

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

LINUS CAROL KISH, Appellant)
and)
DEPARTMENT OF VETERAN AFFAIRS,)
ALVIN YORK MEDICAL CENTER,)
Murfreesboro, TN, Employer)

)

Appearances: *Case Submitted on the Record*
Ronald Kilgore, Esq., for the appellant
Office of Solicitor, for the Director

DECISION AND ORDER

Before:

JURISDICTION

On January 16, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated December 12, 2003 denying continuing disability compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUE

The issue is whether appellant met her burden of proof to establish continuing disability causally related to her accepted back conditions.

FACTUAL HISTORY

On November 26, 2000 appellant, then a 52-year-old licensed practicing nurse, filed a notice of traumatic injury alleging that she fell while in the performance of her federal duties and injured her back, knees and right hip. In support of her claim, appellant submitted a November 28, 2000 report from Dr. James Renfro, an orthopedist, who stated that on physical

examination he found good motion in appellant's back, but discomfort in the upper lumbar area with some radiation into the lower lumbar area. He noted her right hip also had mild discomfort with rotation and she had pain in her groin as well. Results of a magnetic resonance imaging (MRI) scan revealed a mild paracentral disc bulge at L4-5 with facet hypertrophy and mild canal stenosis. In a January 22, 2001 letter, the Office accepted the claim for lumbar strain, bilateral knee strain and right hip strain. On March 22, 2001 appellant returned to limited duty eight hours a day.

On May 22, 2001 appellant filed a claim for recurrence of total disability effective April 5, 2001 and stated that the pain became progressively worse after returning to work. In a June 6, 2001 letter, appellant was referred for a second opinion. In a June 13, 2001 report, Dr. Rex Arendall, a neurological surgeon and appellant's treating physician, stated that appellant presented with complaints of right hip and leg pain, as well as pain in her left leg with numbness, tingling and weakness. He noted a myelogram showed a lumbar strain but no sign of a fracture or a ruptured disc. Dr. Arendall opined that appellant was totally disabled and he referred her to pain management.

In a July 2, 2001 report, Dr. Warren McPherson, a neurosurgeon and Office referral physician, stated that appellant complained of low back pain as well as pain, weakness and tingling in her leg. He stated that appellant's knee and hip conditions had resolved as she did not complain of pain in those areas. Dr. McPherson also noted that her electromyogram was normal. He noted that there was nothing of significance in her MRI scan. In a clarifying report dated July 26, 2001, Dr. McPherson added that appellant's lumbar strain is due to her muscular pain and there is no objective test to prove that. He concluded that there was no objective evidence documenting a disability, noting that her only indication is a subjective complaint of pain. Dr. McPherson listed appellant's medical restrictions as no sitting for more than 4 hours a day, walking and standing were restricted to 2 hours a day and pushing and pulling were restricted to no more than 40 pounds with lifting restricted to 20 pounds.

In an August 13, 2001 letter, the Office proposed terminating appellant's compensation finding the weight of the medical evidence with Dr. McPherson. In an August 28, 2001 report, Dr. John Lamb, an orthopedist, stated that appellant presented with pain radiating into her right hip, thigh, calf and ankle as well as up the thoracolumbar region. He stated that appellant indicated that the pain keeps her awake at night and is aggravated by sitting, standing, lifting, riding, walking and arising from a sitting or lying down position. On physical examination he found that she walks slowly but without apparent weakness on her toes and heels. Dr. Lamb stated that appellant complained of discomfort in the lumbosacral area and that lateral bending and rotation were uncomfortable but only mildly limited her. He noted that neurological examinations of the lower extremities and pulses were normal. Examination of the right hip revealed mild tenderness of the greater trochanter, but pronounced tenderness of the right sacroiliac joint. Dr. Lamb also noted mild tenderness of the lumbosacral area. He diagnosed lumbar strain with significant evidence of sacroiliac joint disease and recommended appellant continue to work under her medical restrictions.

In an October 12, 2001 decision, the Office finalized the proposed termination, effective October 9, 2001. Appellant requested a review of the written record and submitted a July 2,

2001 report from Dr. John Culclasure, a neurosurgeon and specialist in pain management, who diagnosed right S1 nerve impingement that was not evident on a computerized axial tomography scan because appellant was in a supine position and the spine was not loaded from the weight of appellant's upper body. He also noted a fracture at the pars intra-articularis on the right at L4-5. Finally, Dr. Culclasure stated that appellant's S1 nerve root impingement was probably due to the combination of the hypertrophy of the right L5-S1 joint and disc bulge. In an August 9, 2002 decision, the hearing representative affirmed the Office termination but found that Dr. Culclasure's reports created a conflict in the medical evidence regarding appellant's back condition. As Dr. Culclasure's report was subsequent to the termination, the hearing representative stated that no reinstatement of compensation benefits was warranted as the burden of proof had shifted to appellant upon the October 12, 2001 termination.

In a September 13, 2002 letter, the Office referred appellant for a referee medical examination. In an October 7, 2002 report, Dr. Harold Smith, a Board-certified neurological surgeon, stated that appellant presented as a generally healthy lady who became distraught during the examination, but did not walk with an antalgic gait and sat comfortably on the examination table. Regarding her spine, he noted that appellant could bend forward to 45 degrees with flexion, had 15 degrees of extension and had pain with lateral bending and extension. He stated that straight leg raising test produced pain in the right leg, buttock and back. Dr. Smith stated that it was a difficult case and noted that appellant has had persistent symptoms. He concluded that he could not render an opinion without seeing the results of another myelogram. In a January 9, 2003 report, Dr. Smith stated that the myelogram revealed minimal ventral bulging at L4-5 from slight protrusion of the disc. He noted that there was a subtle narrowing of the dural sac but no root cutoff of the L4, L5 or S1 nerve roots. Dr. Smith further stated that a post-myelogram computerized tomography (CT) scan showed minimal narrowing at L4-5 and some degenerative facet disease and concluded that this study did not indicate a surgical solution. In a February 11, 2003 report, Dr. Culclasure diagnosed multilevel lumbar degenerative disc disease, lumbar radiculopathy, lumbar spondylosis, pars interarticularis fracture secondary to trauma and adjustment reaction with anxiety and depression. He stated that appellant's conditions preclude her from full-time employment for the rest of her life as she suffers from intractable pain secondary to multilevel degenerative disc disease. In a February 21, 2003 decision, the Office found that appellant did not meet her burden of proof to establish continuing disability as the weight of the medical evidence rested with Dr. Smith as the impartial medical examiner.

In an October 8, 2003 letter, appellant requested reconsideration and submitted an April 22, 2003 report from Dr. Culclasure who stated that appellant's condition is related to her work injury because she fell onto her knees and then buttocks which precipitated her pain process resulting from three painful disc levels. He concluded that within a reasonable degree of medical certainty appellant's back pain is a result of her work injury. In a December 12, 2003 decision, the Office denied modification.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.³

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner 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.⁴

ANALYSIS

In the present case, the Office determined that there was a conflict in the medical opinion between Dr. Culclasure, appellant's attending neurological surgeon, and the government physician, Dr. McPherson, a neurological surgeon acting as an Office referral physician, on the issue of whether appellant had continuing disability due to the accepted employment injury. In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Smith, a Board-certified neurological surgeon, for an impartial medical examination and an opinion on the matter.

The Board has carefully reviewed the opinion of Dr. Smith and finds it insufficient to warrant the special weight of an impartial medical examiner. The critical issue for Dr. Smith was to determine if appellant had continuing disability related to her accepted work injury. He has not answered that question. In his October 7, 2002 report, Dr. Smith, stated that appellant presented a difficult case as she had persistent symptoms of pain. He concluded that he could not render an opinion without seeing the results of another myelogram; so one was performed. In a January 9, 2003 report, Dr. Smith stated that appellant's recent myelogram revealed minimal ventral bulging at L4-5 from slight protrusion of the disc. He noted that there was a subtle narrowing of the dural sac but no root cutoff of the L4, L5 or S1 nerve roots. Dr. Smith further stated that a post-myelogram CT scan showed minimal narrowing at L4-5 and some degenerative facet disease and concluded that this study did not indicate a surgical solution. The critical

¹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

² *Id.*

³ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁴ 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. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

question was whether or not appellant had continuing disability related to her accepted work condition. As Dr. Smith did not address this issue, his report cannot be given the special weight of an impartial medical examiner and the case is to be remanded or further development on the issue of whether appellant had ongoing disability related to the accepted conditions.

CONCLUSION

The Office improperly gave the weight of the medical evidence to Dr. Smith as the impartial medical examiner. The case is to be remanded for further development as Dr. Smith has not resolved the issue in question.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 12, 2003 is set aside and the case is remanded for further development consistent with this opinion.

Issued: June 23, 2004
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member