

**United States Department of Labor
Employees' Compensation Appeals Board**

LAURA C. CICONI, Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Holtsville, NY, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-778
Issued: August 9, 2005**

Appearances:

Laura C. Cicconi, pro se

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

COLLEEN DUFFY KIKO, Judge

DAVID S. GERSON, Judge

JURISDICTION

On February 15, 2005 appellant filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated December 27, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation, effective September 5, 2004, on the grounds that she no longer had any remaining disability or residuals causally related to her March 9, 2001 employment injury; and (2) whether appellant had disability on or after September 5, 2004 causally related to the March 9, 2001 employment injury.

FACTUAL HISTORY

On March 13, 2001 appellant, a 43-year-old data transcriber, filed a traumatic injury claim alleging that she injured her back on March 9, 2001 when she slipped and fell on ice in the

parking lot. She stopped work on March 9, 2001 and has not returned. The Office accepted the claim for cervical and lumbar strains and paid appropriate compensation. Appellant was placed on the periodic rolls for temporary total disability by letter dated July 31, 2001.

In a March 31, 2004 report, Dr. Anthony G. Puglisi, a second opinion Board-certified orthopedic surgeon, concluded that appellant had recovered from her accepted lumbar and cervical sprain injuries. A physical examination revealed that appellant was able to bend to 60 degrees, hyperextension to 10 degrees and good strength coming up on her heels and toes. Dr. Puglisi noted that appellant walked into the room and ambulated with ease, had no limp and “did not use any external device for ambulation.” An orthopedic examination revealed no muscle atrophy of the calves or thigh, “no signs of any L5 nerve root decreased sensation,” bilateral reflexes were 2+, and there was “good sensation between the toes of both feet.” With regards to straight leg raising, he noted that it was 45 degrees bilaterally which he referred to “as a ‘positive malingering sign.’” A cervical spine examination “was truly unremarkable, with the patient having the ability to bring her chin to her chest and hyperextend to some 30 degrees.” In concluding that her employment injury had resolved, Dr. Puglisi stated:

“[T]here is no indication in the numerous examinations and test that she has undergone that she sustained anything much more serious than an injury to the soft tissue of the cervical and lumbosacral area, an injury that would be expected to resolve in a few weeks at most. I feel that her present responses of reactions, especially in the face of what she states are her disabilities of activities of daily living and the separate sheet in which she filled out far more of an anatomical involvement than is ever mentioned in any of her previous reports, are inappropriate. I have found that neither I, nor her previous examiners, both previous physicians who evaluated her, have ever found any organic basis for her symptoms. Even the MRI studies are not indicating an involvement of a nerve root, something that would be the worst that might come about, in the lumbar area.”

With regards to appellant’s current disability, Dr. Puglisi opined that there was no objective evidence to support her current disability. He concluded that appellant had “no neurological deficits” and opined that “[s]he has signs of malingering,” based upon “an exaggeration of the symptomatology and inappropriate responses to this injury.” In support of this conclusion, Dr. Puglisi reported that on the day of the injury appellant returned to work, did not go to the emergency room and did not seek medical attention until three days later. Dr. Puglisi noted that there was no objective evidence to support any continued disability or residuals due to her accepted employment injury and, thus, appellant had recovered from her accepted employment injuries. In an attached work capacity evaluation, Dr. Puglisi concluded that appellant had no limitations and was capable of performing her usual job.

On July 30, 2004 the Office issued a notice of proposed termination based upon Dr. Puglisi’s report.

Subsequent to the July 30, 2004 notice, the Office received office notes dated September 1, 2004 from Dr. Shafi Wani, an attending Board-certified neurologist. Dr. Wani diagnosed “[c]hronic pain syndrome with underlying discogenic disease.” A physical

examination revealed cervical bilateral rotation of 45 degrees, cervical extension of 30 degrees, normal cervical flexion, lumbar flexion of 30 degrees, lumbar extension of 15 degrees and bilateral lumbar flexion of 15 degrees.

By decision dated September 21, 2004, the Office finalized the termination of appellant's wage-loss compensation benefits effective September 5, 2004. The Office found that Dr. Puglisi's opinion constituted the weight of the evidence as Dr. Wani's report did not address appellant's ability to work.

On September 27, 2004 the Office received a September 23, 2004 report by Dr. Wani in which he concluded that appellant was totally disabled due to her March 9, 2001 employment injury. Dr. Wani diagnosed cervical radiculopathy, chronic pain syndrome and post-traumatic myofascial pain and discogenic disease. The Office also received disability notes from Dr. Wani for the period January 24, 2003 to June 21, 2004 and office notes dated January 5, February 9, April 19, May 30, June 30 and September 5, 2003 and May 17, June 21, August 2, September 1, 2004, follow-up examination reports dated October 14, 2002, January 24, February 24, March 24 and 31, April 21, October and November 18, 2003 and a November 10, 2003 neurological consultation report.

In his November 10, 2003 report, Dr. Wani reported that a neurological examination revealed "a clinical diagnosis of acute cervical and lumbar pain, post-traumatic myofascial type." He reported prior magnetic resonance imaging (MRI) scans were "positive for lumbar disc herniation at L4-5." Dr. Wani stated that "[p]hysical examination findings are consistent with the diagnosis of post-traumatic cervical, lumbar myofascial pain and radicular symptoms." He diagnosed chronic low back pain due to L4-5 lumbar disc disease which was "associated with chronic post-traumatic myofascial pain syndrome" and "[c]hronic cervical post-traumatic myofascial pain syndrome." He concluded, based upon a physical examination and history, that there is a "direct causal relationship between the fall of September 3, 2001¹ and the clinical condition reported above." With regards to her ability to work, Dr. Wani concluded that appellant was totally disabled based upon her complaints, history, physical findings and medications.

On October 15, 2004 appellant requested reconsideration of the termination of her benefits.

In reports dated January 5, February 9 and October 4, 2004, Dr. Wani diagnosed "[c]hronic post-traumatic myofascial pain syndrome associated with underlying discogenic disease." In the January 4, 2004 report, Dr. Wani noted that appellant complained "of right-sided upper extremity stiffness and tenderness, as well as left-sided hip pain that radiates in other left lower extremity." He reported that appellant continued to complain of back tenderness and stiffness which radiated into her extremities in his October 4, 2004 report.

On November 23, 2004 the Office referred appellant to Dr. Arnold M. Illman, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between

¹ This appears to be either a typographical error or the format is day/month/year as Dr. Wani correctly reported appellant's injury as occurring on March 9, 2001.

Dr. Wani, who concluded that appellant continued to be disabled due to her March 9, 2001 employment injury, and Dr. Puglisi, who concluded that appellant had no disability or residuals due to her March 9, 2001 employment injury.

In a report dated December 9, 2004, Dr. Illman diagnosed “[c]ervical sprain; lumbosacral sprain with small to moderate herniated disc L4-L5 as noted on MRI [scan].” A physical examination of the cervical spine revealed extension of 30 degrees, flexion and lateral rotation of 45 degrees, “[n]o muscle spasm” and “[n]ormal light touch sensation over both upper extremities.” With regards to her lumbosacral spine, the physician reported forward flexion of 60 degrees, extension of 30 degrees, lateral movement of 45 degrees, “[s]traight leg raising was negative to 90 degrees bilaterally” and “[n]o sciatic notch tenderness present.” Dr. Illman stated that he “found no objective evidence of disability” as “the MRI demonstrated a herniated disc, the EMGs were normal” and there was “no objective evidence of radiculitis in all four extremities.” He noted that appellant provided “descriptions of subjective discomfort, but these cannot be explained on the basis of her anatomic normal examination of both neck and back.” Dr. Illman concluded that appellant was capable of working without restriction and was not disabled.

In a December 20, 2004 addendum, Dr. Illman noted that he omitted including that appellant complained of dull headaches in his December 9, 2004 report. However, he stated “this change in my report does not change my original diagnosis.”

By decision dated December 27, 2004, the Office denied appellant’s request for modification of the decision terminating her compensation benefits. The Office found that the opinion of Dr. Illman, the impartial medical examiner, constituted the weight of the evidence establishing that her employment injury had resolved.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee’s benefits.² After it has determined that an employee has disability causally related to 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.³ The Office’s burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁵

² *Paul L. Stewart*, 54 ECAB ____ (Docket No. 03-1107, issued September 23, 2003).

³ *Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issued July 23, 2003).

⁴ *See Del K. Rykert*, 40 ECAB 284 (1988).

⁵ *James F. Weikel*, 54 ECAB ____ (Docket No. 01-1661, issued June 30, 2003).

ANALYSIS -- ISSUE 1

The Board finds in this case that the Office met its burden of proof to terminate appellant's compensation benefits. Appellant's claim had been accepted for cervical and lumbar strains.

The Board finds that the report of the second opinion specialist, Dr. Puglisi, constituted the weight of the medical evidence and established that appellant had no disability or residuals causally related to her accepted conditions of employment. Dr. Puglisi completed a review of the record and appellant's factual and medical history, discussed his findings upon examination and his interpretation of the medical implications from examination results. He noted that there was no objective evidence to support that appellant continued to be disabled due to the accepted cervical and lumbar strains, which had resolved and that the "numerous examinations and test" do not reveal that she sustained anything more serious than a soft tissue injury "that would be expected to resolve in a few weeks at most." Further, Dr. Puglisi opined that appellant had no neurological deficit and had "signs of malingering" resulting from "an exaggeration of symptomatology and inappropriate responses to this injury" based on anatomical involvement." He noted that neither he nor appellant's treating physicians "have ever found any organic basis for her symptoms" and none of the MRI scan studies showed any evidence of a nerve root involvement. Dr. Puglisi completed a work capacity evaluation form indicating that appellant could work eight hours per day without restrictions.

In response to the proposal to terminate her benefits, appellant submitted a September 1, 2004 report by Dr. Wani who diagnosed "[c]hronic pain syndrome with underlying discogenic disease." The Board notes that Dr. Wani did not specifically address how appellant's discogenic disease and chronic pain syndrome were causally related to the accepted March 9, 2001 injury. The Office never accepted that appellant sustained discogenic disease or chronic pain syndrome as a result of her March 9, 2001 injury and appellant thus has the burden of proof to establish causal relationship.⁶ The doctor provided insufficient medical opinion explaining how these conditions were cause or aggravated by the accepted lumbar and cervical strains.⁷

The Board finds that the opinion of Dr. Puglisi is sufficiently well rationalized and based upon a proper factual background. It represents the weight of the evidence and establishes that appellant's accepted lumbar and cervical strains had resolved. Dr. Puglisi indicated that appellant did not have any residuals from her lumbar and cervical strains and that she could return to her regular duties.

For these reasons, the Board finds that the Office met its burden of proof in terminating appellant's compensation benefits.

⁶ *Charlene R. Herrera*, 44 ECAB 361 (1993).

⁷ *Ellen L. Noble*, 55 ECAB ____ (Docket No. 03-1157, issued May 7, 2004). (Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence the burden for reinstating benefits shifts to the claimant.⁸ In order to prevail, the claimant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related disability which continued after termination of compensation benefits.⁹

Section 8123(a) of the Federal Employees' Compensation Act provides 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."¹⁰ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.¹¹

ANALYSIS -- ISSUE 2

After the Office properly terminated appellant's benefits the burden of proof shifted to appellant.¹² Subsequent to the September 21, 2004 decision terminating her benefits, the Office received reports dated September 23, 2004 and November 10, 2003 and various disability notes from Dr. Wani in which he concluded that appellant was totally disabled due to her employment injuries. Dr. Wani diagnosed chronic low back pain due to L4-5 lumbar disc disease and post-traumatic chronic myofascial pain syndrome, which he opined was a direct result of her employment injury. On October 15, 2004 appellant then filed a request for reconsideration and submitted reports dated January 5, February 9 and October 4, 2004 from Dr. Wani who found that she had "[c]hronic post-traumatic myofascial pain syndrome pain as a result of her underlying discogenic disease." The Office found a conflict in the medical opinion between Drs. Wani, a treating Board-certified neurological surgeon, and Dr. Puglisi, a second opinion Board-certified orthopedic surgeon. The Board finds that a conflict in the medical opinion was created as Dr. Wani concluded that appellant was incapable of performing her date-of-injury job due to his accepted employment injuries while Dr. Puglisi concluded that appellant was capable of performing her date-of-injury job and that her accepted employment injuries had resolved. Dr. Illman had the opportunity to review all the medical evidence including the opinions of

⁸ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

⁹ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

¹⁰ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

¹¹ *Sharyn D. Bannick*, 54 ECAB ____ (Docket No. 03-567, issued April 18, 2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

¹² After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that she had an employment-related disability that continued after the termination of compensation benefits. *See Joseph A. Brown, Jr.*, 55 ECAB ____ (Docket No. 04-376, issued May 11, 2004); *Franklin D. Haislah*, 52 ECAB 457 (2001).

appellant's attending physician, Dr. Wani, and the second opinion physician, Dr. Puglisi, at the time of the referral to resolve the conflict in the medical opinion evidence. Dr. Illman concluded that appellant was capable of returning to work without restrictions and also found that appellant had no residuals due to the accepted March 9, 2001 employment injuries. He explained that there was no objective evidence of disability as the MRI scan demonstrated a herniated disc, the EMGs were normal and there was no objective evidence of radiculitis in all extremities. Additionally, he noted appellant's subjective discomfort could not be explained on the basis of the anatomical examination of the back and neck.

The Board finds that the Office properly relied on the impartial medical examiner's December 9, 2004 report and December 20, 2004 addendum, concerning complaints of nonemployment-related headaches, as a basis for terminating benefits. Dr. Illman's opinion is sufficiently well rationalized and based upon a proper factual background. His reports represent the special weight of the medical evidence and establish that appellant had no disability on or after September 5, 2004 the date the Office terminated compensation benefits.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective September 5, 2004. The Board further finds that appellant failed to meet her burden of proof to establish that she had any disability on or after September 5, 2004 causally related to her March 9, 2001 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 27 and September 21, 2004 are affirmed.

Issued: August 9, 2005
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board