U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SYLVIA K. PERRY and DEPARTMENT OF VETERANS AFFAIRS, BROCKTON VETERANS HOSPITAL, Brockton, MA

Docket No. 98-635; Submitted on the Record;
Issued January 21, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden to terminate appellant's benefits effective October 28, 1996.

On November 25, 1994 appellant, then a 58-year-old nurse, filed a notice of traumatic injury alleging that she injured her back on November 25, 1994 when she assisted a patient into bed while in the performance of her federal employment. Appellant stopped working that same date.

On December 12, 1994 the Office accepted the claim for a lumbar strain. The Office subsequently paid compensation for total temporary disability.

On October 16, 1995 appellant returned to work in a limited-duty job for four hours per day and her compensation was reduced accordingly. On November 13, 1995 appellant decreased her work hours to two per day.

On November 27, 1995 and February 16, 1996 Dr. Stephen McNeil, appellant's treating physician and a Board-certified orthopedic surgeon, diagnosed degenerative disc disease with sciatica and indicated that appellant was limited to working 2 hours per day and 10 hours per week. He stated that appellant's light duty should involve no lifting or carrying over 10 pounds, no pushing or pulling and only sedentary work.

In an undated note, Dr. Joseph P. Kagan, appellant's treating physician and a Board-certified internist, indicated that appellant's working hours needed to be decreased to two hours per day due to increased pain she experienced working four hours per day. He stated that appellant was unable to work four hours a day.

On December 7, 1995 the Office referred appellant to Dr. Charles DiCecca, a Board-certified orthopedic surgeon, for a second opinion examination

In two undated attending physician's reports and a January 23, 1996 attending physician's report, Dr. McNeil diagnosed lumbar radiculopathy. He checked "yes" to indicate that the condition was due to the injury for which compensation was claimed. Dr. McNeil also stated that appellant was limited to working 2 hours per day for 10 hours per week and lifting no more than 10 pounds.

On January 23, 1996 Dr. DiCecca reviewed appellant's history of injury and treatment. He noted that appellant presently complained of pain and discomfort across the buttocks with extension into the left leg and down to the ankle. He indicated that appellant could not stand for protracted periods and that she tended to walk leaning forward. He also noted that sitting could be painful. His examination revealed that extension of the lumbar spine was limited by discomfort at zero degrees. It further revealed that lateral tilt was reasonably well tolerated to 30 degrees, as was lateral rotation 40 degrees to the right and left. He noted that a partial deep knee bend was performed with some discomfort in the low back region. In the supine position, he found that straight leg raising was uncomfortable at 45 degrees bilaterally with negative Lasegue enhancement. He also determined that the Patrick maneuver produced some reference to lower back sensitivity, bilaterally. He reviewed an x-ray of lumbosacral spine dated March 7, 1995 and a computerized axial tomography (CAT) scan dated January 25, 1995. Dr. DiCecca noted that appellant had a long history of lumbar difficulty and lumbar spine disease. He diagnosed advanced multi-level lumbar disc disease and degenerative arthritis that predated her November 25, 1994 lifting episode. He opined that the recent aggravation of appellant's preexisting condition did not result in any permanent impairment. He stated that appellant continued to manifest functional intolerance to stressful physical conditions. He indicated that appellant should be restricted from contact with violent patients and not be allowed to lift over 20 pounds, repetitively lift, stoop, carry, crawl, bend, or climb. Dr. DiCecca stated that appellant could work four hours per day within these restrictions. His opinion was presented on stationary from "The Physician Network, Inc."

On February 26, 1996 Dr. McNeil repeated his previous diagnosis and again stated that appellant could not lift more than 10 pounds or work more than 2 hours per day or 10 hours per week.

On March 13, 1996 the Office indicated that a conflict existed between the opinion of Dr. Kagan, appellant's treating physician, who opined that appellant could work only two hours per day, and the second opinion report of Dr. DiCecca, who found that appellant could work four hours per day. The Office referred the case record to Dr. Lawrence Geuss, a Board-certified orthopedic surgeon, for a referee opinion.

On March 30, 1996 Dr. McNeil again indicated that appellant's degenerative disc disease of the lumbosacral spine and sciatica due to her November 25, 1994 injury continued to limit her to working two hours per day.

On April 10, 1996 Dr. McNeil indicated that appellant developed a spasm in the lumbosacral area unrelated to an employment activity. He stated that his restrictions remained the same due to appellant's partial disability.

On April 16, 1996 Dr. Geuss provided his referee opinion. Dr. Geuss reviewed appellant's history of injury and the fact that she underwent surgery in 1960 at L3-4, L4-5 and L5-S1. He noted that appellant complained of pain and discomfort in her back with left leg pain down in the ankle and had difficulty standing, sitting and walking. He stated that there was occasional tingling in the left great toe and infrequent pain in the right leg. On examination he found generalized tenderness to palpation in the low back. Dr. Geuss indicated that appellant could forward flex to 15 degrees. He stated that straight leg raising was negative at 70 degrees bilaterally in a sitting position and positive at 30 degrees on the left with pain and negative at 70 degrees on the right. He indicated that x-rays of the spine in early 1995 showed disc space narrowing with facet hypertrophy at L3-4, L4-5 and L5-1 and that the CAT scan looked relatively benign. Dr. Geuss opined that appellant had a very significant preexisting condition dating back to 1962 with a slow development of degenerative disc disease secondary to the previous disc excisions with facet hypertrophy. He stated that the employment injury appellant sustained in November 1994 would result in a back strain which would resolve in three to four months. He stated that, in the absence of thigh or calf atrophy, there was no significant nerve root compression. Dr. Geuss indicated that appellant's significant underlying condition with disc degeneration was secondary to her disc excisions at the three levels described. He stated that this would cause a slow development of facet hypertrophy with some foraminal encroachment secondary to disc space narrowing. He stated that this was the major cause of appellant's continued disability. He opined that appellant could work 4 hours per day of modified duty with a weight restriction of 10 pounds. He stated that appellant needed some flexibility in standing, sitting and walking. Dr. Geuss indicated that the restrictions were due to appellant's preexisting degenerative joint disease of her lumbar spine.

On April 17, 1996 Dr. Geuss opined that appellant should limit twisting and bending. He further stated that appellant should limit prolonged standing to 1 hour, walking to 30 yards and lifting to 10 pounds. He opined that appellant could work four hours per day. He stated that none of appellant's limitations were due to her employment injury, but that they were all due to nonwork-related disc disease, L3-4, L4-5 and L5-S1.

On May 1, 1996 the Office requested that Dr. Geuss provide a clarifying opinion. On May 11, 1996 Dr. Geuss stated that appellant had an aggravation of a very serious preexisting condition. He stated that this condition, a disc excision at L3-4, L4-5 and L5-S1, caused degenerative joint disease in the lumbar spine. He indicated that the employment injury of November 25, 1994 aggravated the joints. He stated that CAT scan and his physical examination did not indicate that appellant further ruptured a disc. He stated that he did not think that the injury she sustained would cause pain for this length of time. Dr. Geuss stated that appellant's initial injury was a back strain as there was no evidence of a further ruptured disc. He noted no difference in the circumference of appellant's thighs or calves. He found scar tissue at L5-S1. He opined that appellant's pain stemmed from arthritis of the spine and that the arthritis was aggravated by the November 25, 1994 injury. He stated that this type of irritation would usually calm down with gentle strengthening and anti-inflammatory medications. He found no evidence of a radicular component to appellant's injury. He stated that the absence of knee jerk went along with the previous L5-S1 disc excision. He opined that appellant could work 4 hours per day of modified duty with a weight restriction of 10 pounds and flexibility in standing, sitting and walking.

On May 24, 1996 Dr. Kagan diagnosed lumbar sprain, disc disease and sciatica. He stated that appellant could work 2 hours per day if he did not lift/carrying or push/pull over 10 pounds.

On May 28, 1996 Dr. McNeil diagnosed chronic low back pain and left sciatica. He indicated that appellant could work three hours per day.

On May 31, 1996 the Office requested a clarifying opinion from Dr. DiCecca. On June 3, 1996 Dr. DiCecca indicated that he felt that appellant was still recovering from the late 1994 work-related aggravation when he examined her. He further stated that he did not believe the aggravation would be permanent and that the time of an examination would affect the opinion given.

On June 5, 1995 the Office requested that Dr. DiCecca provide a follow-up examination. On June 21, 1996 Dr. DiCecca recorded appellant's complaints of pain associated with her advancing hours of employment. He noted that appellant felt very tender and sensitive at the lumbosacral junction to the left of the midline. He noted persistent numbness radiating down appellant's left leg to her toes. He stated that appellant's pain from the buttocks to her left calf was constant, unlike the pain in her toes. He indicated that appellant complained that she felt like she was dragging her left foot and leg and that she felt a throbbing sensation in the left calf. He noted occasional discomfort extending to the right buttock and that prolonged standing or sitting intensified the low back pain. On examination he found that, while standing upright, appellant appeared to be in a position of forward flexion at her hips of approximately 15 degrees. Dr. DiCecca noted that on forward flex at the lumbosacral level appellant could reach her knees without pain. He stated that extension of the lumbar spine did not exist beyond zero degrees and was limited by discomfort. He found that lateral tilt was present to 35 degrees bilaterally as well as lateral rotation to 35 degrees bilaterally. He noted that appellant complained of discomfort at the extremes of these motions. Dr. DiCecca found that his neurologic examination was normal. He diagnosed advanced multi-level lumbar disc disease and arthritis which predated the November 25, 1994 injury. He indicated that appellant could work three hours per day and increase to four hours per day in one month. He stated that appellant should limit carrying, bending, stooping, kneeling, crawling and climbing. He stated that all the limitations were due to appellant's employment injury rather than her preexisting conditions.

On June 25, 1996 Dr. Kagan repeated his previous diagnoses and found that appellant could only work two to three hours per day.

On July 17, 1996 the Office requested that Dr. DiCecca provide another clarifying report.

On July 23 and August 26, 1996 Dr. McNeil repeated his diagnoses and again stated that appellant could work two to three hours per day of light duty.

On September 17, 1996 Dr. DiCecca stated that appellant did not sustain any form of permanent physical impairment or functional disability from her low back strain. He stated that appellant's low back strain symptoms would resolve leaving only symptoms from her preexisting condition. He indicated that, as of June 21, 1996, all of appellant's remaining symptoms stemmed from her preexisting spinal disease.

On September 20, 1996 Dr. McNeil again diagnosed chronic lumbar strain and lumbar radiculopathy related to the injury for which compensation was claimed. He opined that appellant could engage in light duty, working three hours per day.

On September 27, 1996 the Office issued a notice of proposed termination on the basis that disability resulting from appellant's injury had ceased. Appellant was allowed 30 days to present additional evidence and argument.

On October 8, 1996 Dr. McNeil indicated that appellant showed no changes on physical examination. He found that she still had spasm and the motion was limited to 40 to 50 degrees. His neurological examination was nonfocal. Dr. McNeil opined that appellant had a causally related injury that she sustained on November 25, 1994. He stated that appellant strained her muscles in her low back and that she had an underlying degenerative process at several levels. He noted that appellant was asymptomatic until her work injury and that, therefore, her symptoms are causally related to the injury. He stated that the CAT scan revealed a disc protrusion at L4-5 and that most likely her symptoms stemmed from this problem. He indicated that he thought this was a new injury because appellant's previous laminectomy was a level higher.

By decision dated October 28, 1996, the Office terminated compensation for wage loss and medical benefits effective the same date finding appellant had recovered from the accepted, work-related injury of November 25, 1994.

On October 30, 1996 appellant requested an oral hearing.

On February 15, 1997 Dr. Kagan diagnosed chronic back pain and sciatica. He indicated that appellant could work only three hours per day with no lifting, bending or straining. He stated that appellant may need to get up to stretch or lie down for brief intervals if back pain worsened.

At a hearing held on August 4, 1997, appellant's representative indicated that Dr. DiCecca was a member of a group called Physician's Network, Inc. He stated that he called Physician's Network, Inc. and was told that Dr. Geuss was also a member of Physician's Network, Inc. He, therefore, opined that Dr. Geuss should not have been chosen as the impartial medical specialist in this case.

On August 27, 1997 Dr. McNeil stated that there was no question that appellant had a preexisting condition with her low back, but that he disagreed with the conclusion that the lumbar strain resolved within three to four months. He stated that appellant never recovered from her November 1994 injury and that she only aggravated her preexisting condition. To support his conclusion, Dr. McNeil indicated that appellant was asymptomatic prior to her injury.

By decision dated October 12, 1997, the Office hearing representative affirmed the October 28, 1996 decision of the Office terminating appellant's benefits. The hearing representative indicated that the Physician's Network, Inc. was a referral service and that Drs. DiCecca and Geuss were not connected to each other in any way. The hearing

representative found that the weight of the medical evidence rested with the opinion of Dr. Geuss, the referee examiner, who opined that appellant's work-related disability had ceased.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective October 28, 1996.

Once the Office has accepted a claim and pays compensation, it has the burden or proof 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] Furthermore, the right to medical benefits for the accepted condition is not limited to the period of entitlement to disability.[2] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which no longer requires further medical treatment.[3]

In the present case, the Office accepted appellant's claim for a lumbar sprain and authorized appropriate compensation benefits. Following appellant's return to work for four hours per day, her treating physician, Dr. Kagan, a Board-certified internist, opined that she could only work two hours per day due to the increased pain she was experiencing while working. Dr. Kagan's opinion was supported by the opinion of Dr. McNeil, an attending physician and a Board-certified orthopedic surgeon, who also opined that appellant could only work two hours per day. The Office subsequently referred appellant to Dr. DiCecca, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. DiCecca opined that appellant could work four hours per day of limited duty. Because of the conflict between the reports of Drs. Kagan and DiCecca over the amount of hours appellant was capable of working, the Office referred appellant to Dr. Geuss, a Board-certified orthopedic surgeon, for an impartial medical examination pursuant to section 8123 of the Federal Employees' Compensation Act.[4]

In situations where there are opposing medical reports of virtually equal weight and the case is referred to an impartial specialist, the opinion of such specialist will be given special weight if the opinion is based on proper factual background and well rationalized.[5] Dr. Geuss reviewed the history of appellant's work injury and the history of her preexisting conditions. He recorded appellant's symptoms and performed a thorough physical examinations. Dr. Geuss also reviewed appellant's x-rays and CAT scan. He opined that appellant had a very significant preexisting condition dating back to 1962 with most certain slow development of degenerative disc disease secondary to his previous disc excisions with facet hypertrophy. He stated that appellant's lumbar strain would have resolved in three to four months. He explained that appellant's underlying condition with disc degeneration was secondary to her disc excision.

[1] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[2] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[3] *Id.*

[4] 5 U.S.C. § 8128 *et seq.*

[5] *See Jack R. Smith*, 41 ECAB 691 (1990).

Dr. Geuss indicated that this would cause a slow development of facet hypertrophy with some foraminal encroachment secondary to disc space narrowing and that this was the major cause of appellant's disability. Consequently, he concluded that all of appellant's restriction's stemmed from the preexisting degenerative disc disease of appellant's lumbar spine. Because Dr. Geuss' opinion was based on a proper factual background and medical rationale, his opinion, as the opinion of the impartial medical specialist, constitutes the weight of the evidence.[6] Moreover, the reports submitted by Drs. Kagan and McNeil, after the Office determined that a conflict in the medical evidence existed, merely restated their early conclusions, without additional rationale, that appellant could work only two hours and that this condition stemmed from her employment injury and are, therefore, insufficient to overcome the special weight accorded to the impartial medical examiner.[7] The Board, therefore, finds that the Office met its burden to terminate appellant's compensation effective October 28, 1996.

[6] Contrary to the assertion of appellant's representative at the hearing, the record is devoid of evidence establishing that Dr. Geuss, the referee examiner and Dr. DiCecca, the second opinion examiner, are associated in their respective practices.

[7] *Thomas Bauer*, 46 ECAB 257 (1994).

Accordingly, the decision of the Office of Workers' Compensation Programs dated October 12, 1997 is affirmed.

Dated, Washington, D.C.
January 21, 2000

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member