U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JACQUELINE GIVENS and U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Pittsburgh, Pa.

Docket No. 97-2672; Submitted on the Record;
Issued July 16, 1999

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether appellant's disability and need for medical treatment causally related to her July 1, 1993 employment injury ended by March 18, 1996.

The Office of Workers' Compensation Programs accepted that appellant's July 1, 1993 employment injury resulted in a cervical and lumbosacral strain. Appellant received continuation of pay from July 5, 1993, when she stopped work, until August 25, 1993, after which the Office began paying her compensation for partial and later, total disability. Appellant last worked on September 8, 1993.

On August 18, 1995 the Office issued a notice of proposed termination of compensation on the basis that appellant's disability from her employment injury had ceased. By decision dated April 8, 1996, the Office terminated appellant's compensation on March 18, 1996 on the basis that she no longer had any disability or medical condition causally related to her employment injury. This decision was affirmed by an Office hearing representative in a decision dated October 21, 1996. Appellant requested reconsideration and the Office refused to modify its prior decisions in a decision dated May 14, 1997.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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. The Office also has the burden of proof to terminate authorization for medical treatment and, to do so, must establish that appellant no longer has residuals of an employment-related condition which require further treatment.[1]

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

The Board finds that appellant's disability and need for medical treatment causally related to her July 1, 1993 employment injury ended by March 18, 1996.

There was a conflict of medical opinion on the question of whether appellant continued to have residuals of her July 1, 1993 employment injury. In a report dated June 6, 1994, Dr. Robert M. Yanchus, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion, concluded:

> "It is my opinion, based on today's exam[ination] and review of documents provided including diagnostic studies and treatment that the diagnosis would be cervical/lumbar sprain as a result of a work injury of July 7, 1993.
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> "At this point in time the numerous subjective complaints are not supported in my opinion, by any objective findings.
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> "Sprain type injuries such as this are soft tissue in nature and amenable to recovery with conservative care in the matter of a few weeks or months at the very most."
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> * * *
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> "Also in my opinion … there are no residuals of the work injury and the claimant can return to her regular job with no modifications or restrictions.…
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> "It is my opinion that in treatment with no objective findings, continued ongoing treatment is counterproductive to recovery, serving only to reinforce in the perception of the claimant that some physical problem still exists. Actually, return to work at the appropriate time is beneficial by giving the claimant a structured lifestyle and by doing so reducing tendency for somatization of somatic complaints."

Appellant's attending physician, Dr. Joseph K. Eshleman, an osteopath who specializes in physical medicine and rehabilitation, stated in an October 24, 1994 report, that appellant should not perform even light duty, but should instead attend a chronic pain program. In a report dated September 21, 1994, Dr. Eshleman reported findings of restricted active and passive motion of the left shoulder secondary to pain, moderate palpatory tenderness over the left thoracic paraspinal musculature and marked palpatory tenderness over the origin of the long head of the left biceps. He diagnosed cervical radiculopathy and indicated this condition was due to appellant's July 1, 1993 employment injury.

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,[2] referred appellant, the case record and a statement of accepted facts to Dr. Leland S. Blough, a Board-certified orthopedic surgeon. In a report dated

[2] 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."

December 2, 1994, Dr. Blough set forth appellant's history, complaints, clinical course and findings on physical examination. He then concluded:

> "This lady has had extensive diagnostic studies including structural x-rays of cervical and lumbar spine regions July 7, 1993 reported as showing minimal anterior, inferior spur of the body of C5 vertebra (with no proximity to nerve tissues) and normal lumbosacral spine films. She has had extensive other studies including myelogram and post myelogram CT [computerized tomography] of the cervical spine, MRI [magnetic resonance imaging] studies of the left shoulder and the cervical/thoracic spine and electrical studies. She has also had evaluation by multiple physicians including orthopedic surgeons and is currently under the care of her family physician and osteopath [Dr.] Eshleman. She has had at least one injection in the posterior neck region and notes that she has had constant occipital pain thereafter. She has had no relief from medication or physical therapy she reports. She has had no improvement from the treatment modalities including TENS [transcutaneous electrical nerve stimulation] according to documents. She reports that she has been told by several of her physicians that she has bulging discs in the neck area but no surgery is indicated. She also has been told that she has impingement syndrome in the left shoulder but no surgery is indicated. She said Drs. Eshleman and Tolentino four or five months ago suggested pain clinic attendance and she is willing to go to pain clinic.
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> "This lady shows on examination no cervical or lumbosacral strain objective findings and no plausible clinical picture at this time of any residual cervical or lumbosacral strain pattern. She does report learned pain behavior spending most of her time in bed with sometimes a day spent with up to four or five hours out of bed and shows demeanor during the interview and gentle physical examination of significant degree of learned pain behavior and four positive Wadell nonorganic findings.
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> "In the absence of objective neuromuscular abnormalities to explain the symptomatology, conclusion must be reached that from a physical standpoint there is no longer any residual of 1 July 1993 work injury to prevent her return to her prior level of work capability."
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> * * *
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> "From a pure physical standpoint based on today's examination, there is no reason in relation to injuries of July 1, 1993 that [appellant] is any longer impaired or unable to perform her preinjury level of activities.
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> "However, on the basis of learned pain behavior and assuming that [appellant's] symptomatology is actually perceived by her (in the absence of any surveillance

evidence of malingering), then a period of formal pain clinic attendance might reduce [appellant's] perception of symptoms."

* * *

"Thus from the standpoint of clinical picture and physical findings, there is no indication of any musculoskeletal injury residuals as of 2 December 1994 which would prevent [appellant] from returning to her prior employment level of medium work activities. However, if one accepts the actual presence of unconscious performance of learned pain behavior, then there is a rationale for allowing [appellant] to attend a finite course of reasonable pain clinic attendance of several months. This could serve to reduce her perception of musculoskeletal deficiency, enhance her coping mechanisms and serve also as a physical restorative rehabilitation process prior to her return to work. I believe it is important to apprise her that as of 2 December 1994, there is no injury residual from 1 July 1993 preventing her from work but that rather her secondary learned pain behavior is being addressed with the pain clinic so that she can achieve optimum symptom reduction over the finite several months of prescribed activities and pain clinic prior to her return to work. Thus, she should understand that she is expected to return to work and in the case she is afforded the opportunity to go to 'pain clinic' that it is for symptoms reduction and she is still expected to go to work after pain clinic, irregardless of degree of any self-reported musculoskeletal symptoms."

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.[3] Dr. Blough's report was based on a proper factual background and contains rationale for his opinion that appellant no longer had residuals of her July 1, 1993 employment injury. His report is entitled to special weight and is sufficient to establish that appellant no longer had residuals of her July 1, 1993 employment injury as of the date of Dr. Blough's examination on December 2, 1994.

Nonetheless, the Office authorized the pain clinic recommended by Dr. Blough and appellant attended this program from May 3 to 26, 1995. Appellant reported no improvement at the end of this program and a physical capacity evaluation was done on June 20, 1995. In a report dated August 30, 1995, Dr. Eshleman stated that he agreed with the opinion expressed in the physical capacity evaluation that appellant could perform only a trial of part-time sedentary work. The physical capacity evaluation attributes appellant's inability to work, however, not to her July 1, 1993 employment injury but to excessive pain behaviors, poor application of body mechanic skills and inability to apply self-pain management skills.

The reports of Dr. William K. Petrella, an osteopath specializing in pain management and occupational therapy, also attribute appellant's continuing disability to conditions not accepted

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

by the Office and not established as causally related to appellant's July 1, 1993 employment injury. In a report dated December 15, 1995, Dr. Petrella stated that appellant's "dysfunction may be more of a rebound headache syndrome at this point." In reports dated March 15 and April 12, 1996, he diagnosed myofascial pain syndrome with neck thoracic muscle enthesopathy and possibly an overlay of generalized fibromyalgia and attributed her tension headaches to narcotic use. In a report dated December 9, 1996, Dr. Petrella diagnosed myofascial pain syndrome involving predominately appellant's left neck and shoulder complex. In this report he stated that it was unlikely that the orthopedic surgeons who examined appellant for the Office were experts in the pain syndrome appellant had. There is no reasoned medical opinion sufficient to establish that any of these conditions diagnosed by Dr. Petrella are causally related to appellant's July 1, 1993 employment injury. The reports submitted by appellant subsequent to his report are not sufficient to overcome the weight of that report or to create a conflict of medical opinion with it.

The decisions of the Office of Workers' Compensation Programs dated May 14, 1997 and October 21, 1996 are affirmed.

Dated, Washington, D.C.
July 16, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member