

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

T.D., Appellant

and

DEPARTMENT OF HOMELAND SECURITY,
ARMSTRONG NEW ORLEANS
INTERNATIONAL AIRPORT,
New Orleans, LA, Employer

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**Docket No. 08-1919
Issued: March 17, 2009**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 30, 2008 appellant filed a timely appeal of the December 28, 2007 decision of an Office of Workers' Compensation Programs hearing representative who affirmed the termination of her compensation benefits, and a May 22, 2008 decision which denied her request for reconsideration without a merit review. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over these merit and nonmerit decisions.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective June 13, 2007; and (2) whether the Office properly denied appellant's requests for reconsideration without a merit review.

FACTUAL HISTORY

On October 23, 2004 appellant, then a 40-year-old transportation security screener, filed a traumatic injury claim alleging that, on that date, she felt a sharp pain from her left shoulder to her left hand and from her left hip to her left foot after picking up a bag at work. The Office accepted her claim on January 5, 2005 for left shoulder strain, left hip strain, lumbar strain and cervical strain. Compensation payments commenced on January 9, 2005.

Appellant first sought treatment from Dr. Gordon Nutik, a Board-certified orthopedic surgeon. In reports dated between November and December 2004, Dr. Nutik indicated that his examination revealed no objective findings and that appellant could do light work. He noted that she complained of left shoulder pain that he could not fully explain and he felt she should be working. In a December 12, 2004 treatment report, Dr. Nutik stated that he saw no objective findings on appellant's physical examination or on her diagnostic tests to explain her subjective complaints of significant pain. He had no further treatment to offer her and discharged her with a restriction of light-level lifting due to her subjective complaints. Appellant subsequently sought treatment from Dr. Troy Beaucoudray, a pain medicine specialist. He stated in a January 20, 2005 treatment note that appellant should be placed on light duty and restricted from lifting over 20 pounds until April 1, 2005.

On November 22, 2005 the employing establishment removed appellant from her position because of her inability to perform the physical requirements of that position, which included the ability to lift objects up to 70 pounds.

Appellant subsequently sought treatment from Dr. Stephen Dawkins, Board-certified in occupational medicine, who advised that she undergo a functional capacity evaluation (FCE). The results of the April 19, 2006 FCE revealed that appellant had a maximum lifting capacity of 20 pounds, placing her in the light category.

Appellant was also treated by Dr. Mark Juneau, a Board-certified orthopedic surgeon. On October 24, 2006 Dr. Juneau noted that the FCE "did not make sense" as it stated that appellant could not stand over six minutes and could push 80 pounds. He concluded that there were no objective findings in this examination and no evidence of cervical or lumbosacral radiculopathy. In a November 29, 2006 treatment report, Dr. Juneau found that magnetic resonance imaging (MRI) scan results for appellant's spine were "totally normal." He also stated that there were no objective findings that would make appellant have symptoms for over a year and there were no orthopedic objective reasons for her not to return to her previous work. Dr. Juneau noted that his disagreement with the April 19, 2006 FCE findings and recommended it be performed again by another individual.

The Office referred appellant and a statement of accepted facts to Dr. Christopher Cenac, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a January 17, 2007 report, Dr. Cenac found that appellant had normal motion of the left shoulder, normal lumbar spine and mild degenerative changes at C5-6. He concluded that appellant had appropriate evaluation and treatment to date and all residuals had resolved from the October 23, 2004 injury. Dr. Cenac opined that the date of maximum medical improvement (MMI) was reached on October 24, 2006 at the time of Dr. Juneau's examination and that it was more probable than not

that she could return to any level of physical activity. He also scheduled appellant for an FCE on February 13, 2007 and stated, "I do suspect" that there would be evidence of "symptom magnification and illness behavior noted on the FCE." In a February 15, 2009 work capacity evaluation form, Dr. Cenac indicated that appellant was capable of performing her usual job and that she had reached maximum medical improvement.

The results of the February 13, 2007 FCE revealed that appellant had a maximum lifting capacity of 50 pounds, placing her in the medium level category and she was able to work 8 hours a day, 40 hours a week. The test administrator indicated that self-limiting behavior was noted on 19 percent of the 16 tasks. However, the test administrator further noted that this was considered normal as research suggested that self-limiting behavior only affected test results when it occurred on more than 20 percent of test items. The Office requested that Dr. Juneau review Dr. Cenac's reports and the February 13, 2007 FCE results and submit a response. After reviewing those reports, Dr. Juneau submitted a March 20, 2007 medical report, in which he stated that the February 13, 2007 FCE was more representative than the previous one and he reasserted his opinion that appellant could return to her previous employment because there was a lack of objective orthopedic physical findings. On February 21, 2007 Dr. Cenac confirmed that he reviewed the February 13, 2007 FCE and concluded that appellant was employable at the medium level of physical activity with 50-pound lifting restrictions. In an accompanying February 15, 2007 work restriction evaluation, he also noted that appellant was restricted to no more than 50-pound of pushing, pulling, lifting, squatting, kneeling and climbing. Dr. Cenac also noted that appellant would need a 10-minute break every 2 to 3 hours. He advised that appellant could perform her regular job.

On May 2, 2007 the Office issued appellant a notice of proposed termination of compensation, indicating that the weight of the medical evidence demonstrated that appellant's work-related condition had resolved.

In a decision dated June 13, 2007, the Office terminated appellant's compensation benefits effective that day. It found that the opinions of appellant's treating physicians and Dr. Cenac concurred that her accepted conditions had resolved.

Appellant requested an oral hearing, which was held on November 5, 2007. In a November 14, 2007 report, Dr. Anthony Human, an osteopath specializing in family medicine, reviewed appellant's medical records and examined her on November 9, 2007. He opined that appellant's October 23, 2004 work injuries had not resolved as asserted by Dr. Cenac. Dr. Human noted that the February 13, 2007 FCE did not show symptom magnification as predicted by Dr. Cenac. His review of the February 13, 2007 FCE results found that the medical evidence supported impairment and the need for ongoing treatment. Dr. Human further noted that appellant's return to work would aggravate her condition and result in further injury. In a November 9, 2007 treatment note, he noted that appellant's October 2004 work injury diagnosed cervical radiculitis, cervical myositis, cervicgia, cephalgia and myospams and recommended physical therapy.

In a December 28, 2007 decision, the Office hearing representative affirmed the June 13, 2007 decision terminating appellant's compensation, finding that the weight of the medical evidence rested with Dr. Cenac.

On April 22, 2008 appellant requested reconsideration. She submitted a January 31, 2008 treatment note from Dr. Dawn Wilson, a physiatrist, who reviewed her medical records and provided a history of appellant's work injury stating that she had reinjured her back in January 2005, which caused left upper extremity radiculopathy. She diagnosed: cervical radiculitis; cervical, thoracic, greater than lumbar myositis; cervical, thoracic, greater than lumbar sprain/strain; cephalgia; myospasms and insomnia. Dr. Wilson concluded genuine physical impairment such that appellant could not return to work without aggravating her radiculopathy and cervical, thoracic and lumbar strain. She also recommended more physical therapy and rehabilitation.

In a May 22, 2008 decision, the Office denied appellant's reconsideration request without a review of the merit findings that Dr. Wilson's report was cumulative and immaterial evidence.¹

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

ANALYSIS

The Office accepted that appellant's October 23, 2004 work incident caused left shoulder strain, left hip strain, lumbar strain and cervical strain. However, it has not met its burden to establish that all residuals of appellant's accepted employment conditions had resolved, effective June 13, 2007.

The Office relied upon Dr. Cenac's medical reports to terminate appellant's compensation benefits. However, Dr. Cenac's opinion regarding appellant's disability and residuals is inconsistent. In a January 17, 2007 report, he indicated that all conditions due to the October 23, 2004 work injury had resolved and that appellant could perform any level of physical activity. Dr. Cenac reported examination findings but did not otherwise provide any reasoning or rationale for his opinion on the cessation of residuals.⁵ Thereafter, he scheduled an FCE for appellant and predicted that she would likely demonstrate evidence of symptom

¹ The Board notes that the Office references to a Dr. Dawn Brown instead of Dr. Dawn Wilson, the correct name of appellant's physician.

² *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

³ *Vivien L. Minor*, 37 ECAB 541 (1986).

⁴ *T.P.*, 58 ECAB ___ (Docket No. 07-60, issued May 10, 2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁵ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

magnification. Dr. Cenac did not explain the reason he felt that appellant would magnify her symptoms. Following the February 13, 2007 FCE, he found that appellant could return to work with a 50-pound lifting restriction. In Dr. Cenac's February 15, 2007 work restriction evaluation, he placed similar limits on other activities such as pulling, pushing, kneeling and squatting. He did not address whether these restrictions were due to the employment injury or to a nonwork-related condition. Dr. Cenac also did not appear to be aware that appellant's date-of-injury position required lifting of up to 70 pounds. He did not address the findings in the February 13, 2007 FCE report on indicate whether symptom magnification affected the test results. Dr. Cenac did not specifically address whether all residuals of appellant's accepted conditions had resolved. Given the inconsistent and conclusory nature of his opinion, Dr. Cenac's medical reports are of diminished probative value and insufficient to establish that all residuals of appellant's accepted conditions had resolved.⁶

Dr. Juneau advised that appellant demonstrated no objective findings. However, none of his medical reports provided a well-rationalized explanation that addressed whether appellant continued to be disabled by or have residuals of the accepted conditions, left shoulder strain, left hip strain, lumbar strain and cervical strain. For example, in a March 20, 2007 report, Dr. Juneau did not specifically address whether all residuals of the accepted conditions had ceased; he merely indicated that appellant could return to her regular duties. However, the Board notes that the Office not only terminated appellant's entitlement to wage-loss benefits it also terminated her entitlement to medical benefits.⁷ Therefore, Dr. Juneau's medical reports are insufficient to establish that all residuals of appellant's accepted conditions have resolved.

No other medical reports contemporaneous with the termination of benefits establish that all residuals of appellant's accepted conditions resolved. On the other hand, Dr. Human's November 14, 2007 report provides some support for a continuing employment-related condition.

Consequently, the medical evidence is insufficient to establish that appellant has no continued disability or residuals due to her accepted conditions and, therefore, the Office has failed to meet its burden to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective June 13, 2007. Given the Board's determination regarding the merit issue of this case, it is not necessary for the Board to consider whether the Office properly denied a merit review in its May 22, 2008 decision.

⁶ See *William C. Thomas*, 45 ECAB 591, 594 (1994).

⁷ See *T.P.*, 58 ECAB ____ (Docket No. 07-60, issued May 10, 2007) (the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability; to terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated December 28, 2007 is reversed.

Issued: March 17, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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