United States Department of Labor
Employees' Compensation Appeals Board

ROSE OWENS, Appellant	)	
and	)	**Docket No. 03-2122**
	)	**Issued: January 9, 2004**
DEPARTMENT OF THE ARMY, DISTRICT ENGINEER, Los Angeles, CA, Employer	)	

Appearances:
Rose Owens, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 22, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs merit decision dated June 20, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office properly terminated appellant's entitlement to compensation benefits effective August 23, 1992. On appeal appellant alleges that the Office erred in finding that the weight of the medical evidence rested with the opinion of Dr. Blair C. Filler, a Board-certified orthopedic surgeon, the impartial medical examiner, as he has been closely associated with another physician involved in the claim and, therefore, was not impartial.

FACTUAL HISTORY

This is the second appeal in this case.[1] On the first appeal the Board affirmed the Office's September 27, 1997 decision, by which the Office found that appellant's August 26,

[1] Docket No. 97-713 (issued January 21, 1999).

1996 request for reconsideration was untimely filed and failed to present clear evidence that the Office erred in terminating appellant's compensation benefits effective January 13, 1994.[2] The law and the facts as set forth in the previous Board decision and order, are incorporated herein by reference.

By letter dated April 13, 2000, appellant again requested reconsideration before the Office, asserting that her accepted psychiatric condition rendered her incompetent to meet the Office's deadline for filing a timely request for reconsideration and that the Office should reopen her claim for further merit review. In a decision dated May 4, 2000, the Office found that the medical evidence of record did not establish that appellant was mentally incompetent and that, therefore, her request was untimely filed and failed to present clear evidence of error.

By letter dated January 30, 2001, appellant again requested reconsideration before the Office. In reviewing appellant's request, the Office determined that, while the Office's more recent decisions were sound, there was clear evidence of error in the Office's January 13, 1994 decision. The Office noted that it had mistakenly declared a conflict in medical opinion between Dr. Santi Rao, a Board-certified orthopedic surgeon[3] and Dr. Isaac Schmidt, an orthopedic surgeon,[4] two attending physicians and then referred the case to Dr. Duncan,[5] an impartial medical specialist, upon whom they relied in terminating appellant's compensation benefits. The Office noted that, as Dr. Duncan could not be characterized as an impartial medical specialist, his

[2] Appellant filed a claim for traumatic injury alleging that on July 15, 1982 she injured herself when she slipped on a ladder in the course of her federal employment duties. The Office accepted appellant's claim for lower back and cervical strains and subsequently accepted that, as a result of the employment incident, appellant suffered a psychogenic overlay secondary to her spinal injury. Appellant did not return to duty but resigned due to her disability in 1983. In a decision dated August 14, 1992, the Office terminated appellant's entitlement to monetary compensation and medical benefits on the grounds that the medical evidence of record, represented by the reports of appellant's treating physician, established that appellant no longer had any continuing disability as a result of her July 1982 employment injury. In a decision dated January 8, 1993, the Office denied appellant's request for reconsideration of the Office's August 14, 1992 decision on the grounds that the evidence submitted in support of her request was irrelevant and immaterial regarding the issue of continuing disability. Appellant again requested reconsideration and submitted additional evidence in support of her claim. In a merit decision dated January 13, 1994, the Office reissued the Office's August 13, 1992 decision. The Office found that the weight of the medical evidence was represented by the opinion of Dr. Jan W. Duncan, an impartial medical specialist, in Board-certified orthopedic surgery.

[3] In a report dated November 8, 1991, Dr. Rao, a Board-certified orthopedic surgeon, opined that appellant had no objective factors of disability resulting from her accepted neck or back sprains and that any disability she did have was causally related to her nonemployment-related wrist condition.

[4] In continuing reports, including those dated February 2, April 29 and June 23, 1993, Dr. Schmidt, an orthopedic surgeon, opined that appellant remained totally disabled due to residuals of her accepted cervical and lumbar sprains.

[5] In a report dated September 1, 1993, Dr. Duncan, a Board-certified orthopedic surgeon, stated that the results of his physical examination were normal and that appellant had no significant objective findings of her accepted cervical or lumbar sprains, which would indicate disability.

report had to be viewed as a second opinion report,[6] which entailed a new weighing of the evidence consisting of further merit review.[7] The Office noted that to designate Dr. Duncan as a second opinion physician, find a conflict between Dr. Duncan and Dr. Schmidt and refer the case to a new impartial medical specialist for resolution of the conflict, would effectively deny appellant her right to have a physician of her choice present at the second opinion examination. Therefore, the Office found appellant entitled to a new second opinion evaluation in order to preserve her statutory rights.

By separate letters dated July 11, 2001, the Office referred appellant together with the case record, a list of questions to be resolved and a statement of accepted facts to Dr. Jay Jurkowitz, a Board-certified neurologist, Dr. Bunsri Thanasophon, a Board-certified orthopedic surgeon and Dr. Barry Edelman, a Board-certified psychiatrist, for second opinion evaluations.

In an August 13, 2001 medical report, Dr. Jurkowitz provided a history of appellant's employment and medical conditions, reviewed the relevant medical evidence of record and provided his findings on physical examination. He diagnosed lumbosacral radiculopathy, probably stemming from L5 on the right and possible peripheral neuropathy. Dr. Jurkowitz emphasized that there was no relationship between appellant's employment injury and her proximal peripheral neuropathy. With respect to the L5 radiculopathy, he stated that, although unsupported by the magnetic resonance imaging scan and nerve conduction studies, the L5 radiculopathy finding did correlate with the electromyography of the lower extremities, which showed some denervation in the right extensor digitorum brevis and lumbosacral paraspinous muscles. Dr. Jurkowitz did not clearly explain whether he felt appellant's L5 radiculopathy was causally related to her July 15, 1982 employment injury, or address whether appellant had any disability resulting from her diagnosed conditions.

In a July 29, 2001 medical report, Dr. Thanasophon provided a history of appellant's employment and medical conditions, reviewed the relevant medical evidence of record and provided his own findings on physical examination. Dr. Thanasophon diagnosed cervical spine strain and lumbar spine strain, with minimal degenerative arthritis of the lumbosacral spine. The physician stated that appellant had not fully recovered from her July 15, 1982 injury and that the diagnosed conditions were supported by the objective findings of restriction of motion of the cervical and lumbar spine on physical examination. Dr. Thanasophon concluded that appellant was not capable of returning to her date-of-injury job, which required lifting up to 25 pounds, but was able to work full time with certain physical restrictions. In an October 29, 2001 supplemental report provided at the Office's request, Dr. Thanasophon stated that approximately 50 percent of appellant's loss of range of motion was due to her work injury.

[6] *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996). Appellant correctly argued that an Office referral physician, originally designated as an impartial specialist, was not an impartial medical specialist as no medical conflict existed at the time of the referral. The Board held that even though the reports of this physician were not entitled to the special weight afforded to the opinion of an impartial medical specialist resolving a medical conflict, his reports could still be considered for their own intrinsic value.

[7] Under section 8128 of the Federal Employees' Compensation Act, the Director may review an award for or against payment of compensation at any time on his own motion or on application. *William T. Abernathy*, 48 ECAB 687 (1997).

In an August 25, 2001 medical report, Dr. Edelman provided a history of appellant's employment and medical conditions, reviewed the relevant medical evidence of record and provided his own findings on psychiatric examination. Dr. Edelman diagnosed depressive disorder, not otherwise specified and alcohol abuse, in remission. He stated that, while appellant was mentally competent, she did have a chronic depressed mood and general anxiety causally related to the back and neck pain stemming from her employment injury. Dr. Edelman stated that although appellant would have moderate difficulty performing the social aspect of her job as a clerk, her condition would not preclude her from performing this position eight hours a day. In a supplemental report provided at the Office's request, Dr. Edelman clarified that appellant's current psychiatric condition was causally related to her July 15, 1982 employment injury. He stated that even if her back and neck condition had physically long since resolved, her "back pain can still be psychosomatic, genuine, authentic and stemming from her accepted injury in 1982."

On December 3, 2001 the Office declared a conflict in medical opinion to exist between Dr. Duncan, the former impartial medical examiner, whose opinion had been recharacterized as that of an Office second opinion physician, who opined that appellant had no significant objective findings of her accepted cervical or lumbar sprains, which would indicate disability and Dr. Schmidt, appellant's treating physician, who opined that appellant remained totally disabled due to residuals of her accepted cervical and lumbar sprains. The Office noted that, while there were other physicians of record whose opinions also conflicted with Drs. Duncan and Schmidt, Drs. Duncan and Schmidt represented the most current assessment upon which a conflict could be properly based. The Office stated that the fact that appellant had been referred for three new second opinions had fulfilled the statutory requirement that appellant be able to have a physician of her choice present at an Office second opinion examination, allowing the Office to go forward with referral of appellant to a new impartial specialist to resolve the conflict of medical evidence.

By letter dated December 10, 2001, the Office referred appellant, together with the case record, a list of questions to be resolved and a statement of accepted facts, to Dr. Filler, a Board-certified orthopedic surgeon, for resolution of the conflict. In a letter dated January 4, 2002, appellant objected to the selection of Dr. Filler as the impartial medical specialist, on the grounds that he worked in the same office as Dr. Rao, a physician, previously associated with her claim and, therefore, was not in fact impartial. The record does not reflect that the Office responded to appellant's concern.

In a January 21, 2002 medical report, Dr. Filler provided a history of appellant's employment and medical conditions, reviewed the relevant medical evidence of record and provided his own findings on physical examination. He diagnosed cervical and lumbar strains, both resolved and stated that based on the recovery of her spine from the strain she sustained on July 15, 1982 she was capable of returning to full, unrestricted duty. Dr. Filler concluded that appellant did have additional medical conditions, including knee conditions and possible peripheral neuropathy, which would restrict her from full performance, but emphasized that these conditions were nonindustrial and unrelated to her July 15, 1982 employment injury.

In a decision dated June 20, 2003, the Office affirmed its prior termination of benefits. The Office found that the weight of the medical evidence, represented by the impartial medical opinion of Dr. Filler, established that appellant had no residuals of her accepted conditions and could resume full, unrestricted duty.

LEGAL PRECEDENT

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.[8] 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 through the weight of the medical evidence that the disability has ceased or that it is no longer related to the employment.[9] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[10] 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.[11]

With respect to the evaluation of the medical evidence, section 8123(a) of the Act[12] 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."[13] The Board has held that when there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist to resolve the conflict of medical opinion, the opinion of such specialist, if sufficiently well rationalized and based upon a proper medical background must be given special weight.[14]

ANALYSIS

The Office properly determined that it had committed error in its January 13, 1994 decision by relying on Dr. Duncan as an impartial medical examiner, when there was no conflict in the medical evidence at the time of the referral.[15] The Office also properly recognized the Board's prior holding that when it is later discovered that there was no true conflict, the Office's recharacterization of a previously designated impartial medical examiner as a second opinion physician, effectively denies appellant the right, under section 8123(a) of the Act to have a physician, designated and paid by him or her, present to participate in the second opinion

[8] *William T. Abernathy, supra* note 7; *Mohammed Yunis*, 42 ECAB 325, 334 (1991).

[9] *Beverly J. Duffey*, 48 ECAB 569 (1997).

[10] *Id.*

[11] *Id.*

[12] 5 U.S.C. §§ 8101-8193.

[13] 5 U.S.C. § 8123(a).

[14] *Mary A. Moultry*, 48 ECAB 566 (1997).

[15] The Office had incorrectly referred appellant for an impartial medical examination based upon a difference in medical opinion between two of appellant's treating physicians. *See Adina D. Blanco*, 39 ECAB 510 (1988).

examination.[16] For this reason, the Office cannot rely on a referral physician's opinion before affording appellant an opportunity to exercise his or her statutory right.[17] However, in this case the Office erred in finding that affording appellant the opportunity to exercise her statutory right to participate in the three new second opinion examinations by Drs. Jurkowitz, Thanasophon and Edelman, fulfilled the statutory requirement such that the Office could again rely on the opinion of Dr. Duncan, in whose examination appellant was precluded from participating.[18] As appellant was never afforded the opportunity to select a physician to participate in Dr. Duncan's examination, the Office is precluded from relying on his opinion as that of a second opinion physician. Thus, the Office erred in finding that a conflict in medical opinion existed between Drs. Duncan and Schmidt.

CONCLUSION

The Board finds that the Office has failed to meet its burden of proof in terminating appellant's compensation benefits effective August 23, 1992.[19]

[16] Office procedures provide that among the information to be sent to a claimant in a referral for a second opinion examination is notification of the claimant's right, under 5 U.S.C. § 8123, to have a physician paid by him or her present during a second opinion examination. The procedures state that the law does not provide for participation of a claimant's physician in a referee examination to resolve a medical conflict. *Esther Velasquez*, 45 ECAB 249 (1993).

[17] *Mary L. Barragy*, 47 ECAB 285 (1996).

[18] *Supra* note 13.

[19] *See Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that the Office failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 20, 2003 is hereby reversed.

Issued: January 9, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member