

**United States Department of Labor
Employees' Compensation Appeals Board**

CYNTHIA P. FITZGERALD, Appellant)

and)

GOVERNMENT PRINTING OFFICE,)
Washington, DC, Employer)

**Docket No. 03-247
Issued: August 30, 2004**

Appearances:
Scott Baron, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On November 4, 2002 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 16, 2002 denying modification of an August 14, 2000 decision which terminated her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits as of July 24, 2000; and (2) whether appellant has established continuing disability after July 24, 2000.

FACTUAL HISTORY

On December 29, 1998 appellant, then a 50-year-old bindery worker, filed a notice of traumatic injury alleging that she sustained injury that day when she sat on a broken chair and fell. She experienced pain to the right side of her neck, back, arm and leg. Appellant stopped

work on that day. On December 30, 1998 Dr. Steven Hughes, Board-certified in orthopedic surgery, diagnosed cervical, lumbar, right elbow and leg strains and opined that appellant was totally disabled. In a March 11, 1999 letter, the Office accepted the claim for cervical and lumbar strains.

In an April 6, 1999 report, Dr. Rider Azer, Board certified in orthopedic surgery, stated that appellant presented with tenderness over C2-3, C3-4 with limitation of motion and pain and muscle spasm on movement. He noted that the lumbar spine showed tenderness between L4 and S1 and there were limitations of motion and pain and muscle spasms. Dr. Azer opined that appellant needed an anterior fusion at C2-3. On April 16, 1999 appellant requested authorization for the procedure.

The Office referred appellant for a second opinion evaluation. In a June 25, 1999 report, Dr. Arthur Kobrine, an Office referral physician, Board-certified in neurological surgery, stated that appellant presented with complaints of constant and severe pain in her neck and in her back. He noted that a magnetic resonance imaging (MRI) scan of appellant's cervical area was normal with some degenerative changes in the lateral mass at C2-3 on the right that appeared to have fused naturally. Dr. Kobrine added that x-rays were normal. On examination, he noted that appellant complained of pain when turning her head. Dr. Kobrine noted that there was no paraspinal muscle spasm in appellant's neck and her upper extremities were normal in terms of strength, tone, reflex and sensory. He added that examination of the lower back revealed tenderness to palpation of the paraspinal muscles, but no evidence of spasm and tests were normal regarding strength, tone, reflex and sensory. Dr. Kobrine found no evidence of any neurological abnormalities and no objective evidence of any disability related to the accident. He stated that there was no evidence supporting a surgical fusion as the lateral mass appeared to be already fused due to degenerative arthritis. He did not believe that the recommended surgery would improve appellant's pain symptoms.

On July 7, 1999 Dr. Hughes stated that appellant's back condition had not changed but she was severely depressed and he recommended she see a psychiatrist. In a September 8, 1999 report, Dr. Hughes stated that appellant was very depressed regarding the Office's refusal to authorize surgery and the lack of progress with her condition. He diagnosed C2-3 arthrosis and recommended a functional capacity evaluation.

The Office found a conflict in medical opinion between Dr. Azer and Dr. Kobrine.

In an October 5, 1999 letter, the Office referred appellant for an impartial medical examination to resolve the conflict regarding whether appellant had any continuing work-related disability. In a November 9, 1999 report, Dr. Stanley Rothchild, Board-certified in orthopedic surgery and referee examiner, stated that appellant refused to allow him to move her cervical spine during the physical examination and that he could only get her to laterally rotate to about 10 degrees due to voluntary cessation of motion. He could not find any spinous process or interspinous ligament tenderness and no trapezial tightness or tenderness. Dr. Rothchild added that the neurological evaluation of the upper extremities to be symmetrical with sensation in tact. Muscle testing revealed no deficits but he observed marked limitation of motion of the cervical spine and noted that appellant would not flex or extend the neck. He noted no spinous process or

interspinous ligament tenderness or sciatic notch or tenderness. Dr. Rothchild stated that straight leg raising was to 85 degrees and negative bilaterally with negative Bragard, Patrick and Milgram tests. He concluded that, although appellant was not cooperative, he could find no evidence of any neurological compromise of her extremities and stated that her degenerative changes were not related to the accepted injury. Dr. Rothchild concluded that no surgical procedure should be performed.

On December 3, 1999 the Office proposed suspending appellant's benefits for refusing to participate or obstruction of a medical examination and requested additional information regarding her emotional condition and its relationship to her work injury.

On December 26, 1999 appellant responded to the Office by stating that she had no history of a prior emotional condition, even after losing her father and brother in 1997. She noted that her work injury caused severe pain and resulted in major lifestyle changes, she began to feel sadness and a sense of despair because she could no longer pursue her hobbies of dancing and painting. She submitted a December 21, 1999 letter from Dr. Ghislaine Fougy, a psychiatrist, who stated that appellant presented severely depressed with symptoms of insomnia, crying spells and increased smoking and loss of appetite. She stated that appellant's depression was clearly related to her work injury.

In a January 3, 2000 report, Dr. Steven Scherping stated that appellant presented with complaints of neck and back pain on the right side, but with no numbness in the arms or legs. On examination he noted moderate distress, that she walked with a guarded gait and had very minimal flexion through the cervical spine. Dr. Scherping also noted tenderness to palpation more in the cervical and lumbar spine with moderate tenderness in the paraspinal muscles at the lumbar level. He diagnosed severe neck and back pain with a degenerative facet at C2-3 on the right greater than the left. Dr. Scherping also opined that surgery would reduce appellant's symptoms.

In a June 5, 2000 report, Dr. Fougy stated that she continued to treat appellant for depression and anxiety related to her work injury, noting that she became increasingly depressed after falling from a broken chair and injuring three vertebrae. A June 13, 2000 emergency room report noted that appellant was admitted to the hospital for depression and suicidal ideation. In a June 13, 2000 report, Dr. Hughes stated that he reviewed appellant's job duties and found appellant totally disabled due to neck pain resulting from her work injury. He did not believe appellant would be able to return to her job and believed accommodations would not significantly improve her condition while performing the critical duties of her job.

In a July 11, 2000 letter, the Office proposed terminating appellant's compensation benefits based on the reports of Dr. Rothchild. The Office withdrew the proposed suspension of benefits due for alleged obstruction or failure to participate in a medical evaluation.

In a July 20, 2000 report, Dr. Fougy stated:

[Appellant's] first psychiatric consultation in her life has been regarding feelings of hopelessness and despair resulting from this injury sustained at work. She has

been in treatment for neck and back pain resulting from the same injury and being treated Dr. Hughes. [Appellant's] despair became worse when in the face of increasing problems with proper communications with different agencies ... leading to suicide ideations and emergency admissions to psychiatric unit.... [Appellant's] physical pain and subsequent depression started after her injury on the job.... The opinion that there is no reason for "surgical intervention" does not negate the presence of an injury which causes pain and needs to be treated conservatively. In my opinion [appellant] has suffered a serious injury which needs treatment as the orthopedist has recommended. Severe depression and suicidal and paranoid ideations have ensued requiring an almost two week hospitalization with multiple medications. She is in dire need of continuous treatment for her physical and emotional symptoms until she shows substantial improvements.

Appellant returned to work light duty for four hours a day on July 24, 2000 but stopped shortly thereafter due to pain. In August 3, 2000 form report, Dr. Hughes indicated that appellant was totally disabled.

In an August 14, 2000 decision, the Office terminated compensation, finding the medical evidence established that appellant's accepted medical conditions resolved without disability.

On December 14, 2000 appellant requested reconsideration and submitted a September 7, 2000 treatment note from Dr. Hughes, who stated that appellant could not perform overhead activities or flex her neck. He described her condition as static and repeated that she was totally disabled due to severe cervical facet disease.¹ In a May 8, 2001 report, Dr. Hughes repeated his opinion that appellant's cervical facet disease was causally related to her December 29, 1998 work injury. In an October 17, 2001 report, Dr. William E. Gentry, an orthopedics surgeon, stated that appellant presented with complaints of pain in her back and down her whole right side and constant headaches. He noted that x-rays of her right shoulder were normal. X-rays of her cervical spine showed considerable straightening of the cervical spine with curvature on the lateral view and x-rays of the lumbosacral spine showed a transitional lumbosacral vertebra with pseudoarthritis, rather prominent, of both transverse processes of L5. He noted that x-rays also indicated a transitional lumbosacral vertebrae with bilateral pseudoarthrosis of L5-S1 articulation of the transverse process of sacrum. Dr. Gentry diagnosed cervical facet arthropathy, C2-3 bilaterally, worse on the right side.

In an October 16, 2002 decision, the Office denied modification of the August 14, 2000 termination decision and found the medical evidence insufficient to support continuing disability. Regarding appellant's emotional condition, the Office noted that it had not accepted this condition as related to the December 29, 1998 injury.

¹ The record contains several reports and decisions related to a different claim.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,² once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

In situations where there exist 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 upon a proper factual background, must be given special weight.⁶

ANALYSIS -- ISSUE 1

The Office properly determined that there was a conflict in the medical opinion between Dr. Hughes, appellant's attending Board-certified orthopedic surgeon and Dr. Kobriner, a Board-certified neurological surgeon, acting as an Office referral physician, regarding whether appellant continued to have residuals of the December 29, 1998 employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Rothchild, for an impartial medical examination and an opinion on the matter.⁷

Dr. Rothchild provided a report in which he noted that he could not find any spinous process or interspinous ligament tenderness and no trapezial tightness or tenderness. He stated that the neurological evaluation of the upper extremities was symmetrical with sensation intact. Muscle testing revealed no deficits, no spinous process or interspinous ligament tenderness or sciatic notch or tenderness. Dr. Rothchild stated that straight leg raising was to 85 degrees and negative bilaterally with negative Bragard, Patrick and Milgram test. He concluded that, although he could not perform a thorough evaluation because appellant was voluntarily restricting her ability to move her cervical and lumbar spine, there was no evidence of any neurological compromise of her extremities and that her degenerative changes were not related to the accepted injury.

² 5 U.S.C. § 8101 *et seq.*

³ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁴ *Id.*

⁵ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

⁷ Section 8123(a) of the Act provides in pertinent part: "If 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).

The Board has carefully reviewed the opinion of Dr. Rothchild and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, Dr. Rothchild provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's condition which comported with this analysis.⁸

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Rothchild, the impartial medical specialist selected to resolve the conflict in the medical opinion. The report of Dr. Rothchild establishes that appellant had no disability due to her employment injury.

Appellant thereafter submitted a January 3, 1999 report from Dr. Scherping. While Scherping diagnosed degenerative facet at C2-3, he did not offer a rationalized medical opinion explaining how this condition was causally related to the accepted employment injury. Furthermore, Dr. Scherping offered no medical explanation of how this condition disabled appellant. As such his report is of limited probative value and insufficient to outweigh the report of the impartial medical examination.

LEGAL PRECEDENT -- ISSUE 2

After termination of benefits clearly warranted on the basis of the evidence, the burden for reinstating benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability that continued after termination of compensation benefits.⁹

ANALYSIS -- ISSUE 2

In support of her claim for continuing disability appellant submitted an October 17, 2001 report Dr. Gentry who noted that x-rays of her right shoulder were normal while those of her spine included significant amounts pseudoarthritis, rather prominent. He diagnosed cervical facet arthropathy, C2-3 bilaterally, worse on the right side. Dr. Gentry's report is insufficient to establish continuing disability because he never discussed whether appellant was disabled; nor address the causal relationship of his diagnosis in light of appellant's preexisting conditions and the work injury. Because Dr. Gentry did not provide a rationalized medical opinion based upon a complete medical history explaining why his diagnosis of cervical facet arthropathy C2-3 was caused by the employment injury and how it disabled appellant, his report is of limited probative value.

Dr. Hughes' reports are also insufficient to establish continuing employment-related disability. In a September 7, 2000 report, he stated that appellant could not do overhead

⁸ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

⁹ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

activities or flex her neck, that her condition was static and she was totally disabled due to severe cervical facet disease.¹⁰ In a May 8, 2001 report, Dr. Hughes repeated his opinion that appellant's cervical facet disease was causally related to her December 29, 1998 work injury.

The Board notes that, in terminating appellant's compensation, the Office relied on the reports of Dr. Rothchild, the Board-certified orthopedist, selected as the impartial medical examiner. Dr. Rothchild was selected to resolve the conflict in medical opinion between Dr. Hughes and Dr. Kобрine. For this reason, the reports of Dr. Hughes, which were essentially repetitive of his prior reports, are insufficient to outweigh the special weight given the report of Dr. Rothchild as Dr. Hughes had participated in the creation of the medical conflict which was referred to Dr. Rothchild to resolve.¹¹

Regarding appellant's emotional condition, the Board notes that appellant bears the burden of proof to establish this condition is causally related to her accepted work injury. The record contains medical evidence suggesting appellant's depression is a consequential injury of the accepted back strains, but the medical evidence lacks sufficient rationale to establish this allegation. Dr. Fougy stated that appellant's depression was a result of her back injury but did not provide a rationalized medical opinion on causal relationship to support her stated conclusion. Moreover, in a July 20, 2000 report, Dr. Fougy stated that appellant's condition was a result of her miscommunication with various agencies. The Board notes that the development of any condition related to such matters would not arise in the performance of duty as the processing of compensation claims bears no relation to appellant's day-to-day or specially assigned duties.¹² Based on this evidence, the Board finds that appellant has not met her burden of proof.

CONCLUSION

The Office met its burden of proof to terminate appellant's compensation. Appellant did not meet her burden to establish that her continuing disability is employment related or that she sustained an emotional condition as a result of the accepted condition.

¹⁰ The record at this point contains a number of reports and decisions related to a different claim related to a wrist injury. The Office claim number for the case at issue in this appeal is A25 535 663.

¹¹ See *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹² See *George A. Ross*, 43 ECAB 346, 353 (1991); *Virgil M. Hilton*, 37 ECAB 806, 811 (1986).

ORDER

IT IS HEREBY ORDERED THAT the August 14, 2000 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 30, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member