

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

J.C., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Green Bay, WI, Employer**

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**Docket No. 11-1245
Issued: February 6, 2012**

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
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 26, 2011 appellant, through her attorney, filed a timely appeal of a March 17, 2011 decision of the Office of Workers' Compensation Programs (OWCP) affirming the prior termination of her wage loss and medical compensation benefits and affirming prior denials of compensation benefits following the termination. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective December 13, 2006 on the grounds that accepted lumbar myalgia had ceased without residuals; and (2) whether appellant has met her burden of proof in establishing that she was totally disabled for work on and after December 13, 2006 causally related to accepted lumbar myalgia.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, counsel asserts that OWCP's March 17, 2011 decision is "contrary to fact and law."

FACTUAL HISTORY

This is the second appeal before the Board in this case. By order issued October 26, 2010 under File No. xxxxxx197, the Board set aside OWCP's June 10, 2009 decision denying a request for a merit review. OWCP based its denial on evidence from a digital video disc (DVD) that was not included in the record. The Board remanded the case to OWCP for reconstruction of the record, including obtaining a complete copy of the evidence appearing on the DVD and incorporating these documents into the case record.²

OWCP accepted that on or before September 1, 2003 appellant, then a 35-year-old rural letter carrier, sustained lumbar myalgia due to driving her delivery route and lifting mail.³ It assigned the claim File No. xxxxxx197.⁴ Appellant resigned from the employing establishment effective August 27, 2005 and did not return. She claimed wage-loss compensation from August 1, 2005 to August 25, 2006.⁵

Appellant was followed by several physicians. Dr. William L. Van Dorp, an attending Board-certified physiatrist, submitted reports from July 2004 to April 2006 finding appellant totally disabled for work due to lumbar myofascial pain.⁶ Dr. Brenda J. Dierschke, an attending Board-certified physiatrist, noted on August 14, 2006 that appellant used medications and a transcutaneous electrical stimulation (TENS) unit for back pain. In a February 17, 2004 report, Dr. Stephen M. Gutting, an attending Board-certified neurosurgeon, noted a history of back pain with radiculopathy beginning in September 2003.

On June 29, 2006 OWCP obtained a second opinion from Dr. John L. Khim, a Board-certified orthopedic surgeon, who found no objective abnormalities on examination. Dr. Khim diagnosed back pain of unspecified etiology. OWCP found a conflict between Dr. Khim and appellant's attending physicians regarding the nature and extent of any disability resulting from the accepted lumbar myalgia. To resolve the conflict, OWCP appointed Dr. Stephen F. Weiss, a Board-certified orthopedic surgeon, as impartial medical examiner. In an October 18, 2006 report, Dr. Weiss reviewed the medical record and statement of accepted facts provided for his review. He noted positive Waddell's signs and pain behaviors but found no objective

² Docket No. 10-429 (issued October 26, 2010).

³ September 27, 2003 and August 15, 2006 lumbar magnetic resonance imaging (MRI) scans were negative.

⁴ Under File No. xxxxxx517, appellant filed an occupational disease claim on October 1, 2003 for a lumbar condition caused by prolonged standing and repetitive lifting and carrying. OWCP denied this claim by decision dated January 7, 2004. On March 17, 2011 OWCP doubled appellant's claims under File No. xxxxxx517 and xxxxxx197 under File No. xxxxxx197 as both claims concerned the same part of the body and contained largely the same evidence.

⁵ On December 10, 2005 appellant claimed a schedule award. In a January 20, 2006 letter, OWCP advised her that it could not develop her schedule award claim until she had attained maximum medical improvement.

⁶ Appellant also underwent chiropractic manipulation from November 2004 to April 2005.

abnormalities on examination. Dr. Weiss opined that appellant could return to full duty without restrictions.

By notice dated October 31, 2006, OWCP advised appellant that it proposed to terminate her wage loss and medical compensation benefits as the medical evidence demonstrated that the accepted condition ceased without residuals. Appellant responded in a November 13, 2006 letter, contending that Dr. Khim and Dr. Weiss were biased. She submitted pain clinic reports dated from October 2004 to August 2006, August 14, 2006 imaging studies showing sclerotic margins at S1, and a November 15, 2006 report from Dr. Dierschke diagnosed musculoligamentous back pain related to lifting and driving at work beginning in August 2002.

By decision dated December 13, 2006, OWCP terminated appellant's wage loss and medical compensation effective that day on the grounds that the accepted myalgia had ceased without residuals. It found that the additional evidence submitted was insufficiently rationalized to outweigh Dr. Weiss' opinion.

In a December 20, 2006 letter, appellant requested reconsideration. She submitted a November 22, 2006 report from Dr. Dierschke opining that delivering mail at work caused appellant's low back pain.

By decision dated January 26, 2007, OWCP denied modification on the grounds that Dr. Dierschke's report was insufficiently rationalized to outweigh Dr. Weiss' opinion.

By decision dated September 13, 2007, OWCP denied appellant's claim for total disability compensation for the period August 1, 2005 to August 25, 2006 on the grounds that causal relationship was not established.⁷

In December 10, 2007 and January 22, 2008 letters, appellant requested reconsideration. She submitted new medical evidence. In a June 27, 2007 report, Dr. Ralph B. Nelson, an attending osteopathic physician, found restricted lumbar motion and diminished lower extremity strength bilaterally. He opined that appellant was severely limited by lumbar pain and side effects from prescription narcotics.⁸

In a November 12, 2007 report, Dr. Dierschke opined that lifting trays of mail and driving at work "more likely than not" caused appellant's musculoligamentous back pain as she had no symptoms prior to beginning the mounted route.

By decision dated March 3, 2008, OWCP denied modification on the grounds that the new medical evidence did not establish a causal relationship between work factors and appellant's lumbar symptoms on and after December 13, 2006.

⁷ OWCP stated that appellant remained entitled to medical benefits. In a January 14, 2008 letter, it advised appellant that the statement in the September 13, 2007 decision that her medical benefits continued was incorrect. OWCP terminated appellant's medical benefits by the December 13, 2006 decision.

⁸ A December 20, 2007 lumbar MRI scan showed possible mild desiccation at L3-4 of doubtful clinical significance.

In January 6⁹ and March 18, 2009 letters received on March 23, 2009, appellant requested reconsideration. She submitted a DVD of medical records. As the DVD was not readable, OWCP requested that appellant submit printouts of the evidence. Appellant submitted a new DVD on May 20, 2009 but did not provide the requested printouts.

By decision dated June 10, 2009, OWCP denied reconsideration on the grounds that appellant's request was not timely filed and failed to present clear evidence of error. It found that the imaging studies on the DVD were irrelevant as they did not address causal relationship.¹⁰

As noted, appellant appealed to the Board on December 4, 2009. By order issued October 26, 2010, the Board set aside OWCP's June 10, 2009 decision and remanded the case to OWCP for reconstruction of the record, including obtaining a complete copy of the evidence appearing on the DVD and incorporating these documents into the case record.

On remand of the case, OWCP advised appellant in a January 6, 2011 letter to submit printed copies of the evidence on the DVD. It added a March 26, 2009 MRI scan report submitted under File No. xxxxxx517 to the present case record. The scan showed a small right-sided foraminal disc protrusion at L4-5 with no apparent nerve root impingement. Appellant did not submit additional evidence prior to March 17, 2011.

By decision dated March 17, 2011, OWCP denied modification of its March 3, 2008 merit decision¹¹ affirming the denial of compensation and medical benefits on and after December 13, 2006 on the grounds that the medical evidence did not support an ongoing work-related condition. It found that the March 26, 2009 lumbar MRI scan report did not explain how or why appellant's condition on and after December 13, 2006 was related to the accepted lumbar myalgia.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹² Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the

⁹ The form is dated "January 6, 2008." However, the fax stamp shows that it was transmitted on January 6, 2009.

¹⁰ After appellant filed her first appeal with the Board on December 4, 2009, OWCP issued a December 10, 2009 decision denying a November 3, 2009 request for reconsideration on the issue of whether appellant had a continuing work-related disability on and after December 31, 2006. (RD 12/10/09) This decision, however, is null and void as the Board and OWCP may not simultaneously have jurisdiction over the same issue. *See Terry L. Smith*, 51 ECAB 182 (1999); *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

¹¹ OWCP's March 17, 2011 decision referenced several decisions under both claims and stated that appellant's claim continued to be denied. However, the majority of the rationale set forth in the decision indicates that OWCP intended to affirm its prior termination of appellant's compensation.

¹² *Bernadine P. Taylor*, 54 ECAB 342 (2003).

employment.¹³ OWCP's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁴

To terminate authorization for medical treatment, OWCP must establish that the claimant no longer has residuals of an employment-related condition which require further medical treatment.¹⁵

Section 8123 of FECA provides that, 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.¹⁶ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁷

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained lumbar myalgia in the performance of duty. Appellant claimed but did not receive wage-loss compensation for the period August 1, 2005 to August 25, 2006 due to insufficient medical evidence establishing total disability for work.

Dr. Dierschke, an attending Board-certified physiatrist, and Dr. Gutting, an attending Board-certified neurosurgeon, treated appellant for back pain. Both physicians attributed appellant's lumbar pain to driving a delivery route and lifting at work. Dr. Van Dorp, an attending Board-certified physiatrist, held appellant off work through April 2006 due to lumbar pain. OWCP obtained a second opinion from Dr. Khim, a Board-certified orthopedic surgeon, who found no objective abnormalities on examination.

OWCP then found a conflict of medical opinion between Dr. Khim and appellant's physicians. Dr. Weiss, a Board-certified orthopedic surgeon, was selected as impartial medical examiner. He found no objective abnormality of the spine on examination, but noted positive Waddell's signs and pain behaviors. Dr. Weiss opined that in the absence of objective findings, appellant had no work limitations and could resume full duty. Based on his report as the weight of the medical evidence, OWCP issued a December 13, 2006 decision terminating appellant's wage-loss compensation and medical benefits effective that day.

The Board finds that Dr. Weiss' opinion as impartial medical examiner is sufficient to represent the weight of the medical evidence. It is based on the complete factual and medical

¹³ *Id.*

¹⁴ *Raymond W. Behrens*, 50 ECAB 221 (1999).

¹⁵ *Pamela K. Guesford*, 53 ECAB 726 (2002).

¹⁶ 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

¹⁷ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

history as well as a thorough clinical examination.¹⁸ Also, there was no reasoned medical evidence submitted indicating that appellant could not perform the date-of-injury position as of December 13, 2006. Therefore, OWCP's December 13, 2006 decision was proper under the law and facts of this case.

On appeal, counsel asserts that OWCP's March 17, 2011 decision is "contrary to fact and law." As stated above, OWCP properly terminated appellant's compensation effective December 13, 2006 as the medical evidence demonstrated that the accepted lumbar myalgia ceased without residuals.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

After OWCP has met its burden of proof in terminating compensation benefits, the burden shifts to the claimant to establish a medical condition causally related to his or her accepted injuries.¹⁹ In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.²⁰ For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.²¹

ANALYSIS -- ISSUE 2

Following OWCP's December 13, 2006 decision terminating her wage-loss compensation and medical benefits, appellant requested reconsideration on December 20, 2006 and December 10, 2007, denied by merit decisions issued January 26, 2007 and March 3, 2008 respectively. Appellant again requested reconsideration on January 6, 2009 and submitted a DVD of medical evidence. OWCP denied reconsideration by June 10, 2009 decision based on evidence from the DVD, but did not include this evidence in the record. Pursuant to the first appeal, the Board remanded the case to OWCP to obtain printouts of the evidence on the DVD.

In support of her requests for reconsideration, appellant submitted November 22, 2006 and November 12, 2007 reports from Dr. Dierschke opining that lifting mail and driving a delivery route caused appellant's low back pain. She also provided a June 27, 2007 report from Dr. Nelson, an attending osteopathic physician, stating that appellant was limited by back pain and prescription side effects. However, Dr. Dierschke and Dr. Nelson did not explain the

¹⁸ *James R. Taylor*, 56 ECAB 537 (2005); *Jacqueline Brasch (Ronald Brasch)*, *id.*

¹⁹ *Manuel Gill*, 52 ECAB 282 (2001); *Talmadge Miller*, 47 ECAB 673 (1996).

²⁰ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101 (1992).

²¹ *Alice J. Tysinger*, 51 ECAB 638 (2000).

pathophysiologic relationship between appellant's back pain and the accepted lumbar myalgia.²² Neither physician explained how work factors prior to appellant stopping work in August 27, 2005 would cause an ongoing condition on and after December 13, 2006.²³ Also, pain is considered to be a symptom and not a compensable diagnosis.²⁴ Therefore, these reports are insufficiently rationalized to outweigh Dr. Weiss' opinion or create a new conflict of medical opinion.²⁵

Appellant did not respond to OWCP's request for printouts of the DVD evidence. However, OWCP considered a March 26, 2009 lumbar MRI scan report of record in a related claim, showing a small disc protrusion at L4-5. As this report does not contain any rationale relating the disc protrusion to the accepted condition, it is insufficient to meet appellant's burden of proof.²⁶

The Board finds that appellant submitted insufficient rationalized medical evidence to establish a causal relationship between her condition on and after December 13, 2006 and the accepted injuries. Therefore, she failed to meet her burden of proof.

On appeal, counsel asserts that OWCP's March 17, 2011 decision is "contrary to fact and law." As stated above, appellant did not provide sufficient medical evidence to establish that her condition on and after December 13, 2006 was causally related to the accepted lumbar myalgia.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 13, 2006. The Board further finds that appellant has not established that her condition on and after December 13, 2006 was causally related to accepted lumbar myalgia.

²² *Mary E. Marshall*, 56 ECAB 420 (2005).

²³ *Alice J. Tysinger*, *supra* note 21.

²⁴ *See Robert Broome*, 55 ECAB 339 (2004).

²⁵ *Virginia Davis Banks*, *supra* note 20.

²⁶ *Alice J. Tysinger*, *supra* note 21.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 17, 2011 is affirmed.

Issued: February 6, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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