

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ARVISE J. PHENIOUS and GOVERNMENT PRINTING OFFICE,
EMPLOYEE RELATIONS, Washington, D.C.

*Docket No. 96-2411; Submitted on the Record;
Issued March 2, 1999*

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation as of October 2, 1995.

This case has been before the Board on three prior occasions. By decision and order dated June 17, 1983, the Board found that the weight of the medical evidence established that appellant's employment-related lumbosacral strain resolved by August 5, 1980 and that she had no employment-related disability after that date.¹ By decision and order dated August 8, 1989, the Board found there was a conflict of medical opinion on the issue of whether appellant's degenerative disc disease was causally related to her January 19, 1978 and June 4, 1979 employment injuries. The Board remanded the case to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate medical specialist for a reasoned opinion.²

On August 7, 1991 the Office referred appellant, the case record and a statement of facts to Dr. Francis P. Milone, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion. In a report dated August 26, 1991, Dr. Milone discussed his findings on examination and concluded that the aggravation of appellant's back symptoms was temporary and should have resolved satisfactorily within a period of two months and that there was no permanency of disability attributable to the degenerative disc. Dr. Milone stated that the diagnosis of degenerative disc disease was such that appellant might have had some degenerative changes in her lumbar spine but that the myelogram and magnetic resonance imaging (MRI) scan did not confirm this diagnosis. Dr. Milone advised that appellant could return to work, that she should undergo a psychiatric evaluation and should be placed initially on light duty upon her return to work.

¹ 34 ECAB 1209 (1983).

² Docket No. 89-437.

In decisions dated October 3, 1991 and January 26, 1993, the Office denied appellant's requests for reconsideration, finding that the evidence submitted was not sufficient to establish that her degenerative disc disease was causally related to her employment injuries.

By decision and order dated May 16, 1994, the Board vacated and remanded the Office's January 26, 1993 decision, finding that Dr. Milone's August 26, 1991 report was not sufficient to resolve the conflict of medical opinion. The Board stated that Dr. Milone's opinion was not well rationalized because it was apparently based on his statement that appellant's May 29, 1987 MRI did not confirm that appellant had degenerative changes in her lumbar spine. The Board stated that Dr. Milone's interpretation of the MRI was contrary to those of Dr. Michael A. Proctor, an orthopedic surgeon and appellant's treating physician, and Dr. John L. Sherman, the Board-certified radiologist, who performed the MRI on May 29, 1987, and that, therefore, he was to provide further explanation of his disagreement with these interpretations. The Board further stated that the conflict of medical opinion was not over whether appellant had degenerative disc disease, which was essentially uncontested, but whether this condition was causally related to her employment injuries. The Board found that Dr. Milone failed to provide adequate rationale for his conclusion that the aggravation of appellant's degenerative disc disease had ended, and made no attempt to reconcile this statement with appellant's symptoms. The case was referred back to Dr. Milone for a supplemental report.

Dr. Milone submitted a supplemental report dated July 15, 1994, in which he stated, "As I interpret my report of the independent medical evaluation of ... [appellant], I did state there were degenerative changes in the lumbar spine.... There was no abnormality in the alignment of the vertebrae but there was narrowing of the lumbosacral disc space. This narrowing of the disc space is indicative of degenerative changes in the lumbar spine. I also noted [appellant] had arthritic changes in the facets, which also is indicative of arthritic changes in the lumbar spine." Dr. Milone reiterated that his interpretation of appellant's MRI was that there was no evidence of any disc herniation, and that he had diagnosed low back syndrome, satisfactorily treated, with mild degenerative changes in the lumbar spine. Dr. Milone then commented that, "[t]herefore, I am not in disagreement with the interpretation of [the other two physicians of record] regarding degenerative changes to the lumbar spine or disc space levels. I indicated there was evidence of a degenerated disc by the very fact that [appellant] had some narrowing of the lumbosacral disc space, which existed in the year 1980. My interpretation, therefore, was that this was a preexisting condition." Dr. Milone noted, "I did indicate there was degenerative disc disease and it was aggravated. My reason for saying it was aggravated is that this is a condition which existed in 1980. The study ... showed no change in the myelogram compared to that of 1980, and, therefore, since [appellant] had no evidence of neurologic deficit or neuropathy on the basis of the [electromyograph] EMG examination, there was no permanent exacerbation of a discogenic abnormality. She had been treated by conservative modalities which were satisfactory in resolving her symptomatology."

By letter dated September 1, 1994, the Office advised appellant that her claim had been accepted for temporary aggravation of degenerative disc disease at L5-S1, resolved.

In a letter dated September 11, 1994, the Office contacted Dr. Milone and asked him to clarify a few outstanding issues in appellant's case and requested that he submit his answers in

another supplemental report. The Office specifically asked whether appellant still suffered residuals from her aggravated degenerative disc disease, and if so, when these residuals would be expected to resolve. The Office also asked, if the residuals had resolved, for Dr. Milone to indicate the date this had occurred.

In a report dated October 2, 1995, Dr. Milone stated that injuries of lumbar strain, such as those sustained by appellant, usually respond satisfactorily to conservative treatment within three months and that, thereafter, appellant had no residuals due to the accepted condition.

By decision dated March 15, 1996, the Office found that Dr. Milone's opinion that appellant no longer had residuals from her employment-related degenerative disc disease constituted the weight of medical opinion. The Office found her temporary total disability had resolved as October 2, 1995, the date of Dr. Milone's most recent medical report.³

The Board finds that the Office properly terminated appellant's compensation as of October 2, 1995.

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.⁴ 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.⁵

In the present case, the Office based its March 15, 1996 decision to terminate appellant's compensation on the July 15, 1994 and October 2, 1995 supplemental medical reports of Dr. Milone, who, on remand from the Board's 1994 decision, provided the well-rationalized referee medical report necessary for resolving the issue of whether appellant currently had any residuals causally related to her January 19, 1978 and June 4, 1979 employment injuries. In his July 15, 1994 report, Dr. Milone clarified and elaborated on his previous opinion by emphasizing that he had agreed with Drs. Proctor and Sherman that there were degenerative changes in appellant's lumbar spine as indicated by a narrowing of the lumbosacral disc space, which reflected degenerative changes in the lumbar spine and that appellant also had arthritic changes in the lumbar spine. Dr. Milone stated that his interpretation of appellant's MRI was that there was no evidence of any disc herniation, and that he had diagnosed low back syndrome, satisfactorily treated, with mild degenerative changes in the lumbar spine. He further indicated that appellant had degenerative disc disease, which was temporarily aggravated and then satisfactorily treated by conservative means, with no permanent exacerbation.

³ Appellant requested reconsideration of the Office's previous decision, which the Office denied by decision dated August 12, 1996. This Office decision is null and void, however, because it involves the same issue, which is simultaneously on appeal before the Board in the present case; *see Douglas E. Billings*, 41 ECAB 880 (1990).

⁴ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁵ *Id.*

The Office accepted appellant's claim for temporary aggravation of degenerative disc disease at L5-S1, resolved, based on Dr. Milone's July 15, 1994 report. With regard to the question of residuals, Dr. Milone stated in his October 2, 1995 report that lumbar injuries such as those sustained by appellant would be expected to be resolved within three months and thus appellant currently had no residuals. As Dr. Milone did not specify a date, the Office found that appellant's accepted condition had resolved as of October 2, 1995, the date of his supplemental report.

The Board holds that the Office properly found that Dr. Milone's referee opinion negating a causal relationship between appellant's claimed current condition and disability and her January 19, 1978 and June 4, 1979, employment injuries and finding that she no longer had any residuals from the employment injuries was sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office acted correctly in according Dr. Milone's July 15, 1994 and October 2, 1995 reports the special weight of an impartial medical examiner.⁶ Accordingly, the Board finds that Dr. Milone's July 15, 1994 and October 2, 1995 reports, constituted sufficient medical rationale to support the Office's March 15, 1996 decision terminating appellant's compensation as of October 2, 1995.⁷ The Board, therefore, affirms the Office's March 15, 1996 decision.

⁶ *Gary R. Seiber*, 46 ECAB 215 (1994).

⁷ The Board notes that an Office claims examiner engaged in an improper telephone communication on January 24, 1996, when she called Dr. Milone and requested further clarification of his opinion. The Board has generally held that such oral communications or conversations between the Office and the impartial medical examiner on disputed issues should not occur, as it undermines the appearance of impartiality that is crucial to a referee opinion. *See Carlton L. Owens*, 36 ECAB 608 (1985). The Board, however, finds that this error on the part of the Office is harmless in this particular case. The Office's transcript of this conversation merely stated that Dr. Milone "informed me that he had reviewed the information and is standing by his report of August 26, 1991, in which he states that [appellant's] back symptoms were temporary and resolved satisfactorily within 2 months from the date of injury, June 4, 1979." Thus, the transcript indicates that Dr. Milone simply reiterated his prior opinion on the issue at hand and does not indicate that the Office asked him any leading questions or otherwise engaged in conduct giving rise to any inference of impropriety.

The decision of the Office of Workers' Compensation Programs dated March 15, 1996 is hereby affirmed.

Dated, Washington, D.C.
March 2, 1999

David S. Gerson
Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member