U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARTHA L. CEJA and U.S. POSTAL SERVICE,
POST OFFICE, Benicia, CA

Docket No. 03-1152; Submitted on the Record;
Issued October 16, 2003

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether appellant has established that she sustained a recurrence of disability on November 29, 2000 causally related to her September 13, 1999 and March 16, 2000 employment injuries.

On September 15, 1999 appellant, then a 34-year-old distribution window clerk, filed a traumatic injury claim, assigned number 13-1198415, alleging that on September 13, 1999 she felt a sharp pain in her lower back after she tried to catch a box that slipped from her grip. Appellant stated that she fell on the dock and landed flat on her buttocks, which made the pain in her tailbone worse. By letter dated December 23, 1999, the Office of Workers' Compensation Programs accepted appellant's claim for a lumbosacral strain.

On March 16, 2000 appellant filed a traumatic injury claim, assigned number 13-1212596, alleging that on that date she lifted a tray of third class letters and as she flipped the mail onto the ledge she felt a sharp pain in her upper right arm, shoulder and neck and left mid-arm and wrist. Appellant stopped work on March 16, 2000.[1] The Office accepted appellant's claim for cervical subluxation, cervical strain and right shoulder strain.[2]

Appellant returned to light-duty work and missed work intermittently between March 17 and July 22, 2000.

On January 26, 2001 appellant filed a claim alleging that she sustained a recurrence of total disability on November 29, 2000 due to her employment injuries. Appellant stated that she experienced increased pain in her lower back, neck and shoulder when she returned to work after

---

[1] On September 28, 2000 the Office doubled appellant's claims into a master case file assigned number 13-1212596.

[2] On December 16, 2002 the Office granted appellant a schedule award for a seven percent permanent impairment of the right upper extremity.

her March 16, 2000 employment injury. Appellant stopped work on November 30, 2000. Appellant's claim was accompanied by a December 5, 2000 report from Dr. Norman Livermore, an orthopedic surgeon and appellant's treating physician, who opined that appellant should be taken off work because her duties aggravated her accepted employment injuries.

By letter dated February 1, 2001, the Office referred appellant, together with the medical records, a statement of accepted facts and a list of specific questions, to Dr. Thomas D. Schmitz, a Board-certified orthopedic surgeon, for a second opinion medical examination. Dr. Schmitz submitted a March 20, 2001 report no objective findings regarding appellant's cervical and lumbar strains. He stated that appellant had residuals of her employment-related shoulder injury. He opined that appellant could work eight hours a day with certain physical restrictions. In an accompanying work capacity evaluation of the same date, Dr. Schmitz indicated that appellant could work four out of eight hours and that hopefully in one to two months appellant could progress to eight hours.

The Office received Dr. Livermore's March 8, 2001 report noting that appellant was partially disabled by residuals of her accepted employment injuries and that she could work four hours a day with certain physical restrictions.

On April 23, 2001 the Office found a conflict in the medical opinion evidence between Dr. Livermore and Dr. Schmitz regarding the nature and extent of appellant's residuals and whether she was able to work four or eight hours a day. The Office referred appellant to Dr. J.C. Pickett, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Pickett submitted a May 22, 2001 report providing a history of appellant's September 13, 1999 and March 16, 2000 employment injuries. He indicated a review of medical records and his findings on physical and objective examination. Dr. Pickett diagnosed subdeltoid bursitis of the right shoulder, tendinitis of the right shoulder cuff, mild cervical strain and resolving lumbosacral strain with left sciatica. He opined that appellant still suffered from residuals of her employment injuries in that she had pain. Dr. Pickett recommended that appellant undergo a magnetic resonance imaging (MRI) scan in view of persisting supraspinatus tendinitis. He therefore stated that appellant had not reached maximum medical improvement but found that appellant could work four hours a day with specified restriction. He was unable to state with any certainty whether appellant could or could not perform the duties which she accepted on March 15, 2000 because Dr. Livermore had stated that appellant was disabled as of November 29, 2000. Dr. Pickett concluded that there was no objective material change in appellant's medical condition in any of her evaluations. He also concluded that there was no significant difference between the opinions of Dr. Livermore and Dr. Schmitz because Dr. Schmitz did not truly state that appellant was able to work eight hours a day. Rather, Dr. Schmitz stated that appellant would be able to work if she carried out an exercise program. In an accompanying work capacity evaluation dated June 11, 2001, Dr. Pickett noted appellant's ability to work four hours a day with certain physical restrictions.

In a June 21, 2001 letter, the Office advised Dr. Pickett to clarify his findings regarding appellant's continuing disability due to her employment-related conditions and her ability to work. The Office further advised Dr. Pickett to perform an MRI scan and submit his findings.

Dr. Pickett submitted a supplemental report dated July 10, 2001 providing the results of an MRI scan of the right shoulder and stated that there was a suggestion of fluid in the subcoracoid space which may be synovial effusion of the shoulder and equivocal evidence of tendinitis. He saw no evidence of a definite cyst and there was a reactionary signal in the supraspinatus near its insertion which could represent tendinitis. Dr. Pickett noted the curving of the acromion which could narrow the outlet of the shoulder. He reiterated that there was no evidence of objective material change in appellant's medical condition causing total disability and rendering her unable to work. Dr. Pickett noted findings of pain, somewhat reduced motion, mild cervical strain evidenced by mild reduction of range of motion and a pain, stiffness and tenderness in the lower back with tenderness along the left sciatic tract and positive straight leg raising. Regarding the Office's question as to why appellant's lumbar strain had persisted for two and one-half years, Dr. Pickett stated that he would have expected it to have cleared within a maximum of six months without further aggravation. He stated that he did not believe in a permanent lumbar sprain. Dr. Pickett indicated that there were no findings of other soft tissue damage, no change in the back muscles and no atrophy in that area. He reiterated that appellant could work four hours a day, noting that the only reason he said this was based on appellant's statement that she could not do this and Dr. Livermore who stated that any work beyond this point would cause aggravation. He stated that there were no objective medical findings and the findings were purely subjective. In response to the Office's question of why appellant had not participated in an exercise program for her neck and right shoulder and possible subacromial injections as recommended by Dr. Schmitz, Dr. Pickett replied that he was not privy to why appellant had not received such treatment from Dr. Livermore.

By decision dated August 13, 2001, the Office denied appellant's claim on the grounds that the evidence of record failed to establish that appellant sustained a recurrence of total disability on November 29, 2000 causally related to her September 13, 1999 and March 16, 2000 employment injuries based on Dr. Pickett's opinion. In a September 4, 2001 letter, appellant, through her attorney, requested an oral hearing before an Office hearing representative.

In a January 17, 2003 decision, a hearing representative affirmed the Office's August 13, 2001 decision.

The Board finds that appellant has failed to establish that she sustained a recurrence of disability on November 29, 2000 causally related to her September 13, 1999 and March 16, 2000 employment injuries.

When an employee who is disabled from the job she held is injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that she can perform the light-duty position, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability and that he cannot perform the light-duty position. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[3]

[3] *Terry R. Hedman*, 38 ECAB 222 (1986).

Appellant has not submitted any evidence establishing that her limited duties at work were changed. In addition, appellant has failed to submit medical evidence establishing that her employment-related lumbosacral, cervical and right shoulder strains, and cervical subluxation prevented her from working on or after November 29, 2000.

Dr. Livermore, appellant's treating physician, opined that appellant was totally disabled from work due to an aggravation of her employment-related injuries. Dr. Schmitz, an Office referral physician, opined that appellant was partially disabled and that she could work within certain physical restrictions. The Office properly found a conflict in the medical opinion evidence regarding the nature and extent of appellant's employment-related residuals and her ability to work and referred appellant to Dr. Pickett for an impartial medical examination.

Section 8123(a) of the Federal Employees' Compensation Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[4] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[5]

Dr. Pickett reviewed appellant's medical records and a statement of accepted facts, and he provided detailed physical and objective findings on examination. He found no objective findings to support a medical condition causing appellant to be totally disabled for work. It is well established that when 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.[6] The Board finds that the weight of the medical opinion evidence is represented by the well-rationalized opinion of Dr. Pickett which is based on a complete and accurate factual and medical background.

On appeal, appellant's attorney argued that the second opinion of Dr. Schmitz was equivocal as to how many hours appellant was able to work. Due to the lack of a rationalized medical opinion from Dr. Livermore or Dr. Schmitz regarding whether appellant had any residuals due to her accepted employment injuries and the number of hours appellant was able to work, the Office properly referred appellant to Dr. Pickett for an impartial medical examination.

Appellant's attorney further argued that the Office only requested that Dr. Schmitz determine whether appellant suffered residuals of her March 16, 2000 employment injury and not the September 1999 employment injury. The record indicates that the Office requested Dr. Schmitz to provide "any employment-related factors of disability," a diagnosis and whether appellant had any residuals of the injury. The Office did not specifically request Dr. Schmitz to solely address appellant's March 16, 2000 employment injury.

[4] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[5] *William C. Bush*, 40 ECAB 1064 (1989).

[6] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

Finally, appellant's attorney contended that since Dr. Pickett deferred to Dr. Livermore's opinion that appellant was totally disabled for work, Dr. Livermore's opinion constituted the weight of the medical evidence. However, Dr. Pickett determined that there were no objective findings of any residuals of appellant's accepted employment injuries. Dr. Pickett's opinion is entitled to special weight as an impartial medical examiner that provided a rationalized medical opinion.

The January 17, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
October 16, 2003

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member