U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KAREN KNOTT and SMALL BUSINESS ADMINISTRATION, Washington, DC

Docket No. 00-1266; Submitted on the Record;
Issued January 18, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation benefits as of August 16, 1997 on the grounds that appellant's employment-related disability had ceased; and (2) whether appellant met her burden of proof to establish that her fibromyalgia was causally related to her accepted employment injuries.

On July 23, 1993 appellant, then a 45-year-old general business and industry specialist, sustained a lumbar strain, a herniated disc at L5-S1 and a contusion to the buttocks when her chair slid backwards as she was attempting to sit down at work. The Office accepted the claim for lumbar strain, radiculopathy L5-S1, HNP L5-S1 and contusion of the buttocks. Appellant returned to full duty; however, she sustained a second work-related injury on August 19, 1994 and stopped work on August 19, 1994.[1] The Office placed appellant on the periodic rolls and paid compensation benefits.[2]

In a February 6, 1996 report, Dr. Mayo Friedlis, Board-certified in physical medicine and rehabilitation and a second opinion physician,[3] noted appellant's history of injury and treatment. He also noted an automobile accident of June 15, 1990 involving an injury to her left knee from which she had recovered by the time of her work-related injury on July 26, 1993. Dr. Friedlis indicated that appellant complained of constant pain over the cervical, thoracic and lumbar

[1] Appellant was also injured on August 19, 1994, when appellant inhaled fumes at work and that claim was accepted for aggravation of allergic rhinitis. The Office also accepted that coughing from the second injury aggravated the herniated disc at L5-S1. The two injury claims were subsequently combined.

[2] The record reflects that appellant's employer, the Small Business Administration, terminated her from their rolls, effective August 18, 1995, based on the fact that she was totally disabled from performing her regularly assigned duties.

[3] The record reflects that Dr. Friedlis began to treat appellant.

portions of her back, frequent headaches, pain radiating down the entire length of the upper extremities, over both the anterior and posterior aspects. Additionally, he noted that she also complained of pain radiating down the anterior aspect of the lower extremities and into the toes. Dr. Friedlis diagnosed fibromyalgia, cervical and lumbar radiculopathy and a herniated nucleus pulposus (HNP) at L5-S1. He stated that appellant had several physical problems, which needed to be addressed; however, treatment of these problems would be ineffective due to the severity of her current emotional state. Dr. Friedlis stated that once these problems were addressed, he would recommend initiating a fibromyalgia program. He recommended that, prior to that, appellant should be seen by a psychologist for treatment of her chronic pain behaviors. Dr. Friedlis further noted that he was unable to determine specific work limitations until her emotional status was evaluated.

In a March 1, 1996 report, Dr. Randi J. Long, Board-certified in physical medicine and rehabilitation and appellant's treating physician, responded to a request from the Office regarding appellant's status. He diagnosed chronic pain syndrome with an indefinite time frame for treatment. Dr. Long stated that appellant had reached maximum medical improvement but was unable to determine when she could return to her preinjury position as an industry specialist. He further opined that appellant was unable to tolerate even light-duty work. In the accompanying work capacity evaluation, Dr. Long stated that appellant could lift less than five pounds, tolerate sitting for less than five minutes, walk with a cane, walk for less than five minutes and no overhead work. He further stated that appellant was unable to tolerate even structured work. In response to the question of whether appellant's limitations were due to her employment injury, he stated that all were indirectly related.

In an April 11, 1996 report, Dr. W. Robert Nay, a licensed clinical psychologist, noted that appellant had significant pain in her lower back and intense feelings of depression and irritability related to coping with pain and the problems with her employer. He stated that he intended to begin a program of pain management, while also helping appellant to ventilate these feelings and begin to restructure her thinking in a way that would help her begin to resolve some of the stress that she was currently experiencing.

In an April 25, 1996 report, Dr. Nay concluded that appellant was not ready to proceed with pain management until financial and life stresses were addressed and stated that the sessions could not continue.

In a June 5, 1996 report, Dr. Friedlis stated that he felt appellant had a work-related disability. He noted that her examination was fraught with inconsistencies; however, he did feel that she had true pain. Dr. Friedlis further noted that appellant was emotionally attached to her pain and that she had multiple pain behaviors and was in a chronic pain syndrome. He stated that appellant had "apparently torpedoed the work of Dr. Nay" and that he would not be optimistic that he would be able to do anything constructive for her. Dr. Friedlis recommended immediately returning appellant to work with a 15-pound restriction and indicated that appellant could work 8 hours a day.

In a July 15, 1996 report, Dr. Long indicated that he agreed with the findings, diagnosis and recommendations of Dr. Friedlis in his February 6, 1996 report. In a July 24, 1996 report, he also concurred with Dr. Friedlis' June 5, 1996 report.

By letter dated March 11, 1997, the Office notified appellant that it proposed to terminate her compensation benefits. By decision dated April 14, 1997, the Office terminated appellant's compensation on the grounds that appellant was no longer disabled. By decision dated July 16, 1997, the Office reissued its termination decision to provide appellant appropriate appeal rights and advised appellant that the date her benefits would be terminated was August 16, 1997.

By letter dated October 28, 1997, appellant requested an oral hearing, which was held on May 21, 1998.

In a June 19, 1998 report, Dr. Virginia Steen, a Board-certified internist and a treating physician, examined appellant and noted that a diagnosis of fibromyalgia was made in 1993; however, it did not appear that her physicians or her employers understood the diagnosis. Dr. Steen indicated that, although appellant did have some type of treatment, it was inadequate and triggered a severe amount of stress that seriously exacerbated her problems. She stated that in addition to appellant's diffuse generalized muscle pain, appellant was quite debilitated by the severe muscle and joint tightness, stiffness and spasm. Dr. Steen noted that appellant's skin was hypersensitive with an almost neuropathic type of pattern degree of sensitivity and her back continued to be a problem with pain and radiation of this pain into her legs. She also stated that appellant experienced severe migraine headaches, irritable bowel problems, nonrestorative sleep, depression and a variety of other symptoms consistent with the associated fibromyalgia syndrome. Dr. Steen diagnosed severe fibromyalgia, most likely a secondary problem in relationship to her prior injuries and indicated that after such an extended period of time, it was a permanent condition and it was unlikely that appellant could return to full-time employment. She also indicated that this permanent disability clearly seemed to be "temporarily associated with her prior injury and stress related to unwarranted job termination and financial deprivation."

In a September 8, 1998 report, Dr. Steven E. Braverman, Board-certified in physical medicine and rehabilitation,[4] indicated that he had reviewed appellant's medical records and the most recent summary by Dr. Steen dated June 19, 1998. He noted that his review indicated that Dr. Long, appellant's previous physician, did not agree with Dr. Friedlis' recommendation for full return to work but rather agreed with Dr. Friedlis' February 6, 1996 assessment suggesting a treatment plan but not indicating a prognosis to return to work.

In a decision dated August 14, 1998, an Office hearing representative found the termination proper but also found that Dr. Steen's report created a medical conflict regarding fibromyalgia and continuing disability and remanded the case for further development.

On February 1, 1999 the Office referred appellant, together with a statement of accepted facts, the medical opinions of record and a list of issues to be addressed to Dr. Ana Acevedo, Board-certified in physical medicine and rehabilitation, for an independent medical examination.

In a March 8, 1999 report, Dr. Acevedo noted that appellant presented with chronic pain and a diagnosis of fibromyalgia from a work-related accident on July 27, 1993. She noted that, on physical examination, appellant was constantly switching from the sitting to the standing

[4] He also treated appellant.

position and could not hold a steady position for more than 10 minutes because of subjective discomfort. Dr. Acevedo also noted that cervical range of motion appeared to be restricted, as did lumbar range of motion. She found that appellant was unable to stand on her heels or her toes effectively and was unable to squat. Additionally, Dr. Acevedo indicated that appellant exhibited multiple pain behaviors during the examination including grimacing. She also stated that appellant was tender to palpation throughout her neck, thoracic and lumbar region. Dr. Acevedo indicated that subjectively, appellant had difficulty raising her arms beyond horizontal abduction secondary to pain. In her diagnosis, she found that appellant had: Chronic myofascial pain syndrome; was status post lumbar sprain; had chronic radiculopathy at L5-S1; bronchial asthma; allergic rhinitis; fumes exposure; chronic migraine headaches; status post peptic ulcer; allergy to penicillin; history of colitis and anemia; status post motor vehicle accident on June 15, 1990; and sad affect with depressed mood. Dr. Acevedo further found that the current examination failed to reveal any evidence of acute neurologic compromise along with myofascial and cardiovascular deconditioning likely secondary to her limited daily physical activity. She stated that appellant's depressed mood and frustration related to her work-related injury and subsequent events clearly served as daily, added stressors contributing to her chronic pain. Dr. Acevedo further opined that appellant suffered a lumbar sprain, a probable cervical and lumbar radiculopathy related to her work injury on July 27, 1993, which had ceased by August 16, 1997. She further opined that it was extremely difficult to predict her return to work as appellant was grossly deconditioned physically and emotionally overwhelmed by her current situation. Dr. Acevedo recommended a functional capacity evaluation to objectively document appellant's current level of function and subsequently make recommendations for a work conditioning program. She further advised that every attempt should be made to return appellant to full employment.

By decision dated March 19, 1999, the Office found that appellant had no employment-related disability after August 16, 1997.

In a May 5, 1999 report, Dr. Steen noted that she had treated appellant over the past year for management of her fibromyalgia and stated that appellant continued to have difficulties related to fibromyalgia. She indicated that she had an opportunity to review Dr. Acevedo's March 9, 1999 report and disagreed with his assessment that appellant's disability ended in August 1997. Dr. Acevedo explained that appellant's examination clearly showed significant muscle spasms, limitation of motion, inability to sit in any position for any length of time and an obvious inability to return to work in any situation. Dr. Steen stated that she found it difficult to understand how Dr. Acevedo could make a judgment as to appellant's ability to return to work in August 1997 when there appeared to be complete disability in her March 3, 1999 examination. She further stated that Dr. Acevedo's rationale of no objective evidence was only based on no evidence of neurologic defect. Dr. Steen explained that appellant had normal strength in all of her extremities and did not have neurologic deficits, but indicated that fibromyalgia was not expected to be associated with such findings. She further noted that it appeared that "Dr. Acevedo minimized appellant's pain syndrome into saying that it was subjective and associated with 'chronic' pain behaviors." Dr. Steen further opined that it appeared that Dr. Acevedo was not willing to acknowledge that appellant had fibromyalgia. She concluded that appellant was completely disabled at this time.

By letter dated August 14, 1999, appellant requested reconsideration.

In a May 12, 1999 report, Dr. Braverman stated that he first saw appellant in November 1994 and diagnosed her fibromyalgia, which he thought was exacerbated by a fall that she had at work. He stated that he had seen appellant periodically over the years and at no time did he see appellant improve to a normal functioning level, which would allow her to do her job eight hours a day, every day.

In a September 2, 1999 report, Dr. Steen opined that appellant was totally disabled from fibromyalgia and the likelihood of her returning to work in the foreseeable future was almost zero.

In a merit decision dated December 6, 1999, the Office found that the evidence submitted with appellant's request for reconsideration was insufficient to warrant modification of the prior decision.

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[5] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[6]

In the instant case, the Office relied upon the reports of appellant's treating physicians, Drs. Friedlis and Long to meet their burden to terminate appellant's compensation. Both of these physicians concurred that appellant could return to work with a 15-pound restriction for 8 hours a day. However, these statements as to disability do not make it clear whether these restrictions were within the duties of appellant's preinjury job. The record is unclear as to the requirements of appellant's date-of-injury job. The Office did not request a supplemental report to clarify the opinion as to appellant's employment-related disability and whether appellant was capable of returning to her preinjury position. Finally, with respect to causal relation, Dr. Friedlis did not address whether appellant's disability was related to her employment. Dr. Long did not provide a specific opinion with respect to whether appellant's injuries were employment related except to say that they were "indirectly related" and to concur with Dr. Friedlis February 6 and June 5, 1996 reports. These reports alone were insufficient for the Office to meet its burden to terminate compensation.

Thereafter, the Office found a conflict in the medical evidence under 5 U.S.C. § 8123(a) amoung Drs. Friedlis and Long and Dr. Steen. However, the Board finds that the evidence from Drs. Freidlis and Steen was not sufficient to create a conflict as they were both appellant's

[5] *Curtis Hall*, 45 ECAB 316 (1994); *John E. Lemker*, 45 ECAB 258 (1993); *Robert C. Fay*, 39 ECAB 163 (1987).

[6] *Jason C. Armstrong*, 40 ECAB 907 (1989).

treating physicians. In order for a conflict to arise, there must have been a disagreement between the physician making the examination for the United States and appellant's physician.[7]

The referral to Dr. Acevedo is, therefore, as a second opinion referral physician. In her March 8, 1999 report, she diagnosed fibromyalgia, but did not address the cause or discuss appellant's fibromyalgia. Additionally, Dr. Acevedo indicated that there were numerous medical conditions present at the time of her examination including myofascial pain and depression but she did not explain why these conditions would not be compensable. Although she indicated that appellant had recovered from her employment-related injuries on August 16, 1997, she did not explain why she determined that appellant had recovered in August 1997, as opposed to the date of her examination in March 1999, when appellant continued to demonstrate numerous medical problems. These problems included fibromyalgia, chronic radiculopathy and chronic myofascial pain syndrome as well as sad effect with depressed mood. Additionally, Dr. Acevedo indicated that appellant was in obvious pain throughout the examination and was unable to hold any position for more than 10 minutes. She did not attempt to distinguish appellant's present condition from her accepted employment injury or some other condition. The record reflects that appellant's symptoms, including fibromyalgia dated as back to 1994 and that these conditions were employment related. Dr. Acevedo further recommended a functional capacity evaluation to see if they could objectively document appellant's current level of function and subsequently make recommendations for a work-conditioning program. Her mere conclusion that appellant's symptoms had ceased by August 16, 1997 is insufficient to establish that appellant had no continuing condition as a result of her July 23, 1993 work injury. Inasmuch as Dr. Acevedo failed to provide adequate rationale to support her opinion, the Office improperly relied upon this evidence as a basis for terminating appellant's compensation.

Under these circumstances, the Office has failed to meet its burden to terminate compensation and accordingly, the decision to terminate compensation is reversed.

Furthermore, the Board finds that this case is not in posture for decision on the issue of whether appellant developed fibromyalgia due to her employment duties.

An employee seeking benefits under the Federal Employees' Compensation Act[8] has the burden of establishing the essential elements of his or her claim by the weight of the reliable, probative and substantial evidence, including the fact that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[9]

In this case, the Office accepted that appellant sustained a lumbar strain, radiculopathy at L5-S1, HNP L5-S1 and contusion to the buttocks, along with aggravation of allergic rhinitis.

[7] 5 U.S.C § 8123(a) provides that where there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.

[8] 5 U.S.C. §§ 8101-8193.

[9] *Kathryn Haggerty*, 45 ECAB 383, 388 (1994).

Appellant alleged that she developed fibromyalgia as a result of her accepted employment injuries.

Appellant submitted reports from Drs. Friedlis, Long and Steen that included discussions and/or a diagnosis of fibromyalgia. Dr. Steen elaborated on the diagnosis as far back as 1993 and explained that it did not appear that the diagnosis of fibromyalgia was understood previously and it was not treated properly. She opined that it was a secondary problem related to her prior injuries and was most likely permanent.

The Office referred appellant to Dr. Acevedo and in a report dated March 8, 1999, she stated that appellant presented with a diagnosis of fibromyalgia from a work-related accident of July 27, 1993. However, in her diagnosis, she did not mention the fibromyalgia or explain why this present condition was not related or compensable. Dr. Acevedo indicated that appellant was in obvious pain throughout the examination, being unable to hold any position for more than a few minutes, but she did not offer an explanation on causal relation. For instance, she did not explain how appellant could be in such pain without addressing the fibromyalgia issue, which the records reveal was diagnosed in 1994. Dr. Acevedo further recommended a functional capacity evaluation, but concluded without explanation that appellant's symptoms had ceased.

Although the reports from Drs. Friedlis, Long and Steen are not sufficient to meet appellant's burden of proof as these doctors offered little medical rationale explaining the causal relationship between appellant's current condition and her accepted employment injury, these reports contain a history of injury, diagnosis and an opinion that appellant's current condition was caused by the accepted employment injury. While these reports are not sufficient to meet appellant's burden of proof, they do raise an uncontroverted inference of causal relation between appellant's accepted employment injury and the diagnosis of fibromyalgia and are sufficient to require the Office to undertake further development of appellant's claim.[10] Proceedings under the Act are not adversary in nature nor is the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.[11] Accordingly, once the Office undertakes to develop the medical evidence further, it has the responsibility to do so in a proper manner.

Therefore, the Board finds that the case must be remanded. On remand, the Office should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an evaluation and rationalized medical opinion on whether appellant's fibromyalgia is causally related to her accepted employment injury. After such further development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

[10] *John J. Carlone*, 41 ECAB 354, 358-60 (1989).

[11] *John W. Butler*, 39 ECAB 852 (1988).

The decision of the Office of Workers' Compensation Programs dated December 6, 1999 is hereby set aside and the decision dated March 19, 1999 is hereby reversed. The case is returned to the Office for further action consistent with this decision.

Dated, Washington, DC
January 18, 2002

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member