

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation and medical benefits effective June 28, 2007; and (2) whether appellant met his burden of proof to establish that he had any disability or medical condition after June 28, 2007 causally related to the accepted employment injury.

FACTUAL HISTORY

On January 11, 2005 appellant, then a 42-year-old rural carrier associate, filed a traumatic injury claim alleging that on January 7, 2005 he slipped on ice and fell on his buttocks, sustaining injuries to his lower back, neck and shoulder.

In a January 11, 2005 report, Dr. Philip A. Yazbak, a Board-certified neurologist, advised that appellant was a patient of his who had a spinal cord stimulator implanted for chronic right radiculopathy. He noted that appellant fell the prior week on ice and experienced increasing back and buttock pain. In a January 24, 2005 report, Dr. Steven E. Bondow, a Board-certified family practitioner, noted that appellant had persistent thoracolumbar spine and paraspinal pain after the fall. In a letter dated March 4, 2005, the Office accepted appellant's claim for contusion of the back.

In a March 3, 2005 report, Dr. Bondow noted that appellant had been followed by his office for back pain related to a fall sustained on January 7, 2005. He noted that appellant had persistent pain through his lower and upper back regions and had prior chronic back pain. Dr. Bondow noted that appellant was being followed jointly with Dr. Yazbak and had an implantable stimulator to help deal with chronic pain. Appellant's recent injury increased swelling around the implantable device and a possible irritation of the electrode area. Dr. Bondow noted that appellant was severely limited for any sustained activities and that it was not plausible for him to walk for significant periods as required by his federal employment.

On March 18, 2005 the Office referred appellant to Dr. John L. Kihm, a Board-certified orthopedic surgeon, for a second opinion. In a report dated April 12, 2005, Dr. Kihm listed his impression as "pain syndrome with increase in body pain following fall." He stated that there was no evidence that demonstrated the presence of any organic pathology as the cause for his pain and there were no objective orthopedic findings to cause him to restrict his activity. Dr. Kihm was unable to find any evidence that appellant's spinal cord stimulator caused unusual electrical activity because of the computed tomography (CT) scan.

In a March 21, 2005 note, Dr. Yazbak found that appellant was totally disabled due to lumbago and lumbosacral degenerative disc.

On May 16, 2005 Dr. Yazbak indicated that appellant could return to work six hours a day with three hours sitting and three hours standing and a 20-pound weight restriction. On June 3, 2005 he indicated that appellant would proceed with surgery.

By letter dated June 20, 2005, the Office requested a supplemental report from Dr. Kihm. By letter dated July 5, 2006, Dr. Kihm indicated that the January 7, 2005 fall did not aggravate appellant's preexisting back condition. He also indicated that appellant was not totally disabled from January 7 through May 22, 2006.

On September 16, 2005 appellant underwent a spinal cord stimulator revision, reposition of the IPG from the right buttock to the right abdomen.

The Office found a conflict in medical opinion between appellant's treating physicians and Dr. Kihm as to whether appellant's condition had resolved and whether he sustained an

injury as a result of the shock of the CT scan equipment. By letter dated July 11, 2006, the Office referred appellant to Dr. Stephen E. Barron, a Board-certified orthopedic surgeon, for an impartial medical examination. In a medical report dated August 14, 2006, Dr. Barron opined that appellant sustained a lumbar sprain at the time of his work injury on January 7, 2005. He noted that appellant had preexisting chronic pain of the lumbar spine and preexisting multiple surgeries to his lumbar spine as well as a spinal cord implant. Dr. Barron advised that appellant's current condition was not related to the injury of January 7, 2005 but was totally related to his preexisting degenerative condition. He opined that on January 7, 2005 appellant sustained a soft tissue sprain to his lumbar spine which temporarily aggravated his preexisting back condition. Dr. Barron opined that the temporary aggravation ended as of April 7, 2005 and that his condition thereafter was related to his preexisting condition of multiple back surgeries and spinal cord implant with chronic pain in his lumbar spine. He stated that appellant did not sustain any injury as a result of being shocked by the CT scan equipment when he left the spinal cord stimulator on. Dr. Barron opined that appellant needed no further medical treatment related to the January 7, 2005 injury as his accepted condition had resolved.

On January 23, 2007 the Office proposed termination of appellant's compensation benefits as the weight of the medical evidence of record established that he had no continuing disability as a result of the January 7, 2005 injury.

In response, appellant submitted a September 13, 2006 operative report by Dr. Jeffrey L. Ralston, a Board-certified orthopedic surgeon. On that date, he underwent a right sacroiliac arthrodesis. Appellant also submitted treatment notes from Dr. Ralston dated August 17, 2006 to January 18, 2007. In a February 16, 2007 report, Dr. Ralston indicated that any conclusion with regard to the exacerbation of appellant's symptoms due to the January 7, 2005 fall was subjective. He opined that it "would be unusual for a single incident, particularly of relatively low energy, to cause longstanding, unrelenting, severe S1 joint pain that was nonresponsive to nonsurgical treatment." Dr. Ralston noted, "It is more likely that this represents a chronic condition that was exacerbated by this fall."

In a December 30, 2006 report, Dr. Yazbak indicated that appellant was eight days post placement of a second spinal cord stimulator electrode.

Appellant submitted reports from Dr. James E. Marotz, an osteopath, dated February 28 through April 6, 2006. Dr. Marotz treated appellant for right hip pain. He noted that appellant's right hip pain and low back pain was most likely aggravated by a fall on ice. Dr. Marotz noted that appellant was still in pain as of the time of his April 6, 2006 examination.

In an April 2, 2007 report, Dr. Yazbak indicated that appellant's history was consistent with "either an alteration in the patient's pain due to the fall or an alteration in the functioning of his spinal cord stimulator due to the fall." He indicated that the "idea that [appellant's] symptoms should arbitrarily resolve within two to six weeks is ludicrous." Dr. Yazbak further noted that appellant did not fall on January 7, 2005 as a normal individual, but rather as one with a long prior history of chronic pain.

By decision dated June 28, 2007, the Office terminated appellant's compensation benefits effective June 28, 2007.

On July 26, 2007 appellant requested an oral hearing which was held on December 17, 2007. In a July 19, 2007 report, Dr. Yazbak advised that, although some soft tissue injury at the time of the fall could have resolved, the fall clearly caused an alteration in the function of appellant's spinal cord stimulator and an alteration in his control of pain. He contended that the opinion of Dr. Barron was biased.

On July 20, 2007 Dr. Marotz reiterated his opinion that appellant had multiple work injuries which resulted in essentially permanent disabilities and the inability to perform functional or gainful employment of any type due to his current back condition.

In a March 5, 2008 decision, the hearing representative found that appellant had not established that he continued to have residuals from the accepted injury.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹ It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³

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, the Office must establish that an employee no longer has residuals of an employment-related condition which require further medical treatment.⁴

Section 8123(a) provides in pertinent part: If there is a 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.⁵ 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.⁶

¹ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

² *J.M.*, 58 ECAB ____ (Docket No. 06-661, issued April 25, 2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ *T.P.*, 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁴ *T.P.*, *supra* note 3; *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ 5 U.S.C. § 8123(a).

⁶ *See Gloria J. Godfrey*, 52 ECAB 486 (2001).

ANALYSIS -- ISSUE 1

The Office accepted that on January 7, 2005 appellant sustained a contusion of the back when he fell on ice. Appellant's treating physician, Dr. Bondow noted that appellant had a preexisting back condition of the upper and lower back with chronic pain. He advised that the January 7, 2005 fall resulted in persistent thoracolumbar spine and paraspinal pain. Appellant's pain severely limited his ability for any sustained activities as it was not plausible for him to walk for significant periods of time as required by his federal employment. Dr. Yazbak also treated appellant for his injuries and diagnosed lumbago and lumbosacral degenerative disc disease. The Office's second opinion physician, Dr. Kihm, opined that the fall did not aggravate appellant's preexisting back condition. He advised that there was no pathology due to the accepted injury. In order to resolve the conflict in medical opinion, the Office referred appellant to Dr. Barron. In a well-rationalized report, Dr. Barron advised that no further medical treatment was necessary for appellant's accepted employment-related back condition. He found that appellant sustained a soft tissue sprain to his lumbar spine at the time of the January 7, 2005 injury and that any aggravation of appellant's preexisting back condition had resolved. Dr. Barron also found that appellant did not sustain any injury as a result of being shocked by the CT equipment after he left the spinal cord simulator on. He concluded that the temporary aggravation of appellant's preexisting condition ceased as of April 7, 2005 and that his ongoing back condition was related to his preexisting degenerative condition and multiple back surgeries and spinal cord implant. The chronic pain of the lumbar spine not related to the January 7, 2005 injury. The Board finds that Dr. Barron's report is based on an accurate history and examination. It constitutes the special weight of the medical evidence and establishes that appellant's employment-related disability ceased.

In an April 2, 2007 report, Dr. Yazbak disagreed with Dr. Barron's opinion, noting that appellant did not fall on January 7, 2005 as a normal individual but with a long history of chronic pain. He contended that the idea that appellant's symptoms would have resolved in two to six weeks was "ludicrous." However, the Board notes that Dr. Barron did not ignore appellant's prior back condition or symptoms. Rather, Dr. Barron found that the accepted injury resulted in a temporary aggravation of appellant's degenerative disease which resolved. He attributed appellant's ongoing symptoms to his preexisting condition. Dr. Yazbak's contrary conclusion is not sufficiently rationalized to overcome the special weight given to Dr. Barron as the impartial medical examiner.

Dr. Marotz offered a speculative opinion that appellant's right hip pain and low back pain were most likely aggravated by the fall on the ice. Dr. Ralston, appellant's surgeon, noted that any conclusion with regard to the exacerbation of appellant's condition due to the January 7, 2005 fall was subjective, but that it would be unusual for such an incident to cause such longstanding, unrelenting pain.

Dr. Barron noted appellant's prior history and determined that appellant's current condition was due to his preexisting condition, not the accepted work-related incident. None of the physician's reports, submitted after this opinion, are sufficient to contradict the special weight given to his opinion. Dr. Barron, the impartial medical examiner, provided a well-rationalized opinion finding that appellant's accepted work injury had resolved. His report

represents the special weight of the medical evidence. The Board finds that the Office properly terminated wage-loss compensation and medical benefits.⁷

LEGAL PRECEDENT -- ISSUE 2

After a termination or modification of benefits which is clearly justified on the basis of the evidence, the burden or proof to reinstate compensation benefits rests with the claimant. The claimant must establish by the weight of reliable, probative and substantial evidence that a disability related to employment continued to exist after termination of benefits.⁸ To establish the requisite causal relationship, the claimant must submit a physician's report which contains a review of the factors of employment identified as causing the claimant's condition and taking those factors into consideration, along with the results of a clinical examination and the medical history of the claimant, state whether these employment factors caused or aggravated by claimant's condition.⁹ 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.¹⁰

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that he had any continuing disability or medical condition after the termination of benefits on June 28, 2007. On July 19, 2007 Dr. Yazbak advised that the accepted fall caused an alteration of appellant's spinal cord stimulator and argued that Dr. Barron's opinion was biased. Dr. Marotz merely noted that appellant's multiple work injuries resulted in permanent disabilities. These opinions are essentially repetitive of the physicians prior statements and are insufficient to overcome the special weight given the impartial medical examiner. Furthermore, Dr. Yazbak's general assertion that Dr. Barron's opinion was biased is unsupported by any evidence of record. Accordingly, appellant has failed to establish any disability or entitlement to medical benefits after June 28, 2007.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits effective June 28, 2007. The Board further finds that appellant has not met his burden of proof to establish that he had any disability or condition after June 28, 2007 causally related to the accepted employment injury.

⁷ *Manuel Gill*, 52 ECAB 282 (2001).

⁸ *Franklin D. Haislah*, 52 ECAB 457 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

⁹ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹⁰ *Ernest St. Pierre*, 51 ECAB 623 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 5, 2008 and June 28, 2007 are affirmed.

Issued: January 22, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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