

nucleus pulposus at L5.¹ Appellant received medical benefits and compensation for temporary total disability on the periodic rolls.

On May 11, 2007 Dr. Karl V. Metz, a Board-certified orthopedic surgeon and Office referral physician, related appellant's history and complaints. He reviewed the medical record and the Office's statement of accepted facts. Dr. Metz described his findings on physical examination and noted that the accepted conditions were cervical strain and lumbar disc displacement. He found that appellant no longer suffered from a cervical strain. Indeed, because appellant stated that she had no complaint of neck pain until the fall of 1992, Dr. Metz found that she did not incur a cervical strain related to the 1992 incident at work.

Dr. Metz found that appellant sustained a temporary aggravation of preexisting degenerative disc disease at the L5-S1 level, but that her complaints and disability were related to noninjury conditions that had been ongoing for several years, including minimal degenerative disc disease at L5-S1 and degenerative disc disease at C5-6 with an osteophyte-disc complex at the same level.

On June 6, 2008 Dr. Metz again examined appellant for the accepted conditions. As before, he related her history and complaints and reviewed the medical record. Dr. Metz found that appellant sustained a lumbar sprain when a box of copier paper unexpectedly dropped in 1992. Two years after the injury, a magnetic resonance imaging (MRI) scan showed minimal degenerative findings and minimal central disc bulging at L5-S1 without effacement of the thecal sac or encroachment upon the exiting nerve roots. "These findings are consistent with early degenerative changes of the claimant's lumbar spine and are not, in my opinion, within reasonable medical probability, attributed to the injury event on February 04, 1992." Dr. Metz found appellant capable of sedentary to light work.

On March 27, 2008 an Office hearing representative found that Dr. Metz did not provide sufficient rationale for his opinion that the February 4, 1992 injury did not directly cause a lumbar disc herniation but rather caused an aggravation. The hearing representative also found that Dr. Metz did not clearly explain his opinion on appellant's cervical spine: "Dr. Metz's report was contradictory as to whether the accepted cervical strain had resolved because the doctor stated that a cervical strain was allowed, but that such condition did not result from the February 4, 1992 injury." On remand, the Office asked Dr. Metz to clarify appellant's current diagnoses and the findings that established them. It also asked whether the accepted conditions of cervical strain and lumbar disc herniation were still active and disabling.

In a July 15, 2008 addendum report, Dr. Metz responded that the appropriate diagnoses, with regard to appellant's 1992 employment injury, were cervical strain and lumbar disc displacement. He made clear that these diagnoses were based on the historical data the Office provided at the time of his examinations. Dr. Metz further clarified that the accepted conditions were neither still active nor disabling. He stated that he based his opinion on a review of the medical records and his interview and examination of appellant on May 11 and June 6, 2008.

¹ The Office noted a preexisting osteophyte formation at C5-6.

On March 10, 2009 the Office terminated appellant's compensation effective that date. It found that Dr. Metz's opinion represented the weight of the medical evidence.

On March 17, 2009 Dr. Hazem M. Nouraldin, a Board-certified internist and appellant's attending physician, reviewed Dr. Metz's opinion and disagreed with his assertion that the cervical strain and lumbar disc herniation were no longer active or disabling:

"[Appellant] continues to have significant pain over her low back, as well as persistent neck pain. Dr. Metz claims that the patient's condition is a natural progression of aging. The patient has a large C6-7 right posterior disc herniation with impingement of the right side per her MRI scan on April 10, 2002. The report also indicates the presence of a posterior broad-based disc herniation also greater to the right side at the level of C4-5. This is typically not indicative of the natural aging process.

"I find the patient to have objective evidence supporting her claim of continued neck and back pain."

In a decision dated October 23, 2009, an Office hearing representative affirmed the termination of appellant's compensation. The hearing representative found that Dr. Metz's opinion represented the weight of the medical evidence.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ Having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration by the weight of evidence that entitlement to benefits has ceased.⁵ The inadequacy or absence of a report in support of continuing benefits is not sufficient to support termination and benefits should not be suspended for that reason.⁶

It is a denial of administrative due process requiring reversal for the Office to terminate compensation benefits on the ostensible grounds that a claimant no longer suffers residuals of an

² 5 U.S.C. § 8102(a).

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.0812.3 (July 1993).

⁶ *Id.*, Chapter 2.0812.8(c)(1) (June 2003).

accepted condition, where the record supports that the real reason for the Office's action was that it had determined that the condition was not causally related to the claimant's employment and should not have been accepted as such.⁷ The Office must inform claimants correctly and accurately of the grounds on which a decision rests, so as to afford them an opportunity to meet, if they can, any defect appearing therein.⁸

ANALYSIS

The Office accepted appellant's February 4, 1992 employment injury for cervical strain and a herniated nucleus pulposus at L5, presumably at the L5-S1 level. It, therefore, carries the burden of proof to justify its termination of compensation for those medical conditions.

The Office based its termination on the opinion of Dr. Metz, an orthopedic surgeon and Office referral physician. It provided him with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper factual and medical history. Dr. Metz did not appear to accept what the Office accepted.

Dr. Metz acknowledged that the Office accepted appellant's claim for cervical strain and a lumbar disc displacement, as the Office now called it. He concluded that she sustained neither injury on February 4, 1992. According to appellant's account, she had no complaint of neck pain until the fall of 1992. Two years after the injury, an MRI scan of the lumbar spine showed only a minimal central disc bulging at L5-S1 with minimal degenerative findings. Dr. Metz concluded that appellant instead sustained a lumbar sprain and a temporary aggravation of her preexisting degenerative disc disease.

Dr. Metz was perfectly free to hold that opinion. When the Office asked him to clarify whether the accepted conditions of cervical strain and lumbar disc herniation were still active and disabling, he appeared to pivot. Dr. Metz, stated that those were the appropriate diagnoses with regard to the 1992 employment injury and that the accepted conditions were neither still active nor disabling. It was on that basis that the Office terminated appellant's compensation for the accepted conditions effective May 10, 2009.

The Board finds that the Office has not met its burden of proof. The Office terminated appellant's compensation on the ostensible grounds that she no longer suffered residuals of the accepted medical conditions, while Dr. Metz upon whom the Office based its decision was rather clearly of the opinion that appellant did not sustain those injuries as a result of the February 4, 1992 work injury. It was a denial of administrative due process requiring reversal for the Office not to inform appellant correctly and accurately of the grounds upon which it was terminating her compensation. The Board will, therefore, reverse the Office's October 23, 2009 decision.

⁷ *John M. Pittman*, 7 ECAB 514 (1955) (where the Bureau, now known as the Office, denied a claim and terminated benefits on the ostensible grounds that a claimant was not disabled for work beyond a specific date, when it appeared from the record that the real reason for denial was that the Bureau had determined that the injuries alleged had not in fact occurred and that the claimant had never been disabled, but had been guilty of malingering).

⁸ *E.g., James D. Boller, Jr.*, 12 ECAB 44 (1960).

Dr. Nouraldin, appellant's internist, stated that he disagreed with Dr. Metz, but his opinion did not create a conflict requiring referral to an impartial medical specialist under 5 U.S.C. § 8123(a). He noted that appellant had a large C6-7 right posterior disc herniation with impingement of the right side and a posterior broad-based disc herniation also greater to the right side at the level of C4-5. The Office has accepted neither of those conditions as causally related to the February 4, 1992 work incident. Appellant may well have significant neck and low back pain, as Dr. Nouraldin reported, but the question is whether that pain is a result of the 1992 work injury. Because he did not establish that the identified medical conditions were injury related, Dr. Nouraldin's opinion lacks probative value and is insufficient to create a conflict. As the Board noted earlier, however, the inadequacy of a report in support of continuing benefits is not sufficient to support a termination of benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to justify its May 10, 2009 termination of compensation. The Board failed to inform appellant correctly and accurately of the grounds upon which it was terminating her compensation.

ORDER

IT IS HEREBY ORDERED THAT the October 23, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 15, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board