

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

D.M., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
CARL VINSON VETERANS MEDICAL)
CENTER, Dublin, GA, Employer)

Docket No. 09-684
Issued: December 30, 2009

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
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On January 12, 2009 appellant filed a timely appeal from April 30 and December 4, 2008 decisions of the Office of Workers' Compensation Programs terminating her compensation benefits and a June 10, 2008 decision denying compensation after the termination. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective April 30, 2008 on the grounds that her accepted lumbar injury had ceased without residuals; and (2) whether appellant established that she had a continuing disability on and after April 30, 2008, including the period May 6 to June 20, 2008, related to the accepted injury.

On appeal, appellant, through her attorney, asserts that the Office's December 4, 2008 decision was "contrary to fact and law."

FACTUAL HISTORY

The Office accepted that on October 28, 2006 appellant, then a 45-year-old licensed practical nurse, sustained a lumbar strain due to lifting patients during her work shift that day. She stopped work that day and had intermittent absences through December 2006. Appellant received wage-loss compensation on the daily rolls. Her case was placed on the periodic rolls effective January 18, 2007.

In an October 30, 2006 report, Dr. Anurura Damimeni, an employing establishment physician, noted that appellant experienced low back pain since her work shift on October 28, 2006. The physician diagnosed a back strain and prescribed medication.¹

Beginning in December 2006, appellant was followed by Dr. Dwayne L. Clay, an attending Board-certified physiatrist specializing in pain management. In a December 21, 2006 report, Dr. Clay diagnosed L5-S1 radiculopathy.² He prescribed narcotic medication. In a January 17, 2007 report, Dr. Clay noted that appellant tested positive for marijuana on a prior drug screen but tested negative that day. He refused to prescribe additional opioids. Appellant underwent L4-5 nerve root blocks in February, March and April 2007.³

Appellant returned to full-time light-duty work on May 28, 2007, with intermittent absences through July 2007. As of August 13, 2007, Dr. Clay restricted her to working four hours a day, with lifting limited to 10 pounds. He renewed appellant's work restrictions through November 2007.⁴

On November 16, 2007 the Office obtained a second opinion report from Dr. Alexander H. Doman, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts provided by the Office. Dr. Doman found no objective abnormalities on clinical examination and obtained lumbar x-rays which were normal. He diagnosed a resolved lumbar muscular strain. Dr. Doman found appellant capable of full-time, full-duty work.

In a December 13, 2007 report, Dr. Clay restricted appellant to working four hours a day with lifting limited to 10 pounds. He held her off work through March 2008.

¹ A November 2, 2006 lumbar computed tomography (CT) scan showed disc bulges at L3-4 and L4-5, mild central canal stenosis from L3 to L5 and foraminal stenosis at L4-5. A December 29, 2006 magnetic resonance imaging (MRI) scan showed disc bulges at L3-4 and L5-S1, impinging on the thecal sac.

² Dr. Clay obtained imaging studies. January 17, 2007 electromyography and nerve conduction velocity studies showed right-sided L5-S1 radiculopathy. A February 28, 2007 discogram showed lumbar spondylosis, a displaced lumbar disc and lumbar degenerative disc disease. A February 28, 2007 lumbar CT scan showed annular tears at L3-4, L4-5 and L5-S1.

³ In a June 5, 2007 report, Dr. Sandy Souza, an attending Board-certified neurosurgeon, diagnosed an L4-5 annular tear with no nerve root compression at any level.

⁴ By decision dated November 26, 2007, the Office denied appellant's claim for wage-loss compensation from September 3 to October 4, 2007 on the grounds that she submitted insufficient medical evidence establishing the claimed period of disability. This decision is not before the Board on the present appeal.

The Office found a conflict of opinion between Dr. Clay, for appellant, and Dr. Doman, for the government, regarding the necessity for continued work restrictions. To resolve the conflict, it referred her, the medical record and statement of accepted facts to Dr. James W. Spivey, Jr., a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a February 11, 2008 report, Dr. Spivey reviewed the medical record and statement of accepted facts. He noted slightly restricted lumbar motion, no tenderness on thoracolumbar palpation, negative straight leg raising tests bilaterally and normal motor and sensory findings in the lower extremities. Dr. Spivey opined that there were “no objective findings to support her diagnosis of lumbar sprain.” He stated that the October 18, 2006 injury had resolved without residuals. Dr. Spivey recommended a conditioning program to improve abdominal and back muscle tone. He explained that significant medication and being out of work caused a deconditioned state that required work restrictions. On February 27, 2008 Dr. Spivey found appellant able to resume work for four hours a day, gradually increasing to eight hours a day full duty. He noted a temporary lifting restriction of 35 pounds and recommended that she wear a lumbosacral support at work.

By notice dated March 25, 2008, the Office advised appellant that it proposed to terminate her compensation benefits, based on Dr. Spivey’s opinion that the accepted lumbar sprain had ceased without residuals. It afforded her 30 days to submit additional evidence or argument. In response, appellant submitted an April 11, 2008 report from Dr. Clay, finding her totally disabled for work due to sequelae of the accepted lumbar sprain.

By decision dated April 30, 2008, the Office terminated appellant’s compensation benefits effective that day, finding that Dr. Spivey’s report was sufficient to establish that the accepted lumbar strain had ceased without residuals.

On May 6, 2008 appellant began working four hours a day as a practical nurse at the employing establishment, scheduled to increase gradually to full time. She claimed wage-loss compensation for the period May 6 to June 20, 2008, during which time she worked four hours a day. The Office denied this claim by June 10, 2008 decision as appellant’s compensation benefits were terminated effective April 30, 2008.

In May 19 and July 10, 2008 letters, appellant requested a telephonic hearing, held September 12, 2008. During the hearing, appellant’s attorney asserted that the Office should have accepted lumbar radiculopathy, herniated lumbar discs, annular tears and L4 nerve root irritation. He contended that these conditions persisted although the lumbar strain had resolved.⁵

Following the hearing, appellant submitted a September 18, 2008 report from Dr. Clay, reviewing Dr. Spivey’s report. Dr. Clay contended that the same events that caused the October 28, 2006 lumbar strain also caused an annular tear at L5-S1 with radicular symptoms.

By decision dated December 4, 2008, the Office affirmed the termination of appellant’s compensation. It found that Dr. Spivey’s report remained entitled to the weight of the medical

⁵ In an October 20, 2008 letter, the employing establishment asserted that Dr. Clay’s opinion was not medically credible.

evidence. The Office further found that Dr. Clay's September 18, 2008 report was insufficient to create a conflict with Dr. Spivey's opinion.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁶ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁷

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.⁸ 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.⁹

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, it has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹⁰ If the specialist is unwilling or unable to clarify or elaborate on his or her opinion as requested, the case should be referred to another appropriate impartial medical specialist.¹¹ Unless this procedure is carried out by the Office, the intent of section 8123(a) of the Act¹² will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.¹³

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a lumbar strain on October 28, 2006, causing intermittent periods of disability. Dr. Clay, an attending Board-certified psychiatrist, diagnosed ongoing occupational lumbar conditions requiring work restrictions. Dr. Doman, a Board-certified orthopedic surgeon and second opinion physician, opined that the accepted

⁶ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁷ *Id.*

⁸ 5 U.S.C. § 8123; see *Charles S. Hamilton*, 52 ECAB 110 (2000).

⁹ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

¹⁰ *Harry T. Mosier*, 49 ECAB 688 (1998).

¹¹ *Guisepppe Aversa*, 55 ECAB 164 (2003).

¹² 5 U.S.C. § 8123(a).

¹³ *Harold Travis*, 30 ECAB 1071 (1979).

lumbar strain resolved without residuals. The Office found a conflict of medical opinion between Dr. Clay and Dr. Doman and obtained an impartial opinion from Dr. Spivey, a Board-certified orthopedic surgeon, who opined that the accepted lumbar sprain resolved but that appellant remained in a deconditioned state requiring a conditioning program and work restrictions. It terminated appellant's compensation effective April 30, 2008, based on Dr. Spivey's opinion that the accepted lumbar sprain ceased without residuals. The Board finds that the termination was improper.

Dr. Spivey did not opine that the accepted lumbar strain ceased without residuals. In February 11 and 27, 2008 reports, he found that due to the prolonged work absence and prescribed medications, appellant developed deconditioning of the abdominal and back muscles. Dr. Spivey did not attribute these findings to any nonoccupational factors. He stated that appellant needed a conditioning program to improve her muscle tone. Appellant would also require work restrictions, including limiting her work schedule to four hours a day. As Dr. Spivey found that she had continuing residuals of the accepted lumbar injury, the Office's termination of her compensation was premature.

As the Office improperly terminated appellant's compensation benefits effective April 30, 2008, the second issue regarding whether she established a disability for work on and after that date is moot.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits effective April 30, 2008. The second issue regarding whether she established a continuing work-related disability on and after April 30, 2008 is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 4 and April 30, 2008 terminating appellant's compensation are reversed. The Office's June 10, 2008 decision finding no disability after April 30, 2008 is moot.

Issued: December 30, 2009
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