U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSALIE PALMEIRO and U.S. POSTAL SERVICE,
POST OFFICE, New York, NY

Docket No. 03-1949; Submitted on the Record;
Issued April 14, 2004

DECISION and ORDER

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

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective January 17, 2002.

On July 28, 1976 appellant, then a 28-year-old key punch operator, filed an occupational disease claim for cervical radiculitis of her neck, shoulder, arm and fingers resulting from factors of her federal employment.[1] The Office accepted the claim for cervical radiculitis and, on January 10, 1985, expanded the claim to include aggravation of TMJ dysfunction.[2] After receiving treatment from numerous physicians, the Office authorized construction of permanent crowns to alleviate the TMJ condition on September 11, 1990. Appellant received appropriate compensation benefits.[3]

Appellant received treatment from numerous physicians, including Dr. Theodore Feldman, a Board-certified orthopedist, who diagnosed cervical radiculitis.[4] On February 20, 1997 the Office referred appellant, together with the medical record and a statement of accepted

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[1] Appellant also filed an occupational disease claim on August 24, 1983 alleging her temporomandibular joint (TMJ) dysfunction was causally related to factors of her federal employment.

[2] The Office vacated a prior order dated February 11, 1985 rejecting the claim for compensation. The two claims were subsequently doubled. File No. A2-34839l and A2-517452.

[3] The record reflects that appellant stopped work on April 23, 1976, returned on June 1, 1976, stopped on August 15, 1976, returned on October 10, 1976 and stopped again on March 23, 1977. Following this recurrence, she did not return until June 1, 1981, when she was rehired as a senior clerk under a rehabilitation program. Appellant resigned on May 21, 1984.

[4] Appellant's treatment comprised of physical therapy, cervical hydrocolator pack, pain medication, swim therapy, chiropractic manipulation of the spine, lumbosacral corset, new temporary crown, construction of permanent crown, root canal and a MORA.

facts, to Dr. James B. Sarno, a Board-certified neurosurgeon and second opinion physician.[5] In a March 6, 1997 report, he indicated that appellant had a normal neurological examination and diagnosed degenerative disc disease of the cervical and lumbar spine. He noted that appellant had no objective findings to substantiate her subjective complaints of vertigo and tension vascular and muscular type headaches. Dr. Sarno explained that the degenerative disc disease that was present was due to the normal aging process and that he did not believe this was specifically related to her job. He opined that appellant could be reemployed in the same job with certain physical restrictions.[6] Dr. Sarno concluded that he could find no objective evidence of any ongoing neurological disability.[7]

In a March 17, 1997 report, Dr. Richard S. Kaufman, a specialist in orthodontics and appellant's treating dentist, stated that the delay in proceeding with the construction of the permanent crowns caused infection to set in and abscesses to form in some of appellant's teeth, which needed to be dealt with surgically prior to any other dental work.[8] Dr. Kaufman indicated the TMJ aspect of the case and its severity would result in even greater pain, increased vertigo and other complications which would leave appellant incapacitated for a period of time after each procedure and it would take time for her jaw muscles to recover. He added that TMJ manifested itself in the form of jaw spasms, teeth clenching and grinding which could wear away tooth enamel and cause tooth breakage. Dr. Kaufman added that it was unwise that any additional physical or emotional stress be placed upon appellant, which would be the cases, if she were expected to hold a job and at the same time undergo a multifaceted treatment plan as it would be detrimental to the success of the recovery and lengthen the treatment time. He stated that "stabilization of the jaw with permanent crowns must be achieved first if she is to hold a job."

On March 24, 2000 the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. John Esposito, a dentist, for a second opinion examination.[9]

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[5] The record reflects that appellant was also referred to Dr. Mitchell E. Levine, a Board-certified neurosurgeon, for a second opinion in 1983. In an October 4, 1983 report, he determined that there was no objective evidence of cervical radiculopathy. However, appellant's physician, Dr. Feldman, continue to treat appellant for the cervical condition.

[6] Dr. Sarno specified that a monitor should be placed in front of appellant and elevated so that she did not have to look down and to the left side. He added that she had to have a telephone that she could use a headset with and a high back chair which would improve her condition significantly.

[7] Dr. Sarno advised that appellant should have a magnetic resonance imaging (MRI) scan of the brain with contrast, if necessary, with particular attention to the posterior fossa, in order to rule out the possibility or an organic lesion and an electronystagmogram (ENG) to evaluate the vertigo as he was unable to trigger any nystagmus or vertigo with the Dix Hall-Pike maneuver.

[8] Dr. Kaufman stated that permanent crowns were being made to the new jaw position which required preparation of the nerves (endodontics) and gingival tissue which needed to be performed by the endodontist, Dr. Shammal O'Conner and the periodontist, Dr. Fishbein, respectively. He added that appellant's general dentist, Dr. Mascolo, would be the one making the crowns.

[9] Dr. Esposito is a diplomate of the American Board of Oral and Maxillofacial surgery.

In an April 10, 2000 report, he noted that a "myriad of records were browsed through, too voluminous to examine completely," but indicated that he had reviewed the reports of several of appellant's treating physicians. Dr. Esposito diagnosed myofascial syndrome on the right and left side. He indicated that there were unexplainable complaints that were not related, including blacking out, chest pain and menstrual cycle cramps worsening when the TMJ worsened. Dr. Esposito indicated that he did not agree that there was any internal derangement as appellant had inappropriate complaints that were inexplicable and had no foundation for maxillofacial disorders. He indicated that appellant's major problem was a deteriorated dentition, which he opined had nothing to do with her TMJ disorder as it was routine dental care which had been aborted. Dr. Esposito explained that appellant's treatment was appropriate at first; however, treatment had become inappropriate because her temporary crowns were left in the oral cavity. He opined that this could "only cause the loss of the entire dentition." He also determined that appellant's complaints of having an air conditioning duct aimed at her neck while entering information would not cause her temporomandibular joint dysfunction. Dr. Esposito did not believe that appellant had TMJ, as he could not auscultate any clicks or hitches and he did not find any internal derangement. He noted a myriad of inappropriate and unexplainable complaints which had no foundation in maxillofacial disorders.

In an August 22, 2000 report, Dr. Kaufman advised that he was sending appellant for a tomographic study in order to ascertain what position her condyles were in with her existing temporary crowns. He stated that her condyles were far posterior and it would be better for her to have her condyles placed more interiorly when her permanent crowns were replaced. Dr. Kaufman opined that a visual of appellant's existing condyles would help her in the future and her dentist when placing her mandible more interiorly, as they were now too far posterior.

In an August 29, 2000 report, Dr. Bill B. Akpinar, a dentist who has a masters in cranio-mandibular orthopedics and is a fellow in the American Dental Society of Anesthesiology and the Society of American Breath Specialists, performed a tomography and indicated that appellant sustained a dysfunction of the TMJ. In a December 20, 2000 addendum, Dr. Akpinar indicated that appellant's injury was employment related and opined that it was a postural phenomenon. He noted that her TMJ and supporting structures had deteriorated to the point that she would need extensive crown and bridgework just to keep the maxillomandibular relationship intact. Dr. Akpinar stated that, when the bridgework was completed, a new mandibular orthopedic repositioning appliance could be fabricated.

On December 13, 2000 the Office determined that a conflict in medical opinion had arisen on the issue of whether a causal relationship existed between appellant's TMJ condition and the accepted work injury and whether there was continuing disability due to the accepted work injury. The Office referred appellant and a statement of accepted facts to Dr. Barry C. Cooper, a dentist with a masters in craniomandibular orthopedics, to resolve the conflict between Dr. Esposito and Dr. Kaufman.

In a January 4, 2001 report, Dr. Cooper noted appellant's history of injury and medical treatment and indicated that her chief complaints were vertigo with rotation and migraines that occurred once or twice a month.[10] He stated that the diagnosis of a TMJ disorder was not

[10] Regarding the radiographs, he noted that it was too dark to visualize.

supported, but that the diagnosis of temporarily restored dentition was supported with the exception of the three lower anterior teeth. Dr. Cooper indicated that with regard to the mandibular function, appellant was able to assume all of her daily activities. He noted that with regard to her dental function, with the fabrication of durable crowns and bridges, her teeth would be restored durably, esthetically and with normal function. Dr. Cooper opined that appellant had no clinical signs of a TMJ disorder at the time of the examination, opining that appellant could work full time and perform normal daily activities. He noted that the condition of aggravation of TMJ dysfunction had fully resolved with no objective evidence of any residuals. Dr. Cooper also indicated that with respect to appellant's present dental condition, the prolonged use of acrylic crowns and bridges was not good for the teeth or good for the periodontal tissues. He stated that he did not know why the completion of dental restorative treatment had been delayed since 1983 as many restorative dentists had examined appellant, but had not treated her beyond the temporary crowns. He did not have direct knowledge as to why the preauthorized crowns had not been completed in a timely manner. Dr. Cooper opined that appellant did not suffer from disabling residuals of the injury-related aggravation of a TMJ and did not exhibit the presence of any objective signs of TMJ. He concluded that her condition had fully resolved with no residuals, indicating that she was capable of performing normal work on a full-time basis and her dental condition with all old temporary crowns would not prevent her from working.[11]

By letter dated May 17, 2001, the Office notified appellant that it proposed to terminate her compensation benefits. The Office found that the weight of the medical evidence was represented by Dr. Cooper, the impartial medical examiner, who established that no injury-related disability remained due to the employment injury of April 29, 1983.

In a June 5, 2001 report, Dr. Kaufman, explained that the reason appellant's dental work had not been completed was because it was complicated and the dentists had either been unpaid or had retired or lost interest. He opined that because of the myriad of treatments appellant must undergo to build a new bite, she would be unable to perform any work. By letter dated June 16, 2001, appellant's representative provided his reasons as to why her compensation or medical benefits should not be terminated.

In a decision dated January 17, 2002, the Office finalized the termination effective that day.

By letter dated February 2, 2002, appellant requested a review of the written record by an Office hearing representative and submitted a duplicate of Dr. Akpinar's August 29, 2000 tomography report.

[11] He added that he would be pleased to review a complete set of radiographs together with a detailed treatment plan for the completion of appellant's dental treatment. Further he noted that appellant's dentition was in need of durable restoration as soon as possible. Dr. Cooper indicated that following a short period of maxillary mandibular stabilization with a new removable orthosis, her restorative dentistry could be completed within approximately a two-month period and this would return appellant to a state of normal dental activity such that she could resume her occupation.

By decision dated June 5, 2002, the Office hearing representative affirmed the January 17, 2002 decision. The Office hearing representative indicated that appellant was in need of ongoing dental assistance with regard to her temporary crowns and directed the Office[12] to assist construction of her permanent crowns, which had been authorized by the Office.

On August 19, 2002 appellant filed an appeal with the Board.[13]

By order dated March 12, 2003, the Board remanded the case to the Office because the record before the Board did not contain the June 5, 2002 decision.

After proper assemblage of the record, in a decision dated May 29, 2003, the Office reissued the June 5, 2002 decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation with regard to the TJM condition.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[14] 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.[15] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[16] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[17]

The Office accepted that she sustained cervical radiculitis and aggravation of TMJ and paid appropriate benefits. Appellant's physician, Dr. Kaufman reported that appellant had continuing disability due to the accepted TMJ condition, while Dr. Esposito, the referral physician, indicated that appellant did not have TMJ and could return to full duty. Based on this

[12] Regarding appellant's cervical radiculitis, the Office hearing representative noted that Dr. Sarno's opinion would outweigh the opinions of Dr. Feldman, who did not provide objective rationale and Dr. Sowa, a dental specialist.

[13] Docket No. 02-2206 (issued August 19, 2002).

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

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

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

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

conflict in medical opinion as to whether appellant continued to have residuals of her accepted TMJ condition the Office properly referred her to Dr. Cooper for an impartial examination.[18]

Dr. Cooper, in his role as an impartial medical specialist, provided an opinion based on a proper factual and medical background and has supported his opinion with medical rationale. In a January 4, 2001 report, Dr. Cooper noted appellant's history of injury and treatment and explained that the diagnosis of a TMJ was not established, but that the diagnosis of a temporarily restored dentition was supported, with the exception of appellant's three lower anterior teeth. He found that appellant was able to resume all of her daily activities. His physical examination included an extra oral muscle examination which he noted elicited no response or discomfort on palpation of the head and neck muscles. Dr. Cooper indicated that his examination of the temporomandibular joints caused a response described by appellant as mild soreness on palpation during opening and closing, while the head movements were observed to be normal along with a maximum mandibular opening of 42 centimeter, which was normal with no lateral deviations upon opening and closing. He also noted that appellant had normal mandibular movements and opined that she could work full time and perform normal daily activities with regard to her mandibular function. Further, he indicated that appellant had a normal TMJ function and masticatory muscle function with no compromise or limitation. Dr. Cooper concluded that the aggravation of TMJ dysfunction was fully resolved with no objective evidence of any residuals. He noted that with regard to her dental function, when her permanent crowns were fabricated, her teeth would be restored with normal function and he indicated that appellant was capable of performing normal work on a full-time basis and opined that her dental condition with all old temporary crowns would not prevent her from working.

In situations were there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[19] As Dr. Cooper's report was based on a proper factual background and based on objective physical findings in support of his conclusion that appellant was no longer disabled and had no residuals of her accepted employment injury, his report is entitled to the weight of the medical evidence and the Office properly relied on this report in determining that appellant was not disabled regarding her TMJ condition, effective January 17, 2002.

[18] 5 U.S.C. § 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 person shall be appointed to make an examination to resolve the conflict. *Henry P. Eanes,* 43 ECAB 510 (1992).

[19] *Nathan L. Harrell,* 41 ECAB 401, 407 (1990).

The medical evidence, therefore, establishes that appellant's disability causally related to her accepted claim for aggravation of TMJ had ceased and the Office properly terminated her compensation effective January 17, 2002 with regard to her TMJ condition.[20]

However, at the time of the January 17, 2002 decision, the Office did not obtain medical evidence regarding appellant's accepted cervical radiculopathy. The Office based its decision to terminate benefits for the accepted TMJ condition on current reports. The only medical reports addressing the accepted cervical radiculopathy are over five years old. The record contains the March 6, 1997 report of Dr. Sarno, who indicated that appellant had no objective findings to substantiate her subjective complaints. However, his report advised that appellant should have additional diagnostic tests. The Office did not develop the claim further on the cervical aspect of the claim.

In *James H. Whitton*,[21] the Board found that the Office improperly terminated the employee's compensation benefits based on medical evidence that was 12 years old. The medical reports in this case do not provide a sufficient basis for the Office to terminate appellant's compensation regarding her cervical radiculopathy. The report that the Office relied upon regarding the cervical radiculopathy condition, was dated March 6, 1997. The impartial medical examiner examined appellant on January 4, 2001, however, he did not address her cervical radiculopathy which was another accepted condition. His report was, therefore, insufficient to establish that appellant no longer had employment-related residuals of the accepted condition of cervical radiculitis. The Office accepted appellant's claim for cervical radiculitis and the Board finds there is no current medical evidence of record which would establish that this condition has resolved. Therefore, the Office improperly terminated appellant's compensation benefits effective January 17, 2002 with regard to the accepted cervical radiculopathy.

[20] Further, the Board notes that the Office hearing representative repeated that the crowns were approved and urged the Office to assist appellant with the process.

[21] Docket No. 97-1131 (issued February 2, 1999).

The May 29, 2003 decision of the Office of Workers' Compensation Programs is hereby affirmed with regard to the TMJ condition and reversed regarding the cervical radiculopathy condition.

Dated, Washington, DC
April 14, 2004

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member