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

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| **H.W., Appellant** | ) | |
| **and** | ) | **Docket No. 07-257** |
| | ) | **Issued: August 7, 2007** |
| **U.S. POSTAL SERVICE, POST OFFICE, Pittsburgh, PA, Employer** | ) | |

*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
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On November 6, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated October 17, 2006 which affirmed the Office's March 24, 2006 decision that terminated her compensation. 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 on appeal are: (1) whether the Office properly terminated appellant's compensation benefits effective April 16, 2006; and (2) whether appellant met her burden to establish that she had any disability after April 16, 2006 causally related to the October 22, 2003 employment injury.

### *FACTUAL HISTORY*

On October 23, 2003 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim alleging that, on October 22, 2003, she sustained injuries to her back, neck and elbow when she was rear-ended in her postal vehicle while delivering mail. She stopped work on

October 22, 2003. The Office accepted appellant's claim for lumbar sprain, lumbar subluxation, thoracic sprain and cervical sprain. Appellant received compensation benefits.[1]

Appellant treated with Dr. Jeffrey Langbein, a Board-certified family practitioner and osteopath, who submitted periodic reports in which he opined that appellant was unable to work due to her employment-related condition. He noted that appellant had preexisting lumbar S1 radiculopathy and a history of low back pain. Dr. Langbein prescribed treatment which included chiropractic treatment. In a March 26, 2004 report, Dr. John J. Mahoney, a Board-certified anesthesiologist and an osteopath, noted appellant's history of injury and treatment and conducted a physical examination. He opined that appellant's "problem was primarily degenerative disc disease with a lumbar radiculitis." Dr. Mahoney recommended a lumbar epidural series.

Appellant returned to work on September 20, 2004 and was taken off work by her physician, Dr. Langbein, on September 27, 2004. The Office continued to develop the claim and on February 3, 2005 referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination.

In a February 22, 2005 report, Dr. Smith described appellant's history of injury and treatment. He noted that October 25, 2003 x-rays of appellant's spine revealed a normal cervical spine without any evidence of fracture, dislocation, subluxation, malalignment, facet joint abnormality or soft tissue swelling. Dr. Smith opined that a significant injury to the spine would result in "some deep soft tissue swelling." He noted that, because these findings were not present, it was unlikely that appellant had any significant neck injury. Thoracic spine x-rays showed some marginal spurring consistent with mild preexisting arthritis but no evidence of acute fracture, dislocation or subluxation. Dr. Smith noted that the x-rays showed some mild facet joint hypertrophy consistent with degenerative disease at L5-S1 and some mild narrowing of the L5-S1 disc with marginal spurs. He also indicated that a November 28, 2004 magnetic resonance imaging (MRI) scan of the lumbar spine, revealed diffuse degenerative changes particularly at L5-S1 with facet hypertrophy in the lower lumbar spine causing some neural foraminal narrowing on the left but the nerve roots appeared within normal limits with no evidence of focal herniation or arachnoiditis. Dr. Smith also noted that a December 12, 2003 MRI scan of the cervical spine revealed diffuse degenerative changes including disc osteophyte bulges at multiple levels causing some moderate stenosis and mild degenerative disc disease of the neck. He opined that the findings seen on the x-rays and MRI scans were preexisting and unrelated to the work injury of October 22, 2003. Dr. Smith indicated that appellant stopped work on October 22, 2003 and continued to receive chiropractic manipulation and medication, but she began to complain of some discomfort in her stomach and ended up having an endoscopy. He also advised that appellant related that she was not working due to neck and back symptoms. Dr. Smith found that her current complaints of neck and back pain were aggravated with activity and bipolar disease. Examination of the spine and neck revealed no findings of spasm, atrophy, trigger points or deformity. Dr. Smith opined that appellant had a completely normal neurological examination despite some back pain from straight leg raising and no true radicular findings below the knee. He concluded that appellant's lumbar and thoracic strains had

[1] On October 16, 2004 appellant filed a claim for a recurrence of disability on September 25, 2004. The Office accepted the recurrence.

resolved. Dr. Smith noted that examination of appellant's neck showed no evidence of any pathology that would be related to her federal employment. He opined that, if she did have a cervical strain, it had fully resolved. Dr. Smith noted that appellant had preexisting degenerative changes in her neck and lumbar spine which were unrelated to the accepted injury. He also explained that there was no evidence in the record that appellant's preexisting spondylosis was in any way structurally aggravated by the work injury, noting that medical records on the date of injury showed that appellant did not have any tenderness in the neck and there was supple range of motion. Additionally, Dr. Smith noted that, while medical records from the date of injury indicated that appellant's back was subjectively tender, there were no objective findings of any serious injuries such as spasm, bruising, swelling or neurological deficit that would indicate the possibility of an aggravating injury. He opined that, without these findings, it was clear that she had no aggravation of her preexisting arthritis in this incident and questioned why appellant essentially remained off work for more than a year. Dr. Smith advised that appellant reached maximum medical improvement with regard to the accepted injuries of soft tissue strains of the mid and low back. He found no evidence of continuing spinal pathology requiring treatment or activity modification due to the incident of October 22, 2003. Dr. Smith opined that appellant had no residuals of the accepted injury and could return to regular duty.

On January 25, 2006 the Office issued a notice of proposed termination of compensation. It proposed to terminate appellant's compensation on the basis that the weight of the medical evidence, as represented by the report of Dr. Smith, established that the residuals of the work injury had ceased.

The Office received additional reports from Dr. Langbein dated January 24, February 7 and 21 and March 8, 2006 in which he advised that appellant could not work. In a February 16, 2006 report, Dr. Langbein noted appellant's history and opined that her neck and back pain, and her left-sided radiculopathy had been unresponsive to multiple therapeutic interventions. He advised that appellant had bipolar disorder that was difficult to control due to stress from pain and being unable to work to support herself. Dr. Langbein noted that appellant continued to have anxiety and depression and that her emotional state had declined since she had received the notice of termination. He noted that he had not returned appellant to work.

In a February 6, 2006 letter, appellant alleged that she did not have a history of spinal arthritis and that she continued to have residuals of the accepted injury, including depression. She also questioned the report of Dr. Smith. In a February 15, 2006 report, Dr. Stanford Bazilian, a Board-certified psychiatrist, indicated that appellant had been under his care since December 9, 2004. He determined that appellant was bipolar depressed and prescribed medication. In a report dated February 17, 2006, Drs. Michael Gaffin and Patricia Little, chiropractors, stated that appellant had subluxations in her cervical, thoracic and lumbar regions and that chiropractic care decreased appellant's pain. They opined that appellant could not return to her prior job due to the effects of her work injury.

By decision dated March 24, 2006, the Office terminated appellant's benefits effective April 16, 2006.

The Office received reports dated March 22, April 5 and 25, May 8 and 22 and June 6, 2006 in which Dr. Langbein indicated that appellant could not return to work.

On April 5, 2006 appellant's representative requested a hearing. The hearing was scheduled for August 2, 2006. By letter dated July 11, 2006, appellant's representative changed the request for a hearing, to a request for an examination of the written record. Appellant's representative alleged that appellant's physical and emotional condition continued to deteriorate due to the accepted condition. He asserted that the Office's statement of accepted facts did not include appellant's preexisting conditions and that the February 16, 2006 report of Dr. Langbein created a conflict with the second opinion physician. Furthermore, counsel alleged that the Office did not address appellant's consequential emotional condition. Also submitted was a June 26, 2006 MRI scan of the left knee and hip, read by Dr. Peter Glickman, a Board-certified diagnostic radiologist, that revealed impressions that included degenerative disc changes at L5-S1.

By decision dated October 17, 2006, the Office hearing representative affirmed the Office's March 24, 2006 decision.

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

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

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

The Office accepted appellant's October 22, 2003 traumatic injury claim for lumbar sprain, lumbar subluxation, thoracic sprain and cervical sprain. Appellant received appropriate compensation and benefits. She stopped work on the date of the injury and has not returned, with the exception of one week in September 2004. The issue to be determined is whether the Office has met its burden of proof to establish that appellant had no remaining disability or residuals due to her accepted injury.

In a February 22, 2005 report, Dr. Smith, an Office referral physician, opined that appellant had no continuing residuals of her accepted conditions. He explained his opinion by noting that October 25, 2003 x-rays of appellant's spine showed a normal cervical spine, with no soft tissue swelling, and advised that, if appellant had sustained a significant injury to the spine, "some deep soft tissue swelling" would have been evident. Likewise, Dr. Smith noted that thoracic spine x-rays showed some marginal spurring consistent with mild preexisting arthritis, but no evidence of any acute fracture, dislocation or subluxation, while lumbar findings were limited to mild facet joint hypertrophy consistent with degenerative disease at L5-S1 and mild

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[2] *Curtis Hall,* 45 ECAB 316 (1994).

[3] *Jason C. Armstrong,* 40 ECAB 907 (1989).

[4] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

narrowing of the L5-S1 disc with marginal spurs. He reviewed findings from other testing and advised that his own examination findings were essentially normal with no findings of spasm, atrophy, trigger points or deformity. Dr. Smith concluded that appellant's lumbar and thoracic sprains had resolved as she had a completely normal neurological examination despite some back pain from straight leg raising maneuvers and no true radicular findings below the knee. Furthermore, he explained that his examination of appellant's neck showed no evidence of any pathology that would be related to her federal employment. Dr. Smith opined that any cervical strain sustained by appellant would have fully resolved. He opined that appellant's preexisting degenerative changes in her neck and lumbar spine were unrelated to the accepted injury. Dr. Smith noted that there was no evidence that appellant's preexisting spondylosis was in any way structurally aggravated by the work-related accident and explained that on the date of the accident the medical evidence did not reveal any tenderness in the neck, and showed that appellant had a supple range of motion with no objective findings of any serious injuries such as spasm, bruising, swelling or neurological deficit that would indicate the possibility of an aggravating injury. Based on this, he opined that appellant had no aggravation of her preexisting arthritis. Dr. Smith concluded that appellant no longer had residuals of the accepted injury and could return to regular duty.

The Board finds that the Office properly relied on the report of Dr. Smith to terminate benefits, as it was rationalized and based on a thorough medical history and physical examination of appellant.

In contrast, the Board finds that the medical evidence submitted by appellant's treating physicians are of diminished probative value and insufficient to create a conflict in the medical evidence.[5] Dr. Langbein submitted several reports in which he advised that appellant could not work without any explanation as to how and why any disability would be due to the accepted injury. In his February 16, 2006 report, Dr. Langbein referred to appellant's bipolar disorder and stated that it was difficult to control and was due to the stress of her pain since she received her notice of termination and advised that she could not work. However, he did not address how appellant's bipolar disorder was related to her October 22, 2003 employment injury, other than to indicate that it was due to the stress of her pain. Dr. Langbein's opinions are therefore insufficient to establish appellant's continuing disability due to the accepted conditions.

Dr. Bazilian, a Board-certified psychiatrist, noted on February 16, 2006 that appellant was bipolar depressed. However, this was not an accepted condition. Dr. Bazilian's report did not explain whether there was any causal connection between appellant's condition and her accepted employment injury. Additionally, the Office received a February 17, 2006 report from Chiropractors Gaffin and Little. However, section 8101(2) of the Federal Employees' Compensation Act provides that the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.[6] Drs. Gaffin and Little did not

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[5] *John D. Jackson*, 55 ECAB 465 (2004) (a simple disagreement between two physicians does not, of itself, establish a conflict; to constitute a conflict of medical opinion, the opposing physician's reports must be of virtually equal weight and rationale).

[6] 5 U.S.C. § 8101(2).

diagnose a subluxation based on x-rays.[7] While they noted that appellant had subluxations, they did not indicate that they reviewed x-rays. In the absence of a diagnosis of subluxation based on x-rays, Drs. Gaffin and Little are not physicians under the Act.[8]

The Board finds that Dr. Smith's opinion is entitled to the weight of the evidence as his report is well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant's employment-related condition had resolved. Dr. Smith examined appellant, reviewed her medical records and reported accurate medical and employment histories. He indicated that the employment injuries had resolved and that she could return to regular duty. Dr. Smith found no basis on which to attribute any continuing disability to appellant's accepted injuries. An employee who is disabled solely because of a preexisting condition does not qualify for compensation, as the disability is not due to an injury caused by federal employment.[9] Accordingly, the Office met its burden of proof to justify termination of benefits.

On appeal, appellant's representative argued that the report of the second opinion physician, Dr. Smith, was of limited probative value as the statement of accepted facts did not include appellant's preexisting conditions. However, there is no requirement that the statement of accepted facts include all of appellant's preexisting conditions. The Office provides physicians with a statement of accepted facts to assure that the medical specialist's report is based upon a proper factual background.[10] The statement of accepted facts must include the date of injury, claimant's age, the job held on the date of injury, the employer, the mechanism of injury and the claimed or accepted conditions.[11] The Board has held, however, that it is not necessary that the statement of accepted facts provided to the referral physician contain a complete medical history where the claim was accepted, the physician was provided with the relevant medical evidence and was aware of appellant's medical history.[12] The record reflects that Dr. Smith reviewed the complete medical record and was properly aware of appellant's medical history. Appellant also argues that the opinion of Dr. Langbein created a medical conflict precluding the Office from terminating compensation. However, as noted above, Dr. Langbein's opinion was of diminished probative value and the Board has held that a simple disagreement between two physicians does not, of itself, establish a conflict.[13]

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[7] The Office's implementing federal regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See* 20 C.F.R. § 10.5(bb).

[8] *Michelle Salazar*, 54 ECAB 523 (2003).

[9] *See id.*

[10] *Helen Casillas*, 46 ECAB 1044, 1052 n.15 (1995); *see also Henry J. Smith, Jr.*, 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts,* Chapter 2.809.12 (June 1995). *See also Darletha Coleman*, 55 ECAB 143 (2003).

[12] *Darletha Coleman, id.*

[13] *See supra* note 5.

## *LEGAL PRECEDENT -- ISSUE 2*

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant. 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.[14]

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. 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.[15]

## *ANALYSIS -- ISSUE 2*

Subsequent to the Office's March 24, 2006 decision, appellant submitted reports dated March 22, April 5 and 25, May 8 and 22 and June 6, 2006 from Dr. Langbein, her attending physician, who continued to opine that she could not return to work. However, Dr. Langbein essentially reiterated previously stated findings and conclusions regarding appellant's condition. In the absence of any new findings or rationale, the reports from Dr. Langbein were insufficient to overcome the weight accorded to the report of the Dr. Smith, the second opinion physician, or to create a conflict.

Other medical reports submitted by appellant did not address the cause of her condition. Consequently, she has not established that her condition on and after October 22, 2003 was causally related to her accepted employment injury.[16]

## *CONCLUSION*

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective April 16, 2006 and that appellant did not meet her burden of proof to establish that she had any injury-related condition or disability after April 16, 2006 causally related to the October 22, 2003 employment injury.

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[14] *Talmadge Miller,* 47 ECAB 673, 679 (1996); *Wentworth M. Murray,* 7 ECAB 570, 572 (1955).

[15] *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

[16] Regarding a claim for a consequential emotional condition, the Board notes that the Office has not issued a decision on this matter and the issue is not before the Board on the present appeal. The Board notes that, subsequent to the Office's October 17, 2006 decision, appellant's representative submitted additional evidence. The Board has no jurisdiction to review this evidence for the first time on appeal. 20 C.F.R. § 501.2(c); *James C. Campbell,* 5 ECAB 35 (1952).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the October 17, 2006 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 7, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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