

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

MARY E. JONES, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Orlando, FL, Employer**

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**Docket No. 05-1013
Issued: September 21, 2005**

Appearances:
Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 28, 2005 appellant, through her attorney, filed a timely appeal of the Office of Workers' Compensation Programs' merit decisions dated April 7, 2004 and February 11, 2005, which terminated her compensation benefits effective April 7, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective April 7, 2004.

FACTUAL HISTORY

This case has previously been before the Board on appeal. In its August 12, 2002 decision,¹ the Board found that the Office had not met its burden of proof to terminate appellant's compensation benefits based on her accepted conditions of low back sprain and

¹ Docket No. 01-1753 (issued August 12, 2002).

chronic bulging disc at L4-5² on July 26, 2000 due to an unresolved conflict of medical opinion evidence between appellant's attending physicians, Dr. Charles J. Crosby, an osteopath and Dr. James K. Shea, a physician Board-certified in physical medicine and rehabilitation, and the Office referral physician, Dr. Chris P. Tountas, a Board-certified orthopedic surgeon. The Board reversed the September 1, 2000 and May 22, 2001 decisions of the Office. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

The Office referred appellant and a list of questions³ for an impartial medical examination with Dr. Rory A. Evans, a Board-certified orthopedic surgeon, on March 31, 2003. Dr. Evans provided a brief statement describing appellant's history of injury noting the date of injury, her job title and the duty to sort mail as well as her medical history in his May 12, 2003 report. He noted appellant's description of her employment incident and reported his findings on physical examination including negative straight leg raising to 90 degrees, no paravertebral muscle spasm and a description of diffuse numbness in the left lower extremity in a stocking-type distribution without any specific dermatomal pattern noted and no evidence of any atrophy of any of the muscle groups of either lower extremity. Dr. Evans took x-rays which demonstrated multilevel mild degenerative changes from L3-4 through L5-S1. He diagnosed severe degenerative osteoarthritis of the left hip, mild degenerative osteoarthritis of the right hip, multilevel degenerative disc disease of the lumbar spine and disc protrusion L4-5 by history. Dr. Evans found no definitive evidence of a herniated disc L4-5 on clinical examination or diagnostic study and no evidence of a left lumbar radiculopathy. He noted appellant's conditions of insulin-dependent diabetes mellitus with peripheral neuropathy and left tarsal tunnel syndrome, obesity and hypertension.

Dr. Evans found that appellant's left leg symptoms were due to arthritis which had completely destroyed her left hip joint and left her with no internal or external rotation in the left hip joint resulting in constant pain in the left hip and down the left leg and cramping in the left calf and thigh area. He stated that appellant's severe degenerative osteoarthritis of the left hip was not in any way directly related to her fall of May 4, 1986.

In regard to appellant's accepted employment injuries and continuing disability, Dr. Evans stated: "Based on my evaluation of this patient today, I do not find that her current clinical condition is related to any significant disc pathology at the L4-5 level or to a left lumbar radiculopathy." He recommended a magnetic resonance imaging (MRI) scan to determine if appellant had a herniated disc at L4-5. He concluded that appellant's current complaints of pain in the low back area and the left lower extremity were directly related to her severe degenerative osteoarthritis of the left hip. Dr. Evans stated that appellant's symptoms were not due to any spinal pathology based on the absence of any objective evidence of any neurologic problem in the left lower extremity. He concluded that appellant was totally disabled due to nonemployment-related conditions rather than due to her May 4, 1986 employment injury.

² Appellant was born in 1931 and worked as a letter sorter machine operator.

³ The record does not contain a statement of accepted facts.

In an addendum dated May 27, 2003, Dr. Evans reviewed appellant's May 23, 2003 MRI scan which revealed multilevel disc degeneration from L3-4 through L5-S1, Grade 1 anterolisthesis of the L3 on L4 and L4 on L5, degenerative disc disease with moderate central canal stenosis and a disc herniation at L3-4 with probable impingement upon the exiting left L3 nerve root. He stated that none of his previously expressed opinions were changed by this study and continued to opine that appellant's current symptoms were caused by severe degenerative osteoarthritis of the left hip which was unrelated to her industrial injury of May 4, 1986 and for which she was going to need a total hip arthroplasty on the left side.

The Office requested a supplemental report from Dr. Evans on June 2, 2003 addressing whether appellant's accepted conditions of low back strain and herniated disc at L4-5 had resolved. The Office also asked if appellant had any other contributing factors to her current symptomatology beyond her severe degenerative osteoarthritis of the left hip and whether the accepted work-related conditions of lumbar strain/sprain and herniated disc L4-5 continued to render appellant unable to work.

Dr. Evans responded on June 4, 2003 and opined that appellant's work-related conditions of lumbar strain/sprain had resolved. He further stated that appellant's herniated disc at L4-5 was still present, that this condition would not improve and that it would likely worsen through the natural progression of the degenerative changes. Dr. Evans stated:

“Based on my evaluation of the patient, it is not the accepted work-related conditions of lumbar strain/sprain and [herniated disc] at L4-5 that continue to render [appellant] unable to work. It is the severe degenerative osteoarthritis of the left hip that renders her unable to work.... [T]he degenerative changes in her back contribute about 10 percent to her current condition but these degenerative changes would not prevent her from working full-time normal duties for a patient of her age. It is the severe degenerative osteoarthritis of the left hip that renders her unable to work.”

By decision dated July 7, 2003, the Office terminated appellant's compensation benefits based on Dr. Evans' reports. The Office found that appellant was entitled to continuing medical benefits for her accepted condition of herniated disc L4-5 only.

Appellant, through her attorney, requested an oral hearing on July 15, 2003. In a report dated August 12, 2003, appellant's attending physician Dr. Christopher W. Conaway, a Board-certified family practitioner, stated that appellant's 1986 employment injury resulted in immediate lumbar spine pain with radiculopathy. He stated that the fact that appellant had developed degenerative arthritis of the hip was of no importance in the lumbar spine injury with resulting chronic back pain and sciatica which continued and was a permanent condition.

By decision dated January 20, 2004, the hearing representative set aside the Office's July 7, 2003 decision and remanded for the issuance of a pretermination notice and the required 30 days for a response prior to the issuance of a final decision.

In a letter dated February 19, 2004, the Office proposed to terminate appellant's compensation benefits based on Dr. Evans' reports. The Office allowed appellant 30 days to respond.

In a letter dated March 1, 2004, appellant's attorney argued that Dr. Evans' reports were not sufficiently rationalized to represent the weight of the medical opinion evidence as he failed to address any pain or disability resulting from the accepted disc herniation.

By decision dated April 7, 2004, the Office terminated appellant's wage-loss compensation effective that date based on the reports of Dr. Evans, but found that she was entitled to continuing medical benefits for her accepted herniated disc.

Appellant requested an oral hearing on April 21, 2004. She testified at the oral hearing on November 16, 2004. She stated that she underwent left hip surgery in October 2003 and that this did not relieve her back pain. Following the oral hearing, appellant submitted additional medical evidence. On September 17, 2004 Dr. Colleen M. Zittel, a physician Board-certified in physical medicine and rehabilitation, diagnosed probable mild right L4 radiculopathy. An MRI scan on March 15, 2004 demonstrated Grade 1 anterolisthesis of L3 forward on L4 and L4 forward on L5 as well as annular bulging discs at L3-4 and L4-5 with facet joint arthropathic change and ligmentum flavum hypertory causing moderate spinal stenosis and mild annual bulging discs at L2-3 and L5-S1 without spinal stenosis. In a report dated October 15, 2004, Dr. Gregory Munson, a Board-certified orthopedic surgeon, diagnosed lumbar stenosis and right L4 radiculitis.

By decision dated February 11, 2005, the hearing representative affirmed the Office's April 7, 2004 decision.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁵

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 proper factual and medical background must be given special weight.⁶

ANALYSIS

In its prior decision, the Board found that there was a conflict of medical opinion evidence regarding appellant's continuing employment-related conditions and disability. Based on this decision, the Office referred appellant to Dr. Evans, a Board-certified orthopedic surgeon,

⁴ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

⁵ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁶ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

to resolve the conflict. The record does not contain a copy of the statement of accepted facts provided to Dr. Evans. In his initial report dated May 12, 2003, Dr. Evans merely noted the date and job title of appellant's date-of-injury position without listing the physical requirements of a letter sorter machine clerk. He opined that appellant had no disability due to her accepted employment-related conditions of lumbar sprain/strain and herniated disc at L4-5. He instead attributed her current disability to her severe osteoarthritis of the left hip. In his supplemental report dated June 4, 2003, in response to inquiries from the Office, Dr. Evans noted that appellant's accepted condition of herniated disc at L4-5 was still present. He stated that her back contributed about 10 percent to her current condition but would not prevent her from working full-time normal duties for a patient of her age. Dr. Evans did not expand on what these full-time normal duties were and did not compare his assessment of appellant's work capacity with the duties of her date-of-injury position.

The Board finds that Dr. Evans' reports are of diminished probative value and are insufficient to resolve the existing conflict of medical opinion evidence. The record does not contain the statement of accepted facts provided to Dr. Evans. Although the history which Dr. Evans provided in his report appears relatively consistent with the record, this history is by no means exhaustive and in the absence of the statement of accepted facts, the Board is unable to determine the factual basis for his opinion that appellant was capable of returning to her date-of-injury position without restrictions due to her accepted condition of herniated disc at L4-5.⁷ Consequently, there remains a conflict in the medical evidence and the Office's decisions must be reversed.⁸

CONCLUSION

The Board finds that the Office did not meet its burden as there is no current statement of accepted facts included in the record upon which Dr. Evans could base his opinion that appellant could return to her date-of-injury position. The Office has therefore failed to meet its burden of proof to terminate appellant's compensation benefits.

⁷ Federal (FECA) Procedure Manual, Part 3 -- Claims, *Medical Examinations*, Chapter 3.500.4c(2) (October 1995).

⁸ *Henry J. Smith, Jr.*, 43 ECAB 524, 531 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

ORDER

IT IS HEREBY ORDERED THAT the February 11, 2005 and April 7, 2004 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: September 21, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board