U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THELMA J. NICKERSON and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Sepulveda, CA

Docket No. 01-1241; Submitted on the Record;
Issued April 9, 2002

DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective October 6, 1997; and if so, (2) whether appellant has met her burden of proof to establish that she is entitled to compensation benefits after October 6, 1997.

On February 5, 1981 appellant, then a 43-year-old nursing assistant, sustained a traumatic injury while in the performance of her duties when she attempted to lift and turn a patient. The Office accepted her claim for lumbosacral strain and paid compensation on the periodic rolls.

Appellant's attending physician, Dr. George J. Thomas, III, a Board-certified orthopedic surgeon and Fellow of both the American Academy of Orthopedic Surgeons and the American College of Surgeons, first saw appellant on March 16, 1981. Over the years he continued to diagnose a work-related lumbosacral strain. A computerized axial tomography (CAT) scan of the lumbosacral spine on April 26, 1988 confirmed a disc bulge at the L4-5 level. Routine x-rays confirmed degenerative changes to the lumbosacral spine from L4-S1. A CAT scan on July 8, 1987 confirmed the degenerative changes but showed no spinal stenosis or disc herniation. On July 31, 1989 Dr. Thomas reported: "[Appellant] is being treated primarily for a chronic and acute severe lumbosacral strain with L3-4 fibrocalcific disc and degenerative osteoarthritis in the lumbosacral spine all being work related."

Appellant underwent a total hip arthroplasty on December 20, 1995, following which Dr. Thomas diagnosed chronic lumbosacral strain exacerbated by lumbar lordosis, osteoporosis, degenerative disc disease, right sciatica, lumbar arachnoiditis, resolving obesity and bilateral lumbar radiculitis, not resolving. On June 23, 1997 Dr. Thomas diagnosed chronic lumbosacral strain, cystic lesion right L3 areas with deep subcutaneous aggravating back pains, resolving osteoporosis, degenerative disc disease, right sciatica, resolved hip avascular necrosis status post total hip arthroplasty, lumbar arachnoiditis and resolving obesity.

The Office continued to pay compensation benefits but referred appellant, together with the medical record and a statement of accepted facts, to Dr. Fredrick J. Lieb, a Board-certified orthopedic surgeon and Clinical Assistant Professor of Orthopedic Surgery at the University of Southern California School of Medicine, for a second opinion on the relationship between appellant's diagnosed conditions and the employment injury that occurred on February 5, 1981.

On July 15, 1997 Dr. Lieb examined appellant. He reviewed the statement of accepted facts and appellant's record. Dr. Lieb described appellant's history of injury, medical course and present complaints. He described his findings on physical and radiographic examination. Dr. Lieb diagnosed lumbosacral strain, resolved (work-related injury, February 5, 1981); status postoperative total hip arthroplasty right hip and exogenous obesity. He concluded:

> "Based upon review of medical records, examination of patient and particularly review of her radiographs, it is my professional opinion that, as a result of the February 5, 1981 incident, she sustained nothing more than a relatively minor soft tissue injury of the lower back, *i.e.*, lumbosacral strain. This type of soft tissue injuries would generally heal over the course of a three- to eight-week period with or without medical care. In the sixteen plus year interim, in December of 1996, she has undergone a right total hip arthroplasty. This of course has absolutely nothing to do with her February 5, 1981 work-related injury or any aspect of her short-term employment with the Sepulveda Veterans Administration Hospital, from 1978 to February 5, 1981, as a nursing assistant.
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> "It is also my opinion that her current symptomatology and conduct during examination was not consistent with the objective findings, physical or radiographic examinations. Of course, physical examination was very difficult because of the patient's lack of cooperation and her nonorganic findings. It was extremely difficult to perform a truly objective finding on examination of this patient, due to the active resistance to any examining maneuvers, and her complaint of horrendous pain."

Responding to questions posed by the Office, Dr. Lieb reported that there were no physiologic findings linking her present condition to the work incident of February 5, 1981. He stated: "Soft tissue injuries, of course, do not persist for 16 years. They generally heal with or without medical care over the course of a three- to eight-week period of time." Dr. Lieb concluded that there were no residuals of the accepted lumbosacral strain:

> "Primary findings that support this conclusion is the relatively normal x-ray of the lumbosacral spine. There is some very equivocal narrowing of the L4-5 intervertebral disc space and some equivocal listhesis of L4 on L5, radiographically. However, there are no other evidence of disc degeneration such as marginal osteophyte formation. In my opinion, the only baseline pathology is the presence of the total hip replacement on the right. This was of course of a nonindustrial nature which I assume was as a result of osteoarthritis of the hip. This would be considerably more related to her obesity than to any soft tissue injury which occurred 16½ years ago. The objective findings do not substantiate the claimant's subjective complaints."

In a decision dated October 6, 1997, the Office terminated appellant's compensation benefits effective that date. The Office found that the second opinion of Dr. Lieb represented the weight of the medical evidence and established that appellant no longer suffered residuals of her February 5, 1981 employment injury.

In a report dated October 27, 1997, Dr. Thomas took exception to certain aspects of Dr. Lieb's report. He stated:

> "In sum, I disagree with Dr. Lieb's findings. I have pointed out several contradictions and inaccuracies in his report. He has not reviewed all of her records, obviously. His report only refers to my records of 1981 and 1988, as well as 1991. [Appellant] has four volumes of reports covering at least the last 16 years. These were obviously not reviewed by Dr. Lieb as done in previous reports.
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> "In researching literature, please note that the *New England Journal of Medicine, 1997*, along with findings from Harvard Medical School, confirm that back x-rays alone are not always accurate with respect to defining a patient's back disease. In other words, a patient may have severe back pain without significant x-ray findings and may have significant x-ray findings without severe back pain.
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> "[Appellant] could not continue with an inconclusive EMG [electromyogram] nerve conduction study test of September 23, 1997, due to severe pain. The test was inconclusive. EMGs do not always show nerve injury and certainly [an] incomplete EMG nerve conduction study does not in any way indicate that she does not have nerve injury.
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> "It should also be noted that [appellant] states, 'Dr. Lieb did not examine me for more than five minutes.' She states that she felt that Dr. Lieb was less than pleasant and had she known she had a right to cancel the examination, she certainly would have. She feels upset and anxious in that she basically states Dr. Lieb treated her 'like I [a]m lying.' Patient notes that there was [a] witness who happened to be a sister, Ann Francis Sidel, with a reputation for not lying.
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> "Finally, if the Veterans Administration would like a detailed report from this office again, we would be happy to provide one to confirm that this patient does have chronic severe lumbosacral strain with right L5-S1 disc herniations documented by MRI [magnetic resonance imaging] scan and EMG findings consistent with her original injury, then certainly I would be willing to do so. I would be more encouraged to do so after we are reimbursed for his Medicolegal Review."

On December 4, 1997 Dr. Thomas reported his findings on physical and radiographic examination that day. He diagnosed: (1) ongoing acute exacerbation of chronic lumbosacral strain with right L4-L5-S1 disc herniations; (2) cystic lesion right L3 area, deep subcutaneous aggravating back pains; (3) chronic right sciatica; (4) degenerative intervertebral disc disease lumbar spine; (5) resolving osteoporosis; (6) resolved right hip avascular necrosis, status

postoperative December 20, 1995 total hip arthroplasty at Kaiser Permanente; (7) lumbar arachnoiditis; and (8) resolving obesity.

On June 30, 1998 Dr. Thomas reported that appellant was "disabled directly due to her injury of February 5, 1981, at which time she injured her back and statedly her right hip, according to her statements to Dr. Lieb." Dr. Thomas reported that it was basically indisputably clear that her back injuries were solely related to her February 5, 1981 injury. He reviewed appellant's history of injury and her medical course. Dr. Thomas noted both subjective and objective findings of disability. He added that these objective findings had been present in a progressive manner since he first saw appellant in 1981 and were not present prior to the February 5, 1981. These physical objective findings, Dr. Thomas stated, supported the diagnosis of chronic severe lumbosacral strain with right L4-5, L5-S1 radiculopathy; right sciatica; degenerative intervertebral disc disease; degenerative osteoarthritis; pars interarticularis L4-5, L5-S1 right side, "all work related." "Patient also had lumbar arachnoiditis due to all of the above and these objective findings represent the core minimum of her definite work-related injuries."

In a decision dated November 18, 1998, an Office hearing representative found that the Office had met its burden of proof, when it secured Dr. Lieb's report, to establish that appellant no longer had residuals of an employment-related condition requiring further medical treatment. The hearing representative therefore affirmed the Office's October 6, 1997 decision terminating appellant's compensation benefits. The hearing representative further found that a conflict in medical opinion arose between Dr. Lieb and Dr. Thomas following the Office's October 6, 1997 decision. He remanded the case for referral to a referee medical specialist.

The Office referred appellant, together with appellant's record and a statement of accepted facts, to Dr. Lawrence N. Borelli, a Board-certified orthopedic surgeon and Associate Clinical Professor in orthopedics at the University of Southern California, to determine whether appellant continued to suffer residuals of the accepted lumbosacral strain she sustained on February 5, 1981.

In a report dated April 16, 1999, Dr. Borelli related appellant's complaints, a description of her February 5, 1981 employment injury and his findings on physical and radiographic examination. He reviewed appellant's medical records, including records from Dr. Thomas and Dr. Lieb. Dr. Borelli diagnosed the following: (1) spondylolisthesis, L4-5; (2) status post total hip replacement; (3) obesity; and (4) chronic pain syndrome. He offered the following analysis:

> "The mechanism of injury, that is, bending, reaching and pulling a patient into bed, is consistent with the kind of injury that can cause a lumbosacral strain. Therefore, in response to question one, the diagnosed condition of lumbosacral strain is medically connected to the work injury by direct cause and precipitation of that work event in 1981. I believe that this diagnosed condition is medically connected to her factors of employment as a nursing assistant must help turn patients.

"Diagnostic studies to date are complete. This examiner finds no indication for repeated x-rays that were performed on this patient, sometimes months apart. X-rays were taken today because none were available for review.

"The manner in which the symptoms developed over time is of greatest concern. The patient has a great disparity between objective findings, such as an essentially normal MRI and CT scan, and the great deal of disability she displayed. All musculoskeletal conditions improve to a point of being minimal to slight within a period of two to three months or would have declared themselves clearly on some objective measures such as a CT scan or MRI within two years of the date of injury. The patient did have a preexisting disability. I base this upon her body weight of 190 pounds at the time of the injury, indicating she was greater than her ideal body weight; and, less able to be fully functional compared to other individuals of comparable height, age and gender.

"In my opinion, as a consequence of her injury only, she had subjective factors of occasional minimal to slight low back and buttock pain.

"There are no objective factors of permanent impairment and no loss of work capacity.

"I believe that the patient requires no additional treatment with respect to her back. I believe that the patient does have minimal to slight residuals as a result of her injury of February 5, 1981. My basis for this is no evidence of focal neurological loss, symmetrical reflexes, and no objective imaging study to confirm nerve root impairment or spinal instability. Granted, the patient does have spinal instability at this point in time but I do not feel that it is from work exposure but from the natural progression of the disease process which led to her current present spondylolisthesis.

"I conclude that the period of temporary total disability for this condition should be for a period of two months from the date of injury forward.

"Evidence of EMG and nerve conduction findings taken two months after the Dr. Lieb's examination does not change my opinion for the following reasons. EMG and nerve conduction studies are excellent studies for discovering concurrent and as yet undiagnosed medical conditions such as alcoholic or diabetic neuropathy or fasciculations from a demyelinating disease. In this clinical setting, an EMG and nerve conduction study is of no value in proving impairment which occurred in 1981. It is theoretically of value in predicting an outcome, should surgery or some other modality be employed. Therefore, my conclusions are in agreement with Dr. Lieb.

"Finally, while the patient presently has degenerative spondylolisthesis at L4-5, the onset of such a condition, within reasonable medical probability, is [too] remote from the date of injury to be related to it."

In a supplemental report dated May 7, 1999, Dr. Borelli noted that an MRI of the lumbar spine performed on April 22, 1999 revealed a 3.5 millimeter protrusion at L3-4 and degenerative spondylolisthesis with no stenosis. He stated: "This MRI only strengthens the conclusions of my previous report."

In a decision dated May 17, 1999, the Office found that Dr. Borelli's opinion represented the weight of the medical evidence and established that appellant had no condition, residual or disability causally related to her February 5, 1981 work-related lumbosacral strain.

On May 10, 2000 appellant requested reconsideration. She disagreed with the Office's decision and with the Office's handling of the matter.

Appellant also submitted an April 12, 2000 report from Dr. Thomas, who reviewed and commented on Dr. Borelli's April 16, 1999 report at length. Dr. Thomas stated:

> "[Dr. Borelli's] stated conclusion based on his heretofore and how herein demonstrably erroneous statements, misinformation, and faulty logic with a resulting stated BELIEF is that "THE PERIOD OF TEMPORARY TOTAL DISABILITY FOR THIS CONDITION SHOULD BE FOR A PERIOD OF TWO MONTHS FROM THE DATE OF INJURY FORWARD, is inconsistent with the facts cited in this case and explained in my comments on his characterization of the records." (Emphasis in the original.)

In a decision dated June 1, 2000, the Office reviewed the merits of appellant's claim and denied modification of its prior decision.

The Board finds that the Office met its burden of proof to justify the termination of appellant's compensation benefits effective October 6, 1997.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[1] 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 that the disability has ceased or that it is no longer related to the employment.[2]

Because the Office accepted that appellant sustained a lumbosacral strain on February 5, 1981 while in the performance of her duties, it bears the burden of proof to justify its termination of appellant's compensation benefits effective October 6, 1997.

The Office based its decision to terminate benefits on the July 15, 1997 report of Dr. Lieb, a Board-certified orthopedic surgeon and second opinion physician. Dr. Lieb drew appellant's background from a statement of accepted facts and the record submitted for his review. He described appellant's history of injury and his findings on examination. Dr. Lieb

[1] *Harold S. McGough*, 36 ECAB 332 (1984).

[2] *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

concluded, based on his review of the medical records, his examination of appellant, and particularly his review of the radiographs, that appellant sustained nothing more than a relatively minor soft-tissue injury of the lower back, that is, a lumbosacral strain, as a result of the February 5, 1981 incident at work. He further concluded that there were no residuals of this accepted lumbosacral strain, and he supported his opinion with medical reasoning. He explained that this type of soft-tissue injury would generally heal over the course of a three- to eight-week period with or without medical care. Dr. Lieb reported that there were no physiologic findings linking her present condition to the work incident of February 5, 1981. He again explained that soft-tissue injuries do not persist for 16 years; they generally heal with or without medical care over the course of a three- to eight-week period of time.

The Board finds that Dr. Lieb's July 15, 1997 opinion was based on a proper factual and medical background and was sufficiently well reasoned to justify the termination of appellant's compensation benefits effective October 6, 1997. Appellant's attending physician, Dr. Thomas, also a Board-certified orthopedic surgeon, continued to diagnose an ongoing acute exacerbation of chronic lumbosacral strain with right L4-S1 disc bulges versus herniations, together with several other medical conditions, but without a medically reasoned narrative opinion explaining how these conditions were causally related to the incident that occurred at work on February 5, 1981, his reports were not sufficient to outweigh the narrative opinion of Dr. Lieb or to create a conflict in evidence requiring further development. The weight of the medical opinion evidence rested with Dr. Lieb and justified the Office's termination of compensation benefits. The Board will affirm the Office's June 1, 2000 decision on the issue of termination effective October 6, 1997.

Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the accepted employment injury.[3]

Following the termination of her compensation benefits, appellant submitted additional reports from Dr. Thomas. In an October 27, 1997 report, Dr. Thomas expressly disagreed with Dr. Lieb's findings and took exception to certain aspects of his report. On June 30, 1998 he reported that appellant was disabled directly due to her injury of February 5, 1981. He noted that appellant's objective findings of disability had been present in a progressive manner since he first saw appellant in 1981 and were not present prior to the February 5, 1981 injury. These physical objective findings, he added, supported the diagnosis of chronic severe lumbosacral strain with right L4-5, L5-S1 radiculopathy; right sciatica; degenerative intervertebral disc disease; degenerative osteoarthritis; pars interarticularis L4-5, L5-S1 right side; and lumbar arachnoiditis, all of which Dr. Thomas described as "the core minimum of her definite work-related injuries."

Section 8123(a) of the Federal Employees' Compensation Act provides in part: "If there is disagreement between the physician making the examination for the United States and the

[3] *Maurice E. King*, 6 ECAB 35 (1953); *Wentworth M. Murray*, 7 ECAB 570 (1955) (after a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation, he had a disability causally related to the employment resulting in a loss of wage-earning capacity).

physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[4]

To resolve the conflict in opinion between appellant's physician, Dr. Thomas, and the Office second opinion physician, Dr. Lieb, the Office properly referred appellant, together with the case record and a statement of accepted facts, to Dr. Borelli, a Board-certified orthopedic surgeon. On April 16, 1999 Dr. Borelli described appellant's February 5, 1981 employment injury and his findings on examination. He reviewed appellant's medical records, including the reports from both Drs. Thomas and Lieb. Dr. Borelli did not diagnose lumbosacral strain. Instead, he diagnosed spondylolisthesis, L4-5; status post total hip replacement; obesity; and chronic pain syndrome. He agreed that appellant sustained a lumbosacral strain in 1981. He explained that all musculoskeletal conditions improve to a point of being minimal to slight within a period of two to three months or would have declared themselves clearly on some objective measures such as a CT scan or MRI within two years of the date of injury. Dr. Borelli concluded that the period of temporary total disability for appellant's lumbosacral strain should have ended two months after the date of injury and that appellant required no additional treatment with respect to her back.

Dr. Borelli concluded, "I believe that the patient does have minimal to slight residuals as a result of her injury of February 5, 1981." He proceeded to explain the basis for his opinion but did not adequately identify the nature of these injury-related residuals. Although he negated any causal relationship between appellant's February 5, 1981 employment injury and the diagnosed conditions of spondylolisthesis at the L4-5 level and status post total hip replacement, he did not fully address the relationship between the employment injury and appellant's diagnosis of chronic pain syndrome. The Office should obtain clarification from Dr. Borelli on this issue because continuing residuals of the accepted employment injury are relevant to whether appellant is entitled to continuing benefits.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the referee medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative, or lacks rationale, the Office must submit the case record together with a detailed statement of accepted facts to a second referee specialist for a rationalized medical opinion on the issue in question.[5] Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act will be circumvented when the referee specialist's medical report is insufficient to resolve the conflict of medical evidence.[6]

[4] 5 U.S.C. § 8123(a).

[5] *See Nathan L. Harrell*, 41 ECAB 402 (1990).

[6] *Harold Travis*, 30 ECAB 1071 (1979).

The Board will set aside the Office's June 1, 2000 decision on the issue of continuing residuals and remand the case for clarification of the opinion of the referee medical specialist.[7] After such further development as may be necessary, the Office shall issue an appropriate final decision on whether appellant has met her burden of proof to establish that she is entitled to compensation benefits after October 6, 1997.

The June 1, 2000 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further action consistent with this opinion.

Dated, Washington, DC
April 9, 2002

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[7] The Board has considered appellant's arguments on appeal concerning the statement of accepted facts. While this is not the Office's best work, with its emphasis on what conditions are not accepted, the Board does not find the statement to be prejudicial.