervical strain and contusion to the right shoulder. Compensation and medical benefits for this injury were terminated on June 15, 1994, based on the report of Dr. Joe D. Christian, Jr., a Board-certified orthopedic surgeon and the second opinion specialist.

On March 29, 1994 the Office denied appellant's claim for wage-loss benefits for 158.75 hours in 1993 on the grounds that the medical evidence was insufficient to establish a causal relationship between the initial injury and the alleged disability for work. The Office noted that appellant submitted work excuse slips from her treating physician, Dr. Peter J. Stahl, Board-certified in family practice, but these were not signed by him and reflected only her subjective complaints of pain. The Office added that the November 5, 1993 form report from Dr. Stahl indicated that appellant was capable of functioning in her "specially tailored" job and was not disabled.

Appellant requested reconsideration and submitted an April 25, 1994 report from Dr. Stahl as well as form reports dated April 18 and 20, 1994. On June 13, 1994 the Office denied appellant's request on the grounds that the medical evidence was insufficient to warrant

modification of its prior decision. The Office noted that the record contained no objective findings to support appellant's complaints of pain on the dates for which she was claiming wage loss. Appellant did not appeal this decision.

On October 7, 1994 appellant filed a notice of recurrence of disability, claiming that she could not work after June 16, 1994 because of the pain in her neck. On July 24, 1995 the Office denied the claim on the grounds that the medical evidence was insufficient to establish that the claimed condition was causally related to the initial injury. The Office noted that the impartial medical examiner, Dr. Donald H. McQueen, a Board-certified orthopedic surgeon, resolved the conflict between appellant's physicians and the second opinion physician and had found that appellant had no objective disabling residuals of the 1990 injury.

The Board finds that appellant has failed to meet her burden of proof in establishing that her recurrence of disability was causally related to the accepted 1990 injury.

Under the Federal Employees Compensation Act,[1] an employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable, and probative evidence that the recurrence of the disabling condition for which compensation is sought is causally related to the accepted employment injury.[2] As part of this burden the employee must submit rationalized medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the current disabling condition is causally related to the accepted employment-related condition,[3] and supports that conclusion with sound medical reasoning.[4]

Section 8123(a) of the Act provides that where there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination.[5] In situations where there are 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 a specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[6]

In this case, the Office properly found a conflict in the medical evidence between Dr. Christian's June 15, 1994 opinion and the reports of Dr. C. Tucker Weston, an orthopedic practitioner, and Dr. Stahl, both of whom found appellant unable to work. The Office therefore referred appellant, along with the case record, a statement of accepted facts, and specific

[1] 5 U.S.C. §§ 8101-8193 (1974).

[2] *Dennis J. Lasanen*, 43 ECAB 549, 550 (1992).

[3] *Kevin J. McGrath*, 42 ECAB 109, 116 (1990).

[4] *Lourdes Davila*, 45 ECAB 139, 142 (1993).

[5] 5 U.S.C. § 8123(a).

[6] *Nancy Lackner Elkins*, 44 ECAB 840, 847 (1993).

causation questions, to Dr. McQueen for an impartial medical examination pursuant to section 8123(a). He examined appellant on June 1, 1995, noting full range of motion in her upper and lower extremities, but finding that appellant had no motion in her neck and would not flex forward or extend, rotate right or left, or tilt her head left or right.

Dr. McQueen concluded, based on the lack of clinical evidence of atrophy, reflex changes, or x-ray findings, and a reportedly normal electromyogram, that appellant had no significant residuals from her injury of July 29, 1990 and that she "did not suffer any material worsening of her 1990 work injury or a spontaneous return of those symptoms on June 16, 1994." The physician noted that appellant had been symptomatic since 1990 and had exhibited a pain syndrome for the past four years, but that her symptoms to a large extent were emotional and all her complaints were subjective; while "somewhat genuine" to her and a true disability, appellant's symptoms were not orthopedic in nature.

Dr. McQueen added that the 1990 injury, which had been adequately treated and from which there was no demonstrated residual, was not the current cause of appellant's existing disability.[7] Thus, Dr. McQueen provided a comprehensive evaluation of appellant, complete with examination and testing, and drafted a thorough report explaining his reasons for finding that appellant's current disability for work was not related to the 1990 cervical injury.[8] Therefore, the Board finds that Dr. McQueen's opinion constitutes the weight of the medical evidence and establishes that appellant's recurrence of pain in June 1994 was not caused, precipitated, accelerated, or aggravated by her 1990 cervical injury.[9]

[7] Dr. McQueen provided an assessment of appellant's disability of five percent whole person impairment, but noted there is no objective evidence of radiculopathy or loss of structural integrity.

[8] Dr. McQueen completed a work capacity evaluation indicating that appellant could work for eight hours a day, that she had no limitations due to the employment injury and that she had an emotional, post-surgical, chronic pain syndrome. As the Office has not adjudicated the issue of any employment-related emotional condition it is not before the Board on the present appeal; *see* 20 C.F.R. § 501.2(c).

[9] *See Thomas Bauer*, 46 ECAB 257, 265 (1994) (finding that the additional report from appellant's physician concerning his emotional condition was insufficient to overcome the special weight accorded to the impartial medical examiner's opinion).

The July 24, 1995 decision of the Office of Workers' Compensation Programs is affirmed.[10]

Dated, Washington, D.C.
April 27, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[10] Appellant filed her notice of appeal on December 12, 1995. She also filed a request for reconsideration of the July 24, 1995 decision on August 18, 1995. Her request was denied on December 27, 1995. The Board and the Office cannot have jurisdiction over the same issue in the same case at the same time. 20 C.F.R. § 501.2(c); *Arlonia B. Taylor*, 44 ECAB 591, 597 (1993). Consequently, because appellant's claim was on appeal before the Board, the Office had no jurisdiction to issue the December 27, 1995 decision and it is deemed null and void. *Cf. Douglas E. Billings*, 41 ECAB 880, 893 (1990) (finding that the Office had jurisdiction to issue a decision on a matter unrelated to the issue on appeal before the Board).