

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

V.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
West Lithonia, GA, Employer**

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**Docket No. 09-291
Issued: September 18, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 10, 2008 appellant filed a timely appeal from the July 10 and October 3, 2008 merit decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefit on July 10, 2008; and (2) whether appellant established continuing disability after that date, causally related to the accepted employment injury.

FACTUAL HISTORY

On May 31, 2003 appellant, a 33-year-old mailhandler, injured her lower back when she attempted to move a cage of mail. She filed a claim for benefits on June 3, 2003, which the Office accepted for myofascial strain and herniated disc at L5-S1. It paid compensation for temporary total disability. Appellant underwent L5 laminectomy and L5-S1 lumbar fusion surgery on August 10, 2004, performed by Dr. Lee A. Kelley, Board-certified in orthopedic surgery.

In a work capacity evaluation dated November 27, 2006, Dr. Kelley stated that appellant had reached maximum medical improvement and could return to an eight-hour workday with restrictions of no sitting for more than four hours per day, no walking, standing or operating a motor vehicle for more than one hour per day, no pushing, pulling or lifting exceeding 10 pounds for more than one hour per day and no reaching, reaching above the shoulder, twisting, bending, stooping, squatting, kneeling or climbing. He indicated that appellant should be allowed to take breaks on as needed basis for up to 15 minutes.

In a December 7, 2006 report, Dr. Kelley noted that appellant had chronic pain after the lumbar fusion and that her work restrictions were permanent. Appellant was capable of working only at a sedentary job with the ability to alternate sitting and standing and take breaks on a regular basis.

On August 3, 2007 the employing establishment offered appellant a job as a modified mailhandler within Dr. Kelley's restrictions. Appellant accepted the job on August 14, 2007.

In an August 20, 2007 report, Dr. Kelley noted appellant's complaint of low back pain primarily in the morning with shooting pain into both of her legs and her feet. He noted no changes on physical examination. Appellant reported mild pain and limitation with lumbosacral bending. Dr. Kelley stated that her lower extremity motor and sensory functions were intact bilaterally, with no change in her lower extremity deep tendon reflexes. In a return to work form dated August 30, 2007, Dr. Kelley wrote "continue current light duty, four hours per eight-hour day only!"

In reports dated September 17 and October 10, 2007, he related that appellant had pain in her low back and down both of her legs along the posterolateral thighs into the calves and plantar aspects of both feet. Appellant also showed limited lumbar range of motion. She was tender on palpation across the lumbosacral spine, with pain and limitation with flexion and extension and right and left side bending. Dr. Kelley noted that appellant was working light duty as of August 26, 2007 but had to take time off because she experienced increasing significant pain and was unable to perform most of her daily activities at work. In a Form CA-20 report dated October 23, 2007, he reiterated that appellant was working light duty with restrictions.

In order to determine appellant's current condition, the Office referred her to Dr. Harold H. Alexander, Board-certified in orthopedic surgery, for a second opinion examination. In a February 20, 2008 report, Dr. Alexander stated that she had achieved a complete fusion at the L5-S1 level. He noted persistent bilateral radiation of pain in both legs, decreased sensation in the right foot and ankle, severe restriction of motion and with persistent root irritation. Dr. Alexander noted, however, that these findings were somewhat inconsistent with the excellent fusion appellant had attained from the 2004 surgery and opined that her subjective complaints far outweighed her objective findings. He did not believe that appellant's current residuals were disabling and opined that she could participate in sedentary activities with limitations caused by a left shoulder rotator cuff tear. Dr. Alexander advised that appellant could not return to work as a letter carrier because of the persistent unclear residual symptoms consisting of back pain radiating to both legs with numbness in her right leg and occasional giving way of her back. He advised that appellant could do sedentary work. Dr. Alexander reviewed an electromyogram (EMG) on February 28, 2008 and noted there were no signs of radiculopathy.

In an April 21, 2008 report, Dr. Kelley stated that appellant had ongoing back pain and bilateral leg weakness with shooting pain from her left hip and buttocks into the left leg. He related that appellant's legs gave out four weeks prior to his examination. On examination, Dr. Kelley noted low-grade tenderness on palpation in the lumbar spine with moderate pain with lumbar flexion, extension and right and left side bending and low back pain with straight leg raising bilaterally. Dr. Alexander noted that appellant experienced chronic pain and found that she was totally disabled for work.

The Office found a conflict in medical opinion between Dr. Kelley, appellant's treating physician, who opined that she was totally disabled for work, and Dr. Alexander, the second opinion physician, who opined that she was capable of performing full-time sedentary duty. It referred the case to Dr. Thomas R. Cadier, a Board-certified orthopedic surgeon. In a report dated May 5, 2008, he reviewed the medical history and statement of accepted facts and set forth findings on examination. Dr. Cadier noted that appellant was 5'8 tall and weighed 220 pounds. There was no muscle atrophy. Dr. Cadier noted inconsistent complaints between seated and lying straight leg raising results. Deep tender reflexes were brisk. Dr. Cadier noted appellant's complaint of severe back pain with virtually any testing of motion of the lower extremities. He advised that appellant's herniated disc resolved by surgery and that her subjective complaints outweighed objective findings. Dr. Cadier stated:

"In my opinion, [appellant] is capable of working her date-of-injury position as a letter carrier. She has a solid fusion and absence of any objective findings which would lead me to a different conclusion. I believe the only reason [appellant] may find it difficult to do her job might be the presence of the shoulder pathology or possibly a knee problem and these have not been accepted as related, to her work-related back injury.

"In my opinion, [appellant] is capable of working as a modified mail handler position also since this modified position is less physically demanding than her date-of-injury position.... She has had surgery, she still has some symptoms, but in absence of other objective findings....

"I do not believe further treatment is indicated."

In a notice of proposed termination dated June 6, 2008, the Office found that the weight of the medical evidence demonstrated that appellant was no longer disabled due to her May 31, 2003 employment injury. It found that Dr. Cadier's opinion as an impartial medical examiner resolved the conflict in the medical evidence and constituted the weight of the medical evidence. The Office allowed appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In a report dated June 30, 2008, Dr. Kelley noted that appellant was nearly four years status post lumbar fusion and complained that her low back is "giving out" if she stands for long periods. Appellant was evaluated with an EMG/nerve conduction test on February 28, 2008, which revealed no evidence of radiculopathy in either the right or the left lower extremity. She remained out of work stating that she was medically retired as of June 16, 2008. Dr. Kelly noted no change in appellant's examination. He found motor strength and sensation were intact in the

lower extremities bilaterally. Appellant complained of low back pain with straight leg raise on the right and left but she did not complain of radiating leg pain. There were no changes in her deep tendon reflexes. Dr. Kelley diagnosed chronic pain syndrome and advised that appellant remained out of work.

By decision dated July 10, 2008, the Office terminated appellant's compensation benefits.¹

On September 11, 2008 appellant requested reconsideration. In an August 13, 2008 report, Dr. Kelley reiterated her history of lumbar fusion surgery and chronic pain. An attempt was made to return appellant's light-sedentary duty status, but she was unable to do this due to complaint of pain. Dr. Kelley did not expect her situation to improve or resolve and advised that she was permanently disabled. In a September 8, 2008 report, he reiterated his findings and conclusions.

By decision dated October 3, 2008, the Office denied modification of the July 10, 2008 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or 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.³

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.⁴

ANALYSIS -- ISSUE 1

The Office found a conflict in the medical opinion between appellant's treating physicians, Dr. Kelley and Dr. Alexander, the second opinion physician, regarding appellant's residuals disability and work capacity. It referred appellant to Dr. Cadier, a Board-certified specialist selected as the impartial referee. In a May 5, 2008 report, Dr. Cadier noted that she still complained of symptoms from her 2003 work injury, but found that further treatment for the accepted condition was not indicated in the absence of objective findings. He advised that

¹ The Board notes that the Office issued a decision dated August 19, 2008, which reversed a November 19, 2007 Office decision denying a claim for recurrence of disability. Docket No. 08-463 (issued August 19, 2008). The Board found that the Office in effect terminated appellant's wage-loss compensation in that decision but that it failed to meet its burden to do so.

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

⁴ *Regina T. Pellecchia*, 53 ECAB 155 (2001).

appellant was capable of working her date-of-injury position as a letter carrier. Dr. Cadier stated that appellant had achieved a solid fusion of the L5-S1 disc and noted the absence of any objective findings which would lead to a different conclusion. He also advised that appellant was capable of working as a modified mail handler position since this job was less physically demanding than her date-of-injury position. Dr. Cadier noted some residual impairment of appellant's low back due to the spinal fusion but that the electrical studies were completely normal. He advised that appellant's complaints were a manifestation of symptom magnification. The Office relied on Dr. Cadier's opinion in its July 10, 2008 decision, finding that appellant had no continuing disability of her May 5, 2003 work injury and was therefore, not entitled to compensation or medical benefits.

The Board finds that Dr. Cadier's referee opinion constitutes the weight of medical evidence. Dr. Cadier's report was based on a thorough history of appellant's condition and a review of the diagnostic studies. On examination, he found that appellant no longer had any disabling residuals from her accepted May 5, 2003 injury.⁵ Dr. Cadier's opinion is probative, rationalized and based upon a proper factual background. Therefore, the Office properly accorded his opinion the special weight of an impartial medical examiner.⁶

LEGAL PRECEDENT -- ISSUE 2

Once the Office properly terminated appellant's compensation in its July 10, 2008 decision, the burden of proof shifted to her to establish continuing disability.⁷

ANALYSIS -- ISSUE 2

Appellant subsequently requested reconsideration and submitted the August 13 and September 8, 2008 reports from Dr. Kelley, who advised that she had chronic pain since the lumbar fusion surgery in 2004. Dr. Kelley noted that appellant attempted to return to work on light duty; however, she was unable to continue due to complaint of low back pain. He opined that appellant was permanently disabled due to her continuing back pain.

Dr. Kelley's reports are not sufficient to overcome the weight of medical opinion given to Dr. Cadier as the impartial specialist. They do not contain a well-reasoned opinion, complete with findings on examination, that warrant the reinstatement of compensation. Dr. Kelley's report was on one side of the conflict in medical evidence which was resolved by Dr. Cadier's referee opinion. His additional reports reiterate his prior opinion concerning appellant's residuals and incapacity for work. Appellant failed to submit medical evidence sufficient to negate the finding by Dr. Cadier that she does not have disability caused by residuals of the accepted employment injury. The Office properly found that she had not submitted sufficient evidence to outweigh the opinion of Dr. Cadier.

⁵ While Dr. Cadier addressed permanent impairment to the lumbar spine and noted an impairment rating, the Board noted that the Act excludes the back or spine from consideration of a schedule award. *See Guiseppa Aversa*, 55 ECAB 164 (2003).

⁶ *Gary R. Seiber*, 46 ECAB 215 (1994).

⁷ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on July 10, 2008. Appellant did not establish any employment-related disability following the termination of her benefits.

ORDER

IT IS HEREBY ORDERED THAT the October 3 and July 10, 2008 decisions of the Office of Workers' Compensation Programs be affirmed.

Issued: September 18, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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