

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

E.A., Appellant)
and) Docket No. 07-2037
DEPARTMENT OF VETERANS AFFAIRS,) Issued: April 11, 2008
VETERANS ADMINISTRATION MEDICAL)
CENTER, Boston, MA, Employer)
)

Appearances:

John Whitehouse, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 30, 2007 appellant filed a timely appeal from the July 11, 2007 decision of the Office of Workers' Compensation Programs' hearing representative who affirmed the termination of her wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these issues.

ISSUES

The issues on appeal are: (1) whether the Office properly terminated appellant's wage-loss compensation effective June 1, 2004; and (2) whether appellant met her burden of proof to establish that she was entitled to compensation for wage loss after June 1, 2004.

FACTUAL HISTORY

On July 22, 1994 appellant, then a 31-year-old nursing assistant/phlebotomist, filed a traumatic injury claim alleging that, on June 27, 1994, she lifted a bedside table and picked up a bucket of supplies.¹ The Office accepted the claim for a back sprain. Appellant returned to full

¹ This claim was given File No. 010324535.

duty on August 2, 1994. She filed another traumatic injury claim alleging that, on November 29, 1994, she injured the upper right side of her back while bending over to draw blood from a patient. The Office accepted that appellant sustained a lumbosacral strain.² Appellant returned to light-duty work following this injury. She filed recurrences of disability claims on June 14 and November 18, 1995 and March 18, 1996, which were accepted by the Office.

A July 8, 1995 thoracic spine magnetic resonance imaging (MRI) scan, read by Dr. John Ostheimer, a Board-certified diagnostic radiologist, revealed T6-7 posterior and right-sided disc herniation with mild cord impingement, T11-12 disc and left-sided herniation with slight cord impingement and a small posterior disc bulge at T10-11 and intervertebral disc without cord impingement. A July 19, 1995 MRI scan of the thoracic spine, read by Dr. Ricardo Sanchez, a Board-certified diagnostic radiologist, revealed a right-sided herniation at T6-7, a left-sided herniation at T11-12, and a small posterior bulge at T10-11.

Appellant filed a third traumatic injury claim that involved pushing a wheelchair on March 11, 1998. The Office accepted this claim for lumbosacral strain.³

An October 8, 2000 thoracic MRI scan read by Dr. Avishai W. Shapiro, Board-certified in internal medicine, revealed shallow disc protrusions at C6-7, T9-10, T10-11 at L4-5 and L5-S1.

On July 29, 2003 appellant twisted and sprained her left ankle while wiping her feet on a rug due to the wet ground outside. The record reflects that appellant's claim was administratively processed and lost time was addressed through continuation of pay. The Office combined appellant's claims under master File No. 0355729.

Dr. Stanley Leitzes, an attending orthopedic surgeon, diagnosed thoracolumbar spasm and placed appellant on light duty working no more than three days or 24 hours per week. She later returned to part-time limited duty and worked eight hours per day for three days per week.⁴ Appellant received appropriate compensation. Dr. Leitzes continued to treat appellant and indicate that her work status remained unchanged.

A June 26, 2004 MRI scan of the thoracic spine read by Dr. Ostheimer revealed degenerative disc disease, small right-sided protrusions at several levels but no cord impingement and no evidence of spinal stenosis or intrinsic thoracic spinal cord pathology.

On March 17, 2004 the Office referred appellant for a second opinion to Dr. James S. Broome, a Board-certified orthopedic surgeon. In a March 30, 2004 report, Dr. Broome noted appellant's history of injury and treatment. He found that appellant had complaints of muscle spasms, and focal pain in the thoracic and lumbar areas. Dr. Broome examined appellant and

² The claim was given File No. 010324932.

³ The Office accepted this claim under File No. 0355729. The Office also accepted several recurrence claims in 2000.

⁴ The employing establishment confirmed that appellant had continued in this status since her original injury in 1994.

determined that there was no evidence of spastic paraparesis, her reflexes were intact, and a Babinski sign was negative. He opined that appellant did not have the “classical signs and symptoms of a symptomatic thoracic disease.” Dr. Broome advised that the results of his physical examination did not support a symptomatic thoracic disease as there were no objective findings to support her subjective complaints. He opined that appellant had reached maximum medical improvement. Dr. Broome advised that appellant’s current condition was not work related.

On April 12, 2004 the Office proposed to terminate appellant’s compensation benefits. The Office determined that her injury-related disability had ceased.

In an April 15, 2004 report, Dr. Leitzes opined that appellant was under his care for a ruptured intervertebral disc and disc protrusions which were impinging on her nerves. He noted that appellant had maintained a reduced schedule, which “has enabled her to continue working with her ongoing symptomatology.” Dr. Leitzes advised that this prevented her situation from worsening. He indicated that appellant should continue her present work schedule.

By decision dated June 1, 2004, the Office terminated appellant’s compensation benefits on the grounds that her injury-related condition and disability had ceased.

Dr. Leitzes continued to submit reports and opine that appellant was limited to working three eight-hour days per week.

On June 30, 2004 appellant requested a hearing, which was held on March 29, 2005.

By letter dated April 21, 2005, appellant’s representative alleged that the Office did not meet its burden of proof to terminate her benefits. He enclosed additional evidence, which included an April 6, 2005 report, in which Dr. Leitzes noted that he had treated appellant for more than 10 years. Appellant’s representative indicated that it was unclear how Dr. Broome arrived at his conclusion, as the diagnostic testing revealed a herniated intervertebral disc. Dr. Broome opined that appellant’s herniated discs at the thoracic level were directly related to her 1994 incident at work. Dr. Leitzes indicated that appellant was never totally asymptomatic. In an October 7, 2004 report, Dr. Anthony S. Lapinsky, an orthopedic surgeon, who opined that appellant had degenerative disc disease, at multiple levels of the thoracic spine, and advised that she needed “a modification in her work activity to meet her functional capacity.”

In a June 22, 2005 decision, the Office hearing representative affirmed the June 1, 2004 decision which terminated appellant’s compensation benefits effective June 1, 2004. However, the hearing representative found that the new medical evidence from Dr. Leitzes and Dr. Lapinsky subsequently created a conflict in medical opinion with Dr. Broome on the issue of continuing work-related residuals and disability and whether appellant’s thoracic disc herniations were employment related. The hearing representative directed the Office to refer appellant for an impartial medical examination to resolve the medical conflict.

On May 4, 2006 the Office referred appellant along with a statement of accepted facts, and the medical record to Dr. Vincent Genovese, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in medical opinion.

In a June 8, 2006 report, Dr. Genovese noted appellant's history of injury and treatment, including her diagnostic test results. He indicated that she had complaints of pain in her back traveling down to her buttocks, which appellant described as severe or mild, depending upon her activity and whether she was sitting or standing. Dr. Genovese related that appellant indicated that she was never pain free. Appellant reported that she was able to tolerate a modified work schedule, as she was able to rest and use pain medication. Dr. Genovese determined that appellant was able to ambulate normally with no evidence of any gait disturbance. He diagnosed chronic pain syndrome, status post-recurrent thoracolumbar strain episodes. Dr. Genovese opined that appellant could continue her current pattern of three days of gainful employment. She reached maximum medical improvement and continued to have residuals of chronic pain syndrome. Dr. Genovese stated that appellant had chronic axial pain in the thoracic and lumbar spine of "uncertain etiology." He also noted that appellant's condition arose "apparently, as a result of sprains and strains of the past, reported to have occurred in relationship to her job."

On June 19, 2006 the employing establishment provided the Office with surveillance photographs and summaries, which included that on May 18, 2006 appellant, walked and pushed a carriage for approximately 50 minutes in a Wal-Mart store.

By letter dated July 28, 2006, the Office requested clarification from Dr. Genovese regarding whether appellant's current symptoms were work related, whether her current work capacity was the result of her employment-related conditions, and whether appellant's chronic pain syndrome arose from her accepted injuries.

In an August 4, 2006 report, Dr. Genovese noted reviewing the surveillance photographs, and opined that it appeared that appellant's activities contradicted her reported activity limitations. He completed a work capacity evaluation and opined that appellant was at maximum medical improvement. Appellant was found capable of performing office work 40 hours per week. In an August 31, 2006 follow-up report, Dr. Genovese opined that appellant's chronic pain behavior was exacerbated by her work-related injury of June 27, 1994; however, he noted that it did not cause a post-traumatic disc herniation on July 11, 1994 that could account for her current complaints in 2006. He also noted that appellant became pregnant in the fall of 1996 and was seen for intermittent complaints. Dr. Genovese reviewed the MRI scan results and noted that there was no medical rationale to support a causal relationship for post-traumatic thoracic disc herniation related to the March 11, 1998 incident to explain her current symptoms in 2006. He also reviewed the photographic documentation before and after his examination and opined that appellant had the "physical capacity to do more than what she is willing to reveal and is no doubt capable of working 40 hours in her current light-duty position." Dr. Genovese opined that appellant was "currently satisfied with her current work situation and has a strong desire to keep her situation the way it is now." He explained his statement that appellant's current chronic pain syndrome had an "unknown etiology" and noted that he had referenced Dr. Broome's conclusion. It was Dr. Genovese's opinion that thoracic disc herniations were not the etiology of appellant's ongoing subjective complaints; he opined that appellant's "chronic pain behavior diagnosis developed in response to a series of thoracolumbar and lumbar strains."

By decision dated September 27, 2006, the Office denied reinstatement of compensation on and after June 1, 2004 on the basis that the weight of the medical evidence, as represented by the opinion of Dr. Genovese, indicated that appellant had no continuing condition or disability

causally related to her prior work injuries. In an October 13, 2006 decision, the Office issued an amended decision which denied compensation on and after June 1, 2004.

On October 16, 2006 appellant requested a hearing, which was held on April 25, 2007.

By decision dated July 11, 2007, the Office hearing representative reversed the Office's October 13, 2006 decision with regard to further medical benefits. The hearing representative affirmed the decision with regard to entitlement to compensation for wage loss on or after June 1, 2004.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ 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.⁶

ANALYSIS -- ISSUE 1

At the time of the Office's June 1, 2004 termination decision, the Board finds that the weight of the medical evidence was represented by Dr. Broome, the second opinion physician.

In a report dated March 30, 2004, Dr. Broome noted appellant's history of injury and treatment. While he noted that appellant had complaints of muscle spasms and focal pain in the thoracic and lumbar areas, he conducted a physical examination and determined that there was no evidence of spastic paraparesis, her reflexes were intact, and she had a negative "Babinski." Dr. Broome concluded that appellant did not have symptomatic thoracic disease as there were no objective findings to support appellant's subjective complaints. He opined that appellant had reached maximum medical improvement and that her current condition was not work related.

Appellant's treating physician, Dr. Leitzes, diagnosed thoracolumbar spasm and placed appellant on light duty. He opined that appellant should work no more than 3 days or 24 hours per week. In his April 15, 2004 report, Dr. Leitzes opined that appellant was under his care for a ruptured intervertebral disc and disc protrusions which were impinging on her nerves. He noted that appellant was able to maintain a reduced schedule, which "has enabled her to continue working with her ongoing symptomatology" and opined that appellant continue her present work schedule. However, Dr. Leitzes did not specifically relate any ongoing disability to appellant's accepted conditions and he did not explain how the ruptured intervertebral disc arose as a result of her work-related injury.⁷ This is especially important in light of the fact that a July 19, 1995

⁵ *Curtis Hall*, 45 ECAB 316 (1994).

⁶ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁷ The Office did not accept any disc rupture or herniation was employment related. Thus, with respect to nonaccepted conditions, appellant has the burden of proof to establish that they are employment related. See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

MRI scan of the thoracic spine only revealed a right-sided herniation at T6-7, a left-sided herniation at T11-12, and a small posterior bulge at T10-11. While the medical opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, neither can such opinion be speculative or equivocal. The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.⁸

At the time of the Office's termination of wage-loss compensation the record contained no other current medical evidence addressing whether appellant's accepted back sprain and lumbar strains caused any continuing disability for work.

In these circumstances, the Office properly accorded the weight of the evidence to Dr. Broome's March 30, 2004 findings. Thus, the Board finds that Dr. Broome's report established that appellant had no work-related disability on or after June 1, 2004, thereby justifying the Office's June 1, 2004 termination of her wage-loss compensation.

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 he had an employment-related disability, which continued after termination of compensation benefits.⁹

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.¹⁰

Furthermore, the Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.¹¹ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in

⁸ *Thomas A. Faber*, 50 ECAB 566 (1999); *Samuel Senkow*, 50 ECAB 370 (1999).

⁹ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹⁰ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

¹¹ 5 U.S.C. § 8123(a); *Shirley Steib*, 46 ECAB 309, 317 (1994).

the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS -- ISSUE 2

Subsequent to the Office's June 1, 2004 decision, the Office found that a conflict of medical opinion existed regarding whether or not work-related conditions continued and whether her thoracic spine condition was related to her employment based on the opinions of Drs. Lietzes and Lapinsky, for appellant, and Dr. Broome, the second opinion physician, for the Office. Therefore, the Office properly referred appellant to Dr. Genovese, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In his June 8, 2006 report, Dr. Genovese examined appellant and determined that she was able to ambulate normally without evidence of gait derangement. He diagnosed chronic pain syndrome and advised that she was "post-recurrent" thoracolumbar strain episodes." Dr. Genovese advised that appellant continue her current pattern of working three days per week of gainful employment and noted that she continued to have residuals of chronic pain syndrome.

On July 28, 2006 the Office requested clarification with regard to whether appellant's current symptoms were work related and whether her chronic pain syndrome arose from her accepted injuries. When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.¹³ As the Office needed clarification from the doctor regarding whether the employment-related condition had resolved, it properly requested clarification from Dr. Genovese.

In an August 4, 2006 report, Dr. Genovese noted that he had reviewed the surveillance photographs, and opined that it appeared that appellant's activities contradicted her reported activity limitations. He completed a work capacity evaluation and indicated that appellant was capable of performing office work for 40 hours per week. Dr. Genovese provided an August 31, 2006 follow-up report, in which he indicated that appellant's chronic pain behavior was exacerbated by her June 11, 1994 employment injury; however, it did not cause a post-traumatic disc herniation at that time, which would account for her current complaints. He reviewed the MRI scan reports of record and opined that there was "no medical rationale to support a causal relationship for post-traumatic disc herniation related to the March 11, 1998 incident to explain her current symptoms in 2006." Dr. Genovese also explained that the photographic documentation before and after his examination revealed that "appellant had the "physical capacity to do more than she is willing to reveal and is no doubt capable of working 40 hours in her current light-duty position." He opined that appellant was satisfied with her current situation and had a "strong desire to keep her situation the way it is now." Dr. Genovese also clarified his statement that appellant's current chronic pain syndrome had an unknown etiology and explained

¹² *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹³ *Roger W. Griffith*, 51 ECAB 491 (2000).

that he was merely referencing Dr. Broome's conclusion, but that he had determined that her chronic pain syndrome arose from a series of thoracolumbar and lumbar strains.

The Board finds that Dr. Genovese's opinion is entitled to special weight as his reports are sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant's disc herniation was not work related and that she was able to work 40 hours per week. Dr. Genovese examined appellant, reviewed her medical records, and reported accurate medical and employment histories. He concluded that appellant had no work-related disc herniation and that she was capable of working 40 hours in her current light-duty position.

Appellant did not submit any additional evidence, which would establish that she was unable to work 40 hours per week in her current light-duty position.

Accordingly, appellant did not meet her burden of proof to establish that she was entitled to compensation for wage loss after June 1, 2004 causally related to her June 27, 1994 employment injury.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits effective June 1, 2004. Further, the Board finds that appellant did not meet her burden of proof to establish that she had an employment-related disc herniation or that she was entitled to compensation for wage loss after June 1, 2004 causally related to the June 27, 1994 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the July 11, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: April 11, 2008
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