U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of SUSAN K. CROGHAN and U.S. POSTAL SERVICE,
POST OFFICE, Indianapolis, IN

Docket No. 03-155; Submitted on the Record;
Issued June 9, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective March 9, 2000; and (2) whether the Office abused its discretion by refusing to reopen appellant's case for further consideration of the merits of her claim.

On January 2, 1985 appellant, then a 41-year-old clerk, filed a notice of occupational disease alleging that she had sustained injury to her neck, right shoulder and right arm as a result of her federal employment duties. The Office accepted appellant's claim for a herniated nucleus pulposis (HNP) at the C5-6 level. Appropriate compensation was provided. On December 31, 1985 appellant was again injured when she pulled out a drawer which subsequently fell out and onto the floor. The Office accepted the conditions of herniated C5-6, cervical and lumbar strains, chronic pain syndrome and fibrositis. Appellant eventually returned to the employing establishment working four hours a day. The Office has accepted various recurrences as being causally related to her work conditions. Appellant apparently stopped work in 1987 but returned to work on May 23, 1998 and stopped after one and a half hours claiming increased pain.

In medical reports dated August 12 and December 28, 1996, December 31, 1997 and February 25, 2000, Dr. Stephen H. Neucks, an internist, specializing in rheumatology and pain medicine and appellant's treating physician, continued to diagnose appellant as having cervical spondylosis causally related to the accepted employment injury. He indicated that the magnetic resonance imaging (MRI) showed a substantial worsening of her cervical spondylosis. Dr. Neucks further opined that he saw no benefit in returning appellant to gainful employment, even with restrictions. He stated that it was apparent that appellant's cervical spondylosis has worsened, in spite of the fact she has been at rest and on appropriate medications. Dr. Neucks advised that returning appellant to any kind of environment which required repetitive turning, twisting and head movements could only accelerate the deterioration from her cervical spine. He stated that his concern was not only an exacerbation of her pain, but also the possibility of returning to work and gendering deterioration of her cervical spondylosis.

In a medical report dated June 10, 1997, Dr. Larry M. Davis, a second opinion physician and Board-certified psychiatrist and neurologist, advised that there was no psychiatric diagnosis at Axis I and II and that there was fibromyalgia and cervical spondylosis by other examiners at Axis III. He opined that his finding of chronic pain syndrome was subjective as well as historical with recent notes by Dr. Neucks, appellant's treating physician. Dr. Davis advised that, although several physicians of record have worked with appellant's fibromyalgia and have opined that her diagnosis of fibromyalgia was due to the initial work-related injury in December 1985, he stated that it was not clear from those examiners opinions or his own, if the cervical spondylosis was related directly to that injury. Dr. Davis opined that appellant's return to work was precluded by her subjective complaints of severe pain with even minor muscular activity. He advised that there was no significant or new psychiatric diagnosis or illness contributing to her chronic pain.

In a medical report dated September 5, 1997, Dr. William H. Fulton, a second opinion physician and neurologist, noted that, as far as he could tell, appellant never had a verified definite neurology diagnosis of consequence secondary to upper or lower spinal derangement, but has had a continuing problem with pain of one kind or another and has been diagnosed as having fibromyalgia, which had been caused by cervical strain. Dr. Fulton stated that appellant's story was consistent with a history of a chronic pain syndrome and cervical spondylosis. Appellant had no justifiable findings of peripheral or spinal or central nervous system disease. The finding of some sore muscles with a diffuse distribution did not justify being disabled at this point. The findings of restriction of the neck movement and neck ache, likewise without any peripheral weakness, reflex loss or so forth, also did not indicate disability. Dr. Fulton opined that the injuries incurred in 1985 did not have anything to do with appellant's present circumstances other than it was the start of her symptoms. He opined that appellant was not disabled and could work in a limited-duty clerk position. In a follow-up report dated March 11, 1998 he indicated in pertinent part:

> "[Appellant] had the diagnosis of cervical spondylosis (arthritis of the cervical spine), as well as a chronic pain problem. We should not assume that femoral myositis necessarily becomes chronic pain. At any point, [appellant] has pain all over her body that I could not conceive as being caused by lumbar strain. I do not believe that the fibrositis or fibromyalgia is caused by localized injury to the neck or back. The pain problem has come about from other reasons which I cannot explain. … [P]hysical findings form the standpoint of neurologic disease were functional, not organic and not related to some previous injury."

In a medical report dated November 2, 1998, Dr. Richard A. Hutson, a second opinion physician and a Board-certified orthopedic specialist, advised that appellant had been off work due to soft tissue injuries for quite some time. He noted that she had been diagnosed with cervical spondylosis, but that there were no objective findings to substantiate any loss of nerve function in her upper or lower extremities. Dr. Hutson opined that cervical spondylosis and lumbar spondylosis were a part of the aging process "like wrinkles or gray hair." He did not find appellant to have objective findings to substantiate the difficulties noted in her MRI studies. The soft tissue injuries have long since healed. Dr. Hutson opined that, as an orthopedic surgeon, appellant could handle the job as a modified distribution clerk.

In a January 8, 1999 medical report, Dr. Daniel F. Cooper, a Board-certified neurological surgeon, advised that appellant had severe cervical spondylosis. He advised that her pain certainly would be aggravated by situations which required bending and twisting of the neck. Dr. Cooper stated that appellant has not been able to return to work and to function for any length of time and that he doubted that she would ever be able to perform adequately in a work situation.

The Office declared a conflict in medical opinion evidence between Dr. Hutson and Dr. Neucks concerning appellant's work tolerance and referred her to an impartial medical specialist.

In a June 10, 1999 report, Dr. Paul K. Ho, a Board-certified orthopedic surgeon selected as the impartial medical specialist, advised that he reviewed the statement of accepted facts and medical records. After setting forth his examination findings, he reported that appellant's diagnoses were cervical spondylosis, thoracic spondylosis, fibromyalgia syndrome with chronic pain and mild bilateral carpal tunnel syndrome. Dr. Ho stated:

> "The above diagnosis are all causally unrelated to the work injuries described in 1984 and 1985 or any residuals associated with those injuries. [Appellant] may have had a right sided C5-6 HNP in December 1984, which has resolved and the MRI shows only involvement with the left side now. I am in agreement with GT Spenos' February 14, 1996 statement that 'cervical spondylosis is not secondary to work injury. Cervical spondylosis is a gradual process of arthritis occurring over many years.' Fibromyalgia is a poorly defined syndrome and there is no evidence that her fibromyalgia is in any way related to her described injuries in 1984 and 1985. [Appellant] may have an underlying connective tissue disorder as evidenced by the positive ANA [anti-nucleicacids]. Any cervical and lumbar strain from 1984 and 1985 should certainly have cleared up by now. [Appellant] may well have pain from the above conditions which causes her some disability. She is able to do light housework chores. There is no evidence that this pain would cause total disability."
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> "I believe [that appellant] is able to work within the limitations of the FCE [functional capacity evaluation] [of December 1, 1998]. The duties of a modified distribution clerk appear to fit into those limitations with possibly the exception of bending. [Appellant] should be able to bend moderately from the sitting position ten times an hour, eight hours, a day but not bend from floor to waist lifting."

On February 7, 2000 the Office issued a notice of proposed termination of compensation.[1] Appellant was afforded 30 days in which to present additional evidence or reasons as to why the proposed termination should not be finalized. The Office did not receive any evidence from appellant.

By decision dated March 9, 2000, the Office terminated appellant's compensation benefits effective the same date, finding that the weight of the medical evidence established that she no longer suffered residuals of the work-related conditions of cervical and lumbar strains, herniated disc C5-6, chronic pain syndrome and fibrositis.

By letter dated March 21, 2000, appellant requested an examination of the written record be conducted by an Office hearing representative. No new evidence was received from her and no response was received from the employing establishment. By decision dated November 9, 2000 and finalized November 13, 2000, an Office hearing representative affirmed the Office's prior decision.

By letter dated November 8, 2001, appellant requested reconsideration and submitted additional medical evidence.

Medical reports dated November 14, 2000, March 29 and November 5, 2001 along with CA-20s dated February 12 and October 29, 2001 were received from Dr. Neucks. In his November 14, 2000 report, he advised that appellant is being treated for cervical and lumbar spondylosis, chronic pain syndrome and fibromyalgia. Dr. Neucks stated that appellant's physical examination and findings continue to document the current presence of muscoskeletal abnormalities consistent with the injuries originally described and that she should be considered permanently and totally disabled. He stated that it was apparent that appellant continues to have chronic pain in the neck and lumbar region consistent with fibromyalgia and chronic pain syndrome. Dr. Neucks further advised that appellant's pain syndrome seemed to proceed from a cervical and lumbar injury, which occurred at work and advised that she remains disabled. He advised that it is both Dr. Cooper's and his position that any return to work, even within restrictions will result in a dramatic worsening of her chronic pain syndrome. Dr. Neucks noted that appellant's injuries appear to be gradually worsening as documented by serial MRI's showing worsening cervical spondylosis. In his March 29 and November 5, 2001 reports, he reiterated that appellant continues to have chronic pain syndrome of the lumbar region consistent with fibromyalgia and chronic pain syndrome. Dr. Neucks noted that serial MRI's showed continued deterioration of the cervical neck injury. He reiterated his opinion that appellant is totally disabled due to the abnormalities of the cervical spine and lumbar spine as well as her chronic pain.

Medical reports dated November 6, 2000 and October 25, 2001 were received from Dr. Cooper. In his November 6, 2000 report, he advised that appellant's symptomatology and examination remains much the same. Dr. Cooper noted that the MRI scan, the last one done in 1998, shows cervical spondylosis with degenerative changes throughout. He advised that

[1] The Office found that a report from an impartial medical specialist is entitled to special weight so long as it is based on an accurate history and supported by sound medical reasoning. *Darlene Warren*, 37 ECAB 731 (1986).

appellant's problems are that of cervical spondylosis, neck strain with continued symptomatology since her work-related injures. Significant pain personality. Some depression. Fibromyalgia. He advised that with appellant's complaints, he did not feel that she would be able to return to work. By attempting to work, with what appellant has shown in the past and her present pain profile, Dr. Cooper opined that he did not think she would get to the point where she could handle any type of work. The residuals appellant has from her work-related injuries are that of continued pain. She has developed cervical spondylosis. Appellant's major problem remains that of discomfort and pain with any increased activities. In his October 25, 2001 report, Dr. Cooper advised that physical therapy and chiropractic treatments seem to make things worse. Pain medication only takes the edge off appellant's problem. Past examinations revealed pain and tenderness over the cervical area, but no focal neurological abnormalities were found. Dr. Cooper reiterated his opinion that appellant would be unable to return to work. He further noted that her last MRI scan dated September 14, 2001 of the cervical area showed no major changes, but significant stenosis, right greater than left at C6-7 as well as C5-6. A copy of the MRI of the cervical spine dated September 14, 2001 was included.

By decision dated February 5, 2002, the Office denied modification of its November 9, 2000 decision. The Office found that the evidence submitted was insufficient to overcome the weight of the medical evidence as established by Dr. Ho.

By letter dated April 26, 2002, appellant requested reconsideration and submitted a March 8, 2002 report from Gary Fuller, D.C., a chiropractor. The history of injury was noted along with appellant's subjective complaints. Physical examination revealed C5 subluxated posterior on the right and a left posterior rotation subluxation of C6. A posterior subluxaton/joint dysfunction of T5 was observed. Additional examination findings were noted. Trigger points were found to be consistent with appellant's fibromyalgia. X-rays taken revealed a C2 spinous rotation to the left; a tunicate hypertrophy at C6 and C7 on the left and C5 on the right; a loss of the cervical lordosis along with moderately severe disc degeneration at C4-5, C5-6 and C6-7 with osteophytes noted along C3, C4, C5 and C6; a mild right thoracolumbar scoliosis was noted along with degeneration of the L4-5 and L5-S1 disc spaces. Comparison of the recent radiographs with March 13, 1985 films, revealed considerable change in the amount of cervical joint/disc degeneration in the lower cervical spine, which was noted as being consistent with appellant's persistent pains. Appellant was diagnosed with having cervical disc syndrome without myelopathy and facet pain with attendant fibromyalgia, degenerative disc disease, lower cervical subluxation, cervical hypnosis and left sided brachial neuropathy.

In a March 25, 2002 report, Dr. Cooper noted that appellant has multiple problems including fibromyalgia, cervical spondylosis and a chronic pain syndrome. He noted that, on examination appellant showed chronic pain syndrome. The MRI showed significant spondylosis at C5-6 andC 6-7 with central canal stenosis. No long track findings were noted. Dr. Cooper expressed his concern that appellant would develop further problems from spinal cord compression in the future. He advised that she has a chronic pain syndrome which related to her original injury. Dr. Cooper opined that appellant can not return to work.

By decision dated July 17, 2002, the Office denied appellant's request for reconsideration, finding the evidence submitted to be repetitive and cumulative in nature or not relevant to the issue presented and insufficient to reopen appellant's case for further review.

The Board finds that the Office properly terminated appellant's compensation benefits effective March 9, 2002, as the evidence establishes that her employment-related residuals had ceased.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits by establishing that the accepted disability has ceased or that it is no longer related to the employment.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3]

The Office accepted that appellant suffered a herniated C5-6 disc, cervical and lumbar strains, chronic pain syndrome and fibrositis as a result of her work injuries in 1984 and 1985. The Office, therefore, bears the burden of proof to justify the termination of compensation benefits for these medical conditions.

A conflict arose in this case on whether appellant could return to work and, if so, what her work tolerance was. For purposes of adjudicating the termination of compensation, however, the issue is whether appellant continues to suffer from residuals of the accepted conditions and if so, whether residuals of the accepted conditions continue to disable her for work.

In situations, when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist of the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[4]

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on March 9, 2000 based on the well-rationalized opinion of the impartial specialist, Dr. Ho, a Board-certified orthopedic surgeon.[5]

The Board has carefully reviewed the opinion of Dr. Ho and finds that it has the reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. He provided a thorough factual and medical history through

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[2] *David W. Green*, 43 ECAB 883 (1992); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986); *Harold S. McGough*, 36 ECAB 332 (1984); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

[3] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[4] *Rosie E. Garner*, 48 ECAB 220, 225 (1996).

[5] Section 8123(a) of the Federal Employees' Compensation Act provides that: "[I]f there is 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." 5 U.S.C. § 8123(a).

his examination of record and noted that the objective studies of record, which included a 1985 cervical myelogram, 1987 thoracic x-rays and 1996 cervical MRI films showed degenerative changes, which demonstrates evidence of a preexisting condition of degenerative disc disease, which was advancing in normal fashion given appellant's age. Moreover, Dr. Ho provided a proper analysis of the factual and medical history and findings on examination and reached conclusions regarding appellant's current conditions which comported with this analysis. He included medical rationale for his opinion that appellant's current fibromyalgia condition was not work related as there was evidence of an underlying connective tissue disorder as demonstrated by an objective test. Dr. Ho further included medical rationale for his opinion that any cervical or lumbar strains from 1984 and 1985 were resolved due to the length of time involved and also pointed out the fact that the right sided C5-6 HNP from December 1984 had resolved, as the current MRI only shows involvement with the left side.

The Board further notes that, Dr. Ho's opinion that appellant's current diagnosis of cervical spondylosis and fibromyalgia are not connected to her work-related injuries is supported by the medical opinions of Dr. Fulton and Dr. Hutson, who opined that there was no objective findings of a verified definite neurologic diagnosis of consequence secondary to upper or lower spinal derangement to substantiate the difficulties noted in the MRI studies. Dr. Ho found that appellant suffered no residuals of her work-related conditions and additionally found that her current conditions, which were not causally related to her work injuries, did not render her totally disabled.

The Board further notes that appellant failed to respond to the Office's proposed termination of compensation dated February 7, 2000.

Accordingly, the Board finds that Dr. Ho's opinion is sufficient to meet the Office's burden of proof in terminating appellant's compensation for her accepted conditions.

The Board further finds that the additional evidence submitted by appellant is insufficient to overcome the weight of the evidence accorded to Dr. Ho.

Although, Dr. Neucks continued to opine that appellant's physical examination and findings documented the presence of muscoskeletal abnormalities consistent with the work injuries and that her pain syndrome seemed to proceed from her work-related cervical and lumbar injury, Dr. Neucks has failed to provide a well-reasoned medical opinion as to how appellant's current muscoskeletal abnormalities, which include a diagnosis of cervical spondylosis and pain syndrome relate to the accepted work injuries or came about from the work events of 1984 and 1985. Medical opinion evidence not fortified by medical rationale is of little or no probative value in establishing causal relationship.[6] Moreover, the diagnosis of cervical spondylosis has not been accepted by the Office and Dr. Neucks' reports are insufficient to establish appellant's burden. Additionally, there is no objective findings of the accepted work-related conditions which would indicate continuing residuals and the need for medical treatment due to the accepted conditions. Accordingly, Dr. Neucks' opinion is of little probative value and

[6] *Lucrecia M. Nielsen,* 42 ECAB 583 (1991).

is insufficient to overcome the weight accorded to Dr. Ho's opinion that appellant's work-related conditions have resolved.

Dr. Cooper advised that appellant's problems were that of cervical spondylosis and neck strain with continued symptomatology since her work-related injuries. He stated that appellant's residuals from her work-related injuries were that of pain and discomfort with increased activities. The Board notes, however, that there were no objective findings to support appellant's complaints of pain based on the accepted conditions. In his October 25, 2001 report, Dr. Cooper noted that no focal abnormalities were found over the cervical area. Moreover, he noted that the September 14, 2001 MRI scan of the cervical area showed no major changes, but significant stenosis at C6-7 as well as C5-6. As the condition of cervical spondylosis has not been accepted by the Office as being work related, any of the residuals of this condition may not be considered.

Accordingly, the additional evidence submitted is insufficient to overcome the weight of the medical evidence accorded to Dr. Ho, that the residuals of the accepted work-related conditions have resolved.

The Board further finds that the Office did not abuse its discretion in refusing to reopen appellant's case for further consideration of the merits of her claim.

To require the Office to reopen a case for merit review, section 10.606 provides that a claimant may obtain review of the merits of his or her claim by written request to the Office identifying the decision and setting forth arguments or submitting evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[7] When a claimant fails to meet at least one of the above standards, the Office will deny the application for review without reviewing the merits of the claim.[8]

In support of her April 26, 2002 request for reconsideration, appellant submitted a March 25, 2002 report from Dr. Cooper. He continues to provide diagnoses of cervical spondylosis, a condition which the Office has not accepted as being work related. Dr.Cooper also discussed appellant's chronic pain syndrome and related it to her original injury without providing any medical rationale to establish such a causal connection. The Board finds that Dr. Cooper's March 25, 2002 report is cumulative in nature and is insufficient to warrant a merit review. The Board has found that evidence, which repeats or duplicates evidence already in the record, has no evidentiary value and does not constitute a basis for reopening a case.[9]

Appellant additionally submitted a March 8, 2002 report from Gary Fuller, D.C., a chiropractor. The Board finds that, as a chiropractor, Dr. Fuller is considered a "physician"

[7] 20 C.F.R. § 10.606(a). *See generally* 5 U.S.C. § 8128.

[8] 20 C.F.R. § 10.608(a).

[9] *Paul Kovash*, 49 ECAB 350 (1998).

under the Act for purposes of diagnosing and treating subluxation.[10] Dr. Fuller diagnosed appellant with having lower cervical subluxation. The Board notes that the Office never accepted subluxation as being work related. Moreover, Dr. Fuller did not opine that appellant's subluxation was causally related to her work injuries of 1984 and 1985. The Board finds that this report is insufficient to reopen appellant's case for merit review.

Since 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 submit relevant and pertinent new evidence not previously considered by the Office, she did not establish that the Office abused its discretion in denying her request for reconsideration.

The July 17 and February 5, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
June 9, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member

[10] In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under the Act. Section 8101(2) of the Act provides that the term "'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist…." 5 U.S.C. § 8101(2); *see also Linda Holbrook*, 38 ECAB 229 (1986). Therefore, a chiropractor cannot be considered a physician under the Act unless it is established that there is a subluxation as demonstrated by x-ray evidence. *Kathryn Haggerty*, 45 ECAB 383 (1994). In his March 8, 2002 report, Dr. Fuller diagnosed a subluxation on examination and presented x-ray findings which appear to relate to his diagnosis of lower cervical subluxation. Accordingly, he is considered a physician under the Act.