

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

V.B., Appellant)

and)

U.S. POSTAL SERVICE, PROCESSING)
& DISTRIBUTING CENTER, Orlando, FL,)
Employer)

Docket No. 06-622
Issued: August 18, 2006

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

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 24, 2006 appellant, through counsel, filed a timely appeal from the December 30, 2005 merit decision of an Office of Workers' Compensation Programs' hearing representative who found that appellant had no continuing residuals from his accepted November 20, 1996 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this issue.

ISSUE

The issue is whether appellant has established any continuing disability or residuals subsequent to February 23, 2000, the date the Office terminated his compensation benefits.

FACTUAL HISTORY

This is the second appeal in the present case. In an August 22, 2002 decision, the Board affirmed a January 3, 2001 decision of an Office hearing representative who upheld a February 24, 2000 decision terminating appellant's compensation benefits effective

February 23, 2000.¹ However, the Board determined there was a conflict of medical evidence between appellant's treating physician, Dr. Richard C. Smith, a Board-certified orthopedic surgeon, and a second opinion Office referral physician, Dr. Donald E. Pearson, a Board-certified orthopedic surgeon, as to whether he had any continuing disability or residuals due to his accepted November 20, 1996 employment injury. The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.² The Office referred appellant to Dr. Walter I. Choung, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence.

In a report dated October 31, 2002, Dr. Choung reviewed the medical record, statement of accepted facts and provided findings on physical examination of appellant. He diagnosed chronic low back pain, L4-5 herniated nucleus pulposus and lumbar radiculopathy. The physical examination revealed limited lumbar range of motion, 20 degrees flexion/extension, 15 degrees right and left side lateral bending, virtually 0 degrees lateral rotation and "tenderness to palpitation along the paraspinal musculature." An x-ray revealed L4-5 and L5-S1 narrowed disc spaces. Dr. Choung concluded that appellant's lumbosacral strain had resolved as "certainly the passage of six years was sufficient to resolve this condition." He noted that appellant had a history of a herniated disc and degenerative lumbar disc disease prior to his November 20, 1996 employment injury, which temporarily aggravated this condition. As to appellant's preexisting degenerative disc disease and history of disc herniation, Dr. Choung opined that "[t]he natural progression of such disease is progression with persistent pain and limitation in range of motion." He concluded that appellant's low back pain "appears to stem from degenerative joint disease of the lumbar spine."

In a letter dated February 10, 2003, the Office requested Dr. Choung to provide a supplemental report explaining when the temporary aggravation of the degenerative disease had ceased or whether it was permanent and, if so, whether surgical intervention was warranted. The Office requested that he provide rationale to support his conclusion.

Based upon Dr. Choung's report, on February 11, 2004, the Office expanded the acceptance of appellant's claim to include temporary aggravation of degenerative disc disease and temporary aggravation of herniated disc. It noted that Dr. Choung had not responded to a request for clarification so a referral to another impartial medical specialist would be scheduled.

On February 26, 2004 the Office referred appellant to Dr. Emmanuel D. Scarlatos, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence. In a report dated March 22, 2004, Dr. Scarlatos provided a review of the medical evidence and statement of accepted facts. He diagnosed bilateral low back pain syndrome, degenerative disc disease with L4-5 herniated nucleus pulposus and L5-S1 annular tear. A physical examination revealed increased lumbar lordosis, 80 degrees of forward flexion, good extension, no discernable spasm in the paravertebral lumbar musculature and tenderness to palpation along the

¹ On November 20, 1996 appellant, a 57-year-old flat sorting machine city clerk, filed a traumatic injury alleging that he injured his back that day when he tripped and fell while walking down steps at the employing establishment. The Office accepted a lumbosacral strain.

² Docket No. 01-1181 (issued August 22, 2002).

lower lumbar and lumbosacral and both iliolumbar angles. Dr. Scarlatos agreed with Dr. Choung's assessment that appellant was overweight, poorly conditioned, exhibited poor posture and his range of motion was poor. He opined that these conditions would contribute to abnormal stresses in the low back which aggravated appellant's preexisting degenerative disease and his low back pain. Dr. Scarlatos concluded that the November 20, 1996 employment injury was of a soft tissue nature superimposed upon preexisting degenerative arthrosis and disc pathology at L4-5 which produced an aggravation of low back pain but had since resolved. The aggravation was temporary in nature and not a permanent aggravation. Appellant's current symptoms were unrelated to the accepted November 20, 1996 employment injury. Dr. Scarlatos indicated that appellant's preexisting degenerative condition had continued to progress since the 1990s and the November 20, 1996 employment injury had "merely aggravated this pathology." He opined that appellant's current condition was due to his preexisting degenerative arthrosis and L4-5 disc pathology, which was unrelated to his employment injuries. Dr. Scarlatos concluded that the "residual symptomatology is not causally related to the injury of November 20, 1996 but rather to the natural progression of the disease."

On August 24, 2004 the Office issued a notice of proposed termination of benefits.

By decision dated October 6, 2004, the Office terminated appellant's wage-loss and medical benefits effective that date.

On October 20, 2004 appellant requested an oral hearing which was held on October 27, 2005. He submitted a November 9, 2004 deposition of Dr. Smith. Dr. Smith noted that he had reviewed the reports by Dr. Choung and Dr. Scarlatos and expressed disagreement with Dr. Scarlatos' finding a temporary aggravation of appellant's preexisting degenerative condition. He reiterated his opinion that the injury caused an L5-S1 annular tear, which first exhibited on a July 17, 1998 computerized tomography (CT) scan. Dr. Smith concluded that the November 20, 1996 employment injury caused a permanent aggravation of appellant's preexisting degenerative condition as appellant's symptoms never resolved.

By decision dated December 30, 2005, the Office hearing representative found the evidence insufficient to establish that appellant had any continuing disability or residuals subsequent to February 23, 2000. He found the opinion of Dr. Scarlatos, the impartial medical examiner, represented the special weight of the evidence that appellant had no residuals or continuing disability due to his employment injuries.

LEGAL PRECEDENT

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant.³ In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits.

³ See *Joseph A. Brown, Jr.*, 55 ECAB ____ (Docket No. 04-376, issued May 11, 2004); *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's diagnosed condition and the implicated employment factors.⁴ The opinion of the physician must be based on a complete factual and medical background of appellant, 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.⁵

Section 8123(a), in pertinent part, provides: If there is a 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

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report. However, when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.⁷

ANALYSIS

In the prior appeal, the Board determined there was a conflict in the medical opinion evidence between appellant's attending physician, Dr. Smith, and the Office referral physician, Dr. Pearson, regarding whether appellant had any continuing residuals or disability after February 23, 2000 due to his accepted November 20, 1996 employment injury. The Office properly referred appellant to Dr. Choung, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in the medical evidence regarding whether appellant had any continuing residuals or disability on and after February 23, 2000 due to his accepted November 20, 1996 employment injury. Based upon Dr. Choung's October 31, 2002 report, the Office accepted a temporary aggravation of degenerative disc disease and herniated disc. The Office also requested Dr. Choung, in a February 10, 2003 letter, to provide a supplemental report explaining whether the temporary aggravation of appellant's degenerative disc disease and herniated disc had ceased or whether it was permanent and to provide supporting rationale.

⁴ *Juanita Pitts*, 56 ECAB ____ (Docket No. 04-1527, issued October 28, 2004).

⁵ *Bobbie F. Cowart*, 55 ECAB ____ (Docket No. 04-1416, issued September 30, 2004); *Victor J. Woodhams*, 41 ECAB 345 (1989).

⁶ 5 U.S.C. § 8123(a).

⁷ *Nancy Keenan*, 56 ECAB ____ (Docket No. 05-949, issued August 18, 2005); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071 (1979); see also Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(c)(1)-(2) (April 1993).

Dr. Choung did not respond to the Office's request so the Office informed appellant on February 11, 2004 that a referral to another impartial medical examiner would be scheduled.

The Office properly referred appellant to Dr. Scarlatos, a Board-certified orthopedic surgeon, for a second impartial examination. Board case precedent provides that, when the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report. Only when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, should the Office refer the claimant to a second impartial specialist.⁸ As Dr. Choung did not respond to the Office's request for a supplemental report, the referral to Dr. Scarlatos for a second impartial examination was proper.

In a comprehensive report dated March 22, 2004, Dr. Scarlatos noted his review of the medical record, the history of the injury and list of questions. He reported his findings on examination and testing and diagnosed bilateral low back pain syndrome, degenerative disc disease with L4-5 herniated nucleus pulposus and L5-S1 annular tear. A physical examination revealed "increased lumbar lordosis," 80 degrees of forward flexion, good extension, no discernable spasm in the paravertebral lumbar musculature and "remains generally tender to palpation along the lower lumbar and lumbosacral and both iliolumbar angles." Dr. Scarlatos indicated that appellant's preexisting degenerative condition had continued to progress since the 1990s and the November 20, 1996 employment injury merely aggravated this pathology. He also noted that appellant was overweight, with poor conditioning posture and range of motion, which aggravated the preexisting degenerative disease and caused low back pain as these conditions contributed to abnormal stresses in the low back. Dr. Scarlatos noted that the employment-related injury of November 20, 1996 resulted in a soft tissue injury superimposed upon the preexisting degenerative arthrosis and disc pathology at L4-5 and produced a temporary aggravation which has since resolved. He opined that appellant's current condition was due to the natural progression of his underlying preexisting degenerative arthrosis and L4-5 disc pathology and unrelated to the November 20, 1996 employment injury.⁹

The Board finds that the Office properly relied on the report of Dr. Scarlatos in determining that appellant did not have any residuals or disability on or after February 23, 2000 due to his accepted November 20, 1996 employment injury. Dr. Scarlatos' opinion is sufficiently well rationalized and based upon a proper factual background. He examined appellant, reviewed the medical records and explained that appellant sustained a soft tissue injury which temporarily aggravated his preexisting degenerative condition. Appellant's current condition is unrelated to the accepted employment injury and due to the natural progression of the underlying disease process and deconditioning.

⁸ See *id.*; see also *Phillip H. Conte*, 56 ECAB ____ (Docket No. 04-1524, issued December 22, 2004).

⁹ When employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation. When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased. See *James L. Hearn*, 29 ECAB 278 (1978); see also *Raymond W. Behrens*, 50 ECAB 221 (1999).

In situations where there are 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 on a proper factual background, must be given special weight. Accordingly, the Office properly accorded special weight to the impartial medical examiner's findings.

In a November 9, 2004 deposition, Dr. Smith expressed disagreement with Dr. Scarlatos. He opined that the November 20, 1996 employment injury caused a permanent aggravation of appellant's preexisting degenerative condition as well as an annulus tear. The Board notes that the Office never accepted that appellant sustained an annulus tear as a result of his November 20, 1996 employment injury. The deposition did not fully explain why Dr. Smith reached this conclusion and is insufficient to meet appellant's burden of proof. It did not include a rationalized opinion regarding the causal relationship between appellant's current condition and his accepted conditions.¹⁰ Dr. Smith's stated opinion is similar to previous reports that were considered and found to give rise to the conflict in medical opinion. A subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion.¹¹ The Board finds that appellant has not submitted sufficient medical evidence to establish that he is disabled due to the accepted November 20, 1996 employment-related injury.¹²

CONCLUSION

The Board finds that appellant failed to establish that he had any continuing disability after February 23, 2000 due to his accepted November 20, 1996 employment injury.

¹⁰ *Richard A. Neidert*, 57 ECAB ____ (Docket No. 05-1330, issued March 10, 2006); *Alice J. Tysinger*, 51 ECAB 638 (2000) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹¹ *See Kathryn E. Demarsh*, 56 ECAB ____ (Docket No. 05-269, issued August 18, 2005); *William Morris*, 52 ECAB 400 (2001). The Board notes that Dr. Smith's deposition testimony does not contain new findings or rationale upon which a new conflict might be based.

¹² *Leslie C. Moore*, 52 ECAB 132 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 30, 2005 is affirmed.

Issued: August 18, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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