

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

B.S., Appellant

and

**GENERAL SERVICES ADMINISTRATION,
PUBLIC BUILDINGS SERVICE, Lincoln, NE,
Employer**

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**Docket No. 08-2293
Issued: July 20, 2009**

Appearances:
Jeffry D. Patterson, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 21, 2008 appellant, through her representative, filed a timely appeal from the January 18, 2008 merit decision of the Office of Workers' Compensation Programs, which terminated her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of the case. The Board also has jurisdiction to review the Office hearing representative's May 20, 2008 decision affirming the termination.¹

ISSUE

The issue is whether the Office properly terminated appellant's compensation. On appeal, appellant argues that it misrepresented the opinion of its referral physician, and that there is no positive and specific evidence that her injury-related disability has ceased.

¹ The Board has no jurisdiction to review the hearing representative's finding that a conflict in medical opinion arose after the Office's January 18, 2008 decision, warranting referral to an impartial medical specialist. 20 C.F.R. § 501.2(c) (there shall be no appeal with respect to any interlocutory matter disposed of by the Office during the pendency of a case).

FACTUAL HISTORY

On November 8, 1991 appellant, then a 57-year-old service contract work inspector, sustained an injury in the performance of duty when she slipped and fell on a snowy sidewalk. The Office accepted her claim for low back strain and disc herniation at L5-6, left side. It authorized an April 20, 1992 microlumbar discectomy at L5-6 on the left. Appellant thereafter received compensation for temporary total disability on the periodic rolls.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Anil K. Agarwal, a Board-certified orthopedic surgeon, who examined appellant on October 8, 2007. On October 15, 2007 Dr. Agarwal reported that appellant's chief complaint was lower back pain since the date of injury in 1991. He reported the statement of accepted facts and highlighted the accepted conditions. Dr. Agarwal related appellant's history of injury and current complaints.

Dr. Agarwal reviewed appellant's medical records, including the reports from Dr. Leslie Hellbusch, her attending neurosurgeon, who imposed permanent restrictions on August 6, 1992 and consistently reported that appellant was totally disabled for any work due to chronic low back pain. On December 21, 2005 Dr. Hellbusch reported that appellant had chronic low back pain since undergoing microlumbar discectomy at L5-6 on the left on April 20, 1992 "which has not improved over time." He reported that appellant could not do her previous job as an inspector or be gainfully employed or retrained for gainful employment to any useful degree.

Dr. Agarwal reviewed appellant's diagnostic studies. He described his findings on physical examination. Dr. Agarwal diagnosed chronic lumbar strain and status post laminectomy, 1992. He noted that, although appellant rated her pain 8 out of 10 and complained that it was present all the time, she was taking no narcotic medications and had seen no doctor for two years with regard to her back. Dr. Agarwal found her back pain to be mild. With respect to the accepted herniated disc at L5-6, left side, he noted no obvious physical findings and no neurologic deficit in the lower extremities. "The accepted herniated disc at L5-6 absolutely resolved a long time ago (in 1993 or 1994)," Dr. Agarwal stated.

On November 28, 2007 the Office issued a notice of proposed termination. It found that Dr. Agarwal's opinion represented the weight of the medical evidence and established that the accepted medical conditions of low back strain, and herniated nucleus pulposus at L5-6 had ceased, or were no longer injury related.

Dr. Hellbusch saw appellant on November 30, 2007 and reported her history and current complaints. He described his findings on physical examination and diagnosed chronic low back pain with right-sided posterior thigh pain on occasion, as well as status post left L5-S1 microlumbar discectomy in 1992. Dr. Hellbusch recommended further studies "as it has been quite some time since [appellant] has had any previous scans."

A magnetic resonance imaging (MRI) scan on December 20, 2007 showed a Grade 1 degenerative anterolisthesis of L4-5, multilevel degenerative disc disease with scoliosis, slight retrolisthesis of L2-3 and of L1-2 with midline annular tears, medium-sized, very broad-based,

right paracentral to lateral protrusion of the L1-2 disc and slight ventral epidural scar tissue bilaterally at L4-5 without significant mass effect.

In a decision dated January 18, 2008, the Office finalized the termination of appellant's compensation effective January 20, 2008. It noted Dr. Hellbusch's December 21, 2005 report but found that appellant did not provide a physician's opinion based on objective findings that she still suffered a lumbar condition caused or aggravated by the November 8, 1991 injury or subsequent treatment.

In a decision dated May 20, 2008, an Office hearing representative affirmed the Office's January 18, 2008 decision terminating benefits. The hearing representative found that it appropriately accorded the weight of the medical evidence to Dr. Agarwal. The hearing representative observed that, at the time the Office issued its decision, there was no other current, probative medical evidence to the contrary. The hearing representative further found that a conflict in medical opinion subsequently arose between Drs. Agarwal and Hellbusch and therefore remanded the case for referral to an impartial medical specialist.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴

ANALYSIS

Having accepted appellant's claim, the Office carries the burden to justify the termination of her compensation. It based its termination on Dr. Agarwal's October 18, 2007 report. The Office provided Dr. Agarwal with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper medical and factual history. Dr. Agarwal's review of appellant's case and his findings on examination were extensive. Asked whether there were any objective or diagnostic findings to indicate that the accepted herniated disc at L5-6 was still active, he responded in the negative. Appellant had no obvious physical findings. There was no neurological deficit in the lower extremities. Indeed, Dr. Agarwal reported that the accepted herniated disc at L5-6 "absolutely" resolved a long time ago, in 1993 or 1994. Appellant's representative does not dispute that particular point⁵ and the December 20, 2007 MRI scan

² 5 U.S.C. § 8102(a).

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ "Obviously," Appellant stated to the Office, "the microdiscectomy performed in 1992 'resolved' the disc herniation itself."

confirms that appellant no longer suffers from an L5-6 disc herniation or protrusion. The Board finds, therefore, that Dr. Agarwal's opinion constitutes the weight of the medical evidence on whether appellant continues to suffer from the accepted disc herniation at L5-6, left side. As the Office has met its burden of proof to terminate compensation for that condition, the Board will affirm its decisions, in part, on this issue.

The Board further finds, however, that Dr. Agarwal's opinion is not the weight of the medical evidence with respect to the accepted lumbar strain. Although he noted that appellant was taking no narcotic medications and had seen no doctor for two years with regard to appellant's back, he did not opine that she no longer suffered from the accepted condition or that the condition was no longer related to the work incident on November 8, 1991. Dr. Agarwal diagnosed chronic lumbar strain, just as Dr. Hellbusch, the attending neurosurgeon, had consistently reported. He described appellant's back pain as mild, but he made no real attempt to explain or document any resolution of the accepted low back strain. For this reason, the Board finds that the Office has not met its burden of proof to justify the termination of compensation for low back strain. Accordingly, the Board will reverse the Office decisions, in part, on this issue.

CONCLUSION

The Board finds that the Office did not fully meet its burden of proof to justify the termination of appellant's compensation. While the weight of the medical opinion evidence establishes that appellant no longer suffers from the accepted disc herniation at L5-6, left side, it fails to establish that she no longer suffers from the accepted low back strain.

ORDER

IT IS HEREBY ORDERED THAT the May 20 and January 18, 2008 decisions of the Office of Workers' Compensation Programs are affirmed in part and reversed in part.

Issued: July 20, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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