

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARGARET P. MEYER and PEACE CORPS,
Brazil

*Docket No. 03-131; Submitted on the Record;
Issued April 8, 2003*

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 to terminate appellant's compensation benefits effective December 27, 1999.

Appellant, a Peace-Corps volunteer born January 7, 1949, slipped and fell while walking in a town in Brazil and suffered a lumbar injury in September 1973 and an aggravation of the injury on February 23, 1974. The Office accepted the following conditions as compensable: "lumbosacral strain, chronic low back strain, possible old compression fracture L2-3 with narrowed disc space L2-3, vaginitis, trichomoniasis ... cervical erosions, vernical vulgaris [right] 1st finger, gastrointestinal disorder, type undetermined, possible fungus infection [right] [a]rm [and] resolving respiratory infection." In August 1978 the Office subsequently accepted depression as related to the work injury. Appellant quit her position with the Peace Corps effective March 6, 1974 and later participated in the Office sponsored vocational rehabilitation program and began work as an occupational therapist.¹ Appellant received ongoing medical treatment and appropriate compensation for her accepted conditions.

The record reflects that the Office referred appellant to a variety of specialists in 1999 to determine whether she had any continuing residuals of the accepted work-related conditions and whether they were disabling.

Dr. Michael Friedman, an osteopath, in psychiatry performed a psychiatric evaluation on appellant on September 2, 1999 for symptoms of anxiety, depression and low back pain. In his September 2, 1999 report, Dr. Friedman diagnosed pain disorder with psychological factors, dysthymia, mixed personality disorder, history of fall of 1973 and psychosocial and environmental stressors of being a single parent and experiencing chronic back pain. He concluded that he did not believe appellant currently had a psychological disorder or depression

¹ The Board notes that appellant suffered a back injury on April 19, 1986 while lifting a patient while working as an occupational therapist unrelated to her claim.

as a result of the work factors noted in the statement of accepted facts, noting that the psychological disorder diagnosed in his report was unrelated to the work injury. Dr. Friedman indicated that appellant had returned to work, running her own business on a part-time basis and opined that from a psychiatric standpoint, there was no reason why appellant should not be able to maintain that position and improve in the future. The physician did not recommend any psychiatric treatment for depression at that time.

Dr. Reynold Karr, a Board-certified rheumatologist, examined appellant on September 3, 1999 following a review of the facts of her case and medical record. In his September 3, 1999 report, Dr. Karr determined that appellant's accepted conditions of vaginitis, trichomoniasis, cervical erosions, fungus infection of the right arm, resolving respiratory tract infection and verruca vulgaris of the right first digit had all resolved without residual effects or recurrence.

Dr. Edward Hoffman, a Board-certified neurologist, evaluated appellant for her low back condition in an independent medical examination on September 2, 1999. Dr. Hoffman noted the history of injury, according to the statement of accepted facts dated July 12, 1999, reviewed her current symptoms including chronic low back pain with flare-ups, the extensive medical record and physical examination findings. In the impartial medical examiner's (IME) report, he indicated that appellant's imaging studies and x-ray evaluations revealed marked narrowing of the L2-3 disc interspace and marked degeneration. Dr. Hoffman diagnosed a low back injury in 1973 with most likely resultant collapse of the L2-3 disc interspace and subsequent osteophyte proliferation at that level. He further diagnosed subsequent mild lumbar radiculopathy on the right side, most likely related to the residual status of the injury, persisting pain and pain conviction. He noted that there was no evidence of significant lumbar radiculopathy seen during his examination of appellant.

Dr. Hoffman concluded that there were no objective findings of the accepted conditions of low back strain, with possible compression fracture L2-3 and narrowed disc space L2-3 related to the 1973 work incident that would substantiate appellant's subjective complaints on examination. He further reiterated that there was no evidence of any significant radiculopathy. He then opined that appellant's current pain complaints were not consistent with the residual status from the injury that occurred in 1973 with reagravation in 1974. He indicated that although she might have some persisting low back pain related to the 1973 injury with reagravation in 1974 and 1986, her symptoms could not be explained specifically on the basis of changes at L2-3. Dr. Hoffman stated that there were no significant changes on radiologic studies that would explain appellant's symptoms referable to her right lower extremity. He opined that the degenerative changes in the L2-3 disc space could be the source of some of appellant's current symptoms resulting from the work accident since she had no prior low back injury. However, he opined that the changes would not be the source of all of her current symptoms and that it would not explain the complaints distally in either lower extremity, particularly on the right side.

Dr. Hoffman opined that appellant was not currently disabled in view of the fact that she had been working on a regular basis, 25 to 30 hours a week. He stated that there were no objective findings on examination that would indicate that appellant could not work a 40-hour week; however, he indicated that appellant should have work restrictions of lifting or carrying no more than 30 pounds occasionally or 25 pounds frequently. Dr. Hoffman reported that appellant

should avoid any twisting or jar effect and should be able to change positions as needed from sitting to standing or vice versa.

Regarding treatment, Dr. Hoffman indicated that he did not believe any further curative treatment measures were indicated regarding the residual status from the work injury or subsequent aggravation.

In an addendum report dated October 22, 1999, Dr. Hoffman indicated that the work restrictions he recommended would be specifically for prevention of reinjury of appellant's low back and not related to any residual of the specific changes at L2-3. He further indicated that he did not believe the occupational massage therapy over a period of years would be appropriate or necessary treatment for her work-related condition, particularly in view of the fact that this would not be curative.

On November 19, 1999 the Office issued a notice of proposed termination finding that the weight of the medical evidence established that appellant no longer had any work-related disability of the 1973 and 1974 injury and aggravation and that continuing occupational massage therapy should be denied.

In a letter dated December 16, 1999, appellant's attorney at that time argued that termination was improper arguing that appellant's condition was not fixed or stable and she continued to suffer work-related partial disability.

Appellant's counsel submitted a letter from Dr. Philip Mease, a Board-certified internist, dated December 14, 1999, in which Dr. Mease stated that he reviewed the IME report by Dr. Hoffman and disagreed that appellant's condition was fixed and stable. He opined that appellant continued to be partially disabled and that she had significant ongoing lumbar pain with neuritic symptoms in her lower extremities, which limited the amount of work she could perform and her lifting ability. He further stated: "It is my opinion that her disability relates to her original work-related injury to the lumbar spine. It is my opinion that she should continue with the work restrictions that have been established and that she will need ongoing treatment, both medicinally and with physical therapy type approaches."

Appellant's counsel also submitted a letter from Dr. Christopher Lawrence, a Board-certified neurologist, dated December 13, 1999, in which Dr. Lawrence also indicated that he reviewed Dr. Hoffman's IME report. He stated that appellant has had ongoing low back pain of both the discogenic and myofascial type of intermittent nerve root compression since 1990 when he began treating appellant. Dr. Lawrence acknowledged that although the occupational therapy, chiropractic and osteopathic treatment received was not curative, he opined it allowed her to maintain at a functional level of working 25 to 30 hours per week. The physician related appellant's belief that when she works 40 hours a week she gets a marked increase in pain complaints and her overall level of physical functioning decreases.

Appellant's counsel further submitted a letter from Dr. Charles Schuetz, an osteopath, dated December 15, 1999, in which Dr. Schuetz indicated that he reviewed the September 1999 IME report from Dr. Hoffman and disagreed with the finding that appellant was not disabled. Dr. Schuetz stated in his report that appellant continued to seek treatment to enable her to

perform her activities of daily life and occupation. He indicated that appellant would not continue on a persistent basis if her condition was stable and fixed and particularly, the documented changes at L2-3 continued to be a permanent disabling injury that required treatment.

By decision dated December 28, 1999, the Office terminated compensation benefits effective December 27, 1999.

In a letter dated January 25, 2000, appellant through counsel requested an oral hearing, which was held June 29, 2000. By decision dated October 17, 2000, an Office hearing representative affirmed the prior decision, finding that the evidence failed to establish that appellant suffered from any work-related disability.

Appellant through new counsel requested reconsideration and submitted a detailed memorandum in support of the request. In the memorandum, appellant's counsel argued that appellant was denied her right to effective assistance of counsel at the oral hearing. Appellant's counsel also argued that the Office decision terminating compensation failed to discuss the accepted condition of depression, thus, it remained a compensable condition. Appellant's counsel further argued that the hearing decision ignored uncontroverted medical evidence of a 26-year compression at L2-3 that was accepted as related to the 1974 claim and found in error that there was no objective evidence to support appellant's complaints of lower back pain. Appellant's counsel also argued that the Office failed to obtain an independent medical examination as required when a conflict arose in the medical evidence, as Dr. Hoffman's opinion was suspect and not well reasoned. Appellant's counsel further argued that the statement of accepted facts was flawed in that it did not mention the accepted back condition of L2-3 narrowing of the disc, that it did not contain the job description of the date-of-injury position, or discuss which factors of employment were essential to appellant's date-of-injury position. Appellant's counsel then argued that the Office posed the wrong question to Dr. Hoffman, appellant's physician, specifically whether appellant was disabled from all work due to the accepted work-related condition instead of questioning appellant's ability to perform the date-of-injury job. Appellant's counsel argued that appellant must only demonstrate that the residuals of the work-related injury are permanent and that she cannot earn wages from her date-of-injury position. Appellant's counsel further argued that other questions posed to Dr. Hoffman were improperly phrased, which led him to a speculative conclusion that appellant was not disabled because she was capable of working 25 to 30 hours per week. Further, appellant's counsel argued that in a clarifying note to Dr. Hoffman, the Office posed leading questions and that as a result the physician's answers were not objective and well rationalized as required by a second opinion examiner. Finally, appellant's counsel argued that the Office incorrectly presumed without supportive evidence that appellant's restrictions to prevent reinjury imposed by Dr. Hoffman were due to appellant's fear of reinjury, therefore, the conclusory denial of the claim due to such fear was unsupported.

Appellant's counsel submitted additional evidence, some of which had been previously submitted and new evidence, which he argued supported appellant's disability. The evidence submitted included a letter from Dr. Mease dated February 23, 2001, which summarized the diagnostic tests performed on appellant including the magnetic resonance imaging scan of the spine performed February 7, 2001 revealing the L2-3 compression, which Dr. Mease argued

caused appellant's current disabling back and leg pain. Appellant's counsel also submitted a report from Dr. Lawrence dated September 12, 2001 which, counsel argued, reiterated his conclusion that the original injury caused appellant's current inability to work full time.

By merit decision dated November 7, 2001, the Office denied modification of the prior decision in part finding that the evidence submitted on reconsideration was insufficient to warrant modification of the December 28, 1999 decision, on the issue of whether appellant continued to suffer from any work-related disability. However, the Office modified the December 28, 1999 termination decision, with respect to medical benefits. The Office found that appellant's medical benefits were terminated in error as the only issue in the case at that time concerned work-related disability and not residuals of the employment injury. The Office, therefore, reinstated appellant's medical benefits for necessary and reasonable treatment of residuals of the work-related injury.

The Board finds that the Office properly terminated appellant's compensation benefits on the grounds that she no longer suffered any work-related disability.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.² Furthermore, in situations where there are 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 a specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.³

Subsequent to the Office's December 28, 1999 termination decision, the burden of proof in this case shifted to appellant, who thereafter submitted both argument and medical evidence before the Office hearing representative and in her September 26, 2001 reconsideration request. The Board notes that the issue is whether appellant continues to suffer any injury-related disability. Accordingly, appellant's arguments are of no probative value as they fail to offer any new medical evidence or opinion on the issue of disability. Of the medical evidence submitted, the Board finds that it is not sufficient to outweigh or create a conflict with any of the Office referral physicians in this case.

The medical reports submitted by Drs. Schuetz, Lawrence and Mease on reconsideration discuss mostly appellant's subjective complaints of back pain, her diagnosed L2-3 degenerative disc changes and their opinions that appellant's condition requires ongoing treatment. Notwithstanding the residuals of the work injury, which the Office has accepted as ongoing, each physician acknowledged appellant's ability to work in a restricted capacity. These reports do not sufficiently establish with objective medical evidence that appellant has any work-related disability. The weight of the medical evidence is represented by the thorough, well-rationalized opinions of Dr. Michael Friedman, an osteopath, who is Board-certified in psychiatry,

² See *Patricia A. Keller*, 45 ECAB 278 (1993).

³ See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

Dr. Hoffman, a Board-certified neurologist and Dr. Karr, a Board-certified rheumatologist, who all opined in their respective specialty areas that appellant had no continuing disability as a result of the accepted work-related injuries sustained in 1973 and 1974.

In well-rationalized reports, each of the Office physicians determined within their respective area of expertise that appellant had no disability causally related to employment factors. Dr. Friedman thoroughly discussed that appellant did not have any depressive or psychological condition related to her accepted employment injury and Dr. Karr discussed that each of the conditions for which he was requested to evaluate had long resolved and that appellant only had persistent symptoms of low back pain. Dr. Hoffman in his IME reports dated September 2 and October 22, 1999, reported that appellant had residuals from the 1973 low back injury, however, that her residuals were not disabling. Although Dr. Hoffman stated that appellant had limitations due to her accepted condition of compression fracture L2-3 with narrowed disc space L2-3, he explained that such restrictions were given to prevent reinjury and were not due to any residuals of specific changes at L2-3. He outlined specified work restrictions based on the fact that she was already working 25 hours a week and indicated that there was nothing to prevent her from working 40 hours a week.

Inasmuch as the medical evidence submitted by appellant on reconsideration is not sufficient to create a conflict or overcome the evidence relied upon by the Office in its termination decision of December 28, 1999, the Office properly denied modification of its decision to terminate appellant's compensation.

The November 7, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
April 8, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member