U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of KATHY J. LEAVITT and U.S. POSTAL SERVICE, POST OFFICE, Fontana, CA

Docket No. 02-709; Submitted on the Record; Issued June 11, 2003

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation and medical benefits effective July 12, 2000 on the basis that she no longer suffered from any condition causally related to her September 19, 1994 employment injury; and (2) whether appellant established that she was totally disabled during the period June 30, 1997 through July 12, 2000.

On September 19, 1994 appellant, then a 42-year-old mail carrier, sustained a traumatic injury to her lower back while in the performance of duty. The Office accepted appellant's claim for lumbar strain, L3-4 disc herniation and L5 radiculopathy.

Appellant worked in a part-time, limited-duty capacity following her injury. In December 1996, appellant began participating in a chronic pain management program, which lasted approximately three months. At the conclusion of the pain management program, appellant's physician released her to return to limited-duty work, three hours per day. The Office subsequently paid appellant wage-loss compensation based on her ability to work only three hours per day. For a brief period in June 1997 appellant worked eight-hour days, but she ceased all work on July 1, 1997 and later filed a claim for recurrence of total disability.

In a decision dated July 9, 1997, the Office terminated appellant's wage-loss compensation and medical benefits. Appellant requested an oral hearing and by decision dated July 31, 1998, the Office hearing representative vacated the July 9, 1997 decision terminating compensation. The hearing representative found that the Office failed to meet its burden to terminate benefits.[1]

[1] The medical evidence relied upon by the Office to terminate compensation indicated that appellant could work an eight-hour day. The Office's referral physician also noted temporary work restrictions due to appellant's employment-related disc protrusion at L3-4. In reversing the Office's July 9, 1997 decision, the hearing representative explained that "one's ability to simply work a (sic) 'eight-hour day' does not equate to the claimant being able to perform the position occupied at time of injury or receive the same wages doing other employment."

By letter dated September 1, 1998, the Office advised appellant that she was entitled to compensation for partial disability based on the hearing representative's July 31, 1998 decision. However, the Office further explained that compensation for total disability could not be paid unless appellant established that she suffered a recurrence of disability.[2] The Office further advised appellant to submit a Form CA-2a and additional factual and medical information.

By decision dated July 12, 2000, the Office again terminated appellant's wage-loss compensation and medical benefits on the basis that she no longer had any condition causally related to her September 19, 1994 employment injury.[3]

Appellant requested an oral hearing, which was held on November 4, 2000. In a decision dated January 30, 2001, the Office hearing representative affirmed the July 12, 2000 decision terminating compensation and medical benefits.

In a letter dated March 13, 2001, appellant noted that the hearing representative neglected to address her argument that beginning June 30, 1997 she should have received eight hours of disability compensation per workday rather than the five hours of compensation awarded.

In a decision dated October 10, 2001, the Office denied appellant's claim for additional disability compensation during the period June 30, 1997 through July 12, 2000.

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation and medical benefits effective July 12, 2000.

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] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[6] To terminate authorization for medical treatment,

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[2] In the Office's July 31, 1998 decision, the hearing representative stated: "Since the [d]istrict Office did not meet its burden of proof to terminate your compensation benefits, you are entitled to have your benefits reinstated at their former rate while the new decision is being made." Additionally, the hearing representative noted parenthetically that "[a]lthough at the time of termination, the claimant was working three hours per day, there is some evidence of record which now may support the claimant's entitlement to eight hours per day." Thus, it is clear from the hearing representative's July 31, 1998 decision that he did not specifically find appellant entitled to compensation for total disability. When the Office resumed payment of wage-loss compensation in September 1998, both the retroactive payment and future payments were calculated based upon appellant's ability to work only three hours per day.

[3] On April 11, 2000 the Office issued a notice of proposed termination of entitlement to compensation and medical benefits.

[4] *Curtis Hall*, 45 ECAB 316 (1994).

[5] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[6] *Furman G. Peake,* 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.,* 32 ECAB 1019 (1981).

the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[7]

In the instant case, the Office relied on the second opinion evaluations of Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon and Office referral physician, and Dr. Jay Jurkowitz, a Board-certified neurologist and Office referral physician, as the basis for terminating appellant's wage-loss compensation and medical benefits. Dr. Jurkowitz, examined appellant on September 29, 1998. In a report dated October 23, 1998, he diagnosed disc protrusion at L3-4 with mild central canal stenosis and L4-5 disc protrusion by magnetic resonance imaging (MRI). Dr. Jurkowitz also diagnosed chronic low back pain with subjective complaints of radicular symptoms, without significant objective neurological findings. He interpreted appellant's recent electromyogram and nerve conduction studies as normal and Dr. Jurkowitz stated that from a neurological standpoint appellant could return to work. However, he noted that he would defer physical limitations from appellant's back problems to the appropriate specialist.

Dr. Dorsey examined appellant on October 6, 1998 and diagnosed mild central spinal stenosis by MRI scan, without evidence of clinical manifestation on examination. Dr. Dorsey stated that "at most … [appellant] would have suffered a lumbosacral strain as a result of the events of September 19, 1994" and that this condition has long since resolved. Additionally, Dr. Dorsey identified physical limitations with respect to climbing, squatting, kneeling, pushing, pulling and lifting. He stated that these limitations were based on appellant's MRI findings. The October 19, 1998 MRI scan Dr. Dorsey relied upon noted, among other things, a three millimeter (mm) broad-based disc protrusion at L3-4 with facet hypertrophic changes and probable congenitally shortened pedicles causing mass effect upon the thecal sac. Additional MRI scan findings at the L3-4 level included mild central canal stenosis (eight mm) and mild bilateral neural foraminal encroachment. The only objective evidence acknowledged by Dr. Dorsey was the MRI scan finding of mild spinal stenosis at L3-4. However, he stated that there is no evidence that appellant's MRI scan findings are in any way related to the events of September 19, 1994. Dr. Dorsey concluded that appellant could be returned to work at eight hours per day and that no further treatment was required.

Dr. Dorsey's opinion is insufficient to satisfy the Office's burden to terminate compensation and medical benefits. His conclusion is premised on the belief that appellant only sustained a soft tissue injury on September 19, 1994. Although he acknowledged at the outset of his report that the Office accepted both lumbosacral strain and disc herniation at L3-4 as employment related, he disregarded the latter employment-related diagnosis and concluded that appellant's lumbosacral strain had long since resolved. The Office does not purport to rescind acceptance of appellant's L3-4 disc herniation nor does the record on appeal support such an action. While Dr. Dorsey stated that there "certainly … [was] no evidence that [appellant's] MRI [scan] findings are in any way related to the events of September 19, 1994," he did not review the October 13, 1994 MRI scan, which is the earliest evidence identifying a disc extrusion at L3-4.

[7] *Calvin S. Mays,* 39 ECAB 993 (1988).

As Dr. Dorsey's October 1998 opinion is not based on a proper factual and medical history, the Office erred in relying on this report as a basis for terminating wage-loss compensation and medical benefits. Accordingly, the Office failed to meet its burden to justify termination of benefits. Therefore, appellant is entitled to a reinstatement of wage-loss compensation at the rate she had been receiving when the Office terminated compensation effective July 12, 2000.

The Board finds that appellant's entitlement to compensation for total disability during the period June 30, 1997 through July 12, 2000 is not in posture for decision.

When the Office reinstated appellant's compensation in September 1998, it did so at the rate she had been receiving prior to its July 1997 termination of benefits. The Office subsequently addressed the question of appellant's entitlement to compensation for total disability in its October 10, 2001 decision, and denied additional disability compensation for the period June 30, 1997 through July 12, 2000. In so doing, the Office relied heavily on Dr. Dorsey's October 1998 decision, which as previously discussed, improperly disregarded appellant's L3-4 disc herniation as employment related. Nonetheless Dr. Dorsey indicated that, even with appellant's MRI scan findings, she was capable of working eight hours per day with certain restrictions. Additionally, Dr. Robert Moore, a Board-certified neurologist and Office referral physician, noted in a March 26, 1997 report that, while appellant was capable of working eight-hour days, she was restricted due to her employment-related disc protrusion at L3-4. However, neither Dr. Dorsey nor Dr. Moore found that appellant was capable of performing her regular duties as a mail carrier with the noted physical restrictions.

In contrast, Dr. Stanley A. Rouhe, a Board-certified neurosurgeon, reported on June 30, 1997 that, because of the pain appellant was experiencing while attempting to work just three hours per day, he recommended that appellant seek retirement because she could not continue working at the present level.

In July 1997, appellant resumed treatment with Dr. Gerald Goodlow, a Board-certified physiatrist. In a report dated March 29, 1998, Dr. Goodlow related appellant's history of treatment dating back to his initial examination of her on October 6, 1994. He noted that when she returned in July 1997 she still had pain in her lower back with difficulty moving her back, a decreased lumbar lordotic curve and a positive straight leg raise. Dr. Goodlow explained that, in addition to the pain in her lower back, appellant also complained of upper back and neck pain, which was thought to be due to fibromyalgia. While he referred appellant to a rheumatologist for treatment of the fibromyalgia, Dr. Goodlow reported that after several weeks of treatment there was no significant improvement. He explained that appellant currently had chronic low back pain with a history of degenerative changes and protruding disc as well as fibromyalgia affecting her upper back and neck. Both conditions reportedly were producing chronic upper and lower back pain. He characterized her prognosis as poor and indicated that her condition was permanent with no expected recovery in the foreseeable future. Dr. Goodlow concluded that appellant's degree of pain and level of restrictions would make it very difficult for her to return to any type of work-related activities.

In subsequent reports, both Drs. Rouhe and Goodlow continued to find appellant totally disabled due to her September 1994 employment injury. In reports dated May 27, 1998 and

October 28, 1999, Dr. Goodlow addressed the causal relationship between appellant's condition and her September 19, 1994 employment injury. Additionally, in a May 2, 2000 report, Dr. Goodlow took issue with some of the findings reported by Drs. Dorsey and Jurkowitz, particularly with respect to the diagnosis of fibromyalgia. As recently as August 29, 2000, Dr. Goodlow continued to relate appellant's current condition and ongoing disability to her September 19, 1994 employment injury.

The medical evidence of record raises several unresolved questions. Dr. Goodlow believed that appellant was debilitated by both her upper back and lower back conditions and he treated appellant for 14 of the past 16 years. The Office, however, has not accepted fibromyalgia as a condition arising from appellant's September 19, 1994 employment injury.[8] Additionally, the Office referral physicians acknowledge that this is a controversial condition and Dr. Dorsey stated that "[t]here are no objective findings which can be determined in fibromyalgia," and therefore, in his opinion "it is not a legitimate disease entity." Dr. Goodlow disagreed and in his May 2, 2000 report, he encouraged the Office to refer appellant to a specialist in rheumatology rather than accept Dr. Dorsey's opinion regarding the legitimacy of the condition.

The evidence is also unclear regarding what work, if any, appellant is capable of performing. The Office paid appellant wage-loss compensation based upon her ability to work only three hours per day beginning in March 1997. However, Dr. Rouhe stated that as of June 30, 1997 appellant was totally disabled. The only apparent explanation offered by Dr. Rouhe was that the pain appellant experienced while trying to work three hours per day was too severe for her to continue. Dr. Goodlow similarly found that appellant was totally disabled. It is not entirely clear from the record how and why appellant's condition deteriorated from partial disability in December 1996 when she was working five hours per day to three hours of work beginning March 1997 and then ultimately, total disability as of June 30, 1997. While Drs. Goodlow and Rouhe found appellant totally disabled due to her employment injury, their respective opinions do not clearly explain the reasons for appellant's apparent deterioration.

The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[9] A simple disagreement between two physicians does not, of itself, establish a conflict. To constitute a true conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale.[10]

Notwithstanding the above-noted deficiencies in the reports of Drs. Moore, Dorsey, Rouhe and Goodlow, their respective opinions are in conflict and none can be dismissed as lacking any probative value. As there remains an unresolved conflict of medical opinion regarding the employment-related nature of appellant's diagnosed fibromyalgia and the extent of

[8] Where appellant claims that a condition not accepted or approved by the Office was due to her employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

[9] 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[10] 20 C.F.R. §§ 10.321(a), 10.502 (1999); *see Robert D. Reynolds*, 49 ECAB 561, 565-66 (1998).

her employment-related disability, the case is remanded to the Office for further development of the record.[11]

The January 30, 2001 decision of the Office of Workers' Compensation Programs is reversed and the October 10, 2001 decision is set aside, and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, DC
June 11, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[11] 20 C.F.R. § 10.321(b) (1999).