

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

_____)
D.H., Appellant)
))
and))
))
U.S. POSTAL SERVICE, POST OFFICE,)
Flushing, NY, Employer)
_____)

**Docket No. 09-1699
Issued: May 3, 2010**

Appearances:
Appellant, *pro se*
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 15, 2009 appellant filed a timely appeal from a May 12, 2009 merit decision of the Office of Workers' Compensation Programs terminating her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office properly terminated appellant's medical and wage-loss benefits effective December 9, 2008 on the grounds that her accepted conditions had resolved.

On appeal, appellant contends that Dr. Monette G. Basson, an impartial medical specialist and Board-certified neurologist and psychiatrist, did not consider her most recent 2009 magnetic resonance imaging (MRI) scan results revealing a disc herniation at L4-5 and L5-S1.

FACTUAL HISTORY

On July 4, 2007 appellant, then a 44-year-old clerk, experienced back pain while lifting a tray of Netflix DVDs. The Office accepted the traumatic injury claim for a thoracic back sprain

and a sprain of the lumbosacral joint. Appellant stopped work that day. She received wage-loss compensation and on October 24, 2007 was placed on the periodic rolls.

On October 31, 2007 appellant's treating physician, Dr. Leo Batash, released appellant to part-time, light duty with physical restrictions. He provided updated medical reports advising that she was partially disabled and could only work light duty, four hours a day due to the diagnosed conditions, including radiculopathy, lumbosacral spinal sprain, L4-5 disc bulge and L5-S1 disc protrusion.

On December 8, 2007 appellant returned to part-time, light duty, working four hours a day casing mail.¹

On December 27, 2007 the Office referred appellant to a second opinion physician, Dr. Andrew Weiss, a Board-certified orthopedic surgeon, for a determination of her current disability. In a December 27, 2007 medical report, Dr. Weiss diagnosed a resolved work-related thoracolumbosacral spinal sprain. Physical and neurological examinations were normal and there were no objective findings of any current disability. Dr. Weiss opined that, despite appellant's subjective complaints of pain, the employment condition had completely resolved and she was able to perform her regular clerk duties.

The Office determined that a conflict of medical opinion arose between Dr. Weiss and Dr. Batash. It referred appellant to Dr. Norman Sveilich, an impartial medical specialist and Board-certified orthopedic surgeon, to resolve the conflict. In April 7 and 14, 2008 medical reports, Dr. Sveilich diagnosed hypertension and morbid obesity. No abnormalities were found on physical examination of the thoracic and lumbar spine or on x-ray of the lumbosacral spine. A neurological examination was also normal. Dr. Sveilich opined that appellant's work-related spinal condition had completely resolved and that she was able to return to regular duty.

On May 20, 2008 the Office notified appellant that it proposed to terminate her medical benefits and wage-loss compensation based on Dr. Sveilich's finding that she did not continue to have residuals of her accepted employment-related conditions. It provided her 30 days to submit additional evidence or argument.

Appellant submitted a June 18, 2008 medical report from Dr. Richard J. Radna, a Board-certified neurological surgeon. On physical examination, Dr. Radna noted evidence of a severe bilateral paravertebral spasm with severely diminished range of motion, discomfort with spurring maneuvers and restricted straight leg raises. A neurological examination revealed positive findings, including an antalgic gait and attenuated dorsi and plantar flexion of both feet. Dr. Radna diagnosed lumbosacral radicular pain syndrome and opined that appellant was partially disabled.

By decision dated June 26, 2008, the Office terminated appellant's medical and wage-loss benefits effective June 26, 2008. It found that the special weight of the medical evidence rested with Dr. Sveilich, who determined that she did not continue to have any disability or residuals of her accepted work-related condition.

¹ Appellant continued to submit claims for partial wage-loss compensation (Form CA-7) after December 8, 2007.

On July 8, 2008 appellant filed a request for an oral hearing before an Office hearing representative.

By decision dated August 18, 2008, the Office hearing representative, after a preliminary review, set aside the June 26, 2008 termination of benefits and remanded the case. He found that Dr. Sveilich resolved the conflict between Drs. Batash and Weiss. However, a new conflict existed between Drs. Sveilich and Radna regarding appellant's current diagnosis and disability, which required resolution by a new impartial medical specialist.

On remand, the Office referred appellant to Dr. Basson, a Board-certified neurologist and psychiatrist, for an impartial medical examination. In an October 16, 2008 medical report, Dr. Basson reviewed appellant's medical and occupational history. She performed a full physical examination revealing normal ranges of motion in appellant's spine, no muscle spasm, no focal tenderness, no sciatic notch tenderness, normal straight leg raises and intact sensation in all extremities. Gait station was normal and cranial nerves II through XII were intact. An eye examination was normal and motor examination showed good strength and tone in all extremities. Appellant denied ever experiencing any radicular symptoms. The only abnormality found on examination was a decrease in forward flexion of the lumbar spine, which Dr. Basson found to be normal and voluntary. She opined that appellant had a resolved lumbar sprain with no residual disability. Dr. Basson noted that appellant's MRI scan findings revealed a disc herniation of only one to two millimeters, which was miniscule and not clinically significant. She further opined that appellant did not have a history of radicular symptoms and did not require electromyogram (EMG) or nerve conduction tests. Dr. Basson found that the results of such tests were not clinically valid and concluded that appellant's lumbosacral sprain had resolved with no neurological disability and no need for further neurological tests or treatment.

On November 5, 2008 the Office notified appellant of its proposal to terminate her medical and wage-loss benefits based on Dr. Basson's finding that she no longer had any residuals or disability from her employment-related conditions. It advised her that she had 30 days to submit additional evidence.

Appellant submitted additional medical notes and reports dated June 4 through October 27, 2008 from Dr. Batash, who opined that she could only work part-time, light duty.

By decision dated December 9, 2008, the Office terminated appellant's medical and wage-loss benefits effective that date. It found that the special weight of the medical evidence rested with Dr. Basson, who found that appellant was no longer experiencing any residuals or continuing disability from her employment-related condition.

On December 23, 2008 appellant filed a request for an oral hearing before an Office hearing representative. An oral hearing took place on March 16, 2009.

In medical reports dated June 4, 2008 through April 15, 2009, Dr. Batash diagnosed spinal sprain, radiculopathy, L4-5 disc bulge and L5-S1 disc herniation. He reported that appellant experienced intermittent pain, tenderness of the spinal and paraspinal muscles and muscle spasms. Dr. Batash opined that she was still partially disabled and only able to work light duty, four hours a day, due to her employment injury. He stated that in comparing the

October 24, 2007 MRI scan with the recent April 2, 2009 MRI scan, appellant's condition had worsened due to the continuous performance of her work duties, including regularly lifting trays of mail. Dr. Batash stated that, since October 24, 2007, appellant experienced an interval development of the L4-5 left posterior disc herniation and the subligamentous disc herniation at L5-S1. He also submitted the April 2, 2009 MRI scan results revealing L4-5 left posterior disc herniation, L5-S1 central and left paramedian posterior subligamentous disc herniation and an interval development of L4-5 left posterior disc herniation and subligamentous disc herniation at L5-S1.

Appellant provided a December 1, 2008 medical report from Dr. Radna, who essentially reiterated her prior findings on examination. Dr. Radna diagnosed employment-related lumbosacral, musculoskeletal and radicular pain and opined that she was still partially disabled.

By decision dated May 12, 2009, the Office hearing representative affirmed the December 9, 2008 termination of benefits. He found that Dr. Basson's medical report was well rationalized and based on a proper factual background. Thus, it represented the special weight of the medical evidence. The Office hearing representative further found that the subsequent medical evidence from Dr. Batash was insufficient to outweigh Dr. Basson's opinion as he was on one side of a conflict resolved by an impartial medical examiner.

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 has ceased or that it is no longer related to the employment.² The burden of proof on the Office includes the necessity of furnishing rationalized medical opinion evidence which is based on a proper factual and medical history.³

Section 8123(a) of the Federal Employees' Compensation Act⁴ 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 of Labor shall appoint a third physician who shall make an examination.⁵ When the case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical evidence, the opinion of such specialist will be given special weight when based on a proper factual and medical background and sufficiently well rationalized on the issue presented.⁶

² *David W. Pickett*, 54 ECAB 272 (2002); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

³ *Daniel F. O'Donnell*, 54 ECAB 456 (2003); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Id.* at § 8123(a). See *Elsie L. Price*, 54 ECAB 734 (2003); *Raymond J. Brown*, 52 ECAB 192 (2001).

⁶ See *Bernadine P. Taylor*, 54 ECAB 342 (2003); *Anna M. Delaney*, 53 ECAB 384 (2002).

ANALYSIS

The Office accepted that appellant sustained a thoracic back sprain and a sprain of the lumbosacral joint in the performance of duty and authorized medical and wage-loss benefits. The issue is whether it properly terminated her compensation benefits on December 9, 2008 on the grounds that her accepted conditions had resolved. The Board finds that the Office met its burden of proof.

Appellant's treating physician, Dr. Batash released appellant to part-time light duty on October 31, 2007. Appellant returned to part-time, light duty on December 8, 2007. The Office subsequently determined that a second opinion was required to evaluate her current disability and referred her to Dr. Weiss. In a December 27, 2007 medical report, Dr. Weiss opined that appellant's employment-related thoracolumbosacral spinal sprain had resolved and that she was no longer disabled. The Office found that a conflict of medical opinion arose between Drs. Batash and Weiss regarding appellant's residuals and continuing disability. It properly referred her to Dr. Sveilich for an impartial medical examination.⁷

In April 7 and 14, 2008 medical reports, Dr. Sveilich found that appellant's work-related spinal condition had resolved and that she was able to return to regular duty. The Office proposed termination of her compensation benefits based on Dr. Sveilich's findings and provided her 30 days to submit additional evidence. Thereafter, in a June 18, 2008 medical report, Dr. Radna diagnosed lumbosacral radicular pain syndrome and opined that appellant was partially disabled. The Office terminated her benefits effective June 26, 2008; however, an Office hearing representative set aside the termination and remanded the case finding a new conflict of medical opinion between Drs. Radna and Sveilich.

The Board finds that Drs. Radna and Sveilich provided differing opinions of equal weight and rationale regarding appellant's residuals and current disability. Specifically, the physicians disagreed as to whether appellant had a work-related neurological condition that would prevent her from working full duty. The Board finds that the Office properly referred appellant to a second impartial medical examiner, Dr. Basson, for resolve the conflict.⁸

In an October 16, 2008 medical report, Dr. Basson reviewed appellant's medical and occupational history. A physical examination of appellant's spine and extremities were essentially normal, except for a decrease in forward flexion of the lumbar spine, which Dr. Basson stated was minor and voluntary. Further, the results of a neurological examination were normal and appellant denied any current or prior radicular symptoms. Dr. Basson noted that appellant's MRI scan findings, of a disc herniation of only one to two millimeters, was miniscule and not clinically significant. She further found that, because appellant did not report a history of radicular symptoms, nerve conduction and EMG studies were not required and, therefore, the test results were not clinically valid. Dr. Basson opined that appellant's lumbosacral sprain had resolved with no residual neurological disability.

⁷ See *Willa M. Frazier*, 55 ECAB 379 (2004).

⁸ See *M.B.*, 58 ECAB 588 (2007); *id.*

The Board finds that Dr. Basson's medical report is well rationalized and based on an accurate factual and medical background. Dr. Basson found that appellant did not continue to experience any residuals or disability from her accepted employment injuries. Her report is entitled to the special weight accorded an impartial medical specialist.⁹

The Board further finds that appellant did not provide sufficient medical evidence of disability to overcome the weight of Dr. Basson's opinion. Appellant submitted medical reports dated June 4, 2008 through April 15, 2009 from Dr. Batash, who continued to opine that she was partially disabled. On April 15, 2009 Dr. Batash stated that, based on an April 2, 2009 MRI scan, her condition had worsened since October 24, 2007 due to repetitive lifting at work and that she experienced an interval development of the L4-5 and L5-S1 disc herniations. He included a copy of the April 2, 2009 MRI scan results.

The Board has held that additional reports from a physician who was on one side of a resolved conflict which essentially repeat earlier findings and conclusions are insufficient to overcome the weight accorded an impartial medical specialist.¹⁰ Dr. Batash's additional medical reports essentially reiterate his earlier opinions on appellant's disability. The only new findings provided by him were that, based on an April 2, 2009 MRI scan, appellant's disc herniation and disc bulge had developed since October 24, 2007. However, these conditions are not accepted as employment related as the Office only accepted appellant's sprain of the thoracic back and lumbosacral joint. Further, Dr. Batash did not relate these conditions to appellant's July 4, 2007 employment injury, but rather opined that she sustained the conditions due to her continuous performance of job duties including regularly lifting trays of mail.¹¹ Thus, his findings of a worsened disc herniation and bulge are not relevant to the issue of whether appellant was still experiencing residuals from the July 4, 2007 employment injury.¹² Therefore, the Board finds that the Dr. Batash's reports are insufficient to overcome or create a new conflict with the well-rationalized opinion of Dr. Basson.¹³

Appellant further submitted a December 1, 2008 medical report from Dr. Radna finding that she was still partially disabled. This report is also insufficient to overcome the weight of Dr. Basson's medical report or create a new conflict as Dr. Radna was on one side of the conflict resolved by Dr. Basson and she did not provide any additional findings or rationale to support her conclusions.¹⁴

⁹ See *B.T.*, 60 ECAB ____ (Docket No. 08-1885, issued June 3, 2009).

¹⁰ See *Michael Hughes*, 52 ECAB 387 (2001).

¹¹ The only issue on appeal is whether appellant continued to experience residuals and disability from her July 4, 2007 employment injury. If appellant believes that she is disabled due to other employment factors including repetitive lifting, she may file a claim for an occupational disease using Office Form CA-2.

¹² See *T.M.*, 60 ECAB ____ (Docket No. 08-975, issued February 6, 2009); *Mary E. Jones*, 40 ECAB 1125 (1989).

¹³ See *Guiseppe Aversa*, 55 ECAB 164 (2003); *Howard Y. Miyashiro*, 43 ECAB 1101 (1992).

¹⁴ See *Roger G. Payne*, 55 ECAB 535 (2004).

The Board finds that Dr. Basson's medical opinion, that appellant was no longer disabled or experiencing residuals from her employment-related injury, represents the special weight of the medical evidence accorded an impartial medical specialist. As such, the Office properly terminated appellant's compensation.¹⁵

On appeal, appellant contends that Dr. Basson did not consider her most recent March 2009 MRI scan revealing a disc herniation at L4-5 and L5-S1. As noted, the Office only accepted the conditions of thoracic and lumbosacral joint sprain as employment related. A disc herniation is not an accepted condition. The March 2009 MRI scan is not relevant to the issue of whether appellant continued to have residuals of her accepted employment-related condition.

CONCLUSION

The Board finds that the Office properly terminated appellant's medical and wage-loss benefits effective December 9, 2008 on the grounds that her accepted conditions had resolved.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 3, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

¹⁵ See *Kathryn E. Demarsh*, 56 ECAB 677 (2005).