



In a work capacity evaluation dated April 18, 2005, appellant's treating physician, Dr. Stanley Louie, an osteopath, stated that appellant could do some form of modified work but should avoid pry bar sampling. In two CA-17 forms, duty status reports, he advised that appellant could work with restrictions on lifting continuously more than 5 pounds and intermittently up to 10 pounds; standing continuously more than one hour and standing intermittently for more than four hours per day; intermittent walking for no more than one to two hours per workday; intermittent simple grasping for no more than one to two hours per day; and intermittent reaching above the shoulders up to one-half hour per day.

In order to determine appellant's current condition, the Office referred appellant for a second opinion examination with Dr. G.B. Ha'Eri, M.D., Board-certified in orthopedic surgery. In a report dated March 8, 2006, Dr. Ha'Eri stated that appellant still had residuals from the November 8, 2004 work injury and was not able to perform the duties of a raisin inspector. He outlined the following work restrictions:

"No sitting more than total at four hours per day. Walking and standing two hours each. No bending/stooping more than one hour per day. Pushing and pulling are limited to one hour each to a maximum of 20 pounds and the lifting of one hour per day with maximum of 10 pounds. No kneeling and squatting is recommended."

The Office referred appellant for vocational rehabilitation on April 4, 2006. The vocational rehabilitation counselor, relying on Dr. Ha'Eri's restrictions, stated in a June 12, 2006 report that appellant could perform the job as an appointment clerk, Department of Labor's *Dictionary of Occupational Titles*, (DOT) No. 237.367.010.

In treatment notes dated June 22, 2006, Dr. Louie stated that appellant was unable to sit for more than one-half hour without pain. He placed appellant on temporary total disability and recommended that she be referred to a neurosurgeon.

By letter dated July 31, 2007, the Office provided copies of the job description for an appointment clerk to Dr. Louie and asked him whether appellant could perform the job duties. In a work capacity evaluation dated September 6, 2007, Dr. Louie opined that appellant was unable to perform an eight-hour workday. He restricted appellant from performing work involving her upper or lower extremities, in addition to reaching; reaching above the shoulders; operating a motor vehicle to and from work or at work; and repetitive movement of the wrist and elbow up to four hours per day.

In a report dated November 11, 2007, Dr. Louie stated that appellant would be unable to work for four weeks.

In order to determine appellant's current condition, the Office referred appellant for a second opinion examination with Dr. Charles H. Touton, Board-certified in orthopedic surgery. In a report dated February 25, 2008, Dr. Touton stated that appellant still had residuals from the November 2004 work injury and outlined the following work restrictions: no sitting exceeding four hours; no walking and standing exceeding two hours; no bending/stooping exceeding one hour per day; pushing and pulling limited up to 20 pounds for one hour; and lifting not exceeding

10 pounds up to one hour. He recommended no kneeling or squatting. Dr. Touton concluded that there was nothing in the job description of an appointment clerk which would be beyond her expected capabilities, given her diagnosis and findings.

In an April 28, 2008 notice of proposed reduction of compensation, the Office advised that appellant's compensation be reduced to zero because the factual and medical vocational evidence established that appellant was no longer totally disabled. It advised appellant that she had the capacity to earn the wages of an appointment clerk and requested that she submit additional evidence or argument within 30 days if she disagreed with the proposed action.

Appellant then submitted a form report dated May 27, 2008 from Dr. Louie, who stated that appellant would be unable to work for four weeks due to low back pain. In a narrative report dated May 27, 2008, Dr. Louie noted that on examination that day appellant had bilateral lower paraspinal tenderness and reduced stability of the spine.

In a May 29, 2008 decision, the Office reduced appellant's compensation to zero and terminated appellant's compensation benefits effective June 6, 2008. It found that appellant had the capacity to earn wages as an appointment clerk and found that Dr. Touton's referral opinion represented the weight of the medical evidence.

### **LEGAL PRECEDENT**

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>1</sup>

Section 8123(a) 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.<sup>2</sup>

### **ANALYSIS**

The Board finds that the Office did not meet its burden to reduce appellant's disability compensation. In the instant case, there is a conflict in the medical evidence between appellant's treating physician, Dr. Louie, and Dr. Touton, the second opinion physician, regarding whether appellant was physically able to perform an eight-hour per day job as an appointment clerk. Appellant's treating physician, Dr. Louie continued to opine that appellant was temporarily totally disabled due to paraspinal tenderness, while Dr. Touton opined that appellant could return to work, with restrictions. The Office erred, however, by failing to resolve the existing conflict in the medical evidence. Because the Office relied on the opinion of Dr. Touton to reduce appellant's compensation without having resolved the existing conflict in the medical evidence, it failed to meet its burden of proof in terminating appellant's benefits. The Board reverses the Office's May 29, 2008 decision reducing appellant's compensation.

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<sup>1</sup> *John D. Jackson*, 55 ECAB 465, (2004); *James B. Christenson*, 47 ECAB 775, 778 (1996); *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992).

<sup>2</sup> *Regina T. Pellicchia*, 53 ECAB 155 (2001).

**CONCLUSION**

The Board finds that the Office has failed to meet its burden of proof in reducing appellant's compensation.

**ORDER**

**IT IS HEREBY ORDERED THAT** the May 29, 2008 decision of the Office of Workers' Compensation Programs be reversed.

Issued: March 18, 2009  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

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