

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

T.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Pleasant Prairie, WI, Employer**

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**Docket No. 09-1910
Issued: July 14, 2010**

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 July 21, 2009 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated February 3, 2009. 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 appellant met her burden of proof to establish disability for work from November 2, 2006 to June 8, 2007; and (2) whether the Office met its burden of proof to terminate appellant's compensation benefits effective October 2, 2008.

FACTUAL HISTORY

On January 16, 2007 appellant, then a 36-year-old rural carrier, filed an occupational disease claim alleging that she developed a bulging disc in her low back due to delivering mail. She first became aware of her condition on December 2, 2006 and attributed it to her employment on that date.

Dr. Marina Kropp, a Board-certified neurologist, examined appellant on November 21, 2006 and noted her history of back pain. Diagnostic testing revealed normal nerve conduction studies of the bilateral lower extremities, and no evidence of right L3-S1 radiculopathy.

Dr. Carlos E. Rivera-Tavarez, a Board-certified orthopedic surgeon, completed a report on December 12, 2006 and noted appellant's complaints of low back pain. Appellant reported pain down the right lower extremity. Dr. Rivera-Tavarez found a central disc protrusion at L4-5 on magnetic resonance imaging (MRI) scan and diagnosed herniated disc. On December 21, 2006 Dr. Rivera-Tavarez referred appellant for physical therapy. He noted that appellant wanted to return to work. On January 9, 2007 Dr. Rivera-Tavarez directed appellant to be active and "do all of her activities." Dr. Erik Bukes, a family practitioner, examined appellant on December 13, 2006 and diagnosed anxiety, depression, degenerative disc disease, chronic back pain and insomnia. The Office accepted appellant's claim for aggravation of a herniated lumbar disc on March 9, 2007.

Dr. Rivera-Tavarez completed a note on February 20, 2007 and stated that appellant had been able to perform all of her activities until February 19, 2007 at which point she "drove too long and she had a flare-up." He advised appellant to continue exercising.

In a letter dated March 26, 2007, the employing establishment stated that appellant had been absent without leave since December 15, 2006 and directed her to make a written request for leave. Appellant did not respond. On April 2, 2007 the employing establishment informed her that if she did not return to work she would be subject to discipline. The employing establishment removed appellant from her position by letter dated May 8, 2007.

Appellant filed a claim for compensation for leave without pay from November 2, 2006 through June 8, 2007. She used sick leave from November 3 through December 27, 2006. Appellant began using leave without pay on December 28, 2006. The employing establishment placed her on administrative leave pending termination.

Dr. David A. Fetter, a Board-certified orthopedic surgeon, examined appellant on June 18, 2007 and noted that he previously examined her on November 6, 2006 due to multiple pain symptomatology. He diagnosed chronic cervical and lumbar spine pain with minimal disc bulging at C5-6 and a small central broad-based disc protrusion at L4-5. Dr. Fetter stated, "[Appellant] was previously employed at the [employing establishment] which she does not believe she is able to perform."

On July 16, 2007 Dr. Harry Tagalakakis, a Board-certified anesthesiologist, noted appellant's complaints of low back and neck pain. He recommended a multidisciplinary pain program. On August 6, 2007 Robert C. Rockey, a licensed clinical social worker, stated that appellant was admitted to the hospital on August 5, 2007 and was unable to work.

Dr. Colleen Vanderkolk, an osteopath, examined appellant on October 22, 2007 and stated that she had a five-year history of low back pain. She noted that appellant was treated by chiropractor who advised her to quit work. Appellant stopped seeing the chiropractor in November 2006 when her back pain became worse. Dr. James Bruno, a Board-certified orthopedic surgeon, examined appellant on October 22, 2007 and noted her employment duty of

constantly reaching to the side while delivering mail. He found that appellant had normal strength and reflexes and encouraged her to continue strengthening exercises.

Dr. Thomas P. Siegel, a chiropractor, examined appellant on November 1 and 6 and December 6, 2007 and diagnosed lumbar disc disorder, cervical disc disorder, lumbar somatic dysfunction and cervical somatic dysfunction as well as spinal pain and lumbar spinal dysfunction, thoracic spinal dysfunction, lumbar disc disorder and myalgia. He completed a work release note dated November 1, 2007 which indicated that appellant was unable to work due to chronic neck and back pain.

Dr. David G. Tylicki, a Board-certified physiatrist, examined appellant on January 10, 2008 and noted her history of injury. He stated that appellant felt that she could not drive more than one half hour and lift more than 20 pounds.

The Office referred appellant for a second opinion evaluation with Dr. Stephen E. Barron, a Board-certified orthopedic surgeon. It noted that the accepted condition was displacement of a lumbar intervertebral disc without myelopathy. Dr. Barron examined appellant on January 16, 2008 and reviewed her medical history. In a January 21, 2008 report, he noted that appellant reported that her back pain began in 2002 and her neck pain in 2005. Dr. Barron advised that appellant had no objective findings to support her subjective complaints as she had a normal orthopedic examination. He found that she did not require further medical treatment and stated that she could perform her regular work duties.

The Office found a conflict of medical opinion evidence between appellant's attending physicians who supported her disabling residuals and Dr. Barron who concluded that she had no objective findings of disability. It referred appellant to Dr. James B. Stiehl, a Board-certified orthopedic surgeon, for an impartial medical examination on June 23, 2008.¹

Dr. Stiehl examined appellant on July 18, 2008 and completed a report on July 24, 2008, finding low grade chronic fibromyalgia and normal progression of degenerative joint disease. He opined that her conditions were not work related and stated that appellant had a normal orthopedic examination. Dr. Stiehl stated, "[T]he low grade findings seen on the MRI scans of her cervical and lumbar spine would be considered normal findings for this age group and not pathological conditions." He advised that appellant did not have a work-related condition or aggravation of a preexisting condition, that her examination was normal and the conditions she reported were psychosomatic. Dr. Stiehl concluded that appellant could return to her date-of-injury position with no physical restrictions, but that based on her psychological and psychosomatic complaints she did not intend to return to work.

By letter dated August 7, 2008, the Office proposed to terminate appellant's medical and compensation benefits based on Dr. Stiehl's report. It allowed her 30 days for a response.

¹ Dr. Tylicki examined appellant on July 9, 2008 and noted a progressive increase in pain. He diagnosed myofascial neck and shoulder pain which was "currently progressing in nature as part of workers' compensation case." Dr. Tylicki also diagnosed right lower extremity pain consistent with right L5 radiculopathy which was also progressing.

Appellant responded and disagreed with Dr. Stiehl's report. On October 22, 2007 Dr. Bruno reviewed appellant's employment and medical history. He found that appellant moved about the room readily, could heel and toe walk and touch her toes. Dr. Bruno found normal strength and reflexes. He stated that he could not "offer anything too worthwhile at this time." Dr. Siegel examined appellant on October 29 and November 6, 2007 and repeated his earlier diagnoses and findings.

By decision dated August 18, 2008, the Office found that appellant was not entitled to disability compensation for November 2, 2006 through June 8, 2007. Appellant requested an oral hearing on August 28, 2008.

By decision dated October 2, 2008, the Office terminated appellant's compensation and medical benefits. Appellant requested an oral hearing on October 13, 2008.

Dr. Michael Didinsky, an osteopath, examined appellant on August 14, 2008 and described her work history. He found no paraspinal muscle spasms, full range of motion with normal motor strength, sensation and reflexes. Dr. Didinsky reviewed an August 9, 2008 MRI scan and found mild desiccation of the L4-5 disc with no herniations. He diagnosed cervical musculoligamentous pain and L4-5 mild disc desiccation. Dr. Didinsky recommended epidural injection for the lumbar spine and a nonsurgical pain specialist.

Appellant testified at the December 9, 2008 oral hearing and indicated that she sought treatment from a chiropractor beginning in 2003. She stopped work on November 2, 2006 and did not return.

By decision dated February 3, 2009, an Office hearing representative found that appellant was not entitled to wage-loss benefits from November 2, 2006 to June 8, 2007. Moreover, the Office met its burden of proof to terminate her compensation benefits effective October 2, 2008.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act² has the burden of establishing the essential elements of his or her claim, including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury. These are the essential elements of each and every compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.³

Appellant, for each period of disability claimed, has the burden of proving by a preponderance of the reliable, probative and substantial evidence that she is disabled for work as a result of her employment injury. Whether a particular injury causes an employee to be

² 5 U.S.C. §§ 8101-8193.

³ *Anthony P. Silva*, 55 ECAB 179, 180 (2003).

disabled for employment and the duration of disability are medical issues which must be provide by a preponderance of the reliable and substantial medical evidence.⁴

Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work. The Board has stated that, when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁵

ANALYSIS -- ISSUE 1

Appellant filed a claim for compensation alleging that she was totally disabled for work beginning November 2, 2006. In support of her claim, she submitted medical reports from Dr. Siegel, a chiropractor. Section 8101(2) of the Act provides that the term "'physician' ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."⁶ Dr. Siegel did not provide a diagnosis of subluxation of the spine. Rather, he diagnosed lumbar disc disorder, cervical disc disorder, lumbar somatic dysfunction and cervical somatic dysfunction, spinal pain and lumbar spinal dysfunction, thoracic spinal dysfunction, lumbar disc disorder and myalgia. As Dr. Siegel did not provide x-rays or diagnose a subluxation of appellant's spine, he is not a physician and his reports do not constitute probative medical evidence competent to establish appellant's claim for disability.

On August 6, 2007 Robert C. Rockey, a licensed clinical social worker, stated that appellant was admitted to the hospital on August 5, 2007 and was unable to work. Registered nurses, licensed clinical social workers and physician's assistants are not defined as a "physician" under the Act. Their opinions are of no probative medical value.⁷ It is well established that to constitute competent medical opinion evidence, the medical evidence submitted must be from a qualified physician.⁸ As neither Mr. Rockey nor Dr. Siegel are physicians under the Act, their reports do not establish appellant's claim.

Appellant submitted medical reports from physicians but none of them addressed whether she was totally disabled for work or the period of such disability. Dr. Fetter, a Board-certified orthopedic surgeon, examined appellant on June 18, 2007 and stated that appellant did not believe she was able to perform her employment duties. Dr. Tylicki, a Board-certified

⁴ *Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

⁵ *Id.*

⁶ 5 U.S.C. § 8101(2).

⁷ *Roy L. Humphrey*, 57 ECAB 238, 242 (2005); 5 U.S.C. § 8101(2) of the Act provides as follows: "(2) 'physician' includes surgeons, podiatrists, dentists, clinical psychologist, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law."

⁸ *Vickey C. Randall*, 51 ECAB 357, 360 (2000); *Arnold A. Alley*, 44 ECAB 912, 921 (1993), *Merton J. Sills*, 39 ECAB 572, 575(1988).

physiatrist, examined appellant on January 10, 2008 and stated that appellant felt that she could not drive more than one-half hour and lift more than 20 pounds. Neither of these physicians offered an opinion that appellant was disabled for work. Instead both doctors merely repeated appellant's conclusions that she was unable to work. As noted above when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurts too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁹

The remainder of the medical evidence submitted by appellant did not address either work restrictions or any period of partial or total disability. The Board finds that appellant has not submitted the necessary medical opinion evidence to establish that she was disabled for work from November 2, 2006 through June 8, 2007.

LEGAL PRECEDENT -- ISSUE 2

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.¹⁰ It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.¹¹ The Office's burden of proof in termination compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹² The right to medical benefits for an accepted condition is not limited to the period of entitlement of disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.¹³

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background must be given special weight.¹⁴

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for aggravation of herniated lumbar disc and displacement of lumbar intervertebral disc without myelopathy. Appellant's physicians Drs. Fetter and Bruno, Board-certified orthopedic surgeons, and Dr. Tylicki, a Board-certified physiatrist, diagnosed employment-related back conditions and recommended additional treatment. The Office referred appellant for a second opinion evaluation with Dr. Barron, a

⁹ *Fereidoon Kharabi*, *supra* note 4.

¹⁰ *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

¹¹ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

¹² *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

¹³ *Mary A. Lowe*, *supra* note 11.

¹⁴ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

Board-certified orthopedic surgeon, who found that appellant had no objective findings to support her subjective complaints as she had a normal orthopedic examination and that appellant did not require further medical treatment and stated that appellant could perform her regular work duties. The Act provides that, if there is a 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.¹⁵ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician of an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.¹⁶ The Board finds that the Office properly determined that there was a conflict of medical opinion evidence between Dr. Barron and Drs. Fetter, Bruno and Tylicki regarding the issue of whether appellant required continuing medical treatment for her accepted employment injuries.

The Office selected Dr. Stiehl, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion evidence. In his July 24, 2008 report, Dr. Stiehl diagnosed low grade chronic fibromyalgia and normal progression of degenerative joint disease. He stated that appellant had a normal orthopedic examination. Dr. Stiehl clearly stated that appellant's diagnosed conditions were not work related. He opined, "[T]he low grade findings seen on the MRI scans of her cervical and lumbar spine would be considered normal findings for this age group and not pathological conditions." Dr. Stiehl concluded that appellant did not have a work-related condition or aggravation of a preexisting condition, that her examination was normal and the conditions she reported were psychosomatic. He found that appellant could return to her date-of-injury position with no physical restrictions.

The Board finds that Dr. Stiehl's report was based on the statement of accepted facts, a proper factual background and that he offered detailed medical reasoning in support of his opinion that appellant had no employment-related residuals. Dr. Stiehl found that appellant's orthopedic examination was normal and that her findings on MRI scan were normal for her age. His conclusions are based on sound medical reasoning and are sufficient to constitute the weight of the medical opinion evidence. The Board finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits based on Dr. Stiehl's well-reasoned report.

CONCLUSION

The Board finds that appellant has not established that she was disabled from November 2, 2006 through June 8, 2007. The Board further finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits effective October 2, 2008.

¹⁵ 5 U.S.C. §§ 8101-8193, 8123.

¹⁶ 20 C.F.R. § 10.321.

ORDER

IT IS HEREBY ORDERED THAT February 3, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 14, 2010
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