



On September 8, 2003 appellant, then a 26-year-old mail handler, filed a recurrence of disability claim alleging that on August 20, 2003 she sustained a recurrence of her May 6, 2002 work-related injury. She explained that she had become totally disabled due to sitting under air vents at work. The Office adjudicated appellant's recurrence claim as a new injury. On November 24, 2003 the employing establishment controverted her claim.

On December 15, 2003 Dr. Gerald F. Gaughan, a physiatrist, opined that appellant could not tolerate temperature extremes, particularly cold drafts, as it exacerbated her symptoms. An April 9, 2004 magnetic resonance imaging (MRI) scan revealed a central herniation at L4-5 with bulges at L3-4 and L5-S1. On August 20, 2004 Dr. Gaughan opined that appellant had been totally disabled since August 20, 2004. On August 23, 2004 he opined that appellant was unable to work due to her back condition which prevented her from tolerating long continuous sitting, standing and walking. On September 16, 2004 Dr. John Mitamura, an orthopedic surgeon, found that appellant was totally disabled from work.

In a January 11, 2004 letter, the district medical adviser opined that ventilation from an air duct could not produce a low back condition.

By decision date January 16, 2004, the Office denied appellant's claim.

On January 29, 2004 appellant requested an oral hearing. In a January 19, 2005 decision an Office hearing representative set aside the January 16, 2004 decision and remanded the case for further development. The hearing representative found that there was a conflict of medical opinion between Dr. Gaughan and the Office medical adviser as to whether appellant sustained an injury as a result of air blowing on her back and that she should be referred for an impartial medical examination.

On March 28, 2005 appellant was examined by Dr. Martin Barschi, an orthopedic surgeon selected as the referee examiner. Dr. Barschi found symptoms of lower spine instability and right radiculopathy. He noted that appellant experienced constant severe low back pain mostly on the right side and that she complained of right sided low back pain and tenderness in the right lumbosacral area when moving. Dr. Barschi opined that the August 20, 2003 injury was a permanent aggravation to appellant's lower back condition. He also opined that appellant could perform limited duty and agreed with Dr. Mitamura's request for spinal facet blocks. On April 8, 2005 the Office requested clarification from Dr. Barschi. On April 11, 2005 Dr. Barschi stated that the air vent may have aggravated appellant's lower back condition by affecting the muscles in her lower back which aggravated the radicular symptoms. He also stated that appellant could perform the limited light-duty job she was performing prior to August 21, 2003 as of March 28, 2005 and that her aggravation if any from the air vent, was not permanent in respect to work restrictions.

On June 23, 2005 the Office found that appellant's August 2003 injury caused a temporary aggravation of her underlying lumbar radiculitis. The Office granted appellant compensation and medical benefits for the period August 20, 2003 through March 27, 2005. The Office relied on Dr. Barschi's opinion as the weight of the medical evidence in accepting the claim.

On July 5, 2005 appellant requested an oral hearing. The hearing was held on December 14, 2005.

On February 24, 2006 an Office hearing representative found that appellant's disability ceased on March 28, 2005 based on the report of Dr. Barschi's.

On October 20, 2006 appellant requested reconsideration and submitted additional medical information. In a May 30, 2006 report, Dr. Gaughan opined that appellant was permanently disabled. He stated that appellant should not be bending, lifting, pushing, pulling and carrying on a repetitive basis or more than five pounds. Dr. Gaughan also stated that appellant could not perform these activities for more than 10 to 15 minutes. He referred to a May 16, 2006 MRI scan report which revealed an increase in disc herniation at L4-5 from the previous study and led him to diagnose a worsening lumbar disc herniation with lumbosacral radiculopathy and lumbar spine instability.

In a September 22, 2006 report, Dr. Mitamura opined that appellant had been disabled since her first visit on April 9, 2003. He stated that there was an additional MRI scan in 2006 which demonstrated a worsening in the spinal condition over time. Dr. Mitamura noted that appellant was unable to dress herself and would need surgery as a result of a work-related injury.

In a September 15, 2006 report, Dr. John B. Robbins, a neurosurgeon, opined that appellant's current disability was causally related to the May 6, 2002 work injury and the August 20, 2003 reinjury. He opined that appellant was totally disabled from her regular work activities and that her disability would continue for at least one year.

On February 7, 2007 the Office denied modification of the prior decision on the grounds that the referee specialist's report had great probative value and constituted the weight of the medical evidence.

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

For each period of disability claimed, the employee has the burden of proving that he or she was disabled for work as a result of the accepted employment injury.<sup>1</sup> As used in the Federal Employees' Compensation Act, the term disability means incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.<sup>2</sup> Disability is thus, not synonymous with physical impairment, which may or may not result in an incapacity to earn wages.<sup>3</sup> Whether a particular injury causes an employee to be disabled for employment and the duration of that disability, are medical issues, which must be proved by a preponderance of the reliable, probative and substantial medical evidence.<sup>4</sup> The Board will not require the Office to pay compensation in the absence of medical evidence directly addressing the particular period

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<sup>1</sup> *William A. Archer*, 55 ECAB 674 (2004).

<sup>2</sup> *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.5(f).

<sup>3</sup> *See Fred Foster*, 1 ECAB 21 (1947).

<sup>4</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001); *see also Edward H. Horton*, 41 ECAB 301 (1989).

of disability for which compensation is sought. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>5</sup>

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

On June 23, 2005 the Office found that appellant was totally disabled from August 20, 2003 until March 27, 2005, based upon the report of the impartial medical specialist, Dr. Barschi. Subsequently, appellant submitted additional medical reports from Drs. Gaughan, Mitamura and Robbins to the Office and alleged that she had continuing disability. While Dr. Gaughan opined that appellant was permanently disabled and could not perform physical activities, he did not explain how she was still disabled after March 28, 2005 or how her disabled condition was caused by the accepted August 20, 2003 work injury. Dr. Mitamura opined that appellant had been continuously disabled since April 2003 but failed to explain how the August 20, 2003 injury caused appellant's disability to continue. Dr. Robbins opined that appellant's current disability was related to both work injuries but did not explain how her current disabled state was causally related to the August 20, 2003 injury. The subsequent medical reports were insufficient to establish that appellant was disabled after March 28, 2005, due to her accepted August 2003 employment injury. As such, appellant has not met her burden of proof to establish continuing employment-related disability.

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

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>6</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>7</sup>

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

On June 23, 2005 the Office accepted that appellant sustained a temporary aggravation of her preexisting radiculitis. In the same decision the Office terminated appellant's entitlement to medical benefits effective March 27, 2005.

The Office bears the burden to demonstrate that appellant no longer has residuals of her accepted condition which would require medical treatment. In terminating appellant's medical benefits the Office relied upon Dr. Barschi's March 28 and April 11, 2005 reports. In the March 28, 2005 report, Dr. Barschi noted that appellant has constant severe low back pain mostly on the right side. He also noted that appellant complained of right sided low back pain and tenderness in the right lumbosacral area while moving. Dr. Barschi concluded that appellant had symptoms consistent with lower spine instability and right radiculopathy. In an April 11,

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<sup>5</sup> *Sandra D. Pruitt*, 57 ECAB \_\_\_ (Docket No. 05-739, issued October 12, 2005); *William A. Archer*, *supra* note 1; *Fereidoon Kharabi*, *supra* note 4.

<sup>6</sup> *See LaDonna M. Andrews*, 55 ECAB 301 (2004); *see also Joseph Roman*, 55 ECAB 233 (2004); *Wiley Richey*, 49 ECAB 166 (1997); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>7</sup> *Id.*

2005 addendum, he opined that appellant was capable of performing the same light duties and that the aggravation was not permanent in respect to work restrictions. Dr. Barschi did not address whether appellant's condition resolved. Rather, he noted that she had symptoms of right radiculopathy and lower spine instability. Dr. Barschi's reports do not establish that appellant's condition resolved as of March 28, 2005. Accordingly, the Board finds that the Office did not meet its burden to terminate medical benefits for appellant's accepted back condition.

**CONCLUSION**

The Board further finds that appellant has not established that she had any continuing disability after March 28, 2005 due to her accepted employment injury. The Board finds that the Office improperly terminated appellant's medical benefits as it failed to establish that appellant's condition had resolved.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 7, 2007 decision of the Office of Workers' Compensation Programs be partially affirmed and partially reversed. The decision is affirmed as appellant did not establish continuing disability and reversed as to the termination of her medical benefits.

Issued: November 9, 2007  
Washington, DC

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

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

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