U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CORRIE COURTNEY and DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND, Pensacola, Fla.

Docket No. 98-1464; Submitted on the Record;
Issued January 13, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective November 10, 1996.

On July 24, 1987 appellant sustained an injury at work when she experienced pain in her lower back after lifting landing gear weighing from 30 to 40 pounds. The Office accepted appellant's claim for temporary aggravation of a lumbosacral strain. Appellant was temporarily totally disabled from July 24, 1987 through August 28, 1987 and worked intermittently through May 21, 1990. On May 21, 1990 appellant sustained another injury to her back at work when she fell out of a chair. The Office accepted appellant's claim for a temporary aggravation of a lumbosacral strain under the same number, No. A-490901. Appellant has not worked since May 21, 1990. The Office found that the conditions of spinal stenosis, degenerative arthritis, degenerative disc disease at L3-4, L4-5 and L5-S1, hypertension, diabetes and obesity were either preexisting or concurrent nonwork-related conditions. The Office also found that an ankle surgery appellant underwent in 1989, a November 1991 left knee injury and back, knee and shoulder injuries resulting from a July 7, 1992 car accident were not work related.

Appellant submitted reports from 1987, 1989 and 1991 from her treating physicians to show that the 1987 and 1990 employment injuries permanently aggravated her back condition. In a report dated November 15, 1988, Dr. Wendell J. Newcomb, a Board-certified orthopedic surgeon, stated that he had treated appellant since May 23, 1988 and diagnosed arthritis of the low back with stenosis of the nerve roots referring pain into the legs. He stated that appellant's condition was precipitated when she was lifting aircraft landing gear parts in July 1987. He recommended that she undergo a laminectomy. In a report dated January 25, 1989, Dr. Newcomb noted that when he first treated appellant in May 1988, the x-rays and computerized axial tomography (CAT) scan revealed arthritis of the low back to such a "sufficient degree" that it was causing a partial stenosis of the nerve roots of her low back. He stated that when she lifted the heavy parts of the landing gear, *i.e.*, in her July 1987 employment injury, she strained her back and further aggravated the pain in her low back. Dr. Newcomb

opined that she could not perform her usual work and the strain superimposed on the arthritis and stenosis would probably account for 20 percent of her permanent disability.

In a report dated July 23, 1991, Dr. Stephen J. Flood, a Board-certified orthopedic surgeon, performed a physical examination, reviewed diagnostic tests and diagnosed, *inter alia*, arthritic, disc, facet changes of the lumbar spine with spinal canal stenosis at L3-4 and L4-5, degeneration and radiculitis, and internal disc disruption with subligamentous herniation. He opined that appellant had a permanent impairment of 15 to 20 percent of the lumbar spine or 15 to 20 percent of the body as a whole which, combined with a 10 percent permanent impairment of the knee, equaled an impairment of 18 to 23 percent to the body as a whole. Dr. Flood stated that the May 21, 1990 employment injury caused a permanent aggravation but the degree of disability could not be separated.

In a report dated April 5, 1993, Dr. Russell A. Hudgens, an orthopedic surgeon and a second opinion physician, considered appellant's history of injury, performed a physical examination, and reviewed the September 2, 1992 magnetic resonance imaging (MRI) scan showing degenerative joint arthrosis, degenerative disc disease and marked spinal stenosis at L3-4, L4-5 and L5-S1 and an electromyogram (EMG) and nerve conduction studies suggestive of spinal stenosis and possibly diabetes mellitus. He diagnosed, *inter alia*, chronic lumbar strain with myofascial pain, spinal stenosis and possible diabetic neuropathy. He opined that appellant was primarily suffering from spinal stenosis, that it was "likely aggravated" by her falls at work, but he did not believe the July 2, 1992 car accident aggravated her symptoms more than they were before the accident. He further opined that she could perform light-duty work as an order clerk four hours a day with sitting, standing and lifting restrictions. In a report dated May 4, 1993, in order to clarify his earlier report, Dr. Hudgens stated that appellant's condition was a temporary aggravation "meaning that the stenosis ha[d] reached the stage it would have, even if the work injury had never occurred" and that as long as appellant continued to work and performed any significant bending, standing, walking or prolonged sitting, it would be temporarily aggravated. He stated that her condition would cease permanently if she was not working but he did not expect her symptoms to cause any permanent irreversible damage if she continued to work.

In a report dated May 5, 1994, the district medical adviser opined that appellant was suffering from degenerative changes which most people have at her age, and her changes were aggravated by obesity and possibly were hereditary. He stated that appellant's condition would be the same even if she had not suffered her two injuries.

In a report dated July 8, 1994, Dr. Terrell B. Bounds, a Board-certified orthopedic surgeon and a second opinion physician, considered appellant's history of injury, performed a physical examination and reviewed the September 2, 1992 MRI scan and x-rays dated October 28, 1991 which showed disc space narrowing in the lower lumbar segments. He diagnosed spinal stenosis with radicular complaints although he also stated that appellant's complaints were highly suggestive of spinal stenosis. Dr. Bounds stated that the two employment injuries appellant sustained in 1987 and 1990 "perhaps" aggravated her condition but they did not precipitate the spinal stenosis. He stated that the spinal stenosis was "probably" a combination of congenital factors as well as degenerative changes in the lumbosacral spine.

Dr. Bounds stated that even without the 1987 or 1990 employment injuries, appellant would "more than likely" have complaints based on the underlying spinal stenosis. He stated that the residuals that appellant experience did not necessarily prevent her from physically performing her former work as a production controller, that her only complaints were radicular in nature and there were no positive physical objective findings. Dr. Bounds stated that appellant was grossly overweight, and if she were to lose weight, her symptoms would dramatically improve. He stated that appellant could perform her usual work except for prolonged sitting or standing.

In a report dated September 20, 1994, Dr. Bounds stated that he had reviewed the physical requirements of a production controller and stated that appellant could perform that work as it was within her restrictions. He noted that the job required intermittent walking and sitting for four hours and required some lifting, bending, squatting and climbing. Dr. Bounds reiterated that appellant had spinal stenosis with radicular complaints, that the spinal stenosis was a combination of congenital as well as degenerative factors, and that the condition would be present regardless of whether or not she was employed. He stated that the May 21, 1990 employment injury aggravated appellant's condition but the aggravation "probably" subsided after 6 to 12 weeks and that the "symptom complex did not subside due to the underlying condition" which was still present and explained her symptoms. Dr. Bounds reiterated that if appellant lost weight, her symptom complex would "probably" improve but not completely resolve.

In a report dated January 26, 1995, Dr. Bounds stated that appellant's present problem was the result of spinal stenosis, and was not a result of either the July 24, 1987 or May 21, 1990 lumbosacral strain. He stated that as he had stated in his September 20, 1994 letter, the July 24, 1987 and May 21, 1990 employment injuries should have resolved after 6 to 12 weeks but the symptom complex did not subside due to the underlying condition of spinal stenosis.

By decision dated October 28, 1996, the Office terminated appellant's effective November 10, 1996 stating that the weight of the medical evidence established that appellant's disability resulting from the May 21, 1990 employment injury had ceased as of that date.

In an undated letter received by the Office on November 14, 1996, appellant requested reconsideration of the decision and submitted medical reports from Dr. Troy M. Tippett, a Board-certified neurological surgeon, dated January 14, 1994 which she had previously submitted, and June 3 and August 27, 1996. Appellant also submitted a physical therapy discharge summary dated June 14, 1996 and a medical report of an emergency visit to the hospital dated May 7, 1996 from Dr. David D. Cassidy, an emergency medicine specialist. In his June 3, 1996 report, Dr. Tippett noted that he last saw appellant in 1988 and that the previous month she had an incident of the acute onset of terrible pain in her left buttock with pain, tingling and numbness radiating down her left lower extremity and into her foot. He also noted that appellant underwent many diagnostic tests including an MRI scan. Dr. Troy performed a physical examination and diagnosed probable L5 root irritation with left radicular pain, resolving. He recommended physical therapy, increased walking and weight loss.

In his August 27, 1996 progress note, Dr. Tippett stated that appellant was having recurrent pain in her lower back and down in her left leg as she had in the past and he believed that appellant was unable to work.

In his May 7, 1996 progress note, Dr. Cassidy noted appellant's symptoms of back pain and sciatica, her history of heavy lifting and moving and prescribed treatment.

By decision dated December 9, 1996, the Office denied appellant's reconsideration request.

On October 24, 1997 appellant requested reconsideration of the Office's decision and submitted additional evidence of a lumbar x-ray dated October 28, 1991 showing progressive arthritic and disc changes, facet degeneration involving the spine and lower extremity and nerve impingement, a medical report from Dr. Tippett dated October 22, 1997 and copies of published Board cases. In his October 22, 1997 report, Dr. Tippett opined that since appellant was unable to work since 1990 and had continued symptoms of pain in her back and in her left lower extremity, she was still unable to work. He stated that there was a causal relation between appellant's pain and her industrial accident, that appellant had degenerative changes in her lumbar spine preceding the accident, and that "symptomatically" her symptoms worsened after the accident. An x-ray dated October 28, 1991 showed progressive arthritic changes, facet degeneration involving the spine and lower extremity and nerve impingement.

By decision dated January 9, 1998, the Office denied modification of its prior decisions.

The Board finds that the Office has not met its burden of proof to terminate compensation benefits.

Once the Office has accepted 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.[1] The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.[2]

While an employee is entitled to compensation for periods of disability related to an aggravation to an underlying condition, established by the medical evidence, an employee is not entitled to compensation for periods of disability where the aggravation is temporary and leaves no permanent residuals.[3] This is true even though the employee is found medically disqualified to continue in such employment because of the effect that the employment factors might have on the underlying condition; under such circumstances, the employee's disqualification for continued employment is due to the underlying condition without any contribution by the employment.[4]

[1] *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

[2] *Larry Warner*, 43 ECAB 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[3] *Marion Thornton*, 46 ECAB 899, 906 (1995); *Newton Ky Chung*, 39 ECAB 919, 927-28 (1988).

[4] *Id.*

Some of the medical evidence appellant submitted is not probative. The June 14, 1996 discharge summary by a physical therapist is not probative because a physical therapist is not a physician within the meaning of the Federal Employees' Compensation Act.[5] The report of Dr. Cassidy, an emergency medicine specialist, dated May 7, 1996 is not probative because it does not address causation.

A conflict exists, however, between the medical opinions of appellant's treating physicians, Dr. Newcomb, Flood and Tippett, that appellant's back condition was permanently aggravated by either the July 27, 1987 or the May 21, 1990 employment injury or both and the opinions of the district medical adviser and the referral physicians, Dr. Hudgens and Dr. Bounds, that appellant sustained no permanent aggravation to her back due to those employment injuries. In his November 15, 1988 report, Dr. Newcomb, a Board-certified orthopedic surgeon, opined that appellant had preexisting arthritis and stenosis, that the July 1987 employment injury strained her back and further precipitated the pain in her low back, and stated that the strain would probably account for 20 percent of her permanent disability. In his July 23, 1991 report, Dr. Flood, a Board-certified orthopedic surgeon, stated that the May 21, 1990 employment injury caused a permanent aggravation of appellant's disability and attributed 15 to 20 percent of appellant's permanent disability to her spine. Although Dr. Tippett, a Board-certified neurological surgeon, did not address causation in his May 7, June 3 and August 28, 1996 reports, in his October 22, 1997 report Dr. Tippett opined that after the May 1990 employment injury appellant's symptoms symptomatically worsened and that there was a causal relationship between appellant's pain and her industrial accident.

In contrast, in his April 5, 1993, Dr. Hudgens, an orthopedic surgeon, diagnosed, in part, chronic lumbar strain with myofascial pain, spinal stenosis and possible diabetic neuropathy. He opined that appellant was primarily suffering from spinal stenosis and that it was "likely aggravated" by her falls at work. In his May 4, 1993 report, Dr. Hudgens stated that appellant's aggravation was temporary and that the stenosis would have progressed to its current stage even if appellant's work injury had not occurred. In his May 5, 1994 opinion, the district medical adviser opined that appellant was suffering from degenerative changes which most people have at her age, and her changes were aggravated by obesity and possibly were hereditary. He stated that appellant's condition would be the same even if she had not suffered her two employment injuries.

The opinion of Dr. Bounds, a Board-certified orthopedic surgeon, is not sufficiently rationalized to establish that appellant's 1987 and 1990 employment injuries did not permanently aggravate her back condition. Dr. Bounds' July 8, 1994 report, which is his only narrative report, is replete with speculative statements. For example, Dr. Bounds' stated that appellant's complaints were "highly suggestive" of spinal stenosis. He stated that appellant's 1987 and 1990 employment injuries "perhaps" aggravated her condition but did not precipitate the spinal stenosis. Further, Dr. Bounds stated that appellant's spinal stenosis was "probably" a combination of congenital factors as well as degenerative changes in the lumbosacral spine. He stated that even without the 1987 or 1990 employment injuries, appellant would "more than

[5] *See* 5 U.S.C. § 8101(2); *Jerre R. Rinehart*, 45 ECAB 518, 520 (1994); *Barbara J. William*, 40 ECAB 649, 657 (1988).

likely" have complaints based on the underlying spinal stenosis. Dr. Bounds also stated that the residuals appellant experienced "did not necessarily" prevent her from performing her former work as a production controller. He stated that there were no positive physical findings although the diagnostic tests clearly were positive. A speculative report is of diminished probative value as to whether appellant's current condition is work related.[6] In his subsequent reports dated September 20, 1994 and January 26, 1995, Dr. Bounds reiterated his earlier findings without examining appellant and, in one instance, he was still speculative. For instance, in his September 20, 1994 report, Dr. Bounds stated that the May 21, 1990 employment injury aggravated appellant's condition but the aggravation "probably" subsided after 6 to 12 weeks but the "symptom complex did not subside due to the underlying condition." It is not clear what Dr. Bounds means by the symptom complex and whether it includes appellant's work-related lumbosacral strain. He also is not definite about the aggravation subsiding. In his January 26, 1995 opinion, Dr. Bounds conclusively stated that appellant's present problem was the result of spinal stenosis and not the result of either the 1987 or 1990 lumbosacral strain employment injuries but he does not explain what made him become definite in his opinion. Due to the conflict in the evidence between appellant's treating physicians and the district medical adviser and the second opinion physicians of record as to whether appellant's back condition was permanently aggravated by her 1987 and 1990 employment injuries, the Office has not met its burden to terminate benefits.

The decision of the Office of Workers' Compensation Programs dated January 9, 1998 is hereby reversed.

Dated, Washington, D.C.
January 13, 1999

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

[6] *See William S. Wright*, 45 ECAB 498, 504 (1994).