

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BARBARA A. JOHNSON and DEPARTMENT OF LABOR,
EMPLOYMENT STANDARDS ADMINISTRATION, Indianapolis, IN

*Docket No. 00-2367; Submitted on the Record;
Issued September 18, 2001*

DECISION and ORDER

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

The issues are: (1) whether appellant had continuing disability causally related to her accepted employment injuries after July 29, 1996; and (2) whether the Office of Workers' Compensation Programs properly terminated appellant's medical benefits effective March 31, 1997.

On June 12, 1996 appellant, then a 49-year-old compliance officer, filed a traumatic injury claim, alleging that on June 11, 1996 she sustained multiple injuries when she tripped over a telephone cable and fell to the floor while in the performance of duty. She stopped work on June 11, 1996 and returned to work, four hours a day, on June 9, 1997. Appellant continued to work half days until October 22, 1997, when she elected voluntary retirement.

On July 29, 1996 appellant claimed compensation beginning July 27, 1996. By letter dated August 22, 1996, the accepted appellant's claim for cervical and lumbosacral sprains, but informed her that compensation was not payable because the medical evidence of record contained no objective findings of any disabling condition. The Office allowed appellant 30 days to submit additional evidence.

In response, appellant submitted additional factual and medical evidence, including an October 9, 1996 report from her treating physician, Dr. Steven A. Segal, a family practitioner, who indicated that appellant remained totally disabled for work until further notice.¹

On October 2, 1996 the Office referred appellant for a second opinion examination with Dr. John A. Shay, a Board-certified orthopedic surgeon. In his report dated October 15, 1996,

¹ On September 25, 1996 Dr. Segal stated that appellant could return to work, four hours a day, on October 7, 1996. Appellant reported for work on October 7, 1996 as planned. On October 8, 1996, however, appellant telephoned the employing establishment and informed them that she would not be returning to work, as it had made her sick to her stomach the previous day. In a note dated October 9, 1996, Dr. Segal stated that appellant's trial work period had been unsuccessful and that she would remain off work until further notice.

Dr. Shay opined that appellant could return to work in her usual capacity. Following the receipt of Dr. Shay's report, the Office found that a conflict in medical opinion existed between Drs. Segal and Shay, requiring further medical development of the claim.

To resolve the conflict in medical opinion evidence between Drs. Segal and Shay, the Office referred appellant, statement of accepted facts and copies of the relevant medical evidence of record to an impartial medical specialist, Dr. David G. Schwartz, a Board-certified orthopedic surgeon. Upon receipt of Dr. Schwartz's report, on February 19, 1997, the Office issued a notice of proposed termination of compensation on the grounds that the medical evidence established that appellant had recovered from the effects of her June 11, 1996 accepted cervical and lumbosacral sprains. In a decision dated March 31, 1997, the Office found that appellant had not established any disability for work after June 27, 1996 and terminated appellant's entitlement to medical benefits after March 31, 1997.

By letter dated April 11, 1997, appellant requested an oral hearing. In a decision dated May 26, 1998, the Office hearing representative found that the Office failed to follow correct procedure in selecting Dr. Schwartz as the impartial medical examiner and, therefore, remanded the case for further medical development.

On remand the Office referred appellant to Dr. John Lomas, a Board-certified physiatrist, in accordance with its procedures for selecting an impartial medical examiner. Based on physical examination, patient history and a review of the medical evidence of record, Dr. Lomas, in a report dated September 23, 1998, stated:

“[Appellant] does not have any indicated limitations, at this time, which would prevent her ability to perform the described job description. The use of a wheeled luggage carrier may be beneficial with heavier reports, if they should exceed the 20 [pounds] range. In regards to the long sessions of interacting with clients, if she were able to get up and walk around intermittently, *i.e.*, every half hour to hour, should she have any discomfort, that should suffice as she has a quiescent problem at this point. I, however, do not foresee that as a problem for her. In regards to her problems prior to my assessment, as indicated by the examination and recommendation on [October 15, 1996] by Dr. Shea, [sic] as well as the January 1997 evaluation by Dr. Schwartz, I would concur that, from October 1996, her problems had attained maximum medical improvement regarding the physical issues. Of note, prior to the October 1996 assessment, the patient had been in physical therapy for several months without a specific lesion being identified. This would also suggest that her problems had progressed prior to that time to a quiescent, stable level. If further documentation assessments are required, I would recommend assessment of the actual physical therapy records to identify whether any progress was made in therapy over the last couple of months prior to the October 1996 assessment. I suspect, given the history, that limited to no gains were made during that time. It appears from my review of the records that her case had progressed to a level which most likely should have been addressed in a home exercise setting.”

In conclusion, Dr. Lomas stated that appellant had no active findings consistent with either a lumbar or cervical sprain, that he would expect her to have no problems with performing her full range of duties as a compliance officer and that she required no further medical treatment.

In a decision dated October 14, 1998, the Office again found that appellant was capable of performing her job as a compliance officer and no longer required medical treatment for her June 11, 1996 injury. By letter dated October 27, 1998, appellant requested an oral hearing. In a decision dated August 6, 1999, an Office hearing representative remanded the case for the Office to determine the date by which appellant ceased to be totally disabled and the date by which she no longer required medical treatment for her accepted conditions.

By letter dated September 14, 1999, the Office asked Dr. Lomas to clarify his opinions on whether appellant was disabled for any period after July 27, 1996 and whether appellant required any medical treatment after March 31, 1997.

In a supplemental report dated September 20, 1999, Dr. Lomas stated:

“In response to your letter dated September 14, 1999, I have reviewed my report of September 23, 1998. Question was based on review of the medical evidence and physical examination of the claimant, do you feel that she was disabled after July 27, 1996. The patient was noted to be medically quiescent and had not improved for an extended period of time as per note dated October 15, 1996 by Dr. Shay. I can state absolutely that she did not have any disability from that point forward. I would need to look at the physical therapy reports as indicated in my dictation on September 23, 1998. I could further comment on the period between July 27[, 1996] and October [1996] to further clarify that time period. And, do I feel she required any further medical treatment after March 31, 1997, no. In fact I do not feel any further treatment was indicated after October 15, 1996. At this time, I would recommend she work with a home exercise program.”

Dr. Lomas also returned a copy of the Office’s September 14, 1999 letter, on which he wrote “No” in response to both the Office’s questions.

By decision dated October 21, 1999, the Office found that appellant had not established any disability for work after June 27, 1996 and terminated appellant’s entitlement to medical benefits after March 31, 1997.

By letter dated November 2, 1999, appellant requested an oral hearing and submitted additional evidence including several narrative statements, reports from her treating physical

therapist, social worker and psychiatrists and a medical report from Dr. Victor N. Egwu, a Board-certified orthopedic surgeon.²

In his December 31, 1998 report, Dr. Egwu reviewed the medical evidence of record and provided his findings on physical examination, diagnosing chronic myofascial pain syndrome of the lower back and cervical spine, improved but not completely resolved and adjustment disorder as per appellant's history. Dr. Egwu recommended strengthening exercises to improve appellant's level of comfort and stated in pertinent part:

"I tried to impress upon her that there is no deep-seated injury or findings that we have missed as far as ridding her of her pain is concerned. I explained to her that sometimes people after having had a neck sprain from an injury, or a lumbosacral sprain, may continue to have recurrent back pain even without clear-cut MRI [magnetic resonance imaging] or x-ray evidence or injury to the upper or lower back.... In terms of her inability to return to work during the period of her initial disability, I believe that this patient did have a significant problem with her back as reported by Dr. Segal which was exacerbated by her psychiatric problem. This led her to believe that she did have a significant problem with her back in spite of the findings as far as the MRI was concerned. Based on this, it is my impression that this patient did have good reason to stay off work during the period of time she was off in the initial one year after the accident until she was able to resume part-time work. At the present time, functionally she has improved to a point where she can return to employment, especially if it is employment that does not require any heavy lifting, only 10 [to] 15 pounds."

Following the hearing, by decision dated May 16, 2000, the Office hearing representative affirmed the Office's October 21, 1999 decision.

The Board finds that the Office met its burden of proof to terminate appellant's entitlement to medical benefits effective March 31, 1997.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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 disabling condition has ceased or that it is no longer related to the employment.³

² The Board notes that only the December 31, 1998 report of Dr. Egwu is considered probative medical evidence with respect to this claim. Social workers and physical therapists do not qualify as "physicians" as defined under the Federal Employees' Compensation Act and, therefore, are not competent to render a medical opinion. *Frederick C. Smith*, 48 ECAB 132 (1996); *Shelia Arbour (Victor E. Arbour)*, 43 ECAB 779 (1992); *Debbie J. Hobbs*, 43 ECAB 135 (1991). In addition, while the reports from appellant's treating psychiatrists constitute medical evidence under the Act, they pertain to appellant's separate emotional condition claim, number A11-0153078, which was denied by the Office in a decision dated February 27, 1997 and are not relevant to this case which pertains solely to appellant's June 11, 1996 back injury.

³ *Patricia A. Keller*, 45 ECAB 278 (1993).

In terminating appellant's entitlement to medical benefits effective March 31, 1997, the Office relied on the opinion of Dr. Lomas, as the independent medical examiner. In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an independent medical examiner for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background and must be given special weight.⁴

The Board finds that Dr. Lomas' opinion as expressed in his original September 23, 1998 report and clarified in his September 20, 1999 supplemental report, is complete, well rationalized and unequivocal in establishing that appellant's work-related lumbar and cervical sprains were no longer active. Dr. Lomas reviewed appellant's medical history at length, considered all the relevant diagnostic tests, performed a physical examination and concluded that appellant's need for medical treatment had ceased by October 15, 1996, several before the Office terminated appellant's medical benefits. Dr. Egwu did not specifically comment on whether appellant required any medical treatment after March 31, 1997. Therefore, the weight of the medical evidence remains with Dr. Lomas as the independent medical examiner and the Office properly relied on his opinion in terminating medical benefits effective March 31, 1997.

The Board further finds that this case is not in posture for decision on whether appellant established continuing disability causally related to her accepted employment injuries between July 29 and October 15, 1996.

While the Office properly found that Dr. Egwu's opinion that appellant "did have a good reason to stay off work" during the period in question is, without any supporting objective findings, insufficiently rationalized to establish disability after July 27, 1996,⁵ the Office erred in finding Dr. Lomas' opinion sufficiently conclusive on this issue. In his September 20, 1999 supplemental narrative report, Dr. Lomas stated strongly and unequivocally that the appellant did not have any disability from October 15, 1996 forward and provided rationale for his opinion. Although he answered no to the Office's question on disability after July 27, 1996, Dr. Lomas explained in his September 20, 1999 narrative report that, before he could determine whether appellant was disabled between July 27 and October, 1996, he would first have to review the physical therapy reports.

There is no evidence that, prior to the Office's October 21, 1999 or May 16, 2000 decisions, Dr. Lomas in fact reviewed the physical therapy reports and provided a definitive opinion on the issue of possible disability between July 27 and October 15, 1996. Nor does the record show that the physician clarified the apparent inconsistencies between his narrative response and his comments on the annotated copy of the Office's September 14, 1999 letter. Therefore, this issue remains unresolved.⁶ On remand the Office should provide Dr. Lomas with

⁴ *Kathryn Haggerty*, 45 ECAB 383, 389 (1994); *Jane B. Roanhaus*, 42 ECAB 288 (1990).

⁵ *Charles E. Evans*, 48 ECAB 692 (1997); *Patricia M. Mitchell*, 48 ECAB 371 (1997); *Andy E. Rippy*, 16 ECAB 176 (1964).

⁶ Where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion and the opinion requires further clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. *Margaret M. Gilmore*, 47 ECAB 718 (1996); *Talmdge Miller*, 47 ECAB 673 (1996).

the necessary evidence of record and ask the physician to opine whether appellant had any disability causally related to her accepted employment injuries, between July 27 and October 15, 1996.

The May 16, 2000 and October 21, 1999 decisions of the Office of Workers' Compensation Programs are hereby affirmed in part and set aside in part and this case is remanded for further proceedings consistent with this decision.

Dated, Washington, DC
September 18, 2001

Willie T.C. Thomas
Member

Bradley T. Knott
Alternate Member

Priscilla Anne Schwab
Alternate Member