U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHERYL A. BERGER and DEPARTMENTOF HEALTH & HUMAN SERVICES, REGIONAL PERSONNEL OFFICE, New York, NY

Docket No. 01-1318; Submitted on the Record;
Issued August 19, 2002

DECISION and ORDER

Before COLLEEN DUFFY KIKO, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's wage-loss compensation on the grounds that she had no continuing disability for her date-of-injury job resulting from her August 11, 1988 employment injury.

The Office accepted that on August 11, 1988 appellant, then a 42-year-old claims development clerk, sustained a lumbosacral strain when she fell down three steps. Following this injury, appellant stopped work and did not return; she was placed on the periodic rolls for receipt of wage-loss compensation.

In 1993 appellant began treatment with Dr. Michael G. Sugarman, a Board-certified neurosurgeon. In response to the Office's request for a current medical report, by report dated December 28, 1997, Dr. Sugarman opined that appellant continued to suffer from residuals of her August 11, 1988 work injury and remained totally disabled for all work due to such residuals. He reiterated this opinion on June 25, 1998 and May 3, 1999 work restriction evaluation forms.

The Office determined that a second opinion examination was required, prepared a statement of accepted facts with specific questions to be addressed and referred appellant, together with the relevant case record, to Dr. Richard P. DuShuttle, a Board-certified orthopedic surgeon, for an evaluation.

By report dated June 29, 1999, Dr. DuShuttle diagnosed chronic lumbosacral strain, degenerative disc disease of the lumbar spine and spinal stenosis at L4-5 and L5-S1 and provided the following discussion:

> "Based on the information available to me, it would appear that [appellant's] current complaints were asymptomatic but were flared up by the work incident of August 11, 1988. I am unable to relate the complaints to an incident that took place 10 years ago. She is not a surgical candidate. Unfortunately, it is my opinion that [appellant] will not get any better than she is at this time. She has

reached her maximum medical improvement. It is my medical opinion that [appellant] can do a sedentary type job. It is my medical opinion that [appellant] had an asymptomatic condition of arthritis in the back that was flared up by the work incident, but the initial work incident was not directly responsible for her condition. I do not feel that any further diagnostic studies are necessary. Occasional physical therapy sessions may be necessary for flare-ups. A wellness program is not necessary, nor are any further nerve blocks or injections. A pain management clinic is not necessary but a TENS unit for pain management may be beneficial and is medically reasonable and necessary. [Appellant] may continue to suffer mild residual discomfort related to the chronic lumbosacral strain."

Dr. DuShuttle completed a work restriction evaluation Form OWCP-5c indicating that appellant could work eight hours per day with alternating sitting, walking and standing each for four hours per day, with reaching above the shoulder for four hours per day and with lifting, pushing and pulling 10 pounds for four hours per day.

The Office thereafter referred appellant, together with a statement of accepted facts, questions to be addressed and the relevant case record, to Dr. Norman H. Eckbold, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict between appellant's treating physician and the Office's second opinion.

By report dated October 7, 1999, Dr. Eckbold stated as follows:

"At the time of my interview and exam[ination], [appellant] had marked subjective complaints with no true objective orthopedic or neurologic functional deficits referable to the spine or extremities on physical exam[ination]. The multiple studies [on] the low back show a mild disc protrusion [at] L4-5 with developmentally large facets posteriorly, constricting the canal at L4-5. Despite the constriction by posterior facet elements of a developmental nature, [appellant] has no radicular pain into the legs on provoking tension tests of the low back. She has no objective neurologic deficit of the L4 or L5 nerve roots, which one would anticipate if the constriction at L4-5 was clinically significant.

"The hypertrophy of the posterior elements of the spine at L4-5 is not causally related to the 1988 work accident.

"The diagnosis of hypertrophy of posterior elements at L4-5 are (sic) not causally related to the 1988 work accident.

"I do not find any aggravation of permanent impairment referable to the spine or extremities on physical examination.

"[Appellant] has subjective complaints without support by objective functional deficits.

"In the absence of any objective orthopedic or neurologic functional deficits referable to the spine or extremities, no further treatment is indicated.

"I feel [appellant] is able to return to work in primarily a sitting position. I find no objective residuals from the work-related injury at the time of my physical exam[ination]. The tests performed showed that she does not have a clinically significant herniated disc in the low back but that her anatomical hypertrophy of posterior elements (facets) are the cause of the stenosis at L4-5. This is not caused by the incident of 1988. The degenerative disc phenomenon noted cannot be defined as having been caused or aggravated by the 1988 incident at work."

On January 24, 2000 the Office issued appellant a notice of proposed termination of compensation finding that the weight of the medical evidence of record was represented by the impartial medical report of Dr. Eckbold and established that appellant no longer suffered from any continuing disability from the work injury of August 11, 1988. The Office determined that appellant could work eight hours per day without restrictions.

By letter dated February 28, 2000, appellant, through her representative, disagreed with the proposed termination of benefits, claiming that there were a number of deficiencies with respect to the reports from both Drs. DuShuttle and Eckbold. Appellant claimed that Dr. DuShuttle related appellant's current condition to the work injury and did not indicate that residuals due to the injury had resolved.

Accompanying his letter, appellant's representative submitted an updated February 24, 2000 report from Dr. Sugarman, which stated:

"I did have a chance to review Dr. Eckbold's report of October 7, 1999 and Dr. DuShuttle's report of June 29, 1999. While I am in agreement with these two gentlemen that there is evidence of degenerative disc disease, it is my opinion that this is not the origin of [appellant's] pain. It was not until she fell at work on August 11, 1988 that she developed her low back discomfort which has persisted to date. Further, although there is evidence of degenerative disease within the spine, I believe that this has been potentiated by [appellant's] injury. Were it not for the fall, it is my opinion that she would not have the significant pain that she has today.

"While I agree with Dr. Eckhold in his noting that there is no objective neurologic deficit present at the L4-5 nerve roots, I disagree that this would be anticipated with constriction at the L4-5 level. It is quite common for people with spinal stenosis not to have any definite neurologic findings but simply pain, especially with ambulation. This phenomenon described as 'neurologic claudication' is a well known entity. Although there are no significant neurologic findings at this time, an EMG [electromyogram] report from 1990 was positive for an L5 radiculopathy. While [appellant] may not have sustained enough of an injury to produce any obvious neurologic deficit, she did, in my opinion, sustain enough of an injury to cause an acceleration of the degenerative changes that are seen currently. Since she did not have any difficulties prior to the fall at work and since this has been a persistent phenomenon since the fall, it is my opinion that the fall did lead to a permanent impairment to her spine."

By letter dated March 24, 2000, the Office requested that Dr. DuShuttle submit a follow-up report clarifying his opinion as to whether appellant's diagnosed condition was medically related to her work injury either by direct cause, aggravation, precipitation or acceleration.

Dr. DuShuttle provided a follow-up report dated April 13, 2000 which noted as follows:

> "It is my opinion that [appellant] had an asymptomatic arthritis of the lumbosacral spine prior to her fall in 1988. The subsequent injury aggravated this arthritis to a point where she would have occasional mild symptoms of discomfort on an intermittent basis. Generally this injury would be responsible for periodic discomfort with weather changes and temperature changes whereby [appellant] would elicit discomfort. On examining [appellant] during [my examination], it was apparent that [she] had much more significant subjective symptoms than one would anticipate from my previous statements.
>
> "In conclusion, the fall has, by way of indirect means, caused a mild permanent impairment by aggravation of the then asymptomatic arthritic condition. It is my opinion after seeing her at this ... examination that her severe symptoms and progression are related not to the fall but to the natural progression of the arthritic condition of her low back."

Thereafter, the Office, upon request of the employing establishment, provided a job description and a detailed narration of the physical requirements for the position of claims development clerk.

By letter dated June 2, 2000, the Office sent Dr. Eckbold a copy of Dr. DuShuttle's April 13, 2000 follow-up report and copies of appellant's date-of-injury position description and its physical requirements. The Office requested that Dr. Eckbold review the position description and physical requirements and provide an opinion as to whether appellant was capable of performing the duties of her date-of-injury job.

On June 8, 2000 Dr. Eckbold responded:

> "I reviewed my own report of October 7, 1999 and found no objective functional deficits referable to the spine or extremities to support [appellant's] subjective complaints. She has a developmental change in the facets at L4-5 leading to spinal stenosis not related to the 1988 incident.
>
> "I feel [appellant] is able to return to work without restrictions referable to any injury sustained August 11, 1988. Any restrictions in employment would be simply due to degenerative changes of a developmental nature."

By letter dated June 22, 2000, the Office requested that Dr. Eckbold provide a specific opinion as to whether appellant was physically capable of performing her date-of-injury job.

By report dated June 28, 2000, Dr. Eckbold stated: "I feel that [appellant] is physically capable of performing her job as a claims development clerk, as described in correspondence of June 1, 2000."

On July 20, 2000 the Office issued a second notice of proposed termination of compensation finding that the weight of the medical evidence of record established that appellant was physically capable of performing her date-of-injury position.

By letter dated August 18, 2000, appellant, through her representative, objected to the proposed termination of benefits claiming that Dr. Eckbold failed to address the reports of Drs. Sugarman and DuShuttle, which indicated that appellant continued to suffer from an aggravation causally related to the work injury. Appellant claimed that Dr. Eckbold's reports should not be accorded any credibility as he was partial to the Office and provided no medical rationale.

By decision dated August 24, 2000, the Office terminated appellant's wage-loss compensation entitlement effective September 10, 2000 on the basis that the weight of the medical evidence of record established that she had no further injury-related disability for work and could perform her date-of-injury position.

In a letter dated August 26, 2000, appellant requested a review of the written record.

After a review of the written record, by decision dated March 30, 2001, the hearing representative affirmed the Office's August 24, 2000 decision, finding that the weight of the medical opinion evidence of record established that appellant was no longer disabled from her date-of-injury job. The hearing representative found that the conflict in medical opinion evidence had been resolved by the reports of the impartial medical examiner.

The Board finds that the Office properly terminated appellant's wage-loss compensation on the grounds that she had no continuing disability for her date-of-injury job resulting from her August 11, 1988 employment injury.

Once the Office accepts a claim, it has the burden of justifying 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] The Office met its burden of proof in this case.

In the instant case, the Office properly determined that the June 29, 1999 report from the Office's second opinion specialist, Dr. DuShuttle, created a conflict in medical opinion with the reports of Dr. Sugarman, appellant's treating physician, on the issue of whether appellant had any disabling residuals of her August 11, 1988 lumbosacral muscular strain injury. In order to resolve the conflict, the Office referred appellant, together with a statement of accepted facts, specific questions to be resolved and the relevant case record to Dr. Eckbold, for an impartial medical examination and opinion to resolve the conflict.

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

[2] *Patricia A. Keller*, 45 ECAB 278 (1993); *Vivien L.Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

Dr. Eckbold, in a complete and well-rationalized report, based upon a complete and accurate factual and medical history and the results of his own physical examination, opined that appellant had no true objective orthopedic or neurologic functional deficits referable to her spine or extremities, no 1988 injury-related facet hypertrophy and no aggravation of permanent impairment referable to her spine or extremities. He opined that appellant had no continuing injury-related disability causally related to the August 11, 1988 employment injury and he indicated that she was able to return to primarily sedentary work.

Based on Dr. Eckbold's report, which resolved the conflict in medical opinion evidence, the Office then issued appellant a notice of proposed termination of compensation.

Appellant disagreed with this proposed action, raised a number of objections to the proposed termination of compensation and submitted a February 24, 2000 report from Dr. Sugarman which reiterated his opinions that the 1988 employment fall led to permanent impairment of appellant's spine. The Board notes, however, that Dr. Sugarman was on one side of the conflict in medical opinion created in this case and that his February 24, 2000 report essentially repeated his earlier findings and conclusions.

The Board has frequently explained that an additional report from appellant's physician, which essentially repeated his earlier findings and conclusions, is insufficient to overcome the weight accorded the impartial medical examiner's report, where appellant's physician had been on one side of the conflict in medical opinion that the impartial medical examiner resolved.[3] As Dr. Eckbold resolved the conflict in medical opinion, the additional report from Dr. Sugarman was insufficient to overcome the weight accorded the report of the impartial medical specialist.[4]

In response to these objections, the Office requested that Dr. DuShuttle provide a follow-up report clarifying his opinion regarding causal relationship. In his April 13, 2000 follow-up report, Dr. DuShuttle indicated that appellant did have continuing injury-related residuals causally related to the accepted work injury. However, he continued to indicate that appellant was not totally disabled for all work.

With Dr. DuShuttle's follow-up report, the Office determined that there was no longer a conflict in medical opinion between Drs. Sugarman and DuShuttle with regard to the issue of whether there were continuing injury-related residuals, such that Dr. Eckbold was no longer considered to be a impartial physician with respect to the issue of continuing injury-related residuals. However, the Office properly found that there was still a conflict in medical opinion between Drs. Sugarman and DuShuttle regarding appellant's work capacity. Dr. Sugarman opined that appellant was totally disabled for all employment, while Dr. DuShuttle opined that appellant was capable of performing a sedentary-type job for eight hours per day, with no lifting over 10 pounds and with alternating sitting, standing and walking. Therefore, the Office properly determined that Dr. Eckbold would still be considered to be an impartial physician with respect to the existing conflict regarding appellant's work capacity.

[3] *Thomas Bauer*, 46 ECAB 257 (1994); *Virginia Davis-Banks*, 44 ECAB 389 (1993).

[4] *Id.*

Appellant's date-of-injury job, claims development clerk, was identified as being a sedentary position and the Office obtained a copy of the position description for the job, including a specific description of its physical requirements. The Office provided these descriptions to Dr. Eckbold for his review, with a request for an opinion as to whether appellant was physically capable of performing her date-of-injury job as a claims development clerk.

Dr. Eckbold replied in his October 7, 1999 report that appellant was capable of performing the sedentary-type duties of her date-of-injury position.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[5]

In this case, the Office properly found that there was a conflict between Dr. Sugarman, who opined that appellant remained totally disabled, and Dr. DuShuttle, who opined that appellant could perform sedentary work with certain activity restrictions and it appropriately referred appellant to Dr. Eckbold for an impartial medical opinion to resolve the issue of whether appellant remained disabled for all work. Dr. Eckbold opined, in a complete and well-rationalized report based on an accurate description of the physical requirements of appellant's date-of-injury job and his own physical examination results, that appellant had no continuing disability for work causally related to the August 11, 1988 employment injury and that she therefore, was not disabled for her date-of-injury position. Further, a subsequent report from Dr. Sugarman was found to be insufficient to create a new conflict with the impartial medical examiners report. As Dr. Eckbold's report and follow-up comments were sufficiently well rationalized and based upon a proper factual and medical background, his opinion is entitled to special weight, such that it becomes the weight of the medical opinion evidence and establishes that appellant had no further injury-related disability for work in her date-of-injury position.

[5] *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

Accordingly, the decisions of the Office of Workers' Compensation Programs dated March 30, 2001 and August 24, 2000 are hereby affirmed.

Dated, Washington, DC
August 19, 2002

Colleen Duffy Kiko
Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member