U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of DIANE M. TOMITZ and U.S. POSTAL SERVICE,
POST OFFICE, New Hyde Park, NY

Docket No. 00-1599; Submitted on the Record;
Issued October 1, 2001

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issues are: (1) whether appellant has established a recurrence of disability on May 28, 1997 causally related to her accepted January 10, 1994 employment injury; (2) whether the Office of Workers' Compensation Programs properly terminated medical benefits; and (3) whether the Office abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

On January 11, 1994 appellant, then a 46-year-old letter carrier filed a traumatic injury claim (Form CA-1) for a contusion of her back sustained when she slipped and fell on ice while delivering mail on January 10, 1994. The Office accepted the claim for contusion of the back and lumbar strain. Appellant did not lose time and was placed on limited duty.[1] She was subsequently released to her normal work duties as tolerated.

On June 20, 1997 appellant filed a recurrence claim for disability beginning May 28, 1997.

By decision dated June 27, 1998, the Office denied appellant's recurrence claim.

In a July 13, 1998 letter, appellant requested an oral hearing, which was held on February 24, 1999.

In a February 1, 1999 report, Dr. Susan E. Mirkinson, a Board-certified internist, opined:

> "She has been extensively evaluated and found to have a condition of spinal stenosis and lumbar degenerative disc disease. Prior to this fall she had zero symptoms. Degenerative disc disease is a condition of aging of the discs and

[1] Appellant was released to working her normal duties as tolerated for five hours per day on September 25, 1996. On December 2, 1996 the employing establishment offered appellant a limited-duty position effective November 22, 1996 based upon restrictions noted by her physician.

bones in the spine. This is a normal aging process in most of the adult population. There is no doubt that [with out] the fall she would not have suffered the pain and disability that she now suffers from. The fall that she suffered clearly exacerbated the underlying problem but without that fall she would be employed fully and without difficulty."

In a January 7, 1999 report, Dr. Baron S. Lonner, an attending Board-certified orthopedic surgeon, noted that appellant had "residual back pain and radiculopathy" due to her January 10, 1994 employment injury which he opined exacerbated her underlying condition of spinal stenosis and lumbar degenerative disc disease. Dr. Lonner opined that appellant had marked residual disability due to the exacerbation of her underlying condition by her January 10, 1994 employment injury.

In a March 12, 1999 report, Dr. Jeffrey F. Shapiro, an attending Board-certified orthopedic surgeon, indicated that he treated appellant during the period May 12, 1995 through September 1997 and concluded that appellant sustained a worsening of her accepted employment injury in May 1997. In support of his conclusion, he noted:

"[Appellant] has continued to work in a limited duty (as tolerated) work schedule during this entire period. [Her] symptoms, at times, worsened depending upon the amount of work stress she placed on herself during the workday. [Appellant's] condition declined to the point that on May 29, 1997 she reported that she was unable to do any work at all, at this time I ordered her to remain home and not go to work, as I felt work was causing her original injury of January 1994 to exacerbate. This was not a new injury which caused her to stop working in May 1997, but merely a worsening of the original injury of January 1994."

In a decision dated April 29, 1999, the hearing representative remanded for further development of the evidence regarding appellant's recurrence claim and reinstated her medical benefits.

In a June 2, 1999 report, Dr. Richard S. Goodman, a second opinion Board-certified orthopedic surgeon, diagnosed degenerative arthritis of the lumbar spine and degenerative arthritis of the hip and concluded that appellant's employment injury "did not aggravate or exacerbate her underlying condition, but simply made her aware of it." Dr. Goodman then opined that the aggravation was temporary and should have ended by July 1994. He indicated that appellant's current symptoms were "related to the progressive nature of the underlying condition."

In addendum dated July 1, 1999, Dr. Goodman clarified his prior report by noting that the last three sentences of his June 2, 1999 report were: "The symptoms from the contusion were temporary. The symptoms from the contusion were ended by July of 1994. The current symptoms are related to the progressive nature of the underlying condition." He reiterated that appellant's employment injury did not exacerbate or aggravate her underlying condition.

On August 11, 1999 the Office referred appellant to Dr. Anthony G. Puglisi, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between

Dr. Goodman, the second opinion physician and Drs. Lonner and Shapiro appellant's attending physicians, with regard to whether she had any continuing disability due to her accepted employment injury and whether she had a recurrence of disability beginning May 1997 causally related to her January 10, 1994 employment injury.

In a report dated August 25, 1999, Dr. Puglisi concluded that appellant's accepted back contusion and lumbar strain had resolved, noting that appellant had returned to full-duty work within six months of her January 10, 1994 employment injury. He further opined that she did not have any residual disability requiring further medical treatment related to her January 10, 1994 employment injury. Dr. Puglisi concluded that appellant's current symptoms were due to the progression of her underlying back degeneration. He also opined that any aggravation of appellant's underlying degenerative disc disease was temporary and should have ceased by July 1994. Regarding appellant's recurrence of disability, Dr. Pugilisi opined:

> "The symptoms which begin rather acutely on May 29, 1997 are due to the underlying degenerative changes of this patient's lumbar spine and not to the initial injury. I feel this way as once again there has been nothing in the original injury to suggest that the fall was of such a degree as to have this patient require immediate emergent care."

He also indicated that he believed Dr. Goodman's conclusion was valid and that his rationale was "that if indeed the patient's initial incident of January 1994 had caused her significant enough injury to bring her to this length of time with discomfort then that specific injury would have been one in which she should have certainly required emergency care, perhaps removal by an ambulance" and that a "severe injury would be revealed by an MRI scan or certainly some of the testing performed by some of the doctors who have seen her." Dr. Puglisi also opined that while the January 10, 1994 injury may have aggravated her preexisting condition, that her ability to return to her full-work duties in July 1994 would indicate that the condition had resolved.

In addition, he noted that "other than the subjective complaints that the patient has from May 29, 1997 there has not been any further significant findings to suggest that perhaps the initial evaluation missed any significant traumatic event."

On September 2, 1999 the Office denied appellant's recurrence claim finding that the weight of the evidence rested with Dr. Puglisi, the impartial medical examiner.

On September 2, 1999 the Office issued a notice of proposed termination of medical benefits based upon Dr. Puglisi's report that appellant had no continuing disability related to her January 10, 1994 employment injury and that any injury she sustained should have resolved.

By decision dated October 8, 1999, the Office finalized the termination of medical benefits.

In a letter dated November 19, 1999, appellant requested reconsideration alleging that the information was incorrect and submitted a March 18, 1996 report from Dr. Shapiro in support of her request.

In a nonmerit decision dated January 25, 2000, the Office denied appellant's request for reconsideration.

The Board finds that appellant has not established a recurrence of disability on May 28, 1997 causally related to her accepted January 10, 1994 employment injury.

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that the employee can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence, a recurrence of total disability and to show that he or she cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty job requirements.[2]

Section 8123(a) of the Federal Employees' Compensation Act provides that where there is disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician, who shall make an examination.[3] In situations where there are 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 a specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[4]

In this case, the Office properly found that there was a conflict of medical opinion between Dr. Goodman, an Office referral physician and Dr. Shapiro, appellant's attending physician, regarding whether appellant's disability commencing May 28, 1997 was causally related to her accepted employment injury. To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Act,[5] properly referred the case record to Dr. Puglisi, a Board-certified orthopedic surgeon.

Dr. Puglisi concluded, based on appellant not requiring immediate hospitalization at the time of the incident, negative x-ray or magnetic resonance imaging (MRI) findings and no neurological deficits that appellant had no significant residuals from her injury of January 10, 1994. He noted that appellant had returned to her duty as a letter carrier within six months of the injury, her complaints were subjective and there was no significant findings by her treating physicians indicating that any traumatic event had occurred on January 10, 1994.

Dr. Puglisi added that the January 10, 1994 injury, which had been adequately treated and from which there was no demonstrated residual, was not the current cause of appellant's existing

[2] *Barry C. Peterson*, 52 ECAB ____ (Docket No. 98-2547, issued October 16, 2000); *Linda Thompson*, 51 ECAB ___ (Docket No. 99-1164, issued September 26, 2000).

[3] 5 U.S.C. § 8123(a); *Charles S. Hamilton*, 52 ECAB ___ (Docket No. 99-1262, issued January 2, 2001).

[4] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB ____ (Docket No. 00-743, issued February 8, 2001).

[5] 5 U.S.C. § 8123(a) states in pertinent 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."

disability. Thus, Dr. Puglisi provided a comprehensive evaluation of appellant, complete with examination and testing and drafted a thorough report explaining his reasons for finding that appellant's current disability for work was not related to the 1994 lumbar strain and back contusion injury. Therefore, the Board finds that Dr. Puglisi's opinion constitutes the weight of the medical evidence and establishes that appellant's recurrence of pain on May 28, 1997 was not caused, precipitated, accelerated, or aggravated by her 1994 lumbar strain and contusion of the back injury.[6]

The Board also finds that the Office properly terminated medical benefits.

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.[7] 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.[8] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[9] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[10]

The Office properly determined that there was a conflict in the record between Dr. Goodman, the second opinion physician and Drs. Shapiro and Lonner, appellant's attending physicians, with regard to whether she had any continuing condition due to her accepted employment injury. Due to the conflict, the Office also properly sent appellant to Dr. Puglisi for an impartial medical examination.[11]

In this case, Dr. Puglisi's report was based upon a complete and accurate factual and medical background and on a physical examination. It was well rationalized, based upon the lack of any supporting objective findings, neurological deficit findings and the fact that appellant did not require emergency treatment at the time of the injury and clearly concluded that appellant's accepted employment injuries had resolved. Dr. Puglisi concluded that any disability appellant currently has is due to her preexisting degenerative disc disease which had been

[6] *See Thomas Bauer*, 46 ECAB 257, 265 (1994) (finding that the additional report from appellant's physician concerning his emotional condition was insufficient to overcome the special weight accorded to the impartial medical examiner's opinion).

[7] *Gewin C. Hawkins*, 52 ECAB ____ (Docket No. 99-798, issued January 29, 2001); *Mary A.* Lowe, 52 ECAB ___ (Docket No. 99-1957, issued January 19, 2001); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[8] *Id.*

[9] *Gewin C. Hawkins*, *supra* note 3; *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[10] *Id.*

[11] Section 8123(a) of the Act provides, in pertinent 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 U.S.C. § 8123(a).

aggravated by the slip and fall and that any aggravation had ceased due to appellant's ability to return to her work duties within six months of her injury.

As Dr. Puglisi's reports are based upon a proper factual and medical background and on objective testing results and are sufficiently well rationalized, they are entitled to special weight. According to his reports, that special weight results in his reports constituting the weight of the medical evidence or record. Therefore, based upon Dr. Puglisi's findings and conclusions, the Office met its burden of proof to terminate medical benefits entitlement.

The Board finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

Under section 8128(a) of the Federal Employees' Compensation Act[12] the Office has the discretion to reopen a case for review on the merits. The Office must exercise this discretion in accordance with the guidelines set forth in section 10.606(b)(2) of the implementing federal regulations,[13] which provides that a claimant may obtain review of the merits if her/his written application for reconsideration, including all supporting documents, sets forth arguments and contain evidence that:

> "(i) Shows that OWCP erroneously applied or interpreted a specific point of law; or
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> "(ii) Advances a relevant legal argument not previously considered by the Office, or
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> "(iii) Constitutes relevant and pertinent new evidence not previously considered by [the Office]."

Section 10.608(b) provides that any application for review of the merits of the claim which fails to meet at least one of the standards described in section 10.606(b)(2) will be denied by the Office without review of the merits of the claim.[14]

In the instant case, appellant submitted no new and relevant evidence in support of her November 19, 1999 request for reconsideration, nor did appellant show that the Office erroneously applied or interpreted a point of law. On appeal appellant submitted a March 18, 1996 report from Dr. Shapiro. This report was previously considered by the Office and thus is not new and relevant evidence. In her request for reconsideration, appellant asserted that Dr. Puglisi relied upon inaccurate information in reaching his conclusions, which is insufficient to show that the Office erroneously applied or interpreted a point of law. Accordingly, the Office properly denied appellant's request for review on the merits.

[12] 5 U.S.C. § 8128(a).

[13] 20 C.F.R. § 10.606(b) (1999)

[14] 20 C.F.R. § 10.608(b) (1999).

The decisions of the Office of Workers' Compensation Programs dated January 25, 2000 and September 2, 1999 are affirmed.

Dated, Washington, DC
October 1, 2001

David S. Gerson
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member