

employment.¹ The Office returned appellant to the compensation rolls effective the date of the termination.²

By report dated February 4, 2002, Dr. David Beckmann, a Board-certified internist, noted that he last examined appellant on December 27, 2001. He advised that appellant had permanent work-related restrictions that limited sitting to about 15 minutes and that he could not walk, lift, bend, squat, climb, kneel, twist or stand. Dr. Beckmann noted that appellant was also treated for depression and that his condition would not improve. On September 4, 2004 Dr. Judy L. Fruehbrodt, Board-certified in family medicine, advised that she had been appellant's primary care physician since 2003 and that he had chronic low back pain resulting from the December 1, 1988 employment injury. Appellant was unable to sit for greater than 15 minutes without pain, unable to stand, walk, reach, reach above his shoulder, or twist for any significant period of time and unable to push, pull, lifting, squat, kneel or climb without significant discomfort. Dr. Fruehbrodt concluded that his condition was permanent. In reports dated September 26, 2005, she reiterated his work limitations and advised that appellant's back pain had worsened. Dr. Fruehbrodt also noted that appellant had depression. In a work capacity evaluation dated October 16, 2007, she advised that appellant could sit for less than 15 minutes, could stand and walk for less than 10 minutes, and could not lift, bend, squat, climb, kneel or twist and could not push or pull. Dr. Fruehbrodt further advised that appellant's depression limited his ability to concentrate and that he was permanently disabled due to severe back pain and depression.

The Office of the Inspector General of the employing establishment, provided an investigative report dated May 2, 2008, alleging that appellant was more active than his physicians reported. On August 31, 2007 appellant was observed and videotaped while doing errands: he drove to pick up his mail, then to Wal-Mart where he purchased a deer hunting license for archery, drove to his residence where he sat in his truck for approximately 30 minutes and then was joined by a female and they drove to a residence several miles away. On September 10, 2007 while observed picking up his mail, it was noted that he bent at the waist and picked up an object lying nearby. Appellant then drove to what was believed to be his daughter's residence. He was observed walking briskly around the property for about 20 minutes as he played with a dog, running and kicking at the ground. The report stated that appellant appeared to walk standing tall at a normal gait and did not show signs of discomfort. Appellant drove to the grocery store where he shopped for approximately 38 minutes, pushing a shopping cart and loading groceries which he then placed in the back of his truck. He was observed reaching over his head to pull the truck's back window down. Appellant drove to his residence where he parked next to a motor home. He carried the grocery bags into the motor

¹ Docket No. 97-441 (issued January 4, 1999). The Board found that the Office erred in not considering appellant's subsequent psychiatric condition. On December 1, 1988 appellant, then a 48-year-old part-time distribution clerk, sustained an employment-related ruptured L2-3 disc. After a brief return to work, he stopped on January 14, 1989 and has not returned. In 1976 he underwent surgery for a service-connected herniated disc at L5-S1, for which he receives a 60 percent disability rating from the Department of Veterans Affairs (VA). He also receives a 100 percent disability rating from the VA for service-connected chronic anxiety and depression.

² On January 9, 2002 the Office issued a preliminary finding that an overpayment in compensation was created because optional life insurance was not deducted from appellant's wage-loss compensation when his benefits were reinstated. On April 24, 2002 the Office determined that the cost of collection of the overpayment would exceed the amount to be recovered, and terminated collection action.

home, bent over to unlock storage cabinets on the outside of the motor home, knelt on one knee to look into the storage area and then carried several additional grocery bags and a gallon container up the steps into his apartment building.

On October 17, 2007 appellant was contacted by the employing establishment and related that he was permanently disabled and that his back condition was getting worse. He contended that he could not raise his arm over his shoulders, could only stand or sit for 5 to 10 minutes, and could not drive for long but added that he wanted to travel extensively. The employing establishment contacted the Minnesota Department of Natural Resources which provided appellant's records from 2004 to 2007. Appellant registered a snowmobile in 2003, valid until 2006; registered a pleasure boat in 2006, valid through 2008; registered to hunt small game and bought an archery license each year and fishing licenses in 2006 and 2007. On April 10, 2008 agents interviewed appellant in North Carolina. Appellant acknowledged that he hunted with a cross-bow and owned a boat. He stated that he bought a motor home and was in the process of moving out of his apartment, noting that in November 2007 he drove to New Mexico and several months later drove to North Carolina but that he could not perform sedentary work due to constant pain. Appellant stated that he limped most of the time and could not stand or walk on some days due to his legs going numb and was not able to run due to intense pain and could only pick something up from the ground if he knelt down, but sometimes he could do things and sometimes could not. The employing establishment provided a report of surveillance of appellant on August 31 and September 10, 2007; a transcript of a telephone conversation between the employing establishment and appellant on October 17, 2007; a transcript of an interview with employing establishment agents and appellant on April 10, 2008; rating decisions from the VA dated March 1, 1979, December 20, 1996, March 31, 1997 and June 10, 1998; copies of snowmobile and boat registrations; hunting and fishing licenses and a surveillance video.

On June 13, 2008 the Office referred appellant to Dr. Anil K. Agarwal, a Board-certified orthopedic surgeon, for a second opinion evaluation. By report dated July 29, 2008, Dr. Agarwal reviewed the statement of accepted facts and medical evidence, including magnetic resonance imaging scan reports. Appellant's chief complaint was of neck pain with headaches, low back pain and sciatic pain bilaterally since 1988.³ He advised that appellant was well developed and well nourished and looked muscular for his age, noting that appellant stated that he worked out three times a week with eight-pound dumbbells. On physical examination of the lumbar spine, Dr. Agarwal noted tenderness to palpation and decreased range of motion with hypoesthesia in a nondermatomal distribution and a positive Waddell's sign on straight leg raising. Examination of the thoracic spine was normal. The cervical spine demonstrated tenderness to palpation and painful range of motion. Upper and lower extremity examinations were normal. Dr. Agarwal diagnosed mild acute lumbar strain, temporary aggravation, healed and malingering disorder. He advised that the December 1, 1988 employment injury temporarily aggravated a preexisting condition and that appellant reinjured his lower spine when he slipped on ice in April 1989. As

³ Dr. Agarwal noted that, while he was provided with video evidence, he could not view the tape because it was broken upon arrival. Appellant was also furnished a video that was broken. *Compare J.M.*, 58 ECAB ____ (Docket No. 06-661, April 25, 2007). The statement of accepted facts described the findings of the employing establishment investigation.

of appellant's physical examination, there were no objective neuromuscular deficits or residuals, and no objective signs suggestive of radiculopathy.

Dr. Agarwal further explained there was no obvious positive motor weakness or sensory deficit and appellant's complaint of decreased sensation in his lower extremities did not conform with dermatomal distribution. The straight leg raising revealed a positive Waddell's sign, indicating that appellant's subjective complaints were not supported by objective findings. Dr. Agarwal advised that appellant had reached maximum medical improvement many years prior in 1989 and, by February 1995, a physician noted a positive Waddell's sign indicating that appellant was malingering. A July 1995 functional capacity evaluation noted that appellant had symptom magnification and exaggerated pain and malingering behavior. Dr. Agarwal opined that appellant was a good candidate for light duty or a sedentary job and, while he had a 100 percent service-connected disability for chronic anxiety and depression, appellant was not disabled as he had no pathological symptoms, his mood was dysphoric with good reactivity and stable affect, he had good cognitive function, judgment was intact, insight was present, and global assessment of function was more than 80. He noted that appellant had been hunting and fishing periodically over the prior three years and had plans for long distance motor home travel. Dr. Agarwal concluded that appellant's prognosis was good, reiterating that there was no obvious motor or sensory loss or other positive objective physical findings, and did not need a functional capacity evaluation was not necessary and the physician recommended a home exercise program and age-appropriate physical examinations. In an attached work capacity evaluation, he advised that appellant could work for eight hours a day with sitting, reaching, and operating a motor vehicle at work and to and from work limited to four to six hours; walking two to three hours; standing to three to four hours; reaching above shoulder, twisting, bending, stooping, squatting, kneeling and climbing for one to two hours daily.

On August 29, 2008 the Office proposed to terminate appellant's compensation benefits on the grounds that the medical evidence, as characterized by Dr. Agarwal's report, established that he no longer suffered disability or residuals due to the accepted condition. By letter dated September 14, 2008, appellant disagreed with the proposed termination, advising that he was in Wyoming and the proposed termination was forwarded to him on September 10, 2008. He disagreed with Dr. Agarwal's conclusions, stating that his medical examination was a sham and his report untrue.

By decision dated October 20, 2008, the Office finalized the termination of compensation benefits effective October 26, 2008.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ Its burden of proof in terminating compensation includes the necessity of

⁴ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective October 26, 2008. The accepted conditions in this case are low back strain and ruptured disc at L2-3. The medical evidence relevant to the Office's termination includes a work capacity evaluation dated October 16, 2007 in which Dr. Fruehbrodt, an attending family practitioner, reported that appellant could sit for less than 15 minutes, could stand and walk for less than 10 minutes, and could not lift, bend, squat, climb, kneel or twist and could not push or pull. Dr. Fruehbrodt further advised that appellant's depression limited his ability to concentrate and that he was permanently disabled due to severe back pain and depression. Neither an emotional condition nor a pain condition has been accepted as employment related. Furthermore, pain is a symptom not a compensable medical diagnosis.⁶

Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factor. The opinion of a physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factor identified by the claimant.⁷ Dr. Fruehbrodt did not provide a rationalized explanation as to why the accepted conditions caused appellant's continuing symptoms, and a medical report is of limited probative value on a given medical question if it is unsupported by medical rationale.⁸

The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.⁹ The Board finds that the weight of the medical evidence rests with the July 29, 2008 second opinion evaluation of Dr. Agarwal who provided a comprehensive evaluation based on his review of the statement of accepted facts and medical record, the history of injury, and appellant's complaints of continued pain. Dr. Agarwal advised that appellant had no objective findings on his physical examination, and concluded that there was no need for further treatment referable to the December 1, 1988 employment injury other than over-the-counter medications and a home exercise program. He specifically advised that appellant had no obvious motor or sensory deficit, had a positive Waddell's sign indicating that he was malingering, and did not have ongoing residuals of his accepted conditions. Appellant submitted no medical evidence in response to the notice of proposed termination. His contention

⁵ *Id.*

⁶ *C.F.*, 60 ECAB ____ (Docket No. 08-1102, issued October 10, 2008).

⁷ *Sedi L. Graham*, 57 ECAB 494 (2006).

⁸ *T.F.*, 58 ECAB ____ (Docket No. 06-1186, issued October 19, 2006).

⁹ *C.B.*, 60 ECAB ____ (Docket No. 08-1583, issued December 9, 2008)

that the medical evaluation made by Dr. Agarwal was a sham is not supported by the physicians thorough reports. The Board finds that appellant has no disability or residuals due to the accepted conditions. The Office properly terminated his compensation benefits effective October 26, 2008.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective October 26, 2008.

ORDER

IT IS HEREBY ORDERED THAT the October 20, 2008 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: September 21, 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