U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ELIZABETH S. DAS and U.S. POSTAL SERVICE,
MAIN POST OFFICE, Pasadena, CA

Docket No. 02-136; Submitted on the Record;
Issued July 17, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation on the grounds that her work-related back injury had resolved.

On March 22, 2000 appellant, then a 47-year-old clerk, filed a traumatic injury claim alleging that she experienced pain in her lower back and left leg while bending and picking up sacks of mail. In a recurrence of disability claim also filed on March 22, 2000 appellant alleged that she had felt pain in her lower back while bending and standing since November 1999. Appellant explained that on September 13, 1999 she thought she had a minor back injury from lifting sacks of mail but the pain went away at that time.

On June 15, 2000 the Office accepted appellant's claim for a lumbosacral strain and authorized physical therapy. She had stopped work on April 25, 2000. Appellant began treatment with Dr. Daniel S. Gobaud, a Board-certified orthopedic surgeon.

In a report dated August 2, 2000, Dr. Gobaud stated that the pathology of appellant's condition was osteoarthritis of the cervical and lumbar spine, which had been aggravated by work. He found a limited range of motion of the cervical and lumbar spine, no motor deficits of the upper extremities and hypethesia of the left L5-S1 nerve root. Dr. Gobaud diagnosed acute cervical and lumbar strains and post-traumatic aggravation of degenerative disc disease.

Dr. Gobaud explained that in her job appellant had to do repeated stooping, lifting, bending, pulling and pushing with a lot of standing. After the September 13, 1999 injury, she was transferred to a sitting job, without any bending or lifting, which was "an indication that her problem is work related." Dr. Gobaud added that before the injury appellant was able to work at full duty without any problem but that afterwards she had not been able to do so and had been

given modified duties. In subsequent progress reports, Dr. Gobaud kept appellant off work due to back pain and supervised her thrice-weekly physical therapy sessions.[1]

The Office referred appellant to Dr. Bunsri Thanasophon, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated October 27, 2000, he reviewed appellant's medical record and work history and recorded his clinical findings on examination of appellant. Dr. Thanasophon diagnosed sprain/strain of the lumbosacral spine caused by work factors. He opined that appellant was not totally disabled at this time and was capable of performing the duties listed in her job description. Dr. Thanasophon clarified on December 5, 2000 that appellant could work for eight hours a day with a lifting restriction of 50 pounds occasionally.

Dr. Gobaud reviewed the second opinion report on November 20, 2000 and agreed with Dr. Thanasophon's conclusions that appellant's back condition was work related. Dr. Gobaud was "surprised" that Dr. Thanasophon did not mention appellant's neck pain and disagreed with his opinion that appellant was no longer disabled and required no further back treatment.

On March 30, 2001 the Office referred appellant to Dr. Hampton T. Gaskins, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Gobaud and Thanasophon.[2] In a report dated May 4, 2001, Dr. Gaskins diagnosed Von Willibrand's disease (a bleeding disorder), anemia, hemangioma at L3 and resolved lumbosacral strain and found no evidence of cervical or shoulder injuries.[3] He stated that appellant required no treatment between the "minor lower back injury" of September 13, 1999 and March 22, 2000 when she complained of back pain to a physician. Dr. Gaskins indicated that appellant should never have been totally disabled and did not have any physical limitations for returning to work due to the accepted back strain. His rationale was that appellant herself stated that she needed no treatment, her job in September 1999 was immediately changed to light duty, thus eliminating bending and stooping requirements and there was a six-month gap between the back injury and her March visit to a physician.

On June 18, 2001 the Office issued a notice of proposed termination based on Dr. Gaskins' report. Appellant disagreed with the notice and submitted a statement criticizing Dr. Gaskins' report and explaining the sequence of her back injury. She also submitted a July 2, 2001 report from Dr. Gobaud who critiqued Dr. Gaskins' opinion.

[1] From August 2000 onward, appellant generally saw Dr. Gobaud once a week. His reports related that appellant was doing "fine" or "worse" or "the same" and generally repeated his physical findings and comments. In several reports he stated that appellant had been having more pain due to "change in weather."

[2] 5 U.S.C. § 8123(a) states in pertinent part: "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."

[3] Dr. Gaskins diagnosed anemia, but a June 26, 2001 report from Dr. Sanjay Khedia, Board-certified in internal medicine, stated that appellant did not have anemia, based on blood work done on October 18, 2000.

On July 20, 2001 the Office terminated appellant's compensation on the grounds that appellant no longer had residuals of the accepted work injury. The Office concluded that the weight of the medical opinion evidence rested with the report of Dr. Gaskins.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[4] 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.[5]

In situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examination to resolve the conflict in medical opinion.[6] The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.[7]

In this case, the Office properly determined that a conflict of medical opinion existed over whether appellant was still disabled due to her work-related lumbar condition and referred appellant to Dr. Gaskins to resolve the conflict.[8] However, his report is insufficient to meet the Office's burden of proof because he disregarded the Office's acceptance of appellant's claim for a back injury.

The record reveals that appellant thought she had a minor back injury on September 13, 1999 but refused medical treatment because the pain went away. In her recurrence of disability claim, appellant noted that she had felt pain in her lower back since November 1999 while "bending and standing." A medical report signed by Dr. Sean Early on March 22, 2000 stated that appellant had an initial injury in November 1999 and had hurt her low back twice since then, most recently in January 2000. On May 23, 2000 appellant stated that she asked for medical treatment on February 16, 2000 but did not see the doctor until March 27, 2000.

In his report, Dr. Gaskins stated that appellant first sought medical treatment on March 22, 2000 and the six-month gap between then and the initial minor injury on September 13, 1999 as described by appellant indicated that the back pain she alleged on

[4] *Betty M. Regan*, 49 ECAB 496, 501 (1998).

[5] *Raymond C. Beyer*, 50 ECAB 164, 168 (1998).

[6] *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

[7] *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

[8] The Federal Employees' Compensation Act provides that 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).

March 22, 2000 was probably not medically connected to the September 13, 1999 industrial injury. He opined that appellant had no physical limitations to return to work and "should never have been temporarily totally disabled from work regarding the accepted injury" and "does not have any alleged injuries" stemming from September 13, 1999. Dr. Gaskins also stated that appellant's job changed after September 13, 1999 and this "would have eliminated the possibility" of any recurrence of injury.

The Office accepted that appellant sustained a work injury resulting from the September 13, 1999 incident and further duties thereafter. Because Dr. Gaskins foreclosed the possibility of any back injury after September 13, 1999, his opinion on whether appellant's accepted lumbosacral strain had resolved and whether she had any physical limitations resulting from the accepted injury is of diminished probative value.

Also, Dr. Gaskins' rationale ignores the evidence that while appellant's job duties were changed after the September 13, 1999 incident, they were again changed in November 1999 when she was assigned to the automation section, which required more bending and stooping. Finally, Dr. Gaskins did not address whether the recurrent back strain first diagnosed by Dr. Early on March 22, 2000 continued.

Thus, the Board finds that the opinion of Dr. Gaskins is insufficiently rationalized to establish that appellant had no residuals of her work-related lumbar strain. Therefore, the conflict of medical opinion remains and the Office has failed to meet its burden of proof in terminating appellant's compensation.[9]

[9] *See H. Adrian Osborne*, 48 ECAB 556, 562 (1997) (finding that the impartial medical examiner's report was based on an inaccurate job description and was therefore, insufficiently probative to resolve the conflict in the medical opinion evidence).

The July 20, 2001 decision of the Office of Workers' Compensation Programs is reversed.

Dated, Washington, DC
July 17, 2002

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member