

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

_____)
M.P., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Goleta, CA, Employer)

_____)

Docket No. 09-1616
Issued: March 3, 2010

Appearances:

Alan J. Shapiro, Esq., for the appellant
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 June 10, 2009 appellant filed a timely appeal of a May 18, 2009 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(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 1, 2008; and (2) whether appellant met her burden of proof to establish that she had any employment-related disability or medical condition after December 1, 2008 causally related to her employment injury.

FACTUAL HISTORY

On March 8, 2003 appellant, then a 40-year-old transportation security screener, filed a claim for a traumatic injury alleging that she sustained an injury on January 3, 2003 when she

lifted a large suitcase and felt something pull in her right side. She stopped work on March 7, 2003 and returned to work on May 26, 2003 in a limited-duty capacity. A March 7, 2003 lumbar x-ray revealed mild spondylosis. A March 31, 2003 x-ray of the thoracic spine was negative. Appellant stopped work again on September 18, 2003 due to a separate employment injury and did not return to work.¹ The Office accepted her January 3, 2003 claim for thoracic and lumbar strains.

In a June 27, 2003 report, Dr. Steven Dosch, an attending physician, stated that a magnetic resonance imaging (MRI) scan of appellant's lumbar spine revealed multilevel facet joint hypertrophy. An MRI scan of her thoracic spine was negative.

In a July 10, 2003 report, Dr. William C. Boeck, Jr., a Board-certified orthopedic surgeon and an Office referral physician, reviewed the medical history and provided findings on physical examination. He opined that appellant had residuals of her work-related lumbar strain but could perform her modified-duty job.

On March 22, 2004 Dr. Steven Nagelberg, a Board-certified orthopedic surgeon, began treating appellant for her accepted thoracic and lumbar strains. Electromyogram (EMG) and nerve conduction velocity (NCV) testing performed on April 8, 2004 revealed left-sided S1 radiculopathy. A May 3, 2004 MRI scan revealed degenerative changes at C2-7. A January 31, 2005 EMG and NCV study was normal. A February 10, 2006 cervical spine MRI scan revealed degenerative changes. March 27, 2006 discography of the lumbar spine revealed degeneration and a disc bulge at L5-S1.

On May 4, 2006 Dr. Nagelberg requested authorization for surgery consisting of an anterior lumbar interbody fusion at L5-S1. A November 27, 2006 lumbar MRI scan revealed degenerative changes at L3-4 and L5-S1. On November 29, 2006 Dr. Nagelberg again recommended spinal surgery.

On November 7, 2006 Dr. Boeck reexamined appellant. He opined that her accepted thoracic strain had resolved. Dr. Boeck noted the positive March 27, 2006 L5-S1 discogram, revealing an active lumbar strain with radiculopathy, but he opined that lumbar spine surgery was not medically necessary to treat the condition. He found that appellant could return to her regular work without restrictions.

On March 30, 2007 Dr. Nagelberg reiterated his request for authorization for lumbar spine surgery based on the positive discogram and subjective findings on physical examination. On June 4, 2007 Dr. Boeck stated that lumbar surgery was not warranted. On September 12 and October 4, 2007 Dr. Nagelberg repeated his findings and recommendation for lumbar spine surgery.

On December 10, 2007 the Office found a conflict in medical opinion between Dr. Nagelberg and Dr. Boeck as to whether appellant needed lumbar spine surgery and as to the nature and extent of her work-related medical condition and disability. It referred her, together

¹ Under OWCP File No. xxxxxx795, the Office accepted appellant's claim for a cervical strain, left shoulder strain and left rotator cuff syndrome.

with a statement of accepted facts, a list of questions and the case file, to Dr. Alan P. Moelleken, a Board-certified orthopedic surgeon, for an examination and evaluation to resolve the conflict.

In a July 25, 2008 report, Dr. Moelleken reviewed the medical history in detail, including test results and provided findings on physical examination. He noted that appellant had a neck injury in 1998 while working in private industry. Appellant had not worked at the employing establishment since 2004. In 2006 or 2007, she was involved in a nonwork-related motor vehicle accident but could not recall whether she injured her neck or back at that time. On physical examination, appellant's gait was normal. Dr. Moelleken found no lumbar or thoracic tenderness or significant lumbar nerve compression. Neurological findings were normal. Dr. Moelleken stated that there was an obvious discrepancy in appellant's spine range of motion in that she demonstrated a much greater range of motion when she was simply observed than when she was asked to perform her range of motion evaluation. Hoffman's, Babinski, clonus, straight leg raising, Laseque and Lhermitte signs were all negative. Appellant had significant inorganic findings, including a dramatically positive Waddell's sign for inorganic pain. She screamed in pain with Waddell's testing to simulated axial compression and simulated axial rotation even lightly. Appellant complained on light touch of her skin. Lumbar degenerative changes disclosed in an MRI scan were not related to the January 3, 2003 employment injury. Additionally, the changes were mild and did not warrant surgery. A thoracic spine MRI scan was normal. Dr. Moelleken stated that no surgery was necessary to treat the thoracic and lumbar strains sustained on January 3, 2003. There were no objective abnormalities on physical examination that were causally related to the January 3, 2003 employment injury. Dr. Moelleken opined that appellant had completely recovered from her January 3, 2003 accepted thoracic and lumbar strains.

By letter dated October 29, 2008, the Office advised appellant of its proposed termination of her wage-loss compensation and medical benefits on the grounds that the weight of the medical evidence established that she had no remaining disability or medical condition causally related to her January 3, 2003 employment-related thoracic and lumbar strains.

By decision dated December 1, 2008, the Office finalized its termination of appellant's wage-loss compensation and medical benefits.

Appellant requested a telephonic hearing that was held on March 20, 2009. In a November 19, 2008 report, Dr. Nagelberg provided findings on physical examination and diagnosed cervical and lumbar discogenic pain. He reiterated his recommendation for back surgery.

By decision dated May 18, 2009, the Office affirmed the December 1, 2008 decision.²

² Subsequent to the May 18, 2009 decision, additional evidence was associated with the case. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ It may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.⁴ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.⁶

Section 8123(a) 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 [of Labor] shall appoint a third physician who shall make an examination."⁷ Where 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 a proper factual and medical background, must be given special weight.⁸

ANALYSIS -- ISSUE 1

Appellant's claim for an injury on January 3, 2003 was accepted for thoracic and lumbar spine strains. Dr. Moelleken provided a comprehensive report dated July 25, 2008. He was provided with appellant's case file, a list of questions and a statement of accepted facts. Dr. Moelleken reviewed the medical history in detail, including test results and provided findings on physical examination. He noted that appellant had a neck injury in 1998 while working in private industry. Appellant had not worked at the employing establishment since 2004. In 2006 or 2007, she was involved in a nonwork-related motor vehicle accident but could not recall whether she injured her neck or back at that time. On physical examination, appellant's gait was normal. Dr. Moelleken found no lumbar or thoracic tenderness or significant lumbar nerve compression. Neurological findings were normal. Dr. Moelleken stated that there was an obvious discrepancy in appellant's spine range of motion in that she demonstrated a much greater range of motion when she was simply observed than when she was asked to perform her range of motion evaluation. Hoffman's, Babinski, clonus, straight leg raising, Laseque and Lhermitte signs were all negative. Appellant had significant inorganic findings, including a dramatically positive Waddell's sign for inorganic pain. She screamed in pain with Waddell's

³ *I.J.* 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁴ *J.M.*, 58 ECAB 478 (2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁶ *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

⁷ 5 U.S.C. § 8123(a); *see also* *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁸ *See* *Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

testing to simulated axial compression and simulated axial rotation even lightly. Lumbar degenerative changes disclosed in an MRI scan were not related to the January 3, 2003 employment injury. Additionally, the changes were mild and did not warrant surgery. A thoracic spine MRI scan was normal. Dr. Moelleken stated that no surgery was necessary to treat the thoracic and lumbar strains sustained on January 3, 2003. There were no objective abnormalities on physical examination that were causally related to the January 3, 2003 employment injury.

Dr. Moelleken opined that appellant had completely recovered from her January 3, 2003 accepted thoracic and lumbar strains. The report is based upon a complete and accurate factual and medical background and findings on physical examination. Dr. Moelleken provided medical rationale in support of his opinion that appellant's accepted thoracic and lumbar spine strains had completely resolved and surgery was unnecessary. The Board finds that his thorough and well-rationalized report establishes that she had no continuing disability or medical condition causally related to her January 3, 2003 accepted thoracic and lumbar strains. Accordingly, the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective December 1, 2008 based on the medical opinion of Dr. Moelleken that her accepted thoracic and lumbar strains had resolved.

On appeal, appellant contends that the Office's decisions are contrary to fact and law. However, as noted, the report of Dr. Moelleken is entitled to special weight and establishes that her accepted thoracic and lumbar strains had resolved. The Office properly terminated appellant's wage-loss compensation and medical benefits based on the opinion of Dr. Moelleken.

LEGAL PRECEDENT -- ISSUE 2

Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the employment injury.⁹ In order to prevail, the employee must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.¹⁰

ANALYSIS -- ISSUE 2

The Board finds that, following the proper termination of her compensation and medical benefits on December 1, 2008, appellant failed to establish that she had any continuing disability or medical condition causally related to her January 3, 2003 employment-related thoracic and lumbar strains.

In a November 19, 2008 report, Dr. Nagelberg provided findings on physical examination and diagnosed cervical and lumbar discogenic pain. He reiterated his recommendation for back surgery. A subsequent report submitted by a claimant's attending physician is insufficient to

⁹ *I.J.*, *supra* note 3; *Anna M. Blaine*, 26 ECAB 351, 353-54 (1975); *see Fred Foster*, 1 ECAB 127, 132-33 (1948).

¹⁰ *I.J.* *supra* note 3; *Gary R. Sieber*, 46 ECAB 215, 222 (1994); *see Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

outweigh the report of the impartial medical specialist, where the attending physician's earlier reports had created the medical conflict that was referred to the impartial medical specialist to resolve.¹¹ The supplemental report from Dr. Nagelberg does not provide additional rationale in support of his opinion. The Office properly affirmed the December 1, 2008 termination decision.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective December 1, 2008. The Board further finds that appellant did not meet her burden of proof to establish that she had any work-related disability or medical condition after December 1, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 18, 2009 is affirmed.

Issued: March 3, 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

¹¹ See *Roger G. Payne*, 55 ECAB 535 (2004).