

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

ELIZABETH A. CARITA, Appellant)
and) Docket No. 05-1120
DEPARTMENT OF THE NAVY,) Issued: November 4, 2005
PHILADELPHIA NAVAL STATION,)
Philadelphia, PA, Employer)

)

Appearances:

Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 22, 2005 appellant, through her attorney, filed a timely appeal from a November 29, 2004 decision of a hearing representative of the Office of Workers' Compensation Programs, affirming the denial of her recurrence of disability claim. 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 appellant sustained a recurrence of disability beginning May 24, 1990 causally related to her March 2, 1989 employment injury.

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated May 24, 2001, the Board set aside Office decisions dated February 8 and July 15, 1998 after finding a conflict in medical opinion between Dr. Carl Mogil, an osteopath and appellant's attending physician, and

Dr. Steven Valentino, an osteopath, who performed a second opinion examination.¹ The Board directed the Office to refer appellant for an impartial medical examination to resolve the issue of whether she sustained a recurrence of disability after May 24, 1990 due to her accepted employment injury. The Board further instructed the Office to obtain an opinion from the referral physician regarding whether she sustained a herniated disc causally related to her accepted employment injury. The findings of fact and conclusions of law from the Board's prior decision are hereby incorporated by reference.

In letters dated December 11, 2001, the Office referred appellant to Dr. Evan D. O'Brien, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated January 3, 2002, he reviewed appellant's history of injury and the medical evidence of record. Dr. O'Brien noted her history of the onset of low back and right lower extremity pain on March 21, 1989 after bending over to pick up trash. He listed findings on physical examination and reviewed the results of magnetic resonance imaging (MRI) scan studies. Dr. O'Brien stated:

“Based on my review of the medical records, my examination of [appellant] and also my careful review of the three lumbar MRI scans, I would agree with Dr. Valentino that [she] sustained a lumbar strain on March 2, 1989, which was completely resolved by May 23, 1990.

“[Appellant] had a significant preexisting back problem with back pain and right lower extremity radicular pain. The August 24, 1989 lumbar MRI scan which I reviewed did not show any disc herniations, although it did show disc degeneration at the 3 lowest lumbar discs L3-4, L4-5 and L5-S1. The next MRI scan dated May 18, 1992 showed a definite herniation at L5-S1 on the right side, which represented a change from the previous MRI scan. This change would not have been related to an incident that occurred on March 2, 1989 almost six months prior to the normal August 24, 1989 MRI scan. On the November 11, 1999 MRI [scan], [appellant] has a left-sided herniation at L3-4 and evidence of the L5-S1 herniation, which has improved.”

Dr. O'Brien opined that appellant's current symptoms were due to disc abnormalities and radiculitis of the right lower extremity unrelated to her March 2, 1989 employment injury. He concluded that appellant sustained a lumbar strain as a result of an employment injury on March 2, 1989 which resolved no later than May 23, 1990. Dr. O'Brien further asserted that appellant's L3-4 and L5-S1 disc herniations “occurred sometime after the March 2, 1989 injury and are completely unrelated to that injury.” He found that she was disabled due to her work injury from June 5, 1989 through May 23, 1990, though he noted that the record indicated that she “resigned effective January 2, 1990 to stay home and raise her daughter.”

By decision dated April 15, 2002, the Office denied appellant's claim for a recurrence of disability beginning May 24, 1990 due to her March 2, 1989 employment injury.

On April 19, 2002 appellant, through her attorney, requested an oral hearing. She submitted an MRI scan of the lumbar spine dated December 6, 2003, which showed a left disc

¹ *Elizabeth A. Carita*, Docket No. 99-1852 (issued May 24, 2001).

herniation at L3-4. She further submitted MRI scans dated December 6, 1996 and November 13, 1999² and reports dated 1996 and 1998 from Dr. Mogil. In an unsigned report dated December 5, 1996, he recommended additional objective testing. In an unsigned report dated October 15, 1996, Dr. Mogil noted that appellant was currently working in part-time private employment and that her job aggravated her “low back pain due to [the] herniated disc with S1 radiculopathy.” He recommended conservative treatment. In a report dated February 12, 1998, Dr. Mogil diagnosed persistent lumbar radiculopathy at S1 on the right side with peroneal neurapraxia due to a herniated nucleus pulposus (HNP) at L5-S1. He noted that an electromyogram EMG showed “chronic S1 radiculopathy as of December 11, 1996.”

Appellant also submitted a report dated December 6, 1996 from Dr. John Ashby, a Board-certified physiatrist, who discussed her history of work injuries in 1978, 1983 and 1989. He performed an EMG and nerve conduction studies (NCS) and diagnosed chronic S1 radiculopathy on the right side.

In a report dated February 16, 1998, Dr. Ashby performed NCS and an EMG and diagnosed “[a]cute and chronic S1 radiculopathy bilaterally, right side worse than the left” and L5 nerve root irritation bilaterally. He noted that her condition had worsened since the prior objective studies in 1996.

In a report dated September 19, 2002, Dr. Steven H. Ressler, an anesthesiologist, noted appellant’s history of back problems since the 1970s. He diagnosed an HNP at L3-4 and L5-S1 with “subjective complaints of L5 radiculopathy.”

At the hearing, held on August 31, 2004, appellant’s attorney argued that Dr. O’Brien’s report was speculative and failed to address the EMG findings.

In an unsigned report dated September 1, 2004, Dr. Barry S. Gleimer, who is certified by the American Osteopathic Association as an orthopedic surgeon, discussed appellant’s history of injury and noted that an MRI scan on May 1992 showed a disc herniation at L3-4. He further indicated that the May 18, 1992 MRI scan was interpreted as showing no significant change from the August 24, 1989 MRI scan. Dr. Gleimer diagnosed herniated discs at L3-4 and L4-5 “with progressive disc degeneration desiccation” and “post-traumatic and lumbar radiculopathy S1 right.” He opined that appellant’s current condition was caused by her multiple work injuries, particularly the injury in March 1989. Dr. Gleimer challenged Dr. O’Brien’s finding that the March 1989 injury caused merely a sprain as she subsequently experienced “persistent sciatic pain.”

By decision dated November 29, 2004, the hearing representative affirmed the Office’s April 15, 2002 decision.

² The December 6, 1996 MRI scan showed a small left herniation at L3-4 and a small central right herniation on the right at L5-S1 “pushing the nerve root backward, but not compressing it.” An MRI scan obtained on November 13, 1999 showed a left lateral herniation at L3-4 and degenerative changes at L3-4 through L5-S1.

LEGAL PRECEDENT

A “recurrence of disability” means an inability to work after an employee has returned to work caused by a spontaneous change in a medical condition, which resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.³

Appellant has the burden of establishing by the weight of the substantial, reliable and probative evidence a causal relationship between her recurrence of disability and her employment injury.⁴ This burden includes the necessity of furnishing medical evidence from a physician, who on the basis of a complete and accurate factual and medical history concludes that the disabling condition is causally related to employment factors and supports that conclusion with sound medical reasoning.⁵

The Federal Employee’s Compensation Act⁶ at section 8123(a) provides that, if there is a 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.⁷ It is well established that, when 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.⁸

ANALYSIS

The Office referred appellant to Dr. O’Brien to resolve a conflict in medical opinion between Dr. Mogil and Dr. Valentino regarding whether she sustained a recurrence of disability after May 24, 1990 and whether she sustained a herniated disc due to her March 2, 1989 employment injury. 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.⁹

In a report dated January 3, 2002, Dr. O’Brien diagnosed a lumbar strain resulting from appellant’s March 2, 1989 work injury which he found had resolved no later than May 23, 1990. He opined that she did not sustain an employment-related herniated disc as her initial MRI scan

³ 20 C.F.R. § 10.5(x).

⁴ *Carmen Gould*, 50 ECAB 504 (1999).

⁵ *Alfredo Rodriguez*, 47 ECAB 437 (1996).

⁶ 5 U.S.C. §§ 8101-8193.

⁷ 5 U.S.C. § 8123(a).

⁸ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁹ *Id.*

on August 24, 1989 did not show a herniated disc. Dr. O'Brien concluded that her employment-related disability ceased by May 23, 1990.

The Board finds that the Office properly relied upon the well-rationalized opinion of Dr. O'Brien in determining that appellant did not establish a recurrence of disability beginning May 24, 1990 due to her March 2, 1989 employment injury. The Board has carefully reviewed the opinion of Dr. O'Brien and notes that it has reliability, probative value and convincing quality with respect to the conclusions reached regarding the relevant issues in the present case. Dr. O'Brien based his opinion on a proper factual and medical history, accurately summarized the relevant medical evidence and provided rationale supporting his conclusions by explaining that the most recent MRI scan obtained following appellant's employment injury did not show a herniated disc. He concluded that she sustained a lumbar strain due to her March 2, 1989 employment injury and was able to return to work no later than May 24, 1990.

Appellant submitted numerous reports from Dr. Mogil regarding her condition. He, however, was on one side of the conflict resolved by Dr. O'Brien and thus, his reports are not sufficient to overcome the weight of the impartial medical specialist or to create a new conflict.¹⁰ Appellant further submitted reports by Dr. Asby and Dr. Ressler, however, neither of these physicians address the issue of her ability to work beginning May 24, 1990 or specifically diagnose a herniated disc due to her employment injury and thus, these reports are of little relevance to the issue at hand.

In an unsigned report dated September 1, 2004, Dr. Gleimer diagnosed herniated discs at L3-4 and L4-5 due to her employment injury and expressed disagreement with Dr. O'Brien's finding that her March 1989 work injury caused only a sprain. The Board has held, however, that a report with no physician's signature is of no probative value.¹¹

On appeal, appellant's attorney argues that the Office erred in failing to issue a termination decision at the time it ceased paying her compensation in May 1990. The issue currently before the Board, however, is the Office's January 29, 2004 decision, denying her claim for a recurrence of disability. The Board's jurisdiction is limited to review of final decisions of the Office.¹²

Appellant's attorney further asserts that a prior impartial medical examiner in this case, Dr. Randall N. Smith, a Board-certified orthopedic surgeon, found that she had a work-related herniated disc. The Board, however, determined in its prior decision that a conflict existed between Dr. Mogil and Dr. Valentino on the issue of whether she sustained a herniated disc due to her employment injury.¹³

¹⁰ *Michael Hughes*, 52 ECAB 387 (2001).

¹¹ *Merton J. Sills*, 39 ECAB 572 (1988).

¹² 5 C.F.R. § 501.2(c).

¹³ In a 1994 report, Dr. Smith opined that appellant had a herniated disc at L5-S1 compromising her S1 nerve root as seen on the 1989 MRI scan. He did not, however, specifically address the cause of her herniated disc.

Appellant's attorney additionally contends that Dr. O'Brien's opinion is entitled to little weight as he found that appellant could return to work in May 1990 as determined by her attending physician. Counsel argues that her attending physician returned her to a modified position.¹⁴ As discussed above, however, the opinion of Dr. O'Brien is sufficiently rationalized and based on a proper factual history to be accorded the special weight of an impartial medical specialist.

CONCLUSION

The Board finds that appellant has not established that she sustained a recurrence of disability beginning May 24, 1990 causally related to her March 2, 1989 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 29, 2004 is affirmed.

Issued: November 4, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ Dr. Mark Leone, an osteopath, released appellant from his care on May 24, 1990.