United States Department of Labor
Employees' Compensation Appeals Board

C.L., Appellant	)	
and	)	**Docket No. 07-1595**
	)	**Issued: December 19, 2007**
DEPARTMENT OF THE AIR FORCE, DEFENSE COMMISSARY AGENCY, PATRICK AIR FORCE BASE, FL, Employer	)	

Appearances:
Ronald S. Webster, 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 May 31, 2007 appellant filed a timely appeal from the June 26, 2006 and March 27, 2007 merit decisions of the Office of Workers' Compensation Programs, which terminated her 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 termination.

ISSUE

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

FACTUAL HISTORY

On December 7, 2001 appellant, then a 49-year-old lead sales store checker, completed a claim alleging that she sustained an injury in the performance of duty that day: "Cashier called for [assistance] on register #4 went to her and was leaving to go get change fund slip upon grapes smashed on floor." She explained that she fell on her buttocks and right leg, and customers

helped her up.[1] Appellant did not stop work. The record indicates that the Office accepted the claim, without formal adjudication, for strain, right leg/buttock.

On April 27, 2004 appellant filed a claim alleging that walking on a concrete floor for the prior two years aggravated her December 7, 2001 right knee injury: "My right knee after receiving therapy was ok for first year after injury 2002 [sic] but into 2003 the knee would swell and hurt slightly but increased greatly after walking on my job and standing for seven hours a day out of my eight-hour workday." She first became aware of this condition on August 1, 2003. Appellant underwent a posterior horn medial meniscectomy, right knee, on May 6, 2004.

The Office accepted appellant's occupational disease claim for aggravation of traumatic arthritis of the right knee. The Office also accepted derangement of the posterior horn of the medial meniscus of the right knee, deep vein thrombosis (DVT) of the right leg, lumbago and right-sided sciatica. Appellant received compensation for wage loss on the periodic rolls.

On June 22, 2005 Dr. Jeffrey Greenspoon, an attending orthopedic surgeon, found that appellant's overall physical examination was unchanged. He diagnosed: traumatic arthritis of the right knee with questionable osteochondral defect; history of essential hypertension; history of cardiac murmur; status post knee arthroscopy with medial or lateral meniscectomy; osteoarthritis, lower leg; right knee pain; lumbar arthritis; sciatica; minor diagnosis of DVT, right leg; post phlebitic right leg edema; and weight disorder. Noting no change in her work status, Dr. Greenspoon reported that appellant was disabled for work: "This lady is being considered disabled for the combination of the right knee condition, lumbar spine/radiculopathy, DVT and chronic anticoagulation." He reported that appellant's restrictions were permanent.

The Office obtained a second opinion from Dr. D. Barry Lotman, an orthopedic surgeon. On September 8, 2005 Dr. Lotman related appellant's history and his findings on examination. He reviewed a lumbar magnetic resonance imaging (MRI) scan and found no evidence of disc herniation but did find a mild degenerative change at L5. He also reviewed the preoperative knee MRI scan, which demonstrated that the posterior horn of the medial meniscus was degenerated and truncated, consistent with degenerative tearing. Dr. Lotman diagnosed status post arthroscopy right knee for torn medial meniscus, low back pain "etiology?" and status post thrombophlebitis right lower extremity, resolved.

Dr. Lotman explained that, based on Dr. Greenspoon's surgical findings and his own review of the MRI scan, the mild arthritis reported in the medial compartment was degenerative, not traumatic. He found no current objective physical findings consistent with arthritis. Dr. Lotman added that appellant had no objective evidence of lumbago or right-sided sciatica: "She continues to have subjective complaints but no objective findings." Dr. Lotman concluded that appellant was unable to completely perform all the functions of her date-of-injury job. He did not find that appellant could stand on her feet 4 hours a day or bend and stoop for 30 minutes a day. He reported, however, that appellant could work eight hours a day with restrictions lasting six to eight weeks. Dr. Lotman recommended that appellant return to her attending orthopedic surgeon for additional and ongoing treatment for her right knee symptoms. But he felt that further treatment of her lumbosacral spine was not reasonable, related or necessary.

[1] Appellant later told medical providers that she fell on her right knee.

The Office determined that a conflict in medical opinion existed between Dr. Lotman and Dr. Greenspoon on the issue of injury residuals and work capacity. To resolve the conflict, the Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Emmanuel D. Scarlatos, a Board-certified orthopedic surgeon.

On November 3, 2005 Dr. Scarlatos noted appellant's chief complaints and related her history. He described his findings on examination and reviewed the MRI scans. Dr. Scarlatos diagnosed low back right radicular syndrome and bilateral carpal tunnel syndromes, per a neurodiagnostic study not available for review. He opined that appellant's low back radiculitis was an objective residual causally related to her work injury and that the mildly positive radicular symptoms he elicited on examination required further investigation. Dr. Scarlatos recommended neurodiagnostic studies. He offered the following opinion on appellant's work status:

> "With respect to this individual's ability to return to her prior employment and fulfill the duties as a lead sales store clerk, it is this referee's professional opinion that she would not be able to adequately perform all of these duties and functions. At this juncture, she would be unable to comply with standing for the length of time required for her to be standing, and she would be unable to cope as well with the bending and stooping that is required. I do not foresee significant problems with her pulling objects, helping with grocery purchases, collecting and issuing cash tills, making service calls, or coping with other activities involved with customer service. I would limit her lifting to a maximum of 15 [to] 20 pounds. She should change positions frequently and could sit between 2 [to] 3 hours daily. Ambulation should be intermingled with short periods of sitting for the time being until further clarification can be obtained through neurodiagnostic [study]. It is my opinion that the claimant/examinee could be employed at an eight-hour day.
>
> "Again, this referee is in complete agreement with the findings of Dr. D. Barry Lotman with respect to the investigations as well as with the examination of the right knee where, again, subjective complaints far outweigh the clinical findings."

On a work capacity evaluation form, Dr. Scarlatos indicated that appellant's restrictions would apply for two to three weeks pending neurodiagnostic study. On December 22, 2005 he reported the neurodiagnostic study to be normal. Dr. Scarlatos again reviewed the MRI scan films, which suggested mild-to-moderate degenerative disc disease at L4-5-S1 with broad-based focal prominence, right of midline, at the S1 level with very mild disc bulge at L4-5 and no significant foraminal intrusion. He saw no evidence of herniations. Based on those findings and the neurodiagnostic study, Dr. Scarlatos recommended no surgical intervention.

The Office asked Dr. Scarlatos to clarify his restrictions in light of the normal neurodiagnostic study. On April 13, 2006 he replied that he reviewed appellant's job requirements "and would indicate that the claimant/examinee would be able to accomplish all of these requirements (including standing 4 hours a day, sitting up to 3 hours a day, simple grasping up to 6 hours a day, bending/stooping up to 30 minutes per day, and lifting, pushing and pulling objects up to 20 pounds for up to 30 minutes a day)." Furthermore, assuming that appellant was

able to intermingle standing and sitting, Dr. Scarlatos stated that the breaks previously requested, consisting of five minutes per hour, would not be necessary.

On May 17, 2006 the Office proposed to terminate appellant's compensation for wage loss. The Office found that the weight of the medical evidence rested with the opinion of the impartial medical specialist, Dr. Scarlatos, who opined that appellant was able to return to the full duties of her date-of-injury position as a lead sales store checker.

On June 14, 2006 appellant wrote to explain about her condition and why she was not able to return to work at that time. The Office received a May 9, 2006 report from Dr. Richard A. Hynes, an orthopedic surgeon, who diagnosed lumbar degenerative disc disease at L5-S1, central herniated nucleus pulposus with probably right L5-S1 radiculopathy and lumbar spondylosis. Dr. Hynes stated: "[Appellant] is current[ly] having pain management and is temporarily disabled."

In a decision dated June 26, 2006, the Office terminated appellant's compensation for wage loss effective that date. The Office found that the opinion of the impartial medical specialist, Dr. Scarlatos, represented the weight of the medical evidence.

On June 20, 2006 Dr. Hynes diagnosed L4-5 and L5-S1 mechanical instability secondary to annular tears and intermittent disc herniation. He anticipated an 80 percent improvement in 6 to 12 months and expected appellant to return to a working status within 6 to 9 months.

On November 7, 2006 an Office medical adviser reviewed the medical evidence, including recent reports from appellant's attending physicians. He concluded that a proposed spinal fusion procedure should be authorized, as it "was indicated in the treatment of her accepted condition." The Office authorized the surgery.

On November 29, 2006 appellant requested reconsideration. She argued that the statement of accepted facts was incomplete because it did not describe the mechanism of injury, and therefore Dr. Lotman's and Dr. Scarlatos' reports should not be considered valid. Appellant argued, in the alternative, that Dr. Lotman agreed with her treating physicians that she could not perform her date-of-injury position and therefore the Office should not have sent her to a referee physician. She added that Dr. Scarlatos made an unsupported assumption about the possibility of intermingling standing and sitting.

The employing establishment replied that on July 20, 2005 it notified the Office that appellant's position required "standing -- intermittent -- 4 hours per day." The employing establishment made clear that "the physical activity is intermittent as there are frequent changes in tasks," and that appellant's tour of duty afforded two 15-minute breaks per shift and a lunch period of 30 minutes.

Appellant underwent spinal fusion surgery on January 24, 2007.

In a decision dated March 27, 2007, the Office reviewed the merits of appellant's case and denied modification of its June 26, 2006 decision. The Office explained that, in an occupational disease case, the acceptance of an aggravation of preexisting arthritis was necessarily due to the performance of job requirements, so it was not fatal for the statement of

accepted facts not to state such exactly that way. The Office added: "While it is clearly noted that the current evidence of record indicates that you have since undergone surgery authorized by this office at Holmes Regional Medical Center, the additional medical evidence received did not provide any medical rationale to support that you could not return to work in your date-of-injury position as [l]ead [s]ales [s]tore [c]hecker as of the date of the June 26, 2006 decision."

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[2] "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury. It may be partial or total.[3]

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to his or her 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.[5]

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.[6] 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.[7]

ANALYSIS

A conflict in medical opinion arose between Dr. Greenspoon, the attending orthopedic surgeon, and Dr. Lotman, the referral orthopedic surgeon, on residuals of the accepted conditions and on the nature of appellant's disability. Dr. Greenspoon considered appellant disabled for the combination of her right knee condition, lumbar spine/radiculopathy, DVT and chronic anticoagulation. Dr. Lotman found no current objective physical findings consistent with arthritis, no objective evidence of lumbago or right-sided sciatica and reported that appellant's thrombophlebitis was resolved. Although both reported that appellant was currently unable to return to her date-of-injury position, Dr. Greenspoon reported that appellant's restrictions were

[2] 5 U.S.C. § 8102(a).

[3] 20 C.F.R. § 10.5(f) (1999).

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

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

[6] 5 U.S.C. § 8123(a).

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

permanent, indicating that appellant could never return to regular duty. Dr. Lotman reported that restrictions would last only six to eight weeks, indicating that appellant could begin full-time regular duty after an initial period of work hardening. The Board finds that the Office properly referred appellant to an impartial medical specialist, or referee physician, under 5 U.S.C. § 8123(a).

The Board finds that the opinion of Dr. Scarlatos constitutes the weight of the medical evidence and establishes that appellant was no longer disabled by her accepted employment injuries. The Office provided Dr. Scarlatos with the medical record and a statement of accepted facts so he could base his opinion on a proper factual and medical background. He agreed with Dr. Lotman that appellant's subjective right knee complaints far outweighed the clinical findings. He found that low back radiculitis was the only objective residual causally related to her work injury and recommended further neurodiagnostic study. When that came back normal, he saw no reason to restrict appellant from returning to her prior employment and fulfilling her duties as a lead sales store clerk. He reviewed appellant's job requirements and reported that she would be able to accomplish all of them, including standing 4 hours a day and bending or stooping up to 30 minutes per day.

The Board finds that Dr. Scarlatos' opinion is based on a proper background and is sufficiently well reasoned that it must be given special weight in resolving the conflict between appellant's physician and the Office referral physician. The June 14, 2006 report of Dr. Hynes, another of appellant's physicians, lacks the history and medical rationale necessary to create a conflict with Dr. Scarlatos. Dr. Hynes stated that appellant was temporarily disabled, but his brief report did not explain whether this was based on objective findings of accepted conditions or on appellant's subjective complaint of pain. As Dr. Scarlatos' opinion stands as the weight of the medical evidence, the Board finds that the Office met its burden of proof. The Board will affirm the Office's June 26, 2006 decision to terminate compensation for wage loss.

Appellant contended that the Office's failure to describe explicitly a mechanism of injury in this occupational disease case was fatal to the statement of accepted facts. The Board notes, however, that the statement described the physical requirements of appellant's date-of-injury position and the accepted conditions. Dr. Lotman's report makes clear that he disagreed with Dr. Greenspoon on issues of injury-related residuals and work capacity. Referral to a third physician under 5 U.S.C. § 8123(a) was therefore warranted. The employing establishment made clear that the standing required of appellant's position was intermittent, so Dr. Scarlatos' opinion does not rest on an unsupported assumption. Because the weight of the evidence shows that appellant was no longer disabled by her accepted injuries, the Board will affirm the Office's March 27, 2007 decision to deny modification of its termination, which was effective June 26, 2006.

CONCLUSION

The Board finds that the Office has met its burden of proof to justify the termination of appellant's compensation for wage loss.[8]

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2007 and June 26, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: December 19, 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

[8] Where the Office meets its burden to justify the termination of compensation benefits, the burden switches to the claimant to establish that any subsequent disability is causally related to the accepted employment injury. *Wentworth M. Murray*, 7 ECAB 570 (1955); *Maurice E. King*, 6 ECAB 35 (1953). Whether appellant continued to be disabled by her accepted injuries after June 26, 2006, or whether her authorized spinal fusion surgery caused a recurrence of disability, entitling her to later compensation for wage loss, are issues beyond the scope of this appeal. The Office has issued no final decision on any such claim over which the Board may presently take jurisdiction.