

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GRACE T. LEVANDI and DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE, Holtsville, N.Y.

*Docket No. 98-2525; Submitted on the Record;
Issued July 8, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits on June 11, 1997; and (2) whether the Office abused its discretion in denying merit review of the claim on June 24, 1998.

In the present case, the Office accepted that appellant, a clerk-typist, sustained a contusion and strain of the low back as a result of a slip and fall on November 10, 1987. She stopped work on November 12, 1987 and did not return. The Office terminated appellant's compensation benefits by decision dated June 11, 1997 and denied modification of the prior decision on March 9, 1998. The Office denied merit review of the claim on June 24, 1998.

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 disabling condition has ceased or that it is no longer related to the employment.¹

The Board finds that the Office met its burden of proof in this case.

In the present case, the medical evidence of record substantiates that appellant sought continued medical care over the years from Dr. Kevin G. Vesey, a Board-certified orthopedic surgeon. Dr. Vesey submitted a number of form reports to the record entitled "attending doctor's report" wherein he would note a continued diagnosis of lumbosacral strain. On August 1, 1990 he reported that appellant continued with lumbosacral strain and that because of her back problem she now had some mild chondromalacia patella, of the left side. Dr. Vesey continued to report appellant's diagnosis as lumbosacral strain and chondromalacia of the left patella until September 1992. The Office did not accept the left patella condition as causally related to appellant's accepted employment injury. On September 25, 1992 in form reports, he stated that

¹ *Patricia A. Keller*, 45 ECAB 278 (1993).

appellant's diagnosis was degenerative disc disease L4-5, L3-4 and cervical strain. However, Dr. Vesey reverted to the diagnoses of lumbosacral strain and chondromalacia of the left patella, during numerous reports in the latter months of 1992 and during 1993. On October 15, 1993 he again stated diagnoses of degenerative disc disease L4-5 and cervical strain. On January 18, 1995 Dr. Vesey stated appellant's diagnoses as sciatica, and herniated disc of the cervical spine. On February 22, 1995 he stated a diagnosis of lumbar radiculopathy and on April 5, 1995 he diagnosed lumbosacral sciatica, and lumbosacral herniated disc. Dr. Vesey thereafter submitted a number of reports wherein he indicated he was treating appellant for lumbosacral strain and sciatica. As Dr. Vesey did not offer any medical explanation as to whether the newly diagnosed conditions were caused by the accepted employment injury, the Office did not accept any other conditions as causally related to the employment injury.

On February 20, 1997 the Office referred appellant to Dr. Edmund Stewart, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the extent of appellant's continuing employment-related disability. In a report dated March 19, 1997, Dr. Stewart reviewed appellant's history of injury and history of medical treatment. He concluded that appellant's diagnoses were status post lumbosacral sprain, degenerative disc disease and degenerative arthritis of the lumbosacral spine. Regarding the issue of continuing disability, Dr. Stewart explained that he could not find any objective evidence of any orthopedic disability in either appellant's cervical or lumbosacral spine which he could relate to her November 10, 1987 injury. He stated that appellant only had mild disability due to her lumbosacral degenerative disc and degenerative arthritis. Dr. Stewart explained that in his opinion that fall appellant sustained on November 10, 1987 would have led to a temporary aggravation of her underlying degenerative disc and degenerative arthritis, which would have reached maximum medical improvement at least by nine months following the injury. Finally, Dr. Stewart stated that appellant could return to full-time regular work as a clerk/typist.

On April 28, 1997 the Office issued a notice of proposed termination of compensation wherein it advised appellant that it was recommended that compensation and medical benefits be terminated on the grounds that Dr. Stewart's reported represented the weight of the medical evidence of record and established that appellant had no continuing disability. Appellant was advised that if she disagreed with the proposed action she should submit additional evidence or argument within 30 days.

The Office thereafter received a May 5, 1997 report from Dr. Vesey. In this report he stated appellant's diagnoses as cervical and lumbar sprain. Dr. Vesey stated that appellant subjectively stated that she had a great deal of pain. He concluded that based upon appellant subjective complaints appellant was still disabled due to her work-related injury.

On June 11, 1997 the Office terminated appellant's compensation benefits on the grounds that the weight of the medical evidence of record established that her injury-related disability and the need for any further injury-related medical care had ceased.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits. As Dr. Vesey, appellant's treating physician, had submitted reports to the record for many years indicating that appellant was totally disabled due to subjective complaints, and as he had not identified any objective findings substituting continuation of the accepted conditions of lumbar contusion and strain or offered any medical rationale explaining how his subsequent diagnoses were causally related to the accepted injury, the Office properly

referred appellant to Dr. Stewart for a second opinion evaluation. Dr. Stewart reviewed the entire medical record, examined appellant and thereafter concluded that while the accepted employment injury may have caused a temporary aggravation of appellant's underlying degenerative disc condition, there was no objective evidence of any orthopedic disability in either appellant's lumbar or cervical spine. As Dr. Vesey's reports in general, and his May 1997 report in specific, merely recited appellant's complaints but offered no medical explanation as to whether appellant had residuals of the accepted medical conditions, causing continued disability, the Office properly concluded that his report was of little probative value. The Office properly determined that Dr. Stewart's report, which was based upon a proper factual background and was well rationalized, constituted the weight of the medical evidence, under the circumstances of this case. The Board has held that in assessing medical opinion evidence, the weight to be accorded such medical evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of 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 are factors which enter into this evaluation.² The Office therefore met its burden of proof on June 11, 1997 to terminate appellant's compensation benefits on the grounds that Dr. Stewart's report constituted the weight of the medical evidence.

On June 25, 1997 Dr. Vesey prepared a narrative medical report in which he diagnosed bulging degenerative disc at L3-4, L4-5 and chronic cervical ligament strain. He opined that appellant was "absolutely unable to perform any kind of work-related tasks in an office environment or otherwise." Dr. Vesey explained that appellant's lumbosacral spine x-ray of 1987 showed minimal diffuse anterior hypertrophic spurs, which were not at all indicative of degenerative arthritis. He stated that degenerative arthritis of the lumbar spine typically occurs in the intervertebral spaces and along the posterior facet joints, but interspaces, pedical lamina and sinuous processes were normal, indicating that appellant had an otherwise normal bony architecture at the time of injury and that degenerative changes were brought on and exacerbated by trauma. He also noted that magnetic resonance imaging scan performed in 1988 indicated that appellant had degenerative disc disease at L3-4 and L4-5 with bulging of the annuli.

The Office thereafter determined that this report from Dr. Vesey was of probative medical value. The Office thereafter found that Drs. Vesey's and Stewart's reports were now clearly in conflict as to whether appellant had any residuals of the accepted employment injury which caused continuing disability. The Office thus referred appellant to Dr. Richard S. Goodman, a Board-certified orthopedic surgeon, for an impartial medical evaluation. 5 U.S.C. § 8123(a) 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.

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

² *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

³ *Harrison Combs, Jr.*, 45 ECAB 716 (1994).

In his report dated February 24, 1998, Dr. Goodman reviewed appellant's history of injury and history of medical treatment. He reviewed the November 10, 1987 radiology report and the December 21, 1987 note from Dr. Vesey regarding appellant's lumbosacral spine x-ray examination; as well as Dr. Kuchta's February 27, 1988 magnetic resonance imaging (MRI) scan and a January 9, 1989 progress note from appellant's treating physician which also noted appellant's MRI findings. Dr. Goodman concluded that based upon his physical examination of appellant and his evaluation of the medical record, that appellant's November 10, 1987 slip and fall caused a contusion which should have resolved on the date of injury. He stated that there was no evidence in the entire record that appellant sustained any organic disease or had any organic findings caused by the November 10, 1987 injury. Dr. Goodman opined that appellant had no evidence of any significant job-related condition and could return to her former occupation at any time. He stated that the only factor which had delayed appellant's recovery was her continuing alleged symptoms; but Dr. Goodman concluded that appellant was not disabled.

The Board concludes that Dr. Goodman's opinion that appellant no longer had residuals of the accepted employment injury was based upon the proper history of injury, a thorough review of the medical evidence of record and appellant's current physical examination. His report was based on a proper factual and medical background, was well rationalized and must be given special weight. On appeal appellant's representative alleges that Dr. Goodman's report is of no probative value because it was based upon an incomplete medical history and that Dr. Goodman's opinions were erroneous because he disagreed with the interpretation of appellant's x-ray and MRI examination proffered by Dr. Vesey. Dr. Goodman's report does demonstrate a complete knowledge of appellant's medical history, including review of appellant's x-ray and MRI scans. While appellant's representative disagrees with Dr. Goodman's conclusion that there is no evidence of organic disease or of any current disability causally related to the accepted injury, appellant's representative is essentially substituting his own judgment for that of the physician. The Board also notes that while Dr. Vesey in his June 25, 1997 report gave great importance to appellant's x-ray and MRI findings in concluding that appellant's 1987 and 1988 diagnoses were degenerative disc disease and bulging of the annuli, causally related to appellant's employment injury, the Board notes that Dr. Vesey's conclusions in this regard were inconsistent with the many reports he submitted to the record from 1988, which essentially stated diagnoses of lumbar strain, and did not match the diagnoses stated in the June 25, 1997 report.

As Dr. Goodman's report resolved the conflict in the medical opinion evidence and as his report as that of the impartial medical specialist is entitled to special weight, the Office properly denied modification of the prior decision on March 9, 1998.

On May 7, 1998 appellant's representative requested reconsideration, with a brief in support thereof, and submitted an additional medical report from Dr. Vesey dated February 24, 1998.

The Office's regulations at 20 C.F.R. § 10.138(b)(1) provide that a claimant may obtain a review of the merits of his or her claim by showing that the Office erroneously applied or interpreted a point of law, by advancing a point of law or fact not previously considered by the Office, or by submitting relevant and pertinent evidence not previously considered by the Office. Section 10.138(b)(2) provides that when an application for review of the merits of a claim does

not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.⁴

In his February 24, 1998 report Dr. Vesey again, as in his June 25, 1997 report, diagnosed bulging degenerative disc, L3-4 and L4-5, and chronic cervical ligament strain. Dr. Vesey again concluded that these conditions were causally related to the employment injury and caused appellant continuing disability. The Board finds that this report from Dr. Vesey did not provide any new findings was duplicative of his June 25, 1997 report. The Board has held that evidence which repeats or duplicates evidence already in the record has no evidentiary value and constitutes no basis for reopening a case.⁵

Appellant's representative also submitted arguments in support of his request for reconsideration. Her representative alleged that the Office did not properly terminate appellant's compensation benefits on June 11, 1997 based upon the report of Dr. Stewart and that the Office on March 9, 1998 improperly failed to reinstate appellant's compensation benefits to the date of termination of benefits.

While a reopening of a case may be predicated solely on a legal premise not previously considered, such reopening for further review of the merits is not required where the legal contention does not have a reasonable color of validity.⁶ In arguing that the Office did not meet its burden of proof to terminate compensation on June 11, 1997, appellant's representative argues that a conflict existed on June 11, 1997 between Drs. Vesey and Stewart; however, appellant's representative also argues that no conflict existed in the medical opinion evidence at the time appellant was referred to Dr. Goodman. As previously explained in this decision, the medical reports submitted by Dr. Vesey through June 11, 1997, the date the Office terminated benefits were of limited probative value. Only on June 25, 1997 did Dr. Vesey prepare a report which was of sufficient probative value to create a conflict in the medical opinion evidence. Therefore as of June 11, 1997, Dr. Stewart's report did constitute the weight of the medical opinion evidence. After the Office received Dr. Vesey's June 25, 1997 report a conflict existed in the medical opinion evidence, which the Office resolved through referral to Dr. Goodman, an impartial medical specialist. Appellant's representative's arguments on reconsideration regarding the weight of the medical evidence are not based on a proper factual background, are not internally consistent, and lack reasonable color of validity.

Appellant's representative also alleged that on March 9, 1998 the Office improperly failed to reinstate appellant's benefits to June 11, 1997. This argument also lacks color of validity. The Office would be required to reinstate benefits if a termination of compensation is vacated. In this case, the Office met its burden of proof to terminate compensation benefits on June 11, 1997. The Office did subsequently undertake further development of the medical evidence. The Office denied modification of the prior decision on March 9, 1998. At no time, however, was the termination of compensation benefits vacated. Appellant was not entitled to any further compensation benefits after the termination of compensation on June 11, 1997.

⁴ 20 C.F.R. § 10.138(b)(2); *Norman W. Hanson*, 45 ECAB 430 (1994).

⁵ *Saundra B. Williams*, 46 ECAB 546 (1995).

⁶ *Nora Favors*, 43 ECAB 403 (1992).

As appellant's request for reconsideration did not meet the requirements of 20 C.F.R. § 10.138, the Office did not abuse its discretion in denying merit review on June 24, 1998.

The decisions of the Office of Workers' Compensation Programs dated June 24 and March 9, 1998 are hereby affirmed.

Dated, Washington, D.C.
July 8, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member