U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICK G. MANGAN and DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION, Denver, CO

Docket No. 03-1326; Submitted on the Record;
Issued November 10, 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 for medical benefits effective July 14, 1999; and (2) whether appellant met his burden to establish that he is entitled to continuing medical benefits after July 14, 1999.

On December 1, 1996 appellant, then a 45-year-old biologist, filed a claim for traumatic injury alleging that he sustained neck injuries as a result of a car accident, which occurred in the performance of duty. Appellant did not stop work. The Office accepted appellant's claim for cervical strain and authorized physical therapy and a health club membership.

Subsequently, the Office referred appellant to Dr. Stephen Dinenberg, an orthopedic surgeon, for a second opinion evaluation. Based on his October 5, 1998 report, the Office issued a notice of proposed termination of medical benefits on May 19, 1999, which was made final in a decision dated July 14, 1999. Appellant requested an oral hearing and in a decision dated March 6, 2000, an Office hearing representative found that at the time the Office's prior decision was issued, the weight of the medical evidence supported the Office's termination of medical benefits. Therefore, the Office's July 14, 1999 decision was affirmed. The Office hearing representative further found, however, that new medical evidence submitted by appellant at the hearing was sufficient to create a conflict in medical opinion, requiring referral to an impartial medical specialist, on the issue of whether appellant established that he had any need for continuing medical treatment after July 14, 1999. Therefore, the Office hearing representative remanded the case for the Office to resolve the conflict of medical opinion.

On remand the Office submitted a statement of accepted facts, the medical records and a list of questions to be resolved to Dr. Herbert H. Maruyama, a Board-certified orthopedic surgeon. Based on Dr. Maruyama's September 8, 2000 report, in which the physician stated that appellant's accepted cervical strain had long since resolved and that his current symptoms were due to preexisting degenerative changes of the spine, in a decision dated October 12, 2000, the Office denied appellant's claim for continuing medical benefits after July 14, 1999.

By letter dated April 14, 2001, appellant requested a review of the written record. In a decision dated May 29, 2001, the Office denied appellant's request on the grounds that it was untimely and could further be addressed through reconsideration. By letter dated June 12, 2001, appellant requested reconsideration and submitted additional medical evidence from his treating neurologist, Dr. Lynn Parry, in support of his request. In a decision dated July 19, 2001, the Office found the newly submitted evidence insufficient to warrant modification of the prior decision.

By letter dated August 24, 2001, appellant again requested reconsideration and submitted new medical evidence from Dr. Parry, dated August 21, 2001 in support of his request. By letter dated September 14, 2001, the Office informed appellant that the additional findings and rationale discussed by Dr. Parry in her most recent report were sufficient to create a new conflict with Dr. Maruyama, the prior impartial medical examiner. The Office then referred appellant, together with a new statement of accepted facts, the medical records and a list of questions to be answered, to Dr. Stanley H. Ginsburg, a Board-certified neurologist, for an impartial medical examination.

Based on Dr. Ginsburg's January 25, 2002 report, in a decision dated February 26, 2002, the Office denied modification of its prior decision, finding that the weight of the medical evidence established that appellant had no employment-related residuals requiring continuing medical treatment after July 14, 1999. By letter dated July 2, 2002, appellant requested reconsideration and submitted a report from Dr. Timothy K. Brady, his treating chiropractor, in support of his request. In a decision dated October 24, 2002, the Office found the additional evidence and arguments to be insufficient to warrant further merit review. By letter dated November 29, 2002, appellant again requested reconsideration and submitted additional evidence and arguments in support of his request. In a decision dated February 28, 2003, the Office found the newly submitted evidence to be irrelevant, but noted that appellant had additionally raised three new arguments. After discussing these arguments, the Office affirmed its prior decision denying medical benefits after July 14, 1999.

The Board finds that the Office met its burden of proof to terminate appellant's entitlement to medical benefits effective July 14, 1999.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[1] 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.[2] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.[3]

[1] *Betty Regan*, 49 ECAB 496, 501 (1998).

[2] *Raymond C. Beyer*, 50 ECAB 164, 168 (1998).

[3] *Martin T. Schwartz*, 48 ECAB 521, 522 (1997).

In this case, the Office properly determined that a conflict of medical opinion existed over whether appellant required continuing medical treatment for his accepted cervical strain. In a report dated October 5, 1998, Dr Dinenberg reviewed the statement of accepted facts and the relevant medical evidence of record provided by the Office. After physically examining appellant, Dr. Dinenberg stated that appellant, by history and according to the initial medical evidence of record, had sustained a strain of his neck on November 26, 1996. The physician documented his findings on physical examination, noting that appellant demonstrated no loss of muscle tone in the cervical, trapezius or shoulder areas and no evidence of atrophy. Appellant demonstrated full range of motion of both shoulders and his head and showed no evidence of weakness in his shoulders, biceps, triceps or grip strength. Sensation and deep tendon reflexes were also normal, although appellant did report an odd sensation upon palpation of the trapezius muscle at the base of his neck. Dr. Dinenberg concluded that as he found no orthopedic pathology on examination, appellant had no residuals of his November 26, 1996 employment injury and needed no further medical treatment for his accepted condition. In contrast, in a report dated January 5, 2000, Dr. Parry, appellant's treating physician, stated that physical examination revealed weakness in the right shoulder and decreased range of cervical motion. In addition while appellant had adequate range of motion of the right shoulder girdle, he had abnormal scapulothoracic movement, particularly in abduction. Appellant also had upper trapezius contraction on the right side in abduction, evidencing a tendency to over recruit the upper trapezius. Further, in the prone position, appellant demonstrated mild weakness in rhomboid muscle strength, mild to moderate weakness of the middle trapezius and increased tenderness of the axilla. Dr. Parry stated that these findings demonstrated a combination of cervical strain and shoulder girdle injury and were entirely consistent with appellant's 1996 automobile accident.

In situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examination to resolve the conflict in medical opinion.[4] The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.[5]

In order to resolve the conflict between Drs. Dinenberg and Parry, the Office referred appellant, together with a statement of accepted facts, copies of the relevant medical evidence of record and a list of questions to be resolved, to Dr. Maruyama, a Board-certified orthopedic surgeon. In a report dated September 8, 2000, he reviewed the statement of accepted facts, appellant's work history, the opinions of other physicians, diagnostic testing results and the records of appellant's treatment. Responding to specific questions from the Office, Dr. Maruyama stated that on physical examination, appellant did have some objective findings, notably diminished range of motion in the neck, in extension and in rotation to the right, as well as degenerative spurs and degenerative changes of the cervical spine as demonstrated by x-ray. Dr. Maruyama emphasized that these extensive degenerative changes preceded appellant's 1996 automobile injury, as the age and extent of the changes demonstrated that the condition was chronic and long-standing. Dr. Maruyama also stated that appellant's employment-related

[4] *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

[5] *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

cervical strain injury had long subsided and was not a continuing source of appellant's symptoms. Rather, appellant's symptoms were due to the extensive degenerative changes in his neck.

Dr. Maruyama reviewed the case record and various reports, on appellant's medical treatment since the 1996 injury. He examined appellant thoroughly, discussed diagnostic testing, explained his clinical findings and provided medical rationale for his conclusion that appellant's employment cervical strain had long since subsided and that his current symptoms were related to his preexisting degenerative cervical changes. Thus, Dr. Maruyama provided an opinion that was sufficiently well rationalized to support his conclusion that appellant has no residuals of his work-related conditions, which require further medical treatment. The Board finds that Dr. Maruyama's report represents the weight of the medical opinion evidence and the Office met its burden of proof to terminate appellant's compensation for medical treatment effective July 14, 1999.[6]

The Board further finds that appellant failed to meet his burden to establish entitlement to continuing medical benefits for his accepted conditions after July 14, 1999.

In this case, by decision dated March 6, 2000, an Office hearing representative found that the Office met its burden of proof to terminate appellant's compensation benefits effective July 14, 1999, therefore, the burden shifted to appellant to establish that he continued to require medical treatment for his employment-related conditions.[7]

As noted above, in situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examination to resolve the conflict in medical opinion.[8] The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.[9]

In this case, the Office properly determined that a new conflict of medical opinion existed over whether appellant required continuing medical treatment for his accepted cervical strain. Dr. Maruyama, a Board-certified orthopedic surgeon, stated in a September 8, 2000 report, that appellant's employment-related cervical strain had long since subsided and that his current symptoms were related to his preexisting degenerative cervical changes. In a report dated August 21, 2001, Dr. Parry, a neurologist and appellant's treating physician, took issue with Dr. Maruyama's opinion, stating that appellant had, in fact, suffered a serious and significant scapulothoracic injury, which does not improve over time. She explained that the evaluation and treatment of this type of injury is not in the area of an orthopedic surgeon and that, therefore, it is

[6] *See Jimmie H. Duckett*, 52 ECAB 332 (2001) (opinion that appellant's back condition was due to the natural progression of his spondylitis was sufficiently rationalized to establish that his work-related back condition had resolved and to meet the Office's burden of proof in terminating compensation).

[7] *See George Servetas*, 43 ECAB 424 (1992).

[8] *Richard L. Rhodes*, *supra* note 4.

[9] *Sherry A. Hunt*, *supra* note 5.

not unusual that the full scope of appellant's injury was overlooked during Dr. Maruyama's assessment. Dr. Parry concluded that appellant's injury was still causing him significant problems and required continuing medical treatment.

Dr. Ginsburg, a Board-certified neurologist, resolved the conflict over whether appellant had residuals of his accepted work injuries that required additional medical treatment. In his January 25, 2002 report, Dr. Ginsburg reviewed the revised statement of accepted facts, including a description of several prior injuries, appellant's work history, the opinions of other physicians, diagnostic testing results and the records of appellant's treatment. Responding to specific questions from the Office, Dr. Ginsburg stated that appellant did have some residuals of his employment injury in the form of some continuing, but reduced, discomfort in the neck and shoulder girdle area. He emphasized that the residual discomfort was due to a combination of underlying degenerative changes and some chronic spinal strain, with the degenerative changes playing the major role in production of symptomatology.

Dr. Ginsburg further responded that he did not believe that any aggravation of appellant's underlying degenerative changes had occurred due to the 1996 employment-related automobile accident and associated trauma. He stated that certainly appellant's degenerative changes could progress, but the progression was not due to the effect of the cervical strain. Finally, with respect to the need for continuing medical treatment, Dr. Ginsburg stated:

> "I believe that the only ongoing treatment necessary presently would be an adequate home exercise program. Certainly, after five years, formal therapy is not indicated, a health club might be useful to the patient, but would not be indicated or required as part of his therapy and certainly I can see no need in relation to the original injury for a personal trainer. It certainly would not be the standard in the community of physicians who ordinarily would treat this type of problem to order any formal therapy, health club membership, or personal trainer at this time. I am referring to the community of neurologists, neurosurgeons, orthopedic surgeons, physiatrists, occupational physicians, etc. It certainly would not be the standard of care in the physical therapy community to suggest that further physical therapy or a personal trainer, at this stage of the patient's 'recovery' would be appropriate."

Dr. Ginsburg reviewed the case record and various reports, on appellant's medical treatment since the 1996 injury. He examined appellant thoroughly, discussed diagnostic testing, explained his clinical findings and provided medical rationale for his conclusion that appellant's work-related injuries, while not completely resolved, needed no further medical treatment beyond a home exercise program. Thus, Dr. Ginsburg provided an opinion that was sufficiently well rationalized to support his conclusion that appellant has no residuals of his work-related conditions, which require further medical treatment. The Board finds that Dr. Ginsburg's report represents the weight of the medical opinion evidence and establishes that appellant's accepted work injuries do not require additional medical treatment.[10]

[10] *See Jimmie H. Duckett, supra* note 6.

Subsequent to Dr. Ginsburg's report, appellant submitted a duplicate copy of an August 27, 1999 report from Dr. David Doig, which was previously considered by the Office, as well as a new report from Dr. Brady, his treating chiropractor. He stated that he first examined appellant in 1982, following an earlier employment injury, which resulted in sectional subluxation through C1-4, as demonstrated on cervical x-rays. Dr. Brady stated that he had not seen appellant for almost 20 years, having last treated him on April 13, 1983. He reviewed the medical evidence of record, noting that appellant reported an additional employment-related neck injury, or aggravation, which occurred in 1984. Dr. Brady stated that these three employment-related neck injuries had all contributed to ongoing degenerative joint and disc changes of appellant's cervical spine.[11] With respect to appellant's need for continuing treatment, Dr. Brady stated that as it was likely appellant's degeneration would continue, he should be evaluated every six months by a physiologist, skilled trainer or physical therapist, to evaluate his exercise routine. In addition Dr. Brady felt appellant should have a chiropractic evaluation every six months, to determine whether chiropractic manipulation would be helpful.

The Board finds that Dr. Doig's August 27, 1999 report is of no probative value, as it was duplicates evidence previously contained in the record.[12] Dr. Brady's opinion that appellant requires additional evaluation and treatment is also entitled to no weight as he is a chiropractor and under the Federal Employees' Compensation Act,[13] this report would constitute medical evidence only if it was based on diagnosis of spinal subluxations diagnosed by x-rays.[14] While Dr. Brady may properly have been considered a physician when he treated appellant in 1982, as there was, at that time, x-ray evidence of spinal subluxation, he cannot be considered a physician in the context of the current claim, in which there are no such x-rays. Therefore, the Office properly denied modification of its decision to deny appellant's claim for continuing medical benefits after July 14, 1999.

[11] In the statement of accepted facts sent to Dr. Ginsburg, the Office noted that appellant reported having suffered two prior employment-related injuries, involving his neck and upper back, one in 1982 and another in 1984. The Office noted that neither claim could be located in the Office's data bank.

[12] *Linda I. Sprague*, 48 ECAB 386 (1997).

[13] 5 U.S.C. §§ 8101-8193.

[14] Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-rays to exist. 5 U.S.C. § 8107(a); *Peggy Ann Lightfoot*, 48 ECAB 490 (1997).

The February 28, 2003 and October 24, 2002 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
November 10, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member