U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of GEORGIAMAE P. AGOSTINELLI and DEPARTMENT OF VETERANS AFFAIRS, MANCHESTER VETERANS HOSPITAL, Manchester, NH

Docket No. 97-2428; Submitted on the Record;
Issued September 17, 1999

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant no longer suffered from any residuals on or after May 22, 1996 causally related to her accepted employment injury.

On February 19, 1994 appellant, then a 51-year-old nursing aid, filed a notice of occupational disease and claim for compensation (Form CA-2), alleging that on July 8, 1993 she first realized that the severe spasms caused by two herniated discs in her back were due to her lifting, bending and pulling in her federal employment. On August 23, 1994 the Office accepted the claim for low back pain.[1] Appellant retired on civil service disability effective April 11, 1994.

By letter dated November 25, 1994, the Office referred appellant, together with a statement of accepted facts, medical reports and a list of questions, to Dr. Howard P. Taylor, a Board-certified orthopedic surgeon, for a second opinion as to appellant's disability.

By report dated December 19, 1994, Dr. Taylor opined that appellant was not totally disabled from her position as a nursing aid and that she had no employment-related disability. Dr. Taylor opined that he found no objective findings to support her complaints of pain in her lower back. Dr. Taylor also opined that the disc herniation at L1-2 was not of any clinical significance and unrelated to an injury at work. He stated that appellant had a significant structural problem with her back, but there was no causal relationship between her employment activities and her back pain.

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[1] In a memorandum to file dated November 3, 1994, the claims examiner noted that, while the acceptance letter stated that claim had been accepted for low back pain, the Office Form 800 indicated the claim was accepted for coded 846 for low back sprain. The claims examiner then stated that appellant's accepted condition would be changed based upon a second opinion examination that was being scheduled.

By letter dated February 13, 1994, the Office requested Dr. Frank A. Graf, an attending Board-certified orthopedic surgeon, to provide his comments on Dr. Taylor's opinion that appellant had no employment-related disability. The Office also noted that appellant's claim had been accepted for a low back sprain due to an injury that occurred on July 8, 1993.[2]

In a letter dated March 9, 1995, Dr. Graf diagnosed a herniated intervertebral disc at L1-2 which he opined was clinically significant. Dr. Graf opined that appellant was disabled from performing her employment duties as a nursing aid and that her back condition was due to her employment duties.

By letter dated March 22, 1995, the Office referred appellant to Dr. John M. Grobman, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Taylor, the second opinion physician and Dr. Graf, appellant's attending physician, as to whether appellant was totally disabled due to her employment.

In a report dated May 18, 1995, Dr. Grobman diagnosed chronic musculoskeletal low back pain and opined that appellant was totally disabled from returning to her position of nursing aid. He noted that on physical examination appellant had some evidence of spasm while bending forward. Dr. Grobman opined that it was unlikely that appellant's L1-2 herniated disc was related to a specific work injury.

The Office requested a supplemental report from Dr. Grobman to provide medical rationale for his opinion and the relationship to appellant's work as the claim had been accepted for low back strain. In a response letter dated June 22, 1995, Dr. Grobman attributed appellant's chronic musculoskeletal low back pain to her July 8, 1993, employment injury and her duties as a nursing aid. He opined that appellant's condition would not have occurred but for her lengthy employment as a nursing aid with duties including lifting. Dr. Grobman stated that the heavy and repetitive lifting of patients required by appellant's job as well her deconditioning due to pain were due to her employment. He opined that there was no relationship to a sprain and stated, "[t]his is not a sprain, this is Chronic Musculoskeletal Back Pain, based on degenerative disc disease and chronic deconditioning muscular atrophy and weakness."

In a letter dated December 4, 1995, the Office requested additional clarification from Dr. Grobman as the case was accepted as low back sprain due to appellant's muscle spasms and the pain is not an acceptable diagnosis. The Office then requested him to provide a definite diagnosis and identify which of appellant's conditions of degenerative disc disease and chronic deconditioning are causally related to her employment.

When Dr. Grobman failed to respond to the Office's second request for clarification, the Office referred appellant in a letter dated February 21, 1996, together with a statement of accepted facts, to Dr. Steven Sewall, a Board-certified orthopedic surgeon, to resolve the conflict

[2] The Board notes that appellant filed an occupational claim in which she stated that on July 8, 1993 she first realized that her disability was employment related. The record does not contain a claim stating that appellant sustained an injury on July 8, 1993. The record also contains a letter accepting appellant's claim for low back pain, not low back sprain.

in the medical evidence between Dr. Taylor, a second opinion physician and Dr. Graf, an attending physician.

In a report dated March 18, 1996, Dr. Sewall indicated that appellant suffered a low back strain due to the repetitive lifting and bending required of her position as a nursing aid in 1993. He opined that appellant's back strain had resolved based upon "the paucity of physical findings at the present time." In his physical examination, Dr. Sewall noted that there was no muscle atrophy in her lower extremities and that there was no evidence of any muscle spasms in her back. He opined that appellant was not disabled from working as a nursing assistant and was capable of performing the lifting and bending required of the position.

On April 1, 1996 the Office issued a notice of proposed termination of compensation. In a decision dated May 22, 1996, the Office terminated appellant's compensation effective that day on the grounds that the weight of the medical evidence indicated that she had recovered from her July 8, 1993 injury. The Office found that the opinion of Dr. Sewall, the second referee medical specialist, constituted the weight of the medical evidence.

At a hearing held on February 12, 1997 appellant was represented by counsel and allowed to testify. At the hearing, the hearing representative noted that appellant's claim that her two herniated discs were related to her employment had been accepted by the Office as a low back strain. Appellant's attorney noted that the Office had originally accepted appellant's claim for low back pain, but later referred to it as low back strain.

By decision dated April 15, 1997, the hearing representative affirmed the termination of appellant's compensation benefits. He found that the weight of the medical evidence clearly resided with the opinion of Dr. Sewall.

The Board finds that the Office properly terminated appellant's medical benefits.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[3] 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.[4]

The Office found a conflict in the medical opinion existed between Dr. Graf, appellant's attending physician and Dr. Taylor, a second opinion physician. He opined that appellant had no employment-related disability and was capable of performing her usual duties as a nursing aid. Dr. Taylor also opined that the disc herniation at L1-2 was not of any clinical significance and unrelated to her employment injury. Dr. Graf disagreed with Dr. Taylor that appellant's L1-2 disc herniation was clinically insignificant. Dr. Graf also opined that appellant was totally disabled due to her back condition which had been caused by her employment duties.

[3] *Harold S. McGough*, 36 ECAB 332 (1984).

[4] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

Section 8123(a) of the Federal Employees' Compensation Act provides in part: "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."[5]

The Office initially referred appellant to Dr. Grobman to resolve the conflict. He diagnosed chronic musculoskeletal low back pain and that appellant was disabled from returning to her position of nursing aid. Dr. Grobman opined that appellant's L1-2 disc herniation was unlikely to be related to a specific work injury. The Office requested Dr. Grobman to supplement his opinion and the relationship of appellant's disability to her work. While he provided a June 22, 1995 response, Dr. Grobman did not respond to the Office's subsequent request for clarification of his opinion.

When the Office secures an opinion from an impartial medical specialist for the purpose of clarifying a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative or lacks rationale, the Office must submit the case record with a detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion o on the issue in question.[6] Unless this procedure is carried out by the Office, the intent of 5 U.S.C. § 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[7]

The Board finds that the Office properly referred appellant to a second impartial medical specialist, Dr. Sewall, as Dr. Grobman, the first impartial medical specialist, failed to respond to the Office's request for clarification of his opinion. He provided a complete report and opined that appellant did not have any continuing residuals from her accepted employment injury. In his report, Dr. Sewall diagnosed a back strain which had resolved, noted a lack of objective findings and opined that appellant was capable of performing the lifting and bending required in her nursing assistant position. He provided a rationalized report and his opinion is, therefore, entitled to special weight as an impartial medical specialist. Thus, the Board finds that the report of Dr. Sewall, the second impartial specialist, constitutes the weight of the medical evidence. The weight of the medical evidence establishes that appellant did not suffer from any disability on or after May 22, 1996 causally related to her accepted employment injury and the Office properly terminated her compensation.

The decision of the Office of Workers' Compensation Programs dated is April 15, 1997 is affirmed.

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[5] 5 U.S.C. § 8123(a).

[6] *See Nathan L. Harrell*, 41 ECAB 402 (1990).

[7] *Harold Travis*, 30 ECAB 1071 (1979).

Dated, Washington, D.C.
September 17, 1999

George E. Rivers
Member

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member