

In a May 2, 2005 decision, the Board reversed the August 23, 2004 decision. The Board found that the Office failed to meet its burden of proof in terminating appellant's benefits. The complete facts of this case are set forth in the Board's May 2, 2005 decision and are herein incorporated by reference.¹ Appellant's entitlement to disability compensation was restored.

Appellant submitted an October 13, 2005 report dictated by a physician's assistant and signed by her treating physician, Dr. David A. Esposito, a Board-certified orthopedic surgeon, who related appellant's complaints of persistent, constant pain in her low back. The pain was located in the midline lumbar spine, occasionally extending into the bilateral buttocks and her thighs. Dr. Esposito indicated that appellant remained totally disabled from her previous job as a rural mail carrier, with restrictions of no lifting greater than 10 pounds; no more than 30 minutes of sitting, standing or walking consecutively; no sitting more than 2 hours per day, no standing or walking more than 1 hour per day; bending, twisting, squatting, kneeling, crawling or climbing not exceeding ½ hour per day; and no overhead activity exceeding more than ½ hour per day.

In order to determine whether appellant had any residuals from her work-related concussion condition, the Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Noel Rogers, a Board-certified neurological surgery, for a second opinion examination. In a report dated October 31, 2005, Dr. Rogers stated that appellant's August 1, 2003 lumbosacral strain had resolved. He opined that appellant had little in the way of objective findings, with little or no spasm, normal x-rays and isolated inability to forward flex; appellant's subjective complaints were way out of proportion to the objective findings. Dr. Rogers advised that appellant should be able to perform her date-of-injury job unless it required lifting exceeding 30 pounds. He noted that appellant still had chronic back pain, but advised that this pain did not stem from the work-related injury.

The Office found that there was a conflict in the medical evidence between appellant's treating physician, Dr. Esposito, who opined that appellant remained totally disabled from her previous job as a rural mail carrier, and Dr. Rogers, the second opinion physician, who opined that appellant's accepted lumbosacral strain had resolved and that appellant was able to perform her date-of-injury job unless it required lifting exceeding 30 pounds. The Office referred the case to a referee medical specialist, Dr. Robert M. Moore, a Board-certified orthopedic surgeon. In a report dated December 28, 2005, he stated:

"In my opinion, the lumbosacral strain of August 1, 2003 has resolved. There are no current objective findings, either on physical examination or imaging studies, to support any continuing residuals of that injury. Furthermore, comparison by the radiologist of lumbar magnetic resonance imaging [MRI] scans of November 5, 2003 (postinjury) and May 10, 1996 (preinjury) demonstrate no interval changes. There is also no objective evidence of lumbar radiculitis at this time, nor have any of the lumbar MRI scans shown any evidence of nerve root impingement.

"It is in my opinion medically probable that the lumbosacral strain has resolved. However, the patient does not currently have any symptoms currently that are

¹ Docket No. 05-442 (issued May 2, 2005).

related to her cervical stenosis and spondylosis. I am unable to identify any organic cause for her ongoing complaints of lower back and lower extremity pain. Depression, symptom magnification, secondary gain and self-limiting behavior may be contributing factors. As noted above, there is also evidence that [appellant] had some previous history of low back symptoms prior to the injury of August 1, 2003.”

In a notice of proposed termination dated March 22, 2006, the Office, based on Dr. Moore’s opinion, found that the weight of the medical evidence demonstrated that appellant was no longer disabled due to her August 1, 2003 employment injury. The Office found that Dr. Moore’s opinion was that of an impartial medical examiner sufficient to resolve the conflict in the medical evidence and constituted the weight of the medical evidence. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

By letter dated April 21, 2006, appellant’s attorney stated his opposition to the proposed termination. He related that appellant believed Dr. Moore was biased against her, which cast doubt upon Dr. Moore’s status as an impartial medical examiner. Appellant’s attorney stated that he was submitting a report from Dr. Brian R. Webster, Board-certified in internal medicine, which indicated that appellant currently experienced chronic pain related to her accepted 2003 employment injury. In addition, appellant’s attorney stated that he was also submitting a report from Dr. M. Russell Thomas, Ph.d in psychology, who believed that there was a psychological component to appellant’s work-related low back condition.² Counsel requested that the decision to terminate appellant’s entitlement to compensation and medical benefits be held in abeyance until a determination of her psychological condition could be further evaluated.

In a report dated April 17, 2006, Dr. Webster stated:

“I am currently treating [appellant] for chronic back pain from degenerative disc disease. She has had chronic pain which I have been treating with medications. [Appellant] has been referred to multiple specialists. She has been in such discomfort at times that I have been unable to do a thorough physical exam[ination] with her. I will continue to treat this chronic pain. I feel that she remains disabled, due to the same mechanical processes in the spine that have been present since the initial injury.”

By decision dated May 3, 2006, the Office terminated appellant’s compensation benefits.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or her federal

² The record does not contain a report from Dr. Thomas.

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

Section 8123(a) provides that, if there is 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

ANALYSIS

In order to resolve the conflict in the medical evidence between appellant's treating physician, Dr. Esposito, and Dr. Rogers, the second opinion physician, the Office referred the case to a referee medical specialist, Dr. Moore, who stated in his December 28, 2005 report that there were no objective findings indicating that appellant had any continuing residuals stemming from her August 1, 2003 lumbosacral strain injury. He noted that comparisons of appellant's pre- and postinjury MRI scans showed no changes, no objective evidence of lumbar radiculitis and no evidence of nerve root impingement. Dr. Moore was unable to identify any organic cause for her ongoing complaints of lower back and lower extremity pain. He felt that depression, symptom magnification, secondary gain and self-limiting behavior might be contributing factors to her complaints. Dr. Moore therefore opined that it was medically probable that the accepted lumbosacral strain had resolved. The Office relied on Dr. Moore's opinion in its May 3, 2006 decision, finding that appellant had no residuals or continuing disability stemming from her August 2003 work injury and was therefore not entitled to compensation or medical benefits.

The Board finds that Dr. Moore's referee opinion negated a causal relationship between appellant's condition and disability and constituted medical evidence sufficient to establish that appellant no longer had any residuals from her accepted August 2003 lumbosacral strain injury.⁷ His opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office properly accorded Dr. Moore's opinion the special weight of an impartial medical examiner.⁸ Although appellant submitted the April 17, 2006 report from Dr. Webster, this report does not outweigh Dr. Moore's opinion nor negate the Office's finding that Dr. Moore's report represented the weight of the medical evidence. Dr. Webster's report merely restates one side of the conflict which was resolved by Dr. Moore's referee medical opinion. Accordingly, the Board finds that Dr. Moore's opinion constituted the weight of medical opinion and supports the Office's May 3, 2006 decision to terminate appellant's compensation and deny any entitlement to continuing disability based on the August 1, 2003 work injury.

⁴ *Id.*

⁵ See *Mary Lou Barragy*, 46 ECAB 781 (1995); see also *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *Regina T. Pellecchia*, 53 ECAB 155 (2001).

⁷ The Board notes that appellant did not file a claim based on a psychological component to her August 1, 2003 lumbosacral strain injury; nor did the Office ever accept a claim for a psychological injury. In addition, appellant did not submit any evidence in support of such a claim.

⁸ *Gary R. Seiber*, 46 ECAB 215 (1994).

CONCLUSION

The Board finds that the Office met its burden to terminate appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the May 3, 2006 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: February 28, 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