

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

K.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Flushing, NY, Employer**

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**Docket No. 08-1213
Issued: December 10, 2008**

Appearances:
*Paul Kalker, Esq., for the appellant,
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 18, 2008 appellant's representative filed a timely appeal from the Office of Workers' Compensation Programs' decision dated February 19, 2008 which denied her request to modify a prior decision that terminated her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective July 8, 2007; and (2) whether appellant met her burden of proof to establish that she had any disability after July 8, 2007.

FACTUAL HISTORY

On May 18, 2005 appellant, then a 47-year-old letter carrier, filed a traumatic injury claim alleging that, on that same date, he sustained injuries to his legs, right knee, right hip, back and left shoulder when he was stuck between two vans which were rear-ended in the performance of duty. He stopped work on May 16, 2005. On July 7, 2005 the Office accepted

appellant's claim for right knee sprain, right hip sprain, lumbar sprain and left shoulder sprain and paid her compensation for injury-related disability for work. Appellant received appropriate wage-loss compensation on the periodic compensation rolls.

In an October 18, 2005 report, Dr. Barbara Joyce Freeman, a Board-certified orthopedic surgeon and fitness-for-duty physician, noted appellant's history of injury and treatment. She diagnosed contusion of the left shoulder and lumbar spine sprain. Dr. Freeman opined that appellant was capable of working light duty for eight hours a day, three days a week. She indicated that appellant could not push, pull or lift greater than 10 pounds and should do no squatting, kneeling or climbing.

In a November 11, 2005 report, Dr. Nizarali Visram, a Board-certified physiatrist and a treating physician, diagnosed lumbar radiculopathy, lumbar spine sprain and strain with posterior disc herniation at L4-5 and L5-S1 impinging on the anterior aspect of the spinal canal and nerve roots bilaterally greater on L5-S1, and left shoulder joint sprain and strain. He recommended continued physical therapy and opined that appellant was disabled.

On August 10, 2006 the Office referred appellant to Dr. Bruce P. Meinhard, a Board-certified orthopedic surgeon, for a second opinion examination.

In an August 25, 2006 report, Dr. Visram diagnosed lumbar spine radiculopathy, lumbar posterior disc herniations at L4-5 and L5-S1 impinging on the anterior aspect of the spinal canal and nerve roots bilaterally with myofascial pains, left shoulder impingement of the supraspinatus muscle, right knee medial collateral ligament sprain with tear of the posterior horn of the medial meniscus and opined that appellant was completely disabled.

In a September 7, 2006 report, Dr. Meinhard described appellant's history of injury and treatment and conducted a physical examination. He diagnosed lumbar sprain and indicated that there were no objective findings on examination. Dr. Meinhard also diagnosed left shoulder impingement syndrome, contusion of the medial femoral condyle, right knee, tear of the medial meniscus and sprain of the "MCL," and a resolved right hip contusion, with no objective findings. He indicated that appellant had a mild disability and preexisting degenerative disease of the lumbar spine. Dr. Meinhard opined that appellant could return to light duty for eight hours a day with limitations on walking, squatting, reaching overhead, and lifting less than 10 pounds at table top level, with a five-minute break every hour. He indicated that the conditions causally related to the injury of May 16, 2005 had not fully resolved and opined that the prognosis for a full recovery was poor. Dr. Meinhard indicated that appellant had achieved maximum medical benefit from the treatment rendered and noted that physical therapy had been ineffective in improving his condition. He opined that appellant had reached maximum medical improvement.

In an October 6, 2006 report, Dr. Visram repeated that appellant was totally disabled. He continued to treat appellant and submit reports advising that appellant was disabled.

On March 30, 2007 the Office referred appellant along with a statement of accepted facts and the medical record to Dr. Norman Sveilich, a Board-certified orthopedic surgeon, to resolve the medical conflict between Drs. Visram and Meinhard regarding whether appellant continued to be disabled as a result of his work-related injury.

In his report dated April 16, 2007, Dr. Sveilich noted appellant's history of injury and treatment and provided examination findings. He conducted a physical examination which revealed normal findings. Dr. Sveilich diagnosed hypertension and lumbar spondylosis and indicated that appellant provided an "idiosyncratic response" to the physical examination which was not proportionate to the examination. For example, he indicated that appellant had a disproportionate toe resistance response, was jumpy throughout a negative examination of the left knee, and was able to dress and undress without any inhibition or pain. Likewise, while Dr. Sveilich noted that all movement was "pain inhibited" during examination, appellant did a full situp on the examination table, without inhibition, when he was removing his socks for his foot examination. He indicated that appellant had a permanent mild disability based on his pain response alone but reiterated that there were no objective findings. Dr. Sveilich indicated that no work restrictions were required and appellant could return to full duty. He also indicated that no further medical treatment was necessary.

On May 23, 2007 the Office issued a notice of proposed termination of compensation on the basis that Dr. Sveilich's report established that appellant's injury-related disability and the residuals of the work injury of May 16, 2005 had ceased.

In a May 25, 2007 report, Dr. Visram diagnosed lumbar spine radiculopathy, lumbar spine posterior disc herniations at L4-5 and L5-S1 with myofascial pains, left shoulder impingement syndrome, and right knee medial collateral ligament sprain/strain with a tear of the posterior horn of the medial meniscus.

By decision dated July 2, 2007, the Office terminated appellant's compensation benefits effective July 8, 2007.

The Office then received a June 22, 2007 report from Dr. Visram who indicated that appellant would be unable to return to his old job as a letter carrier because it "would certainly aggravate his symptoms." Dr. Visram indicated that appellant should undergo a functional capacity evaluation to assist with a return to light duty. The Office also received a functional capacity evaluation.

By letter dated November 17, 2007, appellant's representative requested reconsideration and submitted additional evidence. He alleged that the medical evidence supported that appellant's injuries were more extensive than those accepted by the Office. Appellant's representative also alleged that the Office's use of two second opinion physicians was unreasonable. He alleged that the second opinion reports from Drs. Freeman and Meinhard were deficient and inconclusive. Appellant's representative further alleged that the referral to the impartial medical examiner was not warranted as there was not a genuine conflict. Furthermore, he alleged that it was deficient.

The additional evidence included an August 24, 2007 report from Dr. Visram who noted appellant's history and noted that he last saw appellant on June 22, 2007. He diagnosed post-traumatic lumbar sprain/strain, left shoulder joint sprain/strain, left hand sprain/strain, bilateral calf pains and right knee sprain/strain. Dr. Visram diagnosed: post-traumatic lumbar disc herniations at L4-5 and L5-S1 impinging on the anterior aspect of the spinal canal and nerve roots bilaterally, greater at L5-S1, as well as bone edema at L5-S1; post-traumatic left shoulder

acromion impingement on the supraspinatus muscle; post-traumatic right knee tear of the posterior horn of the medial meniscus and medial collateral ligament sprain; traumatic left L5 lumbar radiculopathy; post-traumatic lumbar sprain/strain with myofascial pains; post-traumatic left shoulder joint sprain/strain with impingement; post-traumatic left hand sprain/strain; post-traumatic bilateral calf pains and post-traumatic right knee sprain/strain. He opined that appellant had ongoing pain, suffering and physical impairments of his lumbar spine, left shoulder and right knee which were due to the work injury and not preexisting. Dr. Visram advised that appellant's symptoms were permanent and that physical stress could trigger recurrent episodes of back pain with radicular-type symptoms, as well as left shoulder and right knee pain. He opined that appellant might be prone to future and frequent exacerbations. Dr. Visram indicated that appellant's disability was partial, permanent and might result in chronic pain with progressive remission and exacerbation during overuse of the low back, left shoulder and right knee. He noted that the prognosis for full recovery of the lumbar spine, left shoulder and right knee was poor.

In an October 24, 2007 report, Dr. Bruce S. Stein, Board-certified in internal medicine, noted that appellant had lower back discomfort pain and decreased strength in the left shoulder. He opined that appellant was totally disabled and unable to work for an "indefinite period of time."

By decision dated February 19, 2008, the Office denied modification of the July 2, 2007 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ 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.²

The Federal Employees' Compensation Act³ 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.⁴ In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in 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.⁵

¹ *Curtis Hall*, 45 ECAB 316 (1994).

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ 5 U.S.C. §§ 8101-8193, 8123(a).

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

⁵ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

ANALYSIS -- ISSUE 1

The Office determined that a conflict of medical opinion existed regarding the nature and extent of any ongoing residuals of the work injury of May 18, 2005 based on the opinions of Dr. Visram, appellant's physician, who supported an ongoing employment-related condition and total disability, and Dr. Meinhard, an Office referral physician, who opined that the employment-related condition had resolved. Therefore, the Office properly referred appellant to Dr. Sveilich, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In a report dated April 16, 2007, Dr. Sveilich noted appellant's history of injury and treatment and conducted a physical examination. He indicated that appellant's findings were normal and diagnosed hypertension and lumbar spondylosis. Dr. Sveilich indicated that appellant provided responses on examination which were "idiosyncratic" and not proportionate. For example, he indicated that there were instances during his examination where appellant exhibited pain behavior; however, he was able to perform a similar activity when he was not being examined without any inhibition or pain. Dr. Sveilich opined that appellant had a permanent mild disability based on his pain response alone, and reiterated that there were no objective findings. He indicated that no work restrictions were required, that appellant could return to full duty and did not require any further medical treatment.

The Board finds that Dr. Sveilich's opinion is entitled to special weight as his reports are sufficiently well rationalized and based upon a proper factual background. Dr. Sveilich is a specialist in the appropriate field. At the time benefits were terminated, he clearly opined that appellant had no residuals or disability attributable to his accepted employment-related conditions. Dr. Sveilich's opinion, as set forth in his April 16, 2007 report is found to be sufficiently probative, rationalized and based on a proper factual background. The Board finds that his opinion represents the weight of the medical evidence and is sufficient to justify the Office's termination of appellant's benefits.

Prior to the termination, appellant also submitted a May 25, 2007 report from Dr. Visram. However, Dr. Visram merely provided a diagnosis and did not provide new findings or medical rationale sufficient to establish that any continuing condition or disability is causally related to the May 18, 2005 work injury. His opinion is insufficient to create a new medical conflict or to overcome the weight accorded to Dr. Sveilich's report.⁶ Dr. Visram also diagnosed certain conditions that had not been accepted by the Office as being employment related.⁷

Accordingly, the Office met its burden of proof to justify termination of compensation benefits.

⁶ See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

⁷ Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

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.⁸

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.⁹

ANALYSIS -- ISSUE 2

Subsequent to the Office's July 2, 2007 decision, appellant submitted reports dated June 22 and August 24, 2007 from Dr. Visram who indicated that appellant would be unable to return to his old job as a letter carrier because it "would certainly aggravate his symptoms." Dr. Visram also indicated that appellant's disability was partial, permanent and might result in chronic pain with progressive remission and exacerbation during overuse of the low back, left shoulder and right knee. However, he essentially reiterated previously stated findings and conclusions regarding appellant's condition. As Dr. Visram was on one side of the conflict that had been resolved, the additional reports, in the absence of any new findings or rationale, from appellant's doctor were insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.¹⁰ To the extent that he was alleging that appellant might exacerbate his symptoms during overuse of his low back, left shoulder and right knee. The Board has held that fear of future injury is not compensable.¹¹

In an October 24, 2007 report, Dr. Bruce S. Stein, Board-certified in internal medicine, noted that appellant had lower back discomfort pain and decreased strength in the left shoulder. He opined that appellant was totally disabled and unable to work for an "indefinite period of time." The Board has held that findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the

⁸ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁹ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

¹⁰ *See Guiseppa Aversa*, 55 ECAB 164 (2003); *Jaja K. Asaramo*, *supra* note 7.

¹¹ *See Calvin E. King*, 51 ECAB 394 (2000).

physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.¹²

The Board finds these subsequently submitted reports were insufficient to overcome the weight properly accorded to the impartial medical examiner's report.

Consequently, appellant has not established that his condition on and after July 8, 2007 was causally related to his accepted employment injury.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective July 8, 2007 and that appellant did not meet his burden of proof to establish that he had any injury-related condition or disability after July 8, 2007 causally related to the May 18, 2005 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the February 19, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 10, 2008
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

¹² *G.T.*, 59 ECAB ___ (Docket No. 07-1345, April 11, 2008).