

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

D.M., Appellant	)	
	)	
and	)	<b>Docket No. 09-477</b>
	)	<b>Issued: January 7, 2010</b>
<b>DEPARTMENT OF DEFENSE, DEFENSE</b>	)	
<b>LOGISTICS AGENCY, SHARPE ARMY</b>	)	
<b>DEPOT, Stockton, CA, Employer</b>	)	
	)	

*Appearances:*  
Hank Royal, for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On December 8, 2008 appellant filed a timely appeal of a January 25, 2008 decision of the Office of Workers' Compensation Programs terminating her wage-loss and medical compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

**ISSUES**

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective May 13, 2007 on the grounds that her accepted condition had ceased; and (2) whether appellant established that she had a continuing disability on and after May 13, 2007 related to accepted spinal conditions.

On appeal, appellant, through her representative, asserts that the opinion of the impartial medical examiner and Board-certified orthopedic surgeon is flawed as he relied on a statement of accepted facts omitting an accepted herniated disc. She also contends that he provided insufficient medical rationale supporting his opinion that the accepted conditions ceased without residuals.

## **FACTUAL HISTORY**

The Office accepted that on July 23, 1997 appellant, then a 39-year-old packer, sustained a right thigh strain, lumbar sprain and right-sided sciatica when a 20-pound box she was lifting slipped and fell on her right thigh. Following intermittent periods of light duty, she stopped work on February 12, 1998 and did not return. She received appropriate wage-loss compensation.<sup>1</sup> In April 1998, the Office accepted a herniated nucleated pulposus at L4-5.<sup>2</sup> Appellant remained under medical care.

In September 17, 1998 and September 1, 1999 reports, Dr. Thomas Bielejeski, a Board-certified orthopedic surgeon and second opinion physician, diagnosed lumbosacral degenerative disc disease with foraminal stenosis, an L5-S1 disc protrusion and a lumbosacral strain. He opined that the accepted injury caused a temporary aggravation of underlying degenerative disc disease that resolved within six months.

From October 1999 through May 2004, appellant was treated by Dr. Kenneth A. Adatto, a Board-certified orthopedic surgeon, and Dr. David P. Suchard, Board-certified in occupational medicine. Both physicians diagnosed degenerative lumbar disc disease, L5-S1 radiculitis and an L5-S1 disc bulge with S1 nerve root impingement. Dr. Jacob Rosenberg, an attending Board-certified anesthesiologist, followed appellant beginning in July 2004. He opined that the July 1997 injury caused L5-S1 radiculitis and sacroiliac joint pathologies. In September 2004, Dr. Rosenberg referred appellant to Dr. Andrew V. Sluckey, a Board-certified orthopedic surgeon, who recommended an L5-S1 laminotomy and discectomy. Dr. Rosenberg submitted progress notes through March 2005.

The Office referred appellant for a second opinion examination by Dr. Aubrey Swartz, a Board-certified orthopedic surgeon. It provided a statement of accepted facts and the medical record. In a January 28, 2005 report, Dr. Swartz noted that appellant weighed 260 pounds and had degenerative disc disease prior to the July 1997 injury. On examination, he noted symptom magnification. He opined that the July 23, 1997 injury resolved no later than Dr. Bielejeski's September 17, 1998 examination.

In an April 8, 2005 report, Dr. Rosenberg diagnosed a leak in the sacroiliac joint capsule. He posited that the 1997 injury may have triggered a degenerative process. Dr. Rosenberg submitted progress notes through November 2006 finding appellant totally disabled for work.<sup>3</sup>

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<sup>1</sup> Appellant retired from the employing establishment effective June 16, 1999. In August 1999, she relocated from California to Louisiana. From 2000 to 2003, appellant took classes as part of a vocational rehabilitation program. In 2003, appellant relocated to California.

<sup>2</sup> An August 26, 1997 magnetic resonance imaging (MRI) scan showed a broad-based posterior L5-S1 disc herniation with lateral recess stenosis, mild stenosis at L3-4 and L4-5 and degenerative disc disease at L1-2. October 7, 1999 x-rays showed narrowing of the L5-S1 interspaces. A February 10, 2000 lumbar MRI scan showed a broad-based disc bulge at L5-S1 with a prominent paracentral spur.

<sup>3</sup> Dr. Jason A. Smith, an attending Board-certified orthopedic surgeon, followed appellant from May 2005 through August 2006. He diagnosed L4-5 and L5-S1 disc herniations and stenosis. Appellant was also seen by Dr. Susan Gutierrez, an attending Board-certified orthopedic surgeon, who opined that on April 5, 2006 the accepted injury contributed to ongoing disc degeneration. In a January 22, 2007 report, Dr. Kenneth Kim, a Board-certified physiatrist associated with Dr. Rosenberg, released appellant to sedentary duty four hours a day.

The Office found a conflict in medical opinion arose between Dr. Swartz, for the government and Dr. Rosenberg, for appellant. To resolve the conflict, it referred appellant, the medical record and a statement of accepted facts, to Dr. Howard Sturtz, a Board-certified orthopedic surgeon. The statement of accepted facts listed all accepted conditions, including the herniated L4-5 disc. In a December 2, 2006 report, Dr. Sturtz reviewed the medical record. On examination, he observed nonanatomic findings with Waddell's signs, including stocking anesthesia in the right lower leg. Dr. Sturtz stated that, as appellant had no objective lumbar abnormalities on examination, the accepted injury must have ceased without residuals. He commented that, on close examination of the studies of record, appellant had no true nerve root impingement. Dr. Sturtz opined that she could perform full-time sedentary work.

By notice dated March 19, 2007, the Office proposed to terminate appellant's medical and wage-loss compensation benefits on the grounds that the accepted lumbar injury ceased without residuals, based on Dr. Sturtz's report as the weight of the medical evidence. It afforded appellant 30 days to submit additional evidence or argument.

In an April 19, 2007 letter, appellant contended that Dr. Sturtz found an ongoing aggravation of preexisting back conditions entitling her to continued compensation.

By decision dated April 24, 2007, the Office terminated appellant's wage-loss and medical compensation benefits effective May 13, 2007, based on Dr. Sturtz's opinion.

In letters received by the Office on June 4, 2007, appellant requested an oral hearing, held October 24, 2007. At the hearing, she asserted that she remained debilitated by the July 1997 injury. Appellant contended that Dr. Sturtz's opinion was poorly rationalized.

Following the hearing, appellant submitted additional evidence. In March 22 and April 19, 2007 reports, Dr. Kim noted that she was depressed and awaiting surgery. In an October 5, 2007 report, Dr. Rosenberg opined that the accepted herniated disc compromised the S1 nerve root. In an October 26, 2007 report, he stated that the herniated disc accelerated and permanently aggravated preexisting degenerative disc disease.

In a November 9, 2007 letter, appellant's representative contended that Dr. Sturtz provided insufficient rationale to support that the accepted conditions ceased without residuals.

By decision dated and finalized January 25, 2008, an Office hearing representative affirmed the termination of appellant's compensation. The hearing representative found that Dr. Sturtz's opinion remained entitled to the weight of the medical evidence. The hearing representative noted that the December 29, 2004 statement of accepted facts on which Dr. Sturtz relied incorrectly stated that the Office accepted a herniated lumbar disc.

### **LEGAL PRECEDENT -- ISSUE 1**

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>4</sup> Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate

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<sup>4</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>5</sup>

Section 8123 of the Federal Employees' Compensation Act 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>6</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>7</sup>

### ANALYSIS -- ISSUE 1

The Office accepted that on July 23, 1997, appellant sustained lumbar and right thigh strains, a herniated L4-5 disc and sciatica. Dr. Rosenberg, a Board-certified anesthesiologist, opined that the herniated disc disabled appellant through 2006. Dr. Swartz, a Board-certified orthopedic surgeon and second opinion physician, opined that the accepted conditions ceased without residuals. The Office then found a conflict of medical opinion between Drs. Swartz and Rosenberg and obtained an impartial opinion from Dr. Sturtz, a Board-certified orthopedic surgeon, who opined that appellant had no residuals of the accepted conditions. Based on Dr. Sturtz's opinion, the Office terminated appellant's compensation and medical benefits.

Dr. Sturtz provided a comprehensive review of the medical evidence and detailed findings on examination. He explained that appellant exhibited Waddell's inorganic signs but no objective lumbar abnormalities. He noted that imaging studies of record did not support true nerve root impingement. Dr. Sturtz found that the accepted injuries ceased without residuals. The Board finds that Dr. Sturtz's opinion was sufficient to establish that the accepted conditions had ceased.<sup>8</sup> His opinion was based on a thorough review of the medical record and an accurate statement of accepted facts. Dr. Sturtz provided extensive rationale explaining why he believed appellant no longer had residuals of the accepted conditions. His opinion is therefore entitled to special weight.<sup>9</sup> Thus, the Board finds that the Office met its burden of proof in terminating appellant's compensation benefits.

On appeal, appellant, through her appointed representative, asserted that Dr. Sturtz's opinion was flawed as he relied on a statement of accepted facts omitting the accepted herniated disc. The Office accepted a herniated L4-5 disc in April 1998. The Board, however, notes the statement of accepted facts listed acceptance of a herniated L4-5 disc. In the Office's January 25, 2008 decision, a hearing representative stated that the Office did not accept a herniated lumbar disc. This is incorrect, as the Office accepted the herniated disc, as noted. Dr. Sturtz provided a complete, accurate history in formulating his opinion.

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<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

<sup>7</sup> *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

<sup>8</sup> *Conard Hightower*, 54 ECAB 796 (2003).

<sup>9</sup> *Jacqueline Brasch (Ronald Brasch)*, *supra* note 7.

Appellant also contended that Dr. Sturtz provided insufficient medical rationale supporting that the accepted conditions ceased without residuals. As noted, Dr. Sturtz provided detailed rationale explaining that the lack of objective clinical findings established that the accepted conditions had ceased. The Office appropriately accorded Dr. Sturtz's opinion as the weight of the medical evidence.

### **LEGAL PRECEDENT -- ISSUE 2**

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.<sup>10</sup> For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.<sup>11</sup> The fact that a condition's etiology is unknown or obscure neither relieves appellant of the burden of establishing a causal relationship by the weight of the medical evidence, nor shifts the burden of proof of the Office to disprove an employment relationship.<sup>12</sup>

### **ANALYSIS -- ISSUE 2**

Following the Office's termination of her compensation benefits, appellant requested a hearing and submitted additional evidence. Dr. Kim, an attending Board-certified physiatrist, stated in March 22 and April 19, 2007 reports that appellant was depressed. This opinion is not relevant to the issue of whether the accepted lumbar injuries disabled appellant for work on and after April 24, 2007.

Appellant also submitted October 5 and 26, 2007 reports from Dr. Rosenberg, who opined that the accepted herniated disc permanently aggravated preexisting degenerative disc disease and compromised the S1 nerve root. However, Dr. Rosenberg did not explain the pathophysiologic relationship between the herniated disc, compromised nerve root or permanent aggravation of lumbar disc disease.<sup>13</sup> Further, he was on one side of the conflict resolved by Dr. Sturtz. A medical report from a physician on one side of a conflict resolved by an impartial medical examiner is generally insufficient to overcome the weight accorded the report of an impartial medical examiner or create a new conflict.<sup>14</sup>

Thus, the Board finds that appellant submitted insufficient rationalized medical evidence to establish a causal relationship between her condition on and after April 24, 2007 and the accepted lumbar injuries. Therefore, she has failed to meet her burden of proof.

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<sup>10</sup> See *Virginia Davis-Banks*, 44 ECAB 389 (1993); see also *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

<sup>11</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>12</sup> *Judith J. Montage*, 48 ECAB 292 (1997).

<sup>13</sup> *Mary E. Marshall*, 56 ECAB 420 (2005).

<sup>14</sup> *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

**CONCLUSION**

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits on the grounds that the accepted injuries ceased without residuals. The Board further finds that appellant did not meet her burden of proof in establishing a continuing work-related disability on and after the termination of her compensation benefits on May 13, 2007.

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated and finalized January 25, 2008 is affirmed.

Issued: January 7, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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