

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

T.W., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
EAST ORANGE MEDICAL CENTER,
East Orange, NJ, Employer**

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**Docket No. 09-649
Issued: October 26, 2009**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 6, 2009 appellant, through her representative, filed a timely appeal from the May 27 and December 16, 2008 merit decisions of the Office of Workers' Compensation Programs terminating benefits. Pursuant 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's medical and wage-loss benefits effective May 27, 2008; and (2) whether appellant established any continuing employment-related residuals or disability after May 27, 2008.

FACTUAL HISTORY

On April 26, 2006 appellant, then a 31-year-old program support clerk, filed a traumatic injury claim alleging that on April 20, 2006 she slipped and fell on the floor resulting in an injury to her back, neck, wrist and head. She was off work from April 21 through May 8, 2006. On

October 20, 2006 the Office accepted the claim for lumbar spine radiculopathy. On July 3, 2007 appellant filed a claim for a June 14, 2007 recurrence alleging that she sought pain management treatment from her physician and that due to her lumbar spine radiculopathy she had chronic pain in her neck. She stopped work on June 19, 2007. By decision dated July 3, 2007, the Office accepted the recurrence claim.

Appellant filed several claims for wage-loss compensation (Form CA-7) for the period June 19 through October 22, 2007. On October 2, 2007 the Office placed her on the periodic rolls.

In a June 18, 2007 medical report, Dr. Isaiah Florence, a Board-certified anesthesiologist, stated that appellant's condition, including chronic pain in her legs and back, prevented her from sitting or standing for long periods of time. Appellant was unable to work at that time and was considering surgery in the near future. In a June 28, 2007 medical report, Dr. Florence stated that she had been under his care since May 2006 for pain management related to her lumbar spine radiculopathy, which prevented her from sitting, standing, walking for long periods of time, bending or stooping. He recommended that appellant be relieved of duty until July 31, 2007. On July 25, 2007 Dr. Florence amended his recommendation and stated that she should be relieved of duty until August 31, 2007.

On November 7, 2007 the Office referred appellant, together with her medical record and a statement of accepted facts, to Dr. Melvin P. Vigman, a Board-certified neurologist and psychiatrist, for a second opinion evaluation. In a November 9, 2007 medical report, Dr. Vigman reviewed her medical history and performed a physical examination, which revealed left knee joint pain and discomfort bending the back to 80 degrees. He opined that the only area causing appellant pain was her left knee joint and that she was a nervous individual who seemed to magnify physical ailments. Dr. Vigman stated that nothing in her case history would justify lumbar surgery and that, based on his reading of the records, she never had any lower back disease. He opined that appellant was capable of returning to her regular work without any work restrictions.

The Office determined that a conflict of medical opinion arose between Drs. Vigman and Florence regarding the extent of residuals from the April 20, 2006 employment injury. It referred appellant, together with her record and an updated statement of accepted facts, to Dr. Dev R. Gupta, a Board-certified neurologist, for an impartial evaluation.

In a March 3, 2008 medical report, Dr. Gupta reviewed appellant's medical history. He reported her complaints of diffuse pain in her lower back and left lower extremity with no particular characteristics of radicular pain symptomatology. Dr. Gupta noted that appellant was anxious and emotional and cried several times during the examination and complained that she had severe pain and was unable to function. Physical examination did not reveal any objective weakness in the muscles of the lower extremities. Sensory examination revealed diminished sensation in the entire left lower extremity; however, Dr. Gupta opined that the sensory loss was nonorganic and functional and did not correspond to any particular peripheral nerve root or distribution. He also reviewed a magnetic resonance imaging (MRI) scan of the lumbosacral spine showing mild central disc bulge at L5-S1. Dr. Gupta opined that the MRI scan finding was common in otherwise totally asymptomatic individuals and that it was a very common finding in

the normal population at large. He stated that appellant had a totally normal nonfocal neurologic examination and that he did not find any evidence of disc disease or lumbosacral radiculopathy. Dr. Gupta opined that her symptoms were purely subjective and that there was no objective evidence to account for the symptoms. Appellant did not have any neurologic reasons for the continued symptomatology and that she could return to full-time work.

By letter dated March 18, 2008, the Office requested that Dr. Gupta clarify his medical report and indicate whether he reviewed the October 16, 2007 statement of accepted facts prior to preparing his report. It also requested that he complete a work evaluation form identifying appellant's current work restrictions.

In an April 17, 2008 addendum, Dr. Gupta advised that he read the statement of accepted facts prior to preparing his report. He stated that appellant could return to full-time work without any restrictions.

On April 24, 2008 the Office proposed to terminate appellant's compensation benefits. It found that, based on Dr. Gupta's report, appellant's lumbar spine radiculopathy had ceased and that she no longer had any disability or residuals due to her accepted work-related condition. Appellant was afforded 30 days to submit additional medical evidence.

In a May 20, 2008 telephone memorandum, the employing establishment reported that appellant attempted to return to work on May 13 and 14, 2008 but that she went to the employee health center. Appellant did not return.

In a medical report dated May 20, 2008, Dr. Florence stated that appellant's lower back pain was persistent and that she reported a pain level of 10. He recommended that she be relieved of duty until July 21, 2008 so that she could undergo surgery.

In a May 6, 2008 medical note, Dr. Robert Heary, a Board-certified neurosurgeon, stated that after a pain consultation appellant should consider a lumbar discogram.

On May 20, 2008 Dr. Sanjiv Parikh, a Board-certified anesthesiologist, stated that appellant was under his care for pain management and that she was diagnosed with facet arthropathy of the lumbar spine and disc desiccation of the L5-S1 disc. He noted that appellant was scheduled to undergo a lumbar discogram on May 21, 2008.

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 medical evidence established that she was not disabled due to her employment injury or had residuals requiring further medical treatment.

On June 27, 2008 appellant filed a request for an oral hearing before an Office hearing representative. By letter dated September 25, 2008, appellant's representative requested a telephonic hearing in lieu of an oral hearing, which took place on October 24, 2008.

Appellant submitted chart notes dated April 20, 2006 through September 5, 2008, an August 9, 2008 laboratory testing report, an August 11, 2008 operative report and diagnostic test reports dated January 5, 2007 through August 26, 2008. An August 25, 2008 medical report

signed by a certified nurse practitioner stated that appellant was unable to work in any capacity until at least January 2, 2009.

In a medical report dated June 17, 2008, Dr. Florence reported appellant's complaints of back and left leg pain and that she sometimes stayed in bed all day to treat the pain. He diagnosed lumbar radiculopathy secondary to disc bulge, facet arthropathy, cervical radiculopathy, muscle spasm and neuropathic pain.

In a June 10, 2008 medical report, Dr. Heary stated that appellant experienced lower extremity and low back pain since she fell at work on April 20, 2006. He noted that appellant was ambulatory with a straight cane secondary to weakness. Dr. Heary performed a physical examination and diagnosed lumbar degenerative disc disease at L5-S1. He recommended surgical and weight loss treatment.

By decision dated December 16, 2008, the Office hearing representative affirmed the May 27, 2008 termination of benefits, finding that Dr. Gupta's medical report represented the weight of the medical evidence and that appellant did not submit rationalized medical evidence sufficient to overcome the special weight accorded the Dr. Gupta's opinion of the impartial medical specialist.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.¹ After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had 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.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.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 A.W., 59 ECAB ____ (Docket No. 08-306, issued July 1, 2008).

² J.M., 58 ECAB ____ (Docket No. 06-661, issued April 25, 2007).

³ See *Del K. Rykert*, 40 ECAB 284 (1988).

⁴ T.P., 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007).

⁵ I.J., 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁶ *Gloria J. Godfrey*, 51 ECAB 486 (2001).

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbar spine radiculopathy as a result of her work-related fall on April 20, 2006. Appellant sustained a recurrence of her employment-related injury on June 14, 2007 and stopped working on June 19, 2007. The Office placed her on the periodic rolls on October 2, 2007. The issue is whether it properly terminated appellant's wage-loss and medical benefits effective May 27, 2008.

Appellant's treating physician, Dr. Florence, opined that appellant could not work due to chronic pain in her legs and back related to the spinal radiculopathy. The Office referred her to a second opinion physician, Dr. Vigman, who concluded that she no longer had a lower back disease and was capable of returning to her regular work without restrictions. It properly found that a conflict of medical opinion arose between Drs. Florence and Vigman regarding whether appellant had any residuals or disability from her employment-related injury. The Office referred appellant, together with her medical record and a statement of accepted facts, to Dr. Gupta, a Board-certified neurologist, for an impartial medical examination to resolve the conflict.⁷

In a March 3, 2008 medical report, Dr. Gupta reported appellant's complaints of lower back and left extremity pain but noted that her complaints were not characteristic of radicular pain. He performed a physical examination during which he did not find any evidence of disc disease or lumbosacral radiculopathy. Dr. Gupta did note diminished sensation in the lower left extremity, however, he stated that the loss was nonorganic and functional and did not correspond to a peripheral root or nerve distribution. He also reviewed an MRI scan showing a mild central disc bulge at L5-S1, which he opined was a common finding in the population and not abnormal. Dr. Gupta stated that appellant did not have any neurological reasons for the continued pain and that she could return to full-time work. At the Office's request, in an April 17, 2008 addendum, he clarified that he had reviewed the statement of accepted facts prior to preparing his report and that appellant could return to work full time without any restrictions.

Appellant subsequently submitted a May 20, 2008 medical report from Dr. Florence, who reiterated that she experienced persistent pain and should be off duty until July 21, 2008. A May 6, 2008 note from Dr. Heary recommended a lumbar discogram, and a May 20, 2008 medical report from Dr. Parikh, stated that appellant was diagnosed with facet arthropathy of the lumbar spine and disc desiccation of the L5-S1 and was undergoing lumbar discogram on May 21, 2008.

The Board finds the Office properly terminated appellant's benefits effective May 27, 2008. Where there exists a conflict in medical opinion and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background is entitled to special weight.⁸ Dr. Gupta's medical report was well rationalized and based on a proper

⁷ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the medical conflict. *Richard R. LeMay*, 56 ECAB 341 (2005).

⁸ *Willie M. Miller*, 53 ECAB 697 (2002).

factual background and medical history. His opinion, that appellant no longer had any residuals from her lumbar radiculopathy and could return to work, is entitled to the special weight afforded an impartial medical examiner.

Appellant did not submit sufficient medical evidence to overcome the special weight accorded to Dr. Gupta's opinion. Dr. Heary merely recommended a lumbar discogram. He did not provide a rationalized medical opinion explaining how appellant was still disabled or experiencing residuals from her employment-related injury. Thus, this report is of diminished probative value.⁹ Dr. Parikh only mentioned appellant's lumbar spine diagnoses and that she was to undergo a lumbar discogram on May 21, 2008. He did not address whether she was continuing to experience any residuals or disability from her employment injury. Dr. Parikh did not explain the reasons for the upcoming lumbar discogram or discuss whether the surgery was related to the April 20, 2006 injury. Thus, this report is similarly of diminished probative value.¹⁰ Finally, in the May 20, 2008 medical report, Dr. Florence stated that appellant had continuing lower back pain and that she should be off work until July 21, 2008. He did not provide any rationale as to how her employment injury contributed to her lower back pain or continuing disability. Moreover, Dr. Florence essentially reiterated his prior opinion regarding appellant's disability. As he was on one side of the conflict resolved by the impartial medical specialist, his report is insufficient to create a new conflict.¹¹

The Board finds that Dr. Gupta's medical opinion, that appellant was no longer experiencing any residuals of her employment-related lumbar radiculopathy, represents the weight of the medical opinion. Appellant did not submit any probative medical evidence sufficient to overcome the weight of Dr. Gupta's opinion. Therefore, the Board finds that the Office properly terminated appellant's medical and wage-loss benefits effective May 27, 2008.

LEGAL PRECEDENT -- ISSUE 2

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had any disability causally related to her accepted injury.¹² 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.¹³ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹⁴ Rationalized medical evidence

⁹ See *Jimmie H. Duckett*, 52 ECAB 332 (2001).

¹⁰ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹¹ The Board has held that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict. *E.H.*, 60 ECAB ____ (Docket No. 08-182, issued July 8, 2009).

¹² See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

¹³ *Kathryn E. Demarsh*, *supra* note 5.

¹⁴ *G.T.*, 59 ECAB ____ (Docket No. 07-1345, issued April 11, 2008); *Elizabeth Stanislav*, 49 ECAB 540 (1998).

is medical evidence which includes a physician's rationalized medical 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.¹⁵

ANALYSIS -- ISSUE 2

The issue is whether appellant established any continuing disability or residuals related to her employment injury after May 27, 2008. Subsequent to the Office's termination of compensation benefits, she submitted a June 17, 2008 medical report from Dr. Florence, who reported appellant's complaints of back and left leg pain. Dr. Florence was on one side of the conflict that Dr. Gupta resolved. Thus, his additional report is insufficient to overcome the special weight accorded Dr. Gupta's opinion or to create a new conflict.¹⁶

Further, appellant submitted a June 10, 2008 medical report from Dr. Heary, who stated that appellant experienced lower extremity and low back pain since her April 20, 2006 work-related fall. Dr. Heary diagnosed lumbar degenerative disc disease at L5-S1 based on a physical examination and recommended surgical and weight-loss treatment. He did not provide a rationalized medical opinion explaining how appellant's April 20, 2006 injury was related to the low back and lower extremity pain or any ongoing disability. Further, Dr. Heary only addressed a degenerative disc disease at L5-S1. The only accepted condition in this case is lumbar radiculopathy. As Dr. Heary did not provide an opinion explaining how the degenerative disc disease was related to the accepted lumbar radiculopathy or otherwise resulted from the April 20, 2006 employment injury, his report is of diminished probative value.¹⁷

Finally, appellant submitted an August 25, 2008 medical report from a certified nurse practitioner, who stated that appellant was unable to work in any capacity until January 2, 2009. A nurse practitioner is not included in the definition of a physician under the Federal Employees' Compensation Act. Thus, this medical note is also of diminished probative value.¹⁸

The remaining chart notes, laboratory testing report, operative report and diagnostic test reports do not address appellant's continuing disability or provide a rationalized medical opinion that she continued to experience residuals of her employment-related injury. Thus, these reports are further insufficient to overcome the weight of Dr. Gupta's report.¹⁹

¹⁵ K.W., 59 ECAB ____ (Docket No. 07-1669, issued December 13, 2007); *Solomon Polen*, 51 ECAB 341 (2000).

¹⁶ See *E.H.*, *supra* note 11.

¹⁷ See *K.E.*, 60 ECAB ____ (Docket No. 08-1461, issued December 17, 2008).

¹⁸ Under section 8101(2), the definition of physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2).

¹⁹ See *I.J.*, *supra* note 5.

CONCLUSION

The Board finds that the Office properly terminated appellant's medical and wage-loss benefits effective May 27, 2008. The Board also finds that she did not establish any continuing employment-related residuals or disability after May 27, 2008.

ORDER

IT IS HEREBY ORDERED THAT the December 16 and May 27, 2008 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 26, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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