

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

N.M., Appellant

and

**DEPARTMENT OF AGRICULTURE, RURAL
DEVELOPMENT, Mayaguez, PR, Employer**

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**Docket No. 09-1971
Issued: July 26, 2010**

Appearances:

Alan J. Shapiro, Esq., 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 July 28, 2009 appellant timely appealed the July 7, 2009 merit decision of the Office of Workers' Compensation Programs, which affirmed the termination of her wage-loss compensation and medical benefits. Pursuant to 20 C.F.R. §§ 501.2 and 501.3(e), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective May 10, 2008.

FACTUAL HISTORY

Appellant, a 48-year-old loan specialist, was involved in an employment-related motor vehicle accident (MVA) on May 15, 2006. She was stopped in traffic when another motorist rear-ended her vehicle. The Office accepted her claim for lumbar sprain and cervical strain and placed her on the periodic compensation rolls effective August 6, 2006.

Appellant came under the care of Dr. Manuel A. Martinez, a Board-certified physiatrist, who previously treated her for a July 31, 2003 employment-related back injury (xxxxxx444). On May 25, 2006 Dr. Martinez diagnosed cervical and lumbar strain and advised her to remain off work for approximately one month. In a report dated July 24, 2006, he extended appellant's off-duty status until August 7, 2006. Dr. Martinez also recommended that she see a psychiatrist as she had a prior history of major depression.¹ Dr. Martinez noted that recently she had been very sad and anxious about her condition and was having frequent crying spells. Appellant's prognosis for full rehabilitation was poor and her physical condition had been complicated by her emotional status. In an August 24, 2006 update, Dr. Martinez advised that appellant was undergoing physical therapy. On September 17, 2006 he reported ongoing low back pain and complaints of knee pain, which on x-ray revealed degenerative joint disease of the knee. Dr. Martinez diagnosed lumbar strain and sciatica and recommended that appellant remain off work. He reiterated that she had a poor prognosis for full rehabilitation. Dr. Martinez also noted that her condition should be considered permanent and unlikely to change.²

Dr. Fernando Rojas, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on November 3, 2006. In a November 6, 2006 report, Dr. Rojas noted that appellant was rear-ended by another vehicle on May 15, 2006, sustaining injuries to her neck (whiplash) and lower back. He also noted a history of two previous employment-related motor vehicle accidents in 1990 and 2003 where she sustained cervical/lumbar sprains. Appellant complained of frequent pain and Dr. Rojas noted a considerable loss of motion in the lower back. There was also radiographic evidence of lumbar disc desiccation and disc bulging at L3-4 and L4-5, as well as objective evidence of peripheral neuropathy.³ Dr. Rojas diagnosed low back sprain. He indicated that the current diagnosis was work related and that appellant could not return to her date-of-injury position. With respect to the need for further treatment, Dr. Rojas stated that physical therapy was the only feasible treatment thus far, coupled with oral medications and lumbar supports. He listed appellant's chronic mental depression and early moderate demyelinitative peripheral neuropathy as other conditions that may prevent her from returning to full-time work. Dr. Rojas completed a work-capacity evaluation (Form OWCP-5c), precluding all work due to persistent recurrent pain.

The Office found a conflict in medical opinion between Dr. Rojas and Dr. Martinez and referred appellant for an impartial medical evaluation. In its June 14, 2007 correspondence to appellant, it indicated that there was a conflict on the issues of "causal relationship" and "continuing disability due to the accepted work injury." The Office selected Dr. Fausto Boria as the impartial medical examiner. On August 6, 2007 Dr. Boria examined appellant and reviewed her medical records, but did not request or administer any additional objective studies. He also reviewed appellant's history of injury, occupational history and prior medical history.

¹ She has an accepted claim for major depressive disorder, single episode, which occurred on or about February 26, 2003 (xxxxxx497).

² Dr. Martinez routinely submitted return to work certificates, which extended appellant's off-duty status at four-to five-week intervals.

³ This latter diagnosis was based on a November 13, 2003 lower extremity electromyography and nerve conduction velocity (EMG/NCV) test. Dr. Rojas indicated that the peripheral neuropathy was not related to appellant's work injury.

Dr. Boria's diagnoses included cervical sprain, lumbar sprain and lumbar spine degenerative disc disease. He advised that the cervical and lumbar sprains were work related, but the lumbar degenerative disc disease was not. Dr. Boria stated that appellant's overall prognosis was good and that she had achieved maximum medical improvement. He indicated that there were no objective findings of the accepted conditions. Dr. Boria explained that there was no spasm and appellant's cervical and lumbar spontaneous movements were functional. He concluded that her accepted injuries had resolved and further medical treatment was unnecessary. Dr. Boria found that appellant was able to perform the full duties of her job.

On March 28, 2008 the Office issued a notice of proposed termination of compensation and medical benefits based on Dr. Boria's August 6, 2007 impartial medical evaluation. It afforded appellant 30 days to submit additional evidence or argument to the extent she disagreed with the proposed termination of benefits.

The Office subsequently received an April 16, 2008 report from Dr. Martinez. Since his last medical report of September 17, 2006, he had treated appellant for low back pain on September 12, November 16, 2007 and March 17, 2008, each time prescribing medication. Dr. Martinez most recently examined appellant on April 14, 2008, at which time she complained of low back and left knee pain. He found marked tenderness and severe paravertebral muscle spasms over the lumbar area. Dr. Martinez also stated that appellant's lumbar spine was very stiff. He diagnosed lumbar strain and sciatica and started appellant on physical therapy. Dr. Martinez explained that appellant had a poor prognosis for full rehabilitation and faced long-term disability. He reiterated that her condition should be considered permanent and unlikely to change. Dr. Martinez also reported that appellant had been receiving psychiatric treatment for major depression since being referred in July 2006. He submitted a work capacity evaluation (Form OWCP-5c), which prohibited all work due to recurrent low back pain.

In an April 9, 2007 report, Dr. Dwight M. Santiago Perez, an internist, noted that he evaluated appellant on December 7, 2006 and found her totally and permanently disabled due to a combination of psychiatric and orthopedic conditions. Dr. Santiago diagnosed chronic post-traumatic cervical-dorsal and lumbosacral myofascial pain syndrome, which he attributed to appellant's history of repeated motor vehicle accidents, including the May 15, 2006 employment injury. He also diagnosed bilateral lower extremity moderate demyelinating neuropathy, left knee degenerative joint disease and severe recurrent major depression with psychotic features.

In a May 5, 2008 decision, the Office terminated appellant's compensation and medical benefits effective May 10, 2008. It found that the recently submitted reports from Dr. Santiago and Dr. Martinez did not outweigh the impartial medical examiner's opinion.

In a letter dated May 27, 2008, the Office advised appellant that there was a conflict between Dr. Martinez and Dr. Boria on the issue of whether there was any continuing disability due to the accepted work injury. It referred appellant to Dr. Javier Cerra, a Board-certified physiatrist. In a report dated June 12, 2008, Dr. Cerra noted the history of multiple motor vehicle accidents. While acknowledging that appellant had been diagnosed with cervical and lumbar sprain, Dr. Cerra did not provide a current diagnosis because her case had not been thoroughly worked up following her latest accident. He noted that appellant had no new magnetic resonance imaging (MRI) scans or EMG/NCV tests following her May 15, 2006

injury.⁴ Dr. Cerra advised that appellant continued to suffer residuals of her initial injury, “mainly to the low back.” He noted that her complaints and physical findings did not correlate well. Dr. Cerra stated that no patient with lumbar and cervical sprain without any other significant findings should be permanently and totally disabled from performing any type of work. He recommended a repeat MRI scan and EMG/NCV test. Dr. Cerra also noted that appellant needed intense psychological and psychiatric treatment. He essentially deferred judgment until additional testing was provided. Dr. Cerra subsequently received the results of a June 12, 2008 EMG/NCV administered by Dr. Martinez, which revealed left L5 radiculopathy. In a June 18, 2008 addendum, he indicated that the recent test results could explain some of the findings on the involved left leg, but not on the other leg. Dr. Cerra commented that appellant’s symptoms were not significantly different on both sides, which did not correlate medically. He adhered to his original recommendation of additional testing, including a repeat MRI scan.

On April 14, 2009 appellant’s counsel filed a request for reconsideration. The request was accompanied by a March 29, 2009 report from Dr. Martinez who noted that appellant had been receiving treatment since May 25, 2006 and was recently seen on March 12, 2009 for an exacerbation of her neck and lower back pain. Dr. Martinez reported severe tenderness and muscle spasms over appellant’s cervical, dorsal and lumbar area. He also noted marked stiffness over her cervical and lumbar spine. Recent MRI scans of the cervical and lumbar spine revealed herniated discs from C3 to C7 and L3 to L5. Dr. Martinez also stated that a June 12, 2008 EMG/NCV test revealed left L5 radiculopathy. He further indicated that he referred appellant to an anesthesiologist to consider an epidural block. Dr. Martinez diagnosed: (1) status post cervical and lumbar sprain; (2) cervical, dorsal and lumbar chronic myositis; (3) C3-4, C4-5, C5-6 and C6-7 herniated discs; (4) L3-4 and L4-5 herniated discs; and (5) left L5 radiculopathy. As to the cause of appellant’s current condition, Dr. Martinez explained that the shearing forces produced during a whiplash injury may result in a disc herniation with or without radiculopathy. Therefore, he found that appellant’s current conditions were sequelae of her traumatic injury, which was initially accepted for neck and back sprain. Dr. Martinez also explained that a whiplash injury could result in a residual condition known as chronic myofascial pain syndrome.

By decision dated July 7, 2009, the Office denied modification of the May 5, 2008 decision terminating appellant’s benefits. It found Dr. Martinez’s latest report unpersuasive in part because he had not provided “reports of the MRI [scan] or EMG/NCV testing....” The Office found that the newly submitted evidence was insufficient to overcome the weight accorded Dr. Boria’s opinion. It further noted that due to a “scheduling error,” appellant had been referred for an additional medical examination with Dr. Cerra after her benefits had been terminated.⁵ The Office stated that Dr. Cerra’s June 12, 2008 examination was not considered to be another referee examination, and therefore, it did not supersede the weight of the medical evidence as represented by Dr. Boria, the impartial medical examiner (IME).

⁴ The most recent lumbar MRI scan of which Dr. Cerra was aware is dated December 13, 2005. The latest EMG/NCV test was dated November 13, 2003.

⁵ The Office did not otherwise address the substance of Dr. Cerra’s June 12, 2008 report.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁶ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has either ceased or that it is no longer related to the employment.⁷ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁸ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁹

ANALYSIS

The Board finds that conflict in medical opinion did not arise between Dr. Rojas and Dr. Martinez regarding either causal relationship or continuing employment-related disability.¹⁰ In its latest decision, the Office noted that “it was Dr. Rojas’ opinion that [appellant’s] injury-related condition had resolved...” To the contrary, Dr. Rojas responded “No” when asked the question “Has the injury-related condition resolved?” The Office misinterpreted Dr. Rojas’ November 6, 2006 opinion. Absent a conflict in medical opinion, there was no reason to refer the case to an impartial medical examiner in June 2007. Thus, Dr. Boria’s designation as an impartial medical examiner was inappropriate. His August 6, 2007 findings should be considered those of an Office second opinion examiner rather than an impartial medical referee.

Dr. Boria’s opinion did not resolve a conflict in medical opinion. Rather, it created one.¹¹ The Office recognized this fact, but only after it had already terminated appellant’s compensation and medical benefits. On May 27, 2008 it advised appellant that there was a conflict between Dr. Martinez and Dr. Boria on the issue of whether there was any continuing disability due to the accepted work injury. The Board concurs with the Office’s assessment in this regard. Dr. Boria’s August 6, 2007 second opinion report clearly conflicts with Dr. Martinez’s April 16, 2008 report, which the Office received prior to terminating appellant’s benefits on May 10, 2008. According to Dr. Martinez, appellant continued to have residual disability from the accepted

⁶ *Curtis Hall*, 45 ECAB 316 (1994).

⁷ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁸ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁹ *Calvin S. Mays*, 39 ECAB 993 (1988).

¹⁰ The Federal Employees’ Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee’s physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a) (2006); *Shirley L. Steib*, 46 ECAB 309, 317 (1994). Where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹¹ For a conflict to arise the opposing physicians’ viewpoints must be of “virtually equal weight and rationale.” *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

lumbar strain and sciatica when he examined her on April 14, 2008. Because there was an unresolved conflict in medical opinion, the Office failed to meet its burden of proof to terminate appellant's benefits as of May 10, 2008 based on the report of Dr. Boria.

CONCLUSION

The Office improperly terminated appellant's benefits effective May 10, 2008.

ORDER

IT IS HEREBY ORDERED THAT the July 7, 2009 decision of the Office of Workers' Compensation Program is reversed.

Issued: July 26, 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