U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JEWELL F. MILBY and DEPARTMENT OF THE ARMY, GREEN RIVER LAKE, Campbellsville, Kentucky

Docket No. 01-1763; Submitted on the Record;
Issued April 24, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
A. PETER KANJORSKI

The issues are: (1) whether the Office of Workers' Compensation Programs discharged its burden of proof to terminate appellant's compensation benefits effective July 19, 1998; and (2) whether appellant has established that she has any continuing disability causally related to her accepted employment injuries after July 19, 1998.

On January 27, 1989 appellant, then a 52-year-old secretary, filed a claim for traumatic injury alleging that on January 25, 1989 she injured her back while moving a box weighing approximately 30 pounds. She stopped work on January 27, 1989 and has not returned. On June 9, 1989 the Office accepted that appellant sustained employment-related lumbar and thoracic strains, and subsequently accepted appellant's claim for pneumothorax caused by her back therapy. Appellant received medical treatment from a Dr. Trager, Dr. J.T. Ling, Dr. Paul Lux, Dr. James W. Dunn, Dr. Zack R. Stearns and Dr. Benjamin W. Johnson, but her primary treating physician is Dr. Kenneth J.S. DeSimone, a Board-certified general surgeon. By letter dated May 20, 1998, the Office informed appellant that it proposed to terminate her compensation, based on the opinion of Dr. W. M.I. Malik, a Board-certified orthopedic surgeon and impartial medical examiner, who advised that she had no further limitations casually related to her employment injuries. By decision dated July 7, 1998, the Office terminated appellant's benefits, effective July 19, 1998, on the grounds that her work-related disability had ceased. On July 20, 1998 appellant, through counsel, requested an oral hearing, but on August 6, 1998 she changed her request to one for a review of the written record and submitted additional evidence. In a November 10, 1998 decision, an Office hearing representative affirmed the prior decision. On March 26, 1999 appellant, through counsel, requested another review of the written record and submitted additional medical and factual evidence. By decision dated June 2, 1999, an Office hearing representative affirmed the prior decision. On October 21, 1999 appellant, through counsel, requested reconsideration and submitted additional medical evidence. In a March 8, 2000 decision, the Office denied modification of the prior decision. On January 19, 2001 appellant, through counsel, requested reconsideration and submitted additional medical

evidence. By decision dated May 29, 2001, the Office denied modification of its March 8, 2000 merit decision.

The Board finds that the Office met its burden of proof to terminate appellant's compensation.

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order 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] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[3] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[4]

The medical evidence relevant to the termination of appellant's compensation includes x-rays taken in 1989 of appellant's cervical, thoracic and lumbar spine, all of which were normal, a 1989 magnetic resonance imaging (MRI) scan of appellant's thoracic spine which revealed no obvious problems and a 1994 cervical spine MRI which showed degenerative changes at C4-5 and C5-6, with no definite disc bulge seen. In addition, the record contains reports from appellant's primary attending physician, Dr. DeSimone, which continue to support appellant's disability and need for medical treatment. In a report received May 14, 1991, Dr. DeSimone noted that he had seen appellant on several prior occasions for follow-up of a severe injury to her left scapular area and further noted that appellant complained of pain in her left occipital area, together with headache. He stated that appellant had permanent disability that would require retirement because of her injuries and their resultant abnormalities of function with pain. In reports dated May 10, 1994 and October 1, 1996, Dr. DeSimone stated that appellant continued to suffer from such severe back, neck and arm pain that she could work a maximum of three hours a day, with restrictions. He further noted that appellant was now beginning to be depressed due to the chronicity of her pain and her inability to do the things she did before, and prescribed medication for this condition. Dr. DeSimone stated that appellant would probably never be able to return to regular work duties due to the severity and chronicity of her pain, and explained that as a result of nerve block treatment for her pain, she sustained a life threatening pneumothorax, and was therefore reluctant to revisit this avenue of therapy.

The Office referred appellant for a second opinion evaluation. In a report dated May 16, 1997, Dr. O. James Hurt, a Board-certified orthopedic surgeon, noted appellant's history of injury, reviewed the medical evidence of record and performed a physical examination. Dr. Hurt diagnosed left shoulder girdle strain with probable thoracic spine strain in the mid-portion and degenerative disc disease at C4-5 and C5-6. He noted that appellant related no problems with

[1] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[2] *Id.*

[3] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[4] *Id.*

the lumbar spine, and that her symptoms were primarily related to her left scapular area. Dr. Hurt further noted that there were no truly objective findings and that appellant only exhibited tenderness in the appropriate areas and some restricted range of motion of the left shoulder and that orthopedically, he had trouble explaining the disability appellant claimed. He stated that appellant could perform her job as a secretary, with restrictions of occasional lifting of 25 pounds and frequent lifting of 10 pounds. Dr. Hurt recommended that appellant continue exercise treatment for her left shoulder and neck, and begin a walking regimen. He further noted that if appellant continue to exhibit no response to treatment, she may need psychological testing to identify any additional problems. On an accompanying work capacity evaluation form, Dr. Hurt indicated that appellant could work eight hours a day within the restrictions of occasional lifting of 25 pounds, frequent lifting of 10 pounds, no climbing ladders or lifting overhead, and the ability to change positions every 45 to 60 minutes. He further indicated that all of these restrictions were due to appellant's employment injuries.

In a report dated January 13, 1998, Dr. DeSimone stated that appellant was being treated for severe pain secondary to injury of the left scapular area, and that appellant had had pain in the left posterior occipital area and in the inferior spinatous and anterior spinatous anteriorly. In addition, he noted that appellant has had pain along the rhomboid and to a slight degree along the trapezious on the left. Dr. DeSimone further stated that appellant has had cephalalgia in the left occipital and parietal areas and has had this pain since her injury that occurred at work lifting a box. He noted that appellant had undergone a complete work-up at the pain clinic, which revealed no entrapment in the thoracic outlet or thoracic outlet syndrome. Dr. DeSimone stated that appellant sought relief through numerous therapies and treatments, including nerve blocks, steroids, injections, oral medication and physical therapy, but her injuries were nonresponsive. In addition, appellant experienced a life threatening pneumothorax following nerve block therapy. Dr. DeSimone stated that appellant had further developed a sympathetic myalgia syndrome, as well as depression due to her inability to perform her usual and customary duties. He noted that night pain had been so great that she had cracked a tooth from clenching her teeth and that she reported one occasion where her head pain became so severe that she became unconscious and had to be taken to the hospital by ambulance. Dr. DeSimone noted that physical examination revealed spasms in the trapezius and supraspinatious and ifraspinatous pain, and concluded that appellant had sustained a disabling, traumatic injury, had not responded to treatment, and was considered permanently disabled.

Section 8123(a) of the Federal Employees' Compensation Act,[5] provides, "if there is 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." In this case, in accordance with the Act, the Office referred appellant for an impartial medical evaluation by Dr. Malik. In a report dated March 19, 1998, Dr. Malik reviewed appellant's history of injury, the statement of accepted facts and the medical evidence of record and performed a physical examination. He noted the presence of degenerative cervical disc disease on a 1994 MRI scan, without focal disc herniation, further noted that on physical examination appellant had full movement of the cervical, thoracic and lumbar spine, as well as full active and passive left shoulder movement. Dr. Malik stated that the only objective finding

[5] 5 U.S.C. §§ 8101-8193, § 8123(a).

was some tenderness in the left trapezius area. He diagnosed resolved thoracic and lumbar strain with no residual dysfunction related to the work-related injury and degenerative changes in the cervical spine, related to age. Dr. Malik noted that the strains should have resolved within a maximum of three to six months after her injury. He concluded that appellant would be capable of returning to work where a maximum lifting of 25 pounds was allowed on an occasional basis and 10 to 15 pounds on a repetitive basis and added that appellant required no further treatment for her accepted lumbar and thoracic strains. In a supplemental report dated April 20, 1998, Dr. Malik stated that appellant's accepted pneumothorax had also resolved, and clarified that the work limitations listed in his report were due to appellant's age-related degenerative cervical disc conditions, not to her accepted employment injuries.

Subsequent to Dr. Malik's report, appellant submitted additional medical evidence including reports dated March 3 and June 15, 1998 from Dr. DeSimone, in which he essentially reiterated his January 13, 1998 report and noted that appellant's symptomatology and physical findings were unchanged.

In a report dated June 10, 1998, Dr. Zack R. Stearns stated that appellant had essentially no change in her symptoms and stated that he did not feel there was "any doubt that her symptoms are a result of the injury she sustained" and that given the long-standing nature of her condition and her lack of response to treatment, it was unrealistic to expect that her symptoms would resolve to the point where she could perform any normal activities.

In situations were there are 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 on a proper factual background, must be given special weight.[6] Appellant asserts that Dr. Malik should not be accorded special weight as a referee physician, as he had numerous complaints filed against him at the Medical Board, as well as numerous judgements against him for malpractice. In support of her argument, appellant submitted several documents from the Kentucky Board of Medical Licensure which document that some patients treated by Dr. Malik have lodged complaints against him, as well as a February 20, 1992 order of probation from the Kentucky Board, finding that in prescribing a controversial pain medication, Dr. Malik, "although by no means intentionally or through gross negligence," had "deviated slightly from the standard of practice required by the Kentucky Medical Practice Act." The record further contains evidence, however, that on appeal, by Order dated May 18, 1995, the February 20, 1992 probation was vacated and set aside. As Dr. Malik was never suspended from medical practice, and as his probation was subsequently vacated and set aside, the Board finds that Dr. Malik was properly selected to act as an impartial medical specialist in this case. Appellant additionally asserted that the statement of accepted facts relied upon by Drs. Hurt and Malik was flawed, and, that, therefore, their opinions were likewise flawed. Specifically, appellant asserts that from the statement of accepted facts it appears that appellant stopped working shortly after her injury, when in fact she attempted to return to work on numerous occasions, expending all of her accumulated sick and annual leave, and finally stopped work on December 6, 1990. In addition, appellant asserted that the statement of accepted facts insinuates that appellant stopped treating

[6] *Nathan L. Harrell,* 41 ECAB 401, 407 (1990).

with Dr. Lux in 1989 because he gave her restrictions which would have returned her to work, and that these misstatements together "mischaracterize appellant as a doctor-shopping freeloader." The Board notes that the issue in the case is a medical one of whether appellant's January 25, 1989 employment injury resulted in disability for work after July 19, 1998. As Dr. Malik's report was based on a proper factual background and based on objective physical findings in support of his conclusion that appellant was no longer disabled and had no residuals of her accepted employment injury, his report is entitled to the weight of the medical evidence and the Office properly relied on this report in determining that appellant was no longer entitled to compensation, effective July 19, 1998. The additional reports submitted from Dr. DeSimone essentially reiterate his earlier conclusions, which formed one side of the medical conflict, and therefore, are not sufficient to overcome the weight accorded Dr. Malik's medical opinion as an impartial medical specialist.[7] In addition, as Dr. Stearns does not offer any explanation or objective evidence in support of his conclusion that there is no doubt that all of appellant's complaints are causally related to her accepted injures, his opinion is unrationalized and is also insufficient to overcome the weight accorded to Dr. Malik.[8] The medical evidence therefore establishes that appellant's disability causally related to her accepted lumbar and thoracic strains, and pneumothorax, had ceased and the Office properly terminated her compensation effective July 19, 1998.

The Board further finds that appellant has failed to establish any continuing disability or residuals after July 19, 1998 causally related to her accepted employment injuries.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifts to appellant to establish that she still suffers from residuals of her accepted employment injury.[9] To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.[10] Causal relationship is a medical issue,[11] and the medical evidence required to establish a causal relationship is rationalized medical evidence. Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12] The weight of the medical evidence is determined by its reliability, its probative value, its convincing

[7] *See Dorothy Sidwell*, 41 ECAB 857 (1990); *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

[8] *Gary L. Fowler*, 45 ECAB 365 (1994); *Victor J. Woodhams*, 41 ECAB 345 (1989); *Mary J. Briggs*, 37 ECAB 578 (1986).

[9] *George Servetas*, 43 ECAB 424, 430 (1992).

[10] *See* 20 C.F.R. § 10.110(a).

[11] *Mary J. Briggs*, *supra* note 8.

[12] *Gary L. Fowler*, *supra* note 8; *Victor J. Woodhams*, *supra* note 8.

quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.[13]

The medical evidence submitted subsequent to the July 7, 1998 decision terminating appellant's compensation includes several reports from Dr. DeSimone, dating from October 27, 1998 to February 2, 1999, in which he reiterated his earlier conclusions and an August 10, 1998 report from Dr. William H. Olson, who treated appellant for headaches and opined that appellant probably had a trapped occipital nerve, but did not address whether this condition was related to her employment injury. More importantly, appellant submitted the results of an MRI scan performed on June 30, 1999, which revealed degenerative disc disease at multiple levels in the thoracic spine, mild kyphosis with some minimal compression fractures at T6-7 with some stretching of the cord over the kyphosis and post diffuse disc bulging at T11-12, indenting the cord but not compressing it. In a report dated September 20, 1999, Dr. DeSimone opined that the compression fractures at T6-7 were causing all of appellant's current complaints, explaining that given the history provided to him by appellant regarding the January 25, 1989 incident, and the lack of any other history of injury to this region of her body, he was reasonably certain that the compression fractures occurred at the time of the injury. In a follow-up report dated September 28, 2000, Dr. DeSimone stated that the compression fractures were not appreciated on the earlier regular x-rays. Appellant also submitted a May 1, 2000 report from MRI scan reader Jannice Aaron, who confirmed that the compression fractures were old and the fact that they were not seen at the time of the original injury, on the plain x-ray films, does not mean that they did not occur at that time, as MRI scan is a more sensitive modality for examining the thoracic spine.

Appellant also submitted several 1989 reports from Dr. James W. Dunn, documenting the early onset of her left scapular pain, in addition to a current report from Dr. Dunn dated July 29, 2000. In this recent report, Dr. Dunn noted that he had treated appellant for mid thoracic spine pain and tenderness associated with the left medial scapula the day following her January 25, 1989 injury and noted that she had never before complained of back pain in the 20 years he had treated her. He also noted that from the outset, appellant had headaches which he felt were associated with the back pain. Dr. Dunn explained that while all of the diagnostic tests he performed in 1989 and 1991 showed nothing of significance, he always knew that there was some objective cause for her continued pain, headaches and sleeplessness. He stated that he had recently reviewed the June 30, 1999 MRI report, showing old compression fractures at T6-7, which he noted was the first MRI scan performed on the thoracic portion of the spine and which he felt provided objective evidence of what occurred to appellant's spine on January 25, 1989. Dr. Dunn concluded that all of appellant's symptoms from the time of his initial treatment to the present, including headaches, left arm weakness, chronic muscle spasms, restricted movement of the left shoulder and arm, and tingling in her mid back radiating into her neck and left arm have been caused by the compression fractures seen on the MRI scan, which are in turn causally related to the January 25, 1989 injury.

The Board finds that neither Dr. DeSimone nor Dr. Dunn provided a rationalized opinion explaining how the T6-7 compression fractures seen on the June 30, 1999 MRI scan could have

[13] *James Mack*, 43 ECAB 321 (1991).

been caused by appellant's having picked up a 33-pound box. In addition, neither physician appears to be aware that appellant did have a thoracic spine MRI scan performed on April 14, 1989 at the Orthopedic and Fracture Clinic and while the MRI report itself is not in the record, a corresponding medical treatment note indicates that "no obvious problems were noted." In addition, neither physician appears aware that in April 1989 appellant was noted to have a previous history of having fallen and hit the thoracic portion of her back on a concrete step. Finally, neither physician explains their conclusion that all of appellant's past and present symptoms are casually related to the compression fractures, in light of the multiple level cervical and thoracic degenerative changes seen on the 1994 and 1999 MRI studies. Accordingly, as appellant has not submitted additional probative medical opinion evidence establishing that she had continuing disability causally related to her accepted employment injury, she has not met her burden of proof.

The decision of the Office of Workers' Compensation Programs dated May 29, 2001 is hereby affirmed.

Dated, Washington, DC
April 24, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member