

FACTUAL HISTORY

On May 17, 2002 appellant, then a 40-year-old rural carrier associate, sustained employment-related injuries when his postal vehicle was rear-ended. The Office accepted the claim for cervical strain, lumbar strain, lumbago, left rotator cuff strain, an aggravation of lumbar degenerative disc disease and an annular tear at L4-5. A June 27, 2002 lumbar spine magnetic resonance imaging (MRI) scan demonstrated mild disc bulging and possible minimal protrusion at L4-5. Appellant worked limited duty until he underwent left shoulder arthroscopy on August 20, 2002, after which he returned to limited duty. A November 11, 2002 lumbosacral spine MRI scan demonstrated mild degenerative changes, otherwise negative. Appellant stopped work on February 21, 2003 because his position was no longer available and did not return.¹ A March 17, 2003 provocation discogram of the lumbar spine demonstrated annular tears at L3-4 and L4-5 with concordant pain reproduction. Postdiscogram computerized tomography (CT) scan was interpreted as showing an annular tear at L4-5, normal appearance of L3-4 and mild degenerative change at L5-S1.

Appellant was treated by Dr. Michael Longley, Board-certified in orthopedic surgery. A December 10, 2003 MRI scan of the lumbar spine demonstrated multilevel degenerative disc disease and annular bulging at L4-5 with multilevel hypertrophic changes and mild canal stenosis and bilateral neural foraminal stenosis at L4-5. A lumbar discogram on December 10, 2003, performed by Dr. Longley, demonstrated an annular tear at L4-5 with radiating pain. Postdiscogram CT scan demonstrated L4-5 disc degeneration with extensive leak and mild spinal canal stenosis at L4-5. A September 24, 2004 functional capacity evaluation demonstrated that appellant could perform work activities within the medium physical demand level with occasional forward bending.

On June 23, 2006 appellant was referred to Dr. Anil K. Agarwal, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a July 14, 2006 report, Dr. Agarwal reviewed the statement of accepted facts and the physical requirements of his position. He also summarized the medical record including diagnostic studies. Dr. Agarwal noted appellant's complaint of chronic low back pain and advised that he demonstrated no positive physical findings. He diagnosed status post left shoulder rotator cuff repair in 2003 with no complaints and healed lumbar strain. Dr. Agarwal advised that there was no evidence of any ongoing work-related strain conditions or disc herniation at L4-5. He recommended a good home exercise program and over-the-counter medication. Dr. Agarwal advised that appellant could return to his job as a rural mail carrier.

¹ Appellant also worked on a family farm. He was referred for vocational rehabilitation services in July 2003. By decision dated February 17, 2004, the Office reduced appellant's wage-loss compensation to zero on the grounds that he failed to participate in vocational rehabilitation. In a May 5, 2005 decision, an Office hearing representative found that appellant's failure without good cause to participate in preliminary vocational meetings and testings constituted a failure to participate in the rehabilitative effort and affirmed the February 17, 2004 decision. The hearing representative, however, returned the case to the Office for further develop of the medical evidence regarding appellant's low back condition.

By report dated August 4, 2006, Dr. Longley noted appellant's complaints of low back pain and reported findings on physical examination. He diagnosed low back pain, L4-5 annular tear and disc injury secondary to the employment injury.

In a report dated October 20, 2006, Dr. Agarwal reviewed Dr. Longley's August 4, 2006 report. He advised that, at the time of appellant's examination, no neurological deficits were noted. Dr. Agarwal stated that appellant's underlying degenerative disc disease was temporarily exacerbated by the May 2002 employment injury, but had resolved. He advised that appellant did not need narcotic medication.

The Office found a conflict in medical evidence arose between Dr. Agarwal and Dr. Longley as to whether appellant had any residuals of his employment injury. On April 23, 2007 the Office referred him to Dr. Varhan, for an impartial evaluation. In a May 14, 2007 report, Dr. Varhan reviewed the history of injury and appellant's complaint of low back pain. He noted the medical record and December 10, 2003 diagnostic studies and stated that appellant walked with a cane. Physical examination demonstrated no spinal tenderness or spasm from the cervical to lumbar spine and normal sensation to light touch and pinprick over all dermatomes in his lower extremities with 5/5 muscle strength. Dr. Varhan advised that appellant had no difficulty moving from a sitting to supine or supine to sitting positions and straight leg raising was negative to 70 degrees with functional range of motion of the hips, knees and ankles bilaterally. He diagnosed status postop left rotator cuff repair (industrial), preexisting lumbar spine degenerative disc disease (nonindustrial), exacerbation of preexisting lumbar spine degenerative disc disease (industrial) and habituation to narcotic medications. Dr. Varhan advised that appellant's left shoulder had recovered very well. While the employment injury had exacerbated his underlying degenerative disc disease of the lumbar spine, this was a temporary aggravation and there was no evidence to support that work-related conditions were still active or related to the May 17, 2002 employment injury. Dr. Varhan noted that any deterioration in the degenerative disease process was expected over time and was nonindustrial. He recommended over-the-counter medication, a home exercise program and no surgical treatment. Dr. Varhan advised that, based on his review of the September 2004 functional capacity evaluation, appellant could perform the duties of rural mail carrier associate.

In a deposition of July 30, 2007,² Dr. Longley described the employment injury, appellant's treatment and the December 10, 2003 diagnostic studies. He opined that appellant's L4-5 annular tear was due to an acute phenomenon rather than a degenerative process

² This was apparently for appellant's third-party suit. A third-party settlement was reached on September 12, 2007 and appellant submitted a statement of recovery dated October 3, 2007. By letter dated November 19, 2007, the Office informed appellant that future payments of compensation and/or medical expenses would be credited against the remainder of his third-party recovery.

and caused by the May 17, 2002 car accident. Dr. Longley stated that appellant continued to have back pain and recommended further surgery.³

On December 7, 2007 the Office proposed to terminate appellant's compensation benefits on the grounds that the medical evidence, as represented by Dr. Varhan, established that he had no ongoing disability or residuals due to the accepted injury. On January 9, 2008 appellant, through his attorney, disagreed with the proposed termination.

By decision dated January 10, 2008, the Office finalized the termination, effective that day.

On January 25, 2008 appellant, through his attorney, requested a hearing that was held on May 23, 2008. Counsel noted appellant's disagreement with Dr. Varhan's opinion and argued that the medical report was not timely submitted to appellant. Appellant described the employment injury and his current condition and testified that his farm duties were restricted. He stated that he was awaiting Federal Drug Administration approval for a particular type of disc replacement surgery and that he would like to return to his position as rural carrier following surgery. In a May 20, 2008 affidavit, Dr. Longley reiterated his conclusions. In a June 16, 2008 affidavit, Dr. Robert McKeeman, Board-certified in family medicine, advised that he had cared for appellant for many years, including 18 examinations since the May 17, 2002 employment injury. He stated that he disagreed with Dr. Varhan's opinion and agreed with Dr. Longley regarding appellant's continuing back condition.

By decision dated July 28, 2008, an Office hearing representative affirmed the January 10, 2008 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. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

Section 8123(a) of the Federal Employees' Compensation Act⁶ 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

³ On September 19, 2007 appellant filed a schedule award claim. By letter dated October 18, 2007, the Office informed appellant of the type evidence needed to support a schedule award claim, and advised him that it would be left open for 60 days. In his July 30, 2007 deposition testimony, Dr. Longley provided some impairment analysis under Chapter 15 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

⁴ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁵ *Id.*

⁶ 5 U.S.C. §§ 8101-8193.

examination.⁷ When 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 on a proper factual background, must be given special weight.⁸

ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits. The Office determined that a conflict in medical evidence arose between Dr. Longley, appellant's treating physician, and Dr. Agarwal, who provided a second opinion evaluation for the Office. Dr. Longley found appellant disabled due to residuals of his accepted conditions. Dr. Agarwal advised appellant's accepted conditions had resolved and that he could return to work. The Office properly referred appellant to Dr. Varhan, Board-certified in orthopedic surgery, for an impartial evaluation.

In a comprehensive May 14, 2007 report, Dr. Varhan advised that appellant's left shoulder condition had healed following surgery. The Board notes that Dr. Longley did not address appellant's shoulder condition or report any residuals of the accepted left rotator cuff strain. Dr. Varhan found no tenderness to palpation with a good range of shoulder joint motion and radial pulse. Regarding the accepted lumbar conditions, he reported that physical examination demonstrated no spinal tenderness or spasm from the cervical to lumbar spine with normal sensation to light touch and pinprick over all lower extremity dermatomes and 5/5 muscle strength. Dr. Varhan advised that appellant had no difficulty moving from a sitting to supine or supine to sitting position and straight leg raising was negative to 70 degrees with functional range of motion of the hips, knees and ankles bilaterally. There was no evidence of lumbar radiculopathy. Dr. Varhan diagnosed status postop left rotator cuff repair (industrial), preexisting lumbar spine degenerative disc disease (nonindustrial), exacerbation of preexisting lumbar spine degenerative disc disease (industrial) and habituation to narcotic medications. He advised that, while the May 17, 2002 employment injury exacerbated appellant's lumbar degenerative disc disease lumbar, this was a temporary aggravation. Dr. Varhan found no evidence to support that the work-related conditions were still active or related to the employment injury. The deterioration of appellant's spine was progressive and nonindustrial. He concluded that appellant could perform the duties of rural mail carrier associate.

Dr. Longley was deposed on July 30, 2007 and in a May 20, 2008 affidavit. These reports, however, merely reiterated his prior findings and opinion. A subsequently submitted report of a physician on one side of a 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.⁹ The Board finds that Dr. Longley's medical opinion is insufficient to overcome the special weight accorded Dr. Varhan as an impartial medical specialist regarding appellant's lumbar condition.¹⁰

⁷ 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

⁸ *Manuel Gill*, 52 ECAB 282 (2001).

⁹ *Richard O'Brien*, 53 ECAB 234 (2001).

¹⁰ *Manuel Gill*, *supra* note 8.

Appellant's attending family physician, Dr. McKeeman, provided a June 16, 2008 affidavit. However, he merely stated his disagreement with Dr. Varhan's conclusions and agreement with Dr. Longley. A medical opinion not fortified by rationale is of diminished probative value.¹¹ Furthermore, a report of a physician whose specialty is not in a germane area of medicine is entitled to lesser weight.¹² The Board therefore finds that Dr. McKeeman's report is insufficient to overcome the special weight accorded Dr. Varhan.

Dr. Varhan provided a comprehensive, well-rationalized evaluation regarding appellant's left shoulder and lumbar spine conditions. He found that the accepted conditions had resolved. Dr. Varhan's report is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence regarding appellant's right elbow and lumbar conditions.¹³ The Office properly terminated his compensation benefits for these conditions.¹⁴

Appellant contended that the Office not to provide Dr. Varhan's report in a timely fashion and that he was not granted sufficient time to respond to the notice of proposed termination. The notice was dated December 7, 2007 and the final termination decision was issued on January 10, 2008, 34 days later. Office procedures provide that a 30-day notice be given.¹⁵ It complied with its procedures. The record reflects communication between counsel and the Office concerning the third-party settlement. There is no evidence reflecting that a copy of Dr. Varhan's report was delayed due to the settlement. On December 7, 2007 the date of the proposed termination, the claims examiner addressed the impartial report with appellant's attorney. A copy of the report was submitted, following which counsel requested an extension of the period for a response, which was denied.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that he had no residuals or disability due to his accepted conditions.¹⁶

¹¹ *Cecelia M. Corley*, 56 ECAB 662 (2005).

¹² *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹³ *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

¹⁴ *Manuel Gill*, *supra* note 8.

¹⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 1.1400.7(b)(2)(c) (March 1997).

¹⁶ The Board notes that appellant submitted evidence with his appeal to the Board. The Board cannot consider this evidence as its review of the case is limited to the evidence or record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c); *see Sandra D. Pruitt*, 57 ECAB 126 (2005).

ORDER

IT IS HEREBY ORDERED THAT the July 28, 2008 decision of the Office of Workers' Compensation Programs be affirmed

Issued: August 12, 2009
Washington, DC

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

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

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