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

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| **R.S., Appellant** | ) | |
| **and** | ) | **Docket No. 09-398** |
| | ) | **Issued: October 1, 2009** |
| **U.S. POSTAL SERVICE, POST OFFICE, Lake Oswego, OR, Employer** | ) | |

*Appearances:*
*Howard L. Graham, 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 November 24, 2008 appellant filed a timely appeal from January 2 and August 5, 2008 decisions of the Office of Workers' Compensation Programs terminating her compensation, denying compensation for continuing disability and partially denying her request for a subpoena of documents. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

### ***ISSUES***

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective January 2, 2008 on the grounds that her work-related injury had ceased without residuals; (2) whether she established that she had a continuing disability on and after January 2, 2008 related to the accepted aggravation of lumbar spondylolisthesis; and (3) whether the Office properly denied appellant's request to subpoena documents.

On appeal, appellant, through her attorney, asserts that the Office's termination was not supported by the evidence, contained legal errors, relied on an incorrect standard for causal relationship, failed to correctly adjudicate employment factors, "selectively chose evidence and

ignored evidence favorable to appellant." The attorney also contended that the report of Dr. Hal L. Rappaport, a Board-certified neurologist and impartial medical examiner, was insufficiently rationalized and did not represent the weight of medical opinion.

## ***FACTUAL HISTORY***

The Office accepted that on or before May 11, 2002 appellant, then a 42-year-old letter carrier, sustained an aggravation of a preexisting L5-S1 spondylolisthesis due to repeated twisting and lifting in the performance of duty. She stopped work on May 16, 2002 and returned briefly to light duty. Appellant stopped again in November 2002 and did not return. She received compensation for temporary total disability on the periodic rolls commencing June 2004.

In a May 16, 2002 report, Dr. Jeffrey Scott Pierson, an attending Board-certified internist, reviewed May 2002 imaging studies showing an L5-S1 spondylolysis and spondylolisthesis, L5 pars defect, spina bifida occulta at L5 and lumbar degenerative disc disease.[1] He opined that appellant's condition was due predominantly to preexisting spondylosis, symptomatically exacerbated by work factors.

In a July 5, 2002 report, Dr. Curtis Thiessen, an attending physician Board-certified in occupational medicine, opined that repetitive lifting and twisting at work caused a potentially temporary aggravation of appellant's spondylolisthesis and degenerative disc disease. He submitted reports, through March 2006, finding that appellant's condition was unchanged.[2]

From June to August 2005, the employing establishment obtained surveillance videos showing appellant landscaping, camping and selling fireworks.[3] It noted that the investigation had been compromised.

In a December 23, 2005 letter, the Office referred appellant for updated second opinion examinations to Dr. Stephen Thomas, Jr., a Board-certified orthopedic surgeon, and Dr. M. Sean Green, a Board-certified neurologist. In a January 20, 2006 report, both physicians noted that she was morbidly obese. Dr. Green and Dr. Thomas diagnosed degenerative spondylolisthesis L5 on S1 with spondylosis and resolved L5 radiculopathy. They attributed appellant's current condition to underlying degenerative disc disease. In a July 14, 2006 supplemental report, Dr. Green stated that appellant sustained a temporary aggravation of congenital degenerative

[1] May 1, 2002 x-rays showed an L5-S1 spondylosis, a pars interarticularis defect at L5, spina bifida occulta at L5 and degenerative disc disease at L4-5 and L5-S1. A May 10, 2002 magnetic resonance imaging (MRI) scan showed degenerative lumbar disc disease, Grade 1 spondylolisthesis and bilateral stenosis at L5-S1, foraminal stenosis at L4-5 and a mild disc bulge at L4-5.

[2] On February 5, 2003 the Office obtained a second opinion report from Dr. Patrick F. Golden, a neurosurgeon, who opined that the spondylolisthesis had progressed to Grade 2 and that work duties increased the progression of the pars defect. On May 15, 2004 it obtained second opinion examinations from Dr. John Coletti, Jr., a Board-certified orthopedic surgeon, and Dr. Jau Shin Lou, a Board-certified neurologist. Both physicians found that the accepted aggravation continued to disable appellant for work.

[3] The employing establishment obtained additional surveillance video in August 2003, showing appellant driving and shopping.

spondylolisthesis. The aggravation should have resolved within 12 weeks without worsening of the underlying conditions.

In an August 14, 2006 letter, Dr. Thiessen disagreed with the second opinion reports. He advised that appellant's work activities permanently aggravated the L5-S1 spondylolisthesis. In reports through October 2006, Dr. Thiessen found appellant able to perform modified work for four hours a day.

On October 23, 2006 Dr. Ezra Rabie, an attending physician Board-certified in occupational medicine, obtained x-rays showing no change in the L5-S1 spondylolisthesis since May 1, 2002. On December 27, 2006 he found appellant able to work four hours a day with restrictions.

On May 10, 2007 the Office found a conflict of medical opinion between Dr. Thiessen, for appellant, and Drs. Thomas and Green, for the government, as to whether she sustained a temporary or permanent aggravation and whether she remained disabled for work due to the accepted condition. To resolve the conflict, it referred her for an impairment medical evaluation.[4]

In a June 18, 2007 report, Dr. Rabie noted that appellant did not want to return to work. He released appellant to light-duty work for four hours a day. In reports through November 2007, Dr. Rabie diagnosed left lumbar radiculopathy and degenerative disc disease at L4-5.

On October 22, 2007 the Office referred appellant, a statement of accepted facts and the medical record to Dr. Rappaport, a Board-certified neurologist, for an impartial medical examination.[5]

In a November 2, 2007 letter, appellant's attorney contended that the reports of Drs. Green and Thomas did not create a conflict as they were based on evidence more than 18 months old. He asserted that the Office physician shopped and failed to utilize the Physician's Directory System (PDS). Counsel also noted that Dr. Rappaport did not practice in appellant's commuting area. The Office responded by November 7, 2007 letter, advising counsel that a conflict was found as to any aggravation of appellant's degenerative condition. It noted that Dr. Rappaport was the physician next on the rotational list of physicians for selection of the impartial medical specialist. The Office noted that it paid for an overnight hotel stay and expenses related to appellant's attendance at the impartial examination.

In a November 9, 2007 report, Dr. Rappaport extensively reviewed the medical record, statement of accepted facts and diagnostic studies. He noted findings on examination and advised that appellant weighed 212 pounds. Appellant was able to sit comfortably in the waiting

[4] The Board notes that appellant was initially referred to Dr. Frederick Tilley, a Board-certified orthopedic surgeon. After examining her on June 19, 2007 Dr. Tilley did not submit a report to the Office despite several requests.

[5] In a November 7, 2007 memorandum, the Office stated that it scheduled appellant for an independent medical examination with Dr. Rappaport, as Dr. Tilley did not submit his report.

room for 40 and 60-minute periods and was observed walking briskly in the parking lot. However, she feigned stiffness and gait abnormalities in the office. On examination, Dr. Rappaport noted several Waddell's nonorganic signs and no objective strength or motor deficits of the lower extremities. He diagnosed bilateral L5 pars defects, Grade 1 L5-S1 spondylolisthesis, degenerative disc disease at L5-S1 with bilateral foraminal stenosis and a resolved occupational lumbar strain. Dr. Rappaport opined that appellant had significant disease that preexisted the injury and was aggravated by her work at the employing establishment. However, appellant's current condition was due to the natural progression of preexisting degenerative disc disease and L5-S1 spondylolisthesis. The accepted aggravation had ceased without residual. Dr. Rappaport noted that diagnostic studies had not changed significantly over the prior five years. He released appellant to eight hours a day restricted duty. Dr. Rappaport noted that her work limitations were due to her preexisting spinal condition.

By notice dated November 21, 2007, the Office advised appellant that it proposed to terminate her compensation benefits as the weight of the medical evidence established that the accepted condition had ceased without residuals.

In a December 18, 2007 letter, appellant's attorney objected to the proposed termination. He contended that the Office asked Dr. Rappaport improper leading questions and did not properly utilize the PDS in his selection. The attorney requested a copy of the surveillance video.

By decision dated January 2, 2008, the Office terminated appellant's compensation effective that day, finding that the accepted back condition had ceased without residuals.

In January 15, 2008 letters, appellant, through her attorney, requested an oral hearing. Counsel requested that the Office hearing representative subpoena the Seattle District Director to provide the 2007 referral log for Dr. Rappaport, the PDS entries for appellant's selection in her case and the surveillance videos.

On March 6, 2008 the Office provided PDS logs to appellant's attorney. The logs show that the Office disqualified nine specialists on May 22, 2007 and 10 specialists on October 15, 2007 as their offices were out of appellant's commuting area based on her residential zip code or they refused to perform impartial medical examinations. On March 12, 2008 the Office provided appellant's attorney a copy of the surveillance video.

A hearing was held on May 23, 2008. Appellant reiterated arguments regarding leading questions, Dr. Rappaport's selection and the absence of a conflict.

A November 16, 2006 lumbar MRI scan showed mild to moderate foraminal narrowing at L4-5, moderately severe degenerative disc disease at L5-S1 resulting in a minimal Grade 1 spondylolisthesis and moderate bilateral neural foraminal narrowing, stable to minimally increased since May 2002. In a November 21, 2007 report, Dr. Rabie stated that appellant had no strength, sensation or reflex deficits on examination. January 4, 2008 electrodiagnostic testing of the lower extremities was normal. In January 10 and May 14, 2008 reports, Dr. Rabie found appellant's condition unchanged and that she could perform light-duty work for four hours a day.

By decision dated and finalized August 5, 2008, the Office hearing representative affirmed the January 2, 2008 decision terminating appellant's compensation. She found that Dr. Rappaport's opinion was entitled to the special weight of the medical evidence, as it was well reasoned and based on the complete and accurate medical record. Appellant's counsel did not establish a valid objection to Dr. Rappaport's selection or that the Office did not properly utilize the PDS. The Office hearing representative affirmed the denial of subpoenas granting access to the records of other claimants as this would violate their privacy. She advised appellant's counsel that he could request the information under the Freedom of Information Act.

## ***LEGAL PRECEDENT -- ISSUE 1***

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[6] 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.[7]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[8] 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.[9]

## ***ANALYSIS -- ISSUE 1***

The Office accepted that appellant sustained an aggravation of a preexisting L5-S1 spondylolisthesis due to her work as a letter carrier. Appellant stopped work in November 2002 and was placed on the periodic rolls. Dr. Thiessen, an attending physician Board-certified in occupational medicine, submitted reports from July 2002 to March 2006 finding that she remained totally disabled for work due to the accepted aggravation of her lumbar condition. On January 20, 2006 the Office obtained a second opinion report from Dr. Thomas, a Board-certified orthopedic surgeon, and Dr. Green, a Board-certified neurologist. Both physicians opined that the accepted aggravation had ceased without residuals. Appellant then submitted reports from Dr. Rabie, an attending physician Board-certified in occupational medicine, who found her condition unchanged from May 2002. However, Dr. Rabie released her to part-time light-duty work in October 2006.

The Office found a conflict of medical opinion between Dr. Thiessen, for appellant, and Drs. Green and Thomas, for the government. Section 8123 of the Federal Employees' Compensation Act 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

[6] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[7] *Id*.

[8] *Roger G. Payne*, 55 ECAB 535 (2004).

[9] *Pamela K. Guesford*, 53 ECAB 726 (2002).

a third physician who shall make an examination.[10] The Office initially referred appellant to Dr. Tilley, who examined her but did not submit any report despite reposted requests. It properly referred appellant to Dr. Rappaport, a Board-certified neurologist, for an impartial medical evaluation.[11] In a November 9, 2007 report, Dr. Rappaport noted obesity, inconsistent behaviors and nonorganic findings on examination. He opined that the accepted lumbar strain had resolved without residuals and released appellant to full-time light-duty work. The Office terminated appellant's compensation benefits effective January 2, 2008 based on Dr. Rappaport's opinion as the weight of the medical evidence.

On appeal, appellant's counsel asserts that the termination of appellant's compensation is not supported by the evidence, was based on an incorrect standard of causation and that Dr. Rappaport's report was insufficiently rationalized to carry the weight of medical opinion. The Board, however, disagrees. The impartial specialist provided a 21-page narrative, which extensively reviewed the history of injury appellant's medical treatment and diagnostic studies. He set forth findings on examination of her lumbar spine. Dr. Rappaport explained in detail that appellant had preexisting degenerative disease of the lumbar spine, which was aggravated by heavy work in her federal employment. However, the aggravation of her back condition had resolved and Dr. Rappaport found it was not permanently aggravated by work factors. Rather, appellant's ongoing lumbar condition was due to the natural progression of preexisting disease and not the accepted aggravation. Dr. Rappaport noted inconsistent behaviors and a lack of objective findings. He based his opinion on the complete medical record and a statement of accepted facts which set forth the correct legal standard of causation. Where an impartial medical specialist resolves a conflict between opposing medical reports of virtually equal weight, 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 that Dr. Rappaport's opinion is sufficiently rationalized to represent the special weight of the medical evidence as an impartial specialist.

The Board notes that Dr. Rabie's subsequent reports were insufficiently rationalized to create a new conflict with Dr. Rappaport. Dr. Rabie did not explain how and why the accepted aggravation of the L5-S1 spondylolisthesis would continue to partially disable appellant for work. This lack of rationale greatly reduces the probative value of his opinion.[13] The Office correctly accorded Dr. Rappaport's opinion the weight of the medical evidence.

Counsel also asserted that the Office's termination contained unspecified legal errors, failed to correctly adjudicate employment factors and ignored evidence favorable to appellant. The evidence of record does not support his assertions that the Office improperly selected

[10] *Raymond W. Behrens*, 50 ECAB 221 (1999).

[11] Where an impartial medical examiner is unwilling or unable to respond to the Office's request for information, the Office shall appoint another qualified specialist to serve as impartial medical examiner in the case. Federal (FECA) Procedure Manual, Part 3 -- Medical Examinations, *Exclusion of Medical Evidence*, Chapter 3.500.6.b (March 2005).

[12] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[13] *Deborah L. Beatty*, 54 ECAB 340 (2003).

Dr. Rappaport as the impartial medical specialist or asked improper leading question of the physician. The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective January 2, 2008 based on Dr. Rappaport's opinion.

## ***LEGAL PRECEDENT -- ISSUE 2***

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. The claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.[14] For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.[15]

## ***ANALYSIS -- ISSUE 2***

Following the Office's January 2, 2008 decision terminating appellant's compensation benefits, she submitted additional test results and November 21, 2007 and January 10 and May 14, 2008 reports from Dr. Rabie. Appellant contended that these reports established continuing residuals of the accepted condition on and after January 2, 2008.

Dr. Rabie's November 21, 2007 report did not address the period on and after January 2, 2008. Therefore, it is not relevant to the period at issue. In January 10 and May 14, 2008 reports, Dr. Rabie opined that appellant's condition was unchanged and she was able to perform light-duty work for four hours a day. He did not explain, however, how and why the accepted aggravation of the L5-S1 spondylolisthesis would continue to affect appellant's condition on and after January 2, 2008. Similarly, the November 16, 2006 MRI scan report and January 4, 2008 electrodiagnostic report do not contain medical rationale addressing causal relationship. In the absence of such rationale, Dr. Rabie's opinion and the test reports are insufficient to meet appellant's burden of proof.[16] Thus, the Board finds that appellant submitted insufficient rationalized medical evidence to establish a causal relationship between her condition on and after January 2, 2008 and the accepted cervical and lumbar strains.

Following the January 2, 2008 decision, appellant's attorney requested an oral hearing. He argued that the Office did not properly select Dr. Rappaport from the PDS.[17] To ensure the complete independence of the physicians, the Office selects an impartial medical specialists, the Office developed specific procedures to safeguard against any possible appearance that the selected physician's opinion is biased or prejudiced. Impartial medical specialists are selected from among Board-certified specialists in the appropriate geographical area on a strict rotating

[14] *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

[15] *Alice J. Tysinger*, 51 ECAB 638 (2000).

[16] *Deborah L. Beatty*, *supra* note 13.

[17] Appellant's counsel made similar arguments prior to the January 2, 2008 decision terminating appellant's compensation. However, the relevant evidence was not imaged into the case record until after issuance of the January 2, 2008 decision.

basis to negate any appearance that preferential treatment exists between a particular physician and the Office.[18] The Federal (FECA) Procedure Manual provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the PDS should be used for this purpose wherever possible.[19] The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.[20] The PDS database of physicians is obtained from the American Board of Medical Specialties Directory of Board-certified Medical Specialists (ABMS), which contains the names of physicians who are Board-certified in certain specialties.

In this case, the Office provided PDS logs regarding Dr. Rappaport's selection as impartial medical specialist. These logs show that, on May 22, 2007, the Office disqualified 9 specialists on the PDS roster and on October 15, 2007 disqualified another 10 specialists. There is no evidence that the Office did not select Dr. Rappaport from the PDS or that it failed to comply with its rotational procedures. Counsel has not provided any probative evidence to demonstrate bias on the part of Dr. Rappaport. The Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.[21] Accordingly, appellant has not presented any evidence establishing that Dr. Rappaport was improperly selected as the impartial medical examiner or that he was biased. Therefore, the evidence does not establish an error in the selection of Dr. Rappaport as an impartial medical examiner.

## ***LEGAL PRECEDENT -- ISSUE 3***

Section 8126 of the Federal Employees' Compensation Act provides that the Secretary of Labor, on any matter within his jurisdiction, may issue subpoenas for and compel attendance of witnesses within a radius of 100 miles.[22] This provision gives the Office discretion to grant or reject requests for subpoenas. The Office regulations states that subpoenas for witnesses will be issued only where oral testimony is the best way to ascertain the facts.[23]

In requesting a subpoena, a claimant must explain why the testimony is relevant to the issues in the case and why a subpoena "is the best method or opportunity to obtain such evidence because there is no other means by which, the testimony could have been obtained."[24] The

[18] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003). *See also Willie M. Miller*, 53 ECAB 697 (2002).

[19] Federal (FECA) Procedure Manual, *supra* note 18 Chapter 3.500.4b (May 2003). *See also Willie M. Miller*, *supra* note 18.

[20] Federal (FECA) Procedure Manual, *supra* note 18 Chapter 3.500.7 (May 2003).

[21] *L.W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008).

[22] 5 U.S.C. § 8126.

[23] 20 C.F.R. § 10.619.

[24] *Id*.

Office hearing representative retains discretion on whether to issue a subpoena. The function of the Board on appeal is to determine whether there has been an abuse of discretion. Abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment or actions taken which are clearly contrary to logic and probable deductions from established facts.[25]

## ***ANALYSIS -- ISSUE 3***

By letter dated January 15, 2008, appellant requested that the Office hearing representative issue a subpoena to compel the Seattle District Director to provide employing establishment surveillance videos, the PDS logs relating to Dr. Rappaport's selection, a list of all referrals made to Dr. Rappaport in 2007. On March 6, 2008 the Office provided counsel the PDS logs and on March 12, 2008 sent him the surveillance videos as requested. At the May 23, 2008 hearing and in the August 5, 2008 decision, the Office hearing representative denied the request for a copy of all Office referrals to Dr. Rappaport in 2007. The hearing representative explained that granting counsel access to the names of other claimants would violate their privacy. Also, counsel could obtain this information through making a request under the Freedom of Information Act.

The Board finds that the Office hearing representative properly found that granting the subpoena request would be an unreasonable violation of privacy of any other claimants involved. Likewise, the Office hearing representative properly found that appellant did not demonstrate why such records could not be obtained by other means, such as a request under the Freedom of Information Act. Also, appellant did not explain why these documents would prove Dr. Rappaport's opinion was suspect. The Board finds that the Office hearing representative acted within his discretion in not issuing a subpoena to the Office as requested by appellant.

## ***CONCLUSION***

The Board finds that the Office properly terminated appellant's wage-loss and medical benefits. The Board further finds that she failed to establish a continuing work-related disability on and after January 2, 2008. The Board further finds that the Office properly denied appellant's request for a subpoena of documents.

[25] *Martha A. McConnell*, 50 ECAB 128 (1998).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated August 5 and January 2, 2008 are affirmed.

Issued: October 1, 2009
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