

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

L.C., Appellant)
and) Docket No. 08-2271
U.S. POSTAL SERVICE, POST OFFICE,) Issued: August 6, 2009
Philadelphia, PA, Employer)

)

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 18, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' January 16 and July 21, 2008 merit decisions concerning the Office's termination of her compensation and modification of its determination of her wage-earning capacity. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation and modify its determination of her wage-earning capacity effective January 16, 2008.

FACTUAL HISTORY

The Office accepted that on June 11, 1990 appellant, then a 36-year-old mail handler, sustained a lumbosacral strain when she bent down to pick up an empty mail tub.¹ It later

¹ Appellant stopped work on June 11, 1990 but later returned to light-duty work for the employing establishment.

accepted that she sustained an adjustment reaction due to the injury. Appellant stopped work for various periods and received compensation for periods of partial and total disability.

Appellant received treatment for her orthopedic problems from Dr. Thomas Hopkins, Jr., a Board-certified orthopedic surgeon. She received relatively little treatment for her adjustment reaction. On May 28, 1996 Dr. Fredric K. Katrina, a Board-certified psychiatrist who served as an Office referral physician, detailed appellant's physical and emotional medical history. He indicated that appellant might have some form of chronic pain disorder related to her general medical condition. Dr. Katrina concluded, however, that appellant no longer had residuals of the accepted adjustment disorder. He stated that she did not have objective signs of a lumbosacral sprain and indicated that, by definition, an adjustment reaction was a time-limited diagnosis that generally would not persist for more than six months.

On May 24, 1999 Dr. Ari-Beth Cohen, an attending Board-certified family practitioner, stated that on examination of her back appellant did not have tenderness to palpation or spasms. Straight leg raising was negative. On June 21, 1999 Dr. Hopkins indicated that appellant reported low back pain without radiculopathy. He posited that she could work eight hours per day with a restriction of lifting no more than 15 pounds. On April 20, 2000 Dr. Wendy Lockwood, an attending clinical psychologist, stated that appellant showed signs of depression, including apathy and feelings of hopelessness.

In 2000, appellant began to participate in vocational rehabilitation efforts. Beginning January 7, 2002, she started working as a church secretary with wages of \$300.00 per week. In a March 11, 2002 decision, the Office adjusted appellant's compensation effective January 27, 2002 based on its determination that her wage-earning capacity was represented by her actual wages as a church secretary.

On March 30, 2006 Dr. Hopkins stated that he saw no change in appellant's situation since 1995 in that she was obese and continued to report a chronic backache. He indicated that he would have expected the typical back strain complaint that she suffered in 1990 to be resolved by now and he noted that he could find no objective pathology present on her examination. Dr. Hopkins saw no reason appellant could not work on a full-time basis in a sedentary-type position with a restriction from lifting more than 15 pounds as a preventative measure. He noted that all of her studies were negative, that she had no objective pathology and that there was no further treatment indicated for her. Dr. Hopkins recommended that appellant continue to work on weight loss and continue her back exercises as there was nothing more aggressive that could be done for her and her symptoms were typical of the usual patients with chronic back pain.

On September 18, 2007 Dr. Alexander Doman, a Board-certified orthopedic surgeon who served as an Office referral physician, detailed appellant's medical history and noted that she had not sought medical treatment for a year. He stated that on examination appellant showed intentional symptom exaggeration with complaints of severe pain with simple attempts to flex the left and right knees to 90 degrees and rotate her pelvis to 20 degrees. She had tenderness

with light subcutaneous pressure over her lumbar spine, deep tendon reflexes were normal, there were no signs of muscular atrophy and x-rays of the lumbar spine are normal. Dr. Doman stated:

“There is no diagnosis related to the June 11, 1990 work injury other than the fact that the patient is intentionally and purposely exaggerating her complaints, in the opinion of this examiner, for purposes of secondary gain and leads this examiner to conclude that the diagnosis is that of a malingering the patient. This diagnosis is supported by multiple elements during the physical examination that have no organic basis for any pathology and represent intentional efforts to deceive this examiner. The accepted condition of a lumbosacral strain has long ago resolved. It is my opinion that this condition would have resolved at least 15 years ago. Finally, it is my firm and definite opinion that [appellant] is physically able to perform the duties as a mail handler that she held on June 11, 1990 for reasons stated above.”²

In a December 10, 2007 notice, the Office advised appellant that it proposed to terminate her compensation and modify its determination regarding her wage-earning capacity. It noted that these actions were justified by the medical evidence, including the reports of Dr. Hopkins, Dr. Doman and Dr. Katrina. The Office found that the wage-earning capacity modification was justified by the fact that there had been a material change in her injury-related medical condition. It provided appellant 30 days to submit evidence and argument challenging the proposed actions.

In a January 16, 2008 decision, the Office terminated appellant’s compensation and modified its determination of her wage-earning capacity effective January 16, 2008. It found that her condition had improved such that she no longer had wage loss due to her employment injury.³

At a May 7, 2008 hearing before an Office hearing representative, appellant’s attorney argued that appellant’s employment injury prevented her from earning wages beyond that earned by a church secretary. Appellant testified that she had not seen a psychiatrist since 2002. She submitted a May 28, 2008 report of a physician’s assistant.

In a July 21, 2008 decision, the Office hearing representative affirmed the Office’s January 16, 2008 decision.

LEGAL PRECEDENT

Under the Federal Employees’ Compensation Act,⁴ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁵ It may not

² Dr. Doman indicated on a form report that appellant had no restrictions.

³ Appellant did not submit any evidence in response to the Office’s December 10, 2007 notice within the allotted time.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was in fact erroneous.⁸ The burden of proof is on the party attempting to show the award should be modified.⁹

ANALYSIS

The Office accepted that on June 11, 1990 appellant sustained a lumbosacral strain when she bent down to pick up an empty mail tub. It later accepted that she sustained an adjustment reaction due to the injury. The Board finds that the Office met its burden of proof to terminate appellant's compensation and modify its determination of her wage-earning capacity effective January 16, 2008.

The Office presented sufficient medical evidence to meet this burden of proof. The well-rationalized reports of Dr. Hopkins, an attending Board-certified orthopedic surgeon, and Dr. Doman, a Board-certified orthopedic surgeon who served as an Office referral physician, show that appellant ceased to have residuals of her June 11, 1990 lumbosacral sprain.

On March 30, 2006 Dr. Hopkins stated that he would have expected the typical back strain complaint that appellant suffered in 1990 to be resolved by now and he noted that he could find no objective pathology present on her examination. He saw no reason appellant could not work on a full-time basis in a sedentary-type position with a restriction from lifting more than 15 pounds but explained that this was recommended as a preventative measure rather than being necessitated by an employment-related condition. Dr. Hopkins noted that all of her studies were negative, that she had no objective pathology and that there was no further treatment indicated for her. On September 18, 2007 Dr. Doman stated that on examination appellant showed intentional symptom exaggeration with complaints of severe pain with simple attempts to flex the left and right knees to 90 degrees and rotate her pelvis to 20 degrees. He noted the lack of objective findings on examination and concluded that the accepted condition of a lumbosacral strain had long ago resolved (at least 15 years prior). Appellant's complaints were explained by malingering and she was able to perform the mail handler job she held on June 11, 1990.¹⁰

⁶ *Id.*

⁷ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁹ *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

¹⁰ Appellant submitted a May 28, 2008 report of a physician's assistant in support of her claim. However, as causal relationship is a medical question that can only be resolved by medical opinion evidence, the reports of a nonphysician cannot be considered by the Board in adjudicating that issue. See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

The May 28, 1996 report of Dr. Katrina, a Board-certified psychiatrist who served as an Office referral physician, showed that appellant ceased to have an adjustment disorder due to the June 11, 1990 sprain. He found that she no longer had residuals of the accepted adjustment disorder. Dr. Katrina explained that appellant did not have objective signs of a lumbosacral sprain and indicated that, by definition, an adjustment reaction was a time-limited diagnosis that generally would not persist for more than six months. He indicated that she might have some form of chronic pain disorder related to her general medical condition, but he did not clearly indicate that this was employment related and such a condition has not been accepted by the Office.¹¹

The Office properly modified its March 11, 2002 wage-capacity determination in which it had adjusted appellant's compensation effective January 27, 2002 based on its determination that her wage-earning capacity was represented by her actual wages as a church secretary. The above-described medical evidence shows that there was a material change in the nature and extent of the employment-related condition, *i.e.*, for the better, such that appellant no longer had wage loss because of her accepted employment injury.¹² The Office properly terminated appellant's compensation effective January 27, 2002.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation and modify its determination of her wage-earning capacity effective January 16, 2008.

¹¹ On April 20, 2000 Dr. Lockwood, an attending clinical psychologist, stated that appellant showed signs of depression, including apathy and feelings of hopelessness. She did not indicate that this condition was employment related. Appellant testified in mid 2008 that she had not seen a psychiatrist since 2002.

¹² See *supra* note 8.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' July 21 and January 16, 2008 decisions are affirmed.

Issued: August 6, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge, concurring:

I concur with the holding in this opinion; however, I would further hold that the Office met its burden to terminate benefits when the evidence of rationalized medical reports established that appellant had no residual condition causally connected to the accepted injuries, physical and psychiatric, in this claim. I would find it unnecessary to analyze appellant's earning capacity.

The opinion of Dr. Doman, a Board-certified orthopedist, established that appellant had recovered from any lumbar condition related to her strain on June 11, 1990. The opinion of Dr. Katrina, a Board-certified psychiatrist, established that appellant had no condition causally connected to her injury-related adjustment disorder.

If the medical evidence and opinion are strong enough to meet the Office burden of proof to entirely terminate benefits, the same evidence must necessarily overcome the causal connection link that formerly established a loss of wage-earning capacity. The Office burden to disprove causal connection is identical, irrespective of whether there is a prior order in the claim finding loss of wage-earning capacity. While a claimant may still have medical conditions or impairments, the medical evidence must prove that causal connection no longer exists and that, therefore, the existing conditions or impairments are unrelated to the accident or occupational disease that gave rise to the claim.

In my view of this case, the review of the loss of wage-earning capacity was unnecessary and potentially misleading. This opinion may suggest that a "dual analysis" need be performed

where there is both a termination of benefits and an order determining earning capacity. I find that the burden is the same, the evidence is the same and process of terminating benefits need be done only once.

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board