

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

G.T., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
New Port Richey, FL, Employer)

**Docket No. 10-1156
Issued: December 16, 2010**

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 March 24, 2010 appellant filed a timely appeal from the February 26, 2010 merit decision of the Office of Workers' Compensation Programs, which affirmed the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits.

FACTUAL HISTORY

On July 7, 1989 appellant, then a 48-year-old rural carrier, filed a claim alleging that her back condition was a result of her federal employment. The Office accepted her claim for aggravation of degenerative lumbar disc disease. Appellant received compensation for temporary total disability on the periodic rolls. Effective April 1, 2003, the Office reduced her compensation to reflect her capacity to earn actual wages as a modified rural carrier.

A conflict arose between Dr. Mark C. Cascione, the attending neurologist, and Dr. David B. Lotman, a second opinion orthopedic surgeon. Dr. Cascione found that appellant's injuries were medically still present, not completely resolved and continued to be disabling. "Her condition has not returned to its preinjury status regarding her lumbar disc disease, and it is permanent." Dr. Lotman found no objective evidence on examination to support residuals of the accepted aggravation of degenerative disc disease. He believed appellant's chronic symptoms were on the basis of a natural progression of that disease.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Theodore P. Vlahos, a Board-certified orthopedic surgeon. On June 24, 2009 Dr. Vlahos related appellant's history and complaints. He described his findings on physical examination and reviewed x-rays obtained that day. Dr. Vlahos reviewed appellant's medical record and prior studies. He concluded that appellant's current back problems were due to degenerative disc disease, spondylosis and herniated discs at L4-5 and L5-S1.

Dr. Vlahos found that all of these conditions preexisted the accepted employment injury and were known to progress with time. He stated that it was clear appellant aggravated her condition in 1988, as seen by the significant increase in symptoms, but there were no objective findings at that time to show any permanent aggravation. In Dr. Vlahos' opinion, to a reasonable degree of medical certainty, appellant's current condition was the natural progression of her underlying disease and that the accepted aggravation in 1988 represented only a temporary exacerbation, causing no anatomic alternation or objective acceleration and currently leaving no residuals.

Dr. Vlahos explained that appellant showed no objective findings such as spasm on physical examination. All positive findings had a subjective component and were consistent with the preexisting diagnosis of degenerative lumbar disc disease as well as subsequent fibromyalgia. There was no objective evidence radiologically of any significant advancement of her condition as a result of her employment in 1988. Dr. Vlahos added that appellant had regular episodes of back problems from 1984 to 1988, which represented the natural progression of degenerative disc disease temporarily aggravated by specific incidents such as minor falls and strain and sprain from which she would have otherwise recovered easily were it not for the underlying condition.

In an October 7, 2009 decision, the Office terminated appellant's compensation. It found that the weight of the medical evidence rested with the impartial medical specialist, Dr. Vlahos, and established that appellant no longer had any disability or residuals due to the accepted medical condition.

On December 15, 2009 Dr. Cascione wrote to appellant to explain that he had no obvious disagreement with Dr. Vlahos' orthopedic assessment. He stated that he was not certain that his own opinion regarding her neurologic condition had any impact on her orthopedic condition. "I wish there was something more I could offer to refute his orthopedic opinion, but I am unable to do so."

By decision dated February 26, 2010, an Office hearing representative affirmed the termination of appellant's compensation. The hearing representative found that the weight of the

medical evidence rested with Dr. Vlahos and established that the injury-related condition had resolved.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.¹ Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³

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.⁴ When 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.⁵

ANALYSIS

To resolve the conflict between appellant's physician and the Office referral physician, the Office properly referred appellant to an impartial medical specialist, Dr. Vlahos. The Office provided Dr. Vlahos with the medical record and a statement of accepted facts so he could base his opinion on a proper history of injury and treatment.

After reviewing the record, his findings on examination and x-rays studies, Dr. Vlahos concluded that appellant no longer had residuals from the accepted aggravation. His medical rationale was sound and logical: appellant's degenerative disc disease preexisted her claim and was known to progress with time. Appellant had regular episodes of back pain that were indicative of temporary exacerbations. There was no radiological evidence or objective findings of any permanent anatomic alteration or significant advancement of her condition as a result of the accepted injury. All of appellant's current findings, none of which were objective, were consistent with her preexisting condition. Dr. Vlahos concluded that her current condition was due to the natural progression of the preexisting degenerative disc disease. Dr. Cascione, the attending neurologist, reviewed Dr. Vlahos' orthopedic assessment and did not disagree.

¹ 5 U.S.C. § 8102(a).

² *Harold S. McGough*, 36 ECAB 332 (1984).

³ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁴ 5 U.S.C. § 8123(a).

⁵ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

The Board finds that Dr. Vlahos' opinion is well rationalized and based on a proper factual and medical history. His opinion therefore carries special weight in resolving the conflict. As the weight of the medical opinion evidence establishes that the accepted aggravation has resolved, the Board finds that the Office has met its burden of proof to terminate compensation benefits for that aggravation. The Board will therefore affirm the February 26, 2010 decision.⁶

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation.

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 16, 2010
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

⁶ Having issued a formal wage-earning capacity determination on April 1, 2003, the Office had the burden of establishing a material change in the nature and extent of the accepted aggravation. *Daniel J. Boesen*, 38 ECAB 556 (1987). Dr. Vlahos' opinion discharges that burden. *See A.P.*, 60 ECAB ___ (Docket No. 08-1822, issued August 5, 2009).