

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MINNIE M. FEURTADO and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Charleston, SC

*Docket No. 02-613; Submitted on the Record;  
Issued December 2, 2002*

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DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,  
DAVID S. GERSON

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 18, 2001.

The Board finds that the Office met its burden of proof to terminate appellant's compensation.

On January 9, 1995 appellant, then a 49-year-old phlebotomist, filed a notice of traumatic injury and claim for compensation (Form CA-1), alleging that while moving a patient she injured her back. The claim was accepted for a lumbar strain. Appellant stopped work on the day of the incident and returned to light duty on January 31, 1995.

Appellant had a previously accepted lumbar strain in 1991 for which she was out of work 10 days. She was also previously involved in a car accident that resulted in a severe crush injury and reconstructive surgery to her left foot. Appellant suffered from lumbar spondylosis at the L4-5 level.

On November 13, 1995 appellant had a magnetic resonance imaging (MRI) performed that revealed an abnormal structure above the L3-4 intervertebral space thought to represent a herniated fragment of nucleus pulposus. There was also evidence of disc degeneration at the L4-5 and L5-S1.

In a March 25, 1995 report, Dr. James K. Aymond wrote that x-rays reveal significant spondylosis at the L4-5 level.

In an April 29, 1996 report, Dr. Howard Brilliant, a second opinion referral physician examined appellant and reviewed her x-rays from 1990. He reported that she could continue her work as a phlebotomist with some restrictions. Dr. Brilliant also opined that the x-rays from 1990 showed osteoarthritic changes with disc space narrowing at L4-5 that predated her present injury.

In a July 23, 1996 report, Dr. Aymond diagnosed persistent lumbar spondylosis changes at L3-4, L4-5 and L5-S1. He found no disc herniations.

In a July 23, 1997 report, Dr. John T. Williams diagnosed degenerative disc disease and joints in the lumbar spine but found no herniations.

In a September 24, 1997 report, Dr. Gregory A. Nelson wrote:

“[Appellant] stated that she was ... lifting a patient and she aggravated a previous low back injury, received in 1990.... [Appellant] now complains of constant low back pains.

“Since this [January 9, 1995] incident [appellant] has experienced difficulty with activities such as exercising, playing, running or jogging, prolonged walking, heavy lifting or carrying, bending, prolonged sitting or driving, reaching or stretching, picking things up, climbing up stairs....

“Physical examination ... was remarkable for the presence of decreased range of motion in the lumbar spine; palpatory tenderness over the spinous process of L-5, tenderness of the left posterior superior iliac spine; and muscle spasms with trigger points noted in the paralumbar muscles. [Appellant] had a positive Kemp’s sign bilaterally. [She] also had positive straight leg raising on the left at 30 degrees and on the right at 20 degrees. [Deep tendon reflexes] were symmetrical.

“It is our impression that [appellant] suffered chronic lumbosacral strain and sprain. Herniated nucleus pulposus and lumbar disc pathology are to be ruled out.

“In my opinion, to a reasonable degree of medical certainty, there is a direct causal relationship between the incident on January 9, 1995 and the diagnosis stated hereinabove.”

The Office referred appellant for a second opinion examination. In an April 22, 1998 report, Dr. Frank A. Mattei wrote that “after reviewing the medical records [and] the history given by [appellant] and my objective orthopedic examination, which was somewhat difficult because of the constant subjective complaints of [appellant], I could not find any objective findings, which would prevent her from performing her job as a phlebotomist.... Thus it is my medical opinion within reasonable medical certainty [that] she has made a full recovery from the accepted facts as stated of the lumbosacral sprain and has no residual. The fracture of her wrist joint is not related to her original injury and she has reached her preinjury level of activity.”

The Office found a conflict in the medical evidence between Drs. Nelson and Mattei and in a November 12, 1999 letter, referred appellant to Dr. Easwaran Balasubramanian, an orthopedic surgeon, for a referee medical examination.

Appellant had previously been referred to Dr. Balasubramanian to resolve a conflict. In a November 2, 1998 report he wrote:

“On examination today ... [appellant’s] gait is normal. She is able to toe walk and heel walk. Lumbar examination reveals that she has a diffuse tenderness in the lower back. There are no specific points of tenderness. Lumbar flexion is fair. Extension, lateral flexion is full. There is no evidence of any motor deficits in the lower extremities. She has a global loss of sensation in the right leg, but there is no dermatomal loss of sensation. Straight leg raising and sitting root test are negative.

“Based on review of the statements and records, the history taken and the physical examination, it is my impression that [appellant] sustained an injury to the lower back as a result of the work injury. She had a lumbosacral sprain. It is my clinical opinion that this is not active and that she has healed from that. The present symptoms are related to a degenerative disc disease that has been seen on the multiple MRIs since 1995. She is disabled. I feel that she could return to her job as a phlebotomist with some modifications to prevent repetitive bending. I also feel that these restrictions are based upon her preexisting MRIs.”

Appellant was referred back to Dr. Balasubramanian to determine if a separate 1991 work-related lumbosacral strain was causally related to her current condition. In a December 2, 1999 report, Dr. Balasubramanian reported:

“The previous charts were reviewed and interval history was obtained. [Appellant] states that since the last visit she has not had any further testing done. She still sees Dr. Aaron and also receives acupuncture twice a week and physical therapy three [times] a week. [Appellant] gets an injection from Dr. Mintz every Thursday. She has been wearing a brace for the past three months, which has helped her somewhat.... [Appellant] stated that she feels worse than what she [did] last year ... the pain goes down her right leg into her foot. She can walk around a block or so and [is] able to sit or stand for 15 minutes. Coughing also increases her low back pain.

“Physical exam[ination] reveals that [appellant] is able to walk for a short distance around the room without the help of a cane. She was examined without the brace today. [Appellant] has an antalgic gait. Her flexion is limited to 60 degree in the lumbar spine. Extension is painful. Lateral flexion is painful.... Sitting root test is negative. There is no neurological deficit.

“At the present time it is my opinion and to a reasonable degree of medical certainty that [appellant] is suffering from low back pain secondary to degenerative disc disease. At the present time I feel her work[-]related injury of lumbosacral sprain has healed, but she has a degenerative disc disease [that] predates her injury... She is in a significant amount of pain, ... but this is due to [the] degenerative condition, not due to a work injury.”

On April 14, 2000 appellant had an MRI with impressions that read, disc degeneration at T11-12 with mild to moderate broad-based disc protrusion. Shallow eccentric nuclear herniation towards left neural foramen at L2-3. Severe disc degeneration at L4-5 with a few images suggesting a mild broad-based disc protrusion and some facet joint degenerative joint disease as well.

In a July 7, 2000 report, Dr. Michael Guthrie, who appellant was seeing for pain management, wrote that he had reviewed the MRI and examined appellant. He diagnosed lumbar radiculopathy, L2-3 herniated nucleus pulposus, degenerative disc disease and facet arthropathy.

In a November 16, 2000 letter, the Office sent Dr. Balasubramanian appellant's recent MRI results and asked if the impressions changed his opinion regarding appellant's disability.

In a November 19, 2000 letter, the Office sent appellant a notice of proposed termination along with instructions on how to contest the termination.

In a November 27, 2000 letter, Dr. Balasubramanian stated that the MRI results did not cause him to change his mind that appellant's accepted lumbar strain from 1995 had healed and her continuing disability and pain were related to her preexisting degenerative disc disease. He opined that the MRI findings were a result of her degenerative disc condition rather than a true disc herniation and that "even though the report indicates that there is a shadow eccentric nuclear herniation tilted to the left neural foramina in L2-3, on reviewing the previous MRIs she has had various similar bulges in the past. With multiple disc disease it is my impression that the new report finding of L2-3 herniation is probably related to the disc degeneration rather than a true disc herniation."

In a January 18, 2001 decision, the Office terminated appellant's compensation.

Appellant requested a review of that decision by the Branch of Hearings and Review. In the June 14, 2001 hearing, appellant's counsel argued that Dr. Balasubramanian did not have a proper medical history because he did not have her medical records for the 1991 injury, he had the year of 1995 injury as 1996 and that he mischaracterized what happened in the 1995 injury.

Appellant also submitted a November 7, 2000 report from Dr. Nelson. In it he wrote:

"[Appellant] was most recently evaluated in our office on October 21, 2000 and complained of low back pain. Examination of the lumbar spine revealed decreased range of motion, spasm and positive Kemp's on the right.... Because [appellant] continues to suffer symptomatology, her prognosis remains guarded and is still under our care. She continues to be disabled and unable to return to work as a phlebotomist, which would require prolonged standing, which could aggravate [appellant's] low back pain.... It is our opinion within a reasonable degree of medical certainty, there is a direct causal relationship between the incident of January 9, 1995 and the diagnosis stated hereinabove."

In a September 3, 2001 decision, the hearing representative affirmed the termination.

The Board finds that the Office properly terminated appellant's compensation.

Under the Federal Employees' Compensation Act,<sup>1</sup> once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>2</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>3</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup>

The Office properly determined that there was a conflict in the medical opinion between Dr. Nelson appellant's attending physician and Dr. Mattei, acting as an Office referral physician, regarding whether appellant continued to have residuals of the accepted employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Balasubramanian for an impartial medical examination and an opinion on the matter.<sup>5</sup>

In situations where 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.<sup>6</sup>

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Balasubramanian, the impartial medical specialist selected to resolve the conflict in the medical opinion. The report of Dr. Balasubramanian establishes that appellant had no disability due to her employment injury after January 18, 2001.

The Board has carefully reviewed the opinion of Dr. Balasubramanian and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Balasubramanian's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts that noted both 1991 and 1995 injuries, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Balasubramanian provided a proper analysis of the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition, which

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>3</sup> *Id.*

<sup>4</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>5</sup> 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).

<sup>6</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

comported with this analysis.<sup>7</sup> Dr. Balasubramanian provided medical rationale for his opinion by explaining that appellant's lumbar strain from 1995 would have resolved and the ongoing symptoms and pain were related to the preexisting degenerative disc disease that had been evident on MRIs since prior to the 1995 incident. Furthermore, he opined that the bulges seen on the April 14, 2000 MRI were not actual herniations but result of the disc degeneration condition.

Dr. Nelson, who was on one side of the conflict that Dr. Balasubramanian was asked to resolve, essentially reargues points already submitted. He did not provide a rationalized explanation of why, in light of appellant's preexisting degenerative disc disease, he felt appellant's condition was related to the accepted the 1995 lumbar strain.

The Board finds the Office properly gave the weight of the medical evidence to Dr. Balasubramanian's, reports, as the impartial medical examiner in terminating appellant's compensation effective January 18, 2001.

The decisions of the Office of Workers' Compensation Programs dated September 3 and January 18, 2001 are hereby affirmed.

Dated, Washington, DC  
December 2, 2002

Alec J. Koromilas  
Member

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

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<sup>7</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).