

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

---

In the Matter of ANNA R. ADEBOTE and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, Philadelphia, Pa.

*Docket No. 96-573; Submitted on the Record;  
Issued March 4, 1998*

---

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation, effective December 12, 1994, on the grounds that she had no continuing disability from the accepted injury.

On April 19, 1993 appellant, then a 45-year-old tax technician, filed a notice of traumatic injury, claiming that she hurt her right arm and shoulder when her chair collapsed and she fell to the floor on April 8, 1993. The Office accepted the claim for right ulnar neuropathy and cervical radiculitis and paid appropriate compensation. Appellant returned to work on May 24, 1993, but claimed a recurrence of disability the next day, due to severe pain.

Subsequently, the Office accepted the recurrence claim, based on the reports of Dr. John J. Bowden, Jr., an osteopathic practitioner, and authorized physical therapy. Appellant returned to part-time duty on August 30, 1993, working four hours a day, but stopped work on October 4, 1993. On November 3, 1993 Dr. Bowden found appellant to be "totally incapacitated" until January 2, 1994 because of pain in the cervical spine and right upper extremity.

On December 20, 1993 the Office referred appellant, along with a statement of accepted facts and the medical records, to Dr. Stephen M. Horowitz, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated January 10, 1994, Dr. Horowitz reviewed appellant's medical history and diagnostic testing. He stated that although appellant had many "extremely severe" complaints regarding her neck, shoulder, and arm, a magnetic resonance imaging (MRI) scan of her cervical spine showed only small herniations at C3-4 and C4-5, an MRI of her shoulder was negative, and the electromyography (EMG) studies revealed "only a suggestion" of a C-5 radiculopathy.

Dr. Horowitz noted "many inconsistencies" between appellant's history, his physical findings, and the diagnostic testing. He stated that his clinical findings of diffuse decreased

sensation and muscle weakness in appellant's right upper extremity were "consistent with a nonorganic etiology to her complaints and reflect[ed] symptom magnification." Dr. Horowitz concluded that no objective findings supported a radiculopathy of the cervical spine as shown by the MRI scan and EMG studies, that appellant's current complaints were not related to her April 8, 1993 work injury and that she could return to her prior work in full-duty status.

On February 9, 1994 Dr. Bowden reported that appellant's prognosis was extremely guarded because of her work injury and that she was unable to return to her duties as a tax specialist but could perform modified duties with restrictions on bending and flexing her neck and moving her right upper extremity repetitively. On September 6, 1994 Dr. Bowden stated that appellant had sustained permanent injury to the brachia plexus, upper right shoulder and cervical spine; as a result she was totally disabled from any and all occupations.

On September 28, 1994 the Office referred appellant, along with a statement of accepted facts and the medical records, to Dr. Seymour Shlomchik, a Board-certified orthopedic surgeon, for an impartial medical examination. In his report dated October 19, 1994, Dr. Shlomchik reviewed the reports and treatment notes of Dr. Bowden and the diagnostic studies and reported his findings on physical examination, including a "guardedly limited" range of motion of the cervical spine with "questionable sensory changes" but no palpable trigger points or evidence of muscular spasm. Examination of the right shoulder revealed a full range of passive and active motion, with a normal peripheral ulnar nerve and no swelling or discoloration, but "significant complaints."

Dr. Shlomchik diagnosed transient peripheral ulnar nerve symptoms, now recovered, and stated that there was "no objective evidence ever of a peripheral ulnar nerve neuropathy or of a cervical radiculitis." He found no objective evidence of any right shoulder dysfunction, noting that all x-rays of the right shoulder and elbow, as well as the MRI study of the cervical spine and right shoulder were basically within limits of normal. Dr. Shlomchik concluded that appellant's complaints were purely subjective and had no relationship to the objective findings.

On December 12, 1994 the Office denied continuing compensation on the grounds that the effects of appellant's April 8, 1993 injury had resolved and that she had no continuing work-related disability. The Office noted that the weight of the medical evidence rested with Dr. Shlomchik's report.

Appellant timely requested a hearing, which was held on May 24, 1995, and submitted two reports dated December 21, 1994 and May 23, 1995 from Dr. Bowden, who noted appellant's complaints of increased pain in the cervical spine and upper extremities, which awakened her at night. Dr. Bowden diagnosed post-traumatic herniated nucleus pulposus of the cervical spine, chronic cervical sprain and strain, chronic right C-5 radiculopathy and severe myospasm of the cervical spine. He stated that these diagnoses were directly related to the April 8, 1993 incident and that appellant remained totally incapacitated and restricted from all work-related activities due to chronic and debilitating pain.

On September 6, 1995 the hearing representative denied the claim on the grounds that appellant's work-related disability ceased by December 12, 1994. The hearing representative concluded that the opinions of Drs. Horowitz and Shlomchik represented the weight of the

evidence and that Dr. Bowden's later reports contained no objective data supporting appellant's continuing disability.

Under the Federal Employees' Compensation Act,<sup>1</sup> once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.<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 burden 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 cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>7</sup>

In this case, the Office initially accepted appellant's claim for right ulnar neuropathy and cervical radiculopathy, based on reports from her attending physician. After appellant returned to work but was subsequently found to be "totally incapacitated" by Dr. Bowden, the Office referred appellant to a Board-certified specialist for a second opinion. Dr. Horowitz concluded in January 1994 that appellant had no continuing disability from her work-related injury. He based his conclusion on his clinical findings and the normal results from objective testing.

---

<sup>1</sup> 5 U.S.C § 8101 *et seq.* (1974).

<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).

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

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

<sup>7</sup> *Gary R. Sieber*, 46 ECAB 215, 223 (1994).

Because Dr. Horowitz's report contradicted Dr. Bowden's opinion that appellant could not return to her preinjury job, the Office referred appellant for an impartial medical examination.<sup>8</sup> Dr. Shlomchik's conclusion in October 1994 was similar to Dr. Horowitz's -- there was no objective evidence to support appellant's complaints of pain and stated inability to function.

Appellant argues that Dr. Shlomchik's opinion is insufficient to carry the Office's burden in terminating benefits because he based his conclusion on an inaccurate factual background, namely, that he stated there was no objective evidence of radiculitis yet a July 7, 1993 EMG test showed chronic right C5 radiculitis. In his report, Dr. Shlomchik acknowledged the results of this test but noted that Dr. William Atkins, to whom Dr. Bowden had referred appellant, interpreted the study as indicating only a "suggestion" of radiculitis, with no evidence of polyneuropathy or myopathy. Thus, Dr. Shlomchik concluded that Dr. Atkins' diagnosis was not definite. While Dr. Shlomchik was quite critical of Dr. Bowden's diagnosis and treatment, the Board finds that Dr. Shlomchik accurately characterized the medical records he reviewed.

Further, Dr. Shlomchik's conclusion that appellant had no continuing disability related to the April 8, 1993 injury is well rationalized. Dr. Shlomchik noted that Dr. Richard A. Eisenberg, a Board-certified neurologist to whom Dr. Bowden had also referred appellant, initially diagnosed ulnar neuropathy but reported normal results of an EMG and nerve study conducted on May 17, 1993.<sup>9</sup> Dr. Shlomchik reviewed the October 10, 1993 MRI scan showing small central herniations at C3-4 and C4-5 and found them to be "not clinically significant," noting that he believed they may have been "left over" from appellant's motor vehicle accidents. Based on the normal x-rays and MRI scans, Dr. Shlomchik concluded that appellant's complaints were "purely subjective" and not related to objective findings.<sup>10</sup> He opined that appellant was fully able to return to her job as a tax examiner.

Inasmuch as Dr. Shlomchik reviewed the medical records, a statement of accepted facts, and various diagnostic test results, examined appellant thoroughly, and provided a detailed and well-rationalized medical explanation of why appellant had no continuing disability from the accepted injury, the Board finds that his conclusion, as buttressed by the January 10, 1994 report of Dr. Horowitz, represents the weight of the medical evidence and is sufficient to carry the Office's burden of proof.<sup>11</sup>

---

<sup>8</sup> Section 8123(a) of the Act provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. *Shirley L. Steib*, 46 ECAB 309, 316 (1994); see *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

<sup>9</sup> Appellant argues that Dr. Murray D. Robinson, a general practitioner, diagnosed ulnar neuropathy but his January 26, 1994 report merely indicated that appellant's symptomatology was "consistent" with an ulnar neuropathy because her ulnar nerve was sensitive to palpation. He provided no diagnostic testing in support of this impression.

<sup>10</sup> See *Anna Chrun*, 33 ECAB 829, 835 (1982) (finding that the absence of objective evidence of disability is more compatible with the absence of disability than with its presence).

<sup>11</sup> See *Samuel Theriault*, 45 ECAB 586, 590 (1994) (finding that physician's opinion was thorough, well

The September 6, 1995 and December 12, 1994 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, D.C.  
March 4, 1998

Michael J. Walsh  
Chairman

George E. Rivers  
Member

Michael E. Groom  
Alternate Member

---

rationalized, and based on an accurate factual background and thus constituted the weight of the medical evidence that appellant's accepted injury had resolved).