

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

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C.C., Appellant

and

U.S. POSTAL SERVICE, MAIN POST OFFICE,  
Minneapolis, MN, Employer

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**Docket No. 07-1795  
Issued: January 3, 2008**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On June 25, 2007 appellant filed a timely appeal of a March 30, 2007 merit decision of the Office of Workers' Compensation Programs' hearing representative who affirmed the termination of 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 effective November 30, 2005 on the grounds that she no longer had any residuals or disability causally related to her employment-related May 22, 1997 injury; and (2) whether she had any continuing employment-related residuals or disability after November 30, 2005.

**FACTUAL HISTORY**

On May 24, 1997 appellant, then a 43-year-old manual clerk, filed a traumatic injury claim assigned file number 10-0467641 alleging that on May 22, 1997 she hurt her lower back as

a result of lifting a tray from a u-cart.<sup>1</sup> She was performing limited-duty work at the time of the injury. By letter dated August 13, 1997, the Office accepted appellant's claim for lumbosacral strain.

Appellant began performing limited-duty work four hours per day effective January 8, 2003 based on the medical opinion and restrictions set forth by Dr. John R. Kearns, an attending Board-certified orthopedic surgeon, who opined that appellant had continuing residuals of her employment-related back injury. Dr. Kearns stated that she could only work four hours per day with restrictions due to this injury. Appellant was restricted from lifting over 10 pounds, performing repetitive activities using her back, neck or upper extremities, casing mail and sitting or standing for a prolonged period. She was required to use a chair with back support and should be allowed the freedom to move around and to work during the daytime.

On February 20, 2003 appellant filed a claim for wage-loss compensation for the period beginning January 8, 2003 due to her May 22, 1997 employment injury. The Office paid appropriate compensation.

By letter dated October 22, 2003, the Office referred appellant, together with a statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Edward H. Kelly, a Board-certified orthopedic surgeon, for a second opinion medical examination. He was asked to determine whether she had any employment-related residuals or disability, whether she could return to her regular work duties and whether she could work eight hours per day.

In a November 12, 2003 medical report, Dr. Kelly reviewed a history of appellant's May 22, 1997 and March 28, 1988 employment injuries and medical treatment. He reported his normal findings on physical examination. Dr. Kelly found that appellant suffered from low back, neck and right shoulder pain. He opined that she had no disability or residuals causally related to the May 22, 1997 employment injury. Dr. Kelly stated that appellant had continuing residuals of the March 28, 1988 employment injury. Appellant could not return to her regular work duties but she could work eight hours per day with restrictions due to this injury.

By letter dated December 18, 2003, the Office requested that Dr. Kearns review the findings of Dr. Kelly and determine whether appellant was capable of increasing her light-duty work hours from four to eight hours per day. In a December 28, 2003 letter, Dr. Kearns referred the Office to his previous work restrictions and recommendations regarding appellant's ability to work.

On January 6, 2004 the Office found a conflict in the medical opinion evidence between Dr. Kearns and Dr. Kelly as to whether appellant had continuing residuals or disability causally related to her May 22, 1997 employment injury and whether she could work eight hours per day. By letter dated March 1, 2004, it referred appellant, together with a statement of accepted facts,

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<sup>1</sup> Prior to the instant claim, appellant filed a claim assigned File No. 10-0372892 alleging that she sustained a back injury on March 28, 1988 at work. The Office accepted the claim for lumbosacral strain. Additionally, appellant's claim for a recurrence of disability was accepted by the Office as new claim assigned File No. 10-0383994 for cervical and right shoulder strain and permanent aggravation of cervical degenerative disc disease sustained on February 3, 1989.

the case record and a list of questions to be addressed, to Dr. H. William Park, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an April 12, 2004 report, Dr. Park stated that appellant was examined on April 2, 2004. He noted a history of her May 22, 1987 employment injury and medical background. Dr. Park provided a detailed review of appellant's medical records and his essentially normal findings on physical examination. He stated that she had ongoing degenerative disc problems dating back to 1988 through 1989. Dr. Park opined that appellant sustained a temporary aggravation of this preexisting condition on May 22, 1997 that had since resolved. He noted a 1998 finding of Dr. Thomas C. Jetzer, Board-certified in occupational medicine, that appellant's low back symptoms were improving to the point where her low back problem was resolving. Dr. Park stated that this was consistent with her ongoing problems related to degenerative disc disease in the lower lumbar spine which was demonstrated by a computerized tomography (CT) scan and caused mechanical low back pain which preexisted the May 22, 1997 employment injury. He stated that there was no permanent structural injury and no objective findings of neurological involvement in the lower extremities as a result of the May 1997 employment injury. Dr. Park noted a negative straight leg raising since the May 22, 1997 employment injury. He opined that appellant was capable of working 40 hours per week. Appellant was restricted from repetitive bending and lifting and prolonged sitting for more than two to three hours at a time. Dr. Park stated that appellant should be allowed to get up and walk around on an as needed basis. Lastly, she should avoid heavy lifting based on the CT scan findings of degenerative disc disease with a bulging disc at L5-S1. Dr. Park concluded that the stated restrictions were due to appellant's preexisting condition and not the May 22, 1997 employment injury.

By letter dated May 10, 2004, the Office issued a notice of proposed termination of compensation based on Dr. Park's medical opinion. It provided 30 days in which appellant could respond. She did not respond within the allotted time period.

In a decision issued on June 15, 2004, the Office terminated appellant's compensation benefits.

On June 30, 2004 she requested an oral hearing before an Office hearing representative.

By decision dated March 29, 2005, a hearing representative reversed the June 15, 2004 decision. He found that the Office did not meet its burden of proof in terminating appellant's compensation based on Dr. Park's April 12, 2004 opinion. The hearing representative found that the opinion was of diminished probative value because it was not based on a proper factual background. The statement of accepted facts reviewed by Dr. Park did not contain information regarding the March 28, 1988 employment injury. The hearing representative stated that this information may be relevant to Dr. Park's opinion as he referred to appellant's symptoms of degenerative disc disease dating back to 1988 through 1998. He directed the Office to reinstate her compensation retroactive to the termination date. The hearing representative also directed the Office to obtain appellant's case file for the March 28, 1998 employment injury and combine it with the case record for the instant claim. The Office was instructed to prepare a new statement of facts and refer appellant back to Dr. Park for an examination and opinion as to whether her current back problems were caused or aggravated by the March 28, 1988 or May 22, 1997 employment injuries.

By letter dated July 22, 2005, the Office requested that Dr. Park submit a supplemental report which addressed whether appellant had any disability causally related to the March 28, 1988 or May 22, 1997 employment injuries.

In a September 2, 2005 supplemental report, Dr. Park stated that based on the history provided by appellant on that date, she had continuing symptoms of intermittent mechanical low back pain from 1988 to 1997, his opinion regarding the May 22, 1997 temporary aggravation had not changed since his April 2, 2004 examination. He reiterated his prior findings and rationale regarding the lack of a causal relationship between appellant's current back problems and the May 22, 1997 employment injury and her ability to perform full-time limited-duty work. Dr. Park opined that the May 22, 1997 employment injury aggravated appellant's underlying degenerative disc disease and that this aggravation ceased in April 1998. He stated that she never had any back problems prior to 1988 and that she started having symptoms of low back pain of a mechanical nature. Dr. Park opined that appellant's current degenerative disc disease symptoms in the neck and low back were due to the significant aggravation of the underlying degenerative disc disease dating back to the March 28, 1988 employment injury, as well as the natural progression of the disease.

By letter dated October 26, 2005, the Office issued a notice of proposed termination of compensation based on Dr. Park's September 2, 2005 medical opinion. It provided 30 days in which appellant could respond. In a November 22, 2005 letter, appellant requested that the Office grant her an extension as she was waiting on her physicians so that she could submit additional information. She did not submit any additional evidence.

By decision dated November 30, 2005, the Office terminated appellant's compensation effective that date. It determined that Dr. Park's medical opinion as an impartial medical specialist constituted the weight of the medical evidence in finding that appellant no longer had any residuals or disability causally related to her May 22, 1997 employment injury.

The Office received Dr. Kearns' September 15, 2005 treatment note which addressed appellant's neck and proximal shoulder pain. He prescribed physical therapy and excused her from work for at least a week. In a November 25, 2005 treatment note, Dr. Kearns stated that appellant continued to experience intermittent back problems. He opined that these problems resulted from the 1988 work-related injury.

On December 20, 2005 appellant requested an oral hearing.

The Office received Dr. Kearns' November 7, 2005 treatment note which addressed appellant's neck and back symptoms.

At the February 7, 2007 hearing, appellant submitted Dr. Kearns' January 22, 2007 report. He noted a history that he had been treating appellant since February 1989, approximately 11 months following a work-related injury involving her back and neck. Dr. Kearns stated that this was a significant injury that left her with permanent residual symptoms that were recognized as work related by the employing establishment. He further stated that, since then, appellant has had a number of work-related back injuries. Dr. Kearns related that she sustained significant injury in May 1997 that increased her back symptoms and

continued to play a role in her current symptoms. He opined that appellant's current back and neck problems were related to the 1988 work injury and that the May 1997 employment injury was a permanent aggravation of the previous injury.

By decision dated March 30, 2007, a hearing representative affirmed the November 30, 2005 decision. She accorded special weight to Dr. Park's medical opinion as an impartial medical specialist in finding that appellant no longer had any residuals or disability causally related to her May 22, 1997 employment injury.<sup>2</sup>

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

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that, an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>3</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup>

Section 8123 of the Federal Employees' Compensation Act provides that, 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.<sup>5</sup> When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>6</sup>

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

The Board finds that the Office properly determined that there was a conflict in the medical opinion evidence between Dr. Kearns, an attending physician, and Dr. Kelly, an Office referral physician, as to whether appellant had any continuing residuals or disability causally

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<sup>2</sup> In the March 30, 2007 decision, the hearing representative also found that the claim for the March 28, 1988 employment injury was currently in a denied and closed status. She noted that in May 2005 appellant requested that the claim be reopened. The Office developed the request as a recurrence of disability claim but took no further action after receiving appellant's responses to its June 1 and September 28, 2006 developmental letters. The hearing representative instructed the Office to complete adjudication of the recurrence of disability claim for payment of medical compensation benefits since both Dr. Kearns and Dr. Park opined that appellant had continuing residuals of the March 28, 1998 employment injury. This claim is not currently on appeal to this Board.

<sup>3</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>4</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>5</sup> 5 U.S.C. § 8123.

<sup>6</sup> *James F. Weikel*, 54 ECAB 660 (2003); *Beverly Grimes*, 54 ECAB 543 (2003); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003); *Phyllis Weinstein (Elliot H. Weinstein)*, 54 ECAB 360 (2003); *Robert V. Disalvatore*, 54 ECAB 351 (2003); *Bernadine P. Taylor*, 54 ECAB 336 (2003); *Karen L. Yeager*, 54 ECAB 317 (2003); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

related to her accepted employment-related back injury and ability to perform limited-duty work eight hours per day. Dr. Kearns opined that appellant had continuing residuals of her accepted employment injury and that she could only work four hours per day with restrictions. Dr. Kelly opined that appellant had no residuals or disability causally related to her employment-related back injury and that she could perform limited-duty work eight hours per day with restrictions.

The Office referred appellant to Dr. Park, selected as the impartial medical specialist. In an April 12, 2004 report and a September 2, 2005 supplemental report,<sup>7</sup> he listed no objective findings of residuals relative to the accepted May 22, 1997 employment-related lumbosacral strain. After reviewing appellant's medical records and reporting essentially normal findings on physical examination, Dr. Park opined that the May 22, 1997 employment injury aggravated appellant's preexisting degenerative disc disease but that this aggravation had resolved as of April 1998. He explained that Dr. Jetzer's 1998 finding indicated that appellant's low back symptoms were improving to the point where her low back problem was resolving. Dr. Park stated that this was consistent with the findings of a CT scan and that her preexisting degenerative disc disease caused mechanical low back pain prior to the May 22, 1997 employment injury. He further stated that appellant's preexisting condition dated back to 1988 through 1989. Dr. Park found no permanent structural injury and there were no objective findings of neurological involvement in the lower extremities as a result of the May 1997 employment injury. He noted a negative straight leg raising since this injury occurred. Dr. Park opined that appellant could work 40 hours per week with restrictions that were due to her preexisting degenerative disc disease.

The Board finds that Dr. Park's opinion is based on a proper factual and medical background and is entitled to special weight. He found that appellant no longer had any residuals or disability due to the accepted May 22, 1997 employment-related lumbosacral strain and that she could perform full-time limited-duty work with restrictions. For this reason, his reports constitute the special weight of the medical opinion evidence afforded an impartial medical specialist.

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

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had any disability causally related to her accepted injury.<sup>8</sup> To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.<sup>9</sup> Causal relationship is a medical issue and the medical evidence required to

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<sup>7</sup> The Board notes that it was proper for the Office to seek clarification from Dr. Park as the Board has held that, 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. *See Phillip H. Conte*, 56 ECAB \_\_\_\_ (Docket No. 04-1524, issued December 22, 2004).

<sup>8</sup> *See Manuel Gill*, 52 ECAB 282 (2001).

<sup>9</sup> *Id.*

establish a causal relationship is rationalized medical evidence.<sup>10</sup> Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 the claimant.<sup>11</sup>

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

The relevant medical evidence regarding continuing employment-related residuals submitted by appellant after November 30, 2005 consists of Dr. Kearns' September 15 and November 7 and 25, 2005 treatment notes which addressed appellant's continuing neck, back and shoulder pain. The November 25, 2005 treatment note attributed appellant's current back problems to the March 28, 1988 employment injury. Dr. Kearns' treatment notes failed to provide an opinion as to whether appellant had any continuing symptoms due to the May 22, 1997 employment injury. In a January 22, 2007 report, he found that appellant's current back and neck problems were related to the March 28, 1988 employment injury and that the May 22, 1997 employment injury permanently aggravated the prior injury. Dr. Kearns' opinion regarding causal relationship is similar to his prior opinion that was considered and found to give rise to the conflict in medical opinion. As the Board has held, a subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion.<sup>12</sup> The Board finds that Dr. Kearns' treatment notes and report are insufficient to establish appellant's claim of continuing residuals of the May 22, 1997 employment injury after November 30, 2005.

### **CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation effective November 30, 2005 on the grounds that she no longer had any residuals or disability causally related to her accepted May 22, 1997 employment injury. The Board further finds that appellant failed to establish that she had any continuing employment-related residuals or disability after November 30, 2005.

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<sup>10</sup> *Elizabeth Stanislav*, 49 ECAB 540 (1998).

<sup>11</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

<sup>12</sup> See *Kathryn E. Demarsh*, 56 ECAB \_\_\_\_ (Docket No. 05-269, issued August 18, 2005); *William Morris*, 52 ECAB 400 (2001). The Board notes that Dr. Kearns' treatment notes and report do not contain new findings or rationale upon which a new conflict might be based.

**ORDER**

**IT IS HEREBY ORDERED THAT** the March 30, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 3, 2008  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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