U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CLAUDETTE L. DODDS and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Chicago, IL

Docket No. 99-491; Submitted on the Record;
Issued December 29, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

The Board has duly reviewed the case on appeal and finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Appellant, a teleservice representative, filed a claim on July 27, 1991 alleging on that date she injured her right hip, right side of her back and sustained pain down her right leg in an elevator accident. The Office accepted appellant's claim for a herniated disc L4-S1 and entered appellant on the periodic rolls. The Office terminated appellant's compensation benefits by decision dated July 31, 1996. Appellant requested an oral hearing and by decision dated February 7, 1997, the hearing representative vacated the Office's July 31, 1996 decision and remanded the case for reinstatement of appellant's compensation benefits. The Office proposed to terminate appellant's compensation benefits by letter dated August 7, 1997. By decision dated October 10, 1997, the Office terminated appellant's compensation benefits effective November 9, 1997. Appellant requested an oral hearing and by decision dated July 28, 1998, the hearing representative affirmed the Office's October 10, 1997 decision.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[1] 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.[2] Furthermore, the right to medical

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Id.*

benefits for an accepted condition is not limited to the period of entitlement for disability.[3] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[4]

In this case, appellant's attending physician, Dr. Per Freitag, a Board-certified orthopedic surgeon, submitted a series of reports supporting appellant's continuing disability and the need for further medical treatment. In a report dated July 11, 1996, Dr. Freitag stated that appellant sustained a herniated disc at L5, injuries to the cervical spine and a bulging disc at the thoracic level. He stated that appellant was totally disabled for any and all occupations.

The Office referred appellant for a second opinion evaluation with Dr. Julie M. Wehner, a Board-certified orthopedic surgeon. In a report dated April 11, 1997, she noted appellant's history of injury and performed a physical examination. Dr. Wehner found no atrophy and no abnormal findings of ongoing problems. She stated that appellant's herniated disc was asymptomatic and that she demonstrated multiple inconsistencies on clinical examination. Dr. Wehner concluded that appellant had a normal examination with inconsistent pain behaviors that did not signify underlying organic problems. She stated that appellant could return to regular duty with no work restrictions and that no further therapeutic or diagnostic treatment was necessary.

Section 8123(a) of the Federal Employees' Compensation Act,[5] provides, "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." As there was a conflict of medical opinion evidence between Drs. Wehner and Dr. Freitag the Office properly referred appellant for an impartial medical examination with Dr. Roberto E. Levi, a Board-certified orthopedic surgeon.

In a report dated July 17, 1997, Dr. Levi noted appellant's history of injury, performed a physical examination and reviewed the diagnostic studies. He found that appellant had no neurologic deficits, that the magnetic resonance imaging scan and lumbar myelogram revealed a very mild protrusion of a disc with no impairment of the filling of the nerve roots. Dr. Levi stated that appellant did not have lumbar radiculopathy, that she was in condition to return to work and that she did not need any treatment with regard to the lumbar radiculopathy.

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[6]

[3] *Furman G. Peake,* 41 ECAB 361, 364 (1990).

[4] *Id.*

[5] 5 U.S.C. §§ 8101-8193, 8123(a).

[6] *Nathan L. Harrell,* 41 ECAB 401, 407 (1990).

In this case, Dr. Levi's report was based on a proper factual background and he supported his conclusions that appellant had no disability or residuals with physical findings. He reviewed the history of injury and the medical evidence of record as well as reporting his findings physical examination and review of the diagnostic studies. Dr. Levi concluded that there were no physical problems related to her employment injury that prevented appellant from returning to work. Therefore, the Office properly relied on Dr. Levi's report to terminate appellant's compensation benefits.

Following the Office's October 10, 1997 decision, appellant submitted additional reports from Dr. Freitag. On December 26, 1997 he stated that the diagnostic testing spoke for itself and that a myelogram in 1997 revealed a ventral extra dural defect at L4-5. Dr. Freitag also stated, "[A]s to the permanency of these injuries it is obvious that an injury to the disc in the cervical and lumbar region is indeed a permanent problem which will have its own natural history. The persistence of the pain is indeed a disabling condition and definitely related to the June 1991 injury." In a report dated May 19, 1998, Dr. Freitag diagnosed carpal tunnel syndrome and stated that a physical examination revealed positive straight leg raising on the left. He again stated that appellant had a herniated lumbar disc and a bulging cervical disc. Dr. Freitag stated that these conditions were permanent and gradually progressive. He stated that appellant was disabled because she could not sit, stand, walk, shift, push, pull or bend for any length of time.

Dr. Freitag's reports did not offer any medical reasoning in support of his conclusions. He does not discuss the divergent findings on physical examination as documented by both Drs. Levi and Wehner. Furthermore, Dr. Freitag does not explain why he believes that appellant's herniated disc was severe enough to cause her pain in contradiction of Dr. Levi's findings. As Dr. Freitag was on one side of the conflict that Dr. Levi resolved, the additional report from Dr. Freitag is insufficient to overcome the weight accorded Dr. Levi's report or to create a new conflict with it.[7]

Appellant also submitted evidence and testimony from Dr. Allen Buresz, a chiropractor. Section 8101(2) of the Act[8] provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated by x-ray to exist. Dr. Buresz did not diagnose a subluxation of the spine as demonstrated on his x-rays. Therefore he is not a physician for the purposes of the Act and his reports and testimony do not constitute medical evidence. Likewise the report from appellant's massage therapist is not considered to be medical evidence and has no probative value in overcoming the weight of the medical evidence as represented by the well-rationalized medical report of Dr. Levi.[9]

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[7] *Dorothy Sidwell,* 41 ECAB 857, 874 (1990).

[8] 5 U.S.C. §§ 8101-8193, 8101(2).

[9] Following the July 28, 1998 decision of the Office, appellant submitted additional evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review it for the first time on appeal. 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated July 28, 1998 is hereby affirmed.

Dated, Washington, D.C.
December 29, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member