

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

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**T.F., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Washington, DC, Employer**

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**Docket No. 08-1708  
Issued: February 19, 2009**

*Appearances:*

*William J. Howard, 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 June 2, 2008 appellant filed a timely appeal from July 13, 2007 and March 31, 2008 decisions of the Office of Workers' Compensation Programs affirming the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective May 1, 2006 on the grounds that her work-related injury had ceased without residuals; and (2) whether appellant established that she had a continuing disability on and after May 1, 2006 related to the accepted lumbar sprain with radiculopathy.

## **FACTUAL HISTORY**

This is the second appeal in this case. By decision dated June 11, 2003,<sup>1</sup> the Board reversed a June 5, 2001 decision of the Office terminating her compensation on the grounds she refused an offer of suitable work. The Board found that there was insufficient medical evidence to establish that the offered job was within appellant's work restrictions. The Office had accepted that on May 12, 1999 appellant sustained a lumbosacral strain with S1 radiculitis persisting until August 17, 2000. The Board also set aside May 23 and September 10, 2002 decisions denying appellant's requests for modification. The law and the facts of the case as set forth in the Board's prior decision are hereby incorporated by reference.<sup>2</sup>

Appellant submitted May and June 2003 reports from Dr. James E. Tozzi, an attending Board-certified orthopedic surgeon, who noted the accepted May 12, 1999 lumbosacral strain with S1 radiculitis.<sup>3</sup> Dr. Tozzi opined that appellant had a chronic lumbosacral strain with left-sided L5-S1 radiculopathy, causally related to the May 12, 1999 injury.

Beginning in December 2005, the Office approved a change of physicians to Dr. Patrick A. Noel, a Board-certified orthopedic surgeon, who submitted a December 15, 2005 report noting the accepted May 12, 1999 lumbosacral strain and L5-S1 radiculopathy. On examination, Dr. Noel found limited lumbar motion, diminished ankle jerk reflexes bilaterally and decreased strength in the dorsiflexors and plantar flexors bilaterally. He diagnosed a bulging L4-5 disc with radiculopathy. In a January 17, 2006 report, Dr. Noel found appellant remained disabled for work through February 7, 2006 due to sequelae of the accepted lumbosacral strain with radiculopathy.

The Office obtained a second opinion from Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, who submitted a February 23, 2006 report reviewing the medical record and a statement of accepted facts provided by the Office. On examination, Dr. Draper found limited lumbar motion and a normal neurological examination of both lower extremities. He diagnosed a lumbosacral strain and bilateral knee, ankle and foot strains. Dr. Draper stated that there was no condition on examination related to the May 12, 1999 lumbar strain, a soft tissue injury which should have resolved in three to six months. He opined that appellant was at maximum medical improvement and did not require work restrictions.

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<sup>1</sup> Docket No. 03-737 (issued June 11, 2003).

<sup>2</sup> On remand of the case, the Office reinstated appellant's compensation retroactive to July 6, 2001.

<sup>3</sup> A May 29, 2003 lumbar magnetic resonance imaging (MRI) scan was negative for lumbar herniations or spinal stenosis.

By notice dated March 20, 2006, the Office advised appellant that it proposed to terminate her compensation benefits on the grounds that the accepted lumbosacral strain with radiculopathy had ceased without residuals. It noted that Dr. Draper opined that appellant no longer had any work-related condition. In response, appellant submitted an April 1, 2006 lumbar MRI scan report showing mild annular bulging at L4-5 and L5-S1.

By decision dated May 1, 2006, the Office terminated appellant's wage-loss and medical compensation benefits effective that day on the grounds that the accepted injury had ceased. It found that the weight of the medical evidence rested with Dr. Draper, who presented a well-rationalized opinion based on the complete medical record, finding that appellant no longer had any objective findings related to the accepted lumbar strain with radiculopathy. The Office found that Dr. Noel's opinion was insufficiently rationalized to outweigh that of Dr. Draper.

In a May 7, 2006 letter, appellant requested reconsideration, contending that she remained totally disabled for work. She submitted May 17, June 14 and July 26, 2006 reports from Dr. Rashid M. Khan, an attending Board-certified physiatrist, who noted a history of the May 12, 1999 injury and treatment. On examination, Dr. Khan found limited lumbar motion and slightly decreased sensation in the left foot. He diagnosed chronic low back pain, disc bulges at L4-5 and L5-S1 and a lumbosacral myofascial pain syndrome. Dr. Khan supported a causal relationship between the May 12, 1999 lumbosacral strain with radiculopathy and appellant's ongoing condition.

By decision dated August 1, 2006, the Office denied modification on the grounds that the additional evidence submitted was insufficiently rationalized to warrant modification of the prior decision.

In a November 21, 2006 letter, appellant requested reconsideration. She asserted that Dr. Draper did not consider MRI scan reports showing disc injuries. Appellant submitted copies of Dr. Khan's reports previously of record.

By decision dated February 2, 2007, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant a merit review. It found that appellant's letter and the duplicate medical reports did not constitute new, relevant evidence.

In an April 25, 2007 letter, appellant requested reconsideration. She submitted additional evidence.

Dr. Daniel R. Ignacio, a Board-certified physiatrist, submitted a March 19, 2007 report providing a history of injury and treatment. He performed electromyography (EMG) and nerve conduction velocity (NCV) studies showing progressive lumbar disc syndrome, chronic bilateral L5 radiculopathy and left-sided S1 radiculopathy.

Dr. Philip B. Bovell, an attending Board-certified orthopedic surgeon, provided reports from March 23 to June 15, 2007, noting a history of injury and treatment. He reviewed the March 19, 2007 EMG and NCV studies. Dr. Bovell diagnosed status postchronic lumbosacral injury, indicative of the accepted May 1999 injury.

By decision dated July 13, 2007, the Office denied modification on the grounds that the additional evidence submitted was insufficient to warrant modification of the prior decision. It found that Dr. Bovell and Dr. Ignacio did not provide sufficient rationale to outweigh Dr. Draper's negation of causal relationship.

In a January 9, 2008 letter, appellant requested reconsideration, contending that she remained totally disabled for work due to the accepted injuries. She submitted a September 24, 2007 report from Dr. Noel who diagnosed chronic lumbar radiculitis with a chronic lumbar strain and continued neurologic abnormalities of the lower extremities. Dr. Noel opined that appellant's condition started with the accepted May 1999 injury. He submitted a November 15, 2007 follow-up report reiterating previous findings.

By decision dated March 31, 2008, the Office denied modification on the grounds that the evidence submitted was insufficient to warrant modification of the prior decision. It found that Dr. Noel's reports were insufficiently rationalized to outweigh Dr. Draper'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.<sup>4</sup> 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.<sup>5</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>6</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Office accepted that on March 12, 1999 appellant sustained a lumbosacral strain, with S1 radiculitis persisting until August 17, 2000. She submitted May and June 2003 reports from Dr. Tozzi, an attending Board-certified orthopedic surgeon, who diagnosed chronic lumbosacral strain with left-sided L5-S1 radiculopathy, causally related to the May 12, 1999 injury.

Appellant also submitted December 15, 2005 and January 17, 2006 reports from Dr. Noel, an attending Board-certified orthopedic surgeon, who noted the accepted lumbosacral strain and S1 radiculopathy. Dr. Noel found neurologic abnormalities in the lower extremities,

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<sup>4</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>5</sup> *Id.*

<sup>6</sup> *Roger G. Payne*, 55 ECAB 535 (2004).

<sup>7</sup> *Pamela K. Guesford*, 53 ECAB 726 (2002).

including diminished ankle jerk reflexes bilaterally and diminished strength in plantar and dorsiflexors. He found appellant disabled for work due to sequelae of the accepted injuries.

Dr. Draper, a Board-certified orthopedic surgeon and second opinion physician, submitted a February 23, 2006 report finding no neurologic abnormalities of the lower extremities. He diagnosed a lumbosacral strain and lower extremity strains. Dr. Draper opined that appellant had no objective findings related to the accepted May 12, 1999 lumbosacral strain, a soft tissue injury which should have resolved in three to six months. However, he did not specifically address the accepted S1 radiculitis, which is a neurologic condition.

Thus, Dr. Draper found no neurologic abnormalities in the lower extremities and opined the accepted lumbosacral strain had resolved. In contrast, Dr. Noel found objective neurologic abnormalities in the lower extremities and opined that appellant had residuals of both the accepted lumbosacral strain and S1 radiculopathy. The Board therefore finds a conflict of opinion between Dr. Noel, for appellant, and Dr. Draper, for the government, regarding the continued presence of the accepted lumbar strain and radiculopathy.

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123, states 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. But the Office did not do this. At the time of the termination, there was an outstanding conflict of medical opinion. The termination was thus improper as the Office did not meet its burden of proof in terminating compensation.<sup>8</sup>

As the termination of appellant's wage-loss and medical compensation benefits is reversed, the second issue regarding whether appellant established continuing disability for work is moot.

### **CONCLUSION**

The Board finds that the Office improperly terminated appellant's wage-loss and medical benefits as there was a conflict of medical opinion regarding the presence of continuing injury-related residuals. The case will be returned to the Office for payment of all appropriate compensation. As the termination of appellant's compensation is reversed, the second issue regarding appellant's establishment of continuing disability is moot.

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<sup>8</sup> *Raymond W. Behrens*, 50 ECAB 221 (1999).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated March 31, 2008 and July 13, 2007 are reversed.

Issued: February 19, 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