

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARJORIE F. SCHIAVONE and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Montrose, NY

*Docket No. 02-1527; Submitted on the Record;  
Issued October 9, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, ALEC J. KOROMILAS,  
MICHAEL E. GROOM

The issue is whether appellant had any disability for work or injury-related residuals that required further medical treatment after September 12, 1999, causally related to her August 15, 1975 low back strain injury.

The Office of Workers' Compensation Programs accepted that on August 15, 1975 appellant, then a 22-year-old licensed practical nurse, sustained a low back strain as she was lifting a patient. She stopped work following the incident and did not return; appellant received appropriate compensation benefits.

Appellant was treated conservatively for her low back pain by her physician, Dr. Jerome J. Moga, a Board-certified orthopedist, until she moved to Florida in 1996. He opined that she remained totally disabled as a result of her 1975 injury. Appellant did not seek further medical treatment after the move until requested by letter dated February 18, 1999, to obtain an updated medical evaluation. At that time she was seen by Dr. Michael K. Riley, an orthopedic surgeon, who diagnosed chronic lumbar back pain with some posterior iliac crest tendinitis. On an Office Form OWCP-5, Dr. Riley stated that there was no reason that she would be unable to perform the duties necessary to work eight hours a day.

By report dated August 9, 1999, Dr. Doyle C. Phillips, a Board-certified family practitioner, noted that appellant suffered from chronic back pain which restricted her activity and that due to this condition she was not able to obtain gainful employment. He opined that appellant's condition was likely to be permanent with little or no hope of improvement.

By report dated November 18, 1999, Dr. Christopher M. Leber, a Board-certified physiatrist, noted appellant's difficulty with her gait, diagnosed chronic low back pain related to the 1975 work injury and opined that appellant could not return to work and should be considered permanently and totally disabled.

Appellant was referred for a second opinion examination with Dr. Donald E. Pearson, a Board-certified orthopedist. By report dated June 7, 1999, he indicated that her complaints of pain were not of a strain but were complaints of chronic pain and that there was no objective evidence from an orthopedic standpoint to support that she continued to have residuals of her 1975 low back strain, since her examination was nearly normal and x-rays showed no abnormalities. A letter of clarification was provided by Dr. Pearson on July 19, 1999, which indicated that there was no objective evidence of a work-related injury and that her complaints of pain were subjective and related to chronic pain. He further stated that there were no objective medical findings to indicate that she would be unable to perform activities necessary to work eight hours a day. Although, Dr. Pearson stated that he felt appellant was unable to perform her date-of-injury position, he noted that this was due to the amount of time she had been off work and not due to the work injury itself.

On July 28, 1999 the Office provided appellant a notice of proposed termination of compensation on the grounds that the current medical evidence of record established that she was no longer disabled due to her August 15, 1975 low back strain injury and required no further medical treatment for residuals of such injury. The Office indicated that there was no current medical opinion evidence in the record which disagreed with the findings and conclusions of Drs. Riley and Pearson and it gave appellant 30 days within which to provide further evidence supporting continuing disability if she disagreed with the proposed action. No new medical evidence was forthcoming.

By decision dated September 2, 1999, the Office finalized the termination of appellant's compensation benefits effective September 12, 1999 finding that the current medical evidence of record established that she was no longer disabled due to her August 15, 1975 low back strain injury and required no further medical treatment for residuals of such injury.

Appellant disagreed with this decision and requested an oral argument before an Office hearing representative. She also submitted further medical evidence from Dr. Leber.

An oral hearing was held on March 1, 2000 at which, appellant testified. She claimed that she could not walk because she was in too much pain and could not stand or sit too long.

By decision dated May 22, 2000, the hearing representative affirmed the September 2, 1999 decision terminating appellant's compensation, but she remanded the case for further development to resolve the new conflict in medical evidence that had been created by the submission of additional medical reports from Dr. Leber.

On remand on July 7, 2000 the Office referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Walter I. Choung, a Board-certified orthopedist, for an impartial medical examination to resolve the conflict in medical evidence between the newly submitted reports from Dr. Leber and the report of the second opinion specialist, Dr. Pearson.

By report dated September 19, 2000, Dr. Choung reviewed appellant factual and medical history, noted her current complaints, explained the results of his physical examination, finding no rigidity or focal neurological deficit in either lower extremity and opined that the work-related

low back strain had resolved.<sup>1</sup> Dr. Choung indicated that appellant had sustained a relatively mild lumbar spine injury, which had not responded as expected and he opined that her current symptoms arose from deconditioning which had occurred over many years. Dr. Choung opined that appellant was not capable of returning to work but noted that this was because of her extreme deconditioning and he recommended work hardening, physical therapy and vocational rehabilitation for her, with the goal of returning her to light duty.

By decision dated May 2, 2001, the Office found the weight of the medical opinion evidence was represented by the well-rationalized report from Dr. Choung, the impartial medical examiner. The Office found that the report from him resolved the conflict in medical opinion and established that appellant no longer suffered from disability due to or residuals of her 1975 low back strain.

On May 8, 2001 appellant requested another hearing.

A hearing was held on December 5, 2001 at which appellant testified. She claimed that she had serious physical limitations and opined that her benefits should be continued. Appellant further submitted reports from Dr. Leber, which were repetitive of his previously submitted reports<sup>2</sup> and duplicates of previously submitted medical reports from her treating physicians and Drs. Pearson and Choung.

By decision dated February 20, 2002, the Office hearing representative affirmed the May 2, 2001 decision.

The Board finds that appellant had no disability for work or injury residuals that required further medical treatment after September 12, 1999, causally related to her August 15, 1975 low back strain injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.<sup>3</sup> 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.<sup>4</sup> Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.<sup>5</sup> To terminate authorization for medical

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<sup>1</sup> Dr. Choung did find tenderness to palpation over the paraspinal musculature, worse on the right, very limited range of motion and a mild narrowing of the disc spaces at L4-5 and L5-S1.

<sup>2</sup> Dr. Leber noted that appellant had an antalgic gait, diagnosed chronic low back pain related to the 1975 lumbar strain employment injury and opined that she was permanently and totally disabled.

<sup>3</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>4</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>5</sup> *Marlene G. Owens*, 39 ECAB 1320 (1988).

treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.<sup>6</sup>

The Office met its burden of proof to terminate appellant's compensation for wage loss and medical benefits through the complete and well-rationalized medical opinion from Dr. Choung.

In this case, appellant's treating physicians, Drs. Moga, Riley, Phillips and Leber all indicated that she remained totally disabled due to her 1975 employment low back muscle strain injury and in need of further medical treatment.

The Office second opinion specialist, however, found that appellant's complaints were not of continued low back strain but rather were complaints of chronic pain without orthopedic pathology involved. Upon clarification, Dr. Pearson explained that appellant's work-related injury had resolved without residuals and that, with respect to her accepted low back muscle strain injury, there was no reason why she could not work eight hours a day. He related her inability to perform her date-of-injury job to deconditioning, which had not been accepted as being employment-injury related.

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 Board has frequently explained that where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>7</sup>

In this case, Dr. Choung provided a thorough and well-rationalized report, based upon a proper factual and medical background, which established that appellant was no longer disabled due to her accepted low back muscular strain injury and had no injury-related residuals which required further medical treatment. He found her physical presentation to be totally due to deconditioning over 24 years, unrelated to the 1975 accepted muscular low back strain injury. As this report is well rationalized and based upon a proper factual and medical background, it is entitled to special weight.

The duplicate reports submitted were previously considered and, therefore, did not constitute new medical evidence and the new reports from Dr. Leber submitted by appellant were merely repetitive of earlier reports and, therefore, were of insufficient probative value to overcome or to create a conflict with the well-rationalized report from Dr. Choung.<sup>8</sup>

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<sup>6</sup> See *Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

<sup>7</sup> *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

<sup>8</sup> Additional reports from Dr. Leber, who was on one side of the conflict that was resolved by Dr. Choung, which stated the same as his earlier reports, are insufficient to overcome the special weight accorded Dr. Choung's report or to even create a new conflict with it. See *Thomas Bauer*, 46 ECAB 257 (1994).

As no further rationalized medical evidence has been submitted, the impartial medical examination report from Dr. Choung remains the weight of the medical evidence of record and establishes that appellant had no disability for work or injury residuals that required further medical treatment after September 12, 1999 causally related to her August 15, 1975 low back strain injury.

The decision of the Office of Workers' Compensation Programs dated February 20, 2002 is hereby affirmed.

Dated, Washington, DC  
October 9, 2002

Michael J. Walsh  
Chairman

Alec J. Koromilas  
Member

Michael E. Groom  
Alternate Member