

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of YOLANDA I. WHITE and U.S. POSTAL SERVICE,
POST OFFICE, Floral Park, NY

Docket No. 02-394; Submitted on the Record;
Issued January 27, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation; (2) whether appellant met her burden of proof in establishing that she had any work-related disability or medical condition after April 20, 2000; (3) whether the Office properly denied appellant's request for a subpoena; and (4) whether the Office properly denied appellant's request for reconsideration.

On January 23, 1997 appellant, then a 27-year-old letter carrier, filed a claim for a back injury on that date when she had difficulty opening the back of her truck. The Office accepted her claim for a lumbosacral sprain and left shoulder sprain.

In notes dated April 2, 1998, Dr. Dannielle R. Opam, a Board-certified physiatrist, indicated that appellant's January 23, 1997 employment injury was permanent in nature and she was restricted to limited-duty work with no heavy lifting, no walking, and no excessive sitting or walking.

In a report dated May 9, 1998, Dr. Hershel Samuels, an orthopedic surgeon, stated that appellant had persistent lumbosacral and shoulder symptomatology secondary to her January 23, 1997 employment injury but her symptoms should improve with conservative treatment.

In reports dated May 15, June 2 and June 29, 1998, Dr. Opam diagnosed lumbar myofascitis and strain, lumbosacral radiculopathy, a herniated disc at L4-5, a bulging disc at L5-S1, lumbar disc syndrome, lower back derangement and right shoulder myofascitis. She indicated that appellant was restricted to limited duty due to pain.

In a report dated August 14, 1998, Dr. Norman M. Heyman, a Board-certified orthopedic surgeon and Office referral physician, provided a history of appellant's condition and findings on examination. He stated that appellant's left shoulder and lumbosacral conditions had resolved and she could perform full work duties.

Due to the conflict in the medical opinion evidence between Dr. Heyman, the Office referral physician, and Dr. Opam and Dr. Samuels, appellant's attending physicians, the Office referred appellant, together with the case file and statement of accepted facts, to Dr. Paul J. Miller, a Board-certified orthopedic surgeon, for an examination and evaluation of whether she had any continuing work-related medical condition or disability.

In a report dated May 11, 1999, Dr. Miller provided a history of appellant's condition, findings on examination and a review of the medical evidence. He stated:

“EXAMINATION: LEFT SHOULDER: There is sensitivity over the medial aspect of the left scapula. There is full range of neck motion. There is no tilt or spasm. There is full range of shoulder motion. Internal rotation causes pain in the left scapula region. Resistance against abduction and flex cause pain in the left scapula region. Grip, sensation, and reflexes are intact.

“EXAMINATION: LUMBOSACRAL SPINE: There is tenderness over the lumbosacral spine. There is no tilt or spasm. There is no tenderness or atrophy of the buttocks. Flexion is to 90 [degrees] with pain. Extension is painful. Inclinations and rotations are intact. She is able to balance on her toes and heels. Straight leg raising is to 90 [degrees]. Single hip flexion and Patrick's test are painful on the right. Pelvic roll causes pain in the lower back. Double hip flexion and double leg lowering cause discomfort in the lower back. Motor power, sensation, and reflexes are intact. Soto hall test is negative.

“CONCLUSION: [Appellant] has residual complaints involving the left shoulder and lumbosacral spine. These complaints are related to the accident of [January 23, 1997]. There are no specific orthopedic findings.

“I accept the fact that [appellant] had a work-related injury to the left shoulder and lumbosacral spine. At this time she only has symptomatic complaints. Her original condition has resolved and I do not feel that further medical care is necessary as she has reached maximum improvement from her treatment.

“The only problem at the present time is subjective complaints which are causally related to the accident of [January 23, 1997]. However, there is no associated disability.

“[Appellant] has recovered from the effects of the injury as noted by the fact that there are no clinical or objective findings related to her left shoulder or lumbosacral spine. I am unable to explain why she continues to have subjective complaints.

“There are no residual findings, clinically. Therefore there are no residuals that can be considered permanent.

“I believe that [appellant] would benefit from a work condition program. She has been on limited duty for two years and I believe she is able to go back to her previous work status as before the accident.

“No further orthopedic treatment is needed at this time.”

In a report dated March 14, 2000, Dr. Opam provided findings on examination and stated that appellant continued to have pain in her back and shoulders.

By letter dated February 29, 2000, the Office advised appellant that it proposed to terminate her compensation and medical benefits on the grounds that the weight of the medical evidence, as represented by the report of Dr. Miller, established that she had no disability or medical condition causally related to her January 23, 1997 employment injury.

By decision dated April 20, 2000, the Office terminated appellant’s medical and compensation benefits effective that date.

By letter received by the Office on May 16, 2000, appellant requested a hearing that was held on September 20, 2000.

In a report dated February 28, 2000, Dr. Opam indicated that appellant was still partially disabled.

In a report dated April 28, 2000, Dr. Samuels stated:

“It is my opinion, based on multiple examinations of [appellant], along with evaluation of her radiologic findings, that her present symptoms are the direct result and consequence of the injury which took place on January 23, 1997. In that period of time, she has made little or no progress, symptomatically. She has at this time, a chronic low back, and to a lesser degree, shoulder derangement which, given the length of time which has transpired since injury, cannot be expected to improve appreciably in the future.

“[Appellant] is on a restricted work schedule at this time, and furthermore, it is extremely unreasonable to expect, in the future, that she will be able to resume full work activities.”

In a report dated May 19, 2000, Dr. Jeffrey D. Klein provided findings on examination and noted that a magnetic resonance imaging (MRI) scan dated 1997 revealed a mild disc bulge at L4-5. He diagnosed lumbar degenerative disc disease with a disc bulge at L4-5 and noted that a new MRI was needed.

By letter dated July 28, 2000, appellant requested that the Office’s Branch of Hearings and Review issue a subpoena to compel Dr. Klein to testify because he had fully reviewed her case and performed a new MRI.

By letter dated August 3, 2000, the Office’s hearing representative denied appellant’s request for a subpoena for Dr. Klein on the grounds that her request was not made within 60 days of her initial hearing request and that she had not explained why a subpoena was the only means by which documents or testimony from Dr. Klein could be obtained.

By decision dated December 12, 2000 and finalized January 2, 2001, the Office hearing representative affirmed the Office's April 20, 2000 decision.

By letter dated May 30, 2001, appellant requested reconsideration and submitted additional evidence.

In a disability certificate dated November 30, 2000, a physician indicated that appellant was totally disabled due to a fracture of the hands.

In a report dated February 2, 2001, Dr. Samuels diagnosed a central disc protrusion at L4-5 and L5-S1 and indicated that appellant was partially disabled.

In a disability certificate dated May 24, 2001, a physician indicated that appellant was disabled due to cervical radiculopathy.

By decision dated August 24, 2001, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant further merit review of the case.

The Board finds that the Office met its burden of proof in terminating appellant's medical and compensation benefits.

It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it is no longer related to the employment.¹ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further treatment.²

Dr. Opam, appellant's Board-certified physiatrist, indicated that her January 23, 1997 employment injury was permanent in nature and that she was restricted to limited-duty work with no heavy lifting, no walking, and no excessive sitting or walking. Dr. Samuels, an orthopedic surgeon, stated that appellant had persistent lumbosacral and shoulder symptomatology secondary to her January 23, 1997 employment injury but her symptoms should improve with conservative treatment.

Dr. Heyman, a Board-certified orthopedic surgeon and an Office referral physician, provided a history of appellant's condition and findings on examination. He stated that appellant's left shoulder and lumbosacral conditions had resolved and that she could perform full work duties.

Section 8123(a) of the Federal Employees' Compensation Act provides, in pertinent part, "If there is disagreement between the physician making the examination for the United States

¹ See *Alfonso G. Montoya*, 44 ECAB 193, 198 (1992); *Gail D. Painton*, 41 ECAB 492, 498 (1990).

² See *Furman G. Peake*, 41 ECAB 361, 364 (1990).

and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”³ Due to the conflict in the medical opinion evidence between Drs. Opam and Samuels and Dr. Heyman, the Office properly referred appellant to an impartial medical specialist for resolution of the conflict.

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁴

Dr. Miller provided a history of appellant’s condition, findings on examination, and a review of the medical evidence. Dr. Miller was provided with the complete case file and statement of accepted facts. His May 11, 1999 report was based on a complete and accurate history and was supported by detailed medical rationale and findings. Therefore, Dr. Miller’s opinion is entitled to special weight and the Office properly terminated appellant’s compensation based on Dr. Miller’s opinion that appellant had no residual disability or medical condition causally related to her January 23, 1997 employment injury.

In a report dated March 8, 2000, Dr. Samuels stated that appellant had pain in her lower back and left shoulder. In a report dated March 14, 2000, Dr. Opam provided findings on examination and stated that appellant continued to have pain in her back and shoulders. However, Dr. Samuels and Dr. Opam provided no objective evidence of disability and insufficient medical rationale explaining how appellant’s continuing subjective complaints of pain were causally related to her January 23, 1997 employment injury. Therefore, these reports are insufficient to outweigh the report of Dr. Miller.

The Board further finds that appellant failed to meet her burden of proof to establish that she had any work-related disability or medical condition after April 20, 2000, the date the Office terminated her medical and compensation benefits.

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had a employment-related disability that continued after termination of compensation benefits.⁵

After the Office’s April 20, 2000 decision terminating appellant’s compensation, she submitted additional medical evidence that she felt showed that she was entitled to compensation after April 20, 2000 due to residuals of her January 23, 1997 employment injury. The Board has reviewed the additional evidence submitted by appellant and finds that it is not of sufficient probative value to establish that appellant had residuals of her January 23, 1997 employment injury after April 20, 2000.

³ 5 U.S.C. § 8123(a); *see James P. Roberts*, 31 ECAB 1010 (1980).

⁴ *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

⁵ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

Dr. Opam indicated that appellant was still partially disabled and that she would not be able to resume full work activities.

However, as Drs. Opam and Samuels were on one side of the conflict of medical opinion that was referred to Dr. Miller as the impartial medical specialist, their subsequent reports are insufficient to outweigh or create a new conflict with Dr. Miller's opinion.⁶

In a report dated May 19, 2000, Dr. Klein provided findings on examination and noted that an MRI scan dated 1997 revealed a mild disc bulge at L4-5. He diagnosed lumbar degenerative disc disease with a disc bulge at L4-5 and noted that a new MRI was needed. However, Dr. Klein did not explain how appellant's degenerative disc disease was causally related to her January 23, 1997 employment injury. Therefore, this report is insufficient to establish that appellant had any disability or medical condition after April 20, 2000, the date the Office terminated her compensation benefits.

The Board further finds that the Office properly denied appellant's request for reconsideration.

The Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office.⁷ When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.⁸

In a disability certificate dated November 30, 2000, a physician indicated that appellant was totally disabled due to a fracture of the hands. However, this evidence does not constitute relevant and pertinent evidence not previously considered by the Office as appellant's January 23, 1997 employment injury did not include an injury to her hands.

In a report dated February 2, 2001, Dr. Samuels diagnosed a central disc protrusion at L4-5 and L5-S1 and indicated that she was partially disabled. In a disability certificate dated May 24, 2001, a physician indicated that appellant was disabled due to cervical radiculopathy. However, this evidence contains no medical rationale regarding causal relationship. Therefore, it does not constitute relevant and pertinent evidence not previously considered by the Office.

Appellant also submitted evidence previously of record. As the Office previously considered this evidence, it does not constitute relevant and pertinent evidence not previously considered by the Office.

As appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office, or

⁶ See *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

⁷ 20 C.F.R. § 10.606(b)(2).

⁸ 20 C.F.R. § 10.608(b).

submit relevant and pertinent evidence not previously considered by the Office, the Office properly denied her request for reconsideration.

Regarding the Office hearing representative's denial of appellant's request for subpoenas, section 8126 of the Act provides that the Secretary of Labor, on any matter within her jurisdiction, may issue subpoenas for and compel the attendance of witnesses within a radius of 100 miles. This provision gives the Office discretion to grant or reject requests for subpoenas. Office regulations state that subpoenas for documents will be issued only where the documents are relevant and cannot be obtained by any other means. Subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.⁹

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena "is the best method or opportunity to obtain such evidence because there is no other means by which the testimony could have been obtained."¹⁰ The Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.¹¹

By letter dated July 28, 2000, appellant requested that the Office's Branch of Hearings and Review issue a subpoena to compel Dr. Klein to testify because he had fully reviewed her case and performed a new MRI. However, appellant did not submit the request for a subpoena within 60 days of her request for a hearing and she did not show why information from this individual could not be obtained other than through the subpoena process. Therefore, the Board finds that the Office hearing representative acted within his discretion in not issuing subpoenas as requested by appellant.

⁹ 20 C.F.R. § 10.619.

¹⁰ *Id.*

¹¹ *See Dorothy Bernard*, 37 ECAB 124, 128 (1985).

The decisions of the Office of Workers' Compensation Programs dated August 24, 2001 and December 12, 2000 are affirmed.

Dated, Washington, DC
January 27, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member