

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

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TERESA THOMPSON, Appellant

and

U.S. POSTAL SERVICE, OMAHA  
PROCESSING & DISTRIBUTION CENTER,  
Omaha, NE, Employer

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**Docket No. 06-273  
Issued: June 12, 2006**

*Appearances:*

*Jeffrey P. Zeelander, 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

**JURISDICTION**

On November 4, 2005 appellant, through her attorney, filed a timely appeal of a November 3, 2005 merit decision of the Office of Workers' Compensation Programs' hearing representative, affirming the termination of her compensation and finding that appellant had not sustained an employment-related back injury. Pursuant to 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 properly terminated appellant's compensation effective October 28, 2004 on the grounds that she no longer had any residuals or disability causally related to her August 15, 2003 employment injury; and (2) whether appellant sustained a consequential back injury causally related to the August 15, 2003 employment injury.

**FACTUAL HISTORY**

On August 15, 2003 appellant, then a 42-year-old clerk/expediter, filed a traumatic injury claim alleging that on that date her back and neck popped and she experienced burning pain in

her neck and lower back which shot into her legs as a result of being grabbed from behind in a bear hug and shaken like a rag doll by a coworker. By letter dated September 25, 2003, the Office accepted her claim for cervical strain. The Office paid appropriate compensation.

On September 9, 2003 appellant accepted the employing establishment's job offer for a modified expeditor position. On September 17, 2003 Dr. Jack K. Lewis, an attending internist, advised her not to return to work until a magnetic resonance imaging (MRI) scan was performed to determine the severity of her injury.<sup>1</sup>

By decision dated September 25, 2003, the Office found that appellant was not entitled to continuation of pay for her absence from work during the period August 15 through 28, 2003. It found that she failed to submit medical evidence establishing that she was totally disabled for work during the claimed period. The Office later denied appellant's claims for wage-loss compensation for the period September 30 through November 7, 2003, in decisions dated November 24 and December 1 and 12, 2003.

On December 15, 2003 the employing establishment offered appellant a modified mail processing clerk position. She did not immediately respond.

In a December 17, 2003 form report, Dr. Consuelo T. Lorenzo, an attending Board-certified physiatrist, diagnosed cervical strain. She indicated that appellant could return to full-time work on December 18, 2003 with certain physical limitations. In a December 17, 2003 narrative report, Dr. Lorenzo reported her findings on physical examination and diagnosed an alleged work-related neck and low back injury sustained on August 15, 2003, cervical strain secondary to this injury, residual neck pain and upper limb radicular type symptoms without objective evidence of radiculopathy, radiologic evidence of degenerative disc disease of the cervical spine and probable lumbar strain with residual low back pain and no objective evidence of radiculopathy.

Appellant accepted the employing establishment's offer for a modified distribution clerk position and returned to work on January 9, 2004.

Appellant submitted Dr. Lorenzo's January 8 and 29 and February 18, 2004 reports, which diagnosed a work-related low back injury sustained on August 15, 2003. In a March 11, 2004 report, Dr. Lorenzo diagnosed an alleged August 15, 2003 work-related low back injury.

On March 31, 2004 appellant requested that the Office expand the acceptance of her claim to include her lower back. She submitted Dr. Lewis' March 31, 2004 report in which he noted that she was initially treated for an August 15, 2003 employment-related neck injury and that due to the severity of this condition, her lower back was not ignored by him and other specialists. Dr. Lewis prescribed medication for appellant's back condition and recommended a MRI scan of the lumbar spine.

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<sup>1</sup> On September 29, 2003 Dr. Timothy E. Moore, a radiologist, performed an MRI scan of appellant's thoracic and cervical spines. He diagnosed paracentral disc protrusion at C5-6 and C6-7, noting that the disc protrusion at C5-6 was larger. Dr. Moore found a normal thoracic spine.

By letter dated March 31, 2004, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Julius Sheppard, a Board-certified orthopedic surgeon, for a second opinion medical examination. In an April 14, 2004 medical report, he provided a history of the August 15, 2003 employment injury and appellant's medical treatment and noted her neck symptom. Dr. Sheppard reported his essentially normal findings on physical examination, noting that appellant's hyperextension tilt and twist were within normal limits in the low back. He opined that she was not capable of returning to full work duties of her date-of-injury distribution clerk position as described in an accompanying statement of accepted facts. Appellant continued to have tightness, guarding, restricted motion and other objective findings associated with pain and stiffness in the neck, which affected her shoulder girdle and upper thoracic spine. Dr. Sheppard noted that an MRI scan was not definitive, but indicated trauma on this portion of the spine and could account for most of the symptoms that appellant experienced, even though they were not severe enough to warrant operative therapy and have failed to respond to date to conservative therapy and medication. He restricted the amount of time she could stand and walk. She was not allowed to drive a car and lift over 40 pounds on a regular basis or more than 30 pounds on a continuous basis. Dr. Sheppard stated that appellant should change positions every hour or two and take regular breaks to relax.

In a work capacity evaluation (Form OWCP-5c) dated April 19, 2004, Dr. Sheppard stated that appellant could not perform her usual job but she could work eight hours a day with restrictions. She could sit for six hours, walk, reach above the shoulder, twist, bend and stoop for two hours and stand for four hours. Further, she could operate a motor vehicle to and from work and move her wrist and elbow repetitively for one hour. Appellant was permitted to push and pull up to 50 pounds for 1 hour and lift up to 40 pounds for 1 hour. Dr. Sheppard stated that the above noted limitations were indefinite.

The Office received Dr. Lorenzo's May 6, 2004 report, which found that appellant could work full-time light to medium-type work. She could occasionally lift up to 35 pounds, frequently lift up to 15 pounds and constantly lift up to 7 pounds. She could also occasionally reach above the shoulder and repetitively move her arm and leg.

By letter dated May 12, 2004, the Office advised appellant that the evidence of record was insufficient to expand the acceptance of her claim to include the lower back. It further advised her that there was a conflict in the medical opinion evidence between Dr. Lorenzo and Dr. Sheppard regarding the extent of her work restrictions and, thus, she would be scheduled for an impartial medical examination.

The Office received Dr. Lorenzo's June 2, 2004 report in which she stated that appellant had continuing complaints of low back pain since her original injury, but indicated that this had not been accepted as a compensable injury.

On August 17, 2004 the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed,<sup>2</sup> to Dr. Mercier for an impartial

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<sup>2</sup> The Office not only requested that Dr. Lonnie R. Mercier, a Board-certified orthopedic surgeon, resolve the conflict regarding appellant's physical limitations, but also to determine whether appellant sustained a consequential injury causally related to the August 15, 2003 employment injury.

medical examination. In a September 3, 2004 report, Dr. Mercier provided a history of appellant's August 15, 2003 employment injury and medical treatment. On physical examination, he reported loss of range of motion of the cervical spine and low back with some minor subjective tenderness to palpitation. He further reported a normal neurological examination of the cervical spine and lower extremities. Dr. Mercier opined that appellant apparently sustained a cervical strain as a result of the August 15, 2003 employment injury but contrary to her contention that she sustained a back injury, he found very little evidence in the record or in her own history and clinical findings to suggest that any injury occurred in the low back area. He stated that the only reasonable diagnosis for the August 15, 2003 injury was cervical strain and that back injury was not related to the accepted employment injury. Dr. Mercier noted that appellant continued to have considerable subjective complaints but they were not supported in her history. Appellant's previous limitations were based on pain and essentially were self-imposed by her. Dr. Mercier opined that appellant was capable of performing the duties of a distribution clerk as there was no objective physical evidence to support a need for restrictions. There were no abnormal significant findings in this case. In an accompanying Form OWCP-5c dated September 3, 2004, Dr. Mercier stated that appellant could return to her usual job.

By letter dated September 15, 2004, the Office asked Dr. Mercier why he did not perform a functional capacity evaluation. In a September 15, 2004 letter, he responded that the evaluation was not required and it would not have been helpful in this case.

By letter dated September 24, 2004, the Office issued a notice of proposed termination of compensation based on Dr. Mercier's September 3, 2004 medical report. The Office provided appellant 30 days to respond. She did not respond within the allotted time period.

By decision dated October 28, 2004, the Office terminated appellant's compensation effective that date. It found the evidence of record insufficient to establish that she had any continuing residuals or total disability causally related to the August 15, 2003 employment injury. The Office accorded special weight to the September 3, 2004 report of the impartial medical specialist Dr. Mercier.

On November 5, 2004 the Office reissued the October 28, 2004 decision to reflect the correction of an error.<sup>3</sup> By letter dated November 11, 2004, appellant, through her attorney, requested an oral hearing before an Office hearing representative. In a September 9, 2005 letter, counsel requested that the Office proceed with a review of the written record. He argued that the Office improperly issued a decision finding that appellant did not have any restrictions based on Dr. Mercier's report. Counsel contended that his report "went outside" the conflict between Dr. Lorenzo and Dr. Sheppard and, thus, it could not be considered a referee opinion and only formed a further conflict of opinion that must be resolved. He further contended that Dr. Mercier and the Office improperly perpetuated a misdiagnosis of the claim as Dr. Lorenzo diagnosed an August 15, 2003 work-related cervical strain, chronic neck pain secondary to this injury and radiologic evidence of multi-level cervical degenerative disc disease and Dr. Sheppard confirmed the ongoing nature of the employment-related cervical strain, which he found resisted treatment

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<sup>3</sup> The Board notes that the November 5, 2004 decision appears to be the same as the October 28, 2004 decision.

and required permanent restrictions. In another letter dated September 9, 2005, counsel requested that the Office address appellant's contention that she sustained a back injury causally related to the August 15, 2003 employment injury.

In a November 3, 2005 decision, an Office hearing representative affirmed the November 5, 2004 termination decision. The hearing representative found that appellant no longer had any residuals or total disability due to her August 15, 2003 employment injury based on Dr. Mercier's September 3, 2004 impartial medical report. She also found the evidence of record insufficient to establish that appellant sustained a back injury causally related to the accepted employment injury.

#### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>4</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup> Furthermore, 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.<sup>6</sup>

#### **ANALYSIS -- ISSUE 1**

The Board finds that the Office properly found that a conflict in the medical opinion evidence was created between Dr. Lorenzo, an attending physician and Dr. Sheppard, an Office referral physician, as to the extent of appellant's work restrictions. Dr. Lorenzo opined that appellant could work full-time light to medium type work, which involved occasional lifting up to 35 pounds, frequent lifting up to 15 pounds and constant lifting up to 7 pounds. She could also occasionally reach above the shoulder and repetitively move her arm and leg. Dr. Sheppard opined that appellant could perform full-time work with restrictions that included sitting for 6 hours, walking, reaching above the shoulder, twisting, bending and stooping for 2 hours, standing for 4 hours and operating a motor vehicle to and from work, moving her wrist and elbow repetitively, pushing and pulling up to 50 pounds and lifting up to 40 pounds for 1 hour.

The Office referred appellant to Dr. Mercier, selected as the impartial medical specialist. He conducted a thorough medical examination and found no objective findings of the accepted employment-related cervical strain. He pointed out that although appellant continued to experience subjective complaints about the cervical area, they were not substantiated by her

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<sup>4</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>5</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001).

history. He also noted that the neurological examination was normal, that there were no abnormal findings and that there was no objective evidence to support restrictions. After reviewing a description of the distribution clerk position, Dr. Mercier opined that appellant was capable of performing the duties of this position as there were no objective findings to support a need for restrictions.

The Board finds that Dr. Mercier's opinion is entitled to special weight accorded an impartial medical specialist in finding that appellant no longer has any residuals or disability due to her August 15, 2003 employment injury as it is sufficiently rationalized and based on a proper factual and medical background.

### **LEGAL PRECEDENT -- ISSUE 2**

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.<sup>7</sup>

Appellant bears the burden to establish her claim for a consequential injury.<sup>8</sup> As part of this burden, she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.<sup>9</sup> Rationalized medical evidence is evidence from a physician, which relates a work incident or factors of employment to a claimant's condition, with stated reasons.<sup>10</sup> The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.<sup>11</sup>

### **ANALYSIS -- ISSUE 2**

The Office accepted that appellant sustained a cervical strain as a result of the employment-related August 15, 2003 injury. She contends that she sustained a consequential back injury due to the accepted employment injury. Dr. Lorenzo found that appellant sustained a low back injury on August 15, 2003. However, she failed to provide any medical rationale explaining how or why appellant's back injury was caused by the accepted employment injury. Dr. Lorenzo's opinion is not sufficient to establish appellant's claim. The Board notes that Dr. Lorenzo, in a June 2, 2004 report, noted that appellant had continuing complaints of low back pain since her original injury, but stated that this condition had not been accepted as a compensable injury by the Office.

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<sup>7</sup> *Albert F. Ranieri*, 55 ECAB \_\_ (Docket No. 04-22, issued July 6, 2004).

<sup>8</sup> See *Charles W. Downey*, 54 ECAB 421 (2003).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Gary L. Fowler*, 45 ECAB 365 (1994).

Dr. Lewis noted that appellant was treated for her August 15, 2003 employment-related neck injury, but her lower back symptoms had been disregarded due to the severity of her cervical injury. However, he failed to address whether the diagnosed condition was causally related to the accepted employment injury.

Dr. Sheppard provided an accurate factual and medical background. He conducted a thorough medical examination, which revealed essentially normal findings specifically, that appellant's hyperextension tilt and twist were within normal limits in the low back. Dr. Mercier also provided an accurate factual and medical background and noted appellant's subjective complaints regarding her back. However, he reported essentially normal findings on physical examination and opined that there were no objective findings establishing that appellant sustained a back condition causally related to the accepted employment injury as there were no clinical findings to suggest injury to the back area. Her subjective complaints were not supported in her history. The Board finds that the opinions of Dr. Sheppard and Dr. Mercier constitute the weight of the medical opinion evidence.<sup>12</sup> They support that appellant did not sustain a consequential back injury due to the August 15, 2003 employment injury as they are sufficiently rationalized and based on a proper factual and medical background.

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation effective October 28, 2004 on the grounds that she no longer and any residuals or disability causally related to her August 15, 2003 employment injury. The Board further finds that appellant has failed to establish that she sustained a consequential back injury causally related to the August 15, 2003 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the November 3, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 12, 2006  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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<sup>12</sup> The Board notes that Dr. Mercier functions as a second opinion physician with regard to the issue of whether appellant sustained a consequential back injury as a result of the August 15, 2003 employment injury as there was no conflict in the medical opinion evidence regarding this issue.