U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MIGUELINA VARGAS and DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Richmond, VA

Docket No. 01-882; Submitted on the Record;
Issued August 6, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits effective November 7, 1999, on the grounds that her work-related disability had ceased on or before that date.

On March 7, 1995 appellant, then a 36-year-old time and attendance specialist, sustained an injury to her back and left arm when she slipped and fell on ice in the parking lot in the performance of duty. She stopped work, returned in a light-duty capacity and returned to full duty on March 21, 1995.[1]

Appellant sought initial treatment at the Andover walk-in clinic on March 7, 1995 with Dr. George M. Pomerantz, a Board-certified orthopedic surgeon. He stated that appellant sustained a jamming injury to her left shoulder, which showed a slight glenoid and questionable chip fracture with discomfort at the inferior glenoid. Dr. Pomerantz stated that appellant had aggravation of an existing back condition. He noted that the x-rays of March 8, 1995 failed to reveal any evidence of compression fracture or injury. Dr. Pomerantz's diagnosis was contusion to the left shoulder and left ribs.

[1] She was subsequently placed on the periodic rolls.

The Office accepted appellant's claim for left shoulder/arm sprain, left lumbosacral sprain, left shoulder contusion, left contusion of the chest wall, neck sprain and cervical strain and a C5-6 left disc herniation.[2]

The Office authorized a referral to Dr. Howard M.Gardner, a Board-certified neurological surgeon. In an April 6, 1995 report, he stated that appellant presented with symptoms consistent with both a left cervical radiculopathy and a left ulnar nerve contusion. On a clinical basis, he could not distinguish between the two and recommended an electromyogram (EMG) and nerve conduction studies.[3] Dr. Gardner also stated that appellant appeared to have suffered a cervical and lumbar strain. He recommended a trial of part-time work for 20 hours a week with no lifting over 15 pounds. Dr. Gardner further stated that appellant should be treated by a physiatrist.

Appellant sought treatment from Dr. Scott R. Masterson, a Board-certified physiatrist, who provided his reports. The initial reports were dated May 19, 1995 through July 9, 1996. He initially diagnosed tendinitis/bursitis of the left shoulder as the cause of her continued pain. Dr. Masterson stated further that, over time, her symptoms worsened and showed a change at the C5-6 level with a bulging disc becoming a left-sided herniation. He opined that her current symptoms of neck pain and left arm pain were secondary to her original work-related injury and were the problem that they were treating all along.

In a February 10, 1997 Form CA-20, Dr. Masterson diagnosed cervical disc with left leg radiculopathy and herniated nucleus pulposus-cervical. He checked the box "yes" regarding whether he believed that the condition was caused or aggravated by her employment activity. She continued treatment with Dr. Masterson. In his July 14, 1998 report, he recommended referral to a psychiatrist.

In a September 26, 1998 MRI scan, Dr. Robert C. Hannon, a Board-certified radiologist, found that appellant had a normal lumbar spine with no change since the August 14, 1989 study.

On October 29, 1998 appellant began authorized treatment with Dr. Onassis A. Caneris, a neurologist. He performed a left-sided occipital nerve block, ordered an electrodiagnostic report and epidural steroid injection on November 12, 1998 and a left-sided occipital nerve block on December 8, 1998 and February 5, 1999 and intravenous lidocaine infusion on March 8, 1999. Dr. Caneris continued to treat appellant.

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[2] On May 3, 1995 the Office accepted the claim for left upper arm/shoulder sprain; lumbosacral strain; left shoulder contusion; left rib contusion. Appellant filed a notice of recurrence on February 7, 1996. On August 9, 1996 the Office expanded the claim to include a cervical strain and a left disc herniation of the C5-6 as a result of the injury. A June 15, 1999 statement of accepted facts, indicates that the claim was accepted for cervical disc displacement.

[3] The record shows the EMG was performed on May 15, 1995, which was normal. A magnetic resonance imaging (MRI) scan was performed on July 27, 1995, which showed mild bulging of the C4-5 and C5-6 discs but no focal herniation was identified.

In a January 14, 1999 attending physician's report, Dr. Masterson continued to state that appellant was disabled and checked the box "yes" that her condition was related to her employment.

On May 3, 1999 appellant began treatment with Dr. Robert A. Moverman, a clinical psychologist, for depression. He noted her history of injury and treatment and that appellant had chronic pain. He stated that there appeared to be a more pervasive psychological disturbance that might be more hysterical in nature. Dr. Moverman found that there appeared to be a possible magnification of symptoms and recommended a course of psychotherapy for managing her symptoms.

By letter dated June 15, 1999, the Office advised that no further psychotherapy visits would be authorized, pending the second opinion evaluations.

In a June 15, 1999 statement of accepted facts, the Office advised that appellant's claim was accepted for: left sprain of the shoulder/arm; left sprain/lumbosacral; contusion left shoulder/arm; contusion/left chest wall; sprain of neck; and cervical disc displacement.

By letters dated June 18, 1999, the Office referred appellant along with a statement of accepted facts and a copy of the case record to Dr. Gordon Lupien, a Board-certified orthopedic surgeon, for a second opinion examination.

In a July 14, 1999 report, Dr. Lupien noted that appellant's history of injury and treatment, including a preexisting back injury. He stated that her physical examination revealed no objective evidence of any physical impairment or loss of physical function. Dr. Lupien stated there was no indication that appellant sustained any anatomical derangement or structural lesion of her musculoskeletal system as a consequence of the subject incident. He further opined that there was no objective basis upon which to establish any anatomical diagnosis. Dr. Lupien noted that appellant traveled to Santo Domingo and stated that she was fully capable of participating in the level of activity to perform the duties of any gainful occupation, for which she was fully employed and qualified by training and experience and opined that her entire course of clinical attention, subsequent to her walk in visit at Andover walk-in medical center on March 7, 1995 was unnecessary and inappropriate.

By letters dated July 28, 1999, the Office referred appellant along with a statement of accepted facts and a copy of the case record to Dr. Albert M. Drukteinis, a Board-certified psychiatrist and neurologist, for a second opinion examination.

In an August 13, 1999 report, Dr. Drukteinis noted appellant's history of injury and treatment. He diagnosed pain disorder with psychological factors and a general medical condition, depressive disorder, NOS and ruled out undifferentiated somatoform disorder. Dr. Drukteinis stated that it was his opinion that there was no basis to conclude that appellant was disabled from a psychological condition due to her work injury. He stated that her disability was a physical one and then, if she were physically able to work, she should be able to work psychologically. Dr. Drukteinis stated further that, if the psychological problems were the cause of her present disability, then they were preexisting or unrelated reasons other than the work injury. He stated further that appellant's physical care might be helped by attention to her

depressive disorder, including the use of antidepressant medication and techniques to reduce her muscular tension.

On September 9, 1999 the Office issued a proposed notice of termination of compensation on the grounds that her injury-related disability had ceased and allotted appellant 30 days to submit additional evidence.

In a September 15, 1999 report, Dr. Masterson stated that, since her last visit, appellant continued to have symptoms of neck pain, left-sided occipital headaches and left arm numbness and pain. He noted that appellant continued her treatment with Dr. Caneris[4] for reflex sympathetic dystrophy. Dr. Masterson stated that appellant was having disabling neck and left arm pain. He stated that x-rays showed a C5-6 disc that developed unfortunately into a chronic pain syndrome and developed a sympathetically maintained component to her pain, which were all residual problems from her original injury in the C5-6 disc. Dr. Masterson opined that appellant could not return to work as her abilities to work were limited.

In a September 23, 1999 report, Dr. Moverman advised that appellant was suffering from emotional distress as a result of the combination of her injury and her psychological make up.

By decision dated October 21, 1999, the Office terminated appellant's compensation and medical benefits effective November 7, 1999 on the grounds that the evidence of file failed to establish entitlement to compensation and medical benefits for continuing disability.

By letter dated October 25, 1999, appellant through her representative, requested an oral hearing.[5]

In an October 20, 1999 addendum, Dr. Lupien stated that indeed he had reviewed her extensive medical records prior to her appointment and that he conducted a thorough and careful examination of appellant during the time she was in his office.

In an October 27, 1999 report, Dr. Masterson stated that appellant still suffered from significant frozen shoulder and adhesive capsulitis, which was another part of the evolving pain syndrome in her cervical and shoulder problems.

In an October 28, 1999 report, Dr. Masterson stated that appellant was under his care since May 19, 1995 and that, on March 7, 1995, she slipped on ice in the parking lot and fell on her left side. He stated that she also twisted her left arm behind her back in the fall. Dr. Masterson stated that the MRI scan report of March 11, 1996 revealed that the disc herniation, which initially was bulging, was progressed to a herniation with a left lateral component that was impinging in the neural foramen. He stated further that a definitive diagnosis for appellant was cervical HNP at C5-6 with a left cervical radiculopathy. Dr. Masterson also felt that she had some shoulder tendinitis problems that may have been a

[4] His report is also September 15, 1999.

[5] On October 12, 1999 appellant disagreed with the termination and inferred that the physician did not conduct a proper examination.

primary problem from the original fall or possibly secondary to the muscular weakness due to the radiculopathy. He stated that his review of the medical information led him to believe that there were objective findings of a cervical disc injury, which caused a left cervical radiculopathy, findings of an ongoing development of adhesive capsulitis of the left shoulder and reflex sympathetic dystrophy of the left arm. Dr. Masterson stated that these diagnoses were causally related to the injury of March 7, 1995.

On December 29, 1999 the hearing representative determined that the case was not in posture for a decision and set aside the October 21, 1999 decision, as there was an unresolved conflict. The case was remanded and the Office was advised to set up an impartial medical evaluation to resolve the conflict in opinion as to whether appellant continued to have residuals of her March 7, 1995 injury and resulting disability for work.

In a January 13, 2000 attending physician's report (Form CA-20), Dr. Masterson, checked the box "yes" that appellant's condition was caused or aggravated by her employment activity and indicated that she was not advised to return to work. He stated that appellant had loss of shoulder motion, permanent weakness and pain in the left arm.

In a January 19, 2000[6] statement of facts, the Office advised that appellant's claim was accepted for a left upper arm/shoulder strain, a lumbosacral sprain, a shoulder contusion and a left rib contusion. The Office added that the claim was expanded to include a cervical strain and a C5-6 herniation, again as a result of the injury.

By letters dated February 2, 2000, the Office referred appellant along with a statement of accepted facts and a copy of the case record to Dr. Howard Taylor, a Board-certified orthopedic surgeon, to resolve a conflict in the medical evidence between Drs. Masterson and Lupien.

In a March 15, 2000 report, Dr. Taylor noted appellant's prior history of injury and treatment. He noted that appellant walked with a normal gait, had tenderness on the left side of her neck and over her left shoulder in her left flank. Dr. Taylor stated that there was full-side bending and full-side twisting, appellant bends her neck at 44 degrees and extends at 57 degrees. There is full turning to both sides and full bending to both sides. He stated that there was full range of motion of both shoulders and normal strength at her shoulders. Dr. Taylor also stated that appellant had normal motion at both elbows and wrists, with deep tendon reflexes at the biceps, triceps and brachial radialis, which were equal and full with no motor deficit in her lower extremities but decreased sensation in her left small finger. He noted tenderness in the left sciatic notch, her deep tendon reflexes at the knees and ankles were equal and full and there was no motor or sensory deficit in her lower extremities. Dr. Taylor also found that appellant's straight leg raising was negative bilaterally, the circumference of both thighs was 19 inches and of both calves was 13 inches. He found that she could turn to supine from prone and back without difficulty. Dr. Taylor further found that the grip strength for the right was 70, 75 and 75 on three occasions, with the left was 55, 40 and 40 pounds. He reviewed Dr. Masterson's reports stating that appellant's bulging had progressed to herniation and explained that there was no medical evidence to support the progression of a bulging disc to herniation, as they were two

[6] The file shows January 19, 1999, however, this appears to be a typographical error.

separate conditions. Dr. Taylor opined that, if the MRI scan of August 9, 1995 did not show a disc herniation, then appellant did not suffer one due to her injury of March 7, 1995. He further determined that the hallmark of a reflex sympathetic dystrophy and the one sure diagnostic sign was a marked decrease in the temperature of the extremity. Dr. Taylor stated that appellant did not demonstrate this when he saw her. He stated that there was no difference in the temperature of her two extremities. After reviewing additional medicals from Drs. Masterson, Pomerantz and Gardner, he concluded by stating that there was no relationship between appellant's present condition and her employment injury. Dr. Taylor explained that the length of time was excessive for this type of condition, a new condition arose that was not caused by the accident and her present condition was related to the new diagnosis. He further opined that there was no relationship between appellant's present condition and her employment injury. Dr. Taylor concluded his report by stating that he did not believe appellant could return to work because of the disc herniation and not because of the original injury.

By decision dated April 27, 2000, the Office finalized its proposed termination of benefits. The Office found that Dr. Taylor's opinion represented the weight of the medical evidence. The Office advised appellant that her compensation for wage loss and medical benefits was being terminated because her disabling condition was not causally related to the March 7, 1995 employment injury.

In a July 7, 2000 Form CA-20, a physician whose signature is illegible, stated that appellant had a permanent disability and was unable to work. He also checked the box "yes" in response to whether appellant's condition was caused or aggravated by the employment activity.

In a February 8, 2000 unsigned report, received by the Office on July 17, 2000 Dr. Anne Louise Oaklander, a Board-certified psychiatrist and neurologist, stated that physical examination of the appellant was unchanged from November of 1999. She stated that appellant still had left-sided body pain predominantly in the left neck, arm and head. Dr. Oaklander noted that the previous MRI scan showed only minor weakness of the dorsal interossei muscles on the left. She referred appellant for a repeat MRI scan of the cervical spine to rule out neuro encroachment and advised her to call after obtaining her results.

By letter dated May 9, 2000, appellant through her representative requested an oral hearing, which was scheduled for September 26, 2000.

By letter dated September 5, 2000, appellant's representative withdrew the request for an oral hearing and requested an examination of the written record. He enclosed additional medical evidence with his request.

By decision dated December 7, 2000, the hearing representative affirmed the April 28, 2000 Office decision, finding that the weight of the medical evidence rested with Dr. Taylor the impartial medical specialist, who stated that appellant was not disabled as a result of her March 7, 1995 employment injury.

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective November 7, 1999 on the grounds that her work-related disability had ceased by that date.

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] The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[9]

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits.[10]

In this case, the Office accepted that appellant sustained a left arm sprain, left lumbosacral sprain, left shoulder contusion, neck sprain and a HNP at C5-6 and paid appropriate benefits.

Dr. Masterson reported that appellant had continuing total disability, while Dr. Lupien, the physician to whom appellant was referred for a second opinion, indicated that she did not have any objective basis upon which to establish any anatomical diagnosis. Based on this conflict in medical opinion, as to whether appellant continued to have residuals of her accepted employment injuries and remained disabled for work, the Office properly referred appellant to Dr. Taylor for an impartial examination.[11]

The Board finds that the weight of the medical evidence rests with Dr. Taylor, whose medical opinion presents an accurate and factual medical history and represents the weight of the medical evidence. He reviewed the medical record, including the statement of accepted facts dated January 19, 2000. In his report, Dr. Taylor noted that appellant was initially diagnosed with a contusion and sprain of her left shoulder and an aggravation of her preexisting back condition. He stated that her present diagnosis included a disc herniation at C5-6, which he did not believe was related to the accident of March 7, 1995. He based this upon the fact that the additional MRI showed a bulging and not a disc herniation. He explained that there was no medical evidence to support a bulging disc progressing to a disc herniation and that these were two different conditions. Dr. Taylor explained that, if the MRI did not show a disc herniation initially, then we must conclude that appellant did not initially have a disc herniation. He opined

[7] *Lawrence D. Price,* 47 ECAB 120 (2995).

[8] *Id.; see Patricia A. Keller,* 45 ECAB 278 (1993).

[9] *Raymond W. Behrens,* 50 ECAB 221 (1999).

[10] *Talmadge Miller,* 47 ECAB 673, 679 (1996); *Wentworth M. Murray,* 7 ECAB 570, 572 (1955).

[11] 5 U.S.C. § 8123(a) of the Federal Employees' Compensation 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 person shall be appointed to make an examination to resolve the conflict. *Henry P. Eanes,* 43 ECAB 510 (1992).

that he did not believe that appellant's present condition was related to the work injury of March 7, 1995. Dr. further explained that this length of time was excessive for the time of injury incurred by appellant and opined that a new condition had surfaced that was not caused by the work-related incident and that appellant's present condition was related to the new diagnosis. He further found that appellant could not return to work because of her disc herniation and not because of the injury that occurred on March 7, 1995.

When there exist 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 specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[12] The Board finds that the report of Dr. Taylor can be given special weight, as he did presented an accurate and factual history of the medical evidence and the conflict has been resolved. As the conflict has been resolved, the Office did met its burden to terminate appellant's benefits.

The December 7 and April 28, 2000 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
August 6, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[12] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).