U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROSEMARY DAVIS and U.S. POSTAL SERVICE,
POST OFFICE, South Suburban, IL

Docket No. 03-424; Submitted on the Record;
Issued April 24, 2003

DECISION and ORDER

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

The issue is whether appellant's disability causally related to her January 5, 1982 employment injury ended by March 27, 1999.

This case has previously been on appeal before the Board. By decision and order dated November 6, 2001, the Board found that the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective March 27, 1999, based upon the September 29, 1998 report of Dr. Richard H. Sidell, a Board-certified orthopedic surgeon to whom the Office referred appellant for a second opinion evaluation. The Board further found that the February 14, 2000 report of Dr. Martin G. Luken, appellant's attending Board-certified neurosurgeon, which appellant submitted subsequent to the Office's termination of her compensation, created a conflict of medical opinion on the issue of whether appellant had any continuing disability causally related to the accepted injury. The Board remanded the case to the Office for referral of "appellant, the case record and a statement of accepted facts to an appropriate medical specialist for a reasoned medical opinion of whether appellant still had continuing disability causally related to her accepted employment-related conditions which include permanent aggravation of degenerative disc disease of the lumbosacral spine."[1]

On December 18, 2001 the Office referred appellant, a statement of accepted facts, a list of questions to be resolved and the case record to Dr. Marshall Matz, a Board-certified neurosurgeon, to resolve the conflict of medical opinion found by the Board. On January 17, 2002 the day before appellant's scheduled examination, Dr. Matz's office called the Office to advise that they were not in receipt of the referral letter or the case record. The Office faxed a copy of its referral letter to Dr. Matz on January 17, 2002.

[1] Docket No. 01-531.

In a report dated January 18, 2002, Dr. Matz set forth appellant's history and her complaints, which included having never been without a backache since 1982. After describing appellant's findings on physical examination, Dr. Matz stated:

> "Unfortunately, no old medical records have been provided. The most recent medical report is that of Dr. Luken, who wrote to Mr. Kornfeld[2] on February 14, 2000, wherein he reports that [appellant] was continuing to complain of low back and leg pain, as well as the neurologic deficits related to her cervical cord dysfunction. Dr. Luken's neurologic examination did not reveal any specific abnormalities about the lower back. He reported that his prior charts 'clearly document objective abnormalities of [appellant's] lumbosacral spine or spinal nerve roots, and are entirely consistent with her account of her ongoing lumbar spinal problems.' It is not specified as to what those spinal problems are, nor would one in my opinion reasonably suggest that the minor findings on her imaging studies of the lumbar spine would be a cause for ongoing symptoms and incapacity. Clearly, the physical findings noted on today's evaluation concern her neck and that would be separate and distinct from any claim that she was making with regard to the lower back. Her current neurologic deficit is clearly related to her cervical myelopathy. According to the records provided, she was operated on for a degenerative condition involving her cervical spine, which would also have nothing to do with any low back complaints. There is no suggestion that her degenerative disc disease and any accompanying arthritic abnormalities causing cervical cord compression would be work related. Dr. Luken indicates that he was unable to find any specific abnormalities that could be attributed to dysfunction about the lower back related to nerve root compression and that would at least suggest that there is no objective evidence that would support her contention of physical incapacity since 1982 as a consequence of subjective lower back complaints, particularly in light of the fact that she has an overwhelming neurologic problem related to her cervical myelopathy and cervical cord dysfunction."

In a report dated February 15, 2002, Dr. Matz reviewed the medical reports in the case record going back to 1982 and noted that the findings on a July 9, 1987 electromyogram (EMG) were "minimal in nature, do not involve the nerve root itself, and would not be a cause of weakness attributed to neurologic dysfunction in the lower extremities"; that a December 13, 1988 EMG and somatosensory evoked response examination did not suggest "any neurologic impairment involving the back or lower extremities related to a condition involving the lumbosacral spinal area"; and that a repeat of these electrophysiologic studies by the same physician on May 9, 1990 revealed new abnormalities of the left arm and left leg that, "coming on years after the claimed injury at work could not within a reasonable degree of medical and

[2] N. David Kornfeld is appellant's authorized attorney.

surgical certainty be attributed to any condition of ill being involving the lower back." Dr. Matz concluded:

> "In summary, [appellant] has a history with a lengthy and complicated medical history predating her complaints related to the lower back attributed to a work incident in January 1982. I am referring to her history, as noted, within the medical records, of a prior head injury and lengthy time loss from work prior to her resumption of employment activity in January 1982 and her brief work history thereafter prior to the onset of complaints involving the lower back. Those symptoms were nonspecific and, hence, attributed to a number of potential diagnoses, all of which are anatomically undocumented and unproven. Her acute low back symptoms were variously described as having improved, resolved, recurring and continuing. She subsequently developed a cervical spinal cord compression and cervical myelopathy for which she underwent two operative procedures on her cervical spine being left with very severe neurologic impairment. There is no question among the various physicians who have had an opportunity to examine [appellant] that she is currently completely physically incapacitated. There is also no question that from an objective perspective her incapacity is related to her cervical cord injury. I noted within the medical records an attempt to ascribe at least a portion of her cervical spine dysfunction to her lower back complaints. That attempt is not supported by any factual medical documentation. The records of Dr. Luken, who performed the surgery on her cervical spine, clearly indicate that her disability is related to her cervical myelopathy. He commented that the overwhelming physical findings are related to her cervical spinal cord, but there is no physical examination reported within his records with regard to her back and hip complaints that would suggest any specific abnormality involving the lumbar spine. I certainly appreciate the difficulties in addressing any neurologic deficit that would be related to involvement of the lumbosacral nerve roots with an overriding process involving the cervical spinal cord, yet [appellant's] neurologic examination, which I performed in January 2002, did not reveal any signs of ongoing lumbosacral radiculopathy, there being no reflex or sensory loss or positive straight leg raising findings to suggest involvement of the nervous system about the lumbosacral spine.
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> "The findings of degenerative changes involving the axial skeleton (spinal column) is a normal development in individuals of [appellant's] age. The term 'degenerative disc disease' is a misnomer in the sense that such degenerative changes are age related and a fact of life and are not specifically related to any specific incident, such as described by [appellant]. It is also not possible by looking at imaging studies that reveal degenerative changes to any way suggest that such changes for a given individual are productive of symptoms or that such anatomic findings are the site of a so-called aggravation of a disease process involving the spinal column. Those statements are solely based on subjective complaints of individuals, as there are no laboratory studies or physical examination findings that would document a source of the clinical subjective complaints. As is typically the case, and as noted, in this matter, [appellant's]

> symptoms were attributed to a number of different anatomic locations and pathologic conditions, none of which are proven from an objective medical perspective. It is in my opinion medically unreasonable to suggest that now some twenty years after the onset of her low back symptomatology that [appellant] would be continuously disabled by that process, which even untreated would be self-limiting in nature and not reasonably anticipated to produce long[-]term permanent physical incapacity and disability."

By decision dated March 18, 2002, the Office found that the medical evidence supported that appellant no longer suffered residuals of the accepted employment-related lumbar condition as a result of her January 5, 1982 employment injury.

By letter dated June 15, 2002, appellant requested reconsideration, contending that Dr. Matz's reports should be stricken because they did not reflect a review of the Office's statement of accepted facts and because Dr. Matz did not acknowledge the Office's acceptance of a permanent aggravation of appellant's degenerative disc disease of the lumbar spine but instead "revisit[ed] this question asserting his opinion that any lumbar problems experienced by [appellant] were attributable to the aging process not due to work injury."

By letter dated August 29, 2002, appellant submitted a report of a July 9, 2002 magnetic resonance imaging (MRI) scan of her lumbar spine, which listed an impression of "moderate degree of degenerative spondylolisthesis of the lumbar spine with mild central canal stenosis at L1-2, L2-3 and L3-4." The report also noted an asymmetric bulging annulus at L4-5 but no significant stenosis at that level and "fairly well maintained" neural canals.

By decision dated September 18, 2002, the Office found that the additional evidence was not sufficient to warrant modification of its prior decision.

The Board finds that the weight of the medical evidence establishes that appellant's disability causally related to her January 5, 1982 employment injury ended by March 27, 1999.

On the prior appeal, the Board found that the Office met its burden of proof to terminate appellant's compensation, but that a subsequently submitted medical report created a conflict of medical opinion. To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[3] referred appellant, the case record and a statement of accepted facts to Dr. Matz, a Board-certified neurosurgeon.

In situations where 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.[4]

[3] 5 U.S.C. § 8123(a) states in pertinent part: "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."

[4] *James P. Roberts*, 31 ECAB 1010 (1980).

The reports of Dr. Matz are entitled to special weight and constitute the weight of the medical evidence. Although Dr. Matz did not specifically refer to the Office's statement of accepted facts, this document was contained in the records sent to Dr. Matz before he prepared his second report, and the history contained in his reports is accurate.

Most importantly, Dr. Matz provided rationale for his conclusion that appellant's continuing disability was related to her cervical myelopathy rather than to a low back condition. Dr. Matz stated that one could not "reasonably suggest that the minor findings on her imaging studies of the lumbar spine would be a cause for ongoing symptoms and incapacity," specifically pointing to the findings of a July 9, 1987 EMG, which Dr. Matz characterized as "minimal in nature," with no nerve root involvement and therefore "not … a cause of weakness attributed to neurologic dysfunction in the lower extremities." Dr. Matz also noted that the findings on a December 13, 1988 EMG did not suggest "any neurologic impairment involving the back or lower extremities related to a condition involving the lumbosacral spine area."

According to Dr. Matz, not only did the electrophysiologic studies not show a disabling condition related to the lumbar spine, but the neurologic examination he performed on January 18, 2002 "did not reveal any signs of ongoing lumbosacral radiculopathy, there being no reflex or sensory loss or positive straight leg raising findings to suggest involvement of the nervous system about the lumbosacral spine." He provided a well-rationalized report explaining why he concluded that appellant's continuing disability was not related to any condition of the lumbosacral spine.

The July 9, 2002 MRI submitted by appellant on reconsideration does not contradict Dr. Matz's conclusion. It shows degenerative spondylolisthesis but fairly well-maintained neural canals. This report does not address and therefore does not support the proposition that appellant's continuing disability is related to any condition of her lumbosacral spine.

The September 18 and March 18, 2002 decisions of the Office of Workers' Compensation Programs are affirmed.

Dated, Washington, DC
April 24, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member