

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of LUCY GUEVARA and DEPARTMENT OF COMMERCE,  
BUREAU OF THE CENSUS, Los Angeles, Calif.

*Docket No. 97-277; Submitted on the Record;  
Issued December 16, 1998*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation on the grounds that her work-related injury had resolved.

The Board has carefully reviewed the factual and medical evidence and finds that the Office has established that appellant no longer has any disability related to the accepted work injuries.

Under the Federal Employees' Compensation Act,<sup>1</sup> the Office has the burden of justifying modification or termination of compensation once a claim is accepted and compensation paid.<sup>2</sup> Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing either that its original determination was erroneous or that the disability has ceased or is no longer related to the employment injury.<sup>3</sup>

The fact that the Office accepts appellant's claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.<sup>4</sup> The Office's burden

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<sup>1</sup> 5 U.S.C § 8101 *et seq.*

<sup>2</sup> *William Kandel*, 43 ECAB 1011, 1020 (1992).

<sup>3</sup> *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

<sup>4</sup> *Dawn Sweazey*, 44 ECAB 824, 832 (1993).

includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality. The factors that comprise the evaluation of medical evidence include the opportunity for, and the thoroughness of, physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.<sup>6</sup>

In this case, the Office accepted appellant's claim after she slipped and fell in a driveway while working as a temporary, part-time enumerator on May 18, 1990 for the 1990 census. Appellant stated that she landed on her buttocks and right arm and hurt her low back and right hip.

Following surgery on her shoulder and carpal tunnel syndrome decompression in December 1991, the Office requested that appellant's treating physician, Dr. Jacob E. Tauber, a Board-certified orthopedic surgeon, explain his conclusion that appellant's current cervical condition was causally related to the initial work injury. He responded on December 21, 1994. Subsequently, the Office referred appellant to Dr. Stuart H. Baumgard, a Board-certified orthopedic surgeon, for a second opinion evaluation.

Based on Dr. Baumgard's October 11, 1995 report, the Office issued a notice of proposed termination on February 23, 1996 on the grounds that appellant no longer had any objective residuals of the May 1990 injury. Appellant responded to the notice with a March 6, 1996 report from Dr. Tauber, who disputed the conclusions of Dr. Baumgard.

On March 27, 1996 the Office terminated appellant's compensation and medical benefits on the grounds that she was no longer disabled because of the 1990 injuries. The Office noted that the weight of the medical opinion evidence rested with the report of Dr. Baumgard, who concluded that any work-related aggravation of appellant's preexisting cervical and lumbar degenerative disease had long since ceased.

The Board finds that Dr. Baumgard's conclusions represent the weight of the medical opinion evidence. Dr. Baumgard examined appellant on October 11, 1995 and recorded that she fell on May 18, 1990, landing on her buttocks and breaking her fall with her hands and elbows. He noted that she continued working through mid-June 1990, but experienced pain and discomfort in her neck, back and wrists and sought treatment from a chiropractor on July 13, 1990. After her federal employment ended on July 23, 1990, appellant obtained a nonfederal bookkeeping position and worked from August 12 through November 9, 1990. Dr. Baumgard related that appellant remained under the care of Dr. Raymond Bouchereau, a chiropractor, until July 1991 when she was referred to Dr. Tauber who had a magnetic resonance

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<sup>5</sup> *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

<sup>6</sup> *Connie Johns*, 44 ECAB 560, 570 (1993).

imaging (MRI) scan and electromyogram administered. Following surgery and steroid injections in her neck, appellant opted to have surgery on her cervical spine and was awaiting authorization.

Summarizing appellant's detailed and lengthy description of the nature and intensity of the pain in her neck, which radiated into her arms and jaw area, causing headaches, and into her lower back, Dr. Baumgard noted that appellant felt an 80 percent improvement in her right shoulder and wrist after surgery but that her neck pain had progressively and gradually worsened.

Upon physical examination, Dr. Baumgard found no loss of the normal cervical lordosis and no tenderness over the occipital notches. Range of motion of the cervical spine "was increased dramatically" when appellant was distracted but was otherwise accompanied by complaints of pain throughout the movements. Dr. Baumgard added that grip strengths as measured by the Jamar dynamometer were approximately equal bilaterally, again when appellant was distracted. Various physical tests -- Spurling's, Adson's, Phalen's and Tinel's -- were negative, and motor strength, muscle tone, and coordination of the upper extremities were normal.

Examinations of the lumbosacral spine and shoulders were similarly normal, although Dr. Baumgard noted appellant's complaints of pain throughout. By contrast, examination of appellant's wrists and hands was pain-free but sensation was reduced to light touch and pinprick. Appellant's x-rays revealed degenerative narrowing of the C5-6, L3-4 and L4-5 discs with osteophytic spurring as well as slight narrowing of the acromioclavicular joint in the right shoulder and normal bone structure in both wrists.

Dr. Baumgard summarized each of the medical reports in the record from August 1990 through August 1995 and the results of various MRI scans, computerized tomographic scans, myelograms, and x-rays. Based on this medical history and his extensive physical examination of appellant, Dr. Baumgard concluded:

"[T]here is a glaringly obvious *discrepancy between* the magnitude of the patient's various *symptoms* and the absolute *absence of physical findings* on her examination. Indeed, there is much to suggest this patient is fabricating some and perhaps all of her symptoms." (Emphasis in original)

Dr. Baumgard explained his conclusion in detail, noting the "mutually incompatible" results when he performed a straight leg raising test in two different ways or distracted appellant during range of motion studies. He stated that his findings "strongly suggest[ed] a conversion reaction<sup>7</sup> of the most serious kind" and that even some of appellant's symptoms were "bizarre."

Dr. Baumgard emphasized that appellant was clearly attempting to "deceive" him "in a very transparent fashion" during the examination and that she had no objective findings (or any

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<sup>7</sup> Conversion is a Freudian term describing the process by which emotions become transformed into physical (motor or sensory) manifestations; conversion reaction is a condition in which motor or sensory symptoms are used to symbolize intra-psychic conflict. *Dorland's Illustrated Medical Dictionary* (27th ed. 1988).

findings at all) to identify any organic orthopedic process. He stated that appellant's total disability due to the specific work incident was "in all likelihood" about four to six weeks, that she had no residuals of any form of disability related to the 1990 fall, and that she could return to her usual occupation as a census taker without reservation or restrictions. Dr. Baumgard added that appellant did not need cervical spine surgery or any other orthopedic treatment and before any physician contemplated surgery he should read his report.

By contrast, Dr. Tauber's voluminous reports lack medical rationale for his conclusions. Responding to the Office's September 28, 1994 letter asking him to explain how appellant's current cervical condition was related to the 1990 fall, Dr. Tauber stated on October 5, 1994 that he had treated appellant since July 1991, that there was "no question" that her neck problems resulted from the original injury, and that she had needed surgery "for a remarkable period of time."

In its December 12, 1994 letter to Dr. Tauber, the Office sought additional information in view of the facts that he began treating appellant more than one year after the 1990 injury, that Dr. Bouchereau noted in July and August 1990 when he began treatment that appellant complained only of low back and right hip pain and was not disabled from work, that "subjective complaints" of right shoulder and neck pain began only in January and February 1991, and that appellant performed her regular duties until terminated from federal employment in July 1990 and then worked for several months in private industry.

In response, Dr. Tauber acknowledged that he had not reviewed Dr. Bouchereau's actual reports, but reiterated that there was no question that appellant's current condition stemmed from the 1990 fall. He explained that appellant had cervical radiculitis with an abnormal MRI, electrical study and myelogram, that she had indicated "from the very start" that she had neck pain with radiation into her shoulder,<sup>8</sup> and that she had presented herself in a "legitimate" fashion with a history that correlated with objective findings.

Responding to Dr. Baumgard's report, Dr. Tauber stated on March 6, 1996 that Dr. Baumgard "ignored" the studies of appellant's cervical spine demonstrating C5-6 abnormalities and all the objective tests that explained appellant's complaints of constant pain in her neck radiating to her arms.<sup>9</sup> Dr. Tauber added that he found appellant to be credible during his lengthy course of treatment and that she was trying to "work through her pain." He repeated that the 1990 fall caused appellant's degenerative spinal condition to become symptomatic, that she had right shoulder and arm pain "throughout," and that her treating physician later recognized that her neck was the source of this pain.

The Board notes that on the initial claim form, filed in November 1990, more than six months after the May 1990 fall, appellant reported only low back and right hip pain related to the

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<sup>8</sup> In his August 13, 1991 report, Dr. Tauber found full range of motion in appellant's neck and noted that x-rays of her right shoulder and cervical spine were negative.

<sup>9</sup> An MRI scan dated December 14, 1994 showed degenerative disc disease and mild stenosis at L5-S1, with no significant change since 1991. An electromyogram dated December 22, 1994 showed mild denervation at C5-6 of the cervical spine but all other results were normal.

incident. At that time, Dr. Bouchereau had diagnosed a subluxation at L4-5 and she had been treated only for these conditions. Appellant first reported neck and shoulder pain in early 1991 more than six months after her federal employment had ceased.

Dr. Tauber explained this long-delayed reaction by stating generally that when a person falls and sustains an axial injury in the presence of degenerative disc disease, that individual will have neck pain with radiation. However, nothing in the record indicated that the May 1990 fall caused an axial injury and Dr. Tauber's earliest monthly reports -- dated and put in the dates -- to the Office failed to mention any pain radiating from appellant's neck.

Despite two inquiries from the Office, Dr. Tauber failed to explain why, if appellant's cervical symptoms were severe enough to require surgery several years after the May 1990 fall, she did not complain of neck pain until February 1991. Nor did Dr. Tauber explain why he concluded that the May 1990 fall caused the progression of appellant's degenerative cervical condition, given her continued performance of her duties until her federal appointment ended in July 1990 and her subsequent employment in August-November 1990.<sup>10</sup>

In sum, the Board finds that Dr. Tauber's conclusions are speculative and based primarily on appellant's self-serving reports of experiencing pain in her shoulders and neck ever since the May 1990 fall. Therefore, although his opinion conflicts with that of Dr. Baumgard, the Board finds that Dr. Tauber's reports are insufficiently probative to create a conflict in medical opinion sufficient to require the Office to refer this case to an impartial medical examiner.<sup>11</sup>

By contrast, Dr. Baumgard's comprehensive report is well rationalized and based on a thorough review of the medical evidence in the record, physical examination of and discussion with appellant, the objective testing, and the statement of accepted facts. As such, his report is sufficient to meet the Office's burden of proof in terminating appellant's compensation.<sup>12</sup>

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<sup>10</sup> See *Cleopatra McDougal-Saddler*, 47 ECAB \_\_\_\_ (Docket No. 95-2634, issued March 26, 1996) (finding that the fact that appellant was asymptomatic before an injury but symptomatic afterward is insufficient to establish, absent supporting rationale, a causal relationship); see also *Kimper Lee*, 45 ECAB 565, 574 (1994) (finding that a physician's rationale that appellant's condition was related to a previous lifting injury because appellant reported no similar problem prior to that accepted injury was insufficient to establish a causal relationship).

<sup>11</sup> See *Wanda E. Maisonet*, 48 ECAB \_\_\_\_ (Docket No. 94-2466, issued November 29, 1996) (finding no conflict in the medical opinion evidence because appellant's doctor failed to explain the basis for his conclusion that appellant was still disabled by his back strain).

<sup>12</sup> See *Marion Thornton*, 46 ECAB 899, 907 (1995) (finding that medical reports based on a proper factual and medical background and supported by full rationale were sufficient to meet the Office's burden of proof in establishing that appellant had not sustained a permanent aggravation of her respiratory condition by exposure to second-hand smoke in the workplace).

The March 27, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
December 16, 1998

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

Bradley T. Knott  
Alternate Member