

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

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**T.S., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Jamaica, NY, Employer**

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**Docket No. 07-179  
Issued: May 16, 2007**

*Appearances:*

*Thomas Harkins, Esq., for the appellant  
Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On October 25, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated August 8, 2006 which denied modification of a prior decision that terminated her compensation. 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 on appeal are: (1) whether the Office properly terminated appellant's compensation and medical benefits effective March 22, 2005; and (2) whether appellant met her burden to establish that she had any disability after March 22, 2005 causally related to the July 29, 2002 employment injury.

**FACTUAL HISTORY**

On July 29, 2002 appellant, then a 39-year-old maintenance operations support clerk, hurt her ankle, foot, right shoulder and little finger on the right hand while getting supplies at work in the performance of duty. She stopped work on July 31, 2002. The Office accepted appellant's

claim for cervical and lumbosacral sprains. After being released to limited duty appellant, on October 18, 2002, claimed a recurrence of disability and stopped work on that date. The recurrence claim was accepted by the Office. By letter dated March 27, 2003, the Office advised appellant that she would be paid compensation commencing on February 23, 2003 and placed on the periodic compensation rolls.

In an April 30, 2003 report, Dr. Alvin M. Bregman, a Board-certified orthopedic surgeon and fitness-for-duty physician, noted appellant's medical history and conducted a physical examination. He diagnosed a resolved sprain of the cervical and lumbar spine and right ankle. Dr. Bregman opined that appellant was capable of working at her normal work duties as a clerk and in her activities of daily living and had no disability.

On May 5, 2003 the Office referred appellant to Dr. John Killian, a Board-certified orthopedic surgeon, for a second opinion examination. In a June 3, 2003 report, Dr. Killian described appellant's history of injury and treatment, which included previous injuries to her neck and back. On physical examination, he indicated that appellant had subjective complaints of tenderness to the bony outer aspect of the sacrum and pain "with all attempts to move her neck and back which were contradicted by complaints of comparable pain with rotating the trunk as a unit holding the hands to the sides which causes no spinal stress." Dr. Killian determined that appellant had a normal neurological examination and her complaints of pain were contradicted by negative straight leg raising in the sitting position. He explained that "all of the apparently positive findings in this examination were contradicted by inconsistencies indicating strong symptom magnification." Dr. Killian did not find that appellant had any residual impairment or disability and noted that she was capable of working at her normal capacity and performing all activities of daily living without limitations. He added that it was impossible to assess her impairment in the "face of her grossly exaggerated complaints and volitional resistance to all attempts to move her spine." Dr. Killian added that the spinal sprains resulting from the July 30, 2002 injury had fully resolved.

A May 21, 2003 magnetic resonance imaging scan of the lumbosacral spine read by Dr. Richard Rizzuti, a Board-certified radiologist, revealed a posterior disc herniation at L4-5 impinging on the anterior aspect of the spinal canal.

In an August 21, 2003 report, Dr. Elie J. Sarkis, a Board-certified orthopedic surgeon and treating physician, diagnosed cervical posterior disc herniation at C5-6 impinging on the anterior aspect of spinal canal, bilateral L4-5 radiculopathy of the lumbar spine and a sprain of the bilateral shoulders. He opined that appellant was totally disabled. Dr. Sarkis submitted additional reports in which he found that appellant continued to be disabled due to her work injury.

In a February 20, 2004 report, Dr. James Liguori, Board-certified in cardiovascular disease, diagnosed cervical radiculopathy secondary to a disc herniation at C5-6 and lumbosacral radiculopathy secondary to a disc herniation at L4-5, with bilateral L4-5 radiculopathy. He opined that appellant was totally and permanently disabled as a result of her work-related injuries. In an April 19, 2004 report, Dr. Dinesh K. Sood, a Board-certified psychiatrist, diagnosed major depression, cervical disc herniation at C5-6, lumbar L4-5 disc herniation, hypercholesterolemia, back injuries and opined that appellant was "unable to hold any job at this

time because of her depression and back pains, which may last more than 12 months.” In a June 1, 2004 report, Dr. Liguori repeated his diagnoses and added that appellant had “disabling chronic depression.”

On August 9, 2004 the Office received an investigative report from the employing establishment. It noted that appellant was observed and videotaped walking several blocks with a back pack, at times with a dog on a leash.

On October 13, 2004 the Office referred appellant, along with a statement of accepted facts and the medical record, to Dr. Anthony Puglisi, a Board-certified orthopedic surgeon, to resolve the medical conflict between, Dr. Liguori who opined that appellant continued to be totally disabled due to her work-related injury and Dr. Killian, who opined that appellant’s work-related condition had resolved and that she could return to regular duty.

In an October 27, 2004 report, Dr. Puglisi reviewed appellant’s history of injury and treatment. He conducted a physical examination and noted that appellant did not have any muscle atrophy, ankle swelling or other abnormality on inspection. Dr. Puglisi advised that appellant did not have any back pain when her knee was fully extended, despite the fact, that she leaned somewhat forward compared to a similar straight leg raising examination which was conducted while she was lying down and which she alleged caused back pain on the right side at 30 degrees. He further noted that, for her left side, appellant alleged that she had back pain and pain in her right shoulder on straight leg raising to 45 degrees. Dr. Puglisi explained that this was a “positive malingering sign.” He concluded that all of appellant’s “present subjective complaints have no objective basis. At most this injury as described, should have caused a certain amount of ankle sprain, at most a minimal amount of cervical or lumbosacral strain which should have resolved within a 7- to 10-day period.” Dr. Puglisi did not find any “elements of any strain or sprain as a residual” and concluded that the accepted cervical sprain and lumbosacral sprains had resolved. He advised that appellant was able to return to a limited-duty position from August 19 through September 30[, 2002] for a period of more than 6 weeks. Dr. Puglisi noted that there were no findings of a consistent nature and that a great deal of the examination showed strong symptom magnification. Appellant did not have an objective basis for her subjective complaints and that the positive findings on his examination represented minor changes of her disc pathology due to her “overweight status” and osteoarthritic changes. Dr. Puglisi related that appellant could perform her preinjury position for eight hours a day and that he could not find any plausible reason for continuing cortisone injections as it was not a treatment for any cervical strain, sprain or radiculopathy. He noted that he had reviewed the surveillance videotapes and opined that they showed a normal healthy person performing her normal activities of life. Dr. Puglisi opined that appellant had reached maximum medical improvement and was capable of performing her prior work activities.

In a November 4, 2004 duty status report, Dr. Sarkis diagnosed a cervical disc herniation, lumbar radiculopathy, disc herniation sprain or the right and left shoulders. He opined that appellant was totally disabled.

In a December 27, 2004 letter, appellant requested copies of her medical records and informed the Office that she would like to pursue a stress claim. She explained her actions as documented in the video surveillance and denied that her activities were contrary to her medical condition.

On January 13, 2005 the Office issued a notice of proposed termination of compensation. It noted that the weight of the medical evidence was represented by the report of Dr. Puglisi and established that she was capable of returning to work without restrictions.<sup>1</sup> Appellant was allotted 30 days to submit additional evidence.

Dr. Sarkis provided the Office with a list of dates of treatment from August 1, 2002 to December 30, 2004. He enclosed copies of a duty status report and an attending physician's report dated December 30, 2004 in which he diagnosed a herniated cervical and lumbar spine and opined that appellant was totally disabled. The Office also received an undated range of motion chart and trigger point treatment notes dated January 5 and February 7, 2005 from Dr. Liguori. In attending physician's reports dated January 31 and March 10, 2005, Dr. Sarkis respected his diagnoses and checked the box "yes" that he believed that appellant's condition was caused or aggravated by her employment activity. He indicated that appellant's period of disability was undetermined and that she remained totally disabled.

In a January 27, 2005 report, Dr. Liguori opined that appellant currently had cervical radiculopathy secondary to disc herniation at C5-6 and lumbosacral radiculopathy secondary to disc herniation at L4-5 and bilateral L4-5 radiculopathy. He indicated that appellant was totally and permanently disabled as a result of her injuries.

By decision dated March 29, 2005, the Office terminated appellant's compensation benefits effective March 22, 2005. It found the weight of medical opinion to be represented by Dr. Puglisi.

The Office received additional reports from Dr. Sarkis, in which he repeated his diagnoses and opinion that appellant was totally disabled. The Office also received additional treatment notes from Dr. Liguori.

By letters dated March 6 and 10, 2006, appellant's representative requested reconsideration and submitted additional evidence. He contended that appellant continued to be disabled and that her physical and psychiatric injuries were directly related to her accepted injury. Counsel alleged that neither Dr. Killian nor Dr. Puglisi had the appropriate medical specialties relative to the accepted conditions in the case. He noted that appellant's physician was not provided with a copy of the surveillance videotape. The Office received treatment notes from Dr. Liguori dated May 1 and June 12, 2006, for trigger point injections. In a March 7, 2005 report, Dr. Mitchell Banks, a Board-certified psychiatrist, diagnosed major depression and opined that appellant was totally disabled. He advised that appellant was disabled from

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<sup>1</sup> By letters dated January 12 and 13, 2005, appellant's representative disagreed with the proposed termination of benefits and alleged that it was contrary to the medical evidence. He also advised the Office that the report of Dr. Puglisi was not enclosed. The notice of proposed termination was reissued after the earlier notice dated December 17, 2004.

achieving gainful employment and that her physical and psychiatric injuries were the direct result of her injury at work on July 29, 2002.

By decision dated August 8, 2006, the Office denied modification of the March 29, 2005 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>2</sup> Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>3</sup>

The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.<sup>4</sup> In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, will be given special weight.<sup>5</sup>

### **ANALYSIS -- ISSUE 1**

The Office determined that a conflict of medical opinion existed regarding the nature and extent of any ongoing residuals of the July 29, 2002 work injury. Dr. Liguori, appellant's physician, supported an ongoing employment-related condition and total disability. Dr. Killian, a second opinion physician, opined that the employment-related condition had resolved. The Office properly referred appellant to Dr. Puglisi, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In an October 27, 2004 report, Dr. Puglisi examined appellant and noted that she did not have any muscle atrophy, no ankle swelling nor any other abnormality on inspection. He noted that appellant did not have any back pain when her knee was fully extended but that she alleged pain when she leaned somewhat forward compared to a similar straight leg raising examination which was conducted while appellant was lying down. Dr. Puglisi explained that, for her left side, appellant alleged that she had back pain and pain in her right shoulder on straight leg raising to 45 degrees and noted that this a "positive malingering sign." He concluded that all of appellant's "present subjective complaints have no objective basis." Dr. Puglisi explained that appellant's injury "at most" caused a "certain amount of ankle sprain, at most a minimal amount of cervical or lumbosacral strain which should have resolved within a 7- to 10-day period." He

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<sup>2</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>3</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>4</sup> 5 U.S.C. § 8123(a); *Shirley Steib*, 46 ECAB 309, 317 (1994).

<sup>5</sup> *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

opined that he could not find any “elements of any strain or sprain as a residual” and that the accepted cervical sprain and lumbosacral sprain had resolved. Dr. Puglisi added that appellant was able to “return to a limited-duty position from August 19 through September 30[, 2002] for a period of no more th[a]n 6 weeks” and her work-related injuries had fully resolved. He explained that appellant did not have any consistent findings and that a great deal of the examination “showed strong symptom magnification.” Dr. Puglisi added that appellant did not have an objective basis for her subjective complaints and that the positive findings on his examination represented minor changes of her disc pathology due to her being overweight and other osteoarthritic changes. He related that appellant had reached maximum medical improvement could perform her preinjury position for eight hours a day and that he could not “find any plausible reason for continuing cortisone injection” for appellant as it was not a treatment for any cervical strain, sprain or radiculopathy.

The Board finds that Dr. Puglisi’s opinion is entitled to special weight. His reports are sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant’s employment-related condition had resolved. Dr. Puglisi examined appellant, reviewed her medical records and reported accurate medical and employment histories. He indicated that appellant’s work-related condition had resolved and that she could return to her preinjury position. Accordingly, the Office met its burden of proof to justify termination of benefits.

Subsequent to the evaluation by Dr. Puglisi and prior to the termination of benefits, the Office received treatment notes from Dr. Liguori, who opined that appellant was totally and permanently disabled. Dr. Liguori had been on one side of the conflict in the medical opinion that the impartial specialist resolved. His reports are repetitions of his stated opinion and insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.<sup>6</sup>

The Office also received additional reports from Dr. Sarkis who merely reiterated his previously stated conclusions regarding appellant’s condition and did not identify objective findings. Dr. Sarkis did not provide a rationalized opinion that any of appellant’s existing conditions were causally related to the July 29, 2002 employment injury. His reports are of diminished probative value and insufficient to create a conflict with the opinion of Dr. Puglisi.<sup>7</sup>

On appeal, appellant’s representative contended that the report of the impartial medical examiner should not have been relied upon as he reviewed the surveillance videotape while appellant’s treating physicians were not provided with a copy. He did not make any allegation about the accuracy of the videotape as depicting appellant’s activities. The record, however, does not indicate that appellant or her representative were denied a copy of the tape, or any other evidence, which they would be free to furnish to appellant’s physicians. Additionally, the Board notes that Dr. Puglisi conducted a thorough examination and merely commented on the videotape at the end of his examination. A review of Dr. Puglisi’s report indicates that he

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<sup>6</sup> *Barbara J. Warren*, 51 ECAB 413 (2000); *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>7</sup> See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

formed his medical opinion based on his examination and his review of the record and did not rely solely upon review of the videotape to formulate his opinion.<sup>8</sup> Appellant indicated that she had seen the videotape but did not allege that it was inaccurate. Thus, this argument is without merit.

### **LEGAL PRECEDENT -- ISSUE 2**

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. In order to prevail, appellant 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.<sup>9</sup>

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the appellant'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 appellant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the appellant.<sup>10</sup>

### **ANALYSIS -- ISSUE 2**

Subsequent to the Office's March 29, 2005 decision, appellant submitted additional medical evidence.

In an attending physician's report and a duty status report dated April 14, 2005, Dr. Sarkis repeated his previous diagnoses and opined that appellant was totally disabled. However, he provided no additional rationale for this opinion and did not make objective findings or provide a rationalized opinion causally relating how these conditions were related to the July 29, 2002 employment injury. The reports of Dr. Sarkis are insufficient to establish an ongoing condition and disability causally related to the work injury of July 29, 2002. Dr. Sarkis did not provide any findings and rationale sufficient to overcome or create a new conflict with the opinion of Dr. Puglisi.

Dr. Liguori did not provide a reasoned opinion regarding the cause of appellant's diagnosed conditions. As noted, he was on one side of the conflict that had been resolved. Dr. Liguori's additional reports, in the absence of any new findings or rationale, are insufficient

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<sup>8</sup> See *J.M.*, 58 ECAB \_\_\_\_ (Docket No. 06-661, issued April 25, 2007). (The Board found that the Office's delay in submitting surveillance materials and videotape to appellant did not prejudice her rights. Appellant did not present any evidence following receipt of the videotape to question its accuracy and where the opinion of the impartial specialist who reviewed the tape was clearly based on more than a review of the videotape).

<sup>9</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

<sup>10</sup> *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.<sup>11</sup>

In March 7, 2005 report, Dr. Banks, a Board-certified psychiatrist, diagnosed major depression and opined that appellant was “totally disabled and unable to work at this time.” He advised that appellant was disabled from achieving gainful employment and that her physical and psychiatric injuries were “direct results of her injury at work on July 29, 2002.” Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>12</sup> Dr. Banks either did not identify findings to support diagnoses or provide medical rationale to explain why the accepted condition continued. While he indicated that appellant remained disabled, he did not explain how her major depression attributable to her accepted employment injuries. Dr. Banks’ report is of diminished probative value.

Other medical reports submitted by appellant did not address the cause of her condition. Consequently, she has not established that her condition on and after March 22, 2005 was causally related to her accepted employment injury.

### **CONCLUSION**

The Board finds that the Office met its burden of proof in terminating appellant’s benefits effective March 22, 2005 and that appellant did not meet her burden of proof to establish that she had any injury-related condition or disability after March 22, 2005 causally related to the July 29, 2002 employment injury.

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<sup>11</sup> See *Guiseppe Aversa*, 55 ECAB 164 (2003); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>12</sup> *Jaja K. Asaramo*, *supra* note 11.



**ORDER**

**IT IS HEREBY ORDERED THAT** the August 8, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 2007  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board