U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CAROLYN BUSSOLARI and DEPARTMENT OF THE ARMY, NATIONAL GUARD BUREAU, Milford, MA

Docket No. 01-668; Submitted on the Record;
Issued June 14, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether appellant has met her burden of proof to establish that she was disabled beginning December 18, 1997 due to her accepted employment injury.

On January 6, 1998 appellant, then a 48-year-old contract and administrative assistant, filed a notice of occupational disease claiming that she first realized on March 17, 1997 that the repetitive use of her computer, answering the telephone and long drive to work caused the severe pain in her arm and neck. She stopped work on December 4, 1997.

Appellant submitted an attending physician's report from Dr. Geoffrey Piken dated January 16, 1998, in which he diagnosed her with neck strain, cervical radiculitis, and checked "yes" to the question of whether appellant's condition was caused or aggravated by her employment. Regarding the question on causal relationship, Dr. Piken wrote "desk + computer work aggravating." Dr. Piken further indicated that appellant was partially disabled from November 14 through December 4, 1997, and totally disabled thereafter.

By decision dated April 14, 1998, the Office of Workers' Compensation Programs accepted appellant's claim for cervical strain.

On April 25, 1998 appellant filed a claim for wage-loss compensation (Form CA-7), claiming compensation for the period beginning December 18, 1997.

By letter dated May 11, 1998, the Office informed appellant that medical evidence was necessary to support her claim of disability allegedly caused by the March 17, 1997 employment injury.

By letter dated May 15, 1998, the Office referred appellant to Dr. Howard Taylor, a Board-certified orthopedic surgeon, for a second opinion examination.

By report dated May 29, 1998, Dr. Taylor stated:

> "In my opinion, [appellant] does not have any objectively verifiable residual from the cervical strain that she suffered on March 17, 1997. In my opinion, based on my objective evaluation, I believe that [appellant] could perform the duties of her job which are described as largely sedentary in nature involving a variety of sometimes repetitive administrative and clerical tasks, likely involving intermittent repetitive motions of the wrists, fingers and hands. There does not appear to be any objective reason she could not have performed her duties between December 4, 1997 through to the present time. The objective studies are the x-rays and the MRI [magnetic resonance imaging] [scan]which, as I said, are unremarkable. Based on the evidence at hand, I would have expected a period of impairment from this type of injury of approximately 8 to 12 weeks and a period of partial impairment of approximately 12 weeks after that. That being the case, I would have expected her to be able to return to at least limited duty by the middle of June 1997 and to full duty by approximately the middle of September 1997. I do not believe that she requires any treatment at the present time for her cervical strain that she suffered on March 17, 1997."

Appellant submitted a medical report from Dr. Sheila Tapp, a Board-certified internist, dated June 3, 1998. Dr. Tapp discussed appellant's complaints of pain in the right upper extremity and neck beginning on March 14, 1997. She described appellant's employment duties and indicated that appellant related that her pain is exacerbated by these activities. Dr. Tapp then concluded: "At present, I am unable to completely explain the findings and I require the results of the EMG [electromyography] to further define her diagnosis and prognosis."

By decision dated June 30, 1998, the Office denied appellant's claim, finding that the weight of the medical evidence rested with the opinion of Dr. Taylor and did not support the contention that appellant was disabled as a result of her March 17, 1997 employment injury.

By letter dated July 23, 1998, appellant requested an oral hearing. The hearing was held on January 4, 1999.

Appellant submitted an additional report from Dr. Tapp dated August 7, 1998, in which Dr. Tapp agreed with the diagnosis of Dr. Lynch,[1] an orthopedist, of chronic cervical strain and mild thoracic outlet syndrome and agreed with his suggested work restrictions.

By decision dated March 3, 1999, the hearing representative affirmed the Office's June 30, 1998 decision.

[1] The Board was unable to determine Dr. Lynch's first name and whether he is Board-certified.

By letter dated June 8, 1999, appellant requested reconsideration. In support of her request appellant submitted a report from Dr. Piken, dated April 12, 1999 and a report from Dr. Tapp, dated February 1, 1999. In his April 12, 1999 report, Dr. Piken stated:

> "I do feel [appellant] has been disabled from the time that I first saw her March 17, 1997 through and including the time of February 23, 1998. My diagnosis is cervical strain and secondary mild cervical radiculitis and related to her work situation as described to me. I have not seen her since that time so cannot comment on her current status."

In her report, Dr. Tapp indicated that she first treated appellant on April 29, 1998 and at that time diagnosed her with cervical sprain and right upper extremity weakness with parathesias, and found her to be disabled for her usual employment as a result. She further stated:

> "My professional opinion, to a reasonable medical certainty, is that the above diagnoses and the patient's disability on and after December 18, 1997 were caused by the described incident of March 14, 1997. Immediately before the injury [appellant] was essentially healthy."

By decision dated September 2, 1999, the Office denied modification of the prior decision, stating that the evidence submitted was insufficient to warrant modification.

By letter dated August 29, 2000, appellant requested reconsideration. In support of her claim, appellant submitted outpatient notes from Dr. Lisa Krivickas, Board-certified in physical medicine and rehabilitation, dated February 27 and June 25, 1999, a fitness-for-duty examination from Dr. Reid Boswell, Board-certified in preventative medicine, dated May 26, 2000 and a letter from Dr. George Plotkin, a Board-certified physiatrist and neurologist, dated August 27, 1999. Dr. Krivickas' outpatient notes discussed appellant's past and present physical status but did not address her period of disability. Dr. Boswell diagnosed appellant with "chronic severe myofa[s]cial pain syndrome, unresponsive to a variety of treatments" and stated:

> "It appears to me [appellant] is probably approaching, if not arrived at a medical endpoint in terms of her pain. At this point, pain management would be the only option for her. I believe it is reasonable to permanently restrict her from driving more than 30 minutes or lifting more than 10 pounds. Otherwise, I believe she would be able to perform the essential job duties of administrative assistant."

Dr. Plotkin, in his August 27, 1999 letter, also provided a tenuous diagnosis of "possibly a post-traumatic dystonia, adding to difficulty in ranging her neck," but did not address appellant's period of disability.

By decision dated November 28, 2000, the Office again denied modification of the prior decision.

The Board finds that this case is not in posture for decision because of an unresolved conflict in the medical opinion evidence and thus must be remanded for referral to an impartial medical examiner.

Under the Federal Employees' Compensation Act,[2] the term "disability" means incapacity, due to an accepted employment-related injury, to earn the wages that the employee was receiving at the time of the injury.[3] Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn the wages.[4] An employee who has a physical impairment causally related to a federal employment injury, but who nonetheless has the capacity to earn wages she was receiving at the time of injury, has no disability as that term is used in the Act and is not entitled to compensation for loss of wage-earning capacity.[5]

As the Office did accept the claim for cervical strain, the only issue was appellant's entitlement to disability wage-loss benefits commencing December 8, 1997.

In this case, Drs. Piken and Tapp, found appellant to be disabled during the period after December 18, 1997. In his January 16, 1998 attending physician's report, Dr. Piken indicated that appellant was partially disabled from November 14 through December 4, 1997 and totally disabled thereafter. In his April 12, 1999 report, he again indicated that appellant had been disabled from March 17, 1997 through and including the time of February 23, 1998. Dr. Tapp, in her February 1, 1999 report, found appellant to be disabled beginning December 18, 1997. Drs. Piken and Tapp related appellant's disability during this time period to the accepted condition of cervical strain.

However, Dr. Taylor, the second opinion physician, opined that appellant could perform the duties of her job, which were largely sedentary in nature. He indicated that there was no objective reason appellant could not have performed her duties between December 4, 1997 and the date of his report, May 29, 1998.

Section 8123(a) of the Act provides that, when there is a disagreement between the 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.[6] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[7]

The Board finds that, since there is a conflict in medical opinion evidence between Drs. Piken, Tapp and Taylor as to whether appellant was disabled beginning December 18, 1997, the Office shall prepare a statement of accepted facts and shall refer appellant for an impartial medical examination. After such further development as necessary the Office shall issue a *de novo* decision.

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[2] 5 U.S.C. §§ 8101-8193.

[3] *Maxine J. Sanders*, 46 ECAB 835, 839-40 (1995).

[4] *Id.* at 840.

[5] *Id*.

[6] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[7] *William C. Bush*, 40 ECAB 1064 (1989).

The November 28, 2000 decision of the Office of Workers' Compensation Programs is hereby set aside and the case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
June 14, 2001

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member