U.S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA L. MENDENHALL and U.S. POSTAL SERVICE,
POST OFFICE, Wichita, Kans.

Docket No. 96-748; Submitted on the Record;
Issued March 27, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective December 13, 1994 on the grounds that residuals of her accepted employment injury ceased by September 21, 1988.

On April 12, 1988 appellant, a part-time flexible carrier, filed a claim asserting that she sustained an injury in the performance of duty while carrying a 35-pound bag of mail on March 21, 1988. She stated that she started experiencing a burning sensation in her right shoulder and upper back near the shoulder blade. She worked the rest of that day, a Monday and continued to work full regular days until March 25, 1988. Early medical evidence indicated that, by the end of appellant's route on March 24, 1988, her pain had increased to a stabbing electrical pain with a burning quality. On March 25, 1988 after a two- to three-hour shift, she reported that she had a sharp radiating pain down her left leg.

Cervical and lumbar spine x-rays obtained on May 10, 1988 and a bone scan obtained on May 13, 1988 were reported to be normal and negative. A magnetic resonance imaging (MRI) scan was reported on June 20, 1988 to demonstrate no lesion, especially no disc herniation.

On August 25, 1988 Dr. Guillermo Garcia, a Board-certified orthopedic surgeon and appellant's attending physician, reported that appellant was improved "and altogether she is by far better." He felt that appellant could return to a light-duty job, 40 hours a week, with a minimal amount of bending, stooping, twisting of the back, lifting up to 5 pounds and occasionally 10 pounds and no reaching overhead. On October 20, 1988 Dr. Garcia reported that he felt that appellant had reached the point of maximum recovery. He stated: "I feel that a final disability rating of [five] percent and permanent of the body as a whole is indicated. I feel that she can go back to work with no reaching above the head and lifting up to 25 pounds, occasionally 50 [pounds]. No further return appointment is given." On November 2, 1988 Dr. Garcia reported that this condition was permanent in nature.

Noting the limitations placed upon appellant by Dr. Garcia and by an employing establishment contract physician, the employing establishment advised that it was clear that appellant was incapable of fulfilling the essential job requirements of her position and that modifications could not reasonably be made to allow accommodation.

On July 15, 1990 Dr. Daniel D. Zimmerman, an Office medical director specializing in internal medicine, reported that he had reviewed the statement of accepted facts and the case file. He stated that the diagnosis supported by credible medical sources in this case was cervicothoracic strain/sprain, which was causally related to the type of job-related activities appellant was performing as a postal delivery person. "No other more serious diagnosis can be considered," he stated, "as she has had extensive diagnostic assessment including [an] MRI [scan]…." Dr. Zimmerman discounted the diagnosis of subluxations given by appellant's chiropractor and explained that if subluxations were truly present they would have been noted in her other diagnostic assessments. On the issue of resulting disability Dr. Zimmerman reported as follows: "At most, she would have required absence from work for this condition of no more than a week to 10 days. In fact, in my opinion, she could have been treated with physical therapy modalities and nonsteroidal anti-inflammatory medications and continued her work at least in a light-duty capacity."

On December 31, 1990 the Office noted Dr. Zimmerman's opinion but gave weight to appellant's attending physician, Dr. Garcia, who had treated her. The Office accepted appellant's claim for the condition of cervicothoracic strain. Appellant received continuation of pay through May 11, 1988 and received compensation for temporary total disability through July 29, 1988.[1]

Appellant came under the care of Dr. Wm. Kevin Bailey, a Board-certified specialist in physical medicine and rehabilitation. Dr. Bailey examined appellant on November 8, 1991 and made the following positive finding on physical examination: some decreased flexibility of the cervical spine with only 30 degrees extension before complaints of pain; some difficulty with right shoulder abduction greater than approximately 110 degrees; diffuse tenderness about the cervical spine on the right and posterior lateral right shoulder. He noted break away type muscle strength on the right with difficulty complaining of increased pain. X-rays of the cervical spine showed loss of the normal lordosis but otherwise well-maintained alignment and disc space without particular degenerative changes other than slight kissing of the joints of Luschka diffusely. Dr. Bailey diagnosed chronic cervical strain with perhaps very early degenerative changes of the cervical spine and reported as follows:

> "Basically, I feel that the patient is at maximum medical improvement with a rather remote injury back in 1988. She has previously been given a permanent … impairment of 5 percent. I do not have all of her previous work-up, but apparently it has been largely nonsurgical in nature with only some mild degenerative changes. She has previously been given the above permanent partial impairment and I will not change this at this time. I do feel that she is

[1] The record indicates that appellant had requested retirement benefits, but on January 10, 1992 she elected workers' compensation benefits effective July 30, 1988.

> employable, although she may have some difficulty with rapid alternating movements of the right upper extremity or overhead activities as well as heavy lifting with the right upper extremity greater than approximately 20 pounds occasionally and 10 pounds more frequently. Perhaps a functional capacity evaluation would better delineate her limitations. Do note, the patient is working at this time, although she does have complaints of pain.[2] I do not feel that further work up is necessary at this time and she will continue to work as she is at the present."

Responding to an Office request for an updated medical opinion, Dr. Bailey reported on May 7, 1993 appellant's basic history and complaints. He stated that she "basically looks exactly the same as previously." On physical examination Dr. Bailey also reported that appellant looked exactly the same as previously: "She has some exaggerated pain behaviors. She forward flexes the neck only to 30 degrees, but extends it to 45 with 45 degrees lateral rotation to either side and once again with exaggerated pain behaviors with each movement. She has functional active range of motion of bilateral upper extremities, normal neuromuscular examination, sensation grossly intact, deep tendon reflexes 2+ and symmetric and some mild rhomboid tenderness on deep palpation in the interscapular area and to a lesser extent the paraspinal musculature of the cervical spine." Dr. Bailey reported that x-rays of the cervical spine showed reversal of the normal lordosis but otherwise only a mild kissing of the joints of Luschka. He diagnosed cervical and thoracic strain and offered the following discussion:

> "I see no point in changing this person's impairment rating, although objectively I would imagine that she has very minimal findings and I typically would not give an impairment. However, since she has had it for 10 years I will keep her at 5 percent and I see little point of going through any further work-up or need for further physical therapy, etc. However, I also do not feel that this patient is unemployable, nor do I feel that she is truly disabled from working. At minimum I think she can lift 40 pounds occasional, 20 pounds more frequently and essentially doing any other activities short of that, although she complains with any simple activity such as 'cross stitching.'"

On August 2, 1993 Dr. Zimmerman reported as follows:

> "The claimant has long since recovered from the March 21, 1988 injury. This is amply displayed in the thorough report from Dr. Bailey dated November 8, 1991 and subsequent input dated May 7, 1993 in which Dr. Bailey specifically reports that this claimant is exaggerating her alleged dysfunction. She had normal plane [sic] film x-rays as read by Dr. Garcia and has even had a negative MRI [scan]. Her findings are exclusively subjective. She has no diagnostically positive signs and of course her diagnostic testing, particularly the MRI [scan], has been negative."

[2] The record indicates that appellant provided help in the mailroom at Johnson Bible College from October to December 9, 1991.

The Office found a conflict in medical opinion between Dr. Zimmerman and Dr. Bailey and referred appellant, together with a statement of accepted facts and the case file, to Dr. Wallace D. Holderman, a Board-certified orthopedic surgeon, for resolution of the conflict.

In a report dated September 22, 1993, Dr. Holderman related that appellant complained of constant pain in the back of her neck, twinges to the right side of her neck, an inability to turn her head, running pain to the back of her right upper arm. These symptoms, appellant reported, were aggravated by pushing, use of the upper extremities or raising her arms overhead. Dr. Holderman related appellant's history of injury and reviewed the early medical evidence. Findings on examination that day included restricted mobility of the cervical spine in all planes with rotation about 30 degrees bilaterally, flexion to 20 degrees, extension to 30 degrees, side bend to about 20 degrees bilaterally with complaints of discomfort at the extremes of all movement. Elevation of the right shoulder was restricted to about 160 degrees, otherwise there was full mobility of both shoulders. Dr. Holderman reported a point of tenderness at the midline of the cervicothoracic junction and at the superior angle of the scapula bilaterally, more pronounced on the right. He reported his diagnostic impression as possible fibromyalgia syndrome, presumably triggered by work activity and stated: "I would concur with Dr. Garcia's conclusions that the patient has reached maximum recovery with 5 percent permanent … loss of function of the body as a whole and lifting restrictions of 25 pounds, occasionally 50 [pounds] with no repetitive reaching overhead."

The Office requested a supplemental report from Dr. Holderman providing more precise information about appellant's condition and its relationship to her work. Upon learning that Dr. Holderman had retired, the Office referred appellant, together with a statement of accepted facts and the case file, to Dr. Ely Bartal, a Board-certified orthopedic surgeon, to resolve the conflict between Dr. Zimmerman and Dr. Bailey.

In a report dated April 8, 1994, Dr. Bartal related a reasonably accurate history of injury given by appellant and described her medical course. Appellant's complaints included constant numbness at the base of the skull on the right, going down to about the shoulder blade, also a stabbing pain in the right upper arm, which was not constant. Appellant reported tingling sometimes in the tips of her index and middle fingers on the right. She had tingling in the left index finger on the day of the examination and intermittent numbness just above the elbow. Appellant reported days of tolerable pain but never any pain-free days. She stated that she usually did better in the morning and as the day progressed so did the pain. Appellant stated that she could lift only about six pounds before she has pain. She stated that she was definitely better, but sometimes the pain awakened her at night. She stated that the pain increased with lifting overhead, doing any overhead work, pulling, pushing, lifting greater than 6 pounds and sitting longer than 30 minutes. Appellant complained of neck pain essentially on the right side of the mid cervical and lower cervical area, also in the right interscapular area. Appellant also complained of pain over the deltoid and over the lateral aspect of the right triceps and the right lateral aspect of the elbow.

Dr. Bartal stated that he had reviewed the reports of Dr. Garcia and the early diagnostic tests, as well as current x-rays. Findings on examination included a global relative weakness on the right; pain to light touch of the cervical and interscapular region essentially on the right;

weaker grip on the right; weaker flexion of the elbow; weaker extension of the wrist; weaker abduction of the elbow. Dr. Bartal described the range of motion of the cervical spine as excellent. Because of the global weakness and decrease of sensation, he stated that he would like to order nerve conduction studies and an electromyogram (EMG) before giving his final opinion. He noted, however, that nerve conduction studies and an EMG of the upper extremity on April 4, 1994 were interpreted as being normal. Dr. Bartal concluded as follows:

> "We are dealing with a 35-year-old female with a workman's comp[ensation] injury which occurred March 21, 1988 involving her cervical spine. She has received numerous treatments and seen numerous doctors. I do not have any objective abnormal findings on my exam[ination]. I do have a normal cervical spine x-ray, normal MRI [scan], normal nerve conduction study and unremarkable EMG.
>
> "In my opinion I think that [appellant] does not have any residual disability due to the March 21, 1988 work injury. I do feel that she has reached maximum medical improvement. I do not have any diagnosis for any of the remaining work restricted conditions due to the March 21, 1988 injury."

The Office requested that Dr. Bartal address when appellant recovered from her injury of March 21, 1988. Dr. Bartal responded with a supplemental report dated June 20, 1994, which stated: "I believe that [appellant] recovered from her injury of March 21, 1988 about six months after she sustained her injury."

The Office requested that Dr. Bartal provide his reasons for this opinion. On July 11, 1994 Dr. Bartal responded: "I do believe six months after the neck injury [appellant] sustained she should have reached maximum medical improvement. I understand her injury was [o]n March 21, 1988."

In a third request for clarification, the Office noted that Dr. Bartal had first stated that appellant had recovered about six months after the injury and was now stating that she should have reached maximum medical improvement within six months. "We need you to explain medically why you believe [appellant] recovered from her injury about [six] months after the injury," the Office advised.

On September 16, 1994 Dr. Bartal replied as follows:

> "As stated in my previous letter of July 11, 1994, that six months after the neck injury [appellant] sustained she should have reached maximum medical improvement and this injury occurred on March 21, 1988.
>
> "I reviewed my records and she has normal x-rays and this is based on the history of the injury. There is no sign of degenerative disc disease as of 1994. There is no sign of any disc or any impingement syndrome, therefore most likely than not we are dealing in 1988 with a mild cervical sprain with no detachment of ligament of the cervical spine as this would have created degenerative disc disease and arthritis of the cervical spine."

On November 10, 1994 the Office issued a notice of proposed termination of compensation. In a decision dated December 13, 1994, the Office terminated appellant's compensation effective that day on the grounds that the weight of the medical evidence indicated that she had recovered from the effects of her March 21, 1988 injury by September 21, 1988. The Office found that the opinion of referee medical specialist, Dr. Bartal, constituted the weight of the medical evidence.

At a hearing held on June 21, 1995, appellant submitted a report dated June 21, 1995 from Dr. Victoria M. Moots, an osteopath specializing in gynecology. Dr. Moots explained that Dr. Bailey's x-ray findings of May 7, 1993, showing reversal of the normal lordosis, was an indication of underlying muscle spasm but does n[o]t indicate etiology. Because a recent x-ray showed persistent loss of normal cervical curvature, she explained, the problem had become chronic. "Myofascitis due to previous injury is the most likely cause," she stated. Dr. Moots reported that it was her feeling that appellant's condition began at the time of the work injury and had developed into a chronic problem that would prevent her from working as a letter carrier.[3] "This chronic condition," she stated, "is evidenced by persistent muscle spasm seen on x-ray." Dr. Moots also explained that it was impossible to diagnose fibromyalgia by x-ray: "Fibromyalgia affects the muscles, not the bones. It is detected clinically by finding 'trigger points' (areas of tenderness) in the muscles by palpation with the hands."

In a decision dated September 29, 1995, an Office hearing representative affirmed the termination of appellant's compensation benefits. He found that the weight of the medical evidence clearly resided with the opinions of Dr. Zimmerman and the thorough and well-rationalized medical report submitted by Dr. Bartal.

The Board finds that the Office improperly terminated appellant's medical benefits.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to his or 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.[5]

The Office found that a conflict in medical opinion existed between Dr. Bailey, appellant's attending physician, and Dr. Zimmerman, the Office medical director. Dr. Bailey diagnosed chronic cervical strain and, later, cervical and thoracic strain. He reported that appellant had reached maximum medical improvement, that she was employable within certain restrictions and that, notwithstanding very minimal objective findings, he saw no point in changing Dr. Garcia's long-standing rating of a five percent permanent impairment of the body

[3] On November 8, 1993 Dr. Moots reported that appellant's diagnosis was chronic pain syndrome secondary to cervical strain following a work-related injury of March 21, 1988.

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

[5] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

as a whole. Dr. Zimmerman disagreed. Noting that appellant's complaints were exclusively subjective with no positive diagnostic tests and that she was exaggerating her dysfunction, Dr. Zimmerman reported that appellant had long since recovered from her March 21, 1988 employment injury.

Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[6]

The Office referred appellant to Dr. Holderman to resolve the conflict. Dr. Holderman reported his diagnostic impression as possible fibromyalgia syndrome, presumably triggered by work activity and concurred with the rating of five percent permanent loss of function of the body of the whole and physical restrictions.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question.[7] Unless this procedure is carried out by the Office, the intent of 5 U.S.C. § 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[8]

Given the uncertainty with which Dr. Holderman expressed his diagnostic impression and his failure to provide a well-reasoned opinion on the relationship of this condition to the employment injury of March 21, 1988, the Office properly sought clarification. When it discovered that clarification would not be forthcoming because of Dr. Holderman's retirement, the Office properly referred appellant to another referee specialist, Dr. Bartal, to resolve the conflict in medical evidence.

Dr. Bartal's opinion, however, is insufficient to establish that medical residuals of appellant's accepted employment injury have ceased. Dr. Bartal first reported on April 8, 1994 that appellant had reached maximum medical improvement. This is a term of art that implies the

[6] 5 U.S.C. § 8123(a).

[7] *See Nathan L. Harrell*, 41 ECAB 402 (1990).

[8] *Harold Travis*, 30 ECAB 1071 (1979).

existence of a medical condition that is well stabilized and not expected to improve.[9] He offered no diagnosis, however. It is unclear whether he was withholding his final opinion on appellant's diagnosis pending current nerve conduction studies and an EMG scan, as he appeared to report, or whether he meant to suggest that the absence of objective abnormal findings and negative diagnostic tests showed that appellant had no diagnosed condition. The Office sought clarification. Bringing to Dr. Bartal's attention that he had stated that appellant currently did not have any "residual" of her injury of March 21, 1988 (in fact, he stated that appellant had no residual disability) the Office asked when did he feel that appellant recovered from the injury. Dr. Bartal replied that he believed that appellant recovered about six months after she sustained her injury. When the Office asked for reasons, however, Dr. Bartal reported on July 11, 1994 that he believed appellant should have reached maximum medical improvement six months after the injury, once again raising the implication that appellant's medical condition was not resolved but only well stabilized and not expected to improve. The Office recognized this contradiction and sought clarification for a third time. The Office advised Dr. Bartal that he at one point stated that appellant had recovered from her injury in about six months and that he was now stating that appellant should have reached maximum medical improvement six months after the injury. In a request that could be interpreted as leading, the Office advised: "We need you to explain medically why you believe [appellant] recovered from her injury about six months after the injury." In his final report, Dr. Bartal did not state that appellant had recovered from her injury. Rather, he expressly reasserted his previous statement of July 11, 1994 that appellant should have reached maximum medical improvement six months after her March 21, 1998 injury. He went on to indicate that most likely appellant's injury in 1988 was a mild cervical sprain, as diagnostic studies showed nothing more serious.

Thus, Dr. Bartal's opinion on the question of medical residuals appears consistent with the opinions given years earlier by Dr. Garcia, who reported seven months after the injury that appellant had reached maximum medical improvement, that her condition was permanent in nature and that she could work with restrictions. Dr. Bailey, who acknowledged that appellant had very minimal findings, also reported that she had reached maximum medical improvement and could work with restrictions. And though Dr. Holderman was unavailable to provide a supplemental report to resolve the conflict in this case, he, too, supported that appellant had reached maximum medical improvement. Because Dr. Bartal's reports do not clearly explain when, if at all, medical residuals of appellant's accepted cervicothoracic strain resolved, the Board finds that the Office has not met its burden of proof to justify the termination of appellant's medical benefits.

The Board also finds that the Office properly terminated appellant's monetary compensation for disability effective December 13, 1994.

There is no question concerning Dr. Bartal's opinion on the issue of disability for work. He clearly stated that appellant had no residual disability due to the March 21, 1988 work injury, that he had no objective abnormal findings on examination and that he had a normal cervical

[9] *See Orlando Vivens*, 42 ECAB 303 (1991) (a schedule award is not payable until maximum improvement of the claimant's condition has been reached; maximum medical improvement means that the physical condition of the injured member of the body has stabilized and will not improve further).

spine x-ray, normal MRI scan, normal nerve conduction study and an unremarkable EMG. The Office provided Dr. Bartal with a statement of accepted facts to serve as a reference for his opinion and the statement of accepted facts contained a description of the physical demands of appellant's date-of-injury position. Because his opinion in the issue of disability for work is unequivocal and appears to be well supported by his findings on examination and because this opinion does not appear inconsistent with earlier reports of minimal findings and decreasing restrictions, the Board finds that the Office has discharged its burden of proof to terminate monetary compensation for disability effective December 13, 1994.

The September 29, 1995 decision of the Office of Workers' Compensation Programs is affirmed on the issue of disability for work and is reversed on the issue of continuing medical residuals.

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

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member