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

| | | |
|---|---|---|
| **R.C., Appellant** | ) | |
| **and** | ) | **Docket No. 08-1986** |
| | ) | **Issued: June 4, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, Baton Rouge, LA, Employer** | ) | |

*Appearances:*
*Appellant, pro se*
*No appearance,* for the Director

Oral Argument April 23, 2009

## DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

On July 15, 2008 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated July 2, 2008 which denied modification of a decision denying his request for disability after February 5, 1991. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this decision.

### ***ISSUE***

The issue is whether appellant met his burden of proof to establish that he had disability after February 5, 1991, due to his January 17, 1988 employment injury.

### ***FACTUAL HISTORY***

This is the sixth appeal in this case. On November 19, 1992 the Board affirmed Office decisions finding that the Office met its burden of proof to terminate appellant's compensation benefits effective February 5, 1991.[1] The Board found that the weight of the medical evidence rested with Dr. Gordon P. Nutik, a Board-certified orthopedic surgeon and an impartial medical specialist, who found that appellant had no residuals after February 5, 1991 due to his

[1] Docket No. 92-1352 (issued November 19, 1992).

January 17, 1988 employment injury.[2] On June 2, 1997 the Board found that appellant did not meet his burden of proof to establish that he was disabled after February 5, 1991 due to his January 17, 1988 work injury.[3] The Board noted that, as the Office properly terminated appellant's compensation effective February 5, 1991, the burden of proof shifted to him to show that he was disabled after that date. On July 29, 2002 the Board set aside a July 20, 2000 Office decision and found that appellant submitted new and relevant medical evidence that required reopening of his claim for a merit review.[4] In August 3, 2004[5] and January 12, 2007[6] decisions, the Board found that he did not meet his burden of proof to establish that he had disability on or after February 5, 1991 due to his 1988 work injury. The facts and the circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.

On December 8, 2007 appellant requested reconsideration and submitted additional evidence. He submitted copies of previously received evidence pertaining to his claim for an injury on November 27, 1990, which was denied under claim No. xxxxxx992. Appellant alleged that Dr. Nutik's selection as an impartial medical examiner was in error. He also alleged that his physicians were aware of his history, including the November 27, 1990 motor vehicle accident. With appellant's request he submitted a March 29, 2007 report from Dr. Jack F. Loupe, a Board-certified orthopedic surgeon, who noted being aware that appellant was in a motor vehicle accident on November 27, 1990. Dr. Loupe opined that he "did n[o]t think that it was relevant since [appellant] had been disabled since an accident on the job in 1988." He added that the "accident of November 27, 1990 was an injury that occurred on the job and only temporarily increased his chronic, disabling lower back pain from the accident of January of 1988." Dr. Loupe added that he had previously made an annotation regarding the incident in his report of October 23, 1991. He advised that the accident "caused an aggravation of [appellant's] lower back pain" which was treated by another physician. Dr. Loupe advised that appellant "told me that this accident had no lasting affect on his chronic lower back pain and that he remained disabled from the original injury ever since." He opined that he "did not think that it played a significant role in his chronic back pain and disability, and did n[o]t seem to have caused any lasting effect or lasting increased pain."

In an April 23, 2007 report, Dr. James Butler, a Board-certified orthopedic surgeon, noted that appellant came in for follow up with complaints of chronic back pain. He indicated that he was responding to the issue of whether he was aware of appellant's November 1990 motor vehicle accident. Dr. Butler opined that the motor vehicle accident did "not affect [appellant's] long-term prognosis and was not a contributory factor to his long-term condition in my opinion."

By decision dated July 2, 2008, the Office denied modification of the previous decision.

---

[2] Dr. Nutik also noted that appellant indicated that, on November 27, 1990, appellant was rear-ended in a nonwork-related incident.

[3] Docket No. 94-2110 (issued June 2, 1997).

[4] Docket No. 01-1157 (issued July 29, 2002).

[5] Docket No. 03-698 (issued August 3, 2004).

[6] Docket No. 06-515 (issued January 12, 2007).

## ***LEGAL PRECEDENT***

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.[7]

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 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 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 appellant.[8]

## ***ANALYSIS***

The Board has previously determined that the Office met its burden of proof to terminate appellant's compensation, effective February 5, 1991, on the grounds that he had no residuals after that date due to his January 17, 1988 employment injury. The Board found that the weight of the medical evidence rested with the February 5 and May 2, 1991 reports of Dr. Nutik, a Board-certified orthopedic surgeon, who served as an impartial medical specialist.[9] Therefore, it is not necessary for the Board to now consider the probative value of Dr. Nutik's opinion or the validity of the Office's termination effective February 5, 1991.[10] After the Office's proper termination of compensation effective February 5, 1991, the burden of proof shifted to appellant to show employment-related disability after that date.[11] Moreover, it is not necessary for the Board to revisit the medical evidence it considered in its previous decisions when it determined that the medical evidence appellant submitted after the February 5, 1991 termination did not contain sufficient probative value to show that he had continuing employment-related disability.

---

[7] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

[8] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[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." 5 U.S.C. § 8123(a). In situations where there exist 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 upon a proper factual background, must be given special weight. *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[10] In the absence of further review by the Office on the issue addressed by a Board decision, the subject matter reviewed is *res judicata* and is not subject to further consideration by the Board. 5 U.S.C. § 8128; *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998). A decision of the Board is final upon the expiration of 30 days from the date of the decision. 20 C.F.R. § 501.6(d).

[11] *Wentworth M. Murray*, *supra* note 7.

Following the Board's January 12, 2007 decision, appellant requested reconsideration and submitted additional medical evidence. He made arguments related to the selection of Dr. Nutik as the impartial medical examiner. However, as noted above, the Board has already reviewed this issue in the prior appeal, and this issue is *res judicata* and not subject to further consideration.[12]

Appellant also provided two new medical reports from Drs. Loupe and Butler, in which they confirmed that they were aware of the November 27, 1990 motor vehicle accident. In his March 29, 2007 report, Dr. Loupe related that appellant "told me that this accident had no lasting affect on his chronic lower back pain and that he remained disabled from the original injury ever since." He opined that he "did not think that it played a significant role in his chronic back pain and disability, and did n[o]t seem to have caused any lasting effect or lasting increased pain." Additionally, in his April 23, 2007 report, Dr. Butler opined that the motor vehicle accident did "not affect [appellant's] long-term prognosis and was not a contributory factor to his long-term condition in my opinion." However, these reports are insufficient to establish that appellant's claimed condition or disability after February 5, 1991 is related to his accepted employment injuries. For example, the physicians merely acknowledged that they were aware of the November accident. They did not address with medical rationale that appellant was disabled on or after February 15, 1991 as a result of the employment injury of January 17, 1988, they do not contain sufficient medical reasoning explaining how and why appellant would continue to be disabled on or after February 5, 1991 without corresponding findings on physical examination.[13] These reports are therefore not sufficient to meet appellant's burden of proof and the Office properly denied his claim for continuing disability.

Although appellant alleged that his disability commencing after February 5, 1991 was due to his accepted employment injury, the medical evidence of record does not establish that his claimed disability or condition during the time frame was related to his accepted employment injuries. The Board finds that appellant has failed to submit rationalized medical evidence establishing that his disability from February 5, 1991 was causally related to his accepted employment injury, and thus, he has not met his burden of proof.

## ***CONCLUSION***

The Board finds that appellant did not meet his burden of proof to establish that he was disabled after February 5, 1991 due to his January 17, 1988 employment injury.

[12] *See supra* note 10.

[13] *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).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the July 2, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 4, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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