

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA M. MONDAY and DEPARTMENT OF THE AIR FORCE,
McCLELLAN AIR FORCE BASE, CA

*Docket No. 97-2477; Submitted on the Record;
Issued November 23, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits on July 23, 1995.

On November 18, 1987 appellant, then a 42-year-old production management specialist, filed a claim for a traumatic injury alleging that on November 17, 1987 she sustained a stiff shoulder and neck when she slipped while leaving the rest room and her right shoulder hit the wall as she fell. The Office accepted appellant's claim for a cervical and lumbar strain. Appellant worked intermittently through August 17, 1988, when she stopped work and the Office commenced payment of temporary total disability benefits.

In a deposition dated February 12, 1990, Dr. William P. Duffy, a Board-certified orthopedic surgeon and appellant's treating physician, considered appellant's history of injury, performed a physical examination and reviewed x-rays which were normal. He also reviewed an electromyogram (EMG) which showed a delayed conduction of the ulnar nerve across the elbow or tardy ulnar palsy a bone scan which showed sacroiliitis in the right sacral joint a magnetic resonance imaging (MRI) scan taken in October 1988, which showed an indentation into the spinal canal or a central and a right-sided thoracic disc at T7-8 and a myelogram and computerized axial tomography (CAT) scan which showed a slight, anterior indentation on the thecal sack and posterior aspect of T7-8. Dr. Duffy stated that the CAT scan also showed a slight posterior disc protrusion at T7-8. He opined that appellant was unable to return to her usual work and recommended that she retire. Dr. Duffy recommended restrictions including no lifting more than 10 pounds, changing positions every 30 minutes and no overhead. In subsequent reports through December 23, 1993, he diagnosed either disc bulges at L4-5 and T7-8 or lumbar disc disease and opined that appellant was unable to return to work.

In a report dated October 21, 1988, Dr. Stephen I. Mann, a Board-certified physiatrist and a second opinion physician, considered appellant's history of injury, performed a physical examination, reviewed x-rays, diagnosed cervical, thoracic and lumbar strain and recommended

diagnostic testing. He interpreted the EMG dated October 28, 1988, as showing isolated dysfunction for the left ulnar nerve in across the elbow groove. An MRI scan dated October 27, 1988, showed relatively mild central posterior and somewhat right-sided bulge of the T7-8 disc. A myelogram dated February 13, 1989, showed a slight anterior indentation upon the thecal sac at the posterior aspect of the T7-8 intervertebral disc. A CAT scan dated February 13, 1989, showed a slight posterior disc protrusion at T7-8 to the right of the midline. In a report dated February 9, 1989, Dr. Mann found that the EMG and MRI scan were normal and additionally diagnosed lumbar and thoracic soft tissue injury. He opined that appellant was no longer totally disabled as of January 1989 but she could not perform "very heavy" work and prescribed lifting, walking and sitting restrictions.

In a report dated March 2, 1989, Dr. Mann stated that a bone scan performed on October 27, 1988 showed increased sacroiliac joint activity on the right but the problem with the sacroiliac pain was minor compared to appellant's other complaints which matched that of the cervical and the upper thoracic pain. He stated the conclusions from his February 9, 1989 report were the same.

In a report dated March 3, 1989, Dr. Duffy opined that the CAT scan and myelogram confirmed the results of the MRI scan that appellant had a T7-8 thoracic disc problem.

To resolve the conflict in the medical evidence between Dr. Duffy's opinion that appellant was totally disabled due to the November 17, 1987 employment injury and Dr. Mann's opinion that appellant was able to work, the Office referred appellant to an impartial medical specialist, Dr. Stephen P. Abelow, a Board-certified orthopedic surgeon. In a report dated September 5, 1989, Dr. Abelow considered appellant's history of injury, performed a physical examination, reviewed the diagnostic tests of record and diagnosed, in part, herniated nucleus pulposus at T7-8, cervical spine strain syndrome, mechanical low back pain and left ulnar neuropathy, nonindustrial in nature. He opined that appellant's symptomatology was grossly out of proportion to his findings on physical examination and the physical examination was "grossly" normal. Dr. Abelow stated that there were no significant objective physical examination evidence of residual disability. He concurred with Dr. Mann's February 9, 1989 opinion that appellant could return to work and believed that appellant's total disability ceased in January 1989. Dr. Abelow stated that appellant could perform her usual job even with her thoracic disc problem.

In his report dated May 19, 1990, Dr. Abelow reviewed Dr. Duffy's February 12, 1990 deposition and stated that he did not feel that it altered his opinion on the causal relationship of appellant's cervical, thoracic and lumbosacral spine pain to her November 17, 1987 employment injury. He stated that the MRI scan of the lumbosacral spine showed no definite herniated nucleus pulposus and Dr. Abelow did not believe that the degenerative disc disease was caused by the November 17, 1987 employment injury. He opined that the November 17, 1987 employment injury exacerbated an underlying degenerative disc disease which subsequently became symptomatic. Dr. Abelow also stated that Dr. Duffy's deposition supported his conclusions and his findings.

Appellant was referred for vocational rehabilitation on June 4, 1990.

By decision dated March 22, 1994, the Office terminated benefits finding that the opinion of the impartial medical specialist, Dr. Abelow constituted the weight of the evidence. On April 5, 1994 appellant requested an oral hearing before an Office hearing representative.

By decision dated January 4, 1995, the Office hearing representative reversed the Office's March 22, 1994 termination decision and remanded the case for the Office to refer appellant to another impartial medical specialist. The Office hearing representative found that Dr. Abelow's medical opinion was not well rationalized as to his findings and conclusions. The hearing representative found that the conflict between Drs. Duffy and Mann remained unresolved and directed appellant be referred to a new impartial medical specialist.

An MRI scan performed on March 24, 1995 was interpreted by Dr. James A. Pollock, a Board-certified radiologist, as showing a central T3-4 disc protrusion compressing the anterior subarachnoid space and touching the ventral cord surface.

The Office referred appellant to another impartial medical specialist, Dr. Alan F. Moritz, a Board-certified orthopedic surgeon. In a report dated April 4, 1995, Dr. Moritz considered appellant's history of injury, performed a physical examination, and reviewed the results of the x-rays, the 1988 and 1990 MRI scans and the bone scan. He also reviewed the EMG, which Dr. Moritz found showed tardy ulnar palsy and was an incidental finding, that her symptoms had mostly resolved and it was most likely nonindustrial.

Dr. Moritz concluded that on physical examination, objective findings were absent. He stated that, although he did not have the diagnostic studies to review, the numerous reports of the diagnostic studies confirmed the presence of a posterior disc bulge at T7-8, degenerative disc disease at L4 through S1 and bilateral sacroiliitis. Dr. Moritz stated:

"My net impression is that indeed [appellant] has discomfort in her mid and upper back which is increased with prolonged sitting and vigorous use of her upper extremities. I would consider her pain to be much closer to a minimal to slight level on an occasional basis, increasing with activities and becoming infrequently moderate. I would not consider her discomfort to be of such a degree or frequency to prevent her from performing relatively sedentary work and certainly would not consider her disabled from doing the job she was performing ... at the time of the subject accident."

He also stated:

"[I]n my experience, individuals with thoracic strains, disc disease, facet pathology, and the like, do have discomfort with prolonged sitting. The discomfort is sometimes moderate in severity, but historically the discomfort is lesser in degree than other areas and in [appellant]'s case, I would consider her interpretation of the discomfort she experiences to be greater than what I can appreciate from the objective findings."

Dr. Moritz recommended that another MRI scan be obtained.

In a supplemental report, Dr. Moritz reviewed the March 24, 1995 MRI scan and opined that the study revealed no specific pathology at T7-8 but there was a small disc protrusion at T3-4. He stated:

“Whether or not the abnormality noted on MRI relates to the subject accident or other, obviously cannot be stated. There is no apparent abnormality at the T7-8 level and the discs themselves throughout the thoracic spine appear to have adequate hydration, and there is no evidence of degeneration.

“My net impression of the study sheds little light on identifying the cause of [appellant]’s symptoms. Whether or not the degenerative discs produce a chemical irritation at the specific levels is unclear. There is no question that degenerative discs do have that capacity and thus are a frequent cause of chronic back pain. Again, what the relationship is between the subject accident, the disc protrusion at T3-4 as identified on the recent MRI and [appellant]’s symptoms is unclear. I would tend not to link the three. Further, it will be difficult at this time to suggest the T7-8 abnormality noted on prior study to currently be producing symptoms.”

Dr. Moritz reiterated that appellant could work.

In a report dated May 10, 1995, Dr. Duffy noted that he reviewed Dr. Moritz’s April 4, 1995 report and his opinion that the March 24, 1995 MRI scan, showed a disc bulge at T3-4 and the T7-8 level was normal. Dr. Duffy stated that he reviewed the same MRI scan and that it showed that the defect was present at T7-8 and the T3-4 level was normal. Dr. Duffy stated that he returned the MRI scan report to Dr. Pollock who agreed that the prior report was incorrect and that the central disc protrusion was impressing upon the subarachnoid space central and right sided at T7-8. Dr. Duffy reiterated that appellant remained disabled due to her November 17, 1987 employment injury. In a report dated May 3, 1995, Dr. Pollock opined that the central and slightly right-sided T7-8 disc protrusion was compressing the anterior subarachnoid space. He stated that the designation level of T3-4 on the prior MRI scan was incorrect.

In a report dated May 26, 1995, Dr. Moritz stated that he reviewed the March 24, 1995 MRI scan and agreed with Dr. Duffy and Dr. Pollock’s interpretation that the pathology on it was localized at the T7-8 level. He stated that the T3-4 level was unremarkable. Dr. Moritz also stated:

“The persistence of the pathology at the same level identified in the prior study is evidence that indeed, the T7-8 level is pathological, and while the amount of discomfort the pathology at this level is producing certainly is variable, it is medically likely that it is symptomatic. Pain is a very subjective complaint and it is possible that [appellant] experiences enough discomfort in the sitting position because of the T7-8 disc degeneration that she feels unable to function in a job that demands prolonged sitting. Once again, I refer to my impressions in my original report concerning the effects of degenerative discs in the thoracic area, and the amount of discomfort they can produce, particularly relative to discs in less supported areas in both cervical and lumbar regions.”

By decision dated July 18, 1995, the Office terminated appellant's compensation based on the report of Dr. Moritz. Appellant subsequently requested a hearing.

In a report dated November 7, 1995, Dr. Duffy performed a physical examination on appellant and noted that appellant's condition had not improved since his last examination.

A hearing was held on June 20, 1996. At the hearing, appellant described how her November 18, 1997 employment injury occurred, her work history and her current symptoms of pain including numbness in her fingers and neck pain. She testified that she had problems with her shoulder and her back and she could not sit for any length of time. Dr. Duffy appeared and noted his finding of a small disc herniation based on the October 27, 1988 and March 24, 1995 MRI scans showing problems at the T7-8 level. He stated that whether the test showed a bulge or a herniation was a matter of interpretation and explained his reason for believing that appellant had a herniated disc. Dr. Duffy stated that he believed appellant's condition was related to the November 18, 1997 employment injury because appellant did not have trauma and the resulting symptoms prior to the November 17, 1987 employment injury and his physical examination and the diagnostic tests supported his findings. Dr. Duffy reiterated that appellant was unable to perform her usual work, required restrictions and should be retrained.

By decision dated August 22, 1996, the Office hearing representative affirmed the Office's July 18, 1995 termination decision.

On May 31, 1997 appellant requested reconsideration of the Office's August 22, 1996 decision and submitted additional evidence, some of which had previously been submitted. The evidence included physical therapist's reports dated December 14, 1987 and February 12, 1988, a notice of proposed separation from the employing establishment dated March 11, 1993 and a report from Dr. Duffy dated April 21, 1994, in which he reiterated that the MRI scans, the CAT scan and the myelogram showed that appellant had a problem at the T7-8 level.

By decision dated June 26, 1997, the Office denied appellant's reconsideration request.

The Board finds that the Office did not meet 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

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving

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

² *Larry Warner*, 43 ECAB 1032 (1990); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.³ In the present case, to resolve the conflict between Dr. Duffy's opinion that appellant was totally disabled for work and Dr. Mann's opinion that appellant was able to work, the Office initially referred appellant to an impartial medical specialist, Dr. Abelow.

By decision dated January 4, 1995, the Office hearing representative found that Dr. Abelow's medical opinion was not well rationalized. The Office hearing representative reversed the Office's March 22, 1994 termination decision and remanded the case for the Office to select another impartial medical specialist to examine appellant and to further develop the case.

The Office referred appellant to Dr. Moritz who issued reports dated April 4 and May 26, 1995. The Board finds that Dr. Moritz's reports, however, are speculative and are not well rationalized. The Board has held that a medical report which is equivocal and speculative is of diminished probative value.⁴ In his April 4, 1995 report, Dr. Moritz noted that the diagnostic tests confirmed that there was a posterior disc bulge at the T7-8 level, degenerative disc disease at L4 through S1 and sacroiliitis. In an addendum to that report, he opined that the March 24, 1995 MRI scan showed a small disc protrusion at T3-4 but no specific pathology at T7-8. Dr. Moritz stated that whether or not the abnormality noted on the 1989 MRI scan related to the employment injury accident or other could not be stated. He stated that he would not tend to link the MRI scan results, the T3-4 problem and appellant's November 17, 1987 employment injury but it would be difficult to suggest the T7-8 abnormality noted on the prior study to currently be producing appellant's symptoms.

In his May 10, 1995 report, Dr. Duffy subsequently noted that Dr. Moritz misinterpreted the 1995 MRI scan as it actually showed a problem at the T7-8 level. He attached a report dated May 3, 1995, from Dr. Pollock, the doctor who initially performed and interpreted the MRI scan, in which Dr. Pollock noted that his previous interpretation was erroneous and appellant had a problem at T7-8. In his May 26, 1995 report, Dr. Moritz acknowledged that he had misinterpreted the recent MRI scan and agreed with Drs. Duffy and Pollock that the 1995 MRI scan showed that appellant had a problem at T7-8 and none at T3-4. Dr. Moritz stated that it was "medically likely" that appellant's pathology at the T7-8 level was symptomatic and stated that it was "possible" that appellant was experiencing sufficient discomfort in a sitting position because of the T7-8 disc degeneration that she felt unable to function in a job that demanded prolonged sitting. Because Dr. Moritz's opinion is qualified as to the cause of appellant's medical condition and equivocal as to the degree of appellant's residuals due to her accepted condition, his opinion is not sufficient to establish that appellant is no longer disabled due the November 17, 1987 employment injury. The Office did not meet its burden to terminate benefits.

The decisions of the Office of Workers' Compensation Programs dated June 26, 1997 and August 22, 1996 are hereby reversed.

³ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

⁴ *See William S. Wright*, 45 ECAB 498, 504 (1994); *Alberta S. Williamson*, 47 ECAB 569, 574 (1996).

Dated, Washington, D.C.
November 23, 1999

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member