U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SELETTE R. WILKINS and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, N.J.

Docket No. 97-407; Submitted on the Record;
Issued January 5, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation on the grounds that she has no continuing disability resulting from the accepted work injury.

The Board has carefully reviewed the record and finds that the Office met its burden of proof in terminating appellant's disability compensation.

Under the Federal Employees' Compensation Act,[1] when employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[2] When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased,[3] even if the employee is medically disqualified to continue employment because of the effect work factors may have on the underlying condition.[4]

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of compensation.[5] Thus, after the Office determines that an employee has disability causally related to his or her employment, the Office may not terminate

[1] 5 U.S.C. §§ 8101-8193. (1974).

[2] *Richard T. DeVito*, 39 ECAB 668, 673 (1988); *Leroy R. Rupp*, 34 ECAB 427, 430 (1982).

[3] *Ann E. Kernander*, 37 ECAB 305, 310 (1986); *James L. Hearn*, 29 ECAB 278, 287 (1978).

[4] *John Watkins*, 47 ECAB ___ (Docket No. 94-1615, issued May 17, 1996); *Marion Thornton*, 46 ECAB 899, 906 (1995).

[5] *William Kandel*, 43 ECAB 1011, 1020 (1992).

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.[6]

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 remains with the Office to demonstrate a cessation of employment-related disability in the period subsequent to the date when compensation is terminated or modified.[7] The Office burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

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.[9] 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.[10]

In this case, appellant's claim, filed on July 23, 1992, was accepted for cervical whiplash and lumbar strain after her postal vehicle was struck from behind while waiting at an intersection.[11] Following extensive physical therapy and conservative treatment, the Office referred appellant to Dr. Frederick George, a Board-certified orthopedic surgeon, for an impartial medical examination. Based on his April 21, 1995 report, the Office issued a notice of proposed termination of compensation on August 23, 1995.

On October 4, 1995 the Office terminated appellant's compensation and medical benefits, effective October 15, 1995, on the grounds that the evidence established that appellant had no continuing disability resulting from the accepted work injury. The Office noted that the August 22, 1995 report from appellant's attending physician, Dr. Larry S. Deutsch, a Board-certified orthopedic surgeon, repeated prior reports of a herniated disc at C5-6 and an electromyogram (EMG) showing C6 radiculopathy and was insufficient to refute Dr. George's opinion.

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[6] *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

[7] *Dawn Sweazey*, 44 ECAB 824, 832 (1993).

[8] *Mary Lou Barragy*, 46 ECAB 781, 787 (1995).

[9] *Connie Johns*, 44 ECAB 560, 570 (1993).

[10] *Gary R. Sieber*, 46 ECAB 215, 223 (1994).

[11] Appellant received continuation of pay until September 4, 1992; her appointment as a causal employee expired on October 14, 1992.

Appellant timely requested a hearing, which was held on May 2, 1996. At the hearing, appellant's attorney argued that there was no conflict in the medical opinion evidence requiring referral of appellant to an impartial medical examiner. The attorney also criticized Dr. George's report as speculative and lacking in medical rationale and pointed out that the Office had ignored his request to participate in the selection of an impartial medical examiner.

On August 15, 1996 the hearing representative denied appellant's claim on the grounds that the medical evidence established that she had no disabling residuals resulting from the 1992 work incident but modified the Office's prior decision and restored appellant's medical benefits for the accepted injuries.

Initially, the Board finds that the Office properly referred appellant for an impartial medical examination.[12] The conflict of medical opinion occurred when two physicians, Dr. Hillard C. Sharf, Board-certified in internal medicine and neurology, to whom the Office had referred appellant for a second opinion evaluation and Dr. Elliott L. Ames, an osteopathic practitioner, opined that appellant could return to full duty and Drs. Stuart G. Dubowitch, an osteopathic practitioner, and Marc L. Kahn, a Board-certified orthopedic surgeon, suggested that appellant was capable only of light-duty work.

Dr. Scharf examined appellant on October 25, 1994, noting that appellant exited her vehicle under her own power on the day of the accident and was able to continue working. He diagnosed cervical and lumbar strain, but found no neurological evidence of cervical radiculopathy. Dr. Scharf concluded that appellant was not disabled and "could clearly engage in useful activity that did not require frequent lifting, bending or stooping." He added that he would not expect further symptoms to develop because of appellant's work-related accident.

Dr. Ames examined appellant on November 4, 1994, noting that she had worn a seat belt at the time of the accident on July 21, 1992. He found that while a magnetic resonance imaging (MRI) scan suggested C5-6 herniation, there was no clinical evidence of this, and concluded that appellant had reached maximum medical improvement and "could return to the workforce in the capacity she served at the time of the accident."

By contrast, Dr. Kahn stated in an April 25, 1994 report, that appellant had sustained a permanent injury; in his September 26, 1994 report, he stated that she was permanently disabled from the 1992 incident and could not return to her mail carrier job but could do sedentary work. In his January 28, 1994 report, Dr. Dubowitch diagnosed post-traumatic cervical strain/sprain with myofascitis and lumbar bulging disc with radiculopathy. He added that appellant could return to work, "possibly in a less strenuous capacity than delivering mail." Because these physicians disagreed over appellant's work capacity, the Office properly referred her to an impartial medical examiner.[13]

[12] Section 8123(a) of the Act provides that, 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.

[13] *See Dallas E. Mopps*, 44 ECAB 454, 456 (1993) (finding that the Office properly referred the claim to an impartial medical examiner because of a conflict in the opinions of a psychiatrist and an psychologist).

The Board also finds that appellant was given the opportunity to object to the physician selected as impartial medical examiner in a letter dated April 4, 1995 in which the Office requested that appellant notify the Office immediately if she objected to the choice of Dr. George. No such objection was received by the Office. On May 1, 1995 appellant's attorney wrote to the Office stating that he was in receipt of correspondence scheduling a "second opinion" appointment with him, which appellant had kept and requesting that "in the event an impartial examination is found to be necessary," appellant be permitted to participate in the selection of the referee physician. However, the correspondence to which the attorney refers stated clearly that the examination was "to resolve a conflict in the medical evidence" and appellant had already been examined by Dr. George on April 21, 1995. Further, appellant's attorney provided no reason for requesting to participate in the selection of the impartial medical examiner. Therefore, the Board finds that appellant had notice of his status as an impartial medical examiner.[14]

Finally, the Board finds that Dr. George's opinion as impartial medical examiner is sufficient to meet the Office's burden of proof in terminating appellant's compensation. After stating an accurate history of the July 21, 1992 accident and subsequent treatment, including physical therapy three times a week, he found on physical examination a normal range of motion of the back in all planes and no muscle spasms, tenderness or atrophy. Dr. George reported normal gait and heel-toe walking as well as good handgrip strength and normal straight-leg raising.

Reviewing a normal EMG and the MRI scans, which showed a small disc herniation at C5-6 and mild bulging at L4-5, Dr. George concluded that appellant's complaints were subjective in nature and that she exhibited no objective evidence of orthopedic disability related to the July 21, 1992 accident. He added that appellant had no permanent disability from the work injury that she was able to engage in her usual activities and regular work, and that she had achieved maximum benefits from treatment but should continue with a home exercise program.

Dr. George's report is bolstered by the much earlier report of Dr. Leonard Katz, a Board-certified neurologist, to whom appellant's initial treating physician, Dr. Jamilo B. DeMoura, an orthopedic practitioner, had referred her. On October 12, 1992 three months after the accident, Dr. Katz found no evidence of injury to the central or peripheral nervous system. He stated that appellant had limited back movement, probably secondary to the work injury and some indication of a left S1 radiculopathy but no clinical findings supported that. Dr. Katz concluded that appellant's neurological examination was normal and hoped that her complaints would resolve with time.[15]

[14] *See Irene M. Williams*, 47 ECAB ___ (Docket No. 94-1831, issued May 29, 1996) (finding that appellant received actual notice of the physician's status as an impartial specialist and that the Office's failure to send a copy of the referral letter to appellant's attorney was harmless error).

[15] Dr. Milan Q. Felt, a neurological practitioner, stated in a May 3, 1994 report that appellant had sustained a post-traumatic double crush syndrome as shown by an EMG and nerve conduction studies indicating left C6 radiculopathy and left carpal tunnel syndrome. He saw appellant on June 28, 1993 and noted that she was involved in an automobile accident on July 21, 1992. He did not offer an opinion on whether appellant could work.

The medical evidence appellant submitted after the Office proposed to terminate her compensation is insufficient to detract from the probative value of Dr. George's opinion.[16] First, the treatment notes and October 17, 1995 report prepared by Dr. Deutsch did not address the issue of appellant's work capacity.[17] Similarly, the nerve conduction studies and EMG administered by Dr. Elliot B. Bodofsky, Board-certified in physical medicine and rehabilitation, fail to address the relevant issue. Therefore, the Board finds that these reports have no probative value. In fact, as the hearing representative noted, three of appellant's treating physicians, Drs. Dubowitch, Kahn and Deutsch, all opined that she was capable of returning to light-duty work.

Appellant argues on appeal that Dr. George's report is speculative because he used the phrase, "I feel" before each of his conclusions. Despite his use of this phrase, his conclusions are definite -- appellant has no residuals of the July 21, 1992 accident and is physically capable of performing her regular duties -- and are based on his clinical findings upon examination and the lack of objective evidence of any disability.

Appellant also argues that Dr. George is inconsistent in finding no disability because he diagnosed chronic cervical and lumbar strain and the tests show herniation and radiculopathy. Like complaints of pain, chronicity and symptoms are not evidence of disability.[18] Therefore, the Board rejects appellant's arguments.

[16] *See Thomas Bauer*, 46 ECAB 257, 265 (1994) (finding that the additional report from appellant's physician concerning his emotional condition was insufficient to overcome the special weight accorded to the impartial medical examiner's opinion).

[17] Dr. Deutsch related in an addendum to his October 17, 1995 report that because appellant had no symptoms prior to the July 21, 1992 accident, he felt certain that her cervical herniated disc and symptoms were causally related to the work injury. However, causal relationship was not at issue.

[18] *See John L. Clark*, 32 ECAB 1618, 1624 (1981) (finding that a medical opinion based on a claimant's complaint that he hurt too much to work, with no objective signs of disability being shown, was insufficient to establish a basis for compensation).

The August 15, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
January 5, 1999

George E. Rivers
Member

David S. Gerson
Member

Michael E. Groom
Alternate Member