

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EVA D. AFFOLTER and DEPARTMENT OF THE AIR FORCE,
SCOTT AIR FORCE BASE, IL

*Docket No. 00-1487; Submitted on the Record;
Issued December 13, 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 benefits effective March 27, 1999.

On May 29, 1990 appellant, then a 49-year-old supply technician, was injured when a cart struck her back. Appellant stopped work on the date of injury and, thereafter, worked light duty intermittently until the employing establishment no longer had available work. The employing establishment terminated appellant on May 29, 1992 and appellant's disability retirement was approved effective April 16, 1993. The Office accepted the claim for back contusion, temporary aggravation of herniated disc, and post-laminectomy syndrome. The Office paid appropriate wage-loss compensation.

Appellant submitted various medical records from Dr. Michael G. Murphy, a Board-certified neurosurgeon, who had treated her since 1976. These records indicated that appellant had a cervical discectomy on December 2, 1976, and a semi-hemilaminectomy at L4-5, L5-S1, left, on October 20, 1977. Status reports indicated that appellant's back remained symptomatic thereafter. In a February 16, 1990 report, Dr. Murphy noted that "over the last five months or so" appellant had increasing back and leg pain. A February 28, 1990 magnetic resonance imaging (MRI) revealed degenerative lumbar changes without frank herniation or impingement. On April 26, 1990 Dr. Murphy opined that the MRI showed degenerative disc disease at L4-5 and L5-S1 but did not reveal any significant difficulty at the site of her low back surgery although it was attributable to either scar tissue or discogenic pain.

In a May 29, 1990 form report, Dr. Curtis L. Galke, an osteopath and an employing establishment physician, noted that appellant was hit by a utility cart and diagnosed a back contusion. He recommended that she follow up with her neurosurgeon.

On June 12, 1990 Dr. Murphy advised that appellant stated that she was doing well until the May 29, 1990 work injury. He noted that some of appellant's symptoms had "partially resolved" and that she had no long tract signs or symptoms. On examination straight leg raising

was negative, deep tendon reflexes were symmetrical and equal, and there was no apparent motor deficit in either leg. Dr. Murphy opined that appellant had a focal contusion involving the postoperative scar tissue in the low back. He recommended a nerve block and a brace. In a July 12, 1990 report, Dr. Murphy related that appellant reported diminishing discomfort.

In a January 21, 1991 report, Dr. Murphy advised that a lumbar MRI revealed normal alignment. He listed an impression of degenerative disc disease and probable status postoperative at L4-5 and L5-S1. On January 24, 1991 Dr. Murphy noted findings, diagnosed “chronic low back strain lumbodorsal fasciitis,” and opined that appellant’s history of being “struck in the back by a heavy object at work” was “historically significant in determining the etiology of her complaint.” In a September 3, 1991 attending physician’s report, Dr. Murphy checked a box “yes” to indicate that appellant’s diagnosed lumbar contusion was caused or aggravated by employment activity.

In a June 29, 1992 report, Dr. Herman E. Russell, a Board-certified orthopedic surgeon and an Office referral physician, listed appellant’s history and noted examination findings. He concluded, “She still complains of discomfort which appears to be subjective and cannot be confirmed physically. Physically, there are minimal findings.” Dr. Russell opined that appellant had reached maximum improvement and that her condition would not likely deteriorate. In a September 2, 1992 report, Dr. Murphy advised that he “totally agreed” with Dr. Russell.

Dr. Murphy continued submitting treatment notes summarizing appellant’s status. These reports did not specifically address whether appellant had any continuing disability or residuals causally related to her May 29, 1990 injury.

In an April 16, 1997 letter, the Office requested that Dr. Murphy submit a narrative report addressing whether appellant had continued residuals of her accepted conditions. In a May 1, 1997 response, Dr. Murphy submitted copies of recent treatment notes. In a June 26, 1997 report, he noted that appellant had chronic degenerative changes with discogenic sclerosis at L4-5 and L5-S1, and significant disc space narrowing.

The Office referred appellant to Dr. Patrick A. Hogan, a Board-certified neurologist. In an August 29, 1997 report, Dr. Hogan noted appellant’s history and examination findings. Low back examination revealed normal lordotic curve, without spasm, nodularity or tenderness. He advised that appellant refused to bend at the waist. Straight leg raising was negative at 90 degrees bilaterally, while sitting. Left leg examination revealed “give-away weakness” of the quadriceps and extensors of the foot; the doctor opined that appellant exhibited “little effort” or showed “breakaway weakness.” Sensory examination revealed spotty decreased pinprick sensation on the dorsum of the left foot that could not be reproduced. Dr. Hogan noted that a lumbosacral MRI revealed some postoperative changes but no evidence of disc herniation. He listed an impression of status postoperative cervical and lumbar discectomy, and temporary aggravation of low back discomfort in a previously operated back, without permanent ongoing disability, aggravation or acceleration of any disorder. He opined that the May 29, 1990 employment injury caused some temporary disability secondary to low back strain which may have lasted up to four months but which did not cause any permanent disability.

Dr. Hogan found that appellant's examination was "quite functional" with reflexes intact and without atrophy or fasciculations. He noted that she had "give-away weakness and lack of effort weakness" and that "her mechanical low back examination [was] not remarkable." He opined that, "she had a temporary aggravation of a preexisting condition, but no evidence of disc herniation or arachnoiditis. I do not feel that the work-related aggravation persists and that it was temporary." Dr. Hogan stated that appellant could return to her date-of-injury job and required no specific treatment. In an accompanying August 29, 1997 work restriction evaluation, Dr. Hogan opined that appellant could work eight hours a day and could perform the "tasks that she did prior to May 29, 1990."

On October 22, 1997 the Office provided Dr. Murphy with Dr. Hogan's report and requested that he state whether the May 29, 1990 accepted injuries had resolved. In an undated response received November 4, 1997, Dr. Murphy stated: "I agree that [appellant's] condition is static. She stays in the work force with [physical therapy]. If the therapist suggests termination of treatment, I would agree." In a November 6, 1997 letter, the Office sought clarification from Dr. Murphy, requesting that he state whether he agreed with Dr. Hogan that appellant's work-related conditions from May 29, 1990 had resolved. In a response received December 1, 1997, Dr. Murphy stated: "I believe the best way to settle the problem is to have [appellant] undergo a functional capacity exam[ination] by an independent examiner."

The Office found that a medical conflict existed and referred appellant to Dr. Richard Ashby, a Board-certified neurosurgeon, for an impartial medical examination.

In a January 28, 1998 report, Dr. Ashby related appellant's history and symptoms. Examination of the back revealed normal curve and gait. Forward bending was to 90 degrees with some flattening of the lumbar curve. Extension was to 10 degrees with complaints of pain. Lateral bending was normal while straight leg raising was painful at 60 degrees. Complaints of back pain were not relieved, but were aggravated, by flexion of the knee and thigh. Motor examination revealed no weakness or atrophy. Sensory examination revealed some decreased sensation in a stocking distribution up to the ankles. Dr. Ashby concluded that appellant had advanced degenerative changes at L4-5 and L5-S1 and opined that this caused her current symptoms. He stated that "this problem preexisted her injury of 1990." Dr. Ashby further addressed causation, opining: "While the injury of 1990 temporarily aggravated the symptomatology of her preexisting condition, in my opinion, it would not significantly alter the natural course of this process." He noted that appellant could perform light duties and he submitted a January 29, 1998 work restriction evaluation listing her restrictions.

On February 5, 1999 the Office proposed termination of compensation.

In a March 4, 1999 report, Dr. Murphy stated that, under normal circumstances, the May 29, 1990 incident should have resolved spontaneously within a few months but that this was not the case with appellant who had a history of back problems. He advised that, after eight years, appellant remained functional through the use of physical therapy. He further stated: "Whether she receives physical therapy or not does not alter the fact that she does have a permanent, long-lasting condition: post-laminectomy syndrome. I believe the post-laminectomy syndrome was aggravated by the [employment] incident and I do n[o]t think it makes any

difference as to the level of her disability -- she is still disabled.” Dr. Murphy also questioned the manner in which the Office evaluated claims.

In a March 24, 1999 decision, the Office terminated appellant’s compensation benefits effective March 27, 1999. Appellant requested an oral hearing that was held on September 27, 1999.

In a decision dated and finalized December 16, 1999, an Office hearing representative affirmed the March 24, 1999 decision, finding that the Office properly relied on Dr. Ashby’s report in terminating compensation benefits.

The Board finds that the Office met its burden of proof in terminating appellant’s compensation benefits effective March 27, 1999.

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.¹ 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.²

The Board finds that the weight of the medical evidence rests with the opinions of Drs. Hogan and Ashby who found no basis on which to attribute any continuing employment-related condition to appellant’s May 29, 1990 employment injury.

The Office terminated compensation benefits based on the report of Dr. Ashby, a physician whom the Office selected to resolve a medical conflict. The Board finds that, while the weight of the medical evidence establishes that appellant has no continuing work-related condition or disability after May 27, 1999, there was no conflict in the medical evidence.³ Therefore, Dr. Ashby is considered a second opinion referral physician and not an impartial medical specialist.⁴

Dr. Murphy’s most recent reports, prior to the Office’s referral of appellant to Dr. Ashby, reveal that, while Dr. Murphy consistently found that appellant was disabled, he did not offer a specific opinion as to whether any condition or disability was causally related to the May 29, 1990 employment injury. For example, after the Office received Dr. Hogan’s August 29, 1997 report, the Office, on two occasions, requested that Dr. Murphy indicate whether appellant continued to experience disability or residuals of the May 29, 1990 work injury. Dr. Murphy was nonresponsive regarding causation.

¹ *Bettye F. Wade*, 37 ECAB 556 (1986); *Ella M. Garner*, 36 ECAB 238 (1984).

² *John Wilkes, Jr.*, 36 ECAB 451 (1985); *Betty J. Glover*, 34 ECAB 465 (1982); *Fred Foster*, 1 ECAB 21 (1947).

³ 5 U.S.C. § 8123(a), in pertinent part, provides: “If there is a 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.”

⁴ See *James C. Ross*, 45 ECAB 424 (1994).

Following receipt of Dr. Ashby's January 28, 1998 report, Dr. Murphy, in a March 4, 1999 report, provided some support for causal relationship. However, this report is of limited probative value.⁵ Dr. Murphy addressed causal relationship by noting that the May 29, 1990 incident would usually resolve spontaneously within a few months but such was not the case because of appellant's preexisting back problems. He then opined that appellant's post-laminectomy syndrome was aggravated by her work injury.

However, Dr. Murphy did not provide any medical reasoning or current examination findings to support his opinion. This is important in view of appellant's extensive history of back problems predating her employment injury and the relative lack of any findings in the medical record, subsequent to May 29, 1990, that were not present prior to that date. Instead, he merely stated a conclusion without explaining its medical basis. Given the limited probative value of Dr. Murphy's opinion on the relevant issue in this case, it does not have virtually equal weight and rationale as that of Drs. Hogan and Ashby and, therefore, there is no current conflict in the medical evidence. Board precedent clearly requires that, for there to be a medical conflict, the opinion of the claimant's physician and the Office's physician must be of "virtually equal weight."⁶

In contrast, both Drs. Hogan and Ashby provided reasons for their conclusion that appellant's employment-related conditions had resolved without residual. Each doctor provided a report with opinions based on appellant's history and current examination findings.⁷ Dr. Hogan, in his August 29, 1997 report, noted that appellant gave less than maximum effort on examination, that her examination was "quite functional" and that her low back examination was "not remarkable." Based on his review of appellant's history and examination findings, Dr. Hogan found that appellant's work injury was a temporary aggravation of her low back discomfort, a preexisting condition, and did not persist beyond a few months. He concluded that the only limitations on her activity were ones that preexisted her May 29, 1990 work injury.

Likewise, Dr. Ashby, in a January 28, 1998 report, noted appellant's history and listed findings on examination. Examination findings were generally unremarkable as motor examination revealed no weakness or atrophy while sensory examination revealed some decreased sensation in a stocking distribution up to the ankles. Dr. Ashby diagnosed advanced degenerative changes at L4-5 and L5-S1 but specifically found that "this problem preexisted her injury of 1990." Similar to Dr. Hogan, Dr. Ashby opined that, "while the injury of 1990 temporarily aggravated the symptomatology of her preexisting condition ... it would not significantly alter the natural course of this process." Neither of these physicians found any basis on which to attribute any continuing condition or disability to the May 29, 1990 work injury.

⁵ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

⁶ *Clara T. Norga*, 46 ECAB 473 (1995).

⁷ See *Melvina Jackson*, 38 ECAB 443 (1987) (regarding factors that enter into the assessment of medical evidence).

The Board finds that the reports of Drs. Hogan and Ashby represent the weight of the medical evidence and establish that appellant had no continuing employment-related condition or disability after March 27, 1999.

The December 16, 1999 Office of Workers' Compensation Programs' decision is affirmed as modified.

Dated, Washington, DC
December 13, 2001

David S. Gerson
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member