

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEVERLY S. RHEINGOLD and GENERAL SERVICES
ADMINISTRATION, PUBLIC BUILDINGS SERVICE,
Washington, D.C.

*Docket No. 97-858; Submitted on the Record;
Issued February 25, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant no longer suffered from any residuals from her accepted employment injury.

On November 12, 1985 appellant, then a 48-year-old computer equipment analyst, filed a notice of traumatic injury and claim for continuation of pay/compensation (Form CA-1) alleging that she tore ligaments in her lower back when she bent over while sitting to pick up a paper on the floor on November 1, 1985. The Office accepted the claim for lumbosacral sprain and subluxation. Appellant returned to work on January 15, 1986 for a few hours when she stopped work. She returned to work in May 1986 and filed a recurrence of disability on October 15, 1987. Appellant worked intermittently until October 28, 1988 and then worked continuously until January 7, 1990 when she stopped work. She was placed on the automatic disability roll and received compensation from January 7, 1990 through December 11, 1993.

In a note dated June 4, 1993, Dr. V. Paul Kater, appellant's attending physician noted that he had treated appellant since August 8, 1991, provided a description of his treatment and appellant's subjective complaints. Dr. Kater opined that appellant was totally disabled for working either part time or full time.

In a June 25, 1993 letter, the Office referred appellant, the medical record and a statement of accepted facts to Dr. Eric C. Yu, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation.

In a report dated July 13, 1993, Dr. Frederick W. Close, a Board-certified orthopedic surgeon, based upon a review of the medical records, history of appellant's employment injury, and physical examination, diagnosed chronic postural ligamentous strain of the cervical, dorsal and lumbar spines, early facet arthritis of the lumbar spine, postural low back pain and mild

protective muscle spasm lumbar spine. Dr. Close opined that he found “insufficient objective evidence to support a very limited work activity” and noted that appellant may have had difficulty performing repetitive very heavy lifting activities.

By report dated July 8, 1993, Dr. Linda Folden, appellant’s treating chiropractor, stated she had “reviewed her past medical records and past and current x-rays, and found her signs and symptoms to be consistent with her work-related back injury. Dr. Folden diagnosed work-related traumatic L4-5 disc herniation with sciatic radiculopathy, post-traumatic chronic lumbosacral strain, post-traumatic chronic cervical strain and post-traumatic arthritic degeneration. She also opined that appellant was totally disabled for either part-time or full-time work due to the November 1, 1985 employment injury.

In a report dated August 31, 1993, Dr. Yu provided a history of injury and treatment, described appellant’s duties as a computer specialist, reviewed x-ray interpretations, magnetic resonance imaging (MRI) scans, bone scans and medical records, and related her subjective complaints. He opined that appellant’s back and neck pain were secondary to her underlying degenerative disease of the cervical and thoracic spine which were unrelated to her employment injury. Dr. Yu stated that appellant’s subjective complaints were out of proportion to the objective findings. He opined that appellant’s aggravation was temporary and that her current complaints were due to her history of underlying degenerative disease of her lumbar spine.

By notice dated October 20, 1993, the Office advised appellant that it proposed to terminate her compensation for wage loss and medical benefits as any disability resulting from the November 1, 1985 injury had ceased, based upon the August 31, 1993 report of Dr. Yu. The Office also explained the deficiencies in the report of Dr. Close.

In a November 5, 1993 report, Dr. Kent L. Pomeroy, Board-certified in physical medicine and rehabilitation, based upon the history of appellant’s injury, physical examination and medical history related by appellant, opined that appellant was totally disabled and suffering from residuals of her November 1, 1985 employment injury. Dr. Pomeroy noted that appellant had provided him with medical documents from previous physicians, but stated “I will dictate this report in my own opinion before reviewing those so that I can form my own opinion without influence of the other doctors.”

By decision dated November 26, 1993, the Office terminated appellant’s compensation for wage loss and medical benefits effective December 12, 1993 on the grounds that the residuals of the accepted November 1, 1985 injury had cease by that date. The Office found that the weight of the evidence rested with Dr. Yu, who did not find objective evidence of a work-related disability. The Office found Dr. Pomeroy’s opinion to be entitled to diminished weight as it was speculative and unrationalized as it was not based on objective evidence and because he did not consider appellant’s degenerative disc disease in reaching his opinion.

In a letter dated December 26, 1993, appellant requested an oral hearing before a hearing representative. Appellant submitted her statement regarding the progression and effects of her injury, reports dated November 5, 1993 and March 11, 1994 by Dr. Pomeroy, his curriculum vitae and a March 23, 1994 report by Dr. Hermine Muellerleile, a registered nurse and chiropractor.

In his March 11, 1994 report, Dr. Pomeroy, based upon a January 31, 1994 physical examination, a review of the medical reports, including Dr. Yu's report, x-ray interpretations, computerized tomography (CT) scans and MRI scans, opined that appellant was suffering from cervical, thoracic and lumbosacral sprains as well as degenerative arthritis of the low back. Dr. Pomeroy noted:

“Dr. Yu implies that degeneration and arthritis of the facet joints must have been present prior to the work-related injury. If that is true, then her condition has only been made worse by the injury. Spurs and facet joint arthritis changes will begin to occur on x-ray eight months after an injury. *Incompetent lumbar disc at L4-5 and L5-S1* are evident by CT scan and MRI scan as well as x-rays and have been *protruding or bulging* at one time or another. It is evident that the discs at L4-5 and L5-S1 have been injured, are incompetent and will always produce a weak *failed low back condition*.” (Emphasis in the original.)

Dr. Pomeroy opined that appellant “will not recover her ability to return to full or part[-]time work” and was unable to perform the duties of her prior position.

In a March 23, 1994 report, Dr. Muellerleile diagnosed chronic post-traumatic work-related L4-5 disc herniation, post-traumatic chronic lumbosacral strain, post-traumatic chronic cervical strain, cervicocranial syndrome -- moderate and myofascitis of cervicothoracic and lumbar spine. Dr. Muellerleile opined that appellant was totally disabled due to her accepted employment injury.

By decision dated and finalized November 18, 1994, the Office hearing representative found that the Office terminated compensation based on the report of Dr. Yu. The hearing representative found Dr. Muellerleile, as a chiropractor, could not be considered a physician under the Federal Employees' Compensation Act as she had not diagnosed a subluxation by x-ray and therefore her report had no probative value. The hearing representative found a conflict of medical opinion between Dr. Yu, for the government, and Dr. Pomeroy, for appellant, was created following the termination of benefits as Dr. Pomeroy attributed appellant's continuing and disabling low back condition to the November 1, 1985 injury, and provided supporting medical rationale. The case was remanded to the Office for selection of an impartial medical examiner to resolve the conflict.

By letter dated February 9, 1995, the Office referred appellant to Dr. James C. Nauman, a Board-certified orthopedic surgeon, along with a statement of accepted facts and medical records, to resolve the conflict in the medical opinion evidence.

In a March 6, 1995 report, Dr. Nauman opined, based upon a review of the objective evidence, medical reports, history of the injury and physical examination, diagnosed status post

apparent cervical/thoracic/lumbosacral strain due to her November 1, 1985 employment injury and mild degenerative changes. He then stated:

“The question, of course, relates to the etiology as to time and it is difficult for me to state that the 1985 injury had anything to do with the subjective complaints from an orthopedic point of view. The injury in 1985 just cannot be conceived of as a significant traumatic event in my opinion. In addition, there is no question that the patient does have some degenerative osteoarthritis.”

By decision dated March 20, 1995, the Office found that appellant’s disability had ceased no later than December 12, 1993 based upon the report of Dr. Nauman, the impartial medical examiner, chosen to resolve the conflict in the medical opinion evidence.

In a letter dated April 14, 1995, appellant requested a hearing before an Office hearings representative.

In a February 14, 1996 report, Dr. Pomeroy opined that appellant was totally disabled due to her employment injury.

By decision dated April 25, 1996, the hearing representative set aside the March 20, 1995 Office decision as the hearing representative found that Dr. Nauman provided no medical rationale to support his conclusion that appellant was no longer totally disabled due to her accepted employment injury. The hearing representative instructed the Office on remand to refer appellant to another impartial medical examiner if Dr. Nauman was unable to or unwilling to correct the deficiencies in his report.

By letter dated May 23, 1996, the Office requested clarification from Dr. Nauman. In response to the Office’s May 23, 1996 request, he on May 30, 1996 noted that appellant had temporary symptoms which were expected to subside or resolve in a limited period. Dr. Nauman also indicated that he had “no information that leads me to state there has been a significant ‘aggravation’ secondary to the accident.”

The Office noted in a memorandum to file dated July 12, 1996 that Dr. Nauman’s response was insufficient to resolve or clarify his position and that another impartial medical examiner must be selected to resolve the issue, as directed by the hearings representative.

In a report dated August 16, 1996, Dr. Boris Stojic, a Board-certified orthopedic surgeon, selected by the Office to resolve the conflict in the evidence and based upon a statement of accepted facts, history of the employment injury, review of the medical records and objective evidence diagnosed cervical spondylosis, mild degenerative disease, thoracic spine, lumbar spondylosis, and status post lumbosacral sprain, strain and chronic pain, neck, thoracic and lumbosacral spine. Dr. Stojic noted that the objective evidence was normal and that there was a possibility that the employment injury aggravated a preexisting condition. Dr. Stojic stated that “considering the minimal degenerative changes, as per diagnostic studies and particularly the normal bone scan, the possible aggravation was of a temporary nature with no residual structural alteration of the underlying condition.” Dr. Stojic stated that he agreed with Dr. Yu that appellant’s condition including the possible aggravation of a preexisting condition was of a

temporary nature and that appellant's current complaints were due to the natural progression of a preexisting condition.

By decision dated September 23, 1996, the Office found the evidence of record established that appellant was no longer disabled or suffered from residuals causally related to her November 1, 1985 employment injury.

In the present case, the Office met its burden of proof to terminate appellant's compensation based on the report of Dr. Stojic. Following the November 26, 1993 termination decision, appellant submitted medical evidence from Dr. Pomeroy, which the Office hearing representative found created a conflict under section 8123. As the Office met its burden of proof to terminate compensation, the burden for reinstating benefits shifted to appellant to establish continuing employment-related disability.¹

Section 8123(a) of the Act provides, in pertinent 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."² In this case, the Office properly referred appellant to an impartial medical specialist in order to resolve the conflict in medical opinion.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.³

In the instant case, the Office referred appellant to Dr. Stojic when Dr. Nauman, the physician originally selected to resolve the conflict in the medical opinion evidence between Dr. Yu, the Office second opinion physician, and Dr. Pomeroy, appellant's treating physician, as to whether appellant suffered from any residual disability from her accepted November 1, 1985 employment injury, failed to clarify his original response. Dr. Stojic opined that appellant did not suffer from any residual disability from her accepted employment injury and supported his opinion by the objective evidence and medical rationale.

The Board finds that the thorough and well-rationalized opinion of the impartial medical specialist Dr. Stojic, which was based upon a complete and accurate factual background, is entitled to be accorded special weight and that the Office properly determined, based upon Dr. Stojic's report, that appellant had no residual disability causally related to her accepted November 1, 1985 employment injury as of the date of his impartial examination on August 16, 1996.

¹ See *Gary R. Sieber*, 46 ECAB 215 (1994).

² 5 U.S.C. § 8123(a); see *James P. Roberts*, 31 ECAB 1010 (1980).

³ *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986); *James P. Roberts*, *supra* note 2.

The decision of the Office of Workers' Compensation Programs dated September 23, 1996 is hereby affirmed.

Dated, Washington, D.C.
February 25, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member