U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LYNDA J. OLSON and DEPARTMENT OF HEALTH & HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, Auburn, WA

Docket No. 00-2085; Submitted on the Record;
Issued July 11, 2001

DECISION and ORDER

Before WILLIE T.C. THOMAS, BRADLEY T. KNOTT,
PRISCILLA ANNE SCHWAB

The issue is whether the Office of Workers' Compensation Programs properly determined that residuals of appellant's accepted employment injury had ceased by June 10, 1999; and (2) whether the Office properly refused to reopen appellant's claim for merit review.

On April 18, 1996 appellant, then a 53-year-old service representative, filed an occupational disease claim alleging that the pain and numbness in her left arm and hand, the pain in her shoulders, back and neck and her severe headaches were due to factors of her employment. The Office accepted the claim for temporary aggravation of cervical stenosis.

In a report dated December 21, 1996, Dr. Peter Mohai, appellant's attending Board-certified internist and rheumatologist, opined that appellant's work-related activities aggravated her underlying disc disease. He also noted that appellant "had long-standing problems with recurrent fibromyalgia symptoms, aggravated by stress (primarily at the workplace) as well as repetitive stress from the nature of her work, affecting her arms, shoulders, neck and upper back."

In a report dated July 8, 1997, Donald D. Hubbard, a second opinion Board-certified orthopedic surgeon, concluded that there was no objective evidence that appellant had any partial or temporary aggravation and that appellant's "acquired cervical central canal stenosis is a degenerative problem related to age and smoking, although activities in the work and play environment contribute to degeneration." He added that appellant's cervical surgeries in February 1996 and February 1997 were unrelated to her employment activities and that employment factors did not cause, aggravate, precipitate or accelerate her cervical spine degeneration.

In a report dated April 3, 1998, Dr. William T. Thieme, an impartial Board-certified orthopedic surgeon, opined that appellant "had cervical spondylitis preexisting September 1995 but aggravated and made symptomatic by work activities. The work-related neck and left upper symptoms necessitated cervical disc excision in February 1996 and persistent cervical pain,

again aggravated by work activity, made surgical fusion of the spine necessary." Dr. Thieme also concluded that appellant had a permanent aggravation of her preexisting cervical spondylitis.

By letter dated June 25, 1998, the Office requested Dr. Thieme to clarify his opinion regarding the traditional course of appellant's cervical spondylitis and to provide objective findings to support his conclusion that appellant's work activities caused a permanent aggravation of her condition. In addition, the Office asked Dr. Thieme to provide medical rationale to support his conclusion that appellant's two surgeries were related to her work injury.

In response, Dr. Thieme indicated that "[t]he natural course of cervical spondylitis is gradual worsening of intermittent pain and stiffness and sometimes development of radicular signs and symptoms. A worsening of symptoms is ordinarily directly related to physical stresses and trauma to the neck." He opined that appellant's work activities as set forth in the statement of facts "would be expected to place mechanical stresses on the neck and to cause the symptoms which appellant has."

Next, Dr. Thieme indicated that appellant's "condition differs from the natural or traditional course of cervical spondylitis with stenosis in that her work activities aggravated the condition." He concluded that the two surgical procedures, "were necessary due to the aggravation caused by her work activities" and added that his opinion was "supported by the clinical record and [appellant's] history."

In an August 8, 1998 report, Dr. Mohai opined that appellant's work activities aggravated her preexisting conditions so that in 1995 she developed increased radicular and neck symptoms. He concluded that appellant's work activities, which included using computer keyboards, writing and typing, resulted in repetitive stress injury, which was manifested in nerve entrapment in her wrist and neck.

In an October 2, 1998 report, Dr. Mohai indicated that appellant's pain symptoms were exacerbated by physical activities requiring "use of the arms with repetitive activity of the hands, lifting and carrying" and activities requiring "sustained posturing of the head, as well as turning of the head in various directions is markedly aggravating." Dr. Mohai noted that appellant continued to have problems despite ergonomic changes made by the employing establishment.

On November 18, 1998 the Office referred appellant for a second impartial evaluation to Dr. Richard G. McCollum, finding that Dr. Thieme failed to support his opinion with any medical rationale. In a report dated November 30, 1998, Dr. McCollum concluded that the record contained no objective evidence that appellant sustained anything more than a temporary aggravation of her degenerative cervical spinal disease. In response to the Office's questions, he stated:

> "(1) The natural or traditional course of cervical spondylitis with stenosis would be progression. (2) There are no clinical or laboratory findings to indicate that any of her current disability is a result of a work-related temporary aggravation of a cervical stenosis. In fact, the neurological examination is normal at this time, other than some limited cervical motion, which is due to the preexisting condition,

there is no evidence of any impairment from the temporary aggravation of the cervical spondylitis. (3) I do n[o]t see evidence that the exposure to work factors resulted in a material change in the underlying condition. There are certainly no objective findings in the records to substantiate that opinion. I do n[o]t see any medical mechanics to connect this condition to work and the condition that she does not differ from the natural or traditional course of DJD [degenerative joint disease] of the cervical spine. I do not see that the operations of February 1996 or February 1997 have any relationship to the temporary aggravation of the long-standing degenerative condition of her cervical spine."

On May 7, 1999 the Office issued a proposed notice of termination based upon the opinion of Dr. McCollum that appellant had no residuals or continuing disability due to her accepted employment injury. On June 10, 1999 the Office finalized the termination of benefits.

In a letter dated October 6, 1999, appellant's representative requested reconsideration and a copy of her file. By nonmerit decision dated October 18, 1999, the Office denied appellant's request.

The Board finds that the Office improperly determined that residuals of appellant's accepted employment injury had ceased by June 10, 1999.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] 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.[2] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.[3]

Section 8123(a) of the Federal Employees' Compensation Act[4] provides in part: "If there is 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."[5] The Office properly found a conflict of medical opinion between Drs. Mohai and Hubbard on the issues of whether appellant's February 1996 and February 1997 surgeries were due to work factors and whether her employment duties caused a permanent aggravation of her underlying condition of cervical spondylitis with stenosis.

[1] *Gewin C. Hawkins*, 52 ECAB ___ (Docket No. 99-798, issued January 29, 2001); Alice *J. Tysinger*, 51 ECAB ___ (Docket No. 98-2423, issued August 29, 2000).

[2] *Mary A. Lowe*, 52 ECAB ___ (Docket No. 99-1507, issued January 19, 2001).

[3] *Id.; Leonard M. Burger*, 51 ECAB ___ (Docket No. 98-1532, issued March 15, 2000).

[4] 5 U.S.C. §§ 8101-8193.

[5] 5 U.S.C. § 8123(a).

The Board finds that the report of Dr. McCollum must be excluded from the record. It was improper to refer the case to Dr. McCollum as a second impartial medical specialist when Dr. Thieme, the first impartial medical specialist, provided a report and a supplemental report as requested by the Office and supported his conclusions with rationale.[6] Dr. Thieme's opinion was favorable to appellant and the requested clarification in his July 27, 1998 report explained his conclusions that the aggravation was permanent and that the surgeries were work related. The Office's referral to a second impartial medical specialist gives the appearance of impropriety that the Office was shopping around to secure a medical opinion that would justify termination of appellant's compensation.[7] Therefore, the Board finds that the Office improperly relied on Dr. McCollum's opinion to terminate appellant's compensation.

The October 18 and June 10, 1999 decisions of the Office of Workers' Compensation Programs are hereby reversed.[8]

Dated, Washington, DC
July 11, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member

[6] *See Queenie Anderson*, 37 ECAB 661 (1986).

[7] *Carlton Owens*, 36 ECAB 608, 616 (1985); *see Annabelle Shank*, 39 ECAB 548 (1988).

[8] Given the Board's disposition of the merit issue in the present case, it is not necessary for the Board to specifically address the nonmerit issue of whether the Office, by decision dated October 18, 1999, properly denied appellant's October 6, 1999 request for reconsideration.