

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

JUANITA PITTS, Appellant

and

**DEPARTMENT OF THE AIR FORCE,
McGUIRE AIR FORCE BASE, NJ, Employer**

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**Docket No. 04-1548
Issued: December 2, 2004**

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of the Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member

JURISDICTION

On May 24, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative's decision dated January 29, 2004, which affirmed a March 31, 2003 decision terminating her compensation benefits as of March 28, 2003. Under 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits; and (2) whether appellant has established continuing disability after March 28, 2003, causally related to the accepted employment injury.

FACTUAL HISTORY

On July 11, 2001 appellant, a 42-year-old sales store checker, filed a claim alleging that she injured her elbow, knees and back when she tripped on a cement walkway. The Office accepted the claim for trauma to both elbows, both knees and the low back and paid appropriate

temporary total disability compensation. The Office did not accept appellant's claim for preexisting conditions of herniated cervical and lumbar discs, tenosynovitis and chondromalacia of both knees.

In Form CA-17 duty status reports dated from March 25 to July 31, 2002, Dr. Marshall Gardner, an attending osteopath, indicated that appellant was still totally disabled from gainful employment.

In order to determine appellant's current condition, the Office referred her for a second opinion examination with Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon. In a report dated November 5, 2002, Dr. Maslow stated:

"In my opinion, no additional treatment is indicated for [appellant] causally related to the accident of July 11, 2001. She has had extensive treatment with facet injections and facet rhizotomy, and she still complains of tenderness over the facets and in the low back, and I don't think that those procedures have done her any good nor do I think repeating those procedures makes any sense. In my opinion [appellant] does not have objective evidence of permanency or disability causally related to the accident of July 11, 2001 other than some minor scarring from abrasions on the elbows. There is, in my opinion, degenerative change in the lumbar spine which is related to her prior problems in the 1980's. The patient is capable, in my opinion, [of] working as a sales checker and could manage moderate lifting on the job. I do not identify any impairment causally related to the accident of July 11, 2001. I have enclosed the [w]ork [c]apacity [e]valuation. This indicates some restrictions on lifting, but these are not causally related to the accident under consideration but are related to her longstanding lumbar problems."

The Office determined that there was a conflict in the medical opinion evidence, and referred appellant to Dr. Robert Bachman, a Board-certified orthopedic surgeon, for an impartial examination to resolve the conflict.

In a report dated January 30, 2003, Dr. Bachman reviewed the medical records and the statement of accepted facts and listed his findings on examination. He stated that appellant had no objective findings of residual disability other than her preexisting lumbar incision from a prior surgery. Dr. Bachman reported no objective findings of residual disability regarding the elbows, knees or low back on examination and no neurological deficits. He advised that appellant had recovered from the lumbar strain without the need for further treatment, given that there were no residual symptoms. Regarding appellant's preexisting lumbar condition which the Office did not accept as work related, Dr. Bachman noted that a magnetic resonance imaging (MRI) scan report of the lumbar spine dated September 24, 2002 showed no significant neural change compared with the prior study of October 26, 2000, with small central and right central dorsal disc herniation at L5-S1. Although Dr. Bachman noted that appellant continued to receive physical therapy for the nonwork-related back conditions, appellant had no objective findings related to her accepted work injury. He concluded that based on his examination and evaluation that appellant was capable of resuming her regular job duties without restrictions and had no residual disability attributable to the July 11, 2001 employment injury.

On February 24, 2003 the Office issued a notice of proposed termination of compensation to appellant. The Office found that the weight of the medical evidence, as represented by the August 2, 2002 report by Dr. Bachman, established that appellant's accepted elbow, knee and low back conditions had resolved. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

By decision dated March 31, 2003, the Office found that appellant had no continuing disability or impairment causally related to the July 11, 2001 employment injury, finding that Dr. Bachman's opinion represented the weight of the medical evidence.

By letter dated April 3, 2003, appellant's attorney requested an oral hearing, which was held on October 27, 2003. Appellant submitted reports from Dr. Diane Portman, a Board-certified anesthesiologist; Dr. Andrew Koenig, an osteopath; and Dr. Myron Chu, an osteopath. In Dr. Portman's July 17, 2003 report, she stated that appellant had low back pain at the waist level to the sacral region, radiating to the bilateral buttocks. Dr. Portman also noted complaints of an aching, squeezing sensation with pins and needles of the legs. She recommended physical therapy and anti-inflammatory regimens.

Dr. Koenig submitted an August 15, 2003 report in which he stated findings on examination, diagnosed degenerative arthritis and recommended treatment with anti-inflammatory medicine.

In Dr. Chu's September 11, 2003 report, he diagnosed fibromyalgia and minimal osteoarthritis, with most of it occurring at the lumbar spine. He noted that appellant did not require the aid of a cane or a walker and appeared to have a normal gait.

Appellant's attending physician, Dr. Gardner, submitted a November 27, 2003 report in which he stated that appellant still experienced residuals from the July 11, 2001 employment injury. These included: exacerbation of bulging cervical discs at C3-4, C4-5 and C5-6 levels; a new injury to the right knee with early degenerative changes and chondrocalcinosis of the left knee; injuries to the elbow, including a left evulsion fracture; severe injuries to the lumbar spine, including L2-3 lateral bulging disc disease; L3-4 lateral bulging disc disease; L4-5 lateral bulging disc disease; and right L4-5 radiculopathy with evidence of denervation. He stated that these injuries were all reexacerbated on March 10, 2003. Dr. Gardner expressed his disagreement with the opinions of Drs. Maslow and Bachman that appellant could return to work without restrictions.

By decision dated January 29, 2004, an Office hearing representative affirmed the March 31, 2003 Office decision terminating compensation, finding that appellant had not established entitlement to continuing disability benefits.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹ After it has determined that an employee has disability causally related to his or her federal

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.²

It is well established that, when a 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.³

ANALYSIS -- ISSUE 1

In this case, the Office properly determined that a conflict existed in the medical opinion evidence between appellant's treating physician, Dr. Gardner, who opined that appellant remained disabled due to the July 11, 2001 work injury, and Dr. Maslow, the Office second opinion physician, who found that appellant's work injury had resolved, but that she continued to experience degenerative changes in the spine due to prior nonwork-related injuries. The Office based its decision to terminate appellant's compensation on the reports of Dr. Bachman the impartial medical examiner.

The Board finds that Dr. Bachman's impartial medical report is entitled to special weight. Dr. Bachman's January 30, 2003 report recorded extensive examination findings regarding appellant's lumbar spine, upper and lower extremities, and knees. His report also noted extensive neurological evaluation. Regarding a comparison study of an MRI scan taken in the year 2000, prior to the employment injury, and an MRI scan taken in October 2002, Dr. Bachman noted that, while lumbar disc herniation was still present, these studies showed no change in the preexisting, nonwork-related conditions. Dr. Bachman stated that appellant had no objective findings of residual disability stemming from her employment-related elbow, knee and low back injuries, with no neurological deficits. He opined that appellant had recovered from the lumbar strain without any need for further treatment. Dr. Bachman stated that appellant had no residual disability attributable to the July 11, 2001 employment injury and was capable of resuming her regular job duties without restriction. Finally, while he did note that appellant continued physical therapy for her nonwork-related lumbar conditions, he also noted that this treatment did not improve appellant's nonwork-related conditions.

The Board finds that the Office properly found that Dr. Bachman's referee opinion negated a causal relationship between appellant's claimed current condition and disability and her accepted July 11, 2001 elbow, knee and low back injuries and that she no longer has any residuals from her employment injuries. The Office therefore properly relied on Dr. Bachman's opinion in its March 31, 2003 termination decision.

² *Id.*

³ *Franklin D. Haislah, 52 ECAB 457 (2001).*

LEGAL PRECEDENT -- ISSUE 2

Once the Office properly terminated appellant's compensation in its March 31, 2003 decision, the burden of proof shifted to appellant to establish continuing disability.⁴

ANALYSIS -- ISSUE 2

Appellant submitted reports from Drs. Portman, Koenig and Chu. These physicians diagnosed a variety of conditions, including fibromyalgia and osteoarthritis. But none of these physicians' reports contained a rationalized, probative medical opinion which related appellant's current diagnoses to her July 11, 2001 employment injury. In light of the serious nature of appellant's preexisting diagnoses which included herniated discs, it is especially important to establish the cause of any unaccepted degenerative conditions. The additional reports received after the termination of benefits are therefore insufficient to undermine Dr. Bachman's referee opinion that appellant had no residuals and could return to work without restrictions. The weight of medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.⁵

Appellant also submitted the November 27, 2003 report from Dr. Gardner, her treating physician, who continued to report that appellant remained disabled. The Board notes that, after an impartial specialist resolves a medical conflict, additional reports submitted by a doctor who was on one side of the conflict that the impartial specialist resolved, are insufficient to overcome the opinion of the impartial specialist or to create a new medical conflict. Moreover, his opinion is of limited probative value for the further reason that it is generalized in nature and equivocal in that he only noted summarily that appellant's conditions were causally related to the July 11, 2001 employment injury. Further, although Dr. Gardner also stated that appellant sustained a "re-exacerbation" of her work injuries on March 10, 2003, this allegation is the subject of a new claim for benefits. The Board therefore affirms the January 29, 2004 Office decision affirming the March 31, 2003 Office decision terminating compensation.

CONCLUSION

Under the circumstances described above, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits and appellant has not established an employment-related continuing disability following the termination of her benefits.

⁴ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

⁵ *See Anna C. Leanza*, 48 ECAB 115 (1996).

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 2, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member