

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

KATHLEEN A. MARSDEN, Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
IRON MOUNTAIN VETERANS HOSPITAL,
Iron Mountain, MI, Employer**

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**Docket No. 04-2214
Issued: February 9, 2005**

Appearances:

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 9, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated August 4, 2004, denying modification of a November 4, 2003 Office decision which terminated her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the August 4, 2004 and November 4, 2003 merit decisions.

ISSUE

The issue is whether the Office met its burden of proof in terminating appellant's compensation benefits on the grounds that she no longer had residuals of the accepted condition.

FACTUAL HISTORY

On February 25, 2000 appellant, then a 44-year-old pharmacy technician, filed a traumatic injury claim alleging that she injured her back on that date while lifting intravenous fluid cases onto a cart. The Office accepted her claim for lumbosacral and thoracic sprains. She

returned to work in a light-duty capacity on March 6, 2000 and was released to full duty on April 17, 2000.

In reports dated May 23 and June 26, 2000, Dr. F. Michael Saigh, a Board-certified family practitioner, diagnosed acute and chronic thoracic back pain and muscle spasms. He noted that appellant was working but was experiencing severe back pain.

In a report dated August 8, 2000, Dr. Steven S. Weinshel, a Board-certified neurosurgeon, stated that the magnetic resonance imaging scan report was unremarkable for the cervical and thoracic spine. He opined that appellant's back pain was related to her employment injury but he did not see a surgical or anatomic explanation for the pain.

In a report dated September 7, 2000, Dr. Frederick M. Maynard, Jr., a Board-certified physiatrist, indicated that appellant had persistent thoracic back pain due to her February 25, 2000 employment injury but could continue to perform light-duty work.

In reports dated October 19, 2000 to January 9, 2001, Dr. Maynard opined that appellant was having neck and back pain with disc bulging and possible spinal stenosis but she was able to perform her light-duty job.

On February 5, 2001 the Office referred appellant to Dr. Norman L. Pollak, a Board-certified orthopedic surgeon, for a second opinion examination regarding appellant's lumbosacral and thoracic sprains.

In a report dated March 8, 2001, Dr. Pollak provided physical findings on examination and stated that appellant's examination was normal. He indicated that he was not able to confirm any physical basis for her continued complaints and she was not disabled from work.

In a report dated December 6, 2001, Dr. Barry D. Johnson, a Board-certified neurologist, provided physical findings on examination and diagnosed a "muscular injury, work related, with long-term pain." He stated that appellant was "fairly debilitated" and could not control much of her pain situation. Dr. Johnson recommended a physical therapy evaluation and a muscle relaxant.

On June 19, 2002 the Office referred appellant to Dr. John L. Kihm, a Board-certified orthopedic surgeon,¹ for an independent examination and evaluation in order to resolve the conflict in medical opinion between appellant's treating physicians and Dr. Pollak as to whether appellant had any continuing medical condition causally related to her February 25, 2000 employment injury.² The Office provided appellant with a statement of accepted facts and the entire case file.

¹ Dr. Kihm is listed as a Board-certified orthopedic surgeon in the American Medical Association, Directory of Physicians in the United States (35th ed. 1996) and in the electronic database of the American Board of Medical Specialties.

² The Office indicated in a memorandum of a telephone conversation with appellant on May 23, 2002 that it did not select Dr. Kihm from the Physicians Directory System (PDS) because no physician listed in the PDS was willing to accept a referral in her area.

In a report dated July 22, 2002, Dr. Kihm provided a history of appellant's condition, the results of radiographic studies and physical findings on examination. He stated:

"[Appellant] is tender in the cervical spine from C7 to T7 ... more present on the right than on the left. The range of motion shows full flexion, extension, side bending and side rotation. Vertical compression of the head does not cause pain....

"The range of motion of the shoulders is normal with normal abduction, adduction, flexion, extension, internal and external rotation. Strength is unimpaired to isometric resistance. There is no selective atrophy....

"The spine exam[ination] shows a normal gait and no limp. [Appellant] appears to be quite small, but healthy. The movements sitting and standing are normal. She can stand on her toes and heels. [Appellant] squats to the floor. She has no list. There is no increase in lumbar lordosis or dorsal kyphosis. There is no scoliosis. The neck has no scars. There are no spasms. She is tender from C7-T7, especially on the right. The pelvis is level. There is no atrophy. Vertical compression does not cause pain. [Appellant] forward flexes to touch the floor and comes to neutral. She hyperextends well to the right at 45 degrees and to the left at 45 degrees. [Appellant] rotates to 45 degrees. She sits on a table normally. The straight leg raising can easily be done to 90 degrees.

"Neurologically, we find that [appellant] has normal deep tendon reflexes. Power is unimpaired in the evertors of the feet, dorsi and plantar flexion at the toes and feet, flexors and extensors of the knees. Balance is normal. Fine touch is normal. Pinprick is more sensitive to pin in the feet than the calves. Both calves appear to have diminished sensation to pin. There is no clonus or Babinski. The hips and knees are normal. The calves and thighs tape equally.

"DIAGNOSTIC IMPRESSION

"Based upon today's examination, as well as my review of the medical records and previous diagnostic testing, I am unable to identify evidence of ongoing orthopedic abnormality or neurologic deficit which would restrict [appellant's] ability to perform her normal activities of daily living as well as those duties of a pharmacy technician."

On May 12, 2003 appellant filed a claim for a recurrence of disability causally related to her February 25, 2000 employment injury. She did not provide a specific date for the recurrence, only that she had been restricted to permanent light duty since March 6, 2000 and her disability was "ongoing." The employing establishment indicated on her claim form that she resigned from her position effective June 27, 2003.

By letter dated September 25, 2003, the Office advised appellant that it proposed to terminate her medical benefits based on the July 22, 2002 report of Dr. Kihm which established that she had no residual medical condition causally related to her February 25, 2000

employment-related lumbosacral and thoracic sprains. The Office also denied appellant's claims for continuing partial disability and a recurrence of disability.

In response to the Office's September 25, 2003 letter, appellant submitted additional medical evidence. In a report dated July 10, 2003, a physician indicated that appellant had chronic low back pain and had resigned her position at the employing establishment.

By decision dated November 4, 2003, the Office terminated appellant's benefits effective that date on the grounds that the weight of the medical evidence, as represented by the July 22, 2002 report of Dr. Kihm, established that she had no continuing medical condition causally related to her February 25, 2000 employment injury.

Appellant requested reconsideration and submitted additional evidence.

In a report dated March 31, 2004, Dr. Weinschel opined that, based on appellant's statement that she had no back pain prior to her February 25, 2000 employment injury, her current condition was causally related to the employment injury.

By decision dated August 4, 2004, the Office affirmed its November 4, 2003 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.⁴ The Office'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 for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.⁶

ANALYSIS

In this case, the Office properly determined that there was a conflict in the medical opinion evidence between Dr. Pollak and appellant's treating physicians as to whether she had any continuing medical condition causally related to her February 25, 2000 employment injury. Dr. Pollak stated that appellant's physical examination was normal. However, appellant's

³ *Mohamed Yunis*, 42 ECAB 325 (1991).

⁴ *Id.*

⁵ *See Del K. Rykert*, 40 ECAB 284 (1988).

⁶ *Wiley Richey*, 49 ECAB 166 (1997).

physicians, including Drs. Saigh, Johnson, Weinshel and Maynard, found that she had continuing back problems related to her February 25, 2000 employment-related thoracic and lumbar sprains.

Section 8123(a) of the Federal Employees' Compensation Act⁷ provides, in pertinent part, "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." Where 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.⁸

In his July 22, 2002 report, Dr. Kihm, a Board-certified orthopedic surgeon and impartial medical specialist, provided a history of appellant's condition, the results of tests and detailed physical findings on examination. He opined that she had no continuing medical condition causally related to her February 25, 2000 employment injury. Dr. Kihm stated, "Based upon today's examination, as well as my review of the medical records and previous diagnostic testing, I am unable to identify evidence of ongoing orthopedic abnormality or neurologic deficit. The Board finds that the weight of the medical evidence rests with the July 22, 2002 report of Dr. Kihm who determined that appellant ceased to have residuals of her February 25, 2000 employment injury. The report of Dr. Kihm is well rationalized and based on a complete and accurate factual and medical history. The report was thorough, unequivocal and based on all relevant evidence. It establishes that appellant had no residual medical condition causally related to her February 25, 2000 employment-related lumbar and thoracic sprains. The Office properly based its November 4, 2003 and August 4, 2004 termination decisions on the report of Dr. Kihm.

Appellant submitted a March 31, 2004 report from Dr. Weinshel who opined that appellant's continuing back problems were causally related to her February 25, 2000 employment injury. This report is of diminished probative value in that it is lacking in medical rationale as to how appellant's current condition related to her federal employment. Therefore, this report is not of sufficient weight and rationale to create a conflict in the medical evidence or to overcome the weight of the medical evidence as represented by the reports of Dr. Kihm. Further, as Dr. Weinshel was on one side of the conflict of medical opinion which was referred to Dr. Kihm as the impartial medical specialist, his subsequent report is insufficient to outweigh or create a new conflict with Dr. Kihm's opinion.⁹

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective November 4, 2003.

⁷ 5 U.S.C. § 8123(a).

⁸ See *Roger Dingess*, 47 ECAB 123 (1995).

⁹ See *Dorothy Sidwell*, 41 ECAB 857 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 4, 2004 and November 4, 2003 are affirmed.

Issued: February 9, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member