

FACTUAL HISTORY

The case is on appeal to the Board for the third time.¹ In the first appeal, the Board reviewed the Office's May 11, 1998 decision denying appellant's request for reconsideration of a May 20, 1997 decision terminating her compensation benefits. The Office, based on the opinion of the impartial medical specialist, Dr. W. Scott Nettrour, a Board-certified orthopedic surgeon, found that appellant did not have any continuing disability due to her accepted employment injury and terminated her compensation benefits effective May 25, 1997.² The Board found that Dr. Nettrour's opinion was not well rationalized. Therefore, the conflict in the medical evidence between appellant's treating physician, Dr. Leonard Merkow, an attending Board-certified pathologist, and the second opinion physician, Dr. Patrick G. Laing, a Board-certified orthopedic surgeon, regarding whether she continued to have residual disability due to her accepted employment injury or whether she was capable of performing her date-of-injury position, was not resolved. The Board reversed the Office's May 11, 1998 decision. In the second appeal, the Board vacated Office decision dated April 6, 2001, which terminated her compensation effective September 9, 2000 and an August 16, 2001 decision³ which affirmed the termination.⁴ The Board found that the report of Dr. Robert M. Yanchus, a second impartial Board-certified orthopedic surgeon, was neither factually correct nor well rationalized. Thus, the Board vacated the termination of appellant's benefits and remanded the decision for further development as there remained an unresolved conflict in the medical opinion evidence with regard to whether she continued to have residuals due to her October 18, 1987 employment injury.

On January 15, 2003 the Office referred appellant to Dr. Victor J. Thomas, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence. In a report dated February 14, 2003, Dr. Thomas, based upon a review of the medical record, statement of accepted facts and physical examination, opined that appellant no longer had any residuals due to her accepted employment injury. A physical examination revealed 20 degrees bilateral lateral bending "with complaints of back pain." Dr. Thomas reported "[s]elf-limited range of motion was 40 degrees of flexion to 10 degrees of extensions with complaints of pain on extension greater than flexion." A review of nerve conduction studies and electromyography (EMG) "studies performed on March 26, 1997 are indicative of a past radiculopathy, but no indication of any acute or ongoing radiculopathy." Dr. Thomas stated that he could not "find any objective evidence to substantiate appellant's complaints." He opined that she sustained an aggravation of her preexisting disc herniation due to the October 1987 employment injury, which has resolved. Dr. Thomas also opined that appellant was capable of performing her date-of-injury position.

On March 31, 2003 the Office issued a notice of proposed termination of compensation benefits based upon the report of Dr. Thomas, which was finalized in an April 28, 2003 decision.

¹ Appellant, then a 30-year-old letter sorting machine clerk, filed a traumatic injury claim alleging she injured her back while lifting trays on October 18, 1987. The Office accepted the claim for aggravation of preexisting herniated disc at L5-S1 and subsequently placed appellant on the periodic rolls for temporary total disability.

² Docket No. 99-542 (issued February 7, 2000).

³ This decision was finalized on August 17, 2001.

⁴ Docket No. 01-2255 (issued November 20, 2002).

In a letter dated May 7, 2003, appellant, through counsel, requested an oral hearing. By decision dated October 2, 2003, an Office hearing representative reversed the April 28, 2003 decision terminating appellant's compensation benefits. Appellant was reinstated on the compensation rolls.

On March 26, 2004 the Office referred appellant to Dr. Stephen R. Bailey, a Board-certified orthopedic surgeon, to obtain a current assessment of her medical condition. In a report dated September 24, 2004, Dr. Bailey concluded that appellant had no residuals from her accepted back injury. A physical examination revealed a normal gait, no neuromuscular impairment of the lower extremities, no spinal list, spasm or tenderness in the lower back and "no evidence of nerve root tension" on bilateral straight leg raising. Range of motion of the back revealed 65 degrees trunk flexion, 40 degrees left and right tilting and 25 degrees extension. During flexion appellant complained of feeling her back pulling. With respect to her accepted aggravation of preexisting herniated disc at L5-S1, Dr. Bailey stated that he found "no evidence that that condition has any ongoing signs of impairment at present." Appellant also reported that there were no findings to support any radiculopathy. He concluded that the aggravation was temporary as there was no supporting objective evidence for appellant's complaints. Dr. Bailey opined that appellant no longer required any medical treatment for her back or radiculopathy conditions since "there is no evidence from a physical examination point of view of such a diagnosis."

On December 17, 2004 the Office referred appellant for an impartial medical examination with Dr. Scott L. Baron, a Board-certified orthopedic surgeon. In a report dated January 31, 2005, Dr. Baron, based upon a review of the medical evidence, statement of accepted facts and physical examination, concluded that she no longer had any residuals from her accepted aggravation of a herniated disc. A physical examination revealed a normal gait, diffuse lumbar spine tenderness and "no significant motor or sensory deficit." Range of motion revealed 60 degrees forward flexion, 15 to 20 degrees extension and "essentially unlimited lateral bend and rotation of the lumbar spine." Dr. Baron stated that the diagnosis of aggravation of herniated disc was based upon 1985 and 1987 computerized axial tomography (CAT) scans and opined that, since there "is only minimal change between the findings of those two CAT scans," that appellant had a "very transient aggravation as opposed to a new injury." In support of this conclusion, Dr. Baron stated that the objective findings establish that the condition had resolved.

On March 7, 2005 the Office issued a notice of proposed termination of compensation benefits for wage loss and medical benefits based upon the report of Dr. Baron.

In a letter dated April 6, 2005, appellant's counsel disagreed with the proposed termination of benefits.

In a May 5, 2005 supplemental report, Dr. Baron opined that the changes shown on the 1997 EMG study "are not supported by her current clinical finding" or the many CAT and magnetic resonance imaging (MRI) scans performed.

In a decision dated October 24, 2005, the Office finalized the termination of appellant's medical benefits due to her accepted aggravation of a herniated disc. The Office found that the weight of medical opinion was represented by Dr. Baron. The Office informed appellant that her

claim had been expanded to include the condition of major depression and that she would continue to receive wage-loss compensation and medical benefits for her accepted major depression.

In a letter dated October 25, 2005, appellant, through counsel, requested an oral hearing, which was subsequently changed to a request for a review of the written record.

By decision dated February 6, 2006, the Office hearing representative affirmed the termination of medical benefits for appellant's accepted orthopedic condition of aggravation of a herniated disc.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁵ After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁹

ANALYSIS

The Office initially accepted the conditions of aggravation of preexisting herniated disc at L5-S1, internal derangement of the left knee and subluxation at L5 as being effects of an injury appellant sustained at work on December 4, 1986. The Office subsequently expanded her claim to include the condition of major depression and noted that she would continue to receive wage-loss compensation and medical benefits for her accepted depression condition. Following the Office's April 28, 2003 termination of appellant's compensation benefits, an Office hearing representative reversed the termination on procedural grounds, explaining that the Office had not allowed appellant the requisite 30 days to respond to the proposed notice of termination. Consequently, the hearing representative did not review Dr. Thomas' February 14, 2003 report which served as the basis for the termination. The Board finds that the Office properly referred

⁵ *George A. Rodriguez*, 57 ECAB ____ (Docket No. 05-490, issued November 18, 2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *Kathryn E. Demarsh*, 56 ECAB ____ (Docket No. 05-269, issued August 18, 2005); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ See *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

⁸ *Roger G. Payne*, 55 ECAB 535 (2004).

⁹ *James F. Weikel*, 54 ECAB 660 (2003).

appellant on March 26, 2004 for a second opinion evaluation with Dr. Bailey to obtain a current assessment of appellant's condition.¹⁰

Dr. Bailey concluded that appellant had no residuals from her accepted back injury. He opined there was no objective evidence to support any continued residuals of her accepted aggravation of preexisting herniated disc at L5-S1. Dr. Bailey noted that appellant had a normal gait, no neuromuscular impairment of the lower extremity and no evidence of nerve root tension. He concluded that the aggravation was temporary as there was no radiculopathy. Dr. Bailey opined that appellant no longer required or needed any medical treatment for her back or radiculopathy conditions since "there is no evidence from a physical examination point of view of such a diagnosis."

On December 17, 2004 the Office referred appellant to Dr. Baron to resolve a conflict in the medical opinion evidence.¹¹ The Board finds that the Office incorrectly characterized Dr. Baron as an impartial medical specialist. At the time of the Office's referral, appellant had been reinstated to the periodic rolls for temporary total disability and there was no remaining conflict in the medical opinion evidence. Dr. Bailey, a second opinion physician, concluded that appellant no longer had any residuals due to her accepted orthopedic condition and appellant has not submitted any current medical evidence as to her orthopedic condition. Thus, Dr. Baron's resulting opinion on the issue of whether appellant's employment-related back condition had resolved is that of a second opinion physician and, accordingly, is not afforded the special weight given to an impartial medical specialist.¹²

Dr. Baron submitted a September 24, 2004 medical report in which he provided an accurate factual and medical background. He concluded that appellant had no residuals from her accepted back injury. Dr. Baron concluded that there was no objective evidence to support any continued aggravation of preexisting herniated disc at L5-S1. In support of this conclusion, he reported that there were no findings to support any radiculopathy and, thus, the aggravation was temporary. Dr. Baron opined that appellant no longer required medical treatment for her back or radiculopathy conditions since "there is no evidence from a physical examination point of view of such a diagnosis."

The Board finds that the Office properly terminated appellant's medical compensation benefits based upon the opinions of Drs. Bailey and Baron. The weight of medical opinion establishes that she no longer has any residuals or disability due her accepted orthopedic condition of aggravation of the herniated disc. Furthermore, the record contains no current medical evidence establishing that appellant continues to have any residuals from her orthopedic

¹⁰ See *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981). (Reports almost two years old deemed invalid basis for disability determination and loss of wage-earning capacity).

¹¹ In referring appellant to Dr. Baron to resolve the conflict in the medical opinion evidence, the Office did not specify the nature of the medical conflict. The Board, in its first decision, found a conflict in the medical opinion arose in 1992 based upon reports by Dr. Laing, a second opinion Board-certified orthopedic surgeon, and Dr. Merkow, a treating Board-certified anatomic and clinical pathologist, with respect to whether appellant had any residual disability or remained disabled from performing the duties of her date-of-injury position.

¹² *Bailey Varnado, Jr.*, 53 ECAB 755 (2002).

condition. The reports of Drs. Bailey and Baron constitute the weight of the medical evidence. Appellant is in receipt of ongoing compensation for her accepted major depression.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's medical benefits effective October 24, 2005 on the basis that her accepted aggravation of an L5-S1 herniated disc had resolved.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 6, 2006 be affirmed.

Issued: June 22, 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