

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

L.P., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Richmond, CA, Employer**

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**Docket No. 07-155
Issued: May 1, 2007**

Appearances:
Hank Royal, 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 October 23, 2006 appellant, through her representative, filed a timely appeal from a November 7, 2005 merit decision of the Office of Workers' Compensation Programs terminating her compensation and a nonmerit decision dated February 9, 2006 denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the February 9, 2006 nonmerit decision.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's entitlement to compensation benefits effective January 30, 2004 on the grounds that she had no further disability due to her December 16, 1999 employment injury; (2) whether the Office properly terminated authorization for medical benefits; (3) whether appellant has established that she had continuing disability after January 30, 2004 due to her December 16, 1999 employment injury; and (4) whether the Office properly denied her request for review of the merits of her claim under 5 U.S.C. § 8128.

FACTUAL HISTORY

On February 17, 2000 appellant, then a 53-year-old customer service supervisor, filed a traumatic injury claim alleging that she reinjured her neck and lower back on December 16, 1999 when she stepped on a broken tile and fell through the floor. The Office previously accepted that appellant sustained a strain of the neck, left shoulder and lumbar spine due to a May 6, 1999 motor vehicle accident. The claim was assigned file number 131189616. The Office assigned the December 16, 1999 work injury file number 132007926 and accepted the claim for an aggravation of the lumbar spine.¹

In a report dated December 7, 2001, Dr. David Wren, Jr., an attending orthopedic surgeon, discussed appellant's history of injury on May 6 and December 16, 1999. He diagnosed cervical and trapezial strain, possible cervical radiculitis, chronic low back pain, lumbar disc disorder with disc protrusion at L5-S1 and foraminal stenosis at L4-5 and L5-S1 and lumbar radiculitis. Dr. Wren opined that appellant should work only four hours per day with restrictions beginning December 10, 2001. Appellant received compensation for partial disability from the Office beginning December 10, 2001.

On February 1, 2002 the Office referred appellant to Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated February 19, 2002, Dr. Sherman discussed appellant's December 16, 1999 employment injury. He noted that she had a prior work injury to her neck and lower back in March 1999, when she was in a motor vehicle accident.² Dr. Sherman interpreted a December 2000 magnetic resonance imaging (MRI) scan study as showing arthritic changes at L4-5 and L5-S1 with foraminal stenosis but no nerve root impingement. He diagnosed nonemployment-related osteoarthritis of the lumbar spine without neurological deficit and resolved lumbosacral strain due to the December 16, 1999 employment injury. Dr. Sherman found that appellant had no disability resulting from the December 16, 1999 work injury. He stated: "She has a disability involving her lumbar spine prior to the December 16, 1999 incident, which would prevent her from doing repetitive forward bending or lifting of weights heavier than 25 pounds due to her nonindustrial osteoarthritis and the sprain of the lumbar spine that occurred in March 1999."

On February 28, 2002 the Office requested that Dr. Wren review and comment on Dr. Sherman's findings. On March 14, 2002 Dr. Wren disagreed with Dr. Sherman's conclusion and noted that the MRI scan study showed a "significant disc protrusion at the L5-S1 level" with neural foraminal stenosis, osteophyte formation and facet joint arthritis at L5-S1. He attributed appellant's back condition to her May 1999 and December 16, 1999 work injuries. Dr. Wren stated:

"The injury that [appellant] sustained at work on December 16, 1999 has not resolved. That injury resulted in injury to the disc as well as an aggravation of an underlying arthritic condition. [Appellant] has not had a resolution of the

¹ By decision dated September 6, 2000, the Office denied appellant's claim for continuation of pay as untimely.

² The date of appellant's work-related motor vehicle accident was May 6, 1999.

lumbosacral injury and continues to be symptomatic as a result of the job injury of December 16, 1999 and to a lesser extent by the job injury of May 1999.”

Dr. Wren noted that appellant began working six hours per day on February 11, 2002. In a progress report dated March 14, 2002, he found that appellant could resume full-time employment with restrictions.

The Office determined that a conflict in medical opinion existed between Dr. Sherman and Dr. Wren on the issue of whether appellant had continuing residuals from her December 16, 1999 work injury. The Office referred appellant to Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated June 12, 2002, Dr. Auerbach reviewed the medical evidence of record, including the results of objective studies, discussed her history of injury and listed detailed findings on physical examination. He reviewed the December 2001 MRI scan study and found that it showed degenerative disc disease and bulging discs at L4-5 and L5-S1, a 50 percent narrowing of the intervertebral disc space and some disc bulging into the L5-S1 foramen without nerve root irritation. Dr. Auerbach noted that appellant experienced no back pain prior to her May 1999 motor vehicle accident. Appellant was working with restrictions due to the motor vehicle accident at the time of her December 16, 1999 work injury. Dr. Auerbach stated:

“I do not believe orthopedically that [appellant] continues to suffer from the residuals of her December 16, 1999 industrial injury, aggravation of her preexisting problem secondary to a motor vehicle accident on the job of May 1999 where, among other injuries, she injured her low back and aggravated a degenerative disc disease. [Her] lumbar spine aggravation of December 16, 1999 has dissipated completely. She has no present work restrictions due to the December 16, 1999 temporary aggravation of her preexisting condition that aggravated her lumbar spine. That aggravation again has resolved. Any restricted activities that she has are due to her preexisting condition, osteoarthritis of the lumbar spine, secondary to the aggravation of osteoarthritis, lumbar spine, in the motor vehicle accident at work of May 1999.”

Dr. Auerbach found that appellant could work full time with restrictions due to her May 1999 motor vehicle accident, which he found “aggravated her preexisting but apparently asymptomatic degenerative arthritic low back problem.”

On August 29, 2002 the Office notified appellant that it proposed to terminate her compensation and medical benefits on the grounds that she had no further employment-related residuals. In a decision dated October 16, 2002, the Office finalized the termination of compensation. Appellant requested an oral hearing. By decision dated June 12, 2005, an Office hearing representative set aside the October 16, 2002 decision. The hearing representative instructed the Office to double the case with appellant’s May 1999 work injury, assigned file number 131189616 and request clarification from Dr. Auerbach regarding whether she had continuing residuals from either work injury.

On June 25, 2003 the Office provided Dr. Auerbach with both case files and a revised statement of accepted facts. The Office requested that he discuss whether appellant had any further disability or residuals due to either employment injury. In a report dated September 8, 2003, Dr. Auerbach reviewed the evidence from both case records. He stated:

“The claimant has a subsidiary claim with a date of injury [of] May 6, 1999. Left cervical strain, left trapezius strain [and] low back strain have been accepted as work related. Based on the current objective findings and review of past medical records for both claims [file numbers] 132007926 and 131189616, there is a disc injury due to the December 16, 1999 industrial injury. The claimant’s May 6, 1999 industrial injury presents no change in my previous medical treatment made on June 12, 2002. With the additional medical evidence that there is an accepted May 6, 1999 industrial injury with conditions of left cervical strain, left trapezius strain and low back strain, the claimant’s accepted medical condition of aggravation of lumbar strain for the December 16, 1999 injury was temporary. She has recovered from the December 16, 1999 temporary aggravation and was then left the way she was prior to December 16, 1999 secondary to the original motor vehicle accident of May 6, 1999. The temporary aggravation of December 16, 1999 most probably completely dissipated as of April 16, 2000. My opinion [is that] the temporary aggravation of December 16, 1999 was discussed fully in my original report of June 12, 2002 and has not changed.”

Dr. Auerbach attributed appellant’s work restrictions to her May 6, 1999 motor vehicle accident as described in the previous work restriction evaluated dated July 8, 2002. He stated:

“Given new medical evidence that there was an accepted claim with a date of injury May 6, 1999, the [appellant] continues to suffer residuals only of the May 6, 1999 motor vehicle accident. [She] has recovered from the temporary aggravation of the December 16, 1999 injury completely. [Appellant] continues to have residuals by direct cause only of the May 6, 1999 injury. She does not continue to have residuals by direct cause or aggravation as a result of the December 16, 1999 injury as she has completely recovered from it.

“The medical conditions of left cervical strain and left trapezius strain have resolved, but the low back strain and aggravation of lumbar spine continue as noted with impairment and disability documented in my June 12, 2002 report and documented in my July 8, 2002 OWCP-5c form.

“[Appellant] has no impairment and disability to the neck or left trapezius.”

In a report dated September 25, 2003, Dr. Wren discussed appellant’s complaints of increased pain along the left side of her neck, left shoulder and lower back extending through the right leg and foot. He found that she was temporarily totally disabled due to her increase in pain.

On October 24, 2003 the Office notified appellant that it proposed to terminate her compensation in file number 132007926 on the grounds that she had no residuals of her December 16, 1999 employment injury. The Office indicated that benefits for file number 131189616 were “not affected by this proposed decision.”

In a November 24, 2003 response, appellant argued that Dr. Sherman’s report was insufficient to create a conflict with Dr. Wren’s report as he did not have information regarding the May 6, 1999 work injury at the time he rendered his opinion.³

By decision dated January 30, 2004, the Office finalized its termination of appellant’s entitlement to compensation and authorization for medical benefits on the grounds that she had no further residuals of her December 16, 1999 employment injury. Appellant requested a hearing, which was held on November 30, 2004. She noted that she had retired from the employing establishment on March 1, 2004. Appellant argued that Dr. Auerbach did not explain why her December 1999 employment injury resolved. She also asserted that Dr. Sherman’s opinion was insufficient to create a conflict as the Office did not provide him information about her May 1999 work injury. Appellant indicated that she sustained a subsequent injury to her back in October 2003. She described difficulties obtaining payment for medical expenses. By decision dated March 4, 2005, the Office hearing representative affirmed the January 30, 2004 decision.

On September 3, 2004 appellant requested reconsideration. She submitted a report dated February 8, 2005 from Dr. Wren who discussed appellant’s employment injuries and expressed his disagreement with Dr. Sherman’s opinion. Dr. Wren opined that she “sustained a permanent aggravation of her preexisting osteoarthritis of her lower back. Appellant also has lumbar disc protrusion, L5-S1 and disc bulge L4-5 as a result of her job injury of May 6 and December 16, 1999 in particular.

In a decision dated November 7, 2005, the Office denied modification of the hearing representative’s finding that appellant had no further residuals of her December 16, 1999 employment injury. The Office modified the hearing representative’s March 4, 2005 decision to show that appellant had continuing residuals of her May 6, 1999 employment injury of lumbar strain. The Office further indicated that the May 6, 1999 claim should be expanded to include an aggravation of preexisting lumbar osteoarthritis and degenerative disc disease.

On January 12, 2006 appellant requested reconsideration. She argued that claim file number 131189616 should also include her left shoulder, neck and back conditions.

By decision dated February 9, 2006, the Office denied appellant’s request for reconsideration on the grounds that it was insufficient to warrant review of the November 7, 2005 decision. The Office noted that any argument about claim file number 131189616 should be directed to that file number.

³ On November 20, 2003 appellant appealed to the Board. The Board dismissed the appeal as there was no adverse decision over which it had jurisdiction. Order Dismissing Appeal, Docket No. 04-388 (issued December 31, 2003).

LEGAL PRECEDENT -- ISSUES 1 & 2

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ Additionally, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁷

Section 8123(a) provides that, 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.⁸ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹ In situations where 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.¹⁰

ANALYSIS -- ISSUES 1 & 2

The Office accepted that appellant sustained a reinjury to her lumbar spine due to a December 16, 1999 employment injury, which occurred when she stepped on a broken tile and her foot went through the floor. Appellant worked in a limited-duty capacity at the time of her December 16, 1999 employment injury due to neck, left shoulder and lumbar strain resulting from a May 6, 1999 employment-related motor vehicle accident.

Dr. Sherman, who provided a second opinion evaluation on February 19, 2002, diagnosed resolved lumbosacral strain due to appellant's December 16, 1999 employment injury and nonemployment-related osteoarthritis. He opined that appellant had no further disability due to

⁴ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁵ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁶ *Pamela K. Guesford*, 53 ECAB 727 (2002).

⁷ *Id.*

⁸ 5 U.S.C. § 8123(a).

⁹ 20 C.F.R. § 10.321.

¹⁰ *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

her December 16, 1999 employment injury but had continuing disability from her motor vehicle accident. On March 14, 2002 Dr. Wren diagnosed a disc protrusion at L5-S1 with neural foraminal stenosis, osteophyte formation and facet joint arthritis due to appellant's May and December 1999 employment injuries. The Office determined that a conflict existed between Dr. Sherman and Dr. Wren regarding whether appellant had continuing residuals of her December 16, 1999 employment injury. The Office referred her to Dr. Auerbach for an impartial medical examination.

In a report dated June 12, 2002, Dr. Auerbach reviewed the medical evidence and the results of objective studies. He noted that a December 2001 MRI scan study showed degenerative disease and disc bulges at L4-5 and L5-S1. Dr. Auerbach opined that appellant had no limitations from the "December 16, 1999 temporary aggravation of her preexisting condition that aggravated her lumbar spine." He attributed her work limitations to her "preexisting condition, osteoarthritis of the lumbar spine, secondary to the aggravation of osteoarthritis, lumbar spine, in the motor vehicle accident at work of May 1999."

The Office terminated appellant's compensation based on Dr. Auerbach's June 12, 2002 report. A hearing representative, however, instructed the Office to request clarification from Dr. Auerbach regarding whether appellant had continuing residuals from either her May or December 1999 work injury. On September 8, 2003 Dr. Auerbach indicated that based on his review of case records for both injuries appellant had "a disc injury due to the December 16, 1999 industrial injury."¹¹ He further opined that the aggravation of appellant's lumbar strain due to the December 16, 1999 injury had resolved. Dr. Auerbach also found that appellant's left cervical strain and left trapezius strain had resolved but that she had continuing low back strain and an aggravation of the lumbar spine due to her May 6, 1999 employment injury.

In situations where 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.¹² The Board finds, however, that Dr. Auerbach's opinion that appellant's aggravation of her lumbar condition due to the December 16, 1999 employment injury had resolved is not sufficiently well reasoned to be entitled to special weight. He asserted that appellant had no further aggravation of her back condition due to her December 16, 1999 employment injury but cited no clinical findings to substantiate his assertion. Dr. Auerbach attributed her continuing work restrictions to her prior May 1999 employment injury but provided no analysis to show how he reached such a determination. He did not explain why he believed that appellant had disability due solely to her May 1999 work injury or why he believed that her December 16, 1999 aggravation of her back condition had resolved. While Dr. Auerbach made statements regarding disability and causal relationship that were clear and unequivocal, he failed to offer medical reasoning in support of his conclusions.¹³ The certainty with which he expressed his opinion cannot overcome the lack

¹¹ Dr. Auerbach's finding that appellant had a disc injury due to her December 16, 1999 work injury appears from the context of his report to be a typographical error.

¹² See *David W. Pickett*, *supra* note 10.

¹³ See *Elaine Sneed*, 56 ECAB ____ (Docket No. 04-2039, issued March 7, 2005).

of medical rationale.¹⁴ As Dr. Auerbach did not sufficiently explain why the December 16, 1999 employment injury no longer aggravated appellant's lumbar condition, his opinion is insufficient to constitute the special weight of the medical evidence and the record contains an unresolved conflict in medical opinion. The Board consequently finds that the Office has not met its burden of proof to terminate appellant's compensation and medical benefits for her December 16, 1999 employment injury.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits effective January 30, 2004 on the grounds that she has no further disability or condition due to her December 16, 1999 employment injury.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 9, 2006 and November 7, 2005 are reversed.

Issued: May 1, 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

¹⁴ See *Willa M. Frazier*, 55 ECAB 379 (2004).

¹⁵ In view of the Board's disposition of the merits, the issues of whether appellant has established continuing disability and whether the Office properly denied appellant's request for reconsideration are moot.