U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHLEEN DAMMES and U.S. POSTAL SERVICE,
MASSAPEQUA POST OFFICE, Massapequa, NY

Docket No. 99-516; Submitted on the Record;
Issued February 2, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
VALERIE D. EVANS-HARRELL

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation for refusal to accept suitable work.

On April 7, 1979 appellant, then a 28-year-old letter carrier, ran to a postal vehicle that was rolling in reverse and grabbed the steering wheel with her right arm. She filed a claim for a pulled right arm. The Office accepted appellant's claim for strain of the right shoulder, arm and hand. Appellant received continuation of pay for the period April 7 through May 22, 1979. She returned to work in a part-time, light-duty position and received continuation of pay and compensation for the hours she did not work. In an August 25, 1980 decision, the Office issued a schedule award for a 14 percent permanent impairment of the right arm. On January 3, 1985 appellant began working eight hours a day.

On December 5, 1991 appellant filed a claim for a recurrence of disability for the period July 19 through September 6, 1991. She stated that she had lower back, leg and right arm pain and numbness since the employment injury. In a January 6, 1992 report, Dr. A. Philip Fontanetta, a Board-certified orthopedic surgeon, stated that he had been treating appellant for several months for a herniated L4-5 disc. He indicated that appellant had felt intermittent back pain since the April 7, 1979 employment injury and, therefore, related her condition to the employment injury. The Office accepted appellant's claim for a herniated L4-5 disc. She stopped work again on January 10, 1992. She underwent surgery on January 10, 1992 for a lumbar laminectomy and discectomy. She used leave from January 10 through August 21, 1992. The Office began payment of temporary total disability compensation effective August 22, 1992. On January 5, 1994 appellant underwent additional surgery for recurrent L5 radiculopathy, consisting of a lumbar laminectomy, discectomy at L4-5, bilateral athrodesis from L4 to the sacrum, external, neurolysis of the right L5 nerve root, medial fasciectomy and foraminotomy and fusion in the lumbar spine.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Paul Kleinman, a Board-certified orthopedic surgeon, for an examination and

second opinion on appellant's ability to work. In a February 13, 1995 report, Dr. Kleinman stated that appellant had limitation of motion in the back. He reported that appellant had mild weakness in the right leg in several muscle groups, including the extensor hallucis longus, ankle plantar and dorsiflexors, knee flexors and extensors and hip flexors. Dr. Kleinman noted that a sensory examination showed some decreased sensation down the right lateral thigh and leg. He reported appellant had a positive impingement sign in the right shoulder and positive Tinel's and Phalen's tests in the right arm. Dr. Kleinman diagnosed status post two laminectomies and fusion from L4 to the sacrum, chronic low back pain, impingement syndrome of the right shoulder and right carpal tunnel syndrome. He related all of the diagnosed conditions to appellant's April 7, 1979 employment injury. Dr. Kleinman concluded appellant was totally disabled and stated that her delay in recovery was due to her chronic back pain and chronic low back syndrome. He expressed doubt that appellant would ever recover.

In a June 1, 1995 note, Dr. Fontanetta stated appellant's back pain "from the most recent episode of dancing" was completely resolved. He noted that appellant's leg still remained numb in the distribution which had existed before he started treating her. Dr. Fontanetta commented that appellant was basically functional with most activities, including gardening.

The Office submitted the June 1, 1995 note to Dr. Kleinman and requested his review. In a July 27, 1995 response, Dr. Kleinman commented that the information suggested that appellant had not been truthful in her description of her symptoms and in her compliance with his examination. He indicated that appellant did not present herself as able to do dancing and gardening. In response to specific questions, Dr. Kleinman stated that a patient could continue to have chronic low back syndrome after a successful lumbar fusion. He commented, however, that, according to the new information from Dr. Fontanetta, appellant did not appear to have chronic pain. Dr. Kleinman also indicated that a patient could have an impingement syndrome without working for a period of years. He added, however, that because of the new information, his examination might not have been accurate. Dr. Kleinman concluded that appellant had a mild partial disability. He stated that appellant's conditions were causally related to the employment injury as he had previously stated but indicated that she had recovered at least 90 percent based on the description in Dr. Fontanetta's report.

In a November 17, 1995 letter, the Office offered appellant a position as a human resource specialist, which required sitting eight hours a day with intermittent walking and standing for comfort. In a November 27, 1995 letter, appellant indicated that she was not declining the job. She requested copies of Dr. Kleinman's reports so she could review the reasons for the change in his opinion.

In a December 7, 1995 report, Dr. Fontanetta stated that Dr. Kleinman apparently changed his opinion on appellant's disability based on several elements of his report taken out of context. He noted that he apparently referred to appellant "dancing" and "gardening" in some temporal proximity to an exacerbation of back and leg pain. Dr. Fontanetta stated that in going through appellant's history again, he found that appellant was not dancing but simply moving to music while performing light housework. He stated that, with regard to gardening, the statement referred to a single episode in which appellant used a shovel to contain a leaky sprinkler system. Dr. Fontanetta related that appellant had assured him that she was unable to garden and had hired a landscaper to do the work. He stated that appellant remained totally disabled.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Noah Finkel, a Board-certified orthopedic surgeon, stating that the purpose of the examination was to resolve a conflict in the medical evidence. In a May 24, 1996 report, Dr. Finkel stated that appellant had minimal motion in the lumbosacral region but no evidence of acute symptomatology. He indicated that neurological examination was unremarkable. Dr. Finkel found no evidence of atrophy in any of the muscular groups when compared to the other leg. He commented that appellant had no pathological reflexes and no pattern to any sensory deficit. Dr. Finkel stated that examination of the shoulders revealed no evidence of impingement syndrome. He noted that appellant had a positive Tinel's sign and a negative Phalen's sign. Dr. Finkel diagnosed status post lumbosacral fusion but commented that appellant had nonspecific subjective symptomatology related to her lower back and lower leg. He stated that there was no clinical objective data to demonstrate any ongoing neurological phenomena in the legs. He indicated that the symptomatology appellant complained of was primarily subjective and not found objectively. Dr. Finkel stated that there was no evidence of ongoing impingement. He commented that appellant's subjective symptomatology suggested a low-grade tendinitis. Dr. Finkel also diagnosed carpal tunnel syndrome. He stated that there was a causal relationship between appellant's employment injury and her disc disease and that the carpal tunnel syndrome and shoulder tendinitis were related to the injury. Dr. Finkel concluded that appellant could function at a mild type of physical employment which included different amounts of sitting, standing and remaining mobile. He stated that appellant should not perform any heavy lifting for any length of time. Dr. Finkel indicated that kneeling, standing and bending and twisting should be eliminated from her job. He commented that sitting for one to two hours a day with frequent periods allowing her to rise might be functional. Dr. Finkel concluded that appellant could start working four hours a day, gradually increasing to eight hours a day over the course of one month.

In a July 9, 1996 letter, the employing establishment offered appellant a position as a human resource specialist. It indicated that the physical requirements were sitting, standing and walking intermittently at her comfort, starting at four hours a day, lifting up to five pounds and no kneeling, bending and twisting. The employing establishment stated that appellant would increase work by one hour a week up to eight hours. The employing establishment requested appellant's response within 10 days. In a July 11, 1996 letter, the Office stated that it had reviewed the job offer and found it suitable for appellant. The Office indicated that appellant had 30 days to accept the position or provide a reasonable, acceptable explanation for refusing the offer. The Office warned appellant that if she refused the job or failed to report when scheduled, her compensation would be terminated.

In a July 20, 1996 response, appellant indicated that she was determined to return to work. She noted that she had been to her physician repeatedly since her second operation because of increasing numbness in her leg, unbearable back pain and incapacitating muscle spasms. Appellant stated that she never recovered full feeling in her leg since the second operation. She indicated that she had several serious falls where her leg gave way without warning. Appellant commented that the falls caused such intense pain that she would spend weeks in bed afterwards. She related that her most recent visit to her physician was due to a bad fall on July 7, 1996. Appellant stated that, when she tried to explain her physical limitations or chronic instability, Dr. Finkel stated that he was not there to listen to her because the Office was paying for the examination. In regards to Dr. Kleinman's report, she stated that the "dancing" he

cited in his second report consisted of her swaying her hips to the beat of music that her daughter had on the stereo. Appellant indicated that as a result of this slight movement she was flat on her back for weeks. She stated that, in regard to the other incident, a repairman had left a space in front of her basement window which caused flooding in her basement during a rainstorm. Appellant indicated that she placed a plastic baggie over the space and placed a trowel full of dirt on top to hold the baggie in place. She stated that she offered the statement as a reasonable explanation for failing to report to work as scheduled. Appellant asked that her compensation not be terminated.

In an August 14, 1996 letter, the Office stated that it had reviewed the evidence submitted by appellant and found it insufficient to change the determination previously made. The Office noted that appellant had not submitted any medical rationale to explain her reasons for not accepting the job offer. The Office gave appellant 15 days to accept the job or have her compensation terminated.

In an August 16, 1996 note, Dr. Fontanetta stated that appellant had permanent nerve damage and must remain totally disabled.

In a September 3, 1996 decision, the Office terminated appellant's compensation effective September 15, 1996 for refusal to accept suitable work.

Appellant returned to work, four hours a day, on September 16, 1996. She requested a hearing before an Office hearing representative. In a September 19, 1996 report, Dr. Fontanetta stated that, after appellant's two operations, decompression and arthrodesis had been satisfactory. He noted, however, that appellant had failure of complete neural recovery and, since the most recent operation, had persistent dysesthesia and paresthesias in the right foot. Dr. Fontanetta indicated that appellant also had intermittent episodes of weakness in the right foot and had fallen on a number of occasions due to that weakness. He noted that she had periodic exacerbations of pain. Dr. Fontanetta concluded that appellant continued to be disabled due to the condition of her right foot.

In an October 9, 1996 report, Dr. Lowell B. Barek, a Board-certified radiologist, stated that a magnetic resonance imaging (MRI) scan of the lumbosacral spine showed bony hypertrophy and central disc bulge at L3-4 with a mild narrowing of both exit foramina. At L4-5, Dr. Barek indicated that the MRI scan showed a lateral bony fusion with central disc bulge and posterior vertebral osteophyte formation, which narrowed both exit foramina. He also noted a clumping of nerve roots within the right side of the thecal sac, which suggested arachnoiditis. At L5-S1, Dr. Barek reported that appellant had bony fusion and right-sided laminectomy deficit with central bulge and bony hypertrophy encroaching on the left S1 nerve root and mildly narrowing the left exit foramen.

In a November 21, 1996 report, Dr. Mihai D. Dimancescu, a Board-certified neurosurgeon, stated that appellant had normal strength in the legs except for the right extensor hallucis longus where the muscle tended to give against resistance. He reported appellant had decreased sensation in the right leg over the L5 distribution. Dr. Dimancescu reviewed the MRI scan and stated that appellant had arachnoiditis at the L4-5 level, bony hypertrophy at L5-S1 and facet hypertrophy and ligamentous hypertrophy at L3-4, causing stenosis at that level. He

diagnosed chronic lumbar radiculitis secondary to arachnoiditis. Dr. Dimancescu stated that appellant's condition limited her activities.

In a January 28, 1997 report, Dr. Fontanetta stated appellant had intermittent exacerbations of radicular pain, constant numbness in her right foot and intermittent numbness in her left foot. He also indicated that appellant had dysesthesia in her foot. Dr. Fontanetta noted that appellant had mild dorsiflexion weakness in her right foot. He reported that appellant was considerably limited in her activities of daily living such as putting on her shoes or pantyhose, performing household activities that required bending or loading and unloading groceries. Dr. Fontanetta stated that these activities resulting in numbness extending throughout the right leg. He reported that appellant demonstrated more than subjective findings in loss of sensation and intermittent dorsiflexion in the right foot. Dr. Fontanetta concluded that appellant had significant disability and required at the minimum the work restrictions outlined by Dr. Finkel. He stated that appellant's condition was permanent and demonstrated a moderate, permanent disability.

The hearing before an Office hearing representative was conducted on June 25, 1997. Appellant testified that she had fallen on July 7, 1996 and, therefore, was not able to return to work when requested by the Office. She stated that she requested a delay in returning to work verbally and in writing.

In a July 23, 1997 decision, the Office hearing representative found that appellant's explanation for the dancing and gardening incidents were credible. He, therefore, concluded that Dr. Kleinman's second report was based on an inaccurate history and, therefore, was insufficient to cause a conflict in the medical evidence. The Office hearing representative stated, however, that Dr. Finkel's report constituted the weight of the medical evidence and, therefore, established that appellant was able to work. He further found that appellant, in her letters, was indicating that she was not able to perform the job offered to her and was not requesting a delay due to injuries suffered in a fall. The Office hearing representative, therefore, affirmed the Office's September 9, 1996 decision.

In a July 18, 1998 letter, appellant, through her attorney, requested reconsideration.[1] He stated that, because Dr. Kleinman's second report was based on inaccurate information, the referral of appellant to Dr. Finkel was unnecessary. Appellant also contended that Dr. Finkel's report was tainted by the same misinformation that affected Dr. Kleinman's report. He argued that Dr. Finkel's report had no specific medical findings to support his suppositions of appellant's capability to work. He stated that Dr. Finkel's diagnosis of disability was speculative and not grounded in objective clinical findings. Appellant indicated that, since appellant had returned to work, her physical condition had deteriorated. He cited the reports of Drs. Fontanetta and Dimancescu as giving clinical confirmation of appellant's numbness in her right leg and foot.

[1] Appellant's attorney had previously stated in an August 25, 1997 letter that he was going to request reconsideration. In a September 24, 1997 decision, the Office denied appellant's request for reconsideration. In a September 29, 1997 letter, appellant's attorney stated that the August 25, 1997 letter was not intended as a request for reconsideration.

The attorney submitted reports from Dr. Fontanetta in support of his request. In a June 5, 1997 work restriction form, Dr. Fontanetta indicated that appellant could sit or walk intermittently four hours a day. He concluded that appellant could work up to four hours a day.

In an accompanying note, Dr. Fontanetta stated that appellant's efforts to work beyond four hours a day had a negative impact on her condition. He noted that she had virtually constant numbness in her right leg and increased pain and numbness in her left leg. In a December 9, 1997 report, Dr. Fontanetta stated that appellant continued to have intermittent giving out of her right leg and paresthesias and numbness of the right leg. He indicated that she was intolerant of long periods of sitting and walking. Dr. Fontanetta related her condition to arachnoiditis which was affecting appellant's right leg and causing left leg numbness and pain. He stated that there had been a slow deterioration in appellant's condition. Dr. Fontanetta concluded that appellant's current symptoms were a direct result of the employment injury and the residuals constituted a moderate permanent disability. In a March 10, 1998 report, he stated that appellant's condition continued to deteriorate due to arachnoiditis and permanent nerve damage. Dr. Fontanetta commented that the experiment in part-time employment had failed and concluded that appellant was totally disabled.

In an August 3, 1998 decision, the Office concluded that Dr. Finkel's report remained the weight of the medical evidence. It stated that Dr. Fontanetta's reports on appellant's ability to work had been contradictory or unrationalized and, therefore, the Office hearing representative had acted properly in finding that Dr. Finkel's report was the weight of the medical evidence. The Office further found that the medical evidence submitted in support of the request was either repetitious or irrelevant as it addressed appellant's ability to work after she returned to work, not whether the job was suitable. The Office, therefore, denied appellant's request for reconsideration on the grounds that the evidence and arguments submitted in support of the request were insufficient to warrant review.

The Board notes that the August 3, 1998 decision of the Office engaged in an analysis of the arguments of appellant's attorney and, in a review of the medical evidence, found that the reports of Dr. Fontanetta had been contradictory, an analysis that had not been made by the Office hearing representative. The analysis of Dr. Fontanetta's report reflected on the probative value of his reports, which constitutes a review of the merits of the case. The Board will, therefore, treat the August 3, 1998 decision of the Office as a merit decision.

The Board finds that the Office improperly terminated appellant's compensation for refusal to accept suitable work.

Section 8106(c)(2) of the Federal Employees' Compensation Act states: "a disabled employee who: (1) refused to seek suitable work; or (2) refuses or neglects to work after suitable work is offered is not entitled to compensation."[2] An employee who refuses or neglects to work after suitable work has been offered to him has the burden of showing that such refusal to work was justified.[3]

[2] 5 U.S.C. § 8106(c)(2).

[3] 20 C.F.R. § 10.124.

The Board finds that Dr. Finkel's report does not represent the weight of the medical evidence. The Office hearing representative properly found that Dr. Finkel did not serve as an impartial medical specialist. An impartial medical specialist is called upon to resolve a conflict in the medical evidence between a physician for appellant and a physician for the government.[4] To be in conflict, the reports must contain more than a simple disagreement between the respective physicians. The reports of the opposing physicians must be of virtually equal weight and rationale.[5] As the hearing representative pointed out in this case, Dr. Kleinman's July 27, 1995 report was based on an inaccurate history that assumed appellant was engaging in extensive dancing and gardening, based on an inaccurate interpretation of Dr. Fontanetta's June 1, 1995 note. Dr. Kleinman's July 27, 1995 report, which was invoked by the Office as creating a conflict in the medical evidence, therefore, has limited probative value and, as a result, does not have the weight and rationale to create a conflict in the medical evidence with the reports of Dr. Fontanetta. Since there was no true conflict in the medical evidence prior to Dr. Finkel's report, Dr. Finkel cannot be considered to have the status of an impartial medical specialist.

Dr. Finkel was the only physician of record to state that there was no objective evidence to support appellant's symptoms. Drs. Kleinman, Fontanetta and Dimancescu reported weakness of muscles in appellant's right leg and a sensory deficit in appellant's right leg. Dr. Dimancescu indicated that the sensory deficit was in an L5 pattern as opposed to Dr. Finkel's report that there was no pattern to appellant's sensory deficit. The October 9, 1996 MRI scan report showed degenerative changes in appellant's lumbar region, particularly arachnoididitis, which Drs. Fontanetta and Dimancescu concluded was the cause of appellant's back pain and right leg symptoms. Dr. Finkel's sole report that no such objective findings existed created a conflict in the medical evidence with the other medical reports of record which found objective evidence to support appellant's symptoms. Dr. Finkel's report, while sufficient to create a conflict in the medical evidence, was insufficient to meet the Office's burden of establishing that appellant was capable of performing the suitable work offered to her.

[4] 5. U.S.C. § 8123(a).

[5] *Robert D. Reynolds*, 49 ECAB 561 (1998).

The decision of the Office of Workers' Compensation Programs dated August 3, 1998 is hereby reversed.

Dated, Washington, DC
February 2, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Valerie D. Evans-Harrell
Alternate Member