

On appeal, appellant's attorney contends that OWCP: (1) was required to provide an impartial medical examination under 5 U.S.C. § 8123(a) as the report of Dr. Frank T. Vertosick, a second opinion Board-certified neurosurgeon, was the only evidence contradicting appellant's claim; (2) failed to meet its burden of proof to terminate appellant's compensation benefits; and (3) failed to consider all evidence that was sufficient to overcome termination and created a new conflict regarding continuing disability.

FACTUAL HISTORY

On October 12, 2005 appellant, then a 51-year-old tractor operator, filed a traumatic injury claim (Form CA-1) alleging a herniated disc and chest pains as a result of lifting a heavy trash bag on January 13, 2004. On October 17, 2008 OWCP accepted the claim for a herniated disc at T5-6. An October 14, 2008 statement of accepted facts noted that appellant worked in a light-duty capacity from the date of injury until March 25, 2005 when the assignment was terminated by the employing establishment. Appellant has not worked since March 25, 2005.

To determine whether appellant continued to have residuals of his January 13, 2004 employment injury and his work capacity, OWCP referred him to Dr. Vertosick for a second opinion evaluation. In a December 11, 2008 report, Dr. Vertosick reviewed appellant's medical records and a statement of accepted facts. The low back and thoracic examination revealed normal spinal curvatures without spasm, tenderness or external abnormalities. Dr. Vertosick reported normal gait, normal straight leg raise tests and normal neurological findings upon examination. There was no evidence of reflex abnormality, numbness or weakness. Dr. Vertosick found that appellant's clonus was absent, he had a downgoing Babinski's and normal tone. He opined that appellant's thoracic spine condition was caused by the employment injury which had resolved. Dr. Vertosick found that appellant was at maximum medical improvement and capable of performing his date-of-injury job without restrictions.

In a May 6, 2004 report, Dr. Kathryn Ryan, a Board-certified family practitioner, diagnosed disc degenerative changes in the mid and lower thoracic spine, focal central disc protrusion or herniation at T5-6 and disc bulges or protrusions at T6-7 and T10-11.

By letter dated February 24, 2009, OWCP referred appellant to Dr. Vertosick for a supplemental evaluation. In a March 16, 2009 report, Dr. Vertosick reviewed additional medical records and an addendum to the statement of accepted facts which listed the accepted herniated disc at T5-6. He reported that his opinions rendered in the December 11, 2008 report did not change. Dr. Vertosick opined that there were no objective findings to support any residual compensable medical condition, that appellant had reached maximum medical improvement and was capable of performing his full-time regular-duty job without restrictions.

In a February 12, 2009 medical report, Dr. Joseph Nour, an anesthesiologist, diagnosed chronic back and bilateral lower extremity pain, multilevel discogenic disease, bilateral carpal tunnel, status post carpal tunnel release on the right side, degenerative arthritis and status post an episode of syncope. In a March 12, 2009 progress report, he diagnosed possible intercostal neuralgia and possible costochondritis. In an April 7, 2009 progress report, Dr. Nour diagnosed facet joint arthropathy.

On May 8, 2009 OWCP proposed to terminate appellant's compensation benefits on the grounds that the weight of medical evidence from Dr. Vertosick established that he was no longer disabled due to the accepted condition. Appellant was given 30 days to submit additional evidence or argument.

In response, appellant's attorney submitted a narrative statement dated May 21, 2009 and a May 26, 2009 report by Dr. Nour, who diagnosed chronic back pain, discogenic disease and possible myofascial disease. Dr. Nour reported that appellant continued to have muscle spasms in the middle and upper part of his back.

By decision dated July 9, 2009, OWCP finalized termination of appellant's wage-loss compensation benefits effective July 8, 2009 finding that his accepted conditions had resolved.²

On December 28, 2009 appellant requested reconsideration and submitted additional evidence.

In a June 11, 2009 attending physician's report (Form CA-20), Dr. Ryan diagnosed herniated nucleus pulposus at T5-6 and disc bulge at T6-7 and T10-11. She indicated that starting July 22, 2009, appellant would be able to work two days a week, four hours a day in a light-duty capacity with restrictions: no lifting over 20 pounds; no reaching overhead; no bending and no stooping. On July 22, 2009 Dr. Ryan stated that he continued to be afflicted by and treated for mid-back pain. She noted that appellant's mid-thoracic spine herniated disc was a result of his January 13, 2004 employment injury and opined that his condition would be aggravated by a full-duty workload.

In a July 14, 2009 medical report, Dr. Nour diagnosed chronic back pain, disc herniation at T5-6, disc bulging at T6-7 and T10-11 and facet joint disease. He indicated that he had treated appellant with steroid injections approximately once a year and opined that his symptoms were caused by discogenic disease.

In a June 24, 2009 medical report, Dr. Francis T. Ferraro, a Board-certified neurosurgeon, reported that appellant complained of pain in his mid-thoracic spine and a second pain in the lower thoracic spine radiating around his coastal margin to the upper abdomen on the left side which was aggravated when he sits or stands. He stated that he disagreed with Dr. Vertosick's medical opinion as appellant's symptoms were consistent with thoracic disc herniations. Dr. Ferraro compared a magnetic resonance imaging (MRI) scan of appellant's thoracic spine from April 23, 2008 to an MRI scan from May 6, 2004 and found a central and slightly right-sided disc herniation at T5-6, which appeared to be slightly smaller on the more recent scan and a disc herniation on the left side at T10-11, which appeared to be slightly larger than the previous scan.

² By decision dated July 9, 2009, OWCP denied appellant's claim for compensation (Form CA-7) for the period December 11, 2008 to present. On January 14, 2010 the Office of Personnel Management notified OWCP that an overpayment of \$79,809.87 was paid in full and the account was closed.

By decision dated March 18, 2010, OWCP modified the July 9, 2009 decision to also terminate appellant's medical benefits effective March 18, 2010 because he was no longer disabled nor had residuals of the accepted thoracic condition.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.⁷

ANALYSIS -- ISSUE 1

On October 17, 2008 OWCP accepted appellant's claim for a herniated thoracic disc at T5-6. The issue is whether it properly terminated his benefits effective March 18, 2010 on the grounds that he no longer continued to experience any disability or residuals due to his employment-related injury. The Board finds that the weight of the medical evidence establishes that appellant's accepted herniated disc resolved by December 16, 2009. The Board finds that OWCP met its burden of proof to terminate his compensation benefits as of March 18, 2010 for the accepted herniated disc condition.

In a December 11, 2008 medical report, Dr. Vertosick, an OWCP second opinion physician, reviewed appellant's medical records and a statement of accepted facts and conducted a low back and thoracic examination which revealed normal curvatures without spasm, tenderness or external abnormalities. He reported normal gait, normal straight leg raise tests and normal neurological findings upon examination. There was no evidence of reflex abnormality, numbness or weakness. Dr. Vertosick found that appellant's clonus was absent, he had a downgoing Babinski's and normal tone. He opined that appellant may have had a thoracic spine condition caused by the January 13, 2004 employment injury but concluded that it had resolved and appellant was able to work in his date-of-injury job without restrictions. In a March 16, 2009 supplemental report, Dr. Vertosick reviewed additional medical records and an addendum to the statement of accepted facts which contained the accepted herniated disc, thoracic spine,

³ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁴ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁶ *T.P.*, 58 ECAB 524 (2007).

⁷ *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

level T5-6 employment injury. He reported that his opinions rendered in the December 11, 2008 report did not change and opined that there were no objective findings to support any residual compensable medical condition.

Rationalized medical opinion evidence is medical evidence which includes a physician's opinion addressing the causal relationship between a claimant's diagnosed condition and the accepted employment injury. To be probative, the opinion of a physician must be based on a complete factual and medical background of the employee, 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 employment factor accepted in the case.⁸

The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁹ The Board finds that the weight of the medical evidence rests with the December 11, 2008 and March 16, 2009 reports of Dr. Vertosick, who provided a comprehensive evaluation based on his review of the statement of accepted facts and medical record, the history of injury and findings on physical examination.¹⁰ Dr. Vertosick advised that appellant had no residuals of his accepted herniated disc. Appellant was found capable of returning to his usual job of tractor operator without restriction.

Dr. Nour submitted progress reports dated March 12 to May 21, 2009 concluding that appellant continued to experience muscle spasms in his middle and upper back, but he provided no explanation as to whether the condition was employment related or why the condition precluded appellant from working. There is no rationalized medical evidence from Dr. Nour explaining how the accepted herniated disc caused or contributed to any continuing disability. The Board finds that OWCP properly terminated appellant compensation benefits effective March 18, 2010 relating to the accepted herniated disc, thoracic spine, level T5-6.

LEGAL PRECEDENT -- ISSUE 2

Following the proper termination of benefits, the claimant has the burden to establish continuing employment-related residuals and/or disability with probative medical evidence.¹¹ The medical evidence required to establish a causal relationship, generally, is rationalized medical evidence. Rationalized medical evidence is medical evidence, which includes a physician's opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated 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

⁸ See *Sedi L. Graham*, 57 ECAB 494 (2006).

⁹ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *C.B.*, Docket No. 08-1583 (issued December 9, 2008).

¹⁰ *A.E.*, Docket No. 10-1862 (issued May 11, 2011).

¹¹ *Talmadge Miller*, 47 ECAB 673 (1996).

between the diagnosed condition and the specific employment factors identified by the claimant.¹²

ANALYSIS -- ISSUE 2

The Board finds that the issue of whether appellant had any continuing disability or residuals after March 18, 2010 is not in posture for decision due to a conflict in the medical evidence between Drs. Ryan, Ferraro and Vertosick.

Once OWCP properly terminated appellant's compensation and medical benefits, he had the burden to establish continuing residuals and/or disability due to his accepted injury with probative medical evidence.¹³ Subsequent to the March 18, 2010 decision terminating his compensation, he submitted medical reports from Drs. Ryan and Ferraro. In a June 11, 2009 attending physician's report, Dr. Ryan diagnosed herniated nucleus pulposus at T5-6 and disc bulge at T6-7 and T10-11. She indicated that starting July 22, 2009 appellant would be able to work in a light-duty capacity with restrictions. In a July 22, 2009 medical report, Dr. Ryan stated that he continued to be afflicted by and treated for mid-back pain. She noted that appellant's mid-thoracic spine herniated disc was a result of a January 13, 2004 employment injury and opined that his condition would be aggravated by a full-duty workload. In a June 24, 2009 medical report, Dr. Ferraro reported that appellant complained of pain in his mid and lower thoracic spine which was aggravated by sitting and standing. He compared a MRI scan of appellant's thoracic spine from April 23, 2008 to an MRI scan from May 6, 2004 and found a central and slightly right-sided disc herniation at T5-6, which appeared to be slightly smaller and a disc herniation on the left side at T10-11, which appeared to be slightly larger. Dr. Ferraro stated that he disagreed with Dr. Vertosick's medical reports and opined that appellant's symptoms were consistent with thoracic disc herniations.

As noted, Dr. Vertosick, the second opinion examiner, indicated that appellant's low back and thoracic spine condition had resolved. His examinations revealed normal curvatures of the low back and thoracic spine, normal gait, normal straight leg raise tests and normal neurological findings. Dr. Vertosick also stated there was no evidence of reflex abnormality, numbness or weakness and that appellant was at maximum medical improvement. He concluded that appellant was able to work in his date-of-injury job without restrictions. The Board finds that a conflict in medical opinion exists between the opinions of Drs. Ryan, Ferraro and Vertosick. The Board finds that, since Drs. Ryan and Ferraro's reports contain sufficiently well-rationalized medical opinions that appellant's employment-related condition had not resolved and he still suffers from residuals, the reports create a conflict with the opinion of Dr. Vertosick who found no continuing work-related condition.

On remand, OWCP should refer appellant, the case record and a statement of accepted facts to an appropriate medical specialist for an impartial medical evaluation pursuant to section

¹² *Joe L. Wilkerson*, 47 ECAB 604 (1996); *Alberta S. Williamson*, 47 ECAB 569 (1996).

¹³ *See Talmadge Miller*, *supra* note 11.

8123(a).¹⁴ After such development of the case record as OWCP deems necessary, a *de novo* decision shall be issued.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective March 18, 2010. The Board further finds that the case is not in posture for decision regarding whether appellant has any employment-related residuals of his T5-6 herniated disc after March 18, 2010.

ORDER

IT IS HEREBY ORDERED THAT the March 18, 2010 decision of the Office of Workers' Compensation Programs is affirmed, in part, as to the termination of compensation benefits effective March 18, 2010. The case is set aside and remanded, in part, for further development of the medical evidence on the issue of continuing residuals and disability.

Issued: August 5, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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

¹⁴ 5 U.S.C. § 8123(a). *See also Marvin J. Gan*, 2005 LRP 46993 (Docket No. 02-2212, issued June 6, 2003).