

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

E.S., Appellant

and

**DEPARTMENT OF AGRICULTURE, ANIMAL
& PLANT HEALTH INSPECTION SERVICE,
Edinburg, TX, Employer**

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**Docket No. 10-565
Issued: December 21, 2010**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 28, 2009 appellant filed a timely appeal from the July 20 and November 30, 2009 merit decisions of the Office of Workers' Compensation Programs, which terminated his compensation for wage loss. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.¹

ISSUE

The issue is whether the Office properly terminated appellant's compensation for wage loss.

¹ By order dated November 15, 2010, the Board denied appellant's request for an oral argument after exercising its discretion pursuant to 20 C.F.R. § 501.5. *See* Docket No. 10-565 (issued November 15, 2010).

FACTUAL HISTORY

On December 12, 2007 appellant, then a 31-year-old biological science technician, injured his back in the performance of duty when he lifted the end of a 15-foot auger. The Office accepted his claim for neck sprain, thoracic back sprain and lumbar back sprain. It later accepted displacement of a lumbar intervertebral disc and approved surgery for lumbar disc herniation. Appellant received compensation for temporary total disability on the periodic rolls.

A conflict arose between Dr. Jorge E. Tijmes, an orthopedic surgeon and Office referral physician, and Dr. Monzer H. Yazji, the attending internist. Dr. Tijmes found that the effects of the work-related injury had ceased and that appellant could return to work with restrictions. Dr. Yazji found that appellant had herniated discs at T2-3 and L5-S1, the latter with radiculopathy and was not fit for work. He explicitly disagreed with Dr. Tijmes on the issue of disability for work.

To resolve this conflict, the Office referred appellant, together with the case file and a statement of accepted facts, to Dr. John G. Andrew, a Board-certified orthopedic surgeon, who examined appellant on May 19, 2009. Dr. Andrew related the history of injury and appellant's current complaints. Appellant's main complaint was a mild to moderate upper back ache, which was aggravated by picking up things. He also had mild to moderate lower back pain radiating down the left lower extremity. Prolonged sitting, standing or walking aggravated this low back pain and lying down relieved it.

Dr. Andrew reviewed appellant's medical records. Magnetic resonance imaging scans showed significant disc herniation at the lumbosacral interspace and insignificant findings of a three-millimeter posterolateral herniation at T2-3. Electrodiagnostic studies in March 2008 revealed L5 and S1 nerve root radiculopathy. Dr. Andrew noted that conservative treatment was of no benefit and that appellant underwent L5-S1 microlumbar laminectomy and L5 discectomy in December 2008, but appellant's symptoms persisted, and he continued his treatment of two or three Vicodin and Flexeril tablets a week.

On physical examination Dr. Andrew found that appellant walked without a limp and could walk on his heels and toes without difficulty. Appellant's neck moved freely and rotation of the spine was normal. He could stoop over and reach to within 15 centimeters of his toes. Active straight leg raising was to 55 degrees bilaterally, passive was to 90. There was no muscle spasm or tenderness. The lower extremities were symmetrical and equal and all joints could be moved through a full and normal range of motion.

On neurological examination appellant reported a numb, decreased sensation throughout the anterior, lateral and posterior aspects of the left lower extremity extending up to the waist. Sensation was almost normal on the medial aspect of the thigh and calf. Deep tendon reflexes were symmetrical and equal bilaterally.

Dr. Andrew concluded that appellant sustained an upper back strain on December 12, 2007 and possibly a herniated disc at L5-S1. He found that appellant had reached maximum medical improvement and that current complaints were related to slight degenerative changes in the upper dorsal area, although appellant had no significant objective findings of a significant

injury at that level. Dr. Andrew explained that there currently were no objective findings of an injury that would prevent appellant from returning to work at his regular job eight hours a day and without limitation.

On July 20, 2009 the Office terminated appellant's compensation for wage loss effective August 2, 2009. It found that the opinion of the impartial medical specialist established that appellant was no longer disabled for work due to the accepted conditions. The Office noted that its decision did not affect appellant's medical benefits and that his case would remain open for treatment.

Appellant requested reconsideration and submitted evidence of a disc herniation at C5-6.

On November 30, 2009 the Office reviewed the merits of appellant's case and denied modification of its prior decision. It found that the submitted evidence was immaterial and did not demonstrate that the accepted work injury prevented appellant from returning to his date-of-injury position.

On appeal, appellant disagrees with the Office's decision due to his continued pain and discomfort after injuring himself at work. He states that his current condition prevents him from performing the heavy lifting and bending and other physical demands of his former position.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his 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.⁴

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 When 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.⁶

² 5 U.S.C. § 8102(a).

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ 5 U.S.C. § 8123(a).

⁶ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

The impartial medical specialist's report must actually fulfill the purpose for which it was intended; it must resolve the conflict in medical opinion. An impartial medical specialist's report is entitled to greater weight than other evidence of record as long as the conclusion is not vague, speculative or equivocal and is supported by substantial medical reasoning.⁷

ANALYSIS

To resolve the conflict between the Office referral physician and appellant's physician, the Office properly referred appellant to an impartial medical specialist. Dr. Andrew, a Board-certified orthopedic surgeon, reviewed the record, examined appellant and concluded that appellant could return to work full time and without limitation. He reasoned that there were no objective findings, but he did not reconcile this with the diagnostic tests showing a significant disc herniation at the lumbosacral interspace, the electrodiagnostic studies showing bilateral L5 and S1 nerve root radiculopathy, appellant's continued symptoms following surgery, his continuing treatment with a narcotic pain reliever and muscle relaxant, and findings on neurological examination indicating continuing radiculopathy to the left lower extremity. Dr. Andrew did not soundly explain how a man with a herniated L5-S1 disc could perform, full time and without limitation, the specific physical demands of appellant's date-of-injury position.

Medical conclusions unsupported by rationale are of little probative value.⁸ The Board finds that Dr. Andrew's opinion is not sufficiently rationalized to resolve the conflict on appellant's disability for work. Further, medical conclusions based on inaccurate or incomplete histories are also of little probative value.⁹ The Office provided Dr. Andrew with appellant's case file and a statement of accepted facts so he could base his opinion on a proper factual and medical history, but the statement of accepted facts does not describe the physical demands of appellant's date-of-injury position. Information on the job held on the date of injury is essential to permit the physician to visualize the setting of the injury if it occurred during normal duties and, as in this case, to make judgments about the claimant's potential for returning to duty.¹⁰

Because the opinion of the impartial medical specialist is of diminished probative value, it is not accorded special weight in resolving the conflict. As the conflict remains unresolved, the Board finds that the Office has not met its burden of proof to justify the termination of appellant's compensation for wage loss. The Board will reverse the Office's July 20 and November 30, 2009 decisions.

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11.d(2) (September 2010); quoting *James P. Roberts*, 31 ECAB 1010 (1980).

⁸ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

⁹ *James A. Wyrick*, 31 ECAB 1805 (1980) (physician's report was entitled to little probative value because the history was both inaccurate and incomplete). See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.5.c (September 2009).

CONCLUSION

The Board finds that the Office has not met its burden of proof to justify the termination of appellant's compensation for wage loss.

ORDER

IT IS HEREBY ORDERED THAT the November 30 and July 20, 2009 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: December 21, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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