United States Department of Labor
Employees' Compensation Appeals Board

JANET HALFORD, Appellant	)	
and	)	**Docket No. 04-2012**
	)	**Issued: February 4, 2005**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Holtsville, NY, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On August 9, 2004 appellant filed a timely appeal from the Office of Workers Compensation Programs' merit decision dated July 1, 2004, terminating her medical and wage-loss benefits. 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 is whether the Office properly terminated appellant's medical and wage-loss benefits effective July 10, 2004 on the grounds that the accepted condition of lumbar subluxation had resolved.

Appellant's attorney responded to the proposed termination of benefits pursuant to the Federal Employees' Compensation Act, in which he identified two issues: (1) whether the Office accepted as compensable all injuries and conditions sustained by appellant as a result of the January 10, 2001 incident; and (2) whether the Office properly terminated appellant's

benefits on the grounds that she has no continuing disability causally related to injuries and conditions sustained as a result of the December 10, 2001 incident.

FACTUAL HISTORY

On December 13, 2001 appellant, a 40-year-old clerk, filed a claim for traumatic injury Form CA-1 alleging that while lifting and moving files, she sustained an injury to her back and neck on December 10, 2001. On December 11, 2002 she stopped working. The claim was accepted for a lumbar subluxation.

A report of a January 11, 2002 magnetic resonance imaging (MRI) scan signed by Dr. Melvin Leeds and Dr. Kenneth S. Schwartz, Board-certified radiologists, indicated no side to side malalignment or abnormality to the vertical contour; no displacement of the vertical column; a mild degree of signal loss; minimal narrowing involving the L5 disc; minimal circumferential bulging with no significant impingement on the theca; no significant narrowing of the foramina; a mild asymmetric bulge at L3-4; and a levoscoliotic curvature of the lumbar spine, which is either constitutional or due to muscle spasm. A report of a second MRI scan dated February 1, 2002 and signed by Dr. Barbara Moriarty, a radiologist, and Dr. Schwartz reflected no indication of marrow replacement or cortical disruption; normal height, alignment and signal characteristics; small to moderate size central disc herniation at C4-5 which is contiguous with the cervical cord but without cord impingement; a similar centrally herniated disc at C5-6, also without impingement on the cervical cord; a small central disc herniation which is not contiguous with the cervical cord; a bulging disc at C2-3 and C3-4; prevertebral soft tissue within normal limits; and straightening of the cervical spine likely due to muscle spasm.

In response to a letter from the Office dated April 1, 2003, requesting updated medical information, appellant submitted a report dated June 9, 2003 from a treating physician, Dr. Christopher Durant, a Board-certified orthopedic surgeon, who diagnosed her condition to be cervical spine sprain/strain and chronic lumbosacral spine sprain/strain. Without the benefit of reviewing her x-rays or MRI scans, Dr. Durant opined that appellant's injuries were a direct result of the work-related accident of December 10, 2001.

The record contains numerous physical ability evaluations signed by Dr. Elias Kotsovolos, a chiropractor, commencing January 16, 2002. In a narrative report dated February 20, 2003, he stated that appellant's diagnosis remained "cervical intervertebral disc syndrome with upper extremity radiculitis; lumber intervertebral disc syndrome with lower extremity radiculitis; and headaches."

The Office referred appellant together with a copy of the medical record and a statement of accepted facts to Dr. Anthony Puglisi, a Board-certified orthopedic surgeon, for a second opinion examination. In his report dated August 20, 2003, Dr. Puglisi noted that while the Office had accepted appellant's claim for lumbar subluxation, neither his chiropractor, nor Dr. Durant had provided a diagnosis of subluxation. He stated that the MRI scan of January 11, 2002 revealed a levoscoliotic curvature, likely due to muscle spasm and no significant impingement on the thecae and no significant narrowing of the foramina at the levels of some reported bulging discs. Dr. Puglisi observed that there was no indication of any lumbar subluxation noted in any x-ray or MRI scan, nor was there any mention of the condition made by any physician in any

report he reviewed. Upon examination, Dr. Puglisi stated that appellant ambulated normally and could get up and down from the examining table with ease; had difficulty bending forward to only about 45 degrees and could hyperextend only about 10 degrees; and was able to come up on her toes and heels with good motor power but complained of pain on performing the activity. He reported that while seated on the examination table and engaged in conversation, he was able to bring appellant's knee out to full extension without noting any pain but that lying down she complained of bilateral straight leg raising positive at 20 degrees. Dr. Puglisi stated that appellant's behavior was known as a "positive malingering sign." He also noted that deep tendon reflexes were equal bilaterally but that appellant stated that the testing caused pain while she was lying down. Dr. Puglisi stated that he did not find any organic basis for appellant's complaints and found no objective findings to substantiate her subjective complaints. In his opinion, the record did not contain any reports, either chiropractic or orthopedic of any true objective finding and appellant did not have a musculoskeletal condition that could explain her complaints. He opined that the bulging disc was not interfering with the neurological structures and, therefore, could not be rendering the amount of discomfort and complaints appellant noted. Dr. Puglisi further stated his belief that appellant's alleged current condition was not related to the injury of December 10, 2001, but rather was either psychosomatic or "less than a candid presentation." He based this opinion partially on the inappropriate length of time she had had complaints; her inappropriate response to medication; and inconsistent responses to examination in differing positions. Finally, Dr. Puglisi opined that appellant was capable of performing her work as a clerk, given the sedentary nature of the job.

The Office referred appellant to Dr. Edmunde Stewart, a Board-certified orthopedic surgeon, for a referee medical examination. In his report dated November 24, 2003, Dr. Stewart concluded that there was no objective evidence of any orthopedic disability in her spine and that any irritation to the lower back that she may have suffered on December 10, 2001 would well have resolved within several weeks upon cessation of the activity that precipitated the injury. His report was based upon an examination of appellant and review of the entire medical file and statement of accepted facts. Dr. Stewart's examination revealed that appellant's gait was normal and that she could walk on her heels and toes, although she "complained bitterly" when asked to do so. Examination of her cervical spine revealed that she had exaggerated subjective tenderness to gentle palpation of the cervical muscles and trapezius muscles, posteriorly and that she exhibited exaggerated subjective loss of 50 percent of motion in her cervical spine in forward flexion, extension and rotation. Grossly, neurological evaluation of appellant's upper extremities, with regard to muscle tone, power, reflexes and gross sensory examination, was within normal limits. The report indicated that appellant would abduct her shoulders to only 90 degrees and complained of pain if she raised her arms any higher. Regarding appellant's lumbosacral spine, the examination revealed a subjective loss of 50 percent of motion in forward flexion, extension, lateral flexion and rotation; no objective evidence of any lumbar spasm; and no objective evidence of any lumbar tenderness. Straight leg raising while sitting was negative and grossly the neurological evaluation of her lower extremities was within normal limits. Dr. Stewart reported that appellant showed signs of symptom exaggeration upon examination. In conclusion, he noted that after leaving the evaluation, she was observed walking freely across the parking lot, bending to get into a small compact car, sitting in the car and driving off with no difficulty. Dr. Stewart further noted that, if appellant experienced the degree of pain she alleged in his examination, it would have been extremely difficult for her to sit in or drive a compact car for a distance of 40 miles to her home.

By letter dated March 26, 2004, the Office requested additional information from appellant supporting her continued receipt of compensation benefits, including completion of a Form EN1032 and a narrative medical report with a reasoned opinion on causal relationship. In response, she submitted three reports dated July 14, September 22 and November 17, 2003 from Dr. Durant reflecting her continued complaints of cervical spine and lower back pain, as well as generalized fatigue and muscle aches. In a narrative report dated December 13, 2003, Dr. Durant opined that appellant's cervical and lumbar symptoms, which included decreased range of motion, were causally related to the December 10, 2001 work injury and were permanent. He noted "little if any improvement in her symptomatology" and that continued work activities would exacerbate her symptoms.

By decision dated April 7, 2004, the Office notified appellant of its intent to terminate her medical benefits and compensation payments on the grounds that residuals related to her accepted condition had ceased. The Office stated that the weight of the medical evidence was represented by the referee medical examination report, which the Office considered to be a rationalized medical opinion. The Office determined that the medical evidence from appellant's treating physician was of little probative value because there were no recent medical findings to support her finding disability or continued need for medical treatment.

On April 19, 2004 appellant, through her attorney, responded to proposed termination of benefits. The record contains reports from Dr. Durant dated February 9, April 26 and June 28, 2004 reflecting appellant's continued complaints of cervical and lumbosacral spine pain and numbness and tingling in her feet and hands. The record also contains an April 6, 2004 work capacity evaluation from Dr. Kotsovolos in which he stated that she suffered from lumbar spine subluxation complex with lumbar intervertebral disc syndrome; cervical spine subluxation complex with cervical intervertebral disc syndrome; headaches and fibromyalgia and indicated that she would be able to work no more than two hours per day and that her condition was permanent.

By decision dated July 1, 2004, the Office terminated appellant's medical and wage-loss benefits on the grounds that the residuals of her accepted condition had ceased.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify a termination or modification of compensation benefits.[1] After it has determined that an employee has a condition causally related to his or her federal employment, the Office may not terminate compensation without establishing that the condition has ceased or that it is no longer related to the employment.[2]

If there is disagreement between the physician making the examination for the Office and the physician of the employee, the Secretary shall appoint a third physician who shall make an

[1] *Willa M. Frazier*, 55 ECAB ___ (Docket No. 04-120, issued March 11, 2004); *see also Harold S. McGough*, 36 ECAB 332 (1984).

[2] *Willa M. Frazier*, *supra* note 1; *see also Vivien L. Minor*, 37 ECAB 541, 546 (1986).

examination.[3] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[4]

Under section 8101(2) of the Act,[5] a chiropractor is considered a physician for purposes of the Act only to the extent that his reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[6]

ANALYSIS

Having accepted appellant's claim for a lumbar subluxation on December 10, 2001 the Office terminated her compensation benefits effective July 10, 2004, on the grounds that the condition had resolved and related residuals had ceased. The Office, therefore, bears the burden of proof to justify a termination of benefits.[7] The Board finds that the Office has met its burden of proof.

After her case was accepted for a lumbar subluxation, appellant was treated by a variety of medical doctors and chiropractors for over two years. Reports of MRI scans dated January 11 and February 1, 2002 indicated no displacement of the vertical column; no side to side malalignment or abnormality to the vertical contour; minimal narrowing and circumference bulging with no significant impingement on the theca; a leoscoliotic curvature of the lumbar spine, which is either constitutional or due to muscle spasm; no indication of marrow replacement or cortical disruption; and several small to moderate central disc herniations, without impingement on the cervical cord. The MRI scan made no reference to a lumbar subluxation.

The record contains numerous physical ability evaluations from appellant's chiropractor, Dr. Kotsovolos. His diagnosis remained "cervical intervertebral disc syndrome with upper extremity radiculitis; lumbar intervertebral disc syndrome with lower extremity radiculitis; and headaches" until his report of April 4, 2004, in which he added diagnoses of lumbar and cervical spine subluxation complex and fibromyalgia. The Board does not consider Dr. Kotsovolos' report to be probative medical evidence, as a chiropractor is only considered a physician for purposes of the Act where he diagnoses subluxation by x-ray; there is no provision in the Act or regulation for acceptance of a chiropractor's report as probative medical evidence where

[3] 5 U.S.C. § 8123(a).

[4] *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Glenn C. Chasteen*, 42 ECAB 493, 498 (1991).

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8101(2).

[7] *See Willa M. Frazier*, *supra* note 1.

subluxation is diagnosed by an MRI scan.[8] There is no indication in the record that an x-ray was performed on appellant which revealed a subluxation and the reports of the MRI scans that were performed subsequent to the December 10, 2001 incident did not reveal evidence of any lumbar subluxation. Furthermore, the fact that Dr. Kotsovolos rendered his diagnosis of lumbar and cervical spine subluxation complex more than two years after he had been treating appellant for her injury casts doubt on its credibility.

Reports from Dr. Durant support appellant's position that she suffered from lower back pain causally related to the December 10, 2001 employment injury. In his June 9, 2003 report, Dr. Durant diagnosed her condition to be cervical spine sprain/strain and chronic lumbosacral spine sprain/strain. In his narrative report dated December 13, 2003, Dr. Durant opined that appellant's then current cervical and lumbar symptoms, which included decreased range of motion, were causally related to the work injury and were permanent. However, the only condition the Office accepted was lumbar subluxation. Therefore, appellant had the burden of proof to establish a causal relationship between the newly diagnosed condition and the original condition.[9] Reports on follow up visits through June 28, 2004 document her continued complaints of her spinal pain and of numbness and tingling in her hands and feet. It should be noted, however, that Dr. Durant did not diagnose lumbar subluxation, nor did he explain how appellant's then current condition was causally related to the accepted condition. Dr. Durant's blanket assertion that appellant's condition was related to the employment injury is insufficient to establish a causal relationship. He must explain how her newly diagnosed condition is physiologically related to the December 10, 2001 employment injury and provide medical evidence of bridging symptoms between appellant's current condition and the accepted injury which support the conclusion of a causal relationship.[10] Furthermore, Dr. Durant's letter concerning causal relationship predated the termination of her benefits by seven months and, therefore, does not provide a current statement of appellant's condition as it relates to the December 10, 2001 injury.

The orthopedic surgeon to whom the Office referred appellant for a second opinion examination stated that he did not find any organic basis for and found no objective findings to substantiate appellant's subjective complaints. His report was well reasoned. After examining her and reviewing the entire medical record and statement of accepted facts, Dr. Puglisi opined that appellant did not have a musculosketal condition that could explain her complaints and that her alleged condition was not related to the December 10, 2001 injury but was either psychosomatic or "less than a candid presentation." He based his opinion partly on her inappropriate response to medication, her inconsistent responses to examination in different

[8] *Jay K. Tomokiyo*, 51 ECAB 361, 368 (2000). Section 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. The term 'physician' includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the secretary." *See Merton J. Sills*, 39 ECAB 572, 575 (1988).

[9] *See Donald W. Long*, 41 ECAB 142, 145 (1989) (appellant has the burden of proof to establish causal relationship where conditions were not accepted by the Office).

[10] *Mary A. Ceglia* , 55 ECAB ___ (Docket No. 04-113, issued July 22, 2004).

positions and the inappropriate length of time she had been complaining of pain. Dr. Puglisi opined that the bulging disc was not interfering with the neurological structures and, therefore, could not be rendering the amount of discomfort and pain alleged by appellant. He further stated his belief that she should be able to perform her work, given the sedentary nature of her job as a clerk.

Due to the conflict in medical opinion, the case was properly referred to Dr. Stewart, an impartial medical specialist, for the purpose of resolving the conflict.[11] His opinion, which is based on a proper factual and medical history, is well rationalized and supports the determination that appellant's accepted condition of lumbar subluxation had ceased by July 10, 2004, the date the Office terminated her benefits. Dr. Stewart accurately summarized the relevant medical evidence, provided findings on examination and reached conclusions regarding appellant's condition which comported with his findings. He found that there was no objective evidence of any orthopedic disability in appellant's spine and that any irritation to the lower back that she may have suffered on December 10, 2001 would well have resolved within several weeks upon cessation of the activity that precipitated the injury. Dr. Stewart's examination revealed that appellant's gait was normal and that she could walk on her heels and toes, although she "complained bitterly" when asked to do so. Examination of appellant's cervical spine revealed that she had exaggerated subjective tenderness to gentle palpitation of the cervical muscles and trapezius muscles, posteriorly and that she exhibited exaggerated subjective loss of 50 percent of motion in her cervical spine in forward flexion, extension and rotation. Grossly, neurological evaluation of appellant's upper extremities, with regard to muscle tone, power, reflexes and gross sensory examination, was within normal limits. The report indicated that appellant would abduct her shoulders to only 90 degrees and complained of pain if she raised her arms any higher. Regarding her lumbosacral spine, the examination revealed a subjective loss of 50 percent of motion in forward flexion, extension, lateral flexion and rotation; no objective evidence of any lumbar spasm; and no objective evidence of any lumbar tenderness. Straight leg raising while sitting was negative and grossly the neurological evaluation of her lower extremities was within normal limits. Dr. Stewart reported that appellant had exaggerated subjective pain for which there was no supporting medical evidence. In fact, he noted that at the conclusion of her office visit, she was observed walking, sitting and driving in a manner totally inconsistent with an individual in the type of pain she described. Dr. Stewart opined that appellant orthopedically was capable of performing any occupation for which she had the training.

In *Kathleen M. Moore*,[12] the employee bumped her head on a steel bar while climbing a ladder to board a ship. She was diagnosed with and treated for cervical sprain and traumatically induced anxiety. Having determined that her disability was employment related in that it aggravated a preexisting condition of mild psychoneurosis, the employer demoted claimant at her request to the position of payroll clerk and compensated her for loss of wage-earning capacity which resulted from her transfer. Several months later she alleged a recurrence of disability. Due to conflicting medical opinions, the matter was referred to a referee physician, who opined that claimant was "faking disease" and was physically able to perform the duties of her job. His review of x-rays and a neurological examination of the claimant revealed no

[11] 5 U.S.C. § 8123(a).

[12] 33 ECAB 1331 (1982).

significant abnormalities. Relying upon the referee physician's opinion, the Board held that the Commission had met its burden of establishing that the employee's disability had ceased. In the instant case, Dr. Puglisi stated and Dr. Stewart implied that appellant's complaints were psychosomatic or "less than a candid presentation." Since the referee physician found absolutely no objective evidence of any orthopedic disability in appellant's spine, related or unrelated to the December 10, 2001 incident, the Board finds that the Office has met its burden of showing that appellant's employment-related condition has resolved.

As Dr. Stewart provided a detailed and well-rationalized report based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.[13] The remaining evidence of record is insufficient to outweigh that special weight. Though Dr. Durant opined that appellant's cervical and lumbar symptoms were causally related to the work injury and were permanent, he failed to provide a rationalized medical opinion establishing a causal relationship between the condition and the injury or to address appellant's current condition. Thus the weight of the medical evidence, which is contained in the report of the referee medical examiner, establishes that residuals from appellant's accepted condition have ceased.

CONCLUSION

The Office met its burden of proof in terminating appellant's medical and wage-loss benefits effective July 10, 2004.

[13] *See Roger Dingess, supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the July 1, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 4, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member