United States Department of Labor
Employees' Compensation Appeals Board

ANNETTE D. MONTE, Appellant	)	
and	)	**Docket No. 04-2266**
	)	**Issued: September 20, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Freeport, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On September 16, 2004 appellant, through counsel, filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated June 28, 2004, denying modification of a July 10, 2003 decision, which terminated appellant's compensation effective July 13, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this termination case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective July 13, 2003 on the grounds that she no longer had any residuals or disability causally related to her February 13, 2001 employment injury; and (2) whether appellant has established that she has any continuing disability or residuals on or after July 13, 2003, the date the Office terminated her compensation benefits.

FACTUAL HISTORY

On February 13, 2001 appellant, a 30-year-old mail carrier, filed a traumatic injury claim alleging that she injured her lower back that day while in the performance of duty. The Office accepted the claim for a low back sprain/strain. The Office accepted subsequent claims for recurrences of disability and placed her on the periodic rolls for temporary total disability.

In a report dated August 10, 2001, Dr. Steven J. Littman, an attending Board-certified anesthesiologist, reported that appellant had "significant pain in the right lower back, right buttock, right lateral thigh, right lateral calf to the outside of the right foot." He opined that appellant was "totally disabled for an indeterminate time in the future." In duty status reports dated January 3 and May 4, 2002, Dr. Littman concluded that appellant was totally disabled.

In a June 10, 2002 report, Dr. Sheila Horn, a treating Board-certified physiatrist, indicated that appellant was under her care for a lumbar strain. Dr. Horn requested authorization for a magnetic resonance imaging (MRI) scan of the lumbar spine.

By letter dated October 25, 2002, the Office referred appellant to Dr. Arnold M. Illman, a Board-certified orthopedic surgeon, for a second opinion medical examination. He submitted a November 13, 2002 medical report, finding that appellant's lumbosacral and cervical strains were related to her employment injury and "should have been resolved by this time." He also stated that appellant "might have had an aggravation" of her preexisting scoliosis "which could be making her more susceptible to symptoms in her neck and back." With regard to disability, he opined that she has a "mild causally related to the neck and back" disability. In an attached (Form OWCP-5c) dated November 18, 2002, Dr. Illman concluded that appellant was capable of working eight hours per day with restrictions on reaching above the shoulder, twisting, pushing, pulling, squatting, climbing and lifting.

In a report dated November 13, 2002, Dr. Laurence E. Mermelstein, a treating Board-certified orthopedic surgeon, noted that he first saw appellant on November 6, 2002 and she related that she slipped and fell down wet steps on February 13, 2001. A physical examination of the lumbar spine revealed "no significant muscle spasm in the paraspinal muscles," and no muscle tenderness. He reported her range of motion as 60 degrees of flexion, 40 degrees of lateral bending, 35 degrees of extension and 40 degrees of lateral bending. Dr. Mermelstein diagnosed continued nonspecific symptoms and status post her slip and fall. He opined that appellant had "significant disability with respect to her neck" and that "she has a severe partial disability at this point unless a more definitive diagnosis can be determined."

In a report dated March 10, 2003, Dr. Mermelstein diagnosed cervical myofascial pain syndrome and chronic lumbar spine pain. He reported the MRI scan, nerve conduction studies and electromyography were essentially normal. The MRI scan showed no herniated disc or "significant degenerative changes." He concluded that appellant had "a mild disability with respect to her neck and upper back symptoms."

On March 20, 2003 the Office referred appellant to Dr. Edmunde A.C. Stewart,[1] a Board-certified orthopedic surgeon, to resolve a conflict in the medical opinion evidence found between Dr. Horn and Dr. Illman.

In a report dated March 31, 2003, Dr. Stewart diagnosed subjective back and neck pain. A physical examination of the lumbosacral spine revealed mild congenital scoliosis, no lumbar spasm, "excessive tenderness to gentle palpation in the lower lumbar area" and full range of motion "with subjective complaints of discomfort at the extremes of motion." A review of the MRI scan of the lumbosacral spine in the medical record was essentially normal. Dr. Stewart concluded that appellant did not have any abnormal lumbosacral orthopedic findings by physical examination or history. He opined that appellant required no further orthopedic treatment or therapy. Dr. Stewart also opined that appellant's lower back strain or sprain should have resolved within six to eight weeks of her February 13, 2001 employment injury.

Subsequent to receipt of Dr. Stewart's report, the Office received reports dated March 25 and May 5, 2003 from Dr. Mermelstein and an April 25, 2003 report by Dr. Durlan Castro, a chiropractor. Dr. Mermelstein diagnosed chronic lumbar spine strain and cervical myofascial pain syndrome in March 25, 2003 reports. A physical examination revealed "diffuse lumbar and cervical tenderness with some associated muscle spasms" and severely restricted range of motion. On his May 5, 2003 the physician diagnosed myofascial pain syndrome of the lumbar and thoracic spine with no evidence of spasms and chronic lumbar strain. Dr. Mermelstein stated that he had reviewed previous MRI scans which demonstrated fairly benign changes in both the neck and the back."

In the April 25, 2003 report, Dr. Castro noted that he first saw appellant on April 13, 2003 and she sustained injuries to her back, primarily on the right side due to a fall on February 13, 2001. Appellant related that she has been totally disabled since February 13, 2001. A physical examination of the lumbar spine revealed a positive bilateral Bechterew test and a positive Valsalva maneuver "for local pain." Dr. Castro noted that an MRI scan revealed no significant findings. He diagnosed myofascitis due to the severe muscle injury she sustained.

On June 9, 2003 the Office issued a notice of proposed termination of wage-loss and medical benefits based upon the report of Dr. Stewart.

On June 23, 2003 the Office received a June 16, 2003 report by Dr. Mermelstein, who diagnosed "myofascial pain on both the thoracic, lumbar and cervical spine that has been present since her injury." He noted that "MRI [scans] of both the cervical and lumbar spines have failed to show degenerative changes or radiculopathy." A physical examination revealed "severe tenderness to palpation and tenderness both in the neck and the back."

On July 9, 2003 the Office received the June 30, 2003 report of Dr. Castro, who stated that multiple cervical and lumbar spine x-ray interpretations showed "evidence of dislocation or fracture of the sacral base either recent or old" and "subluxations were also noted at C2, T1." A physical examination of the lumbar spine revealed a positive Braggrard test for "lumbar pain at 30 degrees on the right," a positive bilateral Bechterew test, a positive Naffziger test "for pain at

[1] The Office incorrectly noted the name as Edmund Steward.

the injury site," and a positive Valsalva maneuver "for local pain." He concluded that appellant had "[a]n acute subluxation syndrome" which he opined was due to "trauma to the spine."

On July 9, 2003 the Office also received appellant's response to the proposed termination. Her counsel contended that the reports of Drs. Mermelstein and Castro established that she continued to have residuals of her accepted employment injury and that the termination of her benefits was not warranted. Appellant also argued that the referral to Dr. Stewart was improper since Dr. Horn was not a treating physician at the time of the referral.

By decision dated July 10, 2003, the Office terminated appellant's wage-loss and medical compensation effective July 13, 2003, on the grounds that she no longer had any residuals due to her accepted employment injury. The Office found that the report of the impartial medical examiner, Dr. Stewart, constituted the weight of the medical opinion evidence.

On September 18, 2003 the Office received a September 11, 2003 report by Dr. Mermelstein. He diagnosed myofascial pain syndrome.

On March 23, 2004 appellant, through counsel, requested reconsideration of the termination of her benefits. Appellant submitted legal arguments, a March 10, 2004 report by Dr. Harvey S. Finkelstein, a Board-certified anesthesiologist and a November 7, 2003 report by Dr. Alan C. Jacobson, a Board-certified internist, who diagnosed chronic pain and a fibromyalgia-like illness. He noted that appellant's symptoms began in February 2001, when she fell during work and that subsequently "she developed pain of her joints and headaches." A physical examination revealed full range of motion with tenderness in her right upper back and neck.

In the March 10, 2004 report, Dr. Finkelstein reported that appellant injured herself at work on February 13, 2001 when she fell on her back while stepping on wet wooden steps. Appellant related having persistent bilateral shoulder pain, low back pain, cervical pain, headaches and tingling from her right shoulder to her right hand since the fall. Dr. Finkelstein related that appellant had been diagnosed as having fibromyalgia due to the employment injury by Dr. Jacobson. A physical examination of the lumbar spine revealed "right-sided sacroiliac joint pain with myofascial trigger points" and a "very tender right sacroiliac joint." Lumbar range of motion was "painful forward at 35 degrees, extension at 15 degrees." Dr. Finkelstein diagnosed myofascial pain syndrome, post-traumatic unresolved cervical facet arthropathy and cervical facet disease and bulging lumbar discs at L4-5 and L5-S1 with sacroiliac joint pain. He opined that appellant had "unresolved myofascial pain and fibromyalgia stemming from a post[-]traumatic fall in [February] [20]01" and reported an MRI scan revealed bulging lumbar disc disease.

By decision dated June 28, 2004, the Office denied modification of the July 10, 2003 termination decision.[2]

[2] The Board notes that, following the June 28, 2004 decision, the Office received additional evidence. However, the Board may not consider new evidence on appeal. *See* 20 C.F.R. § 501.2(c).

LEGAL PRECEDENT -- ISSUE 1

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 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 Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5] However, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss due to disability.[6] To terminate authorization for medical treatment the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[7] If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.[8]

Section 8123(a) of the Federal Employees' Compensation 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.[9]

ANALYSIS -- ISSUE 1

In this case, the Office accepted that appellant sustained an employment-related low back strain as a result of her February 13, 2001 employment injury. The Office found a conflict in the medical opinion based upon the opinions of Dr. Horn, a treating Board-certified physiatrist, and Dr. Illman a Board-certified orthopedic surgeon and Office referral physician.[10]

The Office provided Dr. Stewart with a statement of accepted facts, the medical evidence of record and a list of issues to be addressed. In his narrative report dated March 31, 2003,

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[3] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[4] *Lynda J. Olson*, 52 ECAB 435 (2001).

[5] *Manuel Gill*, 52 ECAB 282 (2001).

[6] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[7] *Franklin D. Haislah*, 52 ECAB 457 (2001).

[8] *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

[9] 5 U.S.C. § 8123(a).

[10] The Board notes that the Office incorrectly identified a conflict in the medical opinion evidence between Dr. Horn and Dr. Illman. A review of the record indicates that the record contains reports from Dr. Littman, an attending Board-certified anesthesiologist and Dr. John J. Labiak, a treating Board-certified orthopedic surgeon, who concluded that appellant was totally disabled prior to the referral to Dr. Illman. Thus, the Office's finding of a conflict in the medical opinion based upon the opinion of Dr. Horn is harmless error as a conflict did arise between appellant's treating physicians, Drs. Littman, Labiak and Dr. Illman.

Dr. Stewart noted appellant's history with respect to her employment injury, performed a complete physical examination, including range-of-motion testing and reviewed the diagnostic test results. Dr. Stewart reported that appellant had full range of motion "with subjective complaints of discomfort at the extremes of motion. He also noted that a physical examination revealed no lumbar and excessive tenderness to gentle palpation in the lower lumbar area. He further stated that an MRI scan of the lumbosacral spine was essentially normal and appellant did not have any abnormal lumbosacral orthopedic findings by history or physical examination. Dr. Stewart concluded that appellant's low back strain had completely resolved within six to eight weeks of her employment injury.

Subsequent to the receipt of Dr. Stewart's report, appellant submitted reports dated March 25 and June 16, 2003, by Dr. Mermelstein and reports dated April 25 and June 30, 2003, by Dr. Castro, a chiropractor. Dr. Mermelstein diagnosed chronic lumbar strain and cervical myofascial pain. He noted that the MRI scans he reviewed demonstrated "fairly benign changes in both the neck and the back." His June 16, 2003 report diagnosed myofascial pain, which he stated had been present since her injury. On June 30, 2003 Dr. Castro reported reviewing multiple x-ray interpretations, which he found showed subluxations at C2 and T1.[11] His April 25, 2003 report, diagnosed myofascial pain, which was attributed to her employment injury. Dr. Castro subsequently diagnosed "[a]n acute subluxation syndrome" due to "trauma to the spine." However, neither a subluxation nor myofascial pain is a condition accepted by the Office as related to the February 13, 2001 injury. Where an employee claims that a condition not accepted by the Office was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury.[12] Neither provided a rationalized opinion explaining how either her myofascial pain or subluxation syndrome was causally related to the accepted lumbar strain.[13] Thus, these opinions do not overcome the weight accorded Dr. Stewart's opinion as the impartial medical specialist.

The Board finds that the special weight of the medical opinion evidence is represented by Dr. Stewart, who submitted a thorough medical opinion based upon a complete factual and medical history.[14] His detailed and well-reasoned report established that appellant ceased to have any disability or residuals causally related to her accepted employment injury. The Office properly terminated compensation and medical benefits effective July 13, 2003.

[11] Since Dr. Castro diagnosed a subluxation by x-ray, he is considered a physician under the Act. *See* 5 U.S.C. § 8101(2); *Mary A. Ceglia*, 55 ECAB ___ (Docket No. 04-113, issued July 22, 2004) (where a chiropractor took an x-ray of the spine and diagnosed a spinal subluxation, he was considered to be a "physician" under the Act).

[12] *Jaja K. Asaramo*, 55 ECAB ___ (Docket No. 03-1327, issued January 5, 2004).

[13] *Jimmie H. Duckett*, 52 ECAB 332 (2001); *Franklin D. Haislah*, *supra* note 7 (medical reports not containing rationale on causal relationship are entitled to little probative value).

[14] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation shifts to appellant.[15] In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits.

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of appellant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[16]

ANALYSIS -- ISSUE 2

Since the Office properly terminated appellant's benefits, the burden of proof shifted to appellant.[17] The Board finds that the medical evidence submitted by appellant after the termination of benefits does not specifically address how any continuing employment-related condition was due to the February 13, 2001 work injury.

Appellant submitted a report from Dr. Jacobson dated November 7, 2003, who diagnosed a fibromyalgia like illness and chronic pain. He noted that appellant's symptoms began after her fall at work in February 2001. Dr. Jacobson provided no opinion explaining the causal relationship between appellant's condition and her accepted lumbar strain.[18] The description of the diagnosis also appears uncertain. The Board has held that the opinion of a physician that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without supporting medical rationale, to establish causal relationship.[19] For these reasons, Dr. Jacobson's opinion is insufficient to meet appellant's burden to establish that she had any continuing disability due to her February 13, 2001 employment injury.

On March 10, 2004, Dr. Finkelstein diagnosed myofascial pain syndrome, post-traumatic unresolved cervical facet arthropathy and cervical facet disease and bulging lumbar discs at L4-5 and L5-S1 with sacroiliac joint pain. He opined that appellant had "unresolved myofascial pain

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[15] *See supra* note 8.

[16] *Victor J. Woodhams*, 41 ECAB 345 (1989).

[17] *See Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

[18] *Jimmie H. Duckett, supra* note 13; *Franklin D. Haislah, supra* note 7.

[19] *Jaja K. Asaramo, supra* note 12.

and fibromyalgia stemming from a post[-]traumatic fall in [February] [20]01" and reported an MRI scan revealed bulging lumbar disc disease. As noted, neither myofascial pain nor fibromyalgia is a condition accepted by the Office as related to the accepted injury and appellant bears the burden of proof to establish that the condition is causally related to the February 13, 2001 injury.[20] Dr. Finkelstein did not provide a rationalized opinion regarding the causal relationship between appellant's current conditions of myofascial pain and fibromyalgia and her accepted February 13, 2001 employment injury.[21] His report is insufficient to create a conflict with Dr. Stewart's opinion or establish that her myofascial pain or fibromyalgia is due to her employment injury.

The medical reports submitted by appellant following the termination of her compensation benefits do not provide a rationalized opinion regarding the causal relationship between her current condition and her accepted work-related injury of February 13, 2001. The Board has found that vague and unrationalized medical opinion on causal relationship have little probative value. Therefore, the reports from Dr. Jacobson and Dr. Finkelstein are insufficient to overcome the weight accorded the opinion of Dr. Stewart.[22] Appellant, therefore, has not met her burden of proof to establish that she has continuing disability or residuals causally related to the February 13, 2001 employment injury on and after July 13, 2003.

CONCLUSION

The Board finds that the Office has met its burden of proof to terminate benefits effective July 13, 2003. The Board further finds that she failed to establish that she has any residuals or continuing disability due to her accepted February 13, 2001 employment injury.

[20] *Id.; see also Alice J. Tysinger*, 51 ECAB 638 (2000).

[21] *See supra* note 18.

[22] *See supra* note 17.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 28, 2004 is affirmed.

Issued: September 20, 2005
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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