

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

JEWELL F. MILBY, Appellant)
)
and) **Docket No. 03-2252**
) **Issued: February 2, 2004**
DEPARTMENT OF THE ARMY, GREEN)
RIVER LAKE, Campbellsville, KY, Employer)

Appearances:
Eric R. Collis, Esq. for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On September 11, 2003 appellant filed a timely appeal from a nonmerit decision of the Office of Workers' Compensation Programs dated June 12, 2003 and a merit decision of the Office dated July 10, 2003. Under 20 C.F.R. §§ 501.2(c), 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant met her burden of proof to establish that she had disability causally related to her accepted employment injuries after July 19, 1998.

FACTUAL HISTORY

This is the second appeal in this case. On the prior appeal the Board affirmed decisions of the Office, which terminated appellant's compensation benefits effective July 19, 1998. The Board also found that appellant failed to establish that she had any continuing disability causally

related to her accepted employment injuries after that date.¹ By decision dated April 24, 2002, the Board affirmed the Office's May 29, 2001 decision.² The Board found that the weight of the medical opinion evidence rested with Dr. M.I. Malik, a Board-certified orthopedic surgeon and impartial medical examiner, who advised that appellant had no further limitations causally related to her employment injuries. The Board considered appellant's argument that Dr. Malik was not entitled to special weight as a referee physician, as he had complaints filed against him at the Kentucky Board of Medical Licensure, as well as judgments against him for malpractice. The Board found that Dr. Malik was properly selected to act as an impartial medical specialist in this case and that his medical report was based on a proper factual background and based on objective physical findings in support of his conclusion that appellant was no longer disabled and had no residuals of her accepted employment injury. The Board noted that additional medical reports submitted thereafter were not sufficient to overcome the special weight accorded to Dr. Malik's medical opinion as an impartial medical specialist. The Board found that appellant had not submitted additional probative medical opinion evidence sufficient to establish that she had continuing disability causally related to her accepted employment injuries after July 19, 1998. By order dated July 24, 2002, the Board denied appellant's request for reconsideration of its April 24, 2002 decision. The law and the facts of this case as set forth in the Board's April 24, 2002 decision are herein incorporated by reference.

By letters dated April 8 and May 9, 2003, appellant, through counsel, requested reconsideration before the Office and submitted additional medical evidence and arguments she believed warranted further consideration. In a decision dated June 12, 2003, the Office found that the newly submitted evidence and arguments to be insufficient to warrant further merit review.

Subsequent to the Office's June 12, 2003 decision, appellant's counsel contacted the Office and it was determined that additional evidence sent in support of the reconsideration request had been lost during the processing of the mail. It was agreed that appellant could resubmit the documentation and reconsideration would be readdressed. By letter dated June 24, 2003, appellant again requested reconsideration of the Office's prior decisions and submitted additional evidence.

In a decision dated July 10, 2003, the Office found that the evidence was insufficient to warrant modification of its prior decision.

LEGAL PRECEDENT

In the April 24, 2002, the Board found that the Office had met its burden of proof to terminate appellant's compensation benefits affective July 19, 1998. Therefore, appellant has the burden of proof to establish that she still has disability residuals of her accepted employment

¹ On January 27, 1989 appellant, then a 52-year-old secretary, filed a claim for traumatic injury alleging that on January 25, 1989 she injured her back while moving a box weighing approximately 30 pounds. Appellant stopped work on January 27, 1989 and has not returned. On June 9, 1989 the Office accepted that appellant sustained employment-related lumbar and thoracic strains and subsequently accepted appellant's claim for pneumothorax caused by her back therapy.

² Docket No. 01-1763.

injury.³ To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.⁴ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁵ Rationalized medical opinion evidence is medical evidence, which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 the claimant.⁶ The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁷

ANALYSIS

Appellant submitted additional materials from the Kentucky Board of Medical Licensure, which she asserted, support a finding that Dr. Malik was not fit to function as an impartial medical examiner at the time he prepared his March 19 and April 20, 1998 reports and, therefore, his opinion was not entitled to be accorded special weight.⁸ Appellant submitted evidence that showed that in July 1996 the Kentucky Board, which had been evaluating Dr. Malik since 1989, initiated an investigation into Dr. Malik's charting and documentation methods and surgical practices. In addition, the evidence shows that, on March 23, 1998, Dr. Malik's Hardin Memorial Hospital staff privileges were revoked. On April 14, 1999 Dr. Malik entered into an Agreed Order of Probation, which placed him on probation until April 14, 2002. Subsequently, on November 6, 2002 the Kentucky Board issued an Emergency Order of Restriction prohibiting Dr. Malik from performing any surgical procedures and from practicing medicine outside of an office setting. The evidence establishes that Dr. Malik was under investigation at the time of his March 19, 1998 impartial evaluation, that shortly thereafter his hospital staff privileges were revoked. In November 2002 his license was restricted. The evidence does not establish, however, that Dr. Malik was ever suspended from medical practice and he was not under probation or restriction at the time of his evaluation of appellant. The Board finds that Dr. Malik

³ *Gayle Harris*, 52 ECAB 319 (2001).

⁴ *See* 20 C.F.R. § 10.115(e); *see Manuel Gill*, 52 ECAB 282 (2001).

⁵ *Elizabeth Stanislav*, 49 ECAB 540 (1998).

⁶ *Claudio Vazquez*, 52 ECAB 496 (2001); *Gloria J. McPherson*, 51 ECAB 441 (2000).

⁷ *Duane B. Harris*, 49 ECAB 170 (1997).

⁸ In situations where there are 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 on a proper factual background, must be given special weight. *Stanley B. Plotkin*, 51 ECAB 700 (2000).

was properly selected to act as an impartial medical specialist in this case and the Office properly relied upon his opinion in terminating appellant's compensation benefits effective July 19, 1998.

Appellant also submitted copies of a June 30, 1999 magnetic resonance imaging (MRI) scan report previously contained in the record, a copy of a May 1, 2000 report interpreting the MRI scan from Dr. Jannice Aaron, also previously of record and a January 27, 2003 medical report from Dr. O. James Hurt, a Board-certified orthopedic surgeon, to whom appellant had been referred by the Office in May 1997, for a second opinion evaluation. Dr. Hurt referenced the previously submitted MRI scan reports. In a May 16, 1997 report, he stated that appellant could perform her job as a secretary, with restrictions of occasional lifting of 25 pounds and frequent lifting of 10 pounds. He recommended that appellant continue exercise treatment for her left shoulder and neck and begin a walking regimen. On an accompanying work capacity evaluation form, Dr. Hurt indicated that appellant could work 8 hours a day within the restrictions of occasional lifting of 25 pounds, frequent lifting of 10 pounds, no climbing ladders or lifting overhead and the ability to change positions every 45 to 60 minutes. He further indicated that these restrictions were due to appellant's accepted employment injuries. In a report dated January 27, 2003, Dr. Hurt stated:

"I saw [appellant] May 16, 1997. At that time she complained of pain that had continued since the time of the accident. The pain remained about the same. Presently she is being seen about two times a year for medication renewals. At the time that I saw [appellant], I felt that she continued to have an impairment. In workman[']s comp[ensation] ratings, the doctor gives an impairment rating. A disability rating is decided by a committee and usually medical doctors are not part of this committee. The committee does have the report and the impairment rating of the physician. When evaluated by me, I did feel that she had a partial impairment. I did not see evidence of total impairment or findings of total disability. As well as I can understand, with her retirement, her U.S. Army Corps of Engineers retirement was cashed in and she no longer has an income. If she did have a total disability rating with retirement, I would think that she should be having an income. I have reviewed the MRI [scan] and Dr. Aaron's report of the thoracic spine MRI [scan] dated June 30, 1999 and concur with Dr. Aaron's report."

The Board finds that the January 27, 2003 of report Dr. Hurt essentially reiterates his earlier conclusion that appellant was partially disabled but capable of returning to her usual work full time, which formed one side of the original conflict in medical opinion. He did not find that appellant was totally disabled and his report is insufficient to establish that the Office improperly terminated appellant's benefits effective July 19, 1998. Although while Dr. Hurt stated that he concurred with Dr. Aaron's findings, the Board notes that in her May 1, 2000 report, Dr. Aaron simply found that the compression fractures revealed on the June 30, 1999 MRI scan were old and stated that the fact that they were not seen at the time of the original injury, on the plain x-ray films, did not mean that they did not occur at that time, as an MRI scan is a more sensitive modality for examining the thoracic spine. Dr. Aaron did not offer an opinion as to whether

appellant was disabled due to her accepted employment injuries, either prior to, or after, July 19, 1998. The fact that Dr. Hurt concurred with Dr. Aaron is of limited probative value.⁹ Therefore, Dr. Hurt's opinion is insufficient to establish that appellant continues to be disabled due to her accepted employment injuries.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she had continuing disability after July 19, 1998.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 10 and June 12, 2003 are affirmed.

Issued: February 2, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

⁹ Medical reports not containing rationale on causal relation are entitled to little probative value. *Franklin D. Haislah*, 52 ECAB 457 (2001).