

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGIE L. RUTLEDGE and U.S. POSTAL SERVICE,
POST OFFICE, Dayton, OH

*Docket No. 01-1341; Submitted on the Record;
Issued August 19, 2002*

DECISION and ORDER

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

The issue is whether appellant had any disability for work or injury residuals requiring further medical treatment on or after February 15, 2000, causally related to her August 21, 1991 employment injury.

The Office of Workers' Compensation Programs accepted that on August 21, 1991 appellant, then a 37-year-old distribution clerk, sustained a herniated cervical disc at the C6-7 level after lifting a sack of mail. A posterior laminectomy was performed on August 24, 1991 and an anterior discectomy was performed on November 11, 1991. Appellant thereafter received appropriate compensation benefits.

On April 18, 1995 appellant came under the care of Dr. Susan Hubbell, Board-certified in physical medicine and rehabilitation, who stated that she continued to be disabled as a result of her employment injury and unable to perform the job of accounting clerk.

The Office prepared a statement of accepted facts and referred appellant, together with the questions to be answered and the relevant case record, to Dr. Rudolph A. Hoffman, a Board-certified orthopedic surgeon, for a second opinion examination.

By report dated November 18, 1997, Dr. Hoffman reviewed appellant's factual and medical history, noted her present subjective complaints and described her findings upon physical examination. He opined that appellant could work eight hours a day and he completed a work restriction evaluation form.

The Office referred appellant for vocational rehabilitation services and on March 19, 1998 the employing establishment offered her a job as a modified flat sorting machine operator. Appellant rejected the job offer.

On July 20, 1989 the Office received the July 17, 1998 postal inspector's memorandum which discussed video surveillance tapes of appellant obtained during the period August 1,

through September 25, 1997. The inspectors noted that appellant was observed sitting for extended periods of time, driving frequently, climbing up and down stairs, climbing on a chair in her garage, turning her head frequently to the right and left, carrying numerous shopping bags, pushing shopping carts, frequently opening and closing her car door by extending her arm to reach for the door, opening and closing the tailgate of her station wagon, bending at the waist and reaching overhead with both arms, reading for extended periods and holding a portable telephone to her ear.

The Office sent appellant's physician, Dr. Hubbell, the surveillance tapes, pictures and a statement of accepted facts and work restrictions.

By letter dated June 12, 1998, Dr. Hubbell reported that she had reviewed the tapes, but opined that appellant was unable to perform the modified-duty job without eliminating the 25-pound lifting requirement and the requirement regarding working above the shoulder. She opined that appellant could not reach at all above the level of the left shoulder.

The Office found a conflict in the medical opinion evidence that had arisen between Drs. Hubbell and Hoffman and it referred appellant, together with the statement of accepted facts, questions to be addressed and the relevant case record and surveillance videotapes, to Dr. John Shay, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

By report dated August 18, 1998, Dr. Shay indicated that appellant had chronic cervical radicular syndrome and he noted that radiographic evaluation revealed a solid anterior interbody fusion at C6-7. Dr. Shay opined that, although appellant had some mild dehydration of the upper cervical discs and some left-sided osteophyte formation at both C3-4 and C4-5, which created some mild narrowing of the neural foramen of the left, there was no evidence of significant spinal cord compression and no signal changes within the spinal cord at any cervical level. He noted that appellant had left-sided neck pain as well as pain in the area of her shoulders bilaterally and constant pain, numbness and weakness in the left arm. Dr. Shay opined that it would be unlikely that appellant could not return to her date-of-injury job and he recommended a functional capacity evaluation in an effort to determine appropriate restrictions for further employment.

On March 9, 1999 appellant underwent a functional capacity evaluation.

The Office provided the results of the functional capacity evaluation to Dr. Shay and requested that he review the results and provide an opinion addressing appellant's ability to work. However, the Office received no response from Dr. Shay.

On June 3, 1999 the employing establishment offered appellant a job as a receptionist/secretary.

On June 15, 1999 Dr. Hubbell reviewed the job offer and indicated that appellant could perform the described duties as modified. She noted, however, that appellant could not tolerate an eight-hour workday, but must return to work on a gradual basis. Dr. Hubbell recommended that appellant return to work for two hours a day, five days a week for two weeks, then four

hours a day, five days a week, then six hours a day for four weeks, then eight hours a day, five days a week.

As Dr. Shay did not respond to questions addressing appellant's capacity for work, the Office found the conflict in medical opinion evidence remained between Drs. Hubbell and Hoffman and a second referee examination was required. The Office referred appellant, together with the statement of accepted facts, questions to be addressed and the relevant case record and surveillance videotapes, to Dr. Walter Hauser, a Board-certified orthopedic surgeon, for a second impartial medical evaluation.

By report dated August 4, 1999, Dr. Hauser reviewed appellant's factual and medical history, noted her present subjective complaints and described in detail his findings upon physical examination. He discussed the radiographic test results and concluded that appellant could return to her previous job without restrictions, as well as return to the job that was offered which was of a sedentary nature. Dr. Hauser noted as follows:

"There is [sic] certainly no objective findings. The disc has been successfully treated. The electromyogram (EMG) in [September 1992] was entirely within normal limits showing no objective findings there and the fusion is solid by x-ray.

"Again, she has had a fusion at C6-7. Unfortunately, this has been accepted as a work[-]related injury because there is certainly a doubt about that judging by the emergency room record [August 21, 1991.]

"As far as any residuals that she may be suffering, I already have outlined all of that. She has a great deal of exaggeration of symptoms and this is based on the x-ray findings, the [EMG] findings, the gross restriction of her cervical spine motions, her shoulder motions and complaints of hypoesthesia, none of which are supported by an [EMG] and are contrary to the findings on the surveillance video and the photo[graphs] that were taken showing her leading a very normal active life."

The Office provided a copy of Dr. Hauser's report to Dr. Hubbell for review and comments. They also sent her additional photographs taken by postal inspector between March 30 and May 20, 1999.

In a response dated December 27, 1999, Dr. Hubbell opined that the photographs forwarded to her did not prove that appellant could return to her prior job and she noted that appellant continued to have difficulty using her left arm and turning her head. She noted that restrictions were given under which appellant could work.

On January 13, 2000 the Office issued appellant a notice of proposed termination of compensation finding that the weight of the medical evidence established that she had no continuing disability for work or medical residuals which required further medical treatment as a result of her August 21, 1991 employment injuries. The Office provided appellant copies of the reports of Drs. Hoffman and Hauser and it advised her that she had 30 days within which to submit further evidence or argument if she disagreed with the proposed action.

By letter dated February 9, 2000, received by the Office on February 11, 2000, appellant, through her representative, requested additional time claiming that the tapes and pictures relating to her were not included and demanding the right to review unedited all of the tapes and photographs taken in this matter before the case could proceed.

By decision dated February 15, 2000, the Office terminated appellant's wage-loss compensation benefits and entitlement of medical care on the basis that the evidence of record supported that her work-related disability and injury-related residuals had resolved. The Office noted that the proposed action was based on the medical evidence of record and not on the tapes and photographs, such that copies were not necessary and that additional time was not required.¹

By letter dated February 18, 2000, appellant, through her representative, requested an oral hearing before an Office hearing representative.

A hearing was held on October 25, 2000 at which appellant and her representative appeared. By decision dated February 12, 2001, the hearing representative affirmed the February 15, 2000 decision finding that the weight of the medical opinion of record, as constituted by the impartial medical examination report from Dr. Hauser, established that appellant had no further disability for work or injury residuals that required further medical treatment. Appellant's treating physician was further noted to have opined that she could perform the modified job offer with a gradual return to work.

The Board finds that appellant had no disability for work or injury residuals requiring further medical treatment on or after February 15, 2000, causally related to her August 21, 1991 employment injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² 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.³ Moreover, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁵ The Office met its burdens in this case.

¹ On February 17, 2000 the Office provided appellant's representative with the requested videotapes and still photographs.

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ *Marlene G. Owens*, 39 ECAB 1320 (1988).

⁵ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

In this case, appellant's treating physician continued to report that she remained totally disabled for all employment, but the Office's second opinion specialist, Dr. Hoffman, opined, based upon his examination results, that appellant could work eight hours a day

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."

The Office, therefore, properly determined that there was a conflict in medical opinion evidence between appellant's treating physician, Dr. Hubbell and the Office second opinion specialist, Dr. Hoffman and it correctly referred appellant, together with a statement of accepted facts, specific questions to be addressed and the relevant case record including surveillance tapes and photographs, to Dr. Shay to resolve the existing conflict.

Dr. Shay provided a report opining that appellant could not return to her date-of-injury job, but he recommended a functional capacity evaluation in an effort to determine appropriate restrictions for further employment. Such functional capacity evaluation results were obtained and submitted to Dr. Shay with a request for a further opinion.

However, Dr. Shay was not forthcoming with requested clarification of his examination report and further amplification of his opinion based upon the functional capacity evaluation results.

The Board notes that when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.⁶ However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report are also vague, speculative, or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.⁷

In this case, as Dr. Shay was unresponsive to the Office's requests, referral to a second impartial medical examiner, Dr. Hauser, was appropriate.

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.⁸

⁶ *April Ann Erickson*, 28 ECAB 336, 341-42 (1977).

⁷ *Harold Travis*, 30 ECAB 1071, 1078 (1979).

⁸ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

In this case, Dr. Hauser reviewed appellant's factual and medical history, noted her subjective complaints, described in detail his findings upon examination and opined that she had no objective findings or pathology. He found no objective injury-related residuals requiring further medical treatment and opined that she had no further disability for work, as he found that appellant could return to her previous job without restrictions, as well as return to the job that was offered which was of a sedentary nature. As Dr. Hauser's report was sufficiently well rationalized and based upon a proper factual background, it must be given special weight. According it that special weight results in it constituting the weight of the medical opinion of record and establishing that appellant has no further disability for work or injury residuals requiring further medical treatment on or after February 15, 2000, causally related to her August 21, 1991 employment injury.

At a subsequently requested hearing, appellant objected to the termination of her compensation and medical benefits and argued a due process violation, claiming that she did not have access to all of the unedited videotapes and photographs of record. However, at the hearing the hearing representative explained that the termination decision was based upon the medical evidence of record, which appellant did have copies of and not on the videotapes or photographs. The hearing representative further noted that even the Office did not have unedited versions of this evidence and that it was not relevant to the Office's findings regarding the weight of the medical evidence. It was noted that no further probative medical evidence was submitted to support appellant's contentions of continued disability and injury-related residuals.

Accordingly, the decision of the Office of Workers' Compensation Programs dated February 12, 2001 is hereby affirmed.

Dated, Washington, DC
August 19, 2002

Alec J. Koromilas
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member