

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

O.B., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SUPPLY CENTER, Oakland, CA, Employer**

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**Docket No. 06-2098
Issued: April 5, 2007**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 13, 2006 appellant filed a timely appeal¹ from the July 14, 2006 decision of the Office of Workers' Compensation Programs affirming its November 16, 2005 termination of her wage-loss compensation and medical benefits. 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 for wage-loss and medical benefits effective November 16, 2005.

¹ Appellant submitted new factual evidence along with her notice of appeal. As these documents were not a part of the record at the time the Office made its final decision, the Board is precluded from reviewing this evidence. 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On October 19, 1984 appellant, then 37-year-old warehouse worker, filed a traumatic injury claim, Form CA-1, alleging that she injured her upper and lower back when moving heavy boxes on October 17, 1984. The Office accepted the conditions of lumbar strain, cervical strain and shoulder strain.² Appellant was off of work from October 17, 1984 to May 15, 1985, when she was released to work four hours per day. She stopped working in October 1990 and has not returned. Appellant received compensation for total disability.

On December 16, 2004 the Office referred appellant to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon, for an assessment of her work-related condition. In the statement of accepted facts provided to Dr. Swartz, the Office listed appellant's history of employment injuries, which included strains of the cervical spine, the lumbar spine, the shoulder and the left ankle and recurrent low back pain. The Office also noted that appellant had the nonwork-related condition of morbid obesity.

On January 3, 2005 Dr. Swartz examined appellant, reviewed her medical records and found that she did not continue to suffer from her work-related injuries. He stated that the medical record indicated that she had recovered from her injury of October 17, 1984 by the time she was examined by Dr. Kenneth M. Caldwell, a Board-certified orthopedic surgeon, on June 13, 1985. Dr. Swartz attributed appellant's current disabled status to morbid obesity and chronic depression.

By letter dated January 18, 2005, the Office notified appellant of the proposed termination of her wage-loss compensation and medical benefits. It informed her that the medical evidence submitted by Dr. Swartz established that she had no remaining residuals from her employment injuries.

On February 2, 2005 appellant submitted a letter requesting examination by an impartial medical specialist, as Dr. Swartz's opinion conflicted with that of her treating physician, Dr. Fred Blackwell, a Board-certified orthopedic surgeon, who submitted a report, dated February 4, 2005, in which he disagreed with the opinion reached by Dr. Swartz. Dr. Blackwell found, based on his examinations, that appellant had a diminished range of motion in her neck and back. However, he also noted that, because of her obesity, it was difficult to conduct examinations and that it was "virtually impossible to determine that she has an orthopedic impediment from a physical examination." Dr. Blackwell stated that he relied "primarily on her subjective complaints to make an assessment regarding the reasonableness of an orthopedic impediment." He concluded that appellant's obesity contributed to her disability, but that her employment injuries played a direct role in her disability and impairment.

In a progress report based on a January 31, 2005 examination, Dr. Blackwell diagnosed appellant with musculoligamentous strain and sprain of cervical and thoracolumbar spine and severe obesity. He noted that she had diminished range of motion in forward flexion, lateral

² The Board notes that appellant had four other accepted claims between 1982 and 1989: File No. 130679943, cervical and lumbar strain; File No. 130697316, lumbar strain; File No. 130698475, lumbar strain; and File No. 130894732, left ankle and shoulder strains and aggravation of cervical and lumbar strains.

bend and extension and poor overall mobility. Dr. Blackwell stated that the prolonged and sustained problem with her lower back would not change unless she lost up to 200 pounds.

The Office found that there was a conflict of medical evidence between the medical opinions of Drs. Swartz and Blackwell. On June 3, 2005 it referred appellant for an examination by an impartial medical specialist to resolve the conflict. Dr. Arthur Auerbach, a Board-certified orthopedic surgeon, examined her on June 29, 2005. On palpitation, Dr. Auerbach noted diffuse tenderness in appellant's posterior neck muscles, left trapezius, vertebral border muscles of the left shoulder blade and anterior left shoulder. He also found deep tenderness in the anterior right shoulder. Dr. Auerbach found that she resisted motion in both shoulders above the level of the shoulder in all directions because of pain at the base of the neck and into the trapezius. He found that appellant felt pain in her lower back and left hip, leg and buttock when lying supine or raising her leg while sitting. Dr. Auerbach noted, "a degree of tenderness in the left low back laterally deep to palpitation."

Dr. Auerbach obtained x-rays of appellant's left shoulder, cervical and lumbar spine. His review of the x-rays showed small scattered marginal spurs on the anterior face of the lumbar spine, small spurs on the acromioclavicular joint and mild C5-6 disc narrowing with a prominent ventral spur on the cervical spine.

In addition to a review of her current physical condition, Dr. Auerbach conducted a review of appellant's medical history. He noted a history of chronic strain and degenerative disc disease. In 1985 an x-ray showed degenerative facet joint changes. In 1986 appellant was diagnosed with chronic lumbar strain syndrome. In 1989 she underwent magnetic resonance imaging scans that demonstrated that her condition was not caused by lumbar radiculopathy. In 1991 Dr. Arthur Waltz found that appellant's symptoms were likely due to degenerative changes caused by her age and weight superimposed by chronic muscle tension.

In a report signed September 7, 2005, Dr. Auerbach opined that appellant's current neck, shoulder and low back problems were not related to her employment injuries, from which she had long since recovered. He stated that these conditions had stabilized and reached maximum medical improvement by October 1990. Dr. Auerbach diagnosed chronic cervical strain superimposed on mild degenerative disc disease at C5-6, chronic low back strain and mild degenerative disease of the facets, chronic shoulder strain and morbid obesity. He opined that appellant's current condition was related to her morbid obesity and musculoskeletal deconditioning. Dr. Auerbach found that she would be employable at her usual job if not for her nonemployment-related obesity. He completed a work capacity evaluation form and indicated that she was under permanent restrictions of sitting, walking, standing, reaching above the shoulder and bending not more than eight hours per day. Appellant was also limited to eight hours of pushing, pulling and lifting of two and a half pounds. She was prohibited from kneeling, climbing and squatting.

On September 19, 2005 Dr. Blackwell submitted a progress report indicating that appellant's physical condition remained the same.

By letter dated September 23, 2005, the Office informed appellant of its proposed termination of her compensation and medical benefits. Finding that Dr. Auerbach had resolved

the conflict created by Drs. Blackwell and Swartz with a well-rationalized opinion, the Office found that his report represented the weight of the medical evidence. The Office noted that Dr. Auerbach relied on objective evidence, including new diagnostic tests, in forming his opinion.

On October 21, 2005 appellant challenged the proposed termination on the grounds that the Office did not take her nonemployment-related conditions into consideration for reemployment purposes. She also argued that, contrary to Dr. Auerbach's assertions, she could not perform her usual job even absent her obesity because of her lifting limitations. Appellant claimed that her obesity was related to her employment injuries because the pain medication prescribed for her employment injuries was the cause of the hypothyroidism that caused her to gain weight.

By decision dated November 16, 2005, the Office terminated appellant's wage-loss compensation and medical benefits. It noted that her arguments about reemployment did not apply to the termination process, and that she was not entitled to reemployment assistance because the Office had found no residuals of her accepted employment injury. The Office also noted that the progress report from Dr. Blackwell did not alter the weight of the medical evidence, which rested with Dr. Auerbach's opinion.

On December 13, 2005 appellant requested an oral hearing which was held on April 26, 2006. She introduced no new medical evidence but expressed disagreement with Dr. Auerbach's report.

In a July 14, 2006 decision, the Office hearing representative affirmed the November 16, 2005 termination of wage-loss compensation and medical benefits. She found that Dr. Auerbach's opinion contained a rationalized discussion that ruled out continuing disability due to employment injuries and was well supported by the evidence of record. The Office hearing representative stated that, for these reasons, the Office properly accorded Dr. Auerbach's opinion special weight.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.⁴ The right to medical benefits is not limited to the period of entitlement to disability. 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.⁵

The Federal Employees' Compensation Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the

³ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁵ *Frederick Justiniano*, 45 ECAB 491 (1994).

employee, the Secretary will appoint a third physician to make an examination.⁶ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination and the Office is required to select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁷ 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.⁸

ANALYSIS

As a result of appellant's October 17, 1984 employment injury, the Office accepted the soft tissue conditions of lumbar strain, cervical strain and left shoulder strain. Appellant stopped working in October 1990. The Office determined that a conflict in medical opinion existed between Dr. Blackwell, appellant's physician, and Dr. Swartz, an Office referral physician, as to whether she continued to be disabled or experience residuals from her accepted employment injury. The Board finds that the Office properly referred appellant to Dr. Auerbach, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in opinion.

When a specialist is selected by the Office to resolve a conflict of medical opinion, the specialist's opinion is entitled to special weight if it is sufficiently well rationalized and based on a proper factual and medical history. The Board finds that the opinion of Dr. Auerbach is based on a complete factual and medical history and is sufficiently rationalized, thereby, affording it the special weight of an impartial medical specialist.

In Dr. Auerbach's physical examination of appellant, he found several subjective complaints of pain in the back, neck and shoulders. He also found objective evidence of obesity and limits to sitting and lying leg movements. Dr. Auerbach ordered and reviewed new x-rays of her spine and shoulders, which showed minor spurring on the lumbar spine and acromioclavicular joint and a ventral spur on the cervical spine. In his thorough evaluation of appellant's medical history, he found evidence of chronic strain and degenerative disc disease that were related to her age and weight. Dr. Auerbach diagnosed chronic cervical strain superimposed on mild degenerative disc disease at C5-6, chronic strain and mild degenerative disease of the facets in the low back, chronic shoulder strain and morbid obesity. He determined that these back and shoulder conditions had stabilized and reached maximum medical improvement by October 1990. Dr. Auerbach found that appellant's current condition was unrelated to her soft-tissue employment injuries, which had long since resolved. He opined that they were instead related to her morbid obesity and the attendant musculoskeletal deconditioning. Dr. Auerbach concluded that because appellant had long since recovered from

⁶ 5 U.S.C. §§ 8101-8193, 8123(a).

⁷ 20 C.F.R. § 10.321.

⁸ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

the specific injury of October 17, 1984 appellant had no disabling residuals from the strains to her cervical spine, lumbar spine and left shoulder.

The Board finds that the Office properly relied on the opinion of the impartial medical specialist, Dr. Auerbach, in determining that appellant's disability was no longer related to her employment injury and that she had no residuals of her employment injury. Thus, his report is entitled to the special weight afforded that of an impartial medical specialist. The Office, therefore, met its burden of proof to terminate appellant's compensation benefits for lost wages and medical benefits.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation for wage-loss and medical benefits effective November 16, 2005.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 14, 2006 is affirmed.

Issued: April 5, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board