U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of HELEN M. HIPSHER and U.S. POSTAL SERVICE,
POST OFFICE, Denver, Colo.

Docket No. 97-244; Submitted on the Record;
Issued November 18, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective March 4, 1995, as she no longer had residuals of an accepted December 24, 1979 left hip and thigh strain with aggravation of a preexisting pelvic fracture as of that date; and (2) whether the Office abused its discretion under section 8128(a) of the Federal Employees' Compensation Act by refusing to reopen appellant's case for a merit review.

The Office accepted that on December 24, 1979, appellant, then a 37-year-old clerk, sustained a left hip and thigh strain, and aggravation of a preexisting pelvic fracture when she slipped and fell on an icy sidewalk.[1] Following intermittent light duty from January to March 1980, appellant resigned on May 2, 1980. She then received compensation for temporary total disability.

Appellant submitted reports from 1980 through 1982 from Dr. Richard A. Bell, an attending neurologist, relating her symptoms of low back pain radiating into the left thigh, and finding her disabled for work. In a July 20, 1983 report, an Office medical adviser reviewed the medical record and opined that appellant no longer had residuals of the December 24,

[1] The record indicates that appellant sustained a pelvic fracture in a nonoccupational motor vehicle accident on April 6, 1978.

1979 injury.[2] By April 12, 1985 decision, the Office reduced appellant's wage-loss compensation based on her ability to perform the selected position of telephone solicitor.[3] In affidavits of earnings and employment dated from May 19, 1987 to June 26, 1994, appellant noted working for four hours per day, five days a week from January through April of each year as an income tax preparer.[4]

In an August 14, 1987 report, Dr. Bell noted that appellant was able to "drive well," but required continued pain medication. In a December 24, 1987 report, Dr. Bell noted that appellant remained active, "playing her organ … at some nursing homes, but moving the portable organ around is sometimes aggravating to her back…." In a November 16, 1989 report, Dr. Bell recommended a pain clinic to improve appellant's posture and muscle tone.

In a December 15, 1989 report, Dr. Timothy O. Hall, an attending Board-certified physiatrist, noted a history of injury and treatment, and reviewed December 7, 1989 x-rays and a computed tomography (CT) scan showing a mild bulge at L4-5 and L5-S1, with moderate degenerative changes. On examination, he found tenderness and trigger points in the rhomboids, paraspinals, gluteals and piriformis especially on the left, with "reproduction of … pain in the anterior thigh and radiating into the foot," weakness in internal and external rotation of the left hip, and a positive left straight leg raising test. Dr. Hall diagnosed myofascial pain syndrome with current exacerbation, and piriformis syndrome, and attributed appellant's left leg symptoms to significant lumbar, gluteal and piriformis spasms. He submitted progress reports from January 1990 to December 1993 noting appellant's continuing symptoms, and continued to prescribe medications.

In a July 24, 1991 report, Dr. Bell commented that appellant had "no evidence of any new or different neurologic difficulty," following two "hard" falls while on vacation that month, landing on her left buttock and low back. He continued to note appellant's chronic lumbar and left buttock pain through 1993, stating in a December 30, 1993 report that appellant continued to show no signs of "definite neurologic deficit."[5]

In a March 25, 1994 report, Dr. Robert E. Carlton, a Board-certified orthopedic surgeon and second opinion physician, found slightly increased dorsal kyphosis and lumbar lordosis, slight lumbar tenderness without spasm or restricted motion, normal muscle mass and neurologic

[2] The Office advised appellant of this finding by October 7, 1983 letter. The record also indicates that appellant was not cooperative with vocational rehabilitation efforts in 1983 and 1984.

[3] Following a September 12, 1985 oral hearing, by decision dated January 23, 1986 and finalized January 24, 1986, an Office hearing representative affirmed the Office's determination of appellant's wage-earning capacity and remanded the case for further development regarding reimbursement of certain medical expenses.

[4] In affidavits of earnings and employment dated May 19, 1987, May 26, 1988, May 26, 1989, May 28, 1990, May 30, 1991, July 2, 1992 and June 2, 1993, appellant noted working from January to approximately April 15th of each year as a part-time income tax preparer, working approximately 20 hours per week. In a June 26, 1994 affidavit of earnings and employment, appellant noted earning $7.20 per hour from January 3 to April 15, 1994 working four hours per day as an income tax preparer.

[5] Dr. Hall prescribed a hot tub for appellant in December 1993.

findings of the lower extremities, and "significant localized tenderness over the left greater trochanter." Dr. Carlton reviewed January 3, 1994 magnetic resonance imaging (MRI) findings indicative of degenerative changes at L4-S1. He diagnosed left hip and lower back pain "secondary to trochanteric bursitis" and degenerative disc disease which he opined were unrelated to the December 24, 1979 injury. Dr. Carlton stated that appellant had reached maximum medical improvement and could work eight hours a day with no restrictions attributable to the accepted conditions.

By notice dated April 21, 1994, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that any disability resulting from the December 24, 1979 injury had ceased, based on Dr. Carlton's report. Appellant responded by May 19, 1994 letter, alleging that his report was inaccurate, and that she remained unable to work due to the accepted injuries. She submitted additional medical evidence.

In a May 6, 1994 report, Dr. Bell found an "essentially normal" straight leg raising test, normal strength and reflexes in both legs, lumbar tenderness to palpation, and no "specific evidence of a neurogenic problem.…" He indicated that appellant might be capable of part-time light-duty work.

In a May 16, 1994 report, Dr. Hall found appellant disabled for work due to "chronic myofascial pain and piriformis syndrome as well as degenerative changes in the lumbar spine," with "tender points throughout the … lumbar paraspinal, superior gluteal, piriformis and semimembranosus muscles. Neurologically, she is intact."

By decision dated February 14, 1995, the Office terminated appellant's compensation effective March 4, 1995 on the grounds that her work-related disability had ceased as of that date. The Office found that Dr. Bell did not make objective findings related to the accepted conditions, and that Dr. Hall attributed appellant's condition to nonaccepted chronic myofascial pain syndrome, piriformis syndrome and lumbar degenerative disc disease. The Office noted that appellant's objections to Dr. Carlton were not dispositive.

Appellant disagreed with this decision, and in a March 10, 1995 letter, requested a hearing before a representative of the Office's Branch of Hearings and Review. At the October 19, 1995 hearing, appellant noted that she could not drive long distances and required prescription pain medication for pain unchanged since February 1985. Appellant asserted that Dr. Carlton did not perform a complete examination, was semi-retired and only performing insurance examinations and had no surgical privileges at Denver area hospitals. She submitted two additional reports from Dr. Hall.

In a March 7, 1995 report, Dr. Hall diagnosed a "chronic myofascial pain problem, predominantly involving the left upper back," with trigger points through the supraspinatus, rhomboid, gluteal and piriformis musculature. In an October 12, 1995 report, he noted that appellant's symptoms from myofascial pain syndrome had varied over time, and fluctuated with activity level. He opined that due to the December 24, 1979 injury, appellant was unable to work since he began treating her in December 1989.

By decision dated April 29, 1996 and finalized April 30, 1996, the Office affirmed the February 14, 1995 decision, finding that appellant had not established that her claimed medical conditions on and after March 4, 1995 were causally related to the accepted December 24, 1979 injuries. The hearing representative noted that Dr. Hall's March 7 and October 12, 1995 reports attributed to appellant's condition to nonaccepted diagnoses, and contained insufficient rationale explaining a causal relationship. The hearing representative found that Drs. Bell's and Hall's reports were "insufficient to establish continuing injury-related disability." The Office found that the weight of the medical evidence rested with Dr. Carlton.

Appellant disagreed with this decision, and requested reconsideration in a June 18, 1996 letter through her attorney. Appellant enclosed a May 23, 1996 report from Dr. Bell and a June 17, 1996 report from Dr. Hall.[6]

In a May 23, 1996 report, Dr. Bell opined that appellant "continue[d] to have a chronic pain syndrome related to an on-the-job injury in 1979," evidenced by back and left buttock pain, and a suspected radiculopathy not confirmed by objective findings. Dr. Bell stated that appellant's physical condition had "not changed over the past several years" limiting her housekeeping and recreational activities. Dr. Bell commented that appellant had a "very limited work capability," with standing and sitting limited to 45 minutes at a time, no heavy lifting and no repeated bending.

In a June 17, 1996 report, Dr. Hall opined that appellant's chronic myofascial pain syndrome "stems from a slip and fall in December 1978," complicating injuries sustained in an April 1978 nonoccupational car accident, and rendering her unable to work.

By decision dated July 10, 1996, the Office denied reconsideration on the grounds that the evidence submitted in support thereof was cumulative, and therefore insufficient to warrant a review of the prior decision. The Office found that Dr. Bell's May 23, 1996 report and Dr. Hall's June 17, 1996 reports were repetitive of medical opinion previously of record, and attributed appellant's medical condition to nonaccepted diagnoses.

Regarding the first issue, the Board finds that appellant has not established that her medical condition on and after March 4, 1995 is causally related to an accepted December 24, 1979 as she no longer had residuals of an accepted left hip and thigh strain and aggravation of a preexisting pelvic fracture as of that date.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.[7]

[6] Appellant's attorney originally submitted Dr. Bell's May 23, 1996 report on June 12, 1996. In a June 17, 1996 letter, the Office advised appellant's attorney that "Dr. Bell's report contain[e]d no new objective findings, and actually admits that there are none, which precludes payment of compensation."

[7] *Jason C. Armstrong*, 40 ECAB 907 (1989).

In terminating compensation in this case, the Office relied on the opinion of Dr. Carlton, a Board-certified orthopedic surgeon and second opinion physician, who submitted a March 25, 1994 report explaining how and why appellant's symptoms of lumbar pain radiating into the left thigh were attributable to trochanteric bursitis and degenerative lumbar disc disease, both unrelated to the December 24, 1979 injury. Dr. Carlton made no physical findings of residuals attributable to the accepted December 24, 1979 left thigh strain and aggravation of the preexisting pelvic fracture. Dr. Carlton's report was based on the complete medical record and a statement of accepted facts, as well as a thorough clinical examination. His opinion is thus entitled to the weight of the medical evidence.

Dr. Carlton's opinion is consistent with that of appellant's treating physicians, Dr. Bell, a neurologist, and Dr. Hall, a Board-certified physiatrist. Both Drs. Bell and Hall did not attribute appellant's condition on and after March 4, 1995 to the December 24, 1979 injury, but to other, nonaccepted diagnoses.

Dr. Hall began treating appellant in December 1989, 10 years after the December 24, 1979 left thigh strain and aggravation of nonoccupational pelvic fracture occurred. He opined in his initial December 15, 1989 report that appellant's symptoms of left-sided lumbar pain radiating into the left thigh were caused by myofascial pain syndrome and piriformis syndrome, with degenerative lumbar disc disease. The Board notes that the Office did not accept myofascial pain syndrome, piriformis syndrome or degenerative lumbar disc disease as related to the December 24, 1979 injury, or other employment factors. Yet, Dr. Hall reiterated these diagnoses in a May 16, 1994 report, finding appellant neurologically intact. He again repeated these nonoccupational diagnoses in March 7 and October 12, 1995 and June 17, 1996 reports, concluding that appellant's chronic myofascial pain syndrome originated with the December 24, 1979 injury. However, Dr. Hall submitted insufficient medical rationale explaining how and why the accepted injury would continue to cause or aggravate any medical condition on and after March 4, 1995. Thus, his reports are of greatly diminished probative value, and are insufficient to raise a conflict of medical opinion with that of Dr. Carlton.[8]

Dr. Bell began treating appellant in 1980, submitting periodic reports through 1995 finding appellant disabled for work due to left-sided lumbar pain with radiation into the left lower extremity, although he observed few abnormal clinical findings. He noted in an August 14, 1987 report that appellant was able to "drive well," and in a December 24, 1987 report that appellant remained active, transporting an organ to and from nursing homes where she entertained, even though this aggravated her back. Dr. Bell opined in a July 24, 1991 report that appellant had no "new or different neurologic difficulty" after two "hard" falls while on vacation that month, clarifying in a December 30, 1993 report that appellant exhibited no "definite neurologic deficit." He stated again in a May 6, 1994 report that appellant had no "specific evidence of a neurogenic problem."

Dr. Bell again concluded in a May 23, 1996 report that appellant's pain syndrome was related to the December 24, 1979 injury, but did not provide sufficient medical rationale explaining how and why the December 24, 1979 injury would continue to cause or aggravate any

[8] *Lucrecia M. Nielsen,* 42 ECAB 583 (1992).

medical condition on and after March 4, 1995. Again, the Office has not accepted a pain syndrome as related to the December 24, 1979 injury or other factors of appellant's federal employment. Therefore, Dr. Bell attributed appellant's condition on and after March 4, 1995 to a nonoccupational chronic pain syndrome, and found no evidence of neurologic abnormalities on and after March 4, 1995. These findings are actually very similar to those of Dr. Carlton and therefore do not create a conflict of medical opinion.

Consequently, the Office has met its burden of proof in terminating appellant's compensation effective March 4, 1995, as the weight of the medical evidence establishes that residuals of the accepted left hip and thigh strains with aggravation of a preexisting pelvic fracture had ceased as of that date.[9]

Regarding the second issue, the Board finds that the Office did not abuse its discretion by denying appellant's request for a merit review.

To require the Office to open a case for reconsideration, section 10.138(b)(1) of Title 20 of the Code of Federal Regulations provides in relevant part that a claimant may obtain review of the merits of the claim by written request to the Office identifying the decision and the specific issue(s) within the decision which the claimant wishes the Office to reconsider and the reasons why the decision should be changed and by:

"(i) Showing that the Office erroneously applied or interpreted a point of law, or

"(ii) Advancing a point of law or fact not previously considered by the Office, or

"(iii) Submitting relevant and pertinent evidence not previously considered by the Office."[10]

Section 10.328(b)(2) provides that any application for review of the merits of the claim which does not meet at least one of the requirements listed in paragraphs (b)(1)(i) through (iii) of this section will be denied by the Office without review of the merits of the claim.[11]

In support of appellant's June 18, 1996 request for a merit review, she submitted a May 23, 1996 report from Dr. Bell and a June 17, 1996 report from Dr. Hall. Dr. Bell stated that appellant's chronic pain syndrome was related to the December 24, 1979 fall, and that appellant remained disabled for work. In a June 17, 1996 report, Dr. Hall opined that appellant remained disabled for work due to chronic myofascial pain syndrome "from a slip and fall in December 1978." The Board finds that these two reports are repetitive of opinions previously of

[9] The Board notes that the record clearly indicates that appellant was not totally disabled for work as early as April 12, 1985, when the Office determined that appellant was medically able to perform the selected position of telephone solicitor. Appellant herself admitted on affidavits of earnings and employment from May 19, 1987 through June 26, 1994 that she worked four hours per day, five days per week from January to April 15th of each year as an income tax preparer.

[10] 20 C.F.R. § 10.138(b)(1).

[11] 20 C.F.R. § 10.138(b)(2).

record by these physicians. Therefore, the reports do not constitute relevant and pertinent evidence not considered by the Office.

Additionally, the two reports and appellant's June 18, 1996 letter, do not show that the Office erroneously applied or interpreted a point of law, or advance a point of law or fact not previously considered by the Office. The Board finds that the Office properly exercised its discretion in conducting a limited review of the evidence submitted, and afterward properly denied appellant's June 18, 1996 request for a merit review.

The decisions of the Office of Workers' Compensation Programs dated July 10, 1996, and dated April 29, 1996 and finalized April 30, 1996, are hereby affirmed.

Dated, Washington, D.C.
November 18, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member