United States Department of Labor
Employees' Compensation Appeals Board

GERALDINE D. SHOPE, Appellant	)	
and	)	**Docket No. 04-2158**
	)	**Issued: April 7, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Buffalo, NY, Employer	)	

Appearances:
Dennis A. Clary, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On August 30, 2004 appellant, through her attorney, filed an appeal from a June 2, 2004 merit decision of the Office of Workers' Compensation Programs denying modification of its finding that she had not established continuing employment-related disability after May 19, 2002 and an August 10, 2004 nonmerit decision denying her request for a hearing under 5 U.S.C. § 8124. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case and over the Office's August 10, 2004 nonmerit decision.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation effective May 19, 2002 on the grounds that she had no further disability due to her accepted employment injury; (2) whether the Office properly terminated authorization for medical benefits; (3) whether appellant has established that she had continuing employment-related disability subsequent to May 19, 2002; and (4) whether the Office properly denied appellant's request for a hearing under section 8124 as she had previously requested reconsideration of her claim.

FACTUAL HISTORY

On September 4, 1971 appellant, then a 37-year-old substitute carrier, filed a claim for an injury occurring on that date in the performance of duty. The Office accepted her claim for strain of the back and rib area, a contusion of the buttock and lower back, cervical spine disc degeneration and osteoarthritis of the spine. Appellant stopped work on September 4, 1971 and returned to light-duty employment on May 13, 1972. She subsequently sustained intermittent periods of temporary total and partial disability.

On February 24, 1983 appellant filed a claim for an injury occurring on that date when her "chair went backwards." The Office accepted the claim for a sprained left ankle, lumbar, pardorsal spasm and an aggravation of chronic back strain. The Office doubled the September 4, 1971 and February 24, 1983 claims into file number A2-20261616. Appellant had intermittent periods of total and partial disability until September 2, 1987, when she stopped work and did not return.

A memorandum dated May 15, 1997 indicated that investigators with the employing establishment videotaped appellant during February and March 1997 performing various activities, including bowling in league play. The record contains photographs of the surveillance.

On August 15, 2000 the Office referred appellant to Dr. Melvin M. Brothman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated September 5, 2000, Dr. Brothman diagnosed "chronic low back strain secondary to degenerative disc disease of a mild nature with little objective evidence of a disabling problem with her lumbar spine." He found that appellant could return to work full time as a letter carrier but "should avoid lifting over 25 pounds."

In a report dated February 2, 2001, Dr. Iqbal A. Samad, a Board-certified internist and appellant's attending physician, diagnosed "severe, lower back pain which is aggravating her abdominal pain." He opined that she remained totally disabled from employment.

On September 15, 2001 the Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Patrick J. Hughes, a Board-certified neurologist, for resolution of a conflict in medical opinion regarding appellant's continuing employment-related disability.

In a report dated October 26, 2001, Dr. Hughes reviewed the history of injury, the medical reports of record and the investigative report from the employing establishment. He discussed appellant's complaints and listed findings on physical examination. Dr. Hughes opined that appellant "has no objective findings on neurological examination to substantiate continuing complaints of disabling pain." He stated:

> "Currently, [appellant] has no objective findings. She has no disability causally related to her work injury based on the lack of objective findings on her neurological examination or on her numerous imaging studies. This is consistent with her behavior that was captured in the videotapes and still photographs and with the information in the [i]nvestigative [m]emorandum.

> "There are no medical findings to support that the conditions are still active and still causing objective [s]ymptoms.
>
> "I feel that the accepted conditions of lumbosacral strain, muscle strain of [the] rib area, contusion of buttock and lower back have resolved.
>
> "The degeneration of the cervical spine and osteoarthritis of the entire spine persists but in my opinion is not causing symptoms.
>
> "Injuries from 1983 accident (which she did not mention to me) have resolved."

Dr. Hughes found that appellant could return to her regular employment without restrictions. He related that appellant did not require either work hardening or a functional capacity evaluation and reiterated that her "degenerative disc disease of [the] cervical and lumbosacral spine and osteoarthritis are present but not causing symptoms."[1]

By letter dated March 18, 2002, the Office notified appellant that it proposed to terminate her compensation benefits on the grounds that she had no further disability causally related to her September 4, 1971 employment injury.

In response, appellant submitted a medical report dated December 1, 1987 from Dr. Steven R. Caprow, a chiropractor, and an unsigned report dated January 3, 2001 from Dr. Naim A. Dawli, a Board-certified surgeon, who discussed her complaints of abdominal pain and noted her history of a back injury. He stated:

> "My feeling is that [she] probably has some abdominal adhesions related to her numerous surgeries that she had, which may be the cause of her pain. Most likely, however, I think her pain could be related to her back injury. However, perhaps we are dealing with an abdominal wall neuroma from multiple scarring."

By decision dated April 3, 2002, the Office terminated appellant's compensation and entitlement to medical benefits effective May 19, 2002 on the grounds that her injury-related disability and condition ceased by that date.

In a report dated August 29, 2002, Dr. P. Jeffrey Lewis, a Board-certified neurosurgeon, noted that appellant related a history of back trouble since a 1971 employment injury. He found that a magnetic resonance imaging (MRI) study of appellant's lumbar spine was unremarkable but that she had spondylosis and a disc herniation on the left at C4-5 and C5-6 and a degenerative disc at T11-12. He recommended a cervical spine fusion.

By letter dated November 13, 2002, appellant, through her attorney, requested reconsideration. He submitted an MRI study of appellant's lumbar spine dated January 8, 2002

[1] In an addendum dated December 20, 2001, Dr. Hughes opined that appellant's September 4, 1971 employment injury did not aggravate the conditions of degenerative disc disease of the cervical and lumbosacral spine or osteoarthritis.

which showed degenerative disc desiccation of the lumbar spine with mild bilateral facet arthropathy. An MRI study of appellant's thoracic spine dated January 12, 2002 showed degenerative disc disease at T11-12 and a cervical MRI study dated March 9, 2002 showed early degenerative disc disease at C5-6.

In a decision dated December 4, 2002, the Office denied appellant's request for reconsideration as the evidence submitted was immaterial and insufficient to warrant review of its April 30, 2002 decision.

Dr. S. Khalil, in a work restriction evaluation dated June 17, 2002, found that appellant had lumbar pain with periodic radiation in the extremities and a T11-12 fracture.[2] He opined that appellant was unable to perform light work as she had poor reliability "secondary to waxing and waning of symptoms."

On April 25, 2003 appellant, through her attorney, again requested reconsideration.[3] In support of her request, appellant submitted a medical report dated April 9, 2003 from Dr. Lewis, who stated:

> "In regards to [appellant's] cervical spine injury requiring cervical surgery at C4-5 and C5-6, [she] was injured at work on September 4, 1971. Certainly she had progression with arthritis as any person would as they age. However, [appellant] feels very clearly that her ongoing pain at this point started with the injury dated September 4, 1971."

Dr. Lewis recommended a fusion at C4-5 and C5-6. He related, "Certainly arthritis and cervical spondylosis does come in to play given the fact that this injury was many years ago. However, [appellant] feels clearly, as mentioned, that this injury occurred on September 4, 1971 and has progressively worsened over time."

On December 2, 2003 appellant's attorney again requested a decision on his reconsideration request. He submitted a report dated November 11, 2003 from Dr. Mary Elizabeth Roehmholdt, a Board-certified neurologist, who discussed appellant's medical history and performed objective studies. She related that an electromyogram (EMG) revealed bilateral nerve root irritation and a nerve conduction study showed peripheral neuropathy and further discussed the results of appellant's lumbar and thoracic MRI studies. Dr. Roehmholdt stated:

> "[Appellant] is disabled at this time and according to you letter dated October 13, 2003, the [Office] agrees with this disability but felt it was not due to her injury suffered in the 1970's. It is difficult for me to state that the injuries that she had in the 1970's are the causative agents of her current back disability. It should be noted that the [Office] had stated in the letter of November 24, 1990, that the job-related condition included osteoarthritis of the spine and degenerative disc

[2] The qualifications of this physician are not known.

[3] Appellant, through her attorney, appealed to the Board on March 24, 2003. However, on May 22, 2003, the Board dismissed the appeal at appellant's request so that she could pursue reconsideration before the Office. Order Dismissing Appeal, Docket No. 03-1083 (issued May 22, 2003).

disease. If this is so then I would suspect that by their own acceptance of a job-related condition to include the osteoarthritis that it would be job related and hence, I do not understand the basis of the [Office's] denial that the osteoarthritis of the spine and the degenerative disc disease, which she now has, is not related to the injuries when in 1990 they stated they were."

By decision dated June 2, 2004, the Office denied modification of its April 30, 2002 decision terminating compensation.

In a letter dated and postmarked July 9, 2004, appellant, through her attorney, requested an oral hearing.

By decision dated August 10, 2004, the Office denied appellant's request for a hearing as she had previously requested reconsideration and as the matter could be equally well addressed through the reconsideration process. The Office noted that it had mistakenly included appeal rights which included a hearing with its June 2, 2004 decision.

LEGAL PRECEDENT -- ISSUE 1

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.[4] The Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

Section 8123(a) of the Federal Employees' Compensation Act[7] 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."[8] 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.[9]

[4] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[5] *Barbara J. Warren*, 51 ECAB 413 (2000).

[6] *James M. Frasher*, 53 ECAB 794 (2002).

[7] 5 U.S.C. §§ 8101-8193.

[8] 5 U.S.C. § 8123(a).

[9] *See Willie M. Miller*, 53 ECAB 697 (2002); *James M. Frasher*, *supra* note 6.

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a strain of the back and rib area, a contusion of the buttock and lower back, cervical disc degeneration, osteoarthritis of the spine, a sprained left ankle, lumbar, pardorsal spasm and an aggravation of chronic back strain arising from employment injuries on September 4, 1971 and February 24, 1983. The Office determined that a conflict in medical opinion arose between Dr. Brothman, the Office referral physician, and Dr. Samed, appellant's physician, regarding appellant's continuing employment-related disability. The Office referred appellant to Dr. Hughes for an impartial medical examination to resolve the conflict in opinion.

Where there exists a conflict in medical opinion 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 upon a proper factual background, is entitled to special weight.[10] The Board finds that the opinion of Dr. Hughes, a Board-certified neurologist selected to resolve the conflict in opinion, is based on a proper factual and medical history, is well rationalized and supports that appellant's disability due to her employment injuries ceased by May 19, 2002. Dr. Hughes provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Additionally, he provided a proper analysis of his findings on examination and reached conclusions about appellant's condition which comported with his findings.[11] On examination, Dr. Hughes found that appellant did not have objective findings supporting her pain complaints. He opined that appellant's accepted conditions of lumbosacral strain, muscle strain of the rib area, contusions of the buttock and lower back had resolved as had the conditions arising from her 1983 employment injury of a sprained left ankle, lumbar spasm and chronic back strain. Dr. Hughes found that appellant had continuing degeneration of the cervical spine and osteoarthritis of the spine but that these conditions caused no symptoms or work restrictions. He concluded that appellant could return to her usual employment without restrictions. Dr. Hughes provided rationale for his opinion by explaining that appellant had no objective findings on physical examination or imaging studies supporting her complaints. As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner and is sufficient to meet the Office's burden of proof to terminate appellant's compensation benefits.[12]

The remaining evidence of record submitted subsequent to Dr. Hughes' report and prior to the Office's termination of compensation is insufficient to overcome the weight accorded him as the impartial medical examiner. Appellant submitted a report from 1987; however, this is of no relevance to the pertinent issue of whether she was disabled on or after May 19, 2002 due to her accepted employment injury. She submitted a report dated January 3, 2001 from Dr. Dawli, who noted her history of a back injury and diagnosed probable abdominal adhesions due to multiple surgeries. He further found that her pain "could be related to her back injury."

[10] *Id*.

[11] *Manuel Gill*, 52 ECAB 282 (2001).

[12] *See Barbara J. Warren*, *supra* note 5.

Dr. Dawli, however, did not specifically discuss appellant's employment injury but instead referred in general terms to an unspecified back injury. Further, he did not address the relevant issue of whether she was disabled from employment. Dr. Dawli's opinion, additionally, that appellant's pain "could be related" to a back injury is speculative in nature and therefore of little probative value.[13]

The Board finds that the weight of the medical evidence, as represented by the well-rationalized report of Dr. Hughes, establishes that appellant had no further disability and the Office properly terminated appellant's compensation effective May 19, 2002 based on his report.

LEGAL PRECEDENT -- ISSUE 2

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[14] 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.[15]

ANALYSIS -- ISSUE 2

In this case, the Office met its burden of proof to terminate authorization through the opinion of Dr. Hughes, who found that appellant's accepted conditions had either resolved or were asymptomatic. He provided rationale for his opinion by explaining that the findings on examination, as supported by the investigative memorandum from the employing establishment, showed that she did not have any further disability or symptoms from her accepted conditions. Dr. Hughes further found that appellant did not require either work hardening or a functional capacity evaluation.

LEGAL PRECEDENT -- ISSUE 3

Once the Office meets its burden of proof to terminate appellant's compensation benefits, the burden shifts to appellant to establish that she had disability causally related to her accepted injury.[16] 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 medical and factual background, supporting such a causal relationship.[17] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[18] Rationalized medical evidence

[13] *Frank Luis Rembisz*, 52 ECAB 147 (2000) (medical opinions based on an incomplete history or which are speculative or equivocal in character have little probative value).

[14] *Franklin D. Haislah*, 52 ECAB 457 (2001).

[15] *Id*.

[16] *Manuel Gill*, *supra* note 11.

[17] *Id*.

[18] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

is 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 rationalize explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[19] Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[20]

ANALYSIS -- ISSUE 3

Subsequent to the Office's termination of compensation, appellant submitted a report dated August 29, 2002 from Dr. Lewis, who discussed appellant's complaints of back problems since her 1971 employment injury and diagnosed spondylosis and a disc herniation at C4-5 and C5-6 on the left and degenerative disc disease at T11-12. He recommended a fusion of the cervical spine. Dr. Lewis, however, did not specifically attribute appellant's cervical disc herniation or degenerative disc disease to her accepted employment injuries. Medical evidence that does not offer any opinion on the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[21] Additionally, the Office did not accept appellant's claim for a cervical disc herniation. Appellant bears the burden of proof of establishing causal relationship for any condition not accepted by the Office.[22] The Board thus finds that Dr. Lewis' opinion is of reduced probative value and insufficient to establish that appellant had any residual disability after May 19, 2002 due to her employment injury.

In a report dated April 9, 2003, Dr. Lewis opined that appellant had a cervical spine injury which required surgery at C4-5 and C5-6. He stated that appellant "feels very clearly that her ongoing pain at this point started with the injury dated September 4, 1971." Dr. Lewis, however, merely described appellant's belief that her pain was due to her employment injury, rather than making an independent finding. Consequently, his report is of little probative value.[23]

Appellant also submitted a work restriction evaluation dated June 17, 2002 from Dr. Khalil, who opined that appellant had lumbar pain and a T11-12 fracture. He found that she was unable to perform light work. Dr. Khalil, however, did not discuss appellant's employment

[19] *Leslie C. Moore*, 52 ECAB 132 (2000).

[20] *Ernest St. Pierre*, 51 ECAB 623 (2000).

[21] *Linda I. Sprague*, 48 ECAB 386 (1997).

[22] *Brady L. Fowler*, 44 ECAB 343 (1992).

[23] *Earl David Seal*, 49 ECAB 215 (1997).

injury, address causation or list findings on examination and thus his report is of little probative value.[24]

In a report dated November 11, 2003, Dr. Roehmholdt opined that appellant was disabled from employment. She related that it was "difficult" for her to "state that the injuries that [appellant] had in the 1970's are the causative agents of her current back disability." Dr. Roehmholdt noted that appellant currently had osteoarthritis and degenerative disc disease of the spine which the Office had accepted as employment related and thus questioned why the Office had denied appellant's claim. The issue, however, is whether appellant had any further disability after May 19, 2002 due to her accepted conditions, which include osteoarthritis and degenerative disc disease of the cervical spine. Dr. Roehmholdt's opinion regarding the cause of appellant's disability, however, is speculative and equivocal in nature as she indicates that it is "difficult" for her to relate appellant's disability to her employment injury. Thus, her report is of little probative value.[25] Appellant, consequently, has not met her burden of proof to establish any continuing employment-related disability after May 19, 2002.

LEGAL PRECEDENT -- ISSUE 4

Section 8124(b)(1) of the Act, concerning a claimant's entitlement to a hearing before an Office representative, provides in pertinent part: "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [her] claim before a representative of the Secretary."[26] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when a hearing request is untimely or made after reconsideration under section 8128(a), are a proper interpretation of the Act and Board precedent.[27]

ANALYSIS -- ISSUE 4

In this case, the Office denied appellant's July 9, 2004 request for a hearing as she had already requested reconsideration under section 8128. Appellant requested reconsideration on November 13, 2002, which the Office denied in a decision dated December 4, 2002. She again requested reconsideration on December 2, 2003. In a decision dated June 2, 2004, the Office denied modification of its termination of her compensation. Appellant, therefore, was not entitled to a hearing as a matter of right since the Office had previously reconsidered her claim under section 8128.

The Office then proceeded to exercise its discretion, in accordance with Board precedent, to determine whether to grant a hearing in this case. The Office determined that a hearing was not necessary as the issue in the case could be resolved through the submission of evidence in the

[24] *Fereidoon Kharabi*, 52 ECAB 291 (2001); *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[25] *See Frank Luis Rembisz*, *supra* note 13.

[26] 5 U.S.C. § 8124(b)(1).

[27] *See Claudio Vazquez*, 52 ECAB 496 (2001).

reconsideration process. The Office thus properly denied appellant's request for a hearing as it was made after she requested reconsideration and properly exercised its discretion in determining to deny her request for a hearing as she had other review options available.[28]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective May 19, 2002 on the grounds that she had no further disability due to her accepted employment injury. The Board further finds that the Office properly terminated authorization for medical benefits and that appellant has not established that she had continuing employment-related disability subsequent to May 19, 2002. The Board additionally finds that the Office properly denied appellant's request for a hearing under section 8124 as she had previously requested reconsideration of her claim.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 10 and June 2, 2004 are affirmed.

Issued: April 7, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[28] *Id*.