United States Department of Labor
Employees' Compensation Appeals Board

LESLIE S. CAPLAN, Appellant	)	
and	)	**Docket No. 04-892**
	)	**Issued: December 29, 2004**
FEDERAL JUDICIARY, U.S. DISTRICT COURT, San Francisco, CA, Employer	)	

Appearances:
Leslie S. Caplan, Esq., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On February 17, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated November 13, 2003 wherein the hearing representative affirmed the Office's decision dated September 20, 2002 terminating appellant's wage-loss and medical compensation benefits effective that date. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective September 20, 2002; and (2) whether appellant has established that she had any continuing disability after September 20, 2002.

FACTUAL HISTORY

On July 30, 1991 appellant, then a 29-year-old law clerk/attorney, filed an occupational disease claim alleging that she sustained pain and numbness in her wrists and fingers and pain in her lower arm as a result of typing all day at the computer. By letter dated February 10, 1993,

the Office accepted appellant's claim for left carpal tunnel syndrome and bilateral shoulder strains. Appropriate treatment and compensation payments were authorized.[1]

In a medical report dated May 16, 2001, Dr. Tracy Newkirk, appellant's treating Board-certified neurologist, indicated that appellant continued to make progress and was benefiting from acupuncture and physical therapy. He noted, "The functioning diagnosis is this patient is undoubtedly a post-traumatic thoracic outlet syndrome, causing focal acquired limb dystonia in the upper arms. He hoped that appellant would reach a permanent and stationary status with no residuals. In a form completed for California on May 24, 2001, Dr. Newkirk indicated that appellant was showing remarkable improvement and could increase activity, but that she was to remain off work.

By letter dated August 16, 2001, the Office referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion. The Office asked Dr. Swartz to provide a second opinion with regard to diagnoses, recommendations for treatment and work limitations for rehabilitation purposes. In a report dated September 25, 2001, Dr. Swartz noted that appellant continued to have chronic repetitive strain syndrome which included carpal tunnel syndrome of both hands, in addition to chronic recurrent myofascial strain of the cervical spine and tendinitis of both shoulders. He noted that these problems "appear to be medically-connected to her employment with the [employing establishment]." Dr. Swartz noted that there was no evidence of thoracic outlet syndrome, no evidence of periscapular weakness and no evidence of dystonia. He noted that there did not appear to be any nonindustrial or preexisting disabilities. Dr. Swartz indicated that appellant reached maximum medical improvement on July 20, 1999 and that she required no further physical therapy, biofeedback or acupuncture. He opined that appellant has "received an excessive amount of treatment and no further treatment would be considered helpful or beneficial to [appellant] other than providing palliative, transient and temporary relief of symptoms." In a work capacity evaluation dated September 28, 2001, Dr. Schwartz indicated that appellant could work an eight-hour day with restricted hours on reaching, repetitive movements, pushing, pulling, lifting, squatting, kneeling and climbing.

Dr. Newkirk continued to keep appellant off work. By letter dated October 5, 2001, the Office forwarded a copy of Dr. Swartz's report to Dr. Newkirk for comments. Dr. Newkirk responded in a letter of the same date that appellant continued to make progress as her dystonia was reducing and that there was evidence that her thoracic outlet syndrome is diminishing. He indicated that, although appellant was not yet permanent and stationary, he believed that appellant would be permanent and stationary by "early next year." Dr. Newkirk noted that, contrary to Dr. Swartz's report, there was no such diagnosis as chronic repetitive strain syndrome and that the carpal tunnel symptoms were in fact due to a thoracic outlet syndrome and that appellant had a very clear case of dystonia.

By letter dated October 30, 2001, the Office found that a conflict in medical evidence existed and referred appellant to Dr. Burton L. Wise, a Board-certified neurosurgeon, for a referee examination. The Office noted that a conflict existed between Dr. Newkirk, appellant's

[1] Appellant worked as an attorney/law clerk for the employing establishment from April 8 to August 31, 1991. Appellant was in private employment from September 1, 1991 to February 28, 1992 and July 1 to August 1, 1992. Appellant retuned to full-time work on May 1, 1997, but again stopped work on June 5, 1998.

treating neurologist, and Dr. Swartz, the second opinion orthopedist, with regard to diagnosis, whether appellant was permanent and stationary and recommendations for future care. Dr. Wise examined appellant on November 28, 2001 and reviewed appellant's medical records, including the reports of Drs. Newkirk and Schwartz. In his medical report dated November 29, 2001, he diagnosed appellant with fibromyalgia, which he indicated covered widespread complaints of pain and tenderness without apparent underlying cause. Dr. Wise stated that appellant did not have thoracic outlet syndrome as her symptoms were much too widespread to be explained by this diagnosis and her radial pulses were not obliterated by either cervical rotation or arm abduction. He further noted that, in spite of the "accepted facts," appellant did not ever have carpal tunnel syndrome as she had normal electromyograms, nerve conduction studies and neurological examinations. Dr. Wise stated that the fact that appellant's small activities at home tend to aggravate her symptoms indicates that if she returned to work her symptoms would increase and she would not be able to continue working, but that this could only be determined by attempting some return to work at some time. He concluded that in his experience a person who has been off work for about 10 years due to various conditions was unlikely to return to gainful employment.

By medical report dated January 14, 2002, Dr. Newkirk stated that Dr. Wise "apparently missed some highly important physical findings, which are easily observed." For example, Dr. Newkirk indicated that both Dr. Wise and Dr. Schwartz did not choose to discuss the edema that appellant had at her clavicles, and that this was a cardinal finding that indicated clearly the mechanism of appellant's neurologic symptoms. He also indicated that the physicians should consider the motions of the clavicle and scapula that occur as a patient raises his or her hand which raises the clavicle outward. Dr. Newkirk also noted that all examiners ignored that appellant had visible and palpable dystomia. He continued:

> "Syndromes of neurovascular compression that involved ischemia, through primarily venous and lymphatic compression mechanisms thereby leading to the edema, always have normal neurological exam[ination] and absolutely negative neurodiagnostic studies. It would be a great deal more helpful if the physicians involved would actually look at all the physical findings that are present, and then devote some time to careful consideration of the reasons that such findings are still present. Ignoring the findings does not represent a legitimate or comprehensive examination, and therefore does not serve as a satisfactory basis for denying this patient benefits, or ignoring her obvious diagnosis."

He strongly suggested that appellant have appropriate magnetic resonance imaging/magnetic resonance angiography (MRI/MRA) studies which could indisputably show thoracic outlet syndrome or superior thoracic aperture neurovascular compression. He did agree with Dr. Wise that there was no tenable diagnosis of carpal tunnel syndrome.

On April 4, 2002 the Office referred appellant to Dr. Arthur E. Lyons, a Board-certified neurosurgeon, to resolve a conflict in the evidence. The Office indicated that Drs. Newkirk, Swartz and Wise disagree about the diagnoses, whether there are objective findings, the nature and extent of disability for work and the need for future care. The Office asked Dr. Lyons to resolve questions regarding diagnosis, whether appellant's condition was medically connected to her work factors, if appellant were capable of performing the duties of a law clerk, whether

maximum medical improvement had been reached and what the prognosis was. In a report dated May 13, 2002, Dr. Lyons diagnosed fibromyalgia and concluded that appellant was not disabled from the effects of her work activities. In fact, Dr. Lyons indicated that fibromyalgia is not the result of any type of physical activity. He noted that appellant did not have thoracic outlet syndrome, carpal tunnel syndrome, cervical sprain, brachial plexus lesions or idiopathic dystonia. He noted that appellant had completely recovered from the effects of any work activities of 1991 and that her present symptoms were unrelated to any work activities. He stated:

> "In the face of a normal examination, any type of imaging studies suggested to confirm narrowing of the thoracic outlet in the upper chest are gratuitous and cannot be recommended in the face of clinical findings which fail to suggest the existence of thoracic outlet syndrome, which is a vascular and/or neurological abnormality in the upper extremity due to neurovascular compression at the thoracic outlet. Simple narrowing of the thoracic outlet is a normal variant, and as such, cannot be made the basis of a thoracic outlet syndrome."

On June 15, 2002 the Office sent a notice to appellant in which it proposed to terminate her benefits.

On May 21, 2002 Dr. James D. Collins, a Board-certified radiologist, performed a bilateral MRI/MRA of the brachial plexus, which he interpreted as showing: (1) thin narrow thorax; (2) bilateral round shoulders, right greater than left; (3) right scalene triangle fibrosis; (4) bilateral costoclavicular compression of the draining veins within the neck, supraclavicular fossae with gray signal intensity lymphatics and mild compression of the neurovascular bundles, right greater than left; and (5) bilateral abduction external rotation of the upper extremities triggered complaints, right greater than left, which included back, hip and groin pain, headache, and lower extremity complaints.

In a medical report dated June 21, 2002, Dr. Newkirk stated:

> "[Appellant] has now had an MRI/MRA study at UCLA. This study proves incontrovertibly that [appellant] has moderately severe-to-severe bony compression of the neurovascular bundles at the thoracic apex, which is a condition created by prolonged typing in an individual who has a very narrow A-P [anterior-posterior] diameter at the manubrium."

Dr. Newkirk responded to Dr. Lyons' report, in a letter dated July 12, 2002, and indicated that he was in disagreement with Dr. Lyons' conclusion that appellant had fibromyalgia. He noted that Dr. Lyons did not have access to the MRI/MRA studies, which proved that appellant had an anatomically inescapable diagnosis, *i.e.*, bilateral costocalvicular compression of the brachial plexus, made worse by the fact that she has right scale triangle fibrosis, that is of such severity that appellant will likely require bilateral either transaxillary or supraclaviclar total first rib resection. He concluded that, absent surgery, appellant will remain disabled permanently from any work on a computer or at desk level or at above shoulder level.

In a report dated August 8, 2002, Dr. Lyons reviewed Dr. Newkirk's response and reiterated that his examination failed to reveal any evidence of thoracic outlet syndrome. He also noted that Dr. Newkirk failed to link appellant's present complaints to her work injury of 1991 or suggest that diagnostic studies would have any effect on appellant's complaints.

By decision dated September 20, 2002, the Office terminated appellant's wage-loss compensation and medical benefits effective the date of the decision. The Office noted that the weight of the medical opinion was with Dr. Lyons, a Board certified-neurologist, who agreed with Dr. Wise, also a Board-certified neurologist. The Office noted that the lack of objective findings supported the rationale for failing to confirm the diagnoses given by Dr. Newkirk.

By letter dated October 18, 2002, appellant requested an oral hearing which was held on July 28, 2003. At that time appellant submitted, *inter alia*, information from a website on fibromyalgia, and a copy of Dr. Newkirk's brochure on thoracic outlet problems.

After the hearing, appellant submitted a medical report by Dr. G. James Avery, II, a Board-certified thoracic surgeon, dated August 18, 2003, who noted that when he examined appellant her left side was worse. He noted that she had left-sided neck, shoulder and back pain, weakness and numbness, that her right neck was tight and that her pectoral muscles were tight bilaterally. Dr. Avery also noted that appellant gets tingling in her neck and upper chest. He found that appellant had definite thoracic outlet syndrome bilaterally, caused by her job-related injury in 1991, with her left side currently worse than her right. Dr. Avery recommended that appellant undergo a complete removal of the first rib plus removal of both anterior and middle scaleno muscles.

By decision dated November 13, 2003, the hearing representative affirmed the September 20, 2002 decision terminating benefits. Furthermore, he found that the additional medical evidence received subsequent to Dr. Lyons' reports were not sufficient to either shift the weight of the medical evidence or to warrant further development of the claim by the Office.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.[4] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[5] To terminate authorization for medical treatment, the

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

[3] *David W. Pickett*, 54 ECAB ___ (Docket No. 01-1950, issued, December 26, 2002).

[4] *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *Bettye F. Wade*, 37 ECAB 556, 565 (1986); *see also James L. Hearn*, 29 ECAB 278 (1978).

[5] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

Office must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.[6]

Where there exists a conflict in medical opinion 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 is entitled to special weight.[7]

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for left carpal tunnel syndrome and bilateral shoulder strains. Dr. Newkirk, appellant's treating physician, opined that appellant was unable to work due to thoracic outlet syndrome. The second opinion physician, Dr. Swartz, opined that appellant did not have thoracic outlet syndrome and that there was no evidence of dystonia. He did indicate that appellant had chronic repetitive strain syndrome which included carpal tunnel syndrome of both hands in addition to chronic recurrent myofascial strain of the cervical spine and tendinitis in both shoulders that was medically connected to her employment. Dr. Swartz opined that appellant reached maximum medical improvement with regard to these injuries on July 20, 1999 and required no further treatment. Accordingly, there was a disagreement between these two physicians with regard to whether appellant had reached maximum medical improvement and as to whether appellant had thoracic outlet syndrome.

The Board finds that the case was properly referred to Dr. Wise for an impartial medical examination pursuant to 5 U.S.C. § 8123(a). Dr. Wise agreed with Dr. Swartz with regard to the fact that appellant did not have thoracic outlet syndrome, unlike Dr. Newkirk. Dr. Wise also indicated that appellant never had carpal tunnel syndrome, which Dr. Schwartz believed and the Office had accepted. Instead, he diagnosed appellant as having fibromyalgia, which he determined would explain her widespread complaints of pain and tenderness without underlying cause. Accordingly, at this point, the record included three different diagnoses: thoracic outlet syndrome (Dr. Newkirk), carpal tunnel syndrome (Dr. Schwartz) and fibromyalgia (Dr. Wise).

With regard to whether appellant still had any disability resulting from her employment, Dr. Newkirk opined that she did, whereas Dr. Schwartz opined that appellant reached maximum medical improvement on July 20, 1999, that no further treatment would be beneficial and that she could return to an eight-hour workday with restrictions. The impartial medical examiner, Dr. Wise, stated that appellant was not permanent and stationary. He never clearly stated that appellant's disability had ceased or was no longer related to employment, in fact, he noted ongoing symptoms and that these symptoms were presumably related to her federal employment. Accordingly, the Board finds that Dr. Wise's opinion is not sufficient to terminate either medical or disability benefits. If the Office wanted a clear opinion as to whether appellant remained disabled as a result of her work-related injuries, it should have asked Dr. Wise to clarify his opinion. However, instead the Office referred appellant to another impartial medical examiner, Dr. Lyons. The Board finds that it was improper for the Office to request clarification of

[6] *Id.*

[7] *Leanne E. Maynard*, 43 ECAB 482 (1992).

Dr. Wise's report from the new impartial medical examiner, Dr. Lyons, without first requesting a clarification from Dr. Wise.

In a situation where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such a specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. Unless the above-mentioned procedure is carried out by the Office, the intent of section 8123(a)[8] of the Act will be circumvented when the impartial specialist's medical report is not sufficient to resolve the conflict in the medical evidence.[9]

Accordingly, as Dr. Wise's opinion was not sufficient, without giving him the opportunity for clarification, to establish that appellant's work-related condition had ceased, it could not be used as a well-rationalized medical opinion sufficient to terminate appellant's benefits. Dr. Lyons' opinion was improperly obtained and can be given no weight. This interpretation is consistent with the case of *Carlton L. Owens* in which the Board found that medical reports improperly obtained by the Office would not be given weight by the Board.[10] Accordingly, the Board finds that the Office improperly considered Dr. Lyons' opinion in terminating appellant's benefits.

In light of the disposition of this issue, the second issue is moot.

CONCLUSION

The Office improperly terminated appellant's entitlement to wage-loss and medical compensation benefits.

[8] 5 U.S.C. § 8123(a).

[9] *Queenie Anderson*, 37 ECAB 661 (1986).

[10] *Carlton L. Owens*, 36 ECAB 608, 616 (1982); *see also Terrance R. Stath*, 45 ECAB 412 (1994); Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6b (September 1995).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 17, 2004 is reversed.

Issued: December 29, 2004
Washington, DC

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member