U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YVONNE R. McGINNIS and U.S. POSTAL SERVICE,
POST OFFICE, San Bernardino, Calif.

Docket No. 96-2606; Submitted on the Record;
Issued March 4, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, GEORGE E. RIVERS,
DAVID S. GERSON

The issues are: (1) whether appellant was disabled from March 23, 1993 to August 15, 1996 by her accepted condition of bilateral inguinal hernias; and (2) whether the Office of Workers' Compensation Programs abused its discretion by refusing appellant's request to change authorized physicians.

Except for a part of one day in July 1993 and three days in January 1994, appellant has not worked at the employing establishment since March 23, 1993. The Office paid her compensation for the period March 23 to June 11, 1993, but this compensation was not for her bilateral inguinal hernias but rather was paid under a different claim number for a different condition, right shoulder tendinitis. Although the Office, by decision dated August 16, 1995, accepted that appellant sustained bilateral inguinal hernias causally related to repetitive lifting, pushing and pulling in her employment at the employing establishment, the Office has not paid appellant any compensation for disability for this accepted condition. By decision dated June 7, 1996, the Office refused to modify an earlier decision finding that appellant had not established she was disabled by her accepted inguinal hernias during the period from March 23, 1993 to August 31, 1995. By decision dated September 17, 1996, the Office found that the evidence failed to establish that appellant was disabled for the period October 16, 1995 to August 15, 1996 due to her hernia condition.

The employee has the burden of proving that he or she is disabled for work as a result of an employment injury or condition. This burden includes the necessity of submitting medical opinion evidence, based upon a proper factual and medical background, establishing such disability and its relationship to the employment.[1]

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[1] *Paul Fiedor*, 32 ECAB 1364 (1981).

The Board finds that appellant has not met her burden of proof to establish that she was disabled from March 23, 1993 to August 15, 1996 by her accepted condition of bilateral inguinal hernias.

Even though the Office accepted her claim that she sustained bilateral inguinal hernias in the performance of her duties, appellant still has the burden of proof to establish that this accepted condition resulted in her disability from March 23, 1993 to August 15, 1996. Appellant has not met this burden.

Appellant alleged that she was "pulled off of work on January 13, 1994 due to bilateral hernias." This allegation, however, finds no support in the medical evidence. In a report dated May 23, 1994, Dr. Jorge L. Rivera, a Board-certified surgeon, stated that, based on his examination of appellant on January 12, 1994, "it is likely that she has bilateral inguinal hernias." Dr. Rivera did not indicate in this report or in a February 6, 1995 report, that appellant's hernias were causing any disability for work. Dr. Benson Mugemancuro, an associate of Dr. Rivera, who specializes in general preventive medicine, indicated in an undated report received by the Office on September 22, 1995 that appellant was totally disabled from March 23 to July 12, 1993 and partially disabled from July 13, 1993 to August 31, 1995. The diagnosis on this report was bilateral inguinal hernias. Dr. Mugemancuro's reports, however, show that this doctor never examined appellant, and that he instead relied on the reports of Dr. Rivera to form his opinion on appellant's condition. Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[2]

In a report dated October 6, 1995, submitted in response to an Office inquiry whether appellant was disabled at any time after March 1993 by her bilateral inguinal hernias, Dr. Rivera stated:

> "As far as I am concerned, the hernias do not constitute a disability which would keep you out of regular employment. If you are employed and able to carry out your work duties without any symptoms referable to the hernias, then there would be no reason why you could not continue in this job. However, if a physical examination was done and you were found to have hernias, it could be possible that the potential employer would request that the hernias be repaired. Also, it is possible that once you were employed, that you would notice symptoms referable to the hernias. This would then make it necessary for the hernias to be repaired."

This report does not support appellant's claim for disability due to her accepted bilateral inguinal hernias, nor does an October 16, 1995 report from Dr. Rivera indicating a lifting restriction of 25 pounds. This restriction was not based on an examination of appellant, which Dr. Rivera declined to perform upon appellant's last visit to him on October 16, 1995. Moreover, the 25-pound lifting restriction would not preclude appellant from performing the limited-duty position she was performing at the time she stopped work on March 23, 1993 and

[2] *See Paul D. Weiss*, 36 ECAB 720 (1985).

January 13, 1994. Appellant has not established that she was disabled during any part of the period from March 23, 1993 to August 15, 1996 by her accepted condition of bilateral inguinal hernias.

The Board finds that the Office abused its discretion by refusing to grant appellant's request to change authorized physicians.

Under section 8103 of the Federal Employees' Compensation Act,[3] an employee is permitted the initial choice of a physician. After this initial choice, which is not involved in the present case, the Office has the power to approve appropriate medical care and has the general objective of ensuring that an employee recovers from his or her injury to the fullest extent possible in the shortest amount of time. The Office has broad administrative discretion in choosing means to achieve this goal. Office regulations, at 20 C.F.R. § 10.401(b), provides, in pertinent part: "An employee who wishes to change physicians must submit a written request to the Office fully explaining the reasons for the request. The Office may approve the request in its discretion if sufficient justification is shown for the request."

In the present case, appellant's authorized physician, Dr. Rivera, recommended in an October 16, 1995 report, that appellant be seen by another physician because of her "dismay and disappointment and some feelings of resentment as to why she has been so poorly treated by this office" and because of her "willingness to continue to complain with respect to her poor treatment and how she desired to be seen elsewhere." Since Dr. Rivera no longer desired to treat appellant, the Office recognized the need for appellant to change physicians. In a decision dated November 14, 1995, the Office selected Dr. Bryan Fandrich, a Board-certified surgeon, as appellant's new authorized physician. The Office then treated appellant's preference to see Dr. Gregory Harshbarger, a Board-certified surgeon, as a request to change physicians from Dr. Fandrich, whom she has never seen and states she will not see.

The reason the Office gave for selecting Dr. Fandrich -- that Dr. Rivera referred appellant to this doctor -- is erroneous. While Dr. Rivera, in an October 20, 1995 report, did state that he had "made arrangements for [appellant] to see another surgeon at this office, Dr. Fandrich," Dr. Rivera also stated in this report, "I would encourage you to go ahead and follow up with the new surgeon that you indicated to me that you were going to be seeing in the near future." This report does indicate a referral to Dr. Fandrich, but it also equally expresses Dr. Rivera's agreement with appellant's desire to see another physician. As Dr. Rivera's October 20, 1995 report recommends two courses of action with regard to appellant's future medical care, it is not a proper basis for the Office's selection of Dr. Fandrich as appellant's authorized physician.

Under these circumstances, the Office should have solicited appellant's reasons for wanting to be treated by the physician Dr. Rivera encouraged her to see as opposed to Dr. Fandrich, whom Dr. Rivera made arrangements for her to see. These doctors should have been on equal footing with regard to whose treatment of appellant would be "in the best interest

[3] 5 U.S.C. § 8103.

of the claimant and the government."[4] Instead, the Office placed appellant in the untenable position of attempting to justify a change of physicians from one she had never seen. The focus of the Office's March 5, 1996 and June 7, 1996 decisions should have been on which physician would be more likely to ensure that appellant recovers from her injury to the fullest extent possible in the shortest amount of time. Contrary to a finding in the Office's March 5, 1996 decision, this case does not involve a determination whether the existing care appellant was receiving was proper and adequate, as this care had ended. The case will be remanded to the Office for a proper exercise of its discretion on the selection of an authorized physician to continue appellant's medical care for her accepted condition of bilateral inguinal hernias.

The decisions of the Office of Workers' Compensation Programs dated September 17 and June 7, 1996 (regarding disability) and October 18, 1995 are affirmed. The Office's June 7, 1996 (regarding a change of physicians), March 5, 1996 and November 14, 1995 decisions are set aside and the case remanded to the Office for further action consistent with this decision of the Board.

Dated, Washington, D.C.
March 4, 1999

Michael J. Walsh
Chairman

George E. Rivers
Member

David S. Gerson
Member

[4] This criterion for transfer of medical care is set forth in the Federal (FECA) Procedure Manual, Part 3 -- Medical, *Authorizing Examination and Treatment*, Chapter 3.300.6 (April 1995).