



wheelchair which turned in front of her. She alleged that she hit her shoulder and twisted her back.<sup>1</sup> The employee initially stopped work on November 17, 1994 and again on November 9, 1995. The Office accepted the employee's claim for fractures of the L3 and T11 vertebrae and lumbago. The employee received appropriate compensation for wage loss. On January 17, 1996 she filed a claim for a recurrence of disability on November 8, 1995.

The record reflects that the employee was treated by Dr. Richard Boiardo, a Board-certified orthopedic surgeon, who initially diagnosed severe low back syndrome and advised that the employee was partially disabled. Dr. Boiardo later determined that the employee had a compression fracture at L3 and T11 and a herniated disc. On October 30, 1995 a magnetic resonance imaging (MRI) scan of the thoracic spine, read by Dr. Michael Shapiro, a Board-certified diagnostic radiologist, revealed a compression fracture at T11, diffuse moderate degenerative disease and a mild central disc herniation at L5-S1. On December 8, 1995 Dr. Boiardo opined that the employee was completely disabled.

On April 10, 1996 the Office referred the employee for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Carl Mercurio, a Board-certified orthopedic surgeon.

In a May 1, 1996 report, Dr. Mercurio reviewed the employee's history of injury and treatment, which included a preexisting condition of osteoporosis and degenerative disease of the spine. He advised that, while her preexisting conditions were not significant, there was a relationship between her work injury and her present complaints of thoracic pain. Dr. Mercurio opined that the employee had reached maximum medical improvement related to her thoracic injury. Regarding the employee's low back condition, he advised that the employee was not initially treated for low back pain and that her current low back condition was not causally related to the November 17, 1994 accident. Dr. Mercurio opined that the employee was able to return to her regular duties.

An August 15, 1996 electromyography (EMG) scan revealed evidence of neuropathy and L4-5 radiculopathy on the left. On August 28, 1996 Dr. Boiardo requested authorization for a percutaneous lumbar discectomy.

On October 15, 1996 the Office referred the employee, together with a statement of accepted facts, and the medical record, to Dr. Robert Morrison, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve a conflict in medical opinion between Dr. Boiardo and Dr. Mercurio regarding causal relationship and continuing disability.

In a November 4, 1996 report, Dr. Morrison noted the employee's history of injury and treatment, which included a previous history of a fall at work from a chair in 1991, for which she sustained a compression fracture.<sup>2</sup> He indicated that the employee returned to part-time work in June 1995 and stopped working in November 1995 due to increased pain. Dr. Morrison noted

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<sup>1</sup> The record reflects that appellant had preexisting osteoporosis.

<sup>2</sup> Dr. Morrison also noted a motor vehicle accident 30 years earlier and also that the employee was rear-ended in 1979.

that the October 30, 1995 MRI scan from Dr. Shapiro revealed no pressure on the nerve roots. He also reviewed x-rays of the lumbar spine and noted that they revealed a compression fracture at the bottom of L2 and the top of L3. Dr. Morrison determined that the employee had peripheral neuropathy, which was not work related, preexisting osteoporosis and a history of a prior compression fracture in 1991. He noted that the employee had a small central disc herniation at L5-S1, but noted that it was not responsible for the employee's symptoms in light of the EMG findings of L4-5 radiculopathy. Dr. Morrison also indicated that the employee was overweight and had a positive family history for diabetes. He opined that the employee's ongoing symptoms were not work related, but rather that her symptoms were due in part to her arthritis. Dr. Morrison opined that the employee could perform the duties of her job on a full-time basis, but that she might require a special chair because of arthritis affecting her back.

On November 20, 1996 the Office issued a notice of proposed termination of compensation based on the report of Dr. Morrison which established that the employee had no continuing work-related disability as a result of her November 17, 1994 injury. It provided 30 days in which the employee could respond to this notice. No additional evidence was submitted

By decision dated January 6, 1997, the Office terminated the employee's wage-loss compensation effective February 4, 1997. It determined that the weight of the medical evidence supported that she had no continuing disability as a result of the injury of November 17, 1994.

By letter dated January 6, 1998, the employee's representative requested reconsideration. He alleged that the report of Dr. Morrison was insufficient to resolve the conflict. By decision dated February 18, 1998, the Office denied the employee's request for reconsideration without a merit review. On May 11, 1998 the employee appealed to the Board. The employee then sought reconsideration before the Office on November 5, 1998. On December 28, 1998 the Board dismissed the appeal.<sup>3</sup>

On November 9, 1998 the Office received an undated report from Dr. Boiardo who noted that the employee was in pain as a result of injuries sustained in a fall at the employing establishment on November 17, 1994. Dr. Boiardo noted that Dr. Morrison indicated that the employee still suffered from hot spots at the site of fractures of the T11 and L3 and confirmed the diagnosis of a herniated disc between the L5 and S1. He indicated that the disc did not appear before the fall on November 17, 1994. Dr. Boiardo also noted that the employee would need a special chair and periods for stretching. He opined that the employee was still suffering from work-related injuries which were permanent.

By decision dated January 21, 1999, the Office denied the employee's reconsideration request for the reason that it was not timely filed and failed to present clear evidence of error. In a September 11, 2000 decision, the Board found the Office improperly determined that the employee's request for reconsideration was untimely filed as it was made within one year of the Office's February 18, 1998 decision. The Board remanded the case to the Office for proper consideration of the employee's timely request for reconsideration.<sup>4</sup>

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<sup>3</sup> Docket No. 98-1781 (issued December 28, 1998).

<sup>4</sup> Docket No. 99-1745 (issued September 11, 2000).

By decision dated December 18, 2000, the Office denied the employee's request for reconsideration without a review of the merits on the grounds that the request did not raise a substantial legal question or include new and relevant evidence. It found that the additional evidence from Dr. Boiardo was insufficient to require further merit review. However, by decision dated January 4, 2002, the Board found that the Office improperly denied merit review of the employee's request for reconsideration. The Board found that the report of Dr. Boiardo constituted new and relevant evidence and remanded the case for merit review.<sup>5</sup>

By letter dated February 11, 2002, the Office requested that the employee provide additional information including whether she continued to seek treatment from Dr. Boiardo. It requested that the employee submit a report describing the treatment rendered and her current condition.

On March 14, 2002 the Office received a Form CA-1032, indicating that she had no employment since February 14, 1997.

By decision dated April 19, 2002, the Office vacated its December 18, 2000 decision finding that there was no continuing disability. It advised the employee that it had not received a response to the February 11, 2002 letter requesting medical evidence from 1998 to the present. The Office again requested that the employee submit the requested information from her treating physician. It also indicated that a decision would be rendered regarding her entitlement to compensation after February 4, 1997.

The Office received a letter from the employee on May 13, 2002, in which she contended that her back pain had worsened since January and that she was losing mobility. Appellant indicated that she was referred for diagnostic testing and was told that the deteriorating condition of her spine stemmed from her original injury. She indicated that she was then referred to a pain management specialist, Dr. Cyrus Vosough, Board-certified in physical medicine and rehabilitation, and that she was currently taking medication for her pain.

The Office received a January 20, 2003 report from Dr. Vosough, who noted the employee's history of injury and treatment. Dr. Vosough conducted a physical examination and diagnosed chronic low back pain secondary to intervertebral lumbar disc disorder with history of compression fractures in the lower thoracic and upper lumbar spine. He indicated that, if her history was true, her "low back pain was causally related to the injuries sustained on November 17, 1994."

On March 1, 2003 the employee filed a Form CA-7 for compensation for the period February 14, 1997 to March 1, 2003.

On August 9, 2003 the Office found that the employee was entitled to compensation for the period February 5, 1997 to November 9, 1998 in the amount of \$37,444.17. It requested that she make an election of benefits between the Office of Personnel Management (OPM) and the Federal Employees' Retirement System Act (FERS). The employee did not respond. She died on December 24, 2003.

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<sup>5</sup> Docket No. 01-1028 (issued January 4, 2002).

In a letter dated April 15, 2005, appellant's representative indicated that the requested medical evidence had been provided. He also requested that the Office issue a formal decision concerning the employee's temporary total disability benefits.

By decision dated April 11, 2007, the Office found that appellant did not submit any medical documentation to support the payment of wage-loss compensation after November 9, 1998.

On April 18, 2007 appellant's representative requested a hearing, which was held on July 27, 2007. At the hearing, appellant's representative indicated that the employee's estate was seeking compensation for wage loss from November 9, 1998 to December 24, 2003.

By decision dated October 1, 2007, the Office hearing representative affirmed the April 11, 2007 decision.

### **LEGAL PRECEDENT**

A claimant seeking benefits under the Federal Employees' Compensation Act<sup>6</sup> ("Act") has the burden of proof to establish the essential elements of her claim by the weight of the evidence,<sup>7</sup> including that she sustained an injury in the performance of duty and that any specific condition or disability for work for which she claims compensation is causally related to that employment injury.<sup>8</sup>

As used in the Act, the term "disability" means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.<sup>9</sup> When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, she is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.<sup>10</sup>

Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.<sup>11</sup> Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.<sup>12</sup> The Board has held that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective

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<sup>6</sup> 5 U.S.C. §§ 8101-8193.

<sup>7</sup> *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

<sup>8</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>9</sup> *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f).

<sup>10</sup> *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

<sup>11</sup> *Edward H. Horton*, 41 ECAB 301 (1989).

<sup>12</sup> *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.<sup>13</sup> While there must be a proven basis for the pain, due to an employment-related condition can be the basis for the payment of compensation.<sup>14</sup> The Board, however, will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>15</sup>

### ANALYSIS

In support of her claim for disability after November 9, 1998, the employee submitted an undated report from Dr. Boiardo, which was received on November 9, 1998. Dr. Boiardo indicated that she still had residuals from hot spots at the site of fractures of the T11 and L3 and had a herniated disc between the L5 and S1, which was not present before her fall on November 17, 1994. He opined that the employee still had work-related injuries which were permanent. The Office terminated the employee's compensation based upon the report of the impartial medical examiner, Dr. Morrison, a Board-certified orthopedic surgeon, on the grounds that she had no continuing work-related disability. 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."<sup>16</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>17</sup> Dr. Boiardo reiterated previously stated findings and conclusions regarding appellant's condition. As he was on one side of the conflict that had been resolved, the additional reports, in the absence of any new findings or rationale, from the physician were insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.<sup>18</sup>

The Office also received a report dated January 20, 2003 from Dr. Vosough who opined that the employee had chronic low back pain secondary to intervertebral lumbar disc disorder with history of compression fractures in the lower thoracic and upper lumbar spine. Dr. Vosough indicated that, if her history was true, then her "low back pain was causally related to the injuries sustained on November 17, 1994." However, he did not provide any findings to support how he arrived at his conclusion that her low back pain was causally related to the work-related injury. Thus, at best this provides equivocal support for causal relationship and is

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<sup>13</sup> *John L. Clark*, 32 ECAB 1618 (1981).

<sup>14</sup> *Barry C. Peterson*, 52 ECAB 120 (2000).

<sup>15</sup> *Fereidoon Kharabi*, 52 ECAB 291 (2001).

<sup>16</sup> 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207, 210 (1993).

<sup>17</sup> *See Roger Dingess*, 47 ECAB 123, 126 (1995); *Juanita H. Christoph*, 40 ECAB 354, 360 (1988); *Nathaniel Milton*, 37 ECAB 712, 723-24 (1986).

<sup>18</sup> *See Guiseppa Aversa*, 55 ECAB 164 (2003); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

insufficient to meet appellant's burden of proof.<sup>19</sup> Furthermore, Dr. Vosough did not opine that the employee was disabled such that she was unable to work after November 9, 1998.

None of the employee's physicians provided sufficient medical rationale explaining how and why the accepted November 17, 1994 conditions of fractures of the L3 and T11 vertebrae, and lumbago would cause or aggravate any disability after November 9, 1998.

**CONCLUSION**

The Board finds that the employee was not disabled after November 9, 1998 causally related to the November 17, 1994 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 1, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: February 4, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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

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

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<sup>19</sup> See *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions which are speculative or equivocal in character have little probative value).