United States Department of Labor
Employees' Compensation Appeals Board

N.S., Appellant	)	
and	)	**Docket No. 07-1668**
	)	**Issued: January 7, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Leesburg, VA, Employer	)	

Appearances:
Stephen Domenic Scavuzzo, 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 June 6, 2007 appellant, through counsel, filed a timely appeal from a March 15, 2007 decision of an Office of Workers' Compensation Programs' hearing representative affirming a July 6, 2006 decision terminating her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this termination case.

ISSUE

The issue is whether the Office properly terminated appellant's medical benefits on the grounds that she no longer had any residuals due to her accepted employment injury.

FACTUAL HISTORY

On October 29, 2001 appellant, then a 37-year-old distribution clerk, filed a traumatic injury claim alleging that on that date she injured her back while lifting tubs of mail. The Office accepted the claim for lumbosacral and sacroiliac strains. Appellant returned to light-duty work on November 6, 2001. On May 5, 2002 she began working six hours a day which increased to

seven hours on September 7, 2002 and eight hours on October 21, 2002. Appellant was paid appropriate compensation.

In a report dated July 29, 2002, Dr. Ian M. Wattenmaker, a Board-certified orthopedic surgeon, performed a physical examination and fitness-for-duty report for the employing establishment. He concluded that appellant had sustained a soft tissue injury which should have resolved within eight weeks of the injury. Dr. Wattenmaker also opined that appellant had no residuals or disability due to her accepted October 29, 2001 employment injury and was capable of returning to her regular duties full time.

In a report dated September 27, 2002, Dr. Carol Currier, a treating physician Board-certified in preventive occupational medicine and ophthalmology, reviewed Dr. Wattenmaker's July 29, 2002 report. She disagreed with his conclusion that appellant had no residuals from her accepted October 29, 2001 employment injury. She noted that appellant's physical examination revealed objectively palpable spasms, which she stated was the rationale behind her continuing appellant on light-duty work and her prescription for physiotherapy.

On December 4, 2002 Dr. Currier stated that appellant had been treated since October 29, 2001 for lumbosacral strain and lower limb radiculopathy symptoms. A physical examination revealed that appellant continued to have back pain and radiating pain into her leg. Dr. Currier opined that "regular physical therapy appoints were successful in helping to decrease muscle spasm, inhibit neural impingement and improve her pain." She stated that appellant's physical therapy treatment enabled her to work and that without it she "would have been off duty."

On February 21, 2002 the Office referred appellant to Dr. Raymond Lower, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion between Dr. Currier, who opined that appellant continued to have residuals from her accepted employment injury, and Dr. Wattenmaker, who found that appellant no longer had any residuals or disability due to her accepted employment injury. On March 7, 2003 Dr. Lower reviewed the medical evidence, statement of accepted facts and set forth findings on physical examination. He opined that appellant's employment injury had resolved. A physical examination revealed no spinal muscle spasm on palpation. Dr. Lower opined that the October 29, 2001 employment injury had temporarily aggravated a preexisting condition. With respect to residuals, he opined that he was unable to determine if appellant's symptoms were entirely subjective and unsupported by objective evidence. Dr. Lower found that appellant had no disability and was capable of returning to full-duty unrestricted work.

By decision dated April 22, 2003, the Office found that physical therapy subsequent to June 2, 2002 and the purchase of a prescribed RS-4i stimulator were unwarranted as her accepted October 29, 2001 employment injury had resolved based upon the report of Dr. Lower, the impartial medical examiner. The Office found that appellant no longer had any residuals or disability due to her accepted October 29, 2001 employment injury. Her claim for wage-loss compensation on and after October 19, 2002 was denied.

On May 16, 2003 appellant's counsel requested an oral hearing before an Office hearing representative, which was subsequently changed to a request for a review of the written record by an Office hearing representative.

On November 13, 2003 appellant submitted reports by Dr. Robert J. Heilen, a treating Board-certified orthopedic surgeon, Dr. Gurutrang Singh Khalsa, a chiropractor, and Dr. James E. Tozzi, a treating Board-certified orthopedic surgeon, in support of her claim. On May 2, 2003 Dr. Khalsa noted that he had treated appellant with acupuncture and chiropractor treatment since her injury on October 29, 2001. He noted that prior to the October 29, 2001 employment injury appellant "had absolutely no symptoms or complaints." Dr. Khalsa reported that appellant "exhibited wincing pain upon palpation of the lumbosacral and sacroiliac structures." He opined that appellant had sustained a lumbosacral strain which was "not self-limiting and should not necessarily have resolved by now." Dr. Khalsa attributed her radiculitis to the October 29, 2001 employment injury.

On June 18, 2003 Dr. Heilen diagnosed an L4-5 annular tear which he opined was "certainly the probable cause of the pain that she has and other symptoms." He opined that the October 29, 2001 traumatic injury "perhaps superimposed earlier wear and tear due to her occupation and bend, but she relates a specific pop and the beginning of pain to a specific date," which is the date of her employment injury.

In a report dated October 21, 2003, Dr. Tozzi noted that appellant was referred for a second opinion by a mutual friend. Appellant related that she had no back problems until her injury on October 29, 2001. Dr. Tozzi opined that appellant continued to be disabled from her usual duties. Based upon a review of magnetic resonance imaging scans and a physical examination, Dr. Tozzi noted that appellant probably sustained an "injury to a degenerative asymptomatic dis[c] which has lead to chronic, persistent back pain with secondarily left leg pain."

By decision dated February 25, 2004, the Office hearing representative found that Dr. Wattenmaker could not be considered a second opinion physician as he had been selected by the employing establishment. He found that there was no conflict in the medical opinion evidence at the time of the referral to Dr. Lower and, therefore, Dr. Lower provided a second opinion report and not as an impartial medical examiner. The Office hearing representative found that there was an unresolved conflict in the medical opinion between Drs. Heilen and Tozzi, who diagnosed an annular tear and opined that appellant continued to have residuals from her employment injury, and Dr. Lower, who opined that there were no residuals and remanded the case to the Office for further development. He also noted that, if the impartial medical examiner determined that appellant's condition had resolved, that the approximate date the condition resolved should be included in the report. The Office hearing representative found the only conflict was whether appellant continued to have residuals from her employment injury and that Dr. Lower's opinion constituted the weight of the evidence regarding the denial of approval for physical therapy subsequent to June 2, 2002 and the purchase of a prescribed RS-4i stimulator as they were unwarranted.

On March 25, 2004 the Office referred appellant to Dr. Gabriel Gluck, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Heilen and Tozzi, who opined that appellant continued to have residuals, and Dr. Lower, who opined that there were no residuals. In an April 14, 2004 report, Dr. Gluck, based upon a review of the medical records, statement of accepted facts and physical examination, diagnosed chronic lumbar strain due to her employment injury. He opined that appellant had residuals of her

employment injury, but the residuals were not disabling and no medical care was necessary. Dr. Gluck stated that "[t]he less medical intervention the patient has at this point, the better" and she did not require any physical therapy.

By decision dated June 21, 2004, the Office found appellant no longer had any residuals due to her accepted October 29, 2001 employment injury based upon the report of Dr. Gluck, the impartial medical examiner. It found that appellant was capable of performing her regular duties and "continued medical treatment is not recommended."

By letter dated June 30, 2004, appellant's counsel requested an oral hearing.

By decision dated January 6, 2005, an Office hearing representative vacated the June 21, 2004 decision and remanded the case to the Office to obtain a supplemental report from Dr. Gluck. The Office hearing representative found that Dr. Gluck's opinion was insufficiently "rationalized in that it did not pinpoint and referee the pertinent conflict in the present case," which was whether appellant sustained an L4-5 annular tear as found by Drs. Heilen and Tozzi.

In a March 1, 2005 supplemental report, Dr. Gluck opined that the finding of an annular tear was "an incidental finding and it is not the cause of the patient's back pain or her disability." Dr. Gluck concluded that appellant's back pain was caused by a muscle sprain, which "should resolve over time."

By decision dated July 6, 2006, the Office found that the medical evidence established that she no longer had any residuals due to her accepted October 29, 2001 employment injury. The Office found that the weight of the medical evidence rested with the opinion of Dr. Gluck, the impartial medical examiner. The Office found that appellant was not entitled to any further medical treatment.

On July 19, 2006 appellant's counsel requested an oral hearing before an Office hearing representative, which was held on December 18, 2006. At the hearing appellant submitted additional medical evidence.

In an August 17, 2004 report, Dr. Tony N. Aram, a treating physician, noted that appellant had initially been diagnosed with a lumbar strain due to an October 29, 2001 employment injury. He noted that appellant's condition had not improved and that she had been diagnosed with an L4-5 annular tear by Drs. Heilen and Tozzi. In concluding, Dr. Aram attributed her back pain to her L4-5 annular tear.

On August 18, 2005 Dr. Michael Kuo, a treating Board-certified physiatrist, noted that appellant sustained an employment injury on October 29, 2001 while lifting a tub of mail. Appellant related having lower back pain since the injury. A physical examination revealed "a few tender taut bands and trigger points at the left lower lumbar paraspinal and left gluteal musculature" and "considerable discomfort over the lower lumbar segment." Lumbar range of motion was moderately limited. A review of a magnetic resonance imaging scan revealed Grade 4 L4-5 disc degeneration with protrusion. Diagnoses included L4-5 lumbar degenerative disc disease with a broad-based central disc protrusion and probable annular tear at L4-5 and chronic left lower limb radicular symptoms and lower left-sided back pain.

In a January 5, 2005 report, Dr Kuo diagnosed chronic left lower limb radicular symptoms and lower left-sided back pain, L4-5 annular tear and disc protrusion and lumbar degenerative disc disease.

By decision dated March 15, 2007, the Office hearing representative affirmed the July 6, 2006 Office decision.

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.[1] 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.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. 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.[4]

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[5] Where 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 a proper factual and medical background must be given special weight.[6]

In a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[7] If the impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the

[1] *Paul L. Stewart*, 54 ECAB 824 (2003).

[2] *Elsie L. Price*, 54 ECAB 734 (2003).

[3] *See Del K. Rykert*, 40 ECAB 284 (1988).

[4] *James F. Weikel*, 54 ECAB 660 (2003).

[5] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[6] *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

[7] *L.R. (E.R.)*, 58 ECAB ___ (Docket No. 06-1942, issued February 20, 2007); *Phillip H. Conte*, 56 ECAB ___ (Docket No. 04-1524, issued December 22, 2004); *Guiseppe Aversa*, 55 ECAB 164 (2003).

case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.[8]

ANALYSIS

The Office accepted that appellant sustained lumbosacral and sacroiliac strains as a result of her accepted October 29, 2001 employment injury. The Office found that it had erroneously declared a conflict in the medical opinion evidence between Drs. Currier and Wattenmaker as Dr. Wattenmaker was not a second opinion physician. Therefore, Dr. Lower could not be considered an impartial medical examiner but was a second opinion physician. The Board notes that the Office properly determined that there was a conflict in the medical opinion evidence between Dr. Lower and Drs. Heilen and Tozzi regarding whether appellant continued to have residuals of her accepted employment injury and whether the L4-5 annular tear diagnosed by Drs. Heilen and Tozzi was due to the October 29, 2001 employment injury. The Office properly referred appellant to Dr. Gluck for an impartial medical evaluation as to whether appellant continued to have residuals of her accepted October 29, 2001 employment injury and whether the L4-5 annular tear was due to the injury.

In an April 14, 2004 report, Dr. Gluck, based upon a review of the medical records, statement of accepted facts and physical examination, diagnosed chronic lumbar strain due to her employment injury. He opined that appellant had residuals of her employment injury, but they required no medical care and were not disabling. In a March 1, 2005 supplemental report, Dr. Gluck opined that the finding of an annular tear was "an incidental finding and it is not the cause of the patient's back pain or her disability." He concluded that appellant's back pain was caused by a muscle sprain, which "should resolve over time." Dr. Gluck did not, however, provide any rationale for his determination that appellant's accepted lumbar and sacroiliac strains required medical care or that the L4-5 annular tear was incidental. He concluded that the L4-5 annular tear was incidental and that appellant did not require further medical treatment for her accepted employment injuries, but provided no analysis to show how he reached such a determination. While Dr. Gluck's statement that appellant did not require further medical treatment and that the L4-5 annular tear was clear and unequivocal, he failed to offer any medical reasoning in support of his conclusion.[9] The certainty with which he expressed his opinion cannot overcome the lack of medical rationale.[10] As Dr. Gluck did not sufficiently explain his finding that appellant required no further medical treatment and that the L4-5 annular tear was incidental, his opinion is insufficient to constitute the weight of the evidence on this issue and the record contains an unresolved conflict in medical opinion on the extent of disability. In addition, he did not provide a date for when appellant no longer required medical treatment for her accepted lumbosacral and sacroiliac strains, which was a remand instruction by

[8] *Nancy Keenan*, 56 ECAB ___ (Docket No. 05-949, issued August 18, 2005); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071 (1979); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(c)(1)-(2) (April 1993).

[9] *See Elaine Sneed*, 56 ECAB ___ (Docket No. 04-2039, issued March 7, 2005).

[10] *See Willa M. Frazier*, 55 ECAB 379 (2004).

the Office hearing representative on February 25, 2004. The Board finds that the Office did not meet its burden of proof to terminate her medical benefits.

CONCLUSION

The Board finds that the Office improperly terminated appellant's medical benefits on the grounds that she had no further residuals due to her October 29, 2001 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 15, 2007 is reversed.

Issued: January 7, 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