U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA R. ACKERMAN and U.S. POSTAL SERVICE,
POST OFFICE, Marblehead, MA

Docket No. 01-1225; Submitted on the Record;
Issued May 23, 2002

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's wage-loss compensation due to the September 1997 work injury.

Appellant's claim, filed on December 24, 1991, was accepted by the Office for cervical and lumbar strains sustained while throwing parcels at work. Following a back strain and right rotator cuff tear on May 14, 1993 the Office determined that appellant could work only part time, due to the previous strains and the accepted condition of bilateral carpal tunnel syndrome. She returned to limited duty as a part-time distribution clerk but filed another claim on September 23, 1997 after she tripped over a platform and wrenched her neck, ribs and lower back. This claim was accepted for right shoulder and lower back strains.

Following a fitness-for-duty examination on September 24, 1997, Dr. David M. Rosten (no credentials found) noted that appellant had chronic problems involving the muscles of the right side of her body. He diagnosed myositis, right shoulder rotator cuff problems and a history of bilateral carpal tunnel syndrome. Dr. Rosten cleared appellant for limited duty four hours a day, with no lifting, climbing, bending, stooping, heavy pushing or pulling, or prolonged standing or walking.

Dr. Alexander C. Szabo, Jr., an osteopathic practitioner, who is Board-certified in family practice and appellant's treating physician since 1993, stated in an October 30, 1997 report, that appellant's x-ray dated September 19, 1997 showed chronic degenerative disc disease at C5-6, with some spurring but no acute abnormality. He diagnosed chest and lumbar strains, sciatica and exacerbation of myositis and found appellant to be totally disabled. Subsequently, Dr. Szabo completed a series of attending physician's reports starting in February 1998. He noted that physical therapy treatments were not helping appellant and suggested acupuncture. Dr. Szabo also stated that appellant's rotator cuff problem and carpal tunnel syndrome were not related to work.

The Office referred appellant to Dr. Albert Franchi, a Board-certified orthopedic surgeon, who concluded in a May 6, 1998 report, that appellant could return to her part-time limited-duty work with a lifting restriction of 10 pounds. He also limited pushing and pulling to 15 pounds and walking and standing to 1 hour, with no squatting, kneeling, or climbing. Dr. Franchi stated that these restrictions were permanent.

Based on appellant's history and physical examination as well as his review of the medical records and x-rays, Dr. Franchi diagnosed strains of the shoulders and cervical and lumbar spines due to the 1997 work injury, but found no residuals of these injuries. He explained that appellant's decreased range of motion in her neck and back was due to her preexisting degenerative disease, as noted in her x-rays. Also, appellant stated that she had previous lower back problems with a right-sided radiculopathy. She told him that the range of motion in her right shoulder had improved to its pre 1997 level after a small mass was removed in April 1998. Dr. Franchi stated that Dr. Szabo's treatment was only transient and was not resulting in progressive relief of appellant's symptoms. He concluded that the accepted strains temporarily aggravated appellant's previous conditions and that she had returned to her preexisting baseline.

In a May 13, 1998 report, Dr. Szabo diagnosed fibromyositis as appellant's current disabling condition. In a June 24, 1998 report, he attributed the fibromyositis to the 1997 injury and stated that all of appellant's pain symptoms and depression were related to her previous injuries.

On May 22, 1998 the employing establishment offered appellant a limited-duty assignment tailored to Dr. Franchi's restrictions. On June 18, 1998 the Office informed appellant that the position was suitable and that she had 30 days to accept the job or provide reasons for her refusal. The Office also informed her of the penalties for refusing an offer of suitable work.

On May 27, 1998 Dr. Szabo stated that appellant should not go back to work but should enroll in a work hardening program.

On November 24, 1998 the Office referred appellant to Dr. William Kermond, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence over whether appellant was capable of part-time work.[1]

In a report dated December 9, 1998, Dr. Kermond found appellant able to work for four hours a day. Based on his report, the Office issued a notice of proposed termination of compensation on February 3, 1999.

Dr. Szabo stated in a March 19, 1999 report, that appellant had been totally disabled since September 19, 1997 with minimal improvement. He diagnosed low back pain,

[1] 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."

fibromyalgia, shoulder adhesive capsulitis, right rotator cuff tear, carpal tunnel syndrome, depression and gastritis and stated that her prognosis was poor.

On April 19, 1999 the Office terminated appellant's wage-loss compensation on the grounds that her work-related injuries from the September 19, 1997 incident had resolved. The Office noted that physical therapy notes and several reports from Dr. Szabo finding appellant still totally disabled were insufficient to overcome the special weight accorded Dr. Kermond as the impartial medical examiner.

Appellant requested a hearing, which was held on August 17, 1999. By decision dated January 24, 2000, the hearing representative found that Dr. Kermond's report represented the weight of the medical opinion evidence, that appellant's work-related disability attributable to the 1997 injury had ceased. The hearing representative stated that, while Dr. Szabo's reports included additional diagnoses resulting from the 1997 incident, he provided no reasoned medical opinion establishing a causal relationship. Further, the May 10, 1999 report from Dr. Diana Zantos Beaupre, Board-certified in internal medicine, which diagnosed chronic pain syndrome and "some features" of fibromyalgia, indicated that these conditions could not be positively linked to the accepted strain injuries.

On December 27, 2000 appellant requested reconsideration and submitted an April 18, 2000 report from Dr. Szabo finding her totally disabled. Also submitted was a magnetic resonance imaging (MRI) scan dated October 19, 2000 showing small disc herniation at T5-6 and T6-7 and degenerative change at T11-12 with no spinal stenosis or nerve root impingement and a February 14, 2001 MRI showing a partial rotator cuff tear. Appellant's representative offered legal arguments regarding the weight of the medical evidence; aggravation of appellant's preexisting condition and the Office's failure to follow procedure.

By decision dated March 22, 2001, the Office denied appellant's request on the grounds that the evidence submitted in support of reconsideration was insufficient to modify its previous decision.

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss benefits due to the September 1997 work injury.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] 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.[3]

In this case, the Office properly determined that a conflict of medical opinion existed between Dr. Szabo, appellant's treating physician, who consistently found appellant unable to work at all and the Office's second opinion physician, Dr. Franchi, who opined that while the

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

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

1997 injury had aggravated appellant's preexisting lumbar and shoulder conditions, she had returned to her baseline and was capable of working on limited duty for four hours a day. The Office then referred appellant to Dr. Kermond for an impartial medical evaluation.[4]

In his December 9, 1998 report, Dr. Kermond detailed appellant's work injuries, beginning in 1991 with right scapular pain. Her right shoulder was injured again in 1993 and possible fibromyalgia was diagnosed. Appellant stopped work in February 1994 and underwent a work hardening program. An MRI in December 1994 showed a right rotator cuff tear, but appellant declined surgery. In 1995 she developed bilateral carpal tunnel syndrome and underwent release treatment. In September 1997, she tripped over a platform and "threw out" her back.

After reviewing "voluminous records" of appellant's past medical treatment and noting "no consistent treatment records from January 1996 until September 1997, Dr. Kermond conducted a comprehensive examination of her neck, torso and upper extremities, including range of motion, muscle strength and grip measurements and diagnostic testing. He reported positive and objective findings as limitation of motion of the spine from her neck to the low back, restricted motion and weakness in the shoulders, on the right more than the left, multiple positive trigger point tenderness, but not enough to confirm a diagnosis of fibromyalgia.

While appellant did have objective findings at this time, which were not much different than those of Dr. Franchi seven months earlier, Dr. Kermond stated that her most recent complaints possibly stemmed from a motor vehicle accident a few weeks earlier. He opined that appellant had reached maximum medical improvement for the 1997 injuries, which temporarily aggravated her back, shoulder and cervical conditions. Dr. Kermond noted that appellant's treatment from Dr. Szabo had not entirely relieved her symptoms. He added that appellant's degenerative disc disease was contributing to her symptoms and the diagnosis of fibromyalgia was still in doubt. Dr. Kermond recommended that appellant see a rheumatologist.

Dr. Kermond found that appellant was capable of returning to light work on a four-hour-a-day schedule, with no lifting more than 10 pounds. He stated that she would not ever be able to resume her previous occupation. The limitation was based on her underlying degenerative condition and possible fibromyalgia, which he could not relate to the September 1997 incident.

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.[5] 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.[6]

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[4] *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

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

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

In this case, the Board finds that the report of the referee medical specialist is entitled to such weight.[7] Dr. Kermond reviewed the entire case record and voluminous chart notes and reports on appellant's medical treatment over several years. He examined appellant thoroughly and opined that his clinical findings were not much different than those recorded by Dr. Franchi in an earlier examination. Dr. Kermond discussed the diagnostic testing and explained that the temporary aggravation of appellant's shoulder and back conditions, caused by the September 1997 incident at work, had ceased, leaving her at a preinjury baseline and capable of resuming her part-time limited duty. He noted that her current complaints resulted from her 1993 injury, that she had reached maximum medical improvement and that she would most likely never be able to perform the duties of her pre 1993 injury. Thus, Dr. Kermond provided an opinion that was sufficiently well rationalized to resolve the issue of whether appellant had any residuals of her 1997 work injury.

The subsequent medical evidence submitted on reconsideration does not undermine the probative value of Dr. Kermond's conclusions as impartial medical examiner. Although Dr. Szabo stated that the September 1997 injury "caused further back and neck pain and has resulted in adhesive capsulitis of the shoulders," he provided no rationale for this opinion. Dr. Szabo related only that "there was a precipitous decline" in appellant's ability to function after the 1997 injury, she had been able to work an eight-hour day, then decreased to a four-hour day and then had no ability to work without severe fatigue, myalgias and back, neck and shoulder pain.

Because Dr. Szabo did not include a reasoned explanation regarding the relationship between appellant's current condition and her accepted work injuries right shoulder and lower back strains his report does not rise to the level of rationalized medical opinion evidence.[8] Accordingly, the Office properly denied modification of its March 22, 2001 decision terminating benefits.

Appellant's attorney argues on appeal that the Office did not meet its burden of proof because the opinions of Drs. Franchi and Kermond are speculative, vague and unrationalized, citing *Gary L. Ward*.[9] In that case, the second opinion physician failed to provide rationale for his opinion that the aggravation of appellant's condition was temporary. This case is distinguishable because Dr. Franchi, the second opinion specialist, did provide medical rationale for his opinion. Dr. Franchi's physical examination revealed no residuals of the strains caused by the 1997 incident. Appellant stated that she had previous lower back problems with right-sided radiculopathy and she also reported that the range of motion in her right shoulder had improved to its pre 1977 level after a nonwork-related surgery in April 1998.

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[7] *See Susan L. Dunnigan*, 49 ECAB 267, 270 (1998) (medical evidence established that appellant was capable of performing the duties of the position offered by the employing establishment).

[8] *Vicky L. Hannis*, 48 ECAB 538, 540 (1997) (medical report that fails to provide a clear opinion that appellant's diagnosed condition was due to employment factors is insufficiently rationalized to establish causal relationship); *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

[9] 44 ECAB 1014, 1023 (1993).

Based on this history, Dr. Franchi concluded that appellant's current reduced range of motion was due to preexisting degenerative disc disease as seen on her x-rays. Dr. Franchi found appellant capable of working four hours a day, Dr. Szabo found her totally disabled. Thus, a conflict in the medical opinion evidence was created and the Office properly referred appellant to Dr. Kermond to resolve it. As discussed above, Dr. Kermond's opinion was well rationalized and addressed the pertinent issue of whether the 1997 incident resulted in any residuals that would prevent appellant from performing the duties of her part-time position. Therefore, his report remains the weight of the medical opinion evidence.[10]

The March 22, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
May 23, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

[10] The MRIs dated October 19, 2000 and February 14, 2001 do not establish that appellant has residuals of her 1997 injury. The former revealed disc herniation at T5-6 and T6-7 and the latter showed a partial rotator cuff tear, but both these conditions preceded the 1997 work injuries and were not accepted by the Office as work related due to that incident.