

FACTUAL HISTORY

This case was previously before the Board. In a February 6, 2004 decision, the Board affirmed decisions of the Office that terminated appellant's compensation benefits as of January 27, 2002.¹ The Board found that the weight of medical opinion rested with the impartial medical specialist, Dr. William H. Simon, a Board-certified orthopedic surgeon, who found that appellant no longer had any disability or residuals due to his accepted thoracic and lumbar strains and that his degenerative disc disease was not caused or aggravated by the August 5, 1991 employment injury. Dr. Simon also advised that appellant's preexisting degenerative disease had not been aggravated or accelerated by the accepted injury. The Board found that the evidence submitted subsequent to the termination was insufficient to create a conflict with Dr. Simon's opinion. The facts and history of the claim as contained in the prior decision are incorporated herein by reference.²

On May 17, 2004 appellant requested reconsideration and contended that the Office failed to consider a December 17, 2001 report by Dr. Arthur E. Bogert.

In a July 20, 2004 decision, the Office denied the reconsideration request without further merit review.

On January 14, 2005 appellant requested reconsideration and submitted a November 8, 2004 progress note from Dr. Alan R. Tessler, a treating Board-certified psychiatrist and neurologist, who diagnosed chronic low back pain and chronic headaches. Dr. Tessler noted a history of low back pain since August 1991. Appellant had a magnetic resonance imaging scan in 1999, which show a left-sided disc herniation at L4-5 with degeneration at L5-S1. Dr. Tessler also obtained a history of headaches that developed during basic training and for which appellant had a service-connected disability. In addressing causal relation, he noted that appellant related his back pain to his injury at work "and in my opinion this injury must be considered responsible. [Appellant] continues to suffer the same disabilities that he has suffered since the injury...."

A January 12, 2005 report signed by Catherine V. Delbello, a nurse practitioner, provided findings on examination. Ms. Delbello diagnosed depression, low back pain, headaches and left knee pain.

By decision dated August 8, 2005, the Office denied modification of the decisions terminating appellant's compensation benefits. It found that the report of Dr. Tessler was insufficient to overcome the weight of opinion accorded Dr. Simon as the impartial medical specialist. On June 1, 2007 the Office reissued the August 8, 2005 decision as it had been mailed to an incorrect address.

¹ Docket No. 03-2013 (issued February 6, 2004).

² On August 5, 1991 appellant, then a 43-year-old file clerk, filed a traumatic injury claim alleging that he pulled a muscle or strained his low back while picking up a large folder from a table. The Office accepted that he sustained a thoracic and lumbar strain. On September 25, 1992 it placed appellant on the periodic rolls effective August 22, 1992.

On May 26, 2008 appellant requested reconsideration and submitted a September 13, 2007 progress note from Dr. Tessler,³ who noted that appellant had a history of low back pain since August 1991 when he injured himself at work and reiterated that he did not benefit from physical therapy or from pain medications. Dr. Tessler noted that the results of diagnostic tests from 1998 and 1999 were described in his earlier reports and showed degenerative changes most pronounced at L3-4. On physical examination, he noted that appellant's low back was very tender to light touch, pain on straight leg raising at 45 degrees, no paraspinous muscle spasm and nontender sciatic notches. Dr. Tessler restated the opinion on causal relation noted in his prior progress note.

In a June 10, 2008 decision, the Office denied modification of its prior decisions. It noted that the reports of Drs. Bogert and Stempler were previously of record and considered. The Office found that Dr. Tessler's opinion was insufficiently rationalized to overcome the weight accorded to Dr. Simon.

LEGAL PRECEDENT

Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the employee to establish that any subsequent disability is causally related to an accepted employment injury.⁴

Where an employee claims that, a condition not accepted or approved by the Office was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.⁵ To establish a causal relationship between the condition claimed, as well as any attendant disability and the employment event or incident, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.⁶ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁷ 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.⁸

³ Appellant also resubmitted reports dated September 2, 1993 and December 17, 2002 from Dr. Bogert, a treating osteopath and a March 15, 2001 report from Dr. Norman B. Stempler, an osteopath.

⁴ *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006); *see Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001). *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁵ *See Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁶ *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008); *Elizabeth Stanislave*, 49 ECAB 540 (1998).

⁷ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

⁸ *Ernest St. Pierre*, 51 ECAB 623 (2000).

ANALYSIS

The Office terminated appellant's compensation benefits effective January 27, 2002, based on the medical opinion of Dr. Simon, selected as the impartial medical specialist. In the prior appeal, the Board affirmed the termination of compensation benefits in a February 6, 2004 decision. To establish entitlement to compensation after January 27, 2002, appellant must submit probative medical evidence addressing how his accepted injury caused ongoing residuals and disability.

Appellant submitted progress notes dated November 8, 2004 and September 13, 2007 from Dr. Tessler, who provided findings on examination of appellant and reviewed prior diagnostic studies of 1998 and 1999. In both notes, Dr. Tessler noted that appellant attributed the onset of his low back pain to his injury in 1991, stating "in my opinion this injury must be considered responsible. [Appellant] continues to suffer the same disabilities that he suffered since the injury on August 5, 1991." The Board finds that the opinion of Dr. Tessler is not well rationalized on the issue of causal relationship and residual disability. It is apparent that Dr. Tessler based his stated conclusion on the history obtained from appellant. He did not address the nature of the accepted claim, which was for strains of the thoracic and lumbar spine. Dr. Tessler does not explain how the soft tissue injuries accepted by the Office were competent to cause or contribute to appellant's diagnosed degenerative disc disease or to the disc herniations found on diagnostic testing. The progress notes do not reveal that Dr. Tessler ever reviewed the medical evidence of record pertaining to the accepted claim, particularly the reports of Dr. Simon, who offered no opinion based on a full factual background of appellant's accepted injury or prior medical treatment. As such, his stated conclusion is of diminished probative value and insufficient to give rise to a conflict in medical opinion with the special weight accorded Dr. Simon as the impartial medical specialist. Medical opinions based on an inaccurate or incomplete medical history are of diminished probative value.⁹

The January 12, 2005 report of Ms. Delbello, a nurse practitioner, does not constitute medical evidence. A nurse is not a physician as defined under the Federal Employees' Compensation Act.¹⁰

Appellant also submitted copies of medical evidence from Dr. Bogert and Dr. Stempler which were previously of record and considered by the Office. The Board reviewed this evidence in the prior appeal and explained the basis for finding it insufficient to support continued disability causally related to the accepted injury.

On appeal, counsel contends that Dr. Simon's opinion is insufficient to constitute the weight of the medical evidence as it was not based on a proper factual background and inadequate statement of accepted facts. However, these contentions were considered in the prior appeal. The issue in the present appeal is the adequacy of the medical evidence submitted by appellant in support of his claim of continuing disability and residuals of the accepted injury.

⁹ *M.W.*, 57 ECAB 710 (2006); *John W. Montoya*, 54 ECAB 306 (2003).

¹⁰ *E.H.*, 60 ECAB ____ (Docket No. 08-1862, issued July 8, 2009); *L.D.*, 59 ECAB ____ (Docket No. 08-966, issued July 17, 2008); *Roy L. Humphrey*, 57 ECAB 238 (2005).

Appellant also contends that the Office ignored evidence supporting that his disc herniations and degenerative disc disease are work related. The Office has not accepted these conditions as employment related. Moreover, the contention was raised at the time of the prior appeal. Dr. Simon, the impartial specialist, determined that appellant's degenerative disease of the lumbar spine was not related to the accepted injury. As noted, the progress reports of Dr. Tessler do not provide a well-rationalized medical opinion explaining how appellant's accepted injury would cause or contribute to his degenerative condition. The medical evidence submitted is not sufficient to meet appellant's burden of proof to establish causal relation.

CONCLUSION

The Board finds that appellant did not establish that he has continuing disability or residuals after January 27, 2002 related to his August 5, 1991 injury.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2008 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: March 3, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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