U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLINE GILBERT and U.S. POSTAL SERVICE,
POST OFFICE, Sitka, AK

Docket No. 00-78; Submitted on the Record;
Issued August 23, 2001

DECISION and ORDER

Before DAVID S. GERSON, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation for her accepted liver condition.

On February 10, 1988 appellant, a 37-year-old clerk, claimed that she sustained viral hepatitis in September 1987 after workplace exposure to raw sewage, including drinking discolored water, when leaking water and sewage pipes were being replaced. She also noted exposure to dust during asbestos removal. Appellant stopped work on November 3, 1987 and did not return.[1] The Office accepted the claim for viral hepatitis-A and paid appropriate benefits.

Early medical reports gave differing opinions regarding the type of hepatitis appellant may have contracted. In a November 11, 1987 report, Dr. Paul Lunas, a Board-certified internist, diagnosed "hepatitis of unknown type (negative to hepatitis A)." He noted that appellant had abnormal liver function tests, fever and fatigue. In a February 4, 1988 report, Dr. Lunas opined that testing on November 4, 1987 for hepatitis A and B showed "a remote hepatitis A infection and no evidence of hepatitis B." Testing in late November and December 1987 showed liver function tests at "the upper range of normal."

In an April 25, 1988 report, Dr. Lunas noted appellant's employment-related hepatitis and stated that she had been hospitalized on November 3, 1987 when certain liver function tests were elevated. He stated that tests for hepatitis A and B did not indicate a recent infection. Dr. Lunas noted that appellant recovered slowly from her hepatitis, and her liver function tests eventually returned to normal. He opined that appellant had non-A, non-B hepatitis, a disease usually spread through blood transfusions but also spread through oral fecal contamination.

Appellant relocated and continued submitting medical reports from different treating physicians. These doctors noted appellant's symptoms, test results and generally diagnosed hepatitis or other liver diseases such as cirrhosis or liver failure. A May 24, 1989 abdominal

[1] Appellant's disability retirement became effective on February 22, 1988. The record also indicates that appellant has an accepted knee condition for which she is in receipt of compensation. Only appellant's liver condition is at issue in this appeal.

ultrasound revealed a mild degree of hepatomegaly while March 22 and October 11, 1990 abdominal ultrasounds revealed no definite abnormalities.

In a November 29, 1994 report, Dr. Stephen A. Wallach, a Board-certified internist and an Office referral physician, noted appellant's history and opined that prior laboratory studies provided by appellant showed a "small" elevation of liver function tests and normal serum albumen. Dr. Wallach reported findings, including an enlarged liver and diagnosed chronic persistent hepatitis. He stated that appellant's condition could be type A viral or could be non-A, non-B viral hepatitis. Dr. Wallach stated that a liver biopsy would confirm the diagnosis but a biopsy could not be done because of appellant's abnormal blood clotting. He noted that available records were minimal but that it appeared that appellant's employment was the direct cause of appellant's hepatitis.[2]

In a May 31, 1995 treatment note, Dr. Douglas Bischoff, a Board-certified internist, diagnosed an "unclear liver disease" and advised that laboratory test results were normal. In a November 3, 1995 report, Dr. Bischoff diagnosed chronic active or chronic persistent hepatitis. He noted that other conditions such as cirrhosis and liver failure had been diagnosed by other physicians, but advised that appellant's available laboratory studies, history and physical examination were compatible with chronic hepatitis.

In an April 29, 1996 report, Dr. Charles K. Bedard, a Board-certified gastroenterologist and a fitness-for-duty physician, reviewed the medical record and opined that there was no evidence that appellant ever had hepatitis.

In a September 17, 1996 report, Dr. Richard M. Dennes, a Board-certified internist and an Office medical consultant, noted appellant's history and reviewed the medical record. Dr. Dennes opined that appellant was seriously ill with chronic problems without obvious cause. He questioned whether appellant had liver disease in view of "borderline elevations of liver function tests." Dr. Dennes also questioned the prescribed medication and recommended referral to a general internist who could perform appropriate blood tests and review prior tests.

In a report dated February 25, 1997 and signed March 7, 1997, Dr. Raymond Schumacher, Board-certified in internal and occupational medicine, and an Office referral physician, listed examination findings and diagnosed a "poorly characterized febrile illness, with nonspecific minor elevations of liver enzymes in 1987," after ingestion of water at the employing establishment. Dr. Schumacher agreed with Dr. Dennes that "there has never been convincing evidence of hepatitis of any kind" and that the documented minor elevations of "so-called 'liver enzymes'" were not a characteristic of any known form of hepatitis. He allowed that, while gastrointestinal or hepatic insult may have occurred by means of exposure to an unknown toxic chemical in drinking water in 1987, there was no conclusive evidence of any liver disease at present. Dr. Schumacher concluded that appellant had no continuing employment-related liver condition.

On June 24, 1997 the Office proposed termination of medical benefits for appellant's liver condition. The Office found that the reports of Drs. Schumacher and Dennes established that appellant had no disability or need for medical treatment related to hepatitis.

[2] The record also contains subsequent treatment records from Dr. Wallach who continued to diagnose hepatitis and other liver conditions.

Appellant submitted additional medical evidence. A December 23, 1997 abdominal ultrasound revealed a mildly enlarged liver. In a January 7, 1998 report, Dr. Scott E. Blinkoff, a Board-certified gastroenterologist, diagnosed chronic liver disease but indicated that the cause was unclear. Dr. Blinkoff noted that liver tests from the previous April were normal. He recommended continued testing and opined that the hepatitis could be autoimmune in view of appellant's thyroid disease. Dr. Blinkoff submitted additional reports noting normal liver studies.

In treatment notes beginning May 26, 1998, Dr. Christopher Puca, a Board-certified internist, noted appellant's history of toxic ingestion and occupational liver injury. In a July 22, 1998 report, Dr. Puca disagreed with the Office's proposed termination of compensation for the liver injury, noting that appellant had a toxic exposure and continued symptoms, including persistent low grade fever. He stated that appellant exhibited signs of a constitutional illness related to lingering liver problems. Dr. Puca recommended close monitoring of liver functions and appropriate testing.

In a July 9, 1998 decision, the Office terminated benefits relating to appellant's liver condition effective that date. The Office found that the weight of the evidence rested with Drs. Dennes and Schumacher.

Appellant subsequently requested a hearing. She continued submitting medical records regarding her liver condition, including a December 26, 1985 operative report which found her pelvic anatomy "completely normal in every respect," including the "anterior aspect of the right and left lobes of the liver."

In an August 17, 1998 report, Dr. Schumacher questioned some of appellant's assertions regarding her claim.[3] He stated that his opinion remained unchanged.

In a September 16, 1998 report, Dr. Puca stated that appellant continued with nausea and low-grade fevers due to her liver problem. He advised that appellant's liver injury was "very real" as documented by her initial symptoms in 1987 and her continuing symptoms. Dr. Puca reported that, while the precise nature of the liver problem was unclear, it was "very frequent that we see people with toxic exposures who have many symptoms and yet do not fall into familiar diagnostic categories." In an October 8, 1998 report, he advised that appellant continued with low grade fevers due to her hepatic injury secondary to toxic ingestion at the employing establishment. Dr. Puca also submitted treatment notes diagnosing chemical hepatitis and documenting appellant's status.

By report dated December 2, 1998, Dr. Puca noted reviewing reports of Drs. Lunas, Dennes and Schumacher. Dr. Puca asserted that the Office did not properly interpret the reports of Dr. Lunas as diagnosing hepatitis A. He contended that a careful reading of such reports indicated that, while Dr. Lunas noted that testing showed a remote hepatitis A infection, his subsequent reports and opinions indicated that appellant had either non-A, non-B hepatitis or that she had hepatitis of unknown type.

Dr. Puca opined that Dr. Lunas' 1987 reports showed findings consistent with unspecified toxic hepatitis that occurred shortly after her accepted toxic exposure. He noted that,

[3] Dr. Schumacher wrote in response to an article in a local weekly newspaper regarding appellant's claim.

while appellant currently had normal liver function tests, a December 23, 1997 sonogram had revealed fatty infiltration of her liver and that she had displayed systemic symptoms of low grade fever and nausea. Dr. Puca contended that "her elevated liver enzymes in the past, her symptoms, and finally her abnormal sonogram do constitute objective evidence for some unspecified ongoing liver pathology."

A telephonic hearing was held on April 1, 1999. At the hearing, Dr. Puca testified that appellant had almost daily low-grade fever since her toxic ingestion. He testified that she had two classes of toxic ingestion, biological and nonpathogenic chemical. Dr. Puca noted that there are "many hepatitises" and that, while many cannot be tested, they do exist. He stated that this was supported by two sonograms that had been taken since he started treating appellant. Dr. Puca opined that appellant never stopped having symptoms after the employment exposure to the microbiological and chemical agents.

After the hearing, appellant submitted a March 24, 1999 report from Dr. Arnold B. Merin, a Board-certified gastroenterologist to whom appellant was referred by Dr. Puca. Dr. Merin noted seeing appellant on February 11, 1999, and diagnosed chronic hepatic inflammation and hepatic steatosis. He opined that this resulted from her workplace exposure to a hepatotoxic substance or an agent such as a chronic viral illness.[4]

In a June 24, 1999 decision, the hearing representative affirmed the July 9, 1998 decision, finding that Dr. Schumacher's report represented the weight of the medical evidence.

The Board finds that the Office did not meet its burden of proof in terminating appellant's medical benefits for her accepted liver condition.

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.[5] After it has determined that there is disability causally related to an employee's federal employment, the Office may not terminate or modify compensation without establishing that the disabling condition has ceased or that it is no longer related to the employment.[6]

The Office, based on Dr. Lunas' reports, accepted that appellant sustained hepatitis A due to her 1987 workplace exposure to toxic agents. While the medical reports and testing revealed varying degrees of liver abnormality and sometimes no abnormality, appellant's treating physicians generally provided consistent support that she continued to experience an employment-related liver condition. In particular, Dr. Puca, appellant's most recent attending physician, has repeatedly supported the causal relationship of a continuing employment-related liver condition before and after the July 9, 1998 termination of benefits. He has also provided reasons for his opinion, noting appellant's symptoms and test findings.

[4] Appellant's representative also asserted that Dr. Schumacher was often used by the employing establishment to conduct fitness-for-duty examinations. However, Board precedent allows physicians who are regularly involved in performing fitness-for-duty examinations for the claimant's employing establishment to serve as second opinion specialists, but not to resolve conflicts of medical opinion. *See Cleopatra McDougal-Saddler*, 50 ECAB ___ (Docket No. 97-1360, issued May 4, 1999).

[5] *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Garner*, 36 ECAB 238 (1984).

[6] *John Wilkes, Jr.*, 36 ECAB 451 (1985); *Betty J. Glover*, 34 ECAB 465 (1982); *Fred Foster*, 1 ECAB 21 (1947).

On the other hand, Dr. Schumacher, an Office referral physician, reviewed the record, examined appellant and stated why he felt that appellant had no ongoing liver condition caused or aggravated by her employment exposure to toxic agents. The medical evidence, therefore, is in conflict on the issue of whether appellant has a continuing employment-related liver condition.

Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between a physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[7]

As the Office did not resolve an outstanding medical conflict prior to terminating medical benefits for the liver condition, the Office has not met its burden of proof.

The June 24, 1999 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
August 23, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[7] 5 U.S.C. § 8123(a).