

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

L.V., Appellant)	
)	
and)	Docket Nos. 10-1469 & 10-1688
)	
U.S. POSTAL SERVICE, POST OFFICE, Orange, NJ, Employer)	Issued: May 6, 2011
)	

Appearances:
James D. Muirhead, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

**DECISION AND ORDER IN DOCKET NO. 10-1469 AND
DISMISSING APPEAL IN DOCKET NO. 10-1688**

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 6, 2010 appellant, through her representative, filed a timely appeal from a merit decision of the Office of Workers' Compensation Programs dated November 20, 2009. The Board docketed the appeal as No. 10-1469. 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 this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² On July 8, 2010 appellant, through her representative, filed a timely appeal from a nonmerit decision of the Office dated May 17, 2010 denying her reconsideration request of the November 20, 2009 merit decision. The Board docketed the appeal as No. 10-1688. The Board finds this decision is null and void. Following the docketing of an appeal with the Board, the Office does not retain jurisdiction to render a further decision regarding a case on appeal until after the Board relinquishes its jurisdiction. Any decision rendered by the Office on the same issues for which an appeal is filed is null and void. *Jacqueline S. Harris*, 54 ECAB 139 (2002); *Douglas E. Billings*, 41 ECAB 880 (1990). Accordingly, the appeal docketed as No. 10-1688 is dismissed for lack of jurisdiction and the May 17, 2010 decision is declared null and void.

ISSUE

The issue is whether the Office properly terminated appellant's compensation for wage-loss and medical benefits effective September 17, 2008.

On appeal appellant's counsel contends that the Office erred in the selection of and the issues presented to the impartial medical examiner and erred in terminating appellant's compensation and medical benefits.

FACTUAL HISTORY

On August 19, 2006 appellant, then a 20-year-old casual carrier,³ filed a traumatic injury claim alleging that on August 1, 2006 she sustained a dog bite to her right thigh area. The Office accepted the claim for right thigh dog bite, open wound of the hip and thigh and right ecchymosis, which was expanded to include lumbar back sprain and lumbosacral neuritis or radiculitis. By letter dated March 15, 2007, it placed appellant on the periodic rolls for temporary total disability.

In a March 28, 2007 report, Dr. Jeff Pan, a treating neurosurgeon, reported the history that appellant sustained low back injuries as a result of being attacked by people at work. He reported that appellant had recently undergone a lumbar discogram. A physical examination revealed appellant continued to have significant axial low back pain and right lower extremity numbness and pain and that her pain was "progressively getting worse since the work-related incident." Appellant showed pain at L4-L5 on deep palpation with no Babinski's or Hoffman's signs. Based on her failure to respond to conservative measures and the worsening of her back pain, Dr. Pan recommended L4-L5 and L5-S1 transforaminal lumbar interbody fusion with instrumentation.

Dr. Pan, in a June 29, 2007 report, related that appellant continued to have difficulty ambulating as a result of the back pain from her work-related injury. He noted that appellant had decided to proceed with the surgery and, by form dated July 3, 2007, submitted to the Office an authorization request for the surgery.

On July 10, 2007 Dr. Paul I. Rubinfeld, a Board-certified orthopedic surgeon, was asked by the Office to conduct a second opinion examination. He reviewed the medical evidence, statement of accepted facts and, after conducting a physical examination, diagnosed lumbar sprain and right thigh dog bite. Dr. Rubinfeld opined that appellant continued to suffer from mild residuals of the lumbar sprain but that no further medical treatment was required. He concluded that appellant was disabled from performing her date-of-injury job, but was able to work full time with restrictions. Lastly, Dr. Rubinfeld concluded spinal surgery was not appropriate for appellant as there was no specific lesion on the magnetic resonance imaging (MRI) scan that could be surgically treated. Appellant's lumbar condition was expected to resolve over time. In an attached work capacity evaluation (Form OWCP-5c), Dr. Rubinfeld noted diagnoses of lumbosacral sprain, lumbosacral neuritis, radiculitis, right thigh dog bite and ecchymosis. He indicated that the work restrictions would last four months.

³ Appellant's appointment as a casual worker ended as of November 25, 2006.

On October 11, 2007 Dr. Pan noted that appellant was currently unemployed due to her employment injury when she was bit by a pit bull on her right leg and had trouble performing her activities of daily life. Diagnoses included lumbar degenerative disc disease, L4-L5 lumbar herniated disc and lumbar spondylosis. Palpation of the back showed mild-to-moderate pain over the L4-L5 right facet joint region. Dr. Pan reviewed a March 23, 2007 discogram which showed concordant and severe L4-L5 and L5-S1 discogenic pain with L5-S1 disc disruption. He determined, based on the history of presentation, physical examination and radiographic examinations, within a reasonable degree of medical probability, that appellant's "low back injury is directly related to the injury she sustained at her job while protecting herself from the vicious dog on August 1, 2006." Dr. Pan again recommended lumbar surgery.

On October 23, 2007 the Office referred appellant to Dr. James A. Charles, a Board-certified neurologist and clinical neurophysiologist, to resolve the conflict in the medical opinion evidence between Dr. Pan, her treating physician, and Dr. Rubinfeld, a Board-certified second opinion physician, on her diagnosis and whether surgery was necessary. The referral form to Dr. Charles noted the reason for the examination as "causal relationship," "continuing disability," and "need for surgery." By letter of the same date to appellant, the Office advised her of the independent medical examination on the following issues: "Your diagnosis: The necessity of surgery for treatment of the accepted, work-related condition. Whether a causal relationship exists between your condition and the accepted work injury. Whether there is continuing disability due to the accepted work injury."

In his November 26, 2007 report, Dr. Charles noted the employment injury history and found, upon physical examination, that the lumbar spine showed marked tenderness on very light touch, antalgic gait due to back pain, that she was dragging her right leg and was unable to walk on right toes or heel. A motor examination showed marked right lower extremity muscle weakness of every muscle group but with no atrophy. He found this to be in a nonneuroanatomic distribution. Dr. Charles also noted that the sensory examination revealed decreased pin and temperature in the entire right lower limb from the groin down to the right toes which he found to be completely nonphysiological. In concluding, he opined that appellant's history, examination and records were consistent with a low back sprain with severe functional embellishment and a dog bite to the right lateral thigh without neurological injury to the peripheral or central nervous system. Dr. Charles related that while a lumbar MRI scan reported an L4-L5 left asymptomatic disc herniation, it was not employment related and had no evidence of nerve root compression. In support of this conclusion, he noted that this condition occurs in about 20 percent of the population and is not unusual in patients with a history of obesity. Dr. Charles stated that appellant's right lower limb weakness and numbness were not due to her L4-L5 disc herniation. He opined that appellant required no further testing or medical treatment as there was no evidence of any neurological disability of appellant's peripheral or central nervous system. Dr. Charles also opined that appellant was not a candidate for any type of low back surgery. He found that appellant could work at any job without restriction as there was no neurological injury.

On December 22, 2007 Dr. Arnold T. Berman, a Board-certified orthopedic surgeon and Office medical adviser, reviewed the medical records including Dr. Charles' November 26, 2007 report. He agreed with Dr. Charles that severe pain to light touch is one of the Waddell signs of exaggeration and magnification. He also noted that appellant complained of sensory loss that did

not follow an anatomic distribution. This was nonphysiologic and would not represent an explainable anatomic neurologic abnormality. This he found to be also reflective of exaggeration and magnification. He recommended, consistent with Dr. Charles' conclusion, that the injury-related conditions had resolved and further opined that appellant did not require back surgery as the epidural injections were not successful. He found appellant capable of working at full active duty.

In a February 8, 2008 report, Dr. Pan reviewed Dr. Charles' report and noted his disagreement with the finding that appellant sustained no peripheral or central nervous system injury as a result of the dog bite. He noted that appellant had no disability or back pain complaints prior to the injury and was now completely disabled due to the low back pain. Dr. Pan also disagreed with Dr. Charles' opinion that appellant was malingering as appellant was referred for a discogram and refused to have back surgery. He recommended appellant be seen by a neurosurgeon or orthopedic surgeon specializing in spinal surgery and disorder rather than a neurologist. Neurologists, according to Dr. Pan, were not qualified to make any determination on the issue of whether appellant is a candidate for back surgery.

On April 6, 2008 Dr. Berman stated that the decision on whether back surgery is appropriate is properly made by a neurologist, neurosurgeon or orthopedic surgeon and that the mechanism of appellant's thigh injury as a result of the dog bite would not have caused a lumbar spine herniated disc. Dr. Berman noted that leg pain and numbness does not usually happen in cases of herniated disc disease without a fairly long period of back pain. Lastly, he stated that the examination Dr. Charles conducted showed symptom exaggeration and magnification and nonphysiologic findings. The Office medical adviser also stated that obesity and smokers have less optimal results following lumbar spine surgery.

On April 17, 2008 the Office issued a proposed notice to terminate appellant's compensation benefits. It found the weight of the evidence rested with the opinion of Dr. Charles, the impartial medical specialist.

In a May 12, 2008 letter, appellant's counsel disagreed with the proposal to terminate appellant's compensation and submitted an April 29, 2008 report from Dr. Eric D. Freeman, an osteopath. He also noted that Dr. Charles was selected to resolve the conflict in the medical opinion evidence only on the issue of whether surgery was necessary and not on whether appellant continued to have any residuals from her accepted employment injuries. Appellant also stated that the Office medical adviser incorrectly related that she was a smoker.

In a September 8, 2008 supplemental report, Dr. Charles clarified that appellant's smoking history was irrelevant to her dog bite and the issue of whether she had any continuing neurological conditions. His examination, appellant's history and review of the records were "consistent with a low back sprain with severe functional embellishment." There was no clinical evidence supportive of any neurological disability of her peripheral or central nervous system. Appellant was capable of performing her date-of-injury job with no restrictions as there was no neurological injury.

By decision dated September 17, 2008, the Office finalized the termination of appellant's compensation benefits effective that day.

In a September 23, 2008 letter, appellant's counsel requested an oral hearing before an Office hearing representative, which was held on January 13, 2009.

By decision dated April 7, 2009, the Office hearing representative affirmed the termination of compensation benefits. She found the weight of the evidence rested with the opinion of Dr. Charles, the impartial medical specialist, who found appellant had no disability or residuals due to her accepted employment injuries.

On August 17, 2009 appellant's counsel requested reconsideration and submitted medical evidence in support of her request.

In an October 29, 2009 report, Dr. Adam Lipson reported seeing appellant for her low back pain which radiated into her right leg. He reported that appellant sustained an employment injury in August 2006 when she "was attacked by the people on Property Investment New Jersey" while working as a mail carrier.

By decision dated November 20, 2009, the Office denied modification.

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.⁴ After it has determined that an employee has disability causally related to his 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.⁵ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁸

Section 8123 of the Act provides in pertinent part: If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination. It is also further established that when a case is referred to an impartial medical specialist for the purpose of

⁴ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁶ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁷ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.⁹

ANALYSIS

The Office accepted appellant's claim for right thigh dog bite, open wound of the hip and thigh, right ecchymosis, lumbar back sprain and lumbosacral neuritis or radiculitis. It determined that the record contained a conflict in medical opinion on the issue of her diagnosis and whether surgery was necessary and referred her to Dr. Charles for an impartial medical examination. The Office terminated appellant's compensation by decision dated April 17, 2008 based on its finding that Dr. Charles' opinion represented the weight of the medical evidence and established that she had no further employment-related condition or disability. The Board finds that the Office properly terminated appellant's compensation and medical benefits.

The Office determined that a conflict existed between Dr. Rubinfeld, who provided a second opinion examination and found appellant required no further medical treatment and could work full time with restrictions that would last only four months, and Dr. Pan, appellant's attending physician, who in his various reports consistently stated that appellant continued to have residuals of the injuries sustained as a result of her employment injury. At the time of the Office's referral to Dr. Charles, the conflict in the medical evidence was identified as to causal relationship, continuing disability and need for surgery.

The impartial medical examiner was asked to resolve the conflict on those three bases: causal relationship, continuing disability and the need for surgery. By report dated November 26, 2007, Dr. Charles evaluated appellant, reviewed the medical evidence of record and conducted a physical examination. He noted particularly that muscle atrophy and decreased sensory examination were symptomatic of exaggeration. Dr. Charles diagnosed low back sprain with severe functional embellishment and a dog bite to the right lateral thigh without neurological injury to the peripheral or central nervous system by history and examination. He recognized the L4-L5 slight disc herniation but explained why it was not due to work factors. Dr. Charles opined that the proposed surgery was not appropriate for appellant. He concluded that her accepted employment conditions arising from a dog bite to the right thigh had resolved and appellant could return to work without restrictions.

The Board finds that Dr. Charles thoroughly evaluated the medical evidence or record and his findings are supported by physical findings. Dr. Charles provided a reasoned opinion based on a complete background on the issues presented. His opinion is entitled to special weight and represents the weight of the evidence in this case. Accordingly, the Office met its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation and authorization for medical benefits effective September 17, 2008.

⁹ R.C., 53 ECAB 238, 241 (2006).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 17, 2010 and November 20, 2009 are affirmed.

Issued: May 6, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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