

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROL A. MACZKO and U.S. POSTAL SERVICE,
POST OFFICE, Akron, OH

*Docket No. 00-531; Submitted on the Record;
Issued August 20, 2001*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
PRISCILLA ANNE SCHWAB

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to justify the termination of appellant's compensation benefits effective October 8, 1998 on the grounds that the weight of the medical evidence established that her accepted right leg conditions had resolved; (2) whether appellant's work activities from February to June 1980 further aggravated her accepted right leg conditions; (3) whether appellant's hospitalization in June 1980 was work related; and (4) whether appellant's disability commencing on or about October 27, 1988 was precipitated by the vascular studies performed on September 23, 1988 or by an increased workload beginning on or about October 23, 1988.

On the prior appeal of this case,¹ the Board found that the opinion of the impartial medical specialist, Dr. Charles J. Farrell, a Board-certified vascular surgeon, was insufficiently reasoned to resolve whether the vascular study performed on September 23, 1998 or appellant's increased workload upon returning to an eight-hour day on October 23, 1988 contributed to her disability beginning on or about October 27, 1988. The Board set aside the Office's denial of appellant's claim for an injury on or about October 27, 1998 and remanded the case for a supplemental report from Dr. Farrell clarifying the issue. The facts of this case as set forth in the Board's previous decisions are hereby incorporated by reference.

The record indicates that Dr. Farrell was unwilling to perform even noninvasive testing on appellant because of liability issues. He did not respond to the Office's questions and did not appear willing to. The Office, therefore, referred appellant, together with the case file and a statement of accepted facts, to Dr. George E. Anton, a Board-certified vascular surgeon, for an impartial medical opinion on whether the vascular study performed on September 23, 1998 or appellant's increased workload upon returning to an eight-hour day on October 23, 1988

¹ Docket No. 95-2938 (issued March 27, 1998); *see also* Docket No. 93-326 (issued July 19, 1994), *petition for recon. denied*, issued February 7, 1995; Docket No. 91-1387 (issued January 31, 1992); Docket No. 87-1263 (issued September 30, 1987).

contributed to her disability beginning on or about October 27, 1988. The Office also requested that Dr. Anton address two other questions that were not sufficiently answered by an earlier impartial medical specialist: whether appellant's work activities from February to June 1980 further aggravated her accepted right leg conditions and whether appellant's hospitalization in June 1980 was work related.

In a report dated September 18, 1998, Dr. Anton stated that he had carefully reviewed all the records the Office had forwarded, as well as the history and physical that he personally performed on July 28, 1998, the bilateral lower extremity venous duplex scan he obtained on August 5, 1998 and a literature search for adverse effects caused by noninvasive venous testing. Dr. Anton then focused on the following diagnostic findings, which he considered to be essential in developing his conclusions.

On April 23, 1979 appellant underwent bilateral lower extremity venograms. This study demonstrated a normal left lower extremity. This study also demonstrated intraluminal radiolucent filling defects noted in the distal branches of the anterior tibial vein associated with incomplete filling of the proximal deep vein of the left popliteal vein. The conclusions were that these changes were consistent with acute deep vein thrombosis.

On October 9, 1979 appellant underwent a right leg venogram. The report indicated that previously described filling defects in the deep veins of the right calf were not visualized at that time. These veins appeared to be well filled and the filling defects were no longer evident.

On June 20, 1980 appellant underwent bilateral lower extremity venous PVR and Doppler examination by Dr. Carlos Saavedra. The conclusion was normal deep venous study of the lower extremities.

In 1988 appellant underwent noninvasive studies by Dr. J. Jeffrey Alexander. The studies performed included Doppler venous examination and impedance plethysmography, which showed no evidence of residual deep venous obstruction. Additionally, appellant returned on November 4, 1998 and underwent photoplethysmographic studies to detect the presence of venous valvular insufficiency. This study did not clearly provide any objective evidence of severe valvular insufficiency.

Finally, on August 5, 1998 appellant underwent a bilateral lower extremity deep venous duplex scan. This was a normal bilateral lower extremity deep venous duplex scan. There was no evidence of acute or remote venous thrombotic disease. There was no evidence of venous valvular incompetence. There was no evidence of recanalization.

Dr. Anton reported that, based on his review of these findings, he felt comfortable rendering an opinion with a reasonable degree of medical certainty that the original venogram report was a false positive study. The radiolucent filling defects were consistent with but not necessarily diagnostic of deep vein thrombosis. Further, venous testing, invasive as well as noninvasive, never demonstrated any evidence of venous pathology in appellant. He concluded: "It is my final opinion, that this patient in fact never suffered from deep vein thrombosis or postphlebotic syndrome of the right lower extremity. Furthermore, I conclude that there is no

evidence of any arterial or venous pathology of the right lower extremity, which would account for her symptomatology.”

Responding to whether the work factors appellant performed from February to June 1980 further aggravated her underlying venous insufficiency of the right leg and symptoms of right leg thrombophlebitis, Dr. Anton reported that, as he did not believe that appellant ever suffered from deep vein thrombosis or thrombophlebitis, Dr. Anton could not conceive how any work factors would have aggravated a condition that never existed. His answer was “no.”

Dr. Anton also reported that he did not believe that appellant’s hospitalization in June 1980 was due to employment factors as, once again, there was no evidence that appellant had any arterial or venous pathology of either lower extremity.

As to appellant’s current diagnosis, Dr. Anton repeated that he found no evidence of any arterial or venous pathology based on physical examination and laboratory testing.

Dr. Anton further reported that appellant’s disability commencing on or about October 27, 1988, was not precipitated by the vascular studies performed by Dr. Alexander on September 23, 1988, “nor were they aggravated” by an increased workload due to her return to an eight-hour workday on October 23, 1988:

“I state my answer based on the fact that diagnostic ultrasound has proven to be a valuable tool in medical practice. An excellent safety record exists in that, after decades of clinical use, there is no known instance of human injury as a result of exposure to diagnostic ultrasound. Enclosed is a copy of the Radiological Health Bulletin to support this claim.

“Furthermore, I have enclosed an in-depth literature search which literally cannot support any claim of injury made by this patient.”

On the issue of appellant’s disability status, Dr. Anton noted again that there was no evidence of any arterial or venous pathology to warrant a claim of disability. He was further of the opinion that appellant was capable of returning to her date-of-injury job. Dr. Anton stated that he believed that appellant was capable of doing so shortly after her claimed date of injury.

On October 7, 1998 an Office claims examiner prepared a memorandum recommending that a Notice of Termination of Compensation and Medical Benefits be issued for the reason that the weight of the medical evidence established that appellant’s right leg conditions had resolved. Although the recommendation was approved, the Office issued no pretermination notice.

In a decision dated October 8, 1998, the Office terminated appellant’s compensation for wage loss and medical benefits on the grounds that the weight of the medical evidence established that appellant’s right leg conditions had resolved.

In a decision dated August 8, 1999, an Office hearing representative affirmed the October 8, 1998 termination of benefits. The hearing representative found that Dr. Anton’s opinion constituted the weight of the medical evidence with regard to the issue of continuing residuals of the work-related condition, with regard to the issue of disability beginning in

October 1988 and with regard to the September 23 and August 5, 1998 testing procedures. The hearing representative found that the Office had met its burden.

The Board finds that the Office has not met its burden of proof to justify the termination of appellant's compensation benefits effective October 8, 1998 on the grounds that the weight of the medical evidence established that her accepted right leg conditions had resolved.

Once the Office accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.²

The Office found that the weight of the medical evidence rested with the opinion of Dr. Anton, the Board-certified vascular surgeon and impartial medical specialist. He reported with a reasonable degree of medical certainty that the original venogram report was a false positive study, that the radiolucent filling defects were consistent with but not necessarily diagnostic of deep vein thrombosis. Dr. Anton explained that subsequent venous testing, both invasive and noninvasive, failed to demonstrate any evidence of venous pathology in appellant. From these findings he concluded that appellant in fact never suffered from deep vein thrombosis or postphlebotic syndrome of the right lower extremity. Further, Dr. Anton noted that there was no evidence of any arterial or venous pathology of the right lower extremity that would account for her symptomatology.

Dr. Anton's opinion is well reasoned, but he did not conclude that residuals of the accepted right leg conditions had resolved; he instead explained that the initial venogram gave a false positive and that appellant never in fact suffered from the accepted conditions. It is error for the Office to use such an opinion to terminate compensation for wage loss and medical benefits on the grounds that residuals of the accepted conditions have resolved. Dr. Anton did not accept that appellant ever sustained a deep vein thrombosis, thrombophlebitis or postphlebotic syndrome and so his opinion, while it tends to support an erroneous acceptance of such conditions, provides no evidentiary basis for the Office's finding that residuals of the accepted conditions had resolved. The Board finds that it is a denial of administrative due process requiring reversal for the Office to terminate compensation benefits on the ostensible grounds that a claimant no longer suffers residuals of an accepted condition, where the record supports that the real reason for the Office's action was that it had determined that the claimant never sustained the accepted condition and was never entitled to compensation benefits for that condition.³ The Office must inform claimants correctly and accurately of the grounds on which a decision rests, so as to afford them an opportunity to meet, if they can, any defect appearing therein.⁴ Because the Office failed to do so in this case, the Board will reverse the Office's August 8, 1999 decision, insofar as it affirmed the termination of compensation of wage loss and medical benefits for the accepted right leg conditions.

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ See *John M. Pittman*, 7 ECAB 514 (1955) (where the Bureau, now known as the Office, terminated benefits on the ostensible grounds that a claimant was not disabled for work beyond a specific date, when it appeared from the record that the real reason for denial was that the Bureau had determined that the injuries alleged had not in fact occurred and that the claimant had never been disabled).

⁴ *E.g., id.*; *James D. Boller, Jr.*, 12 ECAB 44 (1960).

The Board further finds that the weight of the medical evidence establishes that appellant's work activities from February to June 1980 did not further aggravate her accepted right leg conditions, that her hospitalization in June 1980 was not work related and that her disability commencing on or about October 27, 1988 was precipitated neither by the vascular studies performed on September 23, 1988 nor by an increased workload beginning on or about October 23, 1988.

When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁵

On remand from the prior appeal of this case, the Office properly referred appellant to an impartial medical specialist, Dr. Anton, for resolution of the outstanding conflicts.⁶ He reviewed the record and was provided a statement of accepted facts.⁷ As the Board found earlier, his opinion is well reasoned. Looking at the medical record as a whole, Dr. Anton observed that the only study to report a venous pathology was the original venogram of April 23, 1979. All subsequent studies, even a study obtained only five and a half months later, failed to support the original finding. He concluded to a reasonable degree of medical certainty the original venogram report was a false positive study; the radiolucent filling defects were consistent with but not necessarily diagnostic of deep vein thrombosis. Dr. Anton's explanation appears sound, reasonable and logical. It is consistent with information obtained from other impartial medical specialists that any damage to venous valves is permanent: If appellant had in fact suffered an aggravation of the accepted right leg conditions and permanent damage to her venous valves, one would expect subsequent studies to demonstrate evidence of this pathology. As this was not the case Dr. Anton reasoned that appellant in fact never suffered from deep vein thrombosis, thrombophlebitis or postphlebotic syndrome of the right lower extremity. And as he believed that appellant never suffered from these conditions, Dr. Anton concluded that work factors from February to June 1980 could not have aggravated conditions that never existed. Likewise, as there was no evidence that appellant had any arterial or venous pathology of either lower extremity, appellant's hospitalization in June 1980 was not due to employment factors.

Dr. Anton further concluded that appellant's disability commencing on or about October 27, 1988 was not precipitated by the vascular studies performed by Dr. Alexander on September 23, 1988 or by an increased workload due to her return to an eight-hour workday on October 23, 1988. He well supported his opinion by observing that diagnostic ultrasound had an excellent safety record, as after decades of clinical use there was no known instance of human

⁵ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁶ At the time of the Board's decision in 1994, two impartial medical specialists were resolving different but related issues. The Board remanded the case for clarification of these issues. When one of the physicians, Dr. Farrell, indicated that he was not willing to oblige the Office referred appellant to a new impartial medical specialist, Dr. Anton, for resolution of all the outstanding issues. This consolidation was consistent with the Board's decision and order.

⁷ The Board has considered appellant's objections to the statement of accepted facts and notes that Dr. Anton's opinion did not rely on any of the statements or findings to which she objected.

injury as a result of exposure to diagnostic ultrasound. He enclosed literature to support this fact and provided an in-depth literature search that he stated could not support any claim of such injury made by appellant.

Dr. Anton's opinion is based on a complete and accurate factual and medical background and is sufficiently well reasoned that it constitutes the weight of the medical evidence in this case. The Board will affirm the Office's August 8, 1999 decision, insofar as it found that appellant's work activities from February to June 1980 did not aggravate her claimed right leg conditions, that her hospitalization in June 1980 was not work related and that her disability commencing on or about October 27, 1988 was precipitated neither by the vascular studies performed on September 23, 1988 nor by an increased workload beginning on or about October 23, 1988.

The August 8, 1999 decision of the Office of Workers' Compensation Programs is reversed on the issue of termination and is otherwise hereby affirmed.

Dated, Washington, DC
August 20, 2001

David S. Gerson
Member

Willie T.C. Thomas
Member

Priscilla Anne Schwab
Alternate Member