

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

a cart and injured the left side of her lower back. The employing establishment indicated on the form that appellant stopped work on August 19, 2009. OWCP accepted the claim on October 5, 2009 for aggravation of sciatica on the left side. Appellant received compensation for wage loss.

An attending physician, Dr. Kenneth Fischer, a Board-certified neurologist, submitted a January 6, 2010 form report (OWCP 5c, work capacity evaluation). He advised that appellant remained totally disabled for work. Dr. Fischer also submitted a narrative report of that date providing results on examination and diagnosing a “somewhat improved but persistent work-related lumbar radiculopathy.”

OWCP referred appellant to Dr. Richard Glatzer, a Board-certified orthopedic surgeon, for a second opinion examination.<sup>2</sup> In a report dated February 4, 2010, Dr. Glatzer provided a history, results on examination and review of medical records. He could not find any relationship between appellant’s subjective complaints and the August 7, 2009 work injury. Dr. Glatzer noted that a medical report of September 14, 2009 made no mention of any neck or back complaints. He found that there was a functional overlay on appellant’s part as he could not make positive objective orthopedic or neurologic findings to corroborate her subjective complaints.

OWCP found a conflict in medical opinion between Dr. Fischer and Dr. Glatzer. Appellant was referred to Dr. Theodore Evans, a Board-certified orthopedic surgeon selected as the referee physician to resolve the conflict in medical evidence. By report dated May 18, 2010, Dr. Evans reviewed a history of injury and medical treatment. Based on the physical examination, he diagnosed lumbar degenerative disc disease with radiculopathy on the left. Dr. Evans also noted cervical spondylosis, and a differential diagnosis of carpal tunnel syndrome or neuropathy on the left, versus C6 radiculitis on the left. He stated that appellant “has a chronic preexisting condition of the lumbar spine: Lumbar spondylosis, degenerative disc disease and radiculopathy on the left which was documented by an orthopedist in 1995. The patient probably sustained a sprain of her low back that was not described as such at the time of injury which occurred on or about August 7, 2009, and an exacerbation of her lumbar spondylosis, degenerative disease and radiculopathy.” In response to the question as to whether appellant continued to have residuals of the work injury, Dr. Evans stated that appellant had “subjectively greater complaints with respect to her low [back] and left lower extremity. However, objectively are findings of chronic preexisting lumbar degenerative disc disease spondylosis and radiculopathy on the left.” Dr. Evans reported that, from the standpoint of the work injury, no further medical treatment was indicated, although appellant had preexisting lumbar disease that required further treatment. As to physical limitations, he stated that there were none related to the August 7, 2009 work injury.

In a letter dated September 23, 2010, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits. It found that the weight of the medical evidence was represented by Dr. Evans.

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<sup>2</sup> 5 U.S.C. § 8123(a) provides that an employee shall submit to an examination by a physician, designated or approved by the Secretary of Labor, as frequently and at the times and places as may reasonably be required.

By letter dated October 3, 2010, appellant, through her representative, argued that the report of Dr. Evans was not sufficient to resolve the conflict in the medical evidence. In a letter dated October 29, 2010, OWCP asked Dr. Evans to clarify his opinion.

Dr. Evans submitted a report dated December 28, 2010, stating that in August 2009 appellant sustained a low back sprain with an exacerbation of lumbar spondylosis, degenerative disease and radiculopathy. He stated that her conditions had improved to the point that no further medical treatment was necessary. Objectively, appellant had reached her baseline. As to her ability to work as a letter carrier, Dr. Evans stated that she had significant preexisting and degenerative conditions that had worsened over time and prevented her from performing heavy work such as 70-pound lifting.

By decision dated January 20, 2011, OWCP terminated appellant's wage-loss and medical benefits. It found that the weight of the medical evidence was represented by Dr. Evans.

Appellant requested a hearing before an OWCP hearing representative, which was held on November 2, 2011. She submitted a November 18, 2011 report from Dr. Fischer, who stated that appellant sustained a work injury on August 7, 2009 with subsequent cervical and lumbar symptomology. Dr. Fischer opined that, although appellant "did have some antecedent degenerative disease, she was functioning and asymptomatic until the [August 7, 2009] accident. That incident aggravated and worsened some antecedent discogenic disease and is the proximate cause of her current disability."

In a decision dated February 15, 2012, an OWCP hearing representative determined that the case required further development of the medical evidence. The hearing representative found that the statement of accepted facts (SOAF) should be updated to include exacerbation of lumbar degenerative disc disease and lumbar strain as accepted conditions. The hearing representative directed OWCP to request a supplemental report from Dr. Evans, addressing whether the exacerbation of lumbar degenerative disc disease and radiculopathy had ceased.

OWCP prepared a SOAF and referred the case to Dr. Evans for a supplemental opinion. In a report dated June 20, 2012, Dr. Evans noted that his review of medical records included Dr. Fischer's November 18, 2011 report. He stated that, while appellant had reported subjective symptoms, he based his opinion on the objective findings. Dr. Evans noted that while Dr. Fischer had referred to the magnetic resonance imaging scan evidence demonstrating discogenic disease and L5 nerve decompression, these objective findings were related chronic degenerative disease related to a 2005 motor vehicle accident. He further stated, "The obvious logical disconnect in this case is that the objective findings in the low back are the same as those described after her previous injury of 2005, there is abundant preexisting disease, the perceived pain level as low with minimal intervention of a medication that is also used for chronic neuropathy, and yet the patient and treating physician allege the present limitations are due to the new injury in 2009." Dr. Evans reiterated his opinion that, based upon the objective findings and within reasonable degree of medical certainty, the current limitations were not due to the injury of 2009.

By letter dated July 20, 2012, OWCP advised appellant that it proposed to terminate her compensation for wage-loss and medical benefits. Appellant was advised she had 30 days to submit additional evidence or argument.

In a decision dated August 24, 2012, OWCP terminated compensation for wage-loss and medical benefits effective that date.

Appellant again requested a hearing before an OWCP hearing representative, which was held on January 18, 2013. She submitted a November 19, 2012 report from Dr. Fischer, who stated that he disagreed with the opinion of Dr. Evans. Dr. Fischer advised that he had last examined appellant on October 30, 2012, and she continued to demonstrate complaints of significant lumbar dysfunction. Appellant had a documented lumbar injury on August 7, 2009, had immediate symptomology and her condition had not improved. Dr. Fischer stated that diagnostic testing in 2009 showed lumbar abnormalities and reiterated his opinion that appellant continued to be disabled as a result of the work injury.

By decision dated April 9, 2013, the hearing representative affirmed the termination of compensation. The hearing representative found that Dr. Evans represented the weight of the medical opinion.

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

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>3</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>4</sup>

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>5</sup> OWCP regulations state that the examination by the selected physician is called a referee examination.<sup>6</sup> It is well established that when a case is referred to a referee physician 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.<sup>7</sup> A rationalized medical

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<sup>3</sup> *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

<sup>4</sup> *Furman G. Peake*, 41 ECAB 361 (1990).

<sup>5</sup> *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

<sup>6</sup> 20 C.F.R. § 10.321(b).

<sup>7</sup> *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

opinion is an opinion of reasonable medical certainty that is supported by an explanation as to the conclusion reached.<sup>8</sup>

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

In the present case, a conflict in the medical evidence arose with respect to appellant's continuing employment-related condition. Attending physician Dr. Fischer found in January 6, 2010 and November 18, 2011 reports that appellant continued to have an employment-related condition and disability from the August 7, 2009 employment injury. In a February 4, 2010 report, second opinion physician, Dr. Glatzer, found no objective evidence of a continuing employment-related condition.

Pursuant to 5 U.S.C. § 8123(a), OWCP selected Dr. Evans as a referee physician. Dr. Evans provided reports dated May 18 and December 28, 2010 and June 20, 2012. In the reports, he provided a history of injury and medical treatment, provided results on examination and a detailed review of the medical evidence. Dr. Evans opined that appellant did not have a continuing employment-related condition. He explained that the objective findings were of a degenerative nature that preexisted the employment injury. Dr. Evans found no objective evidence of a continuing condition or disability causally related to the August 7, 2009 employment injury.

As noted above, when a referee physician provides an opinion that is based on a proper background and supported by rationale, it is entitled to special weight. In this case, Dr. Evans provided detailed reports that were based on a complete background and he supported his opinion with medical rationale. The Board finds that Dr. Evans' opinion was entitled to special weight and represents the weight of the medical evidence in this case.

The Board accordingly finds that OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits as of August 24, 2012. The weight of the medical evidence was properly found to rest with the referee physician, Dr. Evans.

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

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

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

As noted above, the medical evidence was sufficient to terminate compensation for wage-loss and medical benefits effective August 24, 2012. Appellant submitted a new medical report from Dr. Fischer dated November 19, 2012 that discussed examinations through

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<sup>8</sup> See, e.g., *K.W.*, 59 ECAB 271 (2007).

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

October 30, 2012. It is appellant's burden of proof to submit probative medical evidence sufficient to reinstate compensation benefits after August 24, 2012.

The November 19, 2012 report of Dr. Fischer is not sufficient to meet appellant's burden of proof. Dr. Fischer indicated that appellant continues to have lumbar symptoms. The issue is whether there is a relationship between the current lumbar condition and the August 7, 2009 employment injury. Dr. Fischer does not explain why a current disabling lumbar condition is causally related to the specific employment injury in this case. He does not refer to current diagnostic testing or explain why any findings would be related to the pushing of a cart on August 7, 2009. The presence of symptoms does not itself establish causal relationship with employment.<sup>10</sup> In the absence of a rationalized medical opinion, the Board finds that appellant did not meet her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits effective August 24, 2012. Appellant did not establish an employment-related condition or disability after August 24, 2012.

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<sup>10</sup> See *Richard B. Cissel*, 32 ECAB 1910 (1981); *William Nimitz, Jr.*, 30 ECAB 567 (1979).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated April 9, 2013 is affirmed.

Issued: November 20, 2013  
Washington, DC

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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

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