United States Department of Labor
Employees' Compensation Appeals Board

DIANE L. FINLEY, Appellant	)	
and	)	**Docket No. 04-1006**
	)	**Issued: July 13, 2004**
DEPARTMENT OF THE NAVY, NAVAL HOSPITAL, Oak Harbor, WA, Employer	)	

Appearances:
John Eiler Goodwin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
COLLEEN DUFFY KIKO, Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On March 8, 2004 appellant filed a timely appeal of the January 23, 2004 merit decision of the Office of Workers' Compensation Programs which affirmed a November 18, 2002 decision terminating appellant's wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.[1]

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation effective November 18, 2002 on the basis that she was no longer disabled from work due to the effects of her accepted injuries.

[1] On December 9, 2002 the Office issued a preliminary determination that an overpayment occurred in the amount of $739.60. Appellant requested a hearing on January 4, 2003. The record on appeal does not indicate that a prerecoupment hearing has been held or that the Office issued a final decision on the overpayment issue. Accordingly, the overpayment issue is not properly before the Board. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On May 22, 2000 appellant, then a 44-year-old medical secretary, sustained a traumatic injury when she twisted around in her chair to open a door behind her and pulled her lower left back. Appellant stopped working the day of her injury. The Office initially accepted the claim for a lumbar sprain and later expanded the claim to include a herniated nucleus pulposus at L2-3. The Office authorized a left L2-3 discectomy, which appellant underwent on October 24, 2000. Appellant received appropriate wage-loss compensation and the Office placed her on the periodic compensation rolls effective November 5, 2000.

Appellant continued to complain of pain in her lower back and left lower extremity following the October 24, 2000 surgery. She was examined by a number of medical specialists and she received varying recommendations regarding further treatment, which included participation in a pain management program and possible repeat surgery at the L2-3 level and surgery at the L4-5 level.

The Office referred appellant for evaluation by Dr. Allan R. Wilson, a Board-certified orthopedic surgeon, who examined her on June 20, 2001. He diagnosed a significant functional pain behavior and disability conviction. He also diagnosed multilevel degenerative disc disease, status post L2-3 surgery. Dr. Wilson indicated that appellant could work an eight-hour day with certain physical restrictions and advised that no further medical treatment was necessary.[2]

The Office forwarded Dr. Wilson's June 20, 2001 report to appellant's surgeon, Dr. Daniel M. Hanesworth, a Board-certified orthopedic surgeon, for his review and comments. In a July 23, 2001 report, Dr. Jon Park, a neurosurgeon, recommended surgical decompression at L2-3 for a recurrent disc herniation. He also noted a disc bulge at L4-5 with foraminal stenosis and indicated that appellant might benefit from decompressive laminectomy and foraminotomy. On August 16, 2001 Dr. Hanesworth noted his disagreement with the restrictions specified by Dr. Wilson. He also noted his agreement with Dr. Park's recommendation for surgery. Dr. Hanesworth advised that appellant did not have the pain tolerance to work an eight-hour day, but she could work four to six hours. He imposed a one-hour sitting limitation and a two-hour standing limitation. Additionally, he limited appellant's pushing, pulling and lifting to 10 pounds.

Appellant's newly designated treating physician, Dr. Robert G. Billow, an osteopath Board-certified in physical medicine and rehabilitation, examined appellant on August 6, 2001 and diagnosed multilevel disc disease with residual foraminal disc protrusion at L2-3. He also reported a left central disc protrusion at L4-5, with a suspected angular tear. Dr. Billow noted probable lumbar discogenic pain at L4-5 and possible neuropathic pain.[3] He explained that there was a lack of data to support evidence of symptomatology at the L2-3 level and that the physical

[2] In a June 20, 2001 work capacity evaluation (Form OWCP-5c), Dr. Wilson noted hourly restrictions with respect to sitting, walking, standing, twisting and operating a motor vehicle. He also limited pushing, pulling and lifting to 20 pounds and advised that appellant should not perform any squatting, kneeling or climbing. Additionally, Dr. Wilson recommended that appellant be permitted to stand and stretch for five minutes every hour.

[3] The Office provided Dr. Billow with a copy of Dr. Wilson's report, but Dr. Billow did not specifically comment on Dr. Wilson's findings.

examination was consistent with discogenic pain associated with the L4-5 level. Appellant's treatment was reportedly made difficult by her morbid obesity and unspecified personality traits. Dr. Billow also stated that some of appellant's pain was neuropathic in origin and this was impeding her treatment. He recommended an initial attempt at neuropathic pain modulators and, if successful, conservative treatment and physical therapy. The subsequent pain therapy proved unsuccessful due to appellant's allergic reaction to some of the prescribed medications.

In view of the conflicting opinions of Dr. Wilson, Dr. Hanesworth and Dr. Billow, the Office referred appellant for an impartial medical evaluation. In a report dated February 7, 2000, Dr. William T. Thieme, a Board-certified orthopedic surgeon and impartial medical examiner, noted that recently obtained x-rays revealed mild degenerative spurring at L2-3 and superior L5. Under the heading "Impression," the doctor reported a history of chronic low back and left lower extremity pain and an October 24, 2000 lumbar disc excision on the left side at L2-3. Dr. Thieme further reported a nonanatomic distribution of neurological abnormalities in the left lower extremity with predominant give-way weakness, but no muscle atrophy. He also reported exogenous obesity and extensive surgical history. Dr. Thieme diagnosed chronic low back and left lower extremity pain "without clear objective cause." He explained that, although appellant had magnetic resonance imaging (MRI) evidence of collapsed discs at L2-3 and L4-5, these changes were small and would not ordinarily be expected to be symptomatic. Dr. Thieme also stated that appellant's symptoms did not specifically relate to neurologic impairment or impairments caused by a disc at either L2-3 or L4-5. On the question of disability, he stated that appellant did not have objective evidence of total or partial disability and he did not identify any particular work restrictions. Regarding the need for further medical treatment, Dr. Thieme stated that he would not recommend surgical treatment. He believed appellant's condition was primarily a pain problem and that she might benefit from specific pain treatment. Dr. Thieme also noted that appellant would benefit from removal of narcotic drug treatment and that pain treatment might be accomplished over a two- to three-month period at a local pain center.

On October 4, 2002 the Office issued a notice of proposed termination of compensation. The Office found that the impartial medical examiner's February 7, 2002 report represented the weight of the medical evidence of record. In a decision dated November 18, 2002, the Office found that appellant was no longer disabled from work due to the effects of her accepted injuries and terminated her wage-loss compensation.

Appellant requested a hearing, which was held on November 19, 2003. By decision dated January 23, 2004, the hearing representative affirmed the November 18, 2002 termination of wage-loss compensation. The hearing representative noted that appellant remained entitled to medical benefits.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[4] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation

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

without establishing either that the disability has ceased or that it is no longer related to the employment.[5]

ANALYSIS

The Office properly determined that a conflict of medical opinion existed based on the opinions of Dr. Wilson, for the Office, and Drs. Hanesworth and Billow, for appellant. Therefore, the Office correctly referred appellant to an impartial medical examiner.[6] Dr. Thieme, the impartial medical examiner, diagnosed chronic low back and left lower extremity pain "without clear objective cause." He stated that the changes seen on MRI at L2-3 and L4-5 were small and would not ordinarily be expected to be symptomatic. Dr. Thieme also indicated that appellant's reported symptoms do not specifically relate to neurologic impairment or impairments caused by a disc at either L2-3 or L4-5. He stated that appellant did not have objective evidence of total or partial disability and he did not impose any work restrictions.

Appellant's counsel argues that Dr. Thieme's statement that appellant might benefit from specific pain treatment and from removal of narcotic drug treatment was indicative of her continuing disability. Although Dr. Thieme suggested possible pain treatment and removal from narcotic drug treatment, he did not state that participation in such a program would preclude appellant from performing her prior duties as a medical secretary.[7] The Board finds that the Office properly relied on the impartial medical examiner's February 7, 2002 report in determining that appellant no longer had an employment-related disability. Dr. Thieme's opinion is sufficiently well rationalized and based upon a proper factual background. He examined appellant, reviewed her medical records, and reported an accurate medical and employment histories. Accordingly, the Office properly accorded special weight to the impartial medical examiner's findings.[8] The Office, therefore, met its burden of proof to justify modification or termination of benefits.[9]

Counsel also argues that the Office erred when it did not provide written notice of the oral hearing at least 30 days prior to the hearing as required under 20 C.F.R. § 10.617(b). The notice for the November 19, 2003 hearing is dated October 15, 2003, which is more than 30 days prior to the hearing. However, the envelope that purportedly contained the notice is post-marked October 22, 2003. While the Office apparently mailed the notice less than 30 days prior to the November 19, 2003 scheduled hearing, it is not apparent from the record how appellant or

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

[6] The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[7] The hearing representative's January 23, 2004 decision noted that appellant remained entitled to medical benefits and indicated that she could submit a request for authorization of treatment.

[8] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[9] *Curtis Hall, supra* note 4.

counsel was harmed by the notice mailed in this case. Appellant and counsel received the notice and both appeared at the hearing as scheduled. The Board finds that the Office's apparent delay in mailing the hearing notice constitutes harmless error.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2004
Washington, DC

Alec J. Koromilas
Chairman

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member