United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 07-702**
	)	**Issued: September 26, 2007**
U.S. POSTAL SERVICE, GENERAL MAIL FACILITY, Miami, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2007[1] appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated January 13, 2006 terminating her compensation and medical benefits and a nonmerit decision dated May 17, 2006. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this appeal.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation and medical benefits effective November 30, 2004; (2) whether appellant has any continuing disability and residual due to her accepted employment on or after November 30, 2004; and (3) whether the Office properly denied appellant's request for reconsideration under section 10.440 of the governing regulations.

[1] Although appellant's appeal was received in the office of the Clerk of the Board on January 17, 2007, it was post-marked January 13, 2007, within one year of the January 13, 2006 decision. Therefore, the Board has jurisdiction to review this decision on appeal. 20 C.F.R. § 501.3(d)(2)(ii).

FACTUAL HISTORY

On May 24, 1999 appellant, then a 26-year-old manual clerk, filed a traumatic injury claim alleging that on that date she injured her neck and upper back while pushing a general purpose mail contained. The Office accepted appellant's claim for single episode of cervical strain on July 29, 1999. Appellant returned to light-duty work on January 20, 2000 and stopped work on that date. She was involved in a nonemployment-related motor vehicle accident on March 7, 2000. In response to the query of maximum injury severity, the police officer stated "possible."

On January 5, 2001 the Office proposed to terminate appellant's compensation benefits noting that both her physician and a second opinion physician found that she was capable of full-duty work. The Office terminated appellant's compensation benefits on February 6, 2001. Appellant requested an oral hearing. By decision dated November 5, 2001, the hearing representative affirmed the February 6, 2001 termination decision and denied appellant's claim for a low back injury sustained at the time of her May 24, 1999 employment injury.

Appellant requested reconsideration on March 10, 2002 and submitted medical evidence. In a report dated January 8, 2002, Dr. Bruce D. Kohrman, a Board-certified neurologist, noted that appellant experienced a motor vehicle accident on December 4, 2001 with increased pain and stiffness in her neck. Appellant underwent a repeat magnetic resonance imaging (MRI) scan on January 4, 2001, which did not demonstrate any significant difference from her August 2000 MRI scan exhibiting a herniated disc at C5-6. Dr. Kohrman diagnosed chronic cervical sprain with C5-6 disc herniation. He noted appellant's employment injury in 1999 and stated that her first MRI scan was September 2000. Dr. Kohrman opined that appellant's herniated disc was probably present from the onset of her symptoms in 1999.

By decision dated May 8, 2002, the Office vacated its prior decisions terminating appellant's compensation benefits. It accepted a herniated disc at C5-6. Appellant's attending physician, Dr. Carrie Landess, a Board-certified neurologist, examined appellant on May 21, 2003 and found decreased cervical flexion, extension and lateral rotation with moderate pain and spasm. Dr. Landess diagnosed cervical strain and cervical radiculopathy and recommended physical therapy. The Office entered appellant on the periodic rolls on July 5, 2002.

The Office referred appellant for a second opinion evaluation with Dr. Kenneth C. Fischer, a Board-certified neurologist. In a report dated December 15, 2003, Dr. Fischer noted appellant's history of injury and medical history. He found that appellant had a history of neck sprain with no evidence of any residual neurological abnormalities. Dr. Fischer stated that a MRI scan showed a small herniated disc which was not appropriate for surgical treatment. He concluded that appellant had no ongoing neurological process and needed no further treatment.

In a letter dated January 6, 2004, the Office made a preliminary finding that appellant had received an overpayment of compensation in the amount of $5,889.33 due to the Office's failure to withhold health benefit premiums.

The Office requested a supplemental report from Dr. Fischer on February 4, 2004. He responded on February 9, 2004 and stated that appellant's accepted herniated disc was

insignificant. Dr. Fischer stated: "While it might have been precipitated or aggravated by the [employment injury] the disc has no physiological significance." He opined that appellant could return to her full duty as a manual distribution clerk.

On March 25, 2004 the Office requested that Dr. Landess respond to the report of Dr. Fischer.

By decision dated June 14, 2004, the Office finalized its overpayment decision and found that appellant was not entitled to waiver. The Office indicated that appellant could appeal this decision to the Board. Appellant filed an appeal with this Board on August 23, 2004.

In a note dated September 17, 2004, Dr. Landess found decreased cervical flexion, extension and lateral flexion and rotation with moderate pain and spasms. She noted positive trigger points in appellant's neck. Dr. Landess stated that appellant had signs and symptoms of cervical disc herniation and recommended physical therapy. An MRI scan dated September 28, 2004 revealed disc desiccation and mild disc space narrowing at C5-6 as well as a new subarticular degenerative marrow signal change. The MRI scan demonstrated a broad-based posterior slightly more focal left paracentral disc bulge impressing upon the thecal sac and contracting the anterior surface of the cervical spinal cord.

The Office found a conflict in the medical opinion evidence regarding appellant's work capacity and whether her work-related condition had resolved. The Office referred appellant, the medical records, a list of specific questions and a statement accepted facts for an impartial medical evaluation with Dr. Benjamin Barnea, a Board-certified physician in both neurology and psychiatry. The statement of accepted facts indicated that appellant had a motor vehicle accident on March 7, 2000 and that her injuries were possibly severe.

In Dr. Barnea's September 30, 2004 report, he noted appellant's history of injury and performed a physical evaluation noting that she exhibited guarding in all active movements of her neck in all directions. He reviewed the statement of accepted facts and medical records and diagnosed cervical spine disc disease with herniated disc at C5-6, pain disorder and symptom magnification. Dr. Barnea opined that it was questionable whether appellant's herniated disc was due to her accepted employment injury. He stated: "The question of the C5-6 herniation as related to the alleged industrial accident of May 24, 1999 is questionable. The actual activity that she describes of pushing the [cart] on wheels and that she acknowledges was not heavy simply cannot explain the spontaneous presentation of a C5-6 herniation. This leads me to conclude that her severe motor vehicle accident of March 2000 was a more likely cause of her neck pathology." He found that appellant was neurologically fully capable of gainful employment, that her cervical strain should have resolved itself in a few weeks and that her work-related dysfunction and complaints ended in July 1999.

In a letter dated October 28, 2004, the Office proposed to terminate appellant's compensation and medical benefits. By decision dated November 30, 2004, the Office terminated appellant's compensation and medical benefits finding that the report of Dr. Barnea was entitled to the weight of the medical opinion evidence and established that appellant was no longer disabled for work and did not require further medical treatment due to her May 24, 1999 employment injury.

Appellant objected to the proposed termination of compensation in a letter dated November 26, 2004 and received by the Office on December 6, 2004. She objected to the characterization of her motor vehicle accident as serious noting that she merely bumped her head on the visor. Appellant disagreed with the reports from Dr. Fischer and Dr. Barnea. She requested an oral hearing on December 14, 2004.

The Board affirmed the Office's June 14, 2004 overpayment decision on February 17, 2005.[2] Appellant requested reconsideration of the Board's decision on April 25, 2005.

On September 19, 2005 the Branch of Hearings and Review scheduled appellant's oral hearing for October 24, 2005. On November 2, 2005 the hearing representative informed appellant that as her oral hearing was cancelled due to a hurricane. Appellant could either wait for the oral hearing to be rescheduled or request either a review of the written record or a telephonic hearing. She requested a review of the written record on November 28, 2005 and submitted an additional statement. Appellant alleged that she was not provided with 30 days to submit her response to the proposed termination of compensation. She noted that a letter mailed to London, Kentucky from Miami, Florida could take between five to seven days to arrive. Appellant argued that she was not in fact pushing a GPMC, weighing between 230 to 1,200 pounds, as noted on her claim form, but was pushing an eastern regional mail container which weighed between 209 and 1,200 pounds. She stated that she was not pushing an empty container, that she had to load the container with 40-pound trays of mail including parcels and magazines and that she had to push the container through the facility on a twisting bumpy path. She denied that she had a serious motor vehicle accident noting that she struck her head on the visor with no abrasions and minor dizziness. Appellant objected to the intrusive nature of Dr. Barnea's examination.

By decision dated January 13, 2006, the hearing representative affirmed the Office's November 30, 2004 decision and found that appellant had no continuing residuals of her accepted employment injury.

In a decision dated May 17, 2006, the Office denied appellant's request for reconsideration of the Board's February 17, 2005 overpayment decision. The Office stated that final overpayment decisions were not subject to reconsideration requests.

LEGAL PRECEDENT -- ISSUE 1

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 Office's burden of proof in termination compensation includes the necessity of furnishing

[2] Docket No. 04-2090 (issued February 17, 2005).

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

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

rationalized medical opinion evidence based on a proper factual and medical background.[5] The right to medical benefits for an accepted condition is not limited to the period of entitlement of disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.[6]

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.[7]

ANALYSIS -- ISSUE 1

The Office terminated appellant's compensation benefits based on the findings of Dr. Barnea, a Board-certified psychiatrist and neurologist, selected by the Office to resolve the conflict of medical opinion evidence between her attending physician, Dr. Landess, a Board-certified neurologist, and Dr. Fischer, a Board-certified neurologist and Office referral physician. The Office stated that it found a conflict of medical opinion between these physicians regarding appellant's work capacity and whether her work-related condition had resolved. Dr. Landess indicated that appellant had a continuing cervical disc herniation which required additional physical therapy, while Dr. Fischer indicated that appellant required no further medical treatment due to her employment injuries including the cervical disc herniation and could return to full duty.

The Board finds that Dr. Barnea's report is not sufficient to resolve the existing conflict of medical opinion evidence. In his September 30, 2004 report, Dr. Barnea noted appellant's history of injury as well as her medical treatment. He found her past medical history was significant for reported head trauma in a motor vehicle accident which occurred in March 2000. Dr. Barnea found that appellant had a normal motor examination but noted guarding in active movements of the neck in all directions. He diagnosed cervical spine disc disease with herniated disc at C5-6, paid disorder and symptom magnification. Dr. Barnea noted that appellant's initial MRI scan in September 2000 showed only a small herniation while repeat examinations in 2001 and 2002 showed a larger herniation. He stated, "The question of the C5-6 herniation as related to the alleged industrial accident of May 24, 1999 is questionable. The actual activity that she describes of pushing the [cart] on wheels and that she acknowledges was not heavy simply cannot explain the spontaneous presentation of a C5-6 herniation. This leads me to conclude that her severe motor vehicle accident of March 2000 was a more likely cause of her neck pathology." Dr. Barnea's conclusion is couched in speculative terms, noting that the severe motor vehicle accident of March 2000 was a "more likely" cause of her neck pathology. Dr. Barnea did not submit adequate medical reasoning for his conclusion that appellant's neck condition was due to the motor vehicle accident rather than to the accepted employment injury. He failed to explain why pushing a cart would not be competent to result in a cervical disc

[5] *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

[6] *Mary A. Lowe, supra* note 4.

[7] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

herniation. The Board has held that opinions such as the condition was "probably" related, "most likely" related or "could be" related are speculative and diminish the probative value of the medical opinion evidence. The opinion regarding causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, but the opinion must be one of reasonable medical certainty regarding the relationship of the condition to the employment and must be supported with affirmative evidence explained by medical rationale and based upon a complete and accurate factual and medical background.[8] Dr. Barnea couched his opinion in speculative terms as to how appellant's herniated disc occurred. His opinion is not of reasonable medical certainty. The Board finds that Dr. Barnea's report is not sufficient to meet the Office's burden of proof to terminate appellant's compensation benefits.

LEGAL PRECEDENT -- ISSUE 2

Section 10.440(b) of the Office's regulations provides that "[t]he only review of a final decision concerning an overpayment is to the Employees' Compensation Appeals Board. The provisions of 5 U.S.C. § 8124(b) (concerning hearings) and 5 U.S.C. § 8128 (concerning reconsiderations) do not apply to such a decision."[9] The Board has found that the implementation of this regulation is a proper exercise of the director's discretion and that a claimant has no further right to review by the Office once a final decision on the issue of overpayment has been issued.[10]

ANALYSIS -- ISSUE 2

In the June 14, 2004 final overpayment decision, the Office properly informed appellant that she had the right to appeal to the Board. Appellant followed this appeal right and the Board reviewed the overpayment decision on February 17, 2005 affirming the findings of the Office. She then requested reconsideration of the overpayment decision before the Office on April 25, 2005. By decision dated May 17, 2006, the Office informed appellant that she was not entitled to request reconsideration of a final overpayment decision. The Board finds that appellant has pursued all her appeal rights in regard to the final overpayment decision and has no further recourse in regard to this issue.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.[11] The Board further finds that the Office properly denied appellant's request for reconsideration from the Office following review of an Office final decision of overpayment by the Board.

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[8] *Kathy A. Kelley*, 55 ECAB 206, 211-12 (2004).

[9] 20 C.F.R. § 10.440(b).

[10] *Charles E. Nance,* 54 ECAB 447, 453 (2003).

[11] In view of the Board's disposition of the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2006 decision of the Office of Workers' Compensation Programs is reversed. The May 17, 2006 decision of the Office is affirmed.

Issued: September 26, 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