

Office accepted his claim for aggravation of a preexisting herniated disc and lumbar disc displacement. Appellant was found to be entitled to benefits for total disability.

Appellant periodically provided medical reports from his treating physicians, Dr. Mark A. Testa, an osteopathic family practitioner, and Dr. Andrew J. Collier, Jr., a Board-certified orthopedist, who found that he remained totally disabled. He was treated with nonsteroidal anti-inflammatory drugs and epidural steroid injections.

The Office reviewed the case record and determined that a second opinion examination was needed. The Office referred appellant, together with a statement of accepted facts, questions to be addressed and the case record, to Dr. Steven J. Valentino, an osteopathic Board-certified orthopedic and reconstructive spinal surgeon.

By report dated March 14, 2001, Dr. Valentino diagnosed appellant's condition as a resolved aggravation of preexisting low back pain. He opined that appellant had recovered from his work injury without residuals and had no need for ongoing medical care. Dr. Valentino noted that appellant's orthopedic examination had been normal. He stated that, while appellant had a protracted history of symptoms, his most recent magnetic resonance imaging (MRI) scan revealed only mild age-related degenerative changes and no current objective findings to substantiate his complaints. Dr. Valentino stated that, on the date of his evaluation, appellant had recovered from his injury and was capable of returning to his usual work.

The Office found a conflict in medical opinion evidence between Dr. Testa and Dr. Collier, who supported appellant's claim of ongoing disability and Dr. Valentino, who found no disability or residuals of the accepted injury. The Office referred appellant, together with a statement of accepted facts, questions to be addressed and the case record, to Dr. Menachem M. Meller, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict as to whether his injury-related disability had ceased.

On December 7, 2001 Dr. Meller examined appellant and reported as follows:

“[Appellant] has evidence of preexisting degenerative disc bulges at L4-5 and L5-S1. These may have been accepted as a work injury as a disc herniation. At the present time[,] [appellant] has evidence of obesity, deconditioning, passive sedentary lifestyle, self[-]limitation behavior and significant signs and symptoms of symptom embellishment.... In my opinion, it would be beneficial for him to return to the workplace and avoid avoidance behavior in reporting of backache of sitting in a chair as being a back injury. In my opinion, [appellant's] work-related injury is fully and completely resolved. [He] requires no further treatment with regards to his work injury....”

Dr. Meller reported that appellant had no injury-related residuals. He found that his straight leg raising test and sitting root test were negative, that he was not currently receiving any therapy. Dr. Meller noted that a July 26, 2000 MRI scan revealed no change from a March 7, 1995 MRI scan and that appellant had positive Waddell's signs.

On the basis of Dr. Meller's opinion, the Office found that appellant's injury-related disability had ceased. On September 30, 2002 it issued a notice of proposed termination of

compensation. Appellant was given 30 days to submit evidence or argument to support that he had continuing disability causally related to his accepted employment injury.

On October 2, 2002 appellant submitted a September 19, 2002 office note from Dr. Collier, which addressed his present symptoms of back pain that radiated down his legs. On October 14, 2002 he submitted a September 5, 2002 electromyography (EMG) study read by Dr. Amir Katz, a Board-certified physiatrist, and interpreted as being consistent with bilateral L5 radiculopathy that was chronic in nature, but without evidence of peripheral polyneuropathy or myopathy.

By report dated October 31, 2002, Dr. Collier noted that appellant had had a number of injuries to his back, that the most recent one was on May 21, 1998 when he aggravated his underlying degenerative disc disease and developed radiculopathy. He stated that this progressive disorder was due to his multiple injuries, that appellant had not recovered and was still symptomatic. Dr. Collier stated that he disagreed with Dr. Meller.

In a decision dated November 18, 2002, the Office finalized the proposed termination of compensation, finding that the weight of the medical evidence rested with Dr. Meller. The Office found that the additional reports from Dr. Collier merely restated opinions that were reviewed by Dr. Meller and that his reports lacked objective findings of residual disability.

On November 19, 2002 appellant, through his attorney, requested an oral hearing before an Office hearing representative.

A hearing was held on March 18, 2004 at which appellant testified. He contended that he remained disabled because he continued to have problems with his back pain which radiated into his lower extremities. The hearing representative noted that Dr. Meller reported that appellant had preexisting degenerative disc bulges at L4-5 and L5-S1. The hearing representative also considered the additional reports from Dr. Collier which he found to be repetitive in nature. The hearing representative found that the Office had met its burden of proof to terminate compensation, such that the burden of proof shifted to appellant to prove continuing disability. By decision dated June 2, 2004, the Office hearing representative affirmed the November 18, 2002 termination.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his federal employment and pays compensation for such disability, the Office may not modify or terminate compensation without establishing that the disability has lessened or ceased or that it is no longer related to the employment.¹ The Office's burden of proof to terminate or modify compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.² Rationalized medical

¹ See *Regina T. Pellicchia*, 53 ECAB 155 (2001); *Jason C. Armstrong*, 40 ECAB 907 (1989).

² See *James M. Frasher*, 53 ECAB 794 (2002).

opinion evidence is medical evidence that includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. Such an 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 between the diagnosed condition and the specific employment factors identified by appellant.³

Following proper termination of compensation benefits, the burden of proof shifts back to the employee to support his claim of employment-related continuing disability with probative medical evidence.⁴

Section 8123 of the Federal Employees' Compensation Act⁵ provides that, 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.⁶ In situations where 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 and medical background, must be given special weight.⁷ Additional, repetitious, previously considered or unrationalized reports from appellant's physician are insufficient to overcome the weight accorded to an impartial medical examiner's report where appellant's physician had been on one side of the conflict in medical opinion that the impartial medical examiner resolved.⁸

ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective November 18, 2002. His claim was accepted by the Office for aggravation of a preexisting condition with a herniated disc and lumbar displacement.

Dr. Testa and Dr. Collier both provided opinions indicating that, because appellant remained symptomatic, he continued to require treatment and remained totally disabled. The second opinion physician, Dr. Valentino, found a normal orthopedic examination, and opined that appellant had recovered from his work injury without residuals and had no need for ongoing medical care. He noted that his spinal MRI scan changes were limited to mild age-related degenerative changes with no current objective findings to substantiate his complaints.

³ See *Donna Faye Cardwell*, 41 ECAB 730 (1990); *Lillian Cutler* 28 ECAB 125 (1976).

⁴ *John F. Glynn*, 53 ECAB 562 (2002).

⁵ 5 U.S.C. § 8123.

⁶ See *Marion Thornton*, 46 ECAB 899 (1995).

⁷ See *Lan Thi Do*, 46 ECAB 366 (1994).

⁸ *Harrison Combs, Jr.*, 45 ECAB 716 (1994)

The Office properly found a conflict in medical opinion evidence between Dr. Testa, Dr. Collier and Dr. Valentino and selected a third physician to act as the impartial medical specialist to resolve the conflict. Dr. Meller was appropriately chosen and provided with an accurate factual and medical history, a statement of accepted facts, questions to be addressed and the case record. He examined appellant to determine whether his injury-related disability had ceased by November 18, 2002.

On December 7, 2001 Dr. Meller reviewed appellant's history and records, reported finding on physical examination and opined that originally he may have had disc bulges which might have been accepted for disc herniations. As of the date of examination, appellant had evidence of obesity, deconditioning, passive sedentary lifestyle, self-limitation behavior and significant signs and symptoms of symptom embellishment. Dr. Meller opined that it would be beneficial for appellant to return to the workplace. He opined that his work-related injury was fully resolved and that appellant required no further medical treatment with regard to his work injury. Dr. Meller provided a detailed report based on a complete and accurate factual and medical background and his findings upon examination. Dr. Meller addressed the Office's questions and provided a thorough report of his findings on examination. The Board finds that his report is entitled to the special weight accorded to the report of an impartial medical specialist. It represents the weight of the medical evidence of record on the issue of whether appellant had any disability on or after November 18, 2002 causally related to his May 21, 1998 injury.

As the Office met its burden of proof to terminated compensation benefits, the burden shifted to appellant to establish continuing employment-related disability or residuals. He submitted further reports from Dr. Collier, who found that he was disabled because he had ongoing symptoms. The additional reports from Dr. Collier are insufficient to overcome the weight accorded to an impartial medical examiner's report. The Board notes that Dr. Collier was on one side of the conflict in medical opinion that the impartial medical examiner resolved.⁹ His reports are repetitive of previous findings. No further rationalized medical opinion evidence was presented. Consequently, the weight of the medical opinion evidence of record on the issue of whether appellant had any disability after November 18, 2002 rests with the impartial medical report from Dr. Meller.

The Board finds that appellant has not submitted any substantial probative evidence based upon objective findings to establish that he did have ongoing disability on or after November 18, 2002 causally related to his May 21, 1998 employment injury. He has, therefore, failed to meet his burden of proof.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation entitlement on the grounds that his May 21, 1998 employment injuries had ceased by November 18, 2002

⁹ The Board has held that additional reports of an attending physician who was on one side of a conflict in medical opinion, are generally insufficient to overcome the weight accorded an impartial medical specialist when the reports are similar to those already of record. See *William Morris*, 52 ECAB 400 (2001); *Dorothy Sidwell*, 41 ECAB 857 (1990).

without residuals. The Board also finds that he failed to provide sufficient evidence to establish that he had ongoing disability causally related to the May 21, 1998 incident.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 2, 2004 is affirmed.

Issued: June 17, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member