

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

TERRI K. ARBOGAST, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Clarksburg, WV, Employer**

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**Docket No. 04-531
Issued: July 9, 2004**

Appearances:
C. Patrick Carrick, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On December 18, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated September 22, 2003, terminating appellant's compensation benefits on the grounds that she no longer had any residuals due to her August 27, 2000 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this termination case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits on the grounds that she no longer had any residuals due to her accepted employment injury.

FACTUAL HISTORY

On August 29, 2000 appellant, a 40-year-old licensed practical nurse, filed a traumatic injury claim alleging that she injured her lower back on August 27, 2000 while transferring a patient from a commode chair to the bed. The Office accepted the claim for acute lumbar strain.

Appellant stopped work on August 29, 2000 and returned to light-duty work for four hours per day, three days a week on July 9, 2001.

In a February 5, 2001 attending physician's report (Form CA-20), Dr. Louis Ortenzio, an attending Board-certified family practitioner, diagnosed degenerative disc disease with minimal protrusion/bulge which he indicated was caused or aggravated by her employment.

On October 5, 2001 appellant filed a claim for a recurrence of total disability. She alleged that the recurrence began September 1, 2001 and that she stopped work on September 20, 2001. The Office accepted appellant's recurrence of total disability claim beginning September 20 and 22, 2001 and subsequently placed appellant on the automatic rolls for temporary total disability.

In a November 21, 2001 report, Dr. J. Patrick Gale, a Board-certified orthopedic surgeon, to whom the Office referred appellant for a second opinion evaluation, noted that the nerve conduction studies "revealed no evidence of any abnormalities" and there was "no significant abnormality on her magnetic resonance imaging [MRI] scan." He opined that "[t]here are no objective findings to substantiate [appellant's] subjective complaints of pain."

In a December 1, 2001 report, Dr. Shiv Uchila Navada, a Board-certified neurologist with a subspecialty certificate in clinical neurophysiology, diagnosed low back syndrome, paresthesias, depression and porphyria. A physical examination revealed:

"Lumbar Movements: Forward flexion 60 degrees, extension 10 degrees, lateral tilt 10 degrees each. Straight leg raising test caused her lower back pain at 30 degrees bilaterally. Sitting straight leg raising test was normal. Waddell's compression and touch were positive."

The physician reported that an MRI scan revealed a mild disc bulge at L4-5 and a normal electromyography (EMG), which "was not supportive of L5-S1 radiculopathy on either side."

In a January 4, 2002 report, Dr. E. Clifford Valentin, a Board-certified physiatrist, diagnosed chronic low back pain with pain radiating into the left lower extremity, questionable nerve root impingement at L4. Physical findings included a 3/5 positive Waddell's signs and increased subjective pain behavior. He diagnosed chronic low back pain with radiating pain into the left lower extremity, questionable nerve root impingement at left L4 and a psychosocial overlay.

In a February 14, 2002 report, Dr. P. Kent Thrush, a second opinion Board-certified orthopedic surgeon, reported range of motion in the lumbar spine as 60 degrees flexion, 25 degrees hyperextension and left and right lateral tilting as 25 degrees. He noted that appellant complained of "pain with extremes of range of motion." With regards to the objective testing, Dr. Thrush stated:

"I have reviewed two MRI's of the lumbar spine and one MRI of the thoracic spine. These MRI's reveal very mild degenerative disc disease at L4-5 and L5-S1 characterized by mild disc dehydration. There is a very slight bulge at L4-5."

There is no evidence of disc herniations or nerve root impingement. The bulge at L4-5 is tiny, consistent with degenerative disc disease.”

Based upon his review of the medical evidence, history of injury, physical examination and review of the objective studies, Dr. Thrush concluded that appellant had recovered from her employment-related lumbar sprain injury. He opined that “her current symptoms are on the basis of early degenerative disc disease of the lumbar spine.” Dr. Thrush further opined that appellant was not totally disabled and was capable of returning to work. Lastly, he noted that appellant “has a small amount of permanent partial impairment, secondary to underlying mild degenerative disc disease at L4-5.”

On May 8, 2002 the Office issued a notice of proposed termination of appellant’s compensation benefits on the grounds that she no longer had any residuals due to her accepted August 27, 2000 employment injury. In reaching this determination, the Office relied upon the report by Dr. Thrush, the Office referral physician.

By decision dated July 5, 2002, the Office terminated appellant’s compensation benefits effective July 14, 2002. The Office found that she had recovered from her accepted lumbar strain based upon the opinion of Dr. Thrush.

Appellant’s counsel requested reconsideration by letter dated July 2, 2003, and submitted an August 15, 2002 report by Dr. John F. Brick, a treating Board-certified neurologist, a June 27, 2003 deposition of Dr. Ortenzio, reports dated May 31, August 18 and November 21, 2002 and progress notes for the period August 30, 2000 to March 19, 2001, by Judy Ryan, family nurse practitioner, and argument in support of her request. Appellant also submitted reports previously considered by the Office which included an October 29, 2001 report by Dr. Ortenzio, MRI scans dated April 7 and October 10, 2001 and a November 6, 2001 report by Dr. Matt El-Kadi.

In an August 15, 2002 report, Dr. Brick reported physical findings which included:

“[Appellant] has no position sense in her toes and marked decreased vibration in her toes and hands. When I touched her with a sharp object over her hands, legs and faces, she said it was not sharp anywhere. Muscle tone was normal and she has diffuse nonphysiologic giveaway weakness in all four extremities. In spite of this sensory ‘loss’ she can stand unsupported with her eyes closed without falling or wavering. [Appellant’s] stretch reflexes are normally brisk and symmetrical and the toes go down with plantar stimulation.”

With regards to the objective test, the physician noted “some mild degenerative changes” in the lumbar and neck region, but found “nothing that could account for her constellation of symptoms.” In concluding, Dr. Brick opined that there was no objective evidence supporting any neurologic dysfunction and “no significant problems have been found.”

Dr. Ortenzio, in a November 21, 2002 report, noted that appellant had no lumbosacral pain prior to her employment injury. He reported an October 10, 2001 MRI scan revealed a “mild diffuse disc bulge present at the L4-5 areas” and opined that “there is more than the sprain/strain diagnosis indicated for the injury.”

In the June 27, 2003 deposition, Dr. Ortenzio stated that appellant reported symptoms of radiation of pain into her lower extremities, lower back pain, rigidity and stiffness in her lower back, loss of flexibility in the lower back and the inability to stand or sit for any protracted period of time. He concluded that these symptoms were due to her employment injury based upon the employment injury history, the MRI scan and complaints of numbness in her legs. With respect to supporting objective evidence, Dr. Ortenzio interpreted an MRI scan as showing a disc bulge with nerve root impingement, which he attributed to appellant's employment injury. In support of his opinion, Dr. Ortenzio reported there were no other nonwork injuries or other incidents other than the employment injury which would account for the bulging disc. He also stated that he concluded that the bulging disc was due to the employment injury based upon her complaints of numbness in her legs, history of back injury and the nerve root impingement as shown by the MRI scan. The physician opined that appellant's disability was not caused by any degenerative disc disease, but was due to the bulging disc and nerve root impingement as demonstrated by an MRI scan. Dr. Ortenzio concluded that appellant remained totally disabled due to her employment injury.

By decision dated September 22, 2003, the Office denied appellant's request for modification.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ Having determined that an employee has a disability causally related to his 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.² The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.³ 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.⁴

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts which determine the weight to be given to each individual report.⁵

¹ *Paul L. Stewart*, 54 ECAB ____ (Docket No. 03-1107, issued September 23, 2003).

² *Elsie L. Price*, 54 ECAB ____ (Docket No. 02-755, issued July 23, 2003).

³ *James F. Weikel*, 54 ECAB ____ (Docket No. 01-1661, issued June 30, 2003).

⁴ *Donald T. Pippin*, 54 ECAB ____ (Docket No. 03-205, issued June 19, 2003).

⁵ *Jean Cullition*, 47 ECAB 728 (1996).

ANALYSIS

On appeal appellant contends that the Office erred in affirming the termination of compensation. She also contends that it is unclear whether the Office reviewed all the evidence since the Office failed to mention Dr. Ortenzio's deposition testimony in its decision.

In this case, the Office accepted that appellant sustained an acute lumbar strain and paid appropriate medical benefits and compensation for disability. The Office subsequently referred her to Dr. Thrush for a second opinion evaluation. He reported range of motion in appellant's lumbar spine as 60 degrees of flexion, 25 degrees hyperextension and 25 degrees right lateral tilting. With regards to the objective tests, Dr. Thrush noted the MRIs revealed very mild degenerative disease at L4-5 and L5-S1 and no evidence of nerve root impingement or disc herniations. Based upon the physical examination, review of the medical evidence and objective studies, a history of the employment injury and the statement of accepted facts, Dr. Thrush concluded that appellant had recovered from her employment injury. He attributed her current symptoms to early degenerative disc disease in the lumbar spine, which was not employment related. With regards to appellant's ability to work, Dr. Thrush opined that she was not totally disabled and capable of returning to work. In concluding, Dr. Thrush reported that appellant had "a small amount of permanent impairment, secondary to the underlying mild degenerative disc disease at L4-5." The Board finds that, at the time the Office terminated appellant's compensation, the weight of the medical evidence rested with Dr. Thrush, who submitted a thorough medical opinion based on a complete and accurate factual and medical history. He performed a complete examination, reviewed the record and advised that appellant's lumbar strain had resolved and any employment-related residuals had resolved. Dr. Ortenzio, appellant's treating physicians, continued to state that appellant was disabled. In a February 5, 2002 attending physician's report Dr. Ortenzio diagnosed degenerative disc disease caused or aggravated by appellant's employment. He reported increasing complaints of lumbosacral pain and numbness in her left leg in an October 29, 2001 report. Dr. Ortenzio failed to provide any rationale explaining how appellant's current disability was due to her accepted employment injury when she had stopped work on August 29, 2000. Thus, Dr. Ortenzio's reports are also of diminished probative value because he did not explain why she continued to have residuals of her injury.⁶

The Board finds that at the time the Office terminated appellant's compensation benefits, the weight of the medical evidence rested with Dr. Thrush, who submitted a thorough medical opinion based upon a complete and accurate factual and medical history. He performed a complete examination, reviewed the record and advised that appellant had no continued disability from her accepted employment injury and was capable of performing her usual employment and that further medical treatment was unnecessary. He found no evidence of residuals and, thus, determined that appellant's lumbar strain had resolved.

⁶ *Thaddeus J. Spevack*, 53 ECAB ____ (Docket No. 00-1180, issued April 3, 2002). (To be of probative value, the physician must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value).

The Board finds that Dr. Thrush's report established, at that time, that appellant ceased to have any disability or condition causally related to employment, thereby justifying the Office's July 5, 2002 termination of benefits, including medical benefits.⁷

Following the termination of her compensation benefits, appellant submitted additional evidence from Dr. Ortenzio. In a June 27, 2003 deposition, he expressly disagreed with Dr. Thrush's opinion that appellant's low back strain had resolved and that any disability was due to her degenerative disc disease. Dr. Ortenzio attributed appellant's disability due to her August 27, 2000 employment injury which caused a mild disc bulge and nerve root impingement as demonstrated by an MRI scan.

Section 8123 of the Act⁸ provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.⁹ The Board has interpreted the statute to require more than a simple disagreement between two physicians. To constitute a true conflict of medical opinion, the opposing physicians' reports must be of virtually equal weight and rationale.¹⁰

In this case, there is a conflict between the opinion of appellant's attending physician, Dr. Ortenzio, who stated in his deposition that appellant continued to be disabled due to her August 27, 2000 employment injury and Dr. Thrush, the Office's referral physician, who opined in his February 14, 2002 report, that appellant had recovered from her employment-related lumbar sprain injury and that any current disability was due to her early degenerative disc disease in the lumbar spine, which was unrelated to the employment injury.

Dr. Ortenzio attributes appellant's current disability to her August 27, 2000 employment injury which caused a nerve root impingement. In support of his opinion, he reported that there were no other nonwork injuries or other incidents other than the employment injury, which would account for the bulging disc. Dr. Ortenzio noted that appellant's complaints of numbness in her legs, her history of back injury and the nerve root impingement as shown by the MRI scan all supported that her disability was due to her employment injury. The Board finds that since Dr. Ortenzio's June 27, 2003 deposition contains a sufficiently well-rationalized medical opinion that appellant still suffers from residuals, the report creates a conflict between the opinions of Drs. Ortenzio and Thrush.

⁷ See *Joe Bowers*, 44 ECAB 423 (1993).

⁸ 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321.

⁹ *Brenda C. McQuiston*, 54 ECAB ____ (Docket No. 03-1725, issued September 22, 2003); *Shirley L. Steib*, 46 ECAB 309 (1994).

¹⁰ *Adrienne L. Wintrip*, 38 ECAB 373, 379 (1987).

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits as of July 14, 2002. However, the Board finds that subsequent to the termination there is an unresolved conflict in the medical opinion evidence between Dr. Thrush, an Office referral physician, and Dr. Ortenzio, a treating physician, regarding whether appellant has any continuing residuals and disability due to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 22, 2003 is affirmed in part, set aside and remanded for further proceedings consistent with the above decision of the Board.

Issued: July 9, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member