

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

R.D., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Holtsville, NY, Employer**

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**Docket No. 08-996
Issued: September 23, 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 February 19, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' September 7, 2007 and January 30, 2008 merit decisions concerning the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective September 5, 2007 on the grounds that she had no residuals of her February 2, 2005 employment injury after that date.

FACTUAL HISTORY

The Office accepted that on February 2, 2005 appellant, then a 41-year-old tax examiner, sustained employment-related lumbar and neck sprains and strains when she sat down in her

chair. She indicated that while sitting down she turned in the chair and it went all the way back and jerked her back. She stopped work on February 2, 2005.

Appellant initially sought treatment from a chiropractor, Dr. James Lambert, who diagnosed cervical and lumbosacral sprains and strains, cervicgia and cervico-cranial syndrome. Dr. Lambert indicated that appellant could not perform any work.¹ In a November 9, 2005 report, Dr. Richard Pearl, an attending Board-certified neurosurgeon, described the February 2, 2005 injury and stated that appellant had a right leg radiculopathy.

The findings of a May 5, 2006 magnetic resonance imaging test showed C4-5 and C5-6 disc bulges which impinged upon the thecal sac and straightening of the cervical spine probably secondary to muscular spasm and/or strain. Dr. Samir Haddad, an attending Board-certified neurologist, indicated that appellant visited him for the first time on February 10, 2006 and complained of having back and neck pain since her February 2, 2005 injury. He diagnosed cervicgia and severe lumbar radiculopathy.

On August 22, 2006 Dr. Wayne Kerness, a Board-certified orthopedic surgeon, who served as an Office referral physician, described appellant's February 2, 2005 employment injury and noted that she complained of right arm pain and had some limitation of back motion on examination.² He indicated that muscle strength was 5/5 in all extremities and that appellant was able to move her neck and extremities in a normal fashion in unguarded moments. Dr. Kerness concluded that appellant's work-related cervical and lumbosacral sprains and strains had resolved and that she had no residuals of her February 2, 2005 employment injury. He determined that appellant could perform her regular job.

In a September 13, 2006 report, Dr. Haddad stated that appellant exhibited one trigger point of tenderness on the right shoulder and one in the right C5 nerve distribution. On October 16, 2006 he noted that appellant was totally disabled from work due to her February 2, 2005 employment injury. Dr. Haddad periodically treated appellant with trigger point injections and generally indicated that her medical condition did not change.

The Office determined that there was a conflict in the medical evidence between Dr. Kerness and Dr. Haddad regarding whether appellant continued to have residuals of her February 2, 2005 injury and referred the case to Dr. Michael J. Katz, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter.

On May 8, 2007 Dr. Katz described the February 2, 2005 employment injury and indicated that appellant complained of pain in her back when bending at the waist. He indicated that on examination appellant had no tenderness about the cervical spine and had no paravertebral muscle spasm. Appellant's gait was normal and she had no muscle spasms in her

¹ Appellant later sought treatment from another chiropractor, Dr. Larain Valenti, who provided similar diagnoses.

² Appellant indicated that she sustained a low back injury in 1985 and a neck injury "years ago."

lumbosacral spine. Dr. Katz noted that appellant had normal strength and sensation in the cervical and lumbar spines. Regarding the examination, he stated:

“At no time did [appellant] complain of any painful condition. She asked for help getting up from the examining table and prior to stating that she stated, ‘You do not want me to fall.’ I helped the claimant up and it was clear that she was not exerting any effort at all in order to get up on her own. The claimant makes assertions that are quite vague with regard to her types of injury.... She makes no specific radicular complaint at this time and in fact it appears that through the treatments that were rendered her radicular involvement has improved.... The diagnosis is a resolved diagnosed lumbosacral radiculopathy.

“The claimant had a causal relationship to event of February 2, 2005. The causal relationship is by aggravation of preexisting lumbosacral problem. The aggravation was certainly temporary and does not exist at this time. The claimant is capable of working as a tax examiner without restrictions at this time. She is not disabled at the current time.”

In a July 31, 2007 letter, the Office advised appellant of its proposed termination of her compensation based on the opinion of Dr. Katz. It provided appellant 30 days to submit additional evidence if she felt the termination was unwarranted. In an August 13, 2007 letter, appellant, through her attorney, argued that she sustained injuries on February 2, 2005 which were more serious than those accepted by the Office.

In a September 7, 2007 decision, the Office terminated appellant’s compensation effective September 5, 2007 on the grounds that she had no residuals of her February 2, 2005 employment injury after that date. It determined that the weight of the medical evidence on this matter rested with the well-rationalized opinion of Dr. Katz, the impartial medical specialist.³

In a September 12, 2007 report, Dr. Haddad stated that appellant continued to be totally disabled due to her February 2, 2005 employment injury. He indicated that her cervical spine, lumbar spine, right shoulder and headache problems were related to her February 2, 2005 injury.⁴ In a September 25, 2007 report, Dr. Pearl stated that appellant’s symptoms, including back and right leg pain, were related to her employment injury as she did not previously report such symptoms. He indicated that he last saw appellant on January 25, 2006.

In a January 30, 2008 decision, the Office affirmed its September 7, 2007 decision indicating that the additional medical evidence submitted by appellant did not change the fact that the weight of the medical evidence rested with the opinion of Dr. Katz.⁵

³ The Office terminated appellant’s compensation for both wage-loss and medical benefits.

⁴ Appellant also submitted routine treatment notes of Dr. Haddad.

⁵ Appellant submitted additional evidence after the Office’s January 30, 2008 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,⁶ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁷ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁸ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

Section 8123(a) of the 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."¹⁰ In situations where 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.¹¹

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.¹²

ANALYSIS

The Office accepted that on February 2, 2005 appellant sustained employment-related lumbar and neck sprains and strains when she sat down in her chair and the back of the chair went all the way back. It terminated her compensation effective September 5, 2007 on the grounds that she had no residuals of her February 2, 2005 employment injury after that date. The Office determined that the weight of the medical evidence on this matter rested with the well-rationalized opinion of Dr. Katz, a Board-certified orthopedic surgeon who served as an impartial medical specialist.

The Office properly determined that there was a conflict in the medical opinion between Dr. Haddad, appellant's attending Board-certified neurologist, and Dr. Kerness, a Board-certified

⁶ 5 U.S.C. §§ 8101-8193.

⁷ *Charles E. Minmiss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁸ *Id.*

⁹ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ 5 U.S.C. § 8123(a).

¹¹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹² *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

neurosurgeon acting as an Office referral physician, on the issue of whether appellant continued to have residuals of the February 2, 2005 employment injury.¹³ In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Katz for an impartial medical examination and an opinion on the matter.¹⁴

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Katz, the impartial medical specialist selected to resolve the conflict in the medical opinion.¹⁵ The May 8, 2007 report of Dr. Katz establishes that appellant had no residuals of her February 2, 2005 employment injury after September 5, 2007.

On May 8, 2007 Dr. Katz indicated that on examination appellant had no tenderness about the cervical spine and had no paravertebral muscle spasm. Appellant's gait was normal and she had no muscle spasms in her lumbosacral spine. Dr. Katz noted that appellant had normal strength and sensation in the cervical and lumbar spines. He concluded that appellant had no residuals of her February 2, 2005 employment injury.

The Board has carefully reviewed the opinion of Dr. Katz and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Katz' opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹⁶ He provided medical rationale for his opinion by explaining that appellant had no objective signs of employment-related lumbar and neck sprains and strains. Dr. Katz indicated that these conditions were temporary and had since resolved. He explained appellant's continuing symptoms by indicating that they were due to nonwork-related conditions including preexisting degenerative disease. Dr. Katz stated that appellant gave vague answers regarding her medical condition and did not give maximum effort in the examination.¹⁷ For these reasons, the Office's termination of compensation benefits was clearly warranted on the basis of the evidence.

After the Office's September 7, 2007 decision terminating appellant's compensation effective September 5, 2007, appellant submitted additional medical evidence which she felt

¹³ On August 22, 2006 Dr. Kerness concluded that appellant's work-related cervical and lumbosacral sprains and strains had resolved and that she had no residuals of her February 2, 2005 employment injury. In contrast Dr. Haddad indicated on October 16, 2006 that appellant was totally disabled from work due to her February 2, 2005 employment injury.

¹⁴ See *supra* note 10 and accompanying text.

¹⁵ See *supra* note 11 and accompanying text.

¹⁶ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹⁷ Appellant argued that she sustained injuries on February 2, 2005 which were more serious than those accepted by the Office. However, she did not submit sufficient medical evidence to establish this claim. Appellant submitted reports of chiropractors which contained additional diagnoses but these reports do not constitute probative medical evidence as the chiropractors did not diagnose a spinal subluxation as demonstrated by x-ray testing. See 5 U.S.C. § 8101(2); *Jack B. Wood*, 40 ECAB 95, 109 (1988). Some reports mentioned a right leg radiculopathy and straightening of the cervical spine but there is no rationalized medical opinion in the record relating these conditions to the February 2, 2005 injury.

showed that she was entitled to compensation after September 5, 2007 due to residuals of her February 2, 2005 employment injury. Given that the Board has found that the Office properly relied on the opinion of the impartial medical examiner, Dr. Katz, in terminating appellant's compensation effective September 5, 2007, the burden shifts to appellant to establish that she is entitled to compensation after that date.

The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that she had residuals of her February 2, 2005 employment injury after September 5, 2007. Appellant submitted a September 12, 2007 report in which Dr. Haddad stated that she continued to be totally disabled due to her February 2, 2005 employment injury. However, this report is of limited probative value as Dr. Haddad did not provide any medical rationale in support of his opinion. In a September 25, 2007 report, Dr. Pearl, an attending Board-certified neurosurgeon, stated that appellant's symptoms were related to her employment injury as she did not previously report such symptoms. However, this opinion would not relate to appellant's condition after September 5, 2007 as Dr. Pearl indicated that he last saw appellant on January 25, 2006.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective September 5, 2007 on the grounds that she had no residuals of her February 2, 2005 employment injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 30, 2008 and September 7, 2007 decisions are affirmed.

Issued: September 23, 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