

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

LOUISE C. HILTON, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Shepherdstown, WV, Employer**

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**Docket No. 04-2203
Issued: September 19, 2005**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge

JURISDICTION

On September 9, 2004 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated September 23, 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 met her burden of proof to establish continuing disability after August 20, 2002.

FACTUAL HISTORY

On October 6, 1998 appellant, a 42-year-old clerk, injured her lower back while pushing a cart of mail. She filed a claim for benefits on October 8, 1998 which the Office accepted for lumbosacral strain. The Office commenced payment for temporary total disability compensation. Appellant returned to light duty for four hours per day on December 8, 1998. She attempted to increase her hours to six per day but this aggravated her pain. Therefore, she

returned to working four hours per day. The Office continued to pay appropriate compensation benefits.

In a report dated October 28, 1999, Dr. Frank G. Nisenfeld, a Board-certified orthopedic surgeon, stated:

“After examining [appellant] and reviewing the medical records, I came to the following conclusions.... The diagnosis of lumbar strain has been established by the history, the records and the examination. The diagnosed condition is connected to the work injury by direct cause and it is connected to her factors of employment. She does have residual symptoms. There is no evidence of a nonindustrial or preexisting disability. The prognosis is good. There are no recommendations for additional treatment. A functional capacity evaluation is required to accurately determine her physical limitations and to accurately and properly complete the OWCP-5 form. A determination by increasing her hours and allowing her to return to her preinjury job would be made based on the findings of a valid functional capacity evaluation.”

In a report dated August 30, 2000, Dr. Neil J. Barkin, a Board-certified orthopedic surgeon, stated that his diagnosis of low back pain was 100 percent causally related to the October 1998 employment injury. He advised that he anticipated that there would be complete resolution of appellant’s symptoms, but that it was not clear why her symptoms had not fully resolved by that time. Dr. Barkin noted a considerable disparity between objective findings and subjective complaints. He found no specific orthopedic etiology for her ongoing symptom complex. In a work capacity evaluation dated August 30, 2000, Dr. Barkin stated that there was no apparent medical reason why appellant could not work an eight-hour day.

In a report dated January 26, 2001, Dr. Mark J. Yacyk, Board-certified in physical medicine and rehabilitation and the attending physician, stated that appellant’s work-related back injury of October 6, 1998 had left her with chronic low back pain. He stated that appellant’s work duties had to be modified in order for her to continue employment with the employing establishment. Dr. Yacyk also indicated that appellant developed a plantar fasciitis condition in her right foot due to the abnormal gait and/or postural alteration caused by her back pain.¹

In a September 26, 2001 report, Dr. Yacyk stated that he had reviewed Dr. Barkin’s report and indicated that he disagreed with his statement in the August 30, 2000 work capacity evaluation that there was no apparent reason why appellant could not work an eight-hour day. He stated that appellant had made several attempts to increase the amount of hours she worked with the employing establishment, but that all of them had been unsuccessful due to an attendant increase in her low back symptoms. Dr. Yacyk advised that pain is primarily a subjective complaint without reliable objective measures and that, therefore, a physician must rely on the patient’s report to formulate an opinion regarding work capacity. He stated that unless there was evidence to the contrary, work restrictions in a case like this would be based on the perceived limitations of the patient by the evaluator, taking into consideration the clinical history, physical

¹ The Board notes that appellant’s claim for a foot condition, plantar fasciitis, with the alleged injury date of April 19, 2000, was denied under a different claim (A03-0256317) and is not subject of this appeal.

evaluation and diagnostic studies. Dr. Yacyk indicated that he would work with appellant in order to construct a set of physical limitations that were realistic and truly reflected what her pain threshold would allow her to do.

In a work capacity evaluation dated November 27, 2001, Dr. Yacyk indicated that appellant was unable to work an eight-hour day because it aggravated her condition. He reiterated his opinion that appellant could only work 4 hours per day with restrictions on sitting intermittent, standing 10 minutes and walking, reaching, reaching above the shoulder, twisting, operating a motor vehicle, repetitive movements, pushing, pulling, lifting no more than 5 to 10 pounds, squatting and kneeling for no more than 1 hour.

In order to determine appellant's current condition and determine whether she still suffered residuals from her October 6, 1998 employment injury, the Office scheduled a second opinion medical examination with Dr. Robert F. Draper, a Board-certified orthopedic surgeon.

In a report dated May 9, 2002, Dr. Draper reviewed appellant's medical records and a statement of accepted facts, indicated findings on examination and opined that appellant was capable of performing regular duty work for 40 hours per week, with limitations on lifting no more than 50 pounds. He stated that appellant complained of low back pain but advised that he was unable to detect any physical findings to substantiate the continuance of residuals from the work injury. Dr. Draper noted that appellant did have an additional problem, degenerative lumbar disc disease and bulging disc, but advised that this was unrelated to the accepted low back condition. He found no objective findings to substantiate appellant's disability.

In a notice of proposed termination dated July 12, 2002, the Office, based on Dr. Draper's opinion, found that the weight of the medical evidence demonstrated appellant no longer had any residuals from the October 6, 1998 employment injury. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In a July 22, 2002 report, received by the Office on August 12, 2002, Dr. Yacyk stated his disagreement with Dr. Draper's opinion that appellant could return to working 40 hours per week because there were no objective findings to support his subjective complaints. He indicated that pain was a very subjective condition about which it was very difficult to render a truly objective opinion; he stated that there were many individuals suffering from chronic back pain without a substantial pathologic process identifiable on imaging studies or physical examination. Dr. Yacyk asserted that appellant had been very consistent with her complaints and activity tolerance and had repeatedly attempted to increase her work hours without success due to her subjective complaints of pain. He stated:

“Unless there is specific evidence that [appellant] would be tolerant of a normal work schedule in terms of hours and physical activity with a peripheral restrictions of lifting no more than 50 pounds, I would recommend maintaining her present restrictions.”

By decision dated August 20, 2002, the Office terminated appellant's compensation benefits, finding that Dr. Draper's opinion that appellant could work an eight-hour day represented the weight of the medical evidence.

By letter dated September 16, 2002, appellant's attorney requested an oral hearing, which was held on April 30, 2003. Appellant submitted a report dated September 19, 2002 from Dr. Yacyk, who reiterated his disagreement with Dr. Draper's opinion that appellant could work an eight-hour day because the objective findings did not support his subjective complaints. Dr. Yacyk also reiterated his opinion that appellant's complaints of pain were legitimate and that her pain was responsible for her being unable to work eight hours per day. He stated that there was no evidence that appellant was a malingerer or suffered from a fictitious disorder.

In a report dated September 9, 2002, Dr. Michael April, Board-certified in physical medicine, stated that he agreed with Dr. Yacyk's opinion that appellant could work no more than 20 hours per week and was not capable of working a 40-hour week.

By decision dated September 23, 2003, an Office hearing representative affirmed the August 20, 2002 Office decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened to order to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁴

ANALYSIS -- ISSUE 1

In the present case, the Board finds that the opinion of the second opinion physician, Dr. Draper, constitutes the weight of the medical evidence and establishes that the accepted condition of low back strain ceased by August 20, 2002.

The Board notes initially that as early as August 30, 2002 Dr. Barkin reported that there was a great disparity between appellant's objective findings and her subjective complaints. He noted that there was no specific orthopedic etiology that could explain appellant's current complaints and he concluded that there was no medical reason why appellant could not work an eight-hour day.

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

⁴ *See Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazell*, 38 ECAB 299 (1986).

Thereafter Dr. Draper stated that appellant was capable of performing regular-duty work for 40 hours per week, with limitations on lifting no more than 50 pounds. He advised that although appellant complained of low back pain he was unable to detect any objective physical findings to substantiate appellant having residuals from the 1998 work injury. Dr. Draper noted that appellant did have an additional problem, degenerative lumbar disc disease and bulging disc, but advised that this was unrelated to the accepted low back condition. The Board finds that Dr. Draper's report was based upon a proper factual background and a thorough medical examination. Dr. Draper's report provided the proper medical rationale for his opinion that the residuals of the accepted lumbar strain had ceased as he explained that appellant had no objective findings of this condition. Dr. Draper further explained that appellant's pain was emanating from the degenerative disc disease and bulging disc which were not causally related to the accepted employment injury. The Board concurs with the Office's finding that Dr. Draper's report constitutes the weight of the medical evidence and establishes that appellant no longer has residuals of the accepted employment injury.

While Dr. Yacyk, appellant's treating physician, stated in his September 26, 2001 report that he disagreed with Dr. Barkin's statement that there was no apparent reason why appellant could not work an eight-hour day, the Board finds that his opinion is of diminished probative value. Dr. Yacyk stated that, although there were no objective findings on examination or diagnostic tests, every time appellant had attempted to increase the amount of hours she worked with the employing establishment she had been forced to revert back to a four-hour workday due to increased low back symptoms. Dr. Yacyk advised that, unless there was evidence to the contrary, appellant's work restrictions should be based on the examiner's perceptions of her limitations, which were realistic and accurately reflected what her pain threshold would allow her to do.

Dr. Yacyk subsequently submitted a July 20, 2002 report in which he reiterated his previous opinion that many patients experienced chronic back pain, which caused them to have physical restrictions and had symptoms which were not reflected by imaging studies or on physical examination. Dr. Yacyk asserted that appellant had been very consistent with her complaints and activity tolerance and had repeatedly attempted to increase her work hours without success due to her subjective complaints of pain. He stated that, in the absence of specific evidence that appellant would be tolerant of a full work schedule and physical activity with restrictions of lifting no more than 50 pounds, he would recommend maintaining her present restrictions. Dr. Yacyk's opinion that appellant remains disabled due to pain is based merely upon appellant's own complaints. A claimant however is not allowed to self-certify her own disability.⁵

Dr. Yacyk's reports do not establish that appellant had continuing residuals of the accepted lumbar strain. Dr. Yacyk did not identify any objective findings to support a finding that appellant still had residuals of the accepted lumbar strain condition. He did opine that appellant had continuing pain symptoms; however, he did not specifically identify the source of appellant's chronic pain. Furthermore, he did not explain whether appellant's pain could be caused by the nonwork-related degenerative condition, which was diagnosed by Dr. Draper. The

⁵ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

Board has previously noted that pain in the absence of objective findings is a symptom not a diagnosis and is, therefore, not compensable.⁶ The Board finds that the weight of the medical evidence on August 20, 2002, the date the Office terminated appellant's compensation benefits, established that appellant no longer had residuals of the accepted condition of lumbar strain.

LEGAL PRECEDENT -- ISSUE 2

After termination of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability that continued after the termination of benefits.⁷

ANALYSIS -- ISSUE 2

Following the termination of appellant's compensation benefits on August 20, 2002, appellant submitted an additional report from Dr. Yacyk in which he reiterated his earlier conclusions. Dr. Yacyk, however, did not provide a diagnosis of appellant's current condition based upon objective medical evidence. His continued description of appellant's pain complaints does not provide a basis for payment of compensation benefits. Appellant also submitted a new report from Dr. April dated September 9, 2002. In this report, Dr. April opined that he agreed with the work restrictions Dr. Yacyk provided for appellant. Dr. April did not provide a current diagnosis of appellant's condition and he did not provide any medical rationale in support of an opinion that appellant was disabled due to the accepted employment injury. Without a diagnosis of appellant's condition and a rationalized opinion regarding causal relationship, Dr. April's opinion regarding appellant's ability to work is of limited probative value.

CONCLUSION

Under the circumstances described above, the Board finds that the Office has met its burden of proof to terminate appellant's compensation benefits and appellant has not established any entitlement to continuing benefits.

⁶ See *Ruthe Seuell*, 48 ECAB 188 (1996).

⁷ *Howard Y. Miyashiro*, 51 ECAB 253 (1999).

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board