

two hours per day on October 16, 2006, which was subsequently increased to four hours per day on February 20, 2007.

On November 9, 2006 the Office referred appellant to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion. In a report dated November 28, 2006, Dr. Draper reported that a magnetic resonance imaging (MRI) scan revealed a L4-5 degenerative bulging disc. A physical examination revealed a normal gait and stand and no pain on palpation and percussion of the midline spine. Range of motion for the lumbar spine is 70 degrees flexion and 30 degrees extension. Dr. Draper diagnosed lumbosacral strain and preexisting lumbar degenerative disc disease with L5-S1 mild central canal stenosis. He opined that appellant's lumbosacral strain had resolved and there had been no aggravation of her preexisting condition. In concluding, Dr. Draper concluded that appellant was capable of working 8 to 10 hours in her modified carrier position. He indicated that appellant was capable of lifting up to 70 pounds.

On December 8, 2006 Dr. Robert Scalia, a treating Board-certified internist, noted his disagreement with Dr. Draper's report and findings. He opined that appellant was restricted to lifting no more than 10 pounds and that her work injury permanently aggravated her preexisting arthritis.

A functional capacity evaluation (FCE) was performed on May 23, 2007 by Katy Heckman. A June 4, 2007 FCE report indicated that appellant was capable of performing sedentary to light-duty work. Ms. Heckman noted that appellant "was cooperative with testing and was consistent with performance." She stated that the testing had been stopped due to appellant's "reports of back pain and muscle tightness. Prior to stopping testing, Ms. Heckman stated that "the major activities were completed to give comments and recommendations as it pertains to her job" at the employing establishment. Under comments, Ms. Heckman noted appellant's performance was consistent and cooperative and that the "[s]ubjective input match objective data."

On February 13, 2008 the Office referred appellant along with a statement of accepted facts, a list of questions and the medical record to Dr. John F. Perry, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion as to whether appellant had any residuals of her employment-related injury.

On March 10, 2008 Dr. Perry diagnosed spinal stenosis, degenerative lumbar disc disease and degenerative arthritis and inconsistent presentation. A physical examination revealed tenderness in the lumbar paravertebral areas with a positive pinch test, a positive right straight leg raised test, and a normal motor examination. Range of motion included 40 degrees lumbar flexion, 15 degrees lumbar tension and 20 degrees bilateral lumbar lateral rotation. Dr. Perry noted that appellant's physical examination revealed a number of inconsistencies. He noted the FCE performed on May 23, 2007 were not valid or reliable because the report stated, "clear inconsistencies noted between subjective input and objective data." Dr. Perry related that appellant's examination "had a number of inconsistencies" such as a 25-degree bilateral straight leg raise test "and yet she was able to sit straight up after the test was done." Another inconsistency according to him was the positive pinch test which he stated was a nonorthopedic finding. Dr. Perry also found no lumbar spine post-traumatic evidence based upon an MRI scan although the scan did show a small L4-5 protrusion and degenerative bulging. Next, he noted

“[t]here may have been some type of sprain/strain, but on today’s evaluation I cannot identify any remnants of that.” The inconsistencies on examination included a positive paravertebral area pinch test and the fact that appellant was able to sit straight up after the straight leg testing. These inconsistencies implicated a nonorthopedic source of appellant’s symptoms according to Dr. Perry, who also noted that “[t]he lumbar spine examination was so inconsistent that [he] could not state that there is a continuing problem based on orthopedic conditions. In concluding, Dr. Perry opined that appellant was capable of performing her duties as a rural carrier with respect to the work injury, but that her underlying arthritic condition would preclude her from performing those duties. Lastly, he stated that “[i]f she had a sprain/strain, there is no evidence of any structural damage based on that injury” and opined that appellant had no continuing residuals or disability due to her accepted employment injury.

On April 22, 2008 the Office proposed to terminate appellant’s compensation benefits. It determined that, based on Dr. Perry’s report, appellant’s injury-related disability had ceased. Appellant was afforded 30 days within which to submit any additional evidence.

In a letter dated April 28, 2008, appellant noted her disagreement with the Office’s notice of proposed termination. She noted that Dr. Perry inaccurately summarized the FCE findings as it had not stated the results of the test were invalid due to inconsistencies and performance. Appellant also contended that the employment injury had permanently aggravated her preexisting condition as she had no work restrictions or problems prior to the injury.

By decision dated May 27, 2008, the Office finalized the termination of appellant’s compensation benefits effective that date. It found that the weight of the evidence rested with the opinion of Dr. Perry, the impartial medical examiner.

LEGAL PRECEDENT

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.² 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.³

Section 8123(a) provides that, 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.⁴ It is well established that, when a

¹ *A.W.*, 59 ECAB __ (Docket No. 08-306, issued July 1, 2008); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

² *I.J.*, 59 ECAB __ (Docket No. 07-2362, issued March 11, 2008); *Bernadine P. Taylor*, 54 ECAB 342 (2003).

³ *T.P.*, 58 ECAB __ (Docket No. 07-60, issued May 10, 2007); *Gewin C. Hawkins*, *supra* note 1.

⁴ 5 U.S.C. § 8123(a). *See F.R.*, 58 ECAB __ (Docket No. 05-15, issued July 10, 2007); *Regina T. Pellecchia*, 53 ECAB 155 (2001).

case is referred to an impartial medical specialist 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.⁵

ANALYSIS

The Office accepted appellant's claim for lumbar strain. The Board finds the Office met its burden of proof to establish that appellant had no remaining disability or residuals related to her accepted injury.

In a report dated November 28, 2006, Dr. Draper, a second opinion Board-certified physician, concluded that appellant's lumbosacral strain had resolved and that she was capable of lifting up to 70 pounds. Dr. Scalia, a treating Board-certified internist, concluded that appellant was only capable of lifting up to 10 pounds and that her work injury had permanently aggravated her preexisting arthritis. The Board finds that the Office properly found a conflict of medical opinion evidence between Drs. Scalia and Draper on the issue of whether appellant continued to have any employment-related disability, and any associate work restrictions and referred her to an impartial medical examiner, Dr. Perry, to resolve the conflict.

On March 10, 2008 Dr. Perry conducted a physical examination and review of appellant's medical history. He utilized the statement of accepted facts provided by the Office. Dr. Perry diagnosed spinal stenosis, degenerative lumbar disc disease and degenerative arthritis and inconsistent presentation. He explained that the minor disc herniation noted on an MRI scan was not significant or connected to her work injury. Dr. Perry also noted that the physical examination revealed no remnants of appellant's accepted strain/sprain. Moreover, he reported that the inconsistencies seen on appellant's physical examine implicated a nonorthopedic source of appellant's symptoms. In concluding, Dr. Perry opined that appellant was capable of performing her duties as a rural carrier with respect to the work injury, but that her underlying arthritic condition would preclude her from performing those duties. He further opined that appellant did not currently have any residuals from her work injuries as there was no evidence of any structural damage due to the employment injury. Dr. Perry also explained that appellant's continuing condition and disability were produced by her degenerative back condition which had not been caused or aggravated by her accepted employment injury. The Office relied on Dr. Perry's opinion in its May 27, 2008 decision, which found that appellant had no residuals or continuing disability stemming from her work-related employment injuries and was therefore not entitled to compensation benefits.

The Board finds that Dr. Perry's impartial medical opinion establishes that appellant's accepted conditions resolved without continuing disability or residuals from her accepted employment injuries. His opinion is based on a thorough medical examination, a review of the medical evidence of record in appellant's case and a thorough discussion of medical tests performed. Dr. Perry's opinion is sufficiently probative, rationalized and based upon a proper

⁵ See *J.M.*, 58 ECAB ____ (Docket No. 06-661, issued April 25, 2007); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

factual background. Therefore, the Office properly accorded his opinion special weight,⁶ and his report establishes that residuals of appellant's accepted lumbar strain had resolved.

Appellant contended that she sustained a permanent back injury as she had no work restrictions prior to her injury, but did following the injury. Thus, she argues that her employment injury permanently aggravated her preexisting degenerative back condition. The Board notes that the Office has not accepted any aggravation of her degenerative disc disease, temporary or permanent. Furthermore, the Board has held that the mere fact that a condition manifests itself during a period of employment does not raise an inference that there is a causal relationship between the two.⁷ Neither the fact that the condition became apparent during a period of employment nor the belief that the condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.⁸ Causal relationship must be substantiated by reasoned medical opinion evidence, which is appellant's responsibility to submit.⁹

Accordingly, the Board finds that the Office properly terminated appellant's compensation benefits effective May 27, 2008, as the weight of the medical evidence established that her work-related condition had resolved.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits effective May 27, 2008 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injury.

⁶ *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁷ *D.I.*, 59 ECAB ____ (Docket No. 07-1534, issued November 6, 2007).

⁸ *K.W.*, 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007).

⁹ *E.A.*, 58 ECAB ____ (Docket No. 07-1145, issued September 7, 2007) (to establish entitlement to workers compensation benefits, a claimant must submit an affirmative opinion on causal relationship from a physician who supports the opinion with sound medical reasoning).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 27, 2008 is affirmed.

Issued: June 18, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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