

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

R.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Las Vegas, NV, Employer**

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**Docket No. 10-1634
Issued: May 19, 2011**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2010 appellant filed a timely appeal from a May 3, 2010 decision of the Office of Workers' Compensation Programs which affirmed a decision terminating his compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ and 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 met its burden of proof to terminate appellant's compensation benefits for his accepted injury effective December 1, 2009.

FACTUAL HISTORY

On March 4, 2005 appellant, then a 43-year-old letter carrier, filed a traumatic injury claim alleging that, on March 3, 2005, he injured his low back when his postal vehicle was struck by another car. The Office accepted lumbar sprain and strain and expanded his claim to include

¹ 5 U.S.C. §§ 8101-8193.

herniated disc at L4-5. Appellant did not initially stop work but subsequently received wage-loss compensation for hours he was unable to work.

Appellant came under the treatment of Dr. Bevins Chue, a Board-certified physiatrist, for his work injury. Dr. Chue diagnosed right-sided disc herniation at L4-L5. In reports dated July 5 and August 4, 2005 report, he noted appellant's complaints of persistent low back pain and recommended physical therapy, traction and epidural steroid injections. Dr. Chue advised that appellant could work light duty, four hours a day. On May 25, 2005 appellant underwent a magnetic resonance imaging (MRI) scan of the lumbar spine which revealed degenerative changes at L4-5 and L5-S1 and a disc herniation at L4-5.

Appellant was also treated by Dr. James S. Forage, a Board-certified neurologist, from August 16 to November 22, 2005, for severe low back pain subsequent to a work-related motor vehicle accident. Dr. Forage noted that an October 21, 2005 discogram revealed abnormalities at L4-5 and L5-S1. He recommended an L4-5 and L5-S1 anterior and posterior fusion with allograft bone and an L4-S1 laminectomy. A May 24, 2006 MRI scan of the lumbar spine revealed mild degenerative changes at L4-5 and L5-S1 discs with a broad-based bulge with no evidence of thecal sac distortion or nerve root compression. Appellant was treated by Dr. William Muir, a Board-certified neurosurgeon, from March 21 to August 29, 2007, who diagnosed internal derangement of the disc at L4-L5 and L5-S1 that was related to the work accident in March 2005. Dr. Muir recommended a two-level fusion at L4-S1.²

In subsequent reports, Dr. Chue diagnosed small right L4-5 disc herniation and L5-S1 disc degeneration. He noted an October 6, 2006 functional capacity evaluation found that appellant could work in the light to medium level job with lifting restricted of 30 pounds. Dr. Chue opined that appellant could not return to his regular job as a letter carrier as it would require him to lift up to 35 pounds. His reports noted that appellant related injuring his right shoulder at work on April 28, 2008 when he had a back spasm and fell forward. Dr. Chue diagnosed pulled muscle in the right pectoral area which resolved on July 7, 2008. In reports dated August 8 and September 15, 2008, he noted appellant's complaints of back spasms radiating into his thigh and continued his work restrictions of light duty for four hours per day.

On December 30, 2008 the Office referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a January 26, 2009 report, Dr. Swartz reviewed the medical records provided and examined appellant. On examination, the lumbar spine revealed normal motion, normal reflexes and intact sensation in the lower extremities with full motor function. Dr. Swartz noted that the straight-leg testing was invalid and appellant showed signs of symptom magnification. He found no injury-related factors of disability either subjectively or objectively. Dr. Swartz noted that, based on an unremarkable physical examination and an unremarkable May 24, 2006 MRI scan of the lumbar spine, appellant's accepted lumbar sprain and strain and herniated disc at L4-5 had resolved and there was no evidence of residuals. He found that appellant could return to his usual and customary job without restrictions and would need no further medical treatment.

² In a decision dated January 22, 2007, the Office denied appellant's request for surgery.

Appellant submitted reports from Dr. Chue who diagnosed right L4-5 disc herniation with chronic radiculopathy. In duty status reports dated March 20 to June 17, 2009, Dr. Chue noted that appellant could work limited duty for four hours a day.

The Office found that a conflict of medical opinion arose between Dr. Chue, appellant's treating physician, who found that appellant had residuals of his work-related injuries and was partially disabled and could work light duty, four hours a day and Dr. Swartz, an Office referral physician, who determined that appellant's work-related conditions of lumbar sprain and strain and herniated disc at L4-4 had resolved and he had no residuals due to the work injury and could return to his preinjury position as a letter carrier without restrictions.

To resolve the conflict the Office, on August 4, 2009, referred appellant to a referee physician, Dr. Mary Ann Shannon, a Board-certified orthopedic surgeon. In a report dated August 28, 2009, Dr. Shannon reviewed the medical records provided to her and examined appellant. She reviewed appellant's job requirements, noted a history of the work injury and reviewed treatment following the injury. On examination, the lumbar spine revealed superficial tenderness to palpation, no palpable muscle spasm, nontender sciatic notches, negative straight leg raising, mildly antalgic gait, normal strength in all muscle groups of the lower extremity, intact sensation in all dermatomes with normal ankle and knee reflexes. Dr. Shannon noted that appellant did not exhibit his actual best range of motion on examination and exaggerated pain behavior was evident throughout. She diagnosed degenerative disc disease without disc herniation and symptom magnification. Dr. Shannon noted that appellant's disc L4-5 herniation was resolved based on the most recent MRI scan of the lumbar spine and the lack of physical findings of radiculopathy or motor and sensory deficits. Appellant did not exhibit any clinical findings with regard to the accepted chronic lumbar sprain and strain and noted that there was no evidence of muscle spasms and the sciatic notches were nontender. Dr. Shannon advised that there were no objective findings to substantiate the subjective complaints and, on an objective basis, appellant could return to full duty as a mail carrier based on his physical examination. She noted that he would probably not return to work full time based on his exhibited symptom magnification and belief that he was justified in remaining on light duty permanently. Dr. Shannon reiterated that there were no objective findings to support work-related disability and opined that based on objective clinical findings appellant's work-related conditions of lumbar sprain and strain and herniated disc at L4-5 had resolved. The most recent MRI scan of the lumbar spine dated May 24, 2006 did not reveal any disc herniation and the only findings were of degenerative disc disease which was not related to appellant's work injury.

Appellant submitted reports dated August 21 and September 25, 2009, from Dr. Chue who diagnosed right-sided L4-5 disc herniation with chronic radiculopathy. In duty status reports dated August 21 and September 25, 2009, Dr. Chue recommended that appellant continue working light duty, four hours a day subject to restrictions.

On October 27, 2009 the Office issued a notice of proposed termination of compensation benefits on the grounds that Dr. Shannon's report established no residuals of the work-related conditions.

In a November 10, 2009 statement, appellant disagreed with the proposed termination of benefits. Contending that he was only able to work four hours a day. Appellant submitted

reports from Dr. Chue dated October 23 and November 2, 2009, who diagnosed right L4-5 disc herniation with chronic radiculopathy and continued appellant's work restrictions. In a November 2, 2009 report, Dr. Chue reviewed the report of Dr. Shannon and opined that appellant had a disc herniation on a prior MRI scan study which was confirmed by a computerized tomography (CT) scan and discogram. He noted that two spinal surgeons recommended a two-level fusion at L4-5 and appellant continued to have significant disability. Dr. Chue reiterated that appellant could work light duty for four hours a day. In reports dated November 6 to 25, 2009, Dr. Muir diagnosed a work injury of March 3, 2005, internal disc disruption syndrome at L4-S1, chronic significant low back pain due to internal disc disruption at L4-S1, lumbar disc degenerative disc, lumbar disc displacement without myelopathy and lumbar degenerative disc disease. He noted that appellant was a candidate for fusion surgery at L4-S1. Dr. Muir recommended that appellant continue his current work restrictions for four hours a day.

By decision dated December 1, 2009, the Office terminated appellant's compensation benefits effective that day finding that the weight of the medical evidence was represented by Dr. Shannon and established that appellant had no continuing residuals of his accepted employment injuries.

Appellant requested a telephonic hearing which was held on March 1, 2010. In a November 20, 2009 report, Dr. Chue diagnosed right L4-5 disc herniation with chronic radiculopathy. He noted that appellant would require a two-level lumbar fusion. Dr. Chue reiterated that appellant could work limited duty for four hours a day. Appellant submitted a November 20, 2009 MRI scan of the lumbar spine which revealed a disc protrusion in the right lateral recess of L4-5 abutting the right L5 nerve root. Also submitted was a January 5, 2010 duty status report prepared by Dr. Warren Smith, a family practitioner, who diagnosed herniated disc and recommended appellant return to work full time with restrictions on January 5, 2010.

In a decision dated May 3, 2010, an Office hearing representative affirmed the December 1, 2009 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or 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 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, which requires further medical treatment.⁵

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁵ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

ANALYSIS

The Office accepted appellant's claim for work-related lumbar sprain and strain and herniated disc at L4-5. It determined that a conflict in medical opinion arose. Appellant's attending physician, Dr. Chue, a Board-certified physiatrist, advised that appellant had residuals of his work-related injuries and was partially disabled and could work light duty, four hours a day. Dr. Swartz, an Office referral physician, determined that appellant's work-related conditions of lumbar sprain and strain and herniated disc at L4-5 had resolved and he had ongoing no residuals due to the work injury and could return to his preinjury duties as a letter carrier. Consequently, the Office referred appellant to Dr. Shannon to resolve the conflict.

The Board finds that the opinion of Dr. Shannon is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that residuals of appellant's work-related lumbar sprain and strain and herniated disc at L4-5 have ceased. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁶

In an August 28, 2009 report, Dr. Shannon reviewed appellant's history of injury, reported findings and noted that appellant exhibited no objective denial findings of the accepted conditions. She diagnosed degenerative disc disease without disc herniation but with and symptom magnification. Dr. Shannon noted that appellant's disc herniation at L4-5 had resolved based on the most recent MRI scan of the lumbar spine and the lack of physical findings of radiculopathy or motor and sensory deficits. She found that he did not exhibit any findings with regard to the accepted chronic lumbar sprain and strain and noted that there was no evidence of muscle spasms, full range of motion and negative straight leg raises. Dr. Shannon advised that appellant exhibited symptom magnification but that the examination failed to reveal any objective findings to indicate that he had any disability present relating to the accepted lumbar sprain and strain and herniated disc at L4-5 that would impede his ability to return to work as a full-duty letter carrier without restrictions. She noted that the most recent lumbar spine MRI scan did not reveal disc herniations and the only showed degenerative disc disease which was not related to appellant's work injury. Dr. Shannon opined that appellant did not require additional treatment for the work-related injury.

Thereafter, appellant submitted reports from Dr. Chue, who again diagnosed right-sided L4-5 disc herniation with chronic radiculopathy. Dr. Chue recommended that appellant continue working at light duty four hours a day. He reviewed the report of Dr. Shannon and opined that appellant's disc herniation was confirmed by an MRI scan and CT scan and discogram. Dr. Chue found that appellant continued to have significant disability. On November 20, 2009 he reiterated that appellant needed a two-level lumbar fusion. Although Dr. Chue opined that testing showed a herniated disc, the most recent MRI scan, at the time of Dr. Shannon's examination, did not show a disc herniation and Dr. Shannon's examination also did not reveal any motor or sensory findings consistent with a symptomatic herniated disc. Dr. Chue was also

⁶ *Solomon Polen*, 51 ECAB 341 (2000). See 5 U.S.C. § 8123(a).

on one side of a conflict that was resolved by Dr. Shannon⁷ and his reports do not otherwise provide new findings or medical rationale sufficient to establish that any continuing condition or residuals are causally related to the March 3, 2005 work injury.

In reports dated November 6 to 25, 2009, Dr. Muir diagnosed a work injury of March 3, 2005, internal disc disruption syndrome at L4-S1, chronic significant low back pain due to internal disc disruption at L4-S1, lumbar disc degenerative disc, lumbar disc displacement without myelopathy and lumbar degenerative disc disease. He recommended fusion surgery at L4-S1 and continued appellant's work restrictions. Although Dr. Muir noted a work injury of March 3, 2005, he failed to explain how any continuing condition or medical restrictions and disability were causally related to the accepted employment injuries. This report is insufficient to overcome that of Dr. Shannon or to create a new medical conflict. Similarly, appellant submitted a January 5, 2010 duty status report prepared by Dr. Smith who diagnosed herniated disc and recommended appellant return to work full time with restrictions. However, Dr. Smith did not specifically address how any continuing condition or disability was causally related to the March 3, 2005 work injury.

Consequently, the medical evidence submitted after Dr. Shannon's report is insufficient to overcome her report or to create another conflict in the medical evidence. The Board finds that Dr. Shannon's opinion constitutes the weight of the medical evidence and is sufficient to justify the Office's termination of benefits for the accepted conditions of lumbar sprain and strain and herniated disc at L4-5.

CONCLUSION

The Board finds that the Office has met its burden of proof to terminate benefits effective December 1, 2009.

⁷ See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. Chue's report did not contain new findings or rationale on causal relationship upon which a new conflict might be based.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 3, 2010 is affirmed.

Issued: May 19, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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