U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CYNTHIA L. BUCK and DEPARTMENT OF THE ARMY,
FORT SHERIDAN, Fort Sheridan, Ill.

Docket No. 95-2474; Submitted on the Record;
Issued February 3, 1998

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective April 2, 1995 on the grounds that she did not have residuals of her accepted December 27, 1990 L5-S1 herniated disc on and after that date.

This is the second appeal before the Board in this case. By decision and order issued February 3, 1994,[1] the Board found an $817.88 overpayment of compensation in appellant's case from May 5 to 31, 1991 as she received compensation at an incorrect rate, that appellant was at fault in creation of the overpayment as she accepted payments which she knew or should have known were incorrect, and that recovery of the overpayment should be made at $100.00 per month from appellant's continuing compensation payments. The law and facts of the case as set forth in the February 3, 1994 decision and order are incorporated by reference. As the present appeal concerns a medical issue not before the Board on the prior appeal, it is necessary to set forth the pertinent facts of the case.

The Office accepted that on December 27, 1990 appellant, then a 40-year-old bus driver, sustained a lumbosacral strain, with a recurrent herniated nucleus pulposus at L5-S1, requiring May 8, 1991 and May 11, 1992 hemilaminectomies with discectomies.[2] She received benefits on the periodic rolls.

In a December 16, 1992 report, Dr. Allan Minster, an attending neurosurgeon, stated that appellant could no longer work as a bus driver due to chronic right-sided L5-S1 neuropathy, incoordination of the right leg, impairment of proprioception, touch and pinprick sensation below the knee and weakness of right ankle dorsiflexors and great toe. Dr. Minster noted these findings were "probably permanent." He submitted periodic reports through 1993.

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[1] Docket No. 93-419.

[2] Appellant had a 1982 right L5-S1 hemilaminectomy apparently unrelated to her federal employment.

In a March 3, 1994 report, Dr. Minster noted that "prolonged driving of [a] standard transmission car" while commuting 48 miles round-trip to a private sector job during January 1994 caused severe right leg pain with spasms. Dr. Minster opined that because of the three hemilaminectomies, appellant was unable to "drive more than 10 miles twice a day, especially with … a clutch transmission."[3] Dr. Minster added permanent restrictions as of April 26, 1994 against "heavy lifting, repetitive bending or twisting or prolonged sitting or driving or standing."

In a May 11, 1994 report, Dr. Minster stated that driving a standard shift car caused deterioration in appellant's condition due to her postoperative state. Dr. Minster explained that because appellant had nerve root compression at L5-S1 due to scar tissue and a history of disc herniations, elevation, stretching or strenuous use of one leg produced pain in the opposite leg, "a 'cross leg sign.'" Dr. Minster found a positive straight leg test at 30 degrees on the right and 45 degrees on the left, "much worse than that on a postoperative examination July 27, 1992 in which the straight leg raise was to 90 degrees bilaterally."

In a May 24, 1994 magnetic resonance imaging (MRI) report, Dr. Robert A. Breit, a Board-certified radiologist, noted a reduction in the height of the disc space at L5-S1 compared to a May 1, 1992 study, with diffuse bulging mildly abutting the ventral thecal sac, and a "moderate degree of enhancing soft tissue in the right ventral and right lateral epidural space contiguous with the right S1 nerve root. … P[ost]operative bony changes are appreciated posteriorly at L5-S1. … Epidural fibrosis is evidence as is enhancement of the right S1 nerve root, a finding indicative of radiculitis." In a June 1, 1994 report, Dr. Minster reviewed the May 24, 1994 MRI scan and noted that appellant had "epidural fibrosis (scar tissue) around the nerve root at the site of her previous operations" as demonstrated by MRI.

On June 10, 1994 the Office issued a notice of proposed termination of compensation, finalized July 11, 1994 on the grounds that appellant had abandoned suitable private sector employment. Appellant disagreed with this decision, and requested a review of the written record by a representative of the Office's Branch of Hearings and Review. By decision dated and finalized October 28, 1994, an Office hearing representative set aside the Office's July 11, 1994 decision, finding that Dr. Minster presented sufficient evidence to establish that appellant was medically unable to drive the distance to and from work. The case was remanded to the Office for a second-opinion referral and *de novo* decision.

In a November 10, 1994 report, Dr. Minster noted that appellant had increased back and leg discomfort, right-sided limp, weakness of the right ankle and great toe, and a "positive FABER hip test." Dr. Minster diagnosed S1 radiculitis, indicated that appellant's condition was related to the December 1990 injury, and that she was totally disabled for work. He again referred appellant for consideration of spinal fusion.

[3] The record indicates that following vocational rehabilitation and a secretarial and computer course from May 1992 through March 1993 appellant began working as a receptionist on January 21, 1994. By decision dated March 22, 1994, the Office determined that the receptionist position fairly and reasonably represented appellant's wage-earning capacity, calculated at $280.00 per week. On April 22, 1994 appellant claimed a recurrence of disability sustained on January 24, 1994 while working as a secretary/receptionist for a private sector temporary agency, as her "long drive to work" caused "severe back problems." The Office denied appellant's claim for recurrence of disability by June 10, 1994 decision, on the grounds that causal relationship was not established.

In a January 17, 1995 report, Dr. Ronald P. Pawl, a Board-certified neurosurgeon and second-opinion physician provided a history of injury and treatment. Dr. Pawl found an absent right ankle jerk, negative straight leg raising tests and an otherwise normal orthopedic and neurologic examination. He observed a right-sided limp which he characterized as factitious. He opined that the May 23, 1994 MRI scan did not show nerve root entrapment, but that appellant had permanent residuals of scar tissue at the L5-S1 surgical site due to the three hemilaminectomies. Dr. Pawl proffered that the Office should not have accepted a December 1990 L5-S1 disc herniation as the medical record did not support its existence, and that therefore the statement of accepted facts was premised on faulty grounds. Dr. Pawl concluded that he could find no objective cause for appellant's symptoms and that she required no further medical care. However, he stated that appellant had work restrictions against "repeated bending, lifting or twisting or lifting more than 25 to 30 pounds on a regular basis or up to 40 or 50 pounds occasionally" due to her postoperative status and "long-standing degenerative changes at L5-S1," but that she could drive any distance without limitation.

In a February 14, 1995 report, Dr. Minster found a depressed right ankle reflex, slight right-sided limp, positive straight leg raising tests at 60 degrees bilaterally, positive nerve tension tests, and a slightly positive Faber's test on the right.

By notice dated February 15, 1995, the Office advised appellant that it proposed to terminate her compensation as the weight of the medical evidence as represented by Dr. Pawl supported "no continuing disability due to the work injury." The Office noted that Dr. Pawl only found objective evidence of "a surgical scar and an absent right ankle jerk."

In a February 21, 1995 letter, Dr. Pawl reviewed appellant's date-of-injury job description, and stated that appellant was "medically capable" of driving a bus. The position required "using the brakes and gear shift controls when going down steep grades in order to maintain control of heavy vehicles and heavy loads," and "[m]oderate physical effort … in reaching, bending, turning or moving hands, arms, feet, and legs to operate hand and foot controls."

In a March 2, 1995 report, Dr. Minster diagnosed "chronic right S1 radiculopathy, secondary to prior lumbosacral disc herniation, postoperative times three," epidural fibrosis at S1 on the right and S1 nerve root inflammation by MRI. Dr. Minster stated that appellant's condition was related to the December 1990 injury, and that she could not resume driving a bus "because of the sensory impairment and mild incoordination still evident in her right leg."

In March 17 and 22, 1995 letters, appellant, through her attorney representative, stated that Dr. Pawl did not mention appellant's radiculitis or radiculopathy, and recommended work restrictions that the Office failed to address. She asserted that Dr. Minster's March 2, 1995 report showed objective findings of abnormalities that would preclude termination of benefits.

By decision dated April 1, 1995, the Office denied appellant's claim on the grounds that she had not established continuing residuals of the accepted conditions after April 1, 1995, and terminated compensation benefits effective April 2, 1995. The Office found that the "disability outlined by Dr. Pawl does not prevent [appellant] from returning to the job held on the date of injury. Thus, she is not entitled to further benefits."

The Board finds that the Office improperly terminated appellant's compensation benefits effective April 2, 1995, as the case was not in posture for decision due to an outstanding conflict of medical opinion between Dr. Pawl, for the government, and Dr. Minster, for appellant.[4] This conflict pertains both to whether appellant had injury-related residuals on and after April 2, 1995, and whether appellant was medically able to return to her date-of-injury job as a bus driver.

Dr. Minster, appellant's attending neurosurgeon, submitted several reports discussing permanent residuals of the hemilaminectomies, and prescribing permanent restrictions against prolonged driving, the essential activity of appellant's preinjury position as a bus driver. The permanent nature of these restrictions would make them applicable to the period on and after April 2, 1995.

In a December 16, 1992 report, Dr. Minster stated that appellant could not perform her date of injury job as a bus driver due to chronic right-sided L5-S1 neuropathy, incoordination of the right leg, impaired proprioception and sensation below the knee, and weakness of right ankle dorsiflexors and great toe. He opined that these findings were "probably permanent." As of March 3, 1994, Dr. Minster restricted appellant from driving more than 10 miles a day and in April 1994 permanently forbade repetitive bending, twisting, prolonged sitting or driving. In a May 11, 1994 report, Dr. Minster noted a deterioration of appellant's condition due to her driving a standard transmission car in January 1994, with objective worsening of straight leg raising test results. In a March 2, 1995 report, Dr. Minster explained that appellant could no longer drive a bus due to the same sensory impairment and incoordination he had observed since December 1992, postoperative residuals that he believed permanent.

In contrast to Dr. Minster's opinion, Dr. Pawl opined in January 17 and February 21, 1995 reports that appellant had no restrictions against driving, and was medically able to drive a bus.

Dr. Minster also discussed post-surgical scar tissue as a permanent residual of the May 8, 1991 and May 11, 1992 right L5-S1 hemilaminectomies performed to repair the December 27, 1990 L5-S1 herniated disc. In a May 11, 1994 report, Dr. Minster explained that appellant had right S1 nerve root compression due to scar tissue. In a May 24, 1994 MRI report, Dr. Robert A. Breit, a Board-certified radiologist, noted epidural fibrosis at S1 indicative of radiculitis, a diffuse bulging disc at L5-S1, and postoperative bony changes at L5-S1. In a June 1, 1994 report, Dr. Minster explained that the epidural fibrosis was due to scar tissue from the hemilaminectomies. In a March 2, 1995 report, Dr. Minster diagnosed chronic right S1 radiculopathy due to epidural fibrosis at S1 on the right and S1 nerve root inflammation as shown by the May 24, 1994 MRI.

While Dr. Pawl noted scar tissue at the L5-S1 surgical site as a permanent work-related residual, he opined that the May 23, 1994 MRI did not show nerve root entrapment. Both Dr. Minster and Dr. Breit found objective evidence of S1 nerve root entrapment on the MRI.

[4] The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. As appellant filed her appeal with the Board on June 29, 1995, the only decision before the Board on the present appeal is the April 1, 1995 decision terminating appellant's compensation benefits.

Also, Dr. Pawl prescribed work restrictions due to "long-standing degenerative" changes at L5-S1, but did not explain whether or not such changes were related to appellant's surgeries.

Although Dr. Pawl and Dr. Minster performed examinations within several weeks of each other, each physician made very different observations on examination, further indicative of a conflict of opinion. Two months prior to Dr. Pawl's January 17, 1995 examination, in a November 10, 1995 report, Dr. Minster diagnosed S1 radiculitis due to nerve root compression, a right-sided limp and weakness of the right ankle and great toe. Although Dr. Pawl observed appellant limping on January 17, 1995, he dismissed this as factitious, reported negative straight leg raising tests and did not observe right ankle weakness. One month after Dr. Pawl's January 17, 1995 report, on February 14, 1995 report, Dr. Minster found a depressed right ankle reflex, slight right-sided limp, positive straight leg raising tests at 60 degrees bilaterally, positive nerve tension tests, and a slightly positive Faber's test on the right.

Consequently, the Office did not meet its burden of proof in terminating appellant's compensation benefits.

The April 1, 1995 decision of the Office of Workers' Compensation Programs is hereby reversed.

Dated, Washington, D.C.
February 3, 1998

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member