U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEVERLY HALEY and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Philadelphia, PA

Docket No. 01-1305; Submitted on the Record;
Issued September 25, 2001

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

On May 4, 1999 appellant, a 37-year-old distribution clerk, injured her neck, shoulder and back while in the performance of duty. She filed a claim for benefits on May 5, 1999, which the Office accepted for thoracic and cervical sprains on July 2, 1999. The Office paid her compensation for temporary total disability for appropriate periods and placed her on the periodic rolls.

In a fitness-for-duty report dated August 12, 1999, Dr. Norman Stempler, a Board-certified orthopedic surgeon, stated that appellant had recovered from her soft tissue injury and opined that the findings from a July 7, 1999 magnetic resonance imaging (MRI) scan, which showed a small subligamentous disc herniation at C5-6 and a small subligamentous disc protrusion at C6-7, were not consistent with her history and physical findings.

In a report dated September 24, 1999, Dr. Donald B. Parks, a specialist in internal medicine and appellant's treating physician, found based on the results of the MRI that appellant had a herniated disc at C5-6 with C6-7 disc protrusion. He stated that appellant's disc conditions resulted from the May 1999 work injury.

Dr. Parks referred appellant to Dr. Corey K. Ruth, a specialist in orthopedic surgery, who stated in an October 26, 1999 report that the results of the MRI scan indicated a herniated nucleus pulposus at C5-6 and a bulging disc at C6-7.

On October 27, 1999 Dr. Parks noted that appellant was disabled from work due to her herniated disc, which was causally related to the May 4, 1999 injury. Appellant returned to light duty for four hours per day on November 8, 1999, but stopped working on November 15, 1999. She has not returned to work since that time.

In order to determine appellant's current condition and ascertain whether she was capable of returning to work, the Office scheduled a second opinion examination for appellant with Dr. Steven Valentino, an osteopath. In a report dated November 11, 1999, Dr. Valentino, after reviewing the medical records, the statement of accepted facts and stating findings on examination, stated:

> "Today's evaluation reveals no evidence of any ongoing disability or impairment. [Appellant] is capable of gainful employment including her preinjury position without restriction. She has reached maximum medical improvement.
>
> "There was no evidence of aggravation of any preexistent condition as her neurological exam had been repetitively documented as being normal in the medical records as well as in today's evaluation.... I find no periods of total disability due to the work injury. Cervicothoracic sprain would at most impose modified, full-time gainful employment for a period of no longer than two to three months in duration."

In a proposed notice of termination dated November 22, 1999, the Office, relying on Dr. Valentino's opinion, found that the weight of the medical evidence demonstrated appellant no longer had any residuals from the May 4, 1999 employment injury. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination. Appellant did not respond to this request within 30 days.

In a report dated November 29, 1999, Dr. Parks stated that appellant had sought treatment on that date for an exacerbation of her neck and back symptoms. He placed her back on total disability.

In a report dated December 14, 1999, Dr. Ruth related that appellant complained of severe neck and upper back pain, and had difficulty working part time for four hours per day.

In a report dated December 22, 1999, Dr. Parks reiterated his previous findings and conclusions and stated that appellant remained physically impaired.

By decision dated March 9, 2000, the Office terminated appellant's compensation effective March 9, 1999.

By letter dated March 30, 2000, appellant requested an oral hearing, which was held on September 19, 2000.

Appellant submitted an April 11, 2000 report from Dr. Ruth, who related that appellant was still disabled from work and complained of neck, upper back, and radicular left arm pain.

By decision dated December 13, 2000, the Office affirmed the March 9, 2000 decision.

The Board finds that the Office failed to meet its burden to terminate appellant's compensation benefits.

In this case, there was disagreement between Dr. Valentino, the second opinion physician, and Drs. Parks and Ruth, appellant's treating physicians, regarding whether appellant was disabled due to residuals from her May 4, 1999 work injury. Dr. Valentino found no evidence of any ongoing disability or impairment, and advised that she could return to gainful employment, including her date-of-injury position, without restrictions. He stated that appellant's neurological examination was normal, which had been repeatedly documented in her medical records, and found no periods of total disability due to the work injury. Dr. Valentino concluded that appellant had sustained a sprain would result in, at most, modified, full-time employment for a period not exceeding two to three months.

Drs. Parks and Ruth, however, indicated in their reports following appellant's departure from work in late November 1999 that appellant had significant objective symptoms, a herniated disc at C5-6 and disc protrusion at C6-7 based on MRI scan and would have great difficulty performing even light-duty work. This created a conflict in the medical evidence. In its March 9, 1999 termination decision, however, the Office erred in ignoring the conflict and finding that Dr. Valentino's second opinion represented the weight of the medical evidence in terminating compensation.[1] When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or referee physician, also known as an impartial medical examiner.[2] It was therefore incumbent upon the Office to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. Accordingly, as the Office did not refer the case back for a properly selected impartial medical examiner, there remains an unresolved conflict in medical opinion.[3]

[1] Dr. Valentino did not accept that appellant's cervical injury merited any periods of disability, which contradicted the Office's acceptance of a disabling condition.

[2] Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part, "(i)f 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." *See Dallas E. Mopps*, 44 ECAB 454 (1993).

[3] *See Shirley L. Steib*, 46 ECAB 309 (1994); *Vernon E. Gaskins*, 39 ECAB 746 (1988).

The decision of the Office of Workers' Compensation Programs dated December 13, 2000 is reversed.

Dated, Washington, DC
September 25, 2001

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member