

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

DENISE BOOKER, Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
Rosedale, NY, Employer**

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**Docket No. 03-2180
Issued: January 30, 2004**

Appearances:

*Thomas S. Harkins, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 8, 2003 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated June 17, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issues on appeal are: (1) whether the Office properly terminated appellant's compensation and medical benefits effective April 21, 2002; and (2) whether appellant met her burden to establish that she had any disability after April 21, 2002 causally related to the May 19, 1994 employment injury.

FACTUAL HISTORY

On May 19, 1994 appellant, then a 40-year-old immigration inspector, filed a traumatic injury claim (Form CA-1), alleging that on that date, she suffered a low back injury and sustained stomach cramps after lifting and transporting crates of files in the performance of duty. Appellant did not stop work.

Appellant began treatment with Dr. Oscar N. Pizarro, a Board-certified internist, who diagnosed lumbar strain and spasm. A June 7, 1994 computerized axial tomography scan of the lumbar spine performed by Dr. Ricardo Baldonado, a Board-certified radiologist, showed degenerative disc disease at L5-S1. A May 15, 1997 magnetic resonance image (MRI) scan of the lumbar spine revealed degenerative changes at L5-S1 with a diffuse degenerative disc bulge. On July 25, 1997 the Office accepted the claim for lumbar sprain.

On August 6, 1997 appellant filed a notice of recurrence of disability commencing January 29, 1996. Appellant stopped work on February 2, 1996. The Office also accepted that appellant sustained a recurrence on January 15, 1998.¹

In an April 6, 1998 disability slip, Dr. Bradford T. Hinkle, an osteopath of unknown specialty, indicated that appellant had cervical and thoracic sprain and strain with bilateral carpal tunnel syndrome and requested that appellant be treated with hot packs and a transcutaneous electrical nerve stimulator unit.

The Office continued to develop the claim and, by letter dated February 28, 2001, referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Harvey A. Levine, a Board-certified orthopedic surgeon. In a March 15, 2001 report, Dr. Levine noted his findings on physical examination and diagnosed lumbosacral sprain and opined that appellant was not disabled and could return to the work that she was doing at the time of the accident without restriction. He also advised that no further treatment was indicated.

In a March 23, 2001 report, appellant's physician, Dr. Pizarro, diagnosed degenerative disc disease, bulging disc lumbar and cervical sprain. He indicated that appellant continued to experience back pain on physical exertion and opined that appellant was permanently disabled due to previous injuries sustained at work. He provided a work restriction evaluation of the same date and opined that appellant had a permanent disability.

On November 2, 2001 the Office advised appellant that a conflict in the medical evidence existed and referred her to Dr. Paul Anthony Foddai, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a report dated December 11, 2001, Dr. James A. Charles, a Board-certified neurologist, noted the history of treatment and reported appellant's course of treatment.² He examined appellant and opined that she was manifesting a somatoform disorder where she had physical complaints without any objective corroboration and there was no scientific basis for appellant's global nonphysiological weakness in her right lower limb with a normal MRI scan of her lumbar spine.³ Dr. Charles also indicated that there was no scientific basis for appellant not

¹ Appellant was terminated on March 28, 1998.

² The record reflects that the impartial medical examiner, Dr. Foddai, sent appellant to the neurologist for an opinion.

³ He reviewed a December 8, 2001 MRI scan of the lumbar spine, which revealed degenerative disc disease and spondylosis at L5-S1 with mild spinal canal and lateral recess stenosis.

being able to work for the previous five years since she had a normal MRI scan of the lumbar spine, normal objective neurological examination and nonphysiological nonorganic weakness of the entire right lower limb. The physician concluded that appellant was exaggerating a low back strain that had occurred seven and a half years previously and that she had nothing objectively wrong with her, either in her central or her peripheral nervous system. He added that appellant had reached maximum benefit from treatment and required no further treatment or testing as she had no objective neurological disability.

In a December 31, 2001 report, Dr. Foddai, the impartial medical examiner, noted appellant's history of injury and treatment. He indicated that, when he saw appellant in the examining room, she was walking normally without apparent distress and that when he asked her to test for walking, appellant started to walk slowly and deliberately. The physician stated that it was difficult to evaluate appellant's range of motion because of her complaints of pain in the lumbar spine without any attempted motion. Dr. Foddai further noted that appellant had complaints of severe pain with axial compression at the pelvis and with just gentle stroking of the skin, which he deemed to be a nonphysiological response. After conducting neurological examinations and diagnostic testing, the physician concluded that appellant had subjective complaints of back pain radiating to the lower extremities without objective clinical findings that would correspond to her subjective complaints. Dr. Foddai also noted that appellant sustained "a lumbar sprain but her subjective complaints now are far in excess of the objective clinical findings which were actually nil." He advised that appellant was at maximum medical improvement and that she could return to work. Dr. Foddai recommended that appellant resume an eight-hour workday; however, in light of the prolonged subjective complaints of pain, he would return appellant to work in a limited capacity with restrictions.⁴

By letter dated January 17, 2002, the Office requested additional information from Dr. Foddai.

In a January 31, 2002 addendum, Dr. Foddai explained that appellant had subjective complaints without any objective motor, sensory or reflex abnormalities and the MRI scan examination did not show any evidence of disc herniation but instead showed degenerative changes. He advised that this was consistent with a degenerative process in the lumbar spine and was often seen in an aging population without any preexisting trauma. Dr. Foddai explained that the recommendation for returning appellant to work on limited duty was made in an effort to have her return to some degree of gainful employment, stating that the residuals she presented were based purely on her subjective complaints. He noted that he did not find any motor, sensory or reflex abnormalities and opined that appellant was not disabled and was able to resume work on a normal basis. Dr. Foddai explained that he felt that appellant would benefit from a limited work schedule in an effort to transition her from her present status, in which she was not working at all, to a degree of gainful employment. The physician opined, however, that appellant did not have any clear-cut objective clinical findings.

⁴ The restrictions included no pushing, pulling, lifting, or carrying greater than 15 pounds and with frequent periods of being allowed to stand and stretch so that she did not have worsening subjective complaints of back pain.

On February 25, 2002 the Office proposed to terminate appellant's compensation. By letter dated March 11, 2002, appellant's representative indicated that he opposed the proposed termination as it was contrary to the medical evidence of record and a detailed narrative report would be forwarded to the Office by appellant's physician.

By decision dated April 12, 2002, the Office terminated appellant's compensation, effective that day, as the weight of the medical evidence established that her injury-related disability had ceased.

Subsequent to the decision, additional medical evidence was received.

In a May 16, 1997 MRI scan, Dr. Richard S. Pinto, a Board-certified diagnostic radiologist, diagnosed degenerative changes at L5-S1 with a diffuse degenerative disc bulge.

In a March 5, 2003 report, Dr. Pizarro diagnosed lumbar disc disease at L4-5, bulging disc at L4-5 and lumbar muscle pain. He opined that he had known appellant since 1992 and she had not missed work until her work-related injury. The physician indicated that appellant's disc disease and disability had no direct relationship and were not mutually exclusive and that appellant was not malingering. Further, he stated that she would go back to work if she could do so without pain. In a March 10, 2003 disability statement, Dr. Pizarro opined that it was his opinion that the injuries appellant sustained on May 19, 1994 were the direct cause of appellant's disabilities.

On March 25, 2003 appellant, through her representative, requested reconsideration and provided a detailed memorandum with numerous arguments in support of his request.⁵ With her request, she submitted a December 10, 2001 MRI scan report, in which Dr. Abraham Ruiz, a Board-certified radiologist, found degenerative disc disease and spondylosis at L5-S1 with mild spinal canal and lateral recess stenosis.⁶

By decision dated June 17, 2003, the Office denied modification of the April 12, 2002 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁷ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the

⁵ His arguments included that appellant's initial diagnosis was not all inclusive, that the supplemental report was obtained with a leading question and the reports of the second opinion and impartial medical examiners were flawed because they indicated a normal MRI scan when in fact a disc bulge was noted.

⁶ He also reported an annular bulging disc associated with facet and ligamentum flavum hypertrophy causing mild spinal canal stenosis and bilateral lateral recess stenosis.

⁷ *Curtis Hall*, 45 ECAB 316 (1994).

employment.⁸ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁹ 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.¹⁰

Furthermore, the Federal Employees' Compensation Act¹¹ provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.¹² In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

ANALYSIS -- ISSUE 1

The Office determined that a conflict of medical opinion existed based on the opinions of Dr. Pizarro, appellant's Board-certified internist and Dr. Levine, a Board-certified orthopedic surgeon and second opinion physician.¹⁴ Therefore, the Office properly referred appellant to an impartial medical examiner, Dr. Foddai, a Board-certified orthopedic surgeon.¹⁵

The Board finds that the Office properly relied on the impartial medical examiner's December 31, 2001 and January 31, 2002 reports, in which he determined that there were no objective findings to correspond with appellant's subjective complaints and that there was no objective evidence of any work-related disability. Dr. Foddai determined that appellant sustained a lumbar strain and noted that, despite a myriad of subjective complaints, they did not correspond to any objective findings. He also indicated that appellant did not have evidence of disc herniation but did show signs of degenerative change consistent with age and opined that

⁸ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁹ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

¹⁰ *Calvin S. Mays*, 39 ECAB 993 (1988).

¹¹ 5 U.S.C. §§ 8101-8193, 8123(a).

¹² 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹³ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

¹⁴ As previously noted, appellant's treating physician, reported that appellant continued to experience back pain and that her disability was the direct result of her May 19, 1994 employment and she continued to be disabled, while Dr. Levine, the second opinion physician, indicated that appellant no longer had any residuals of the accepted work injury.

¹⁵ The Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); *Shirley L. Steib*, *supra* note 12. A simple disagreement between two physicians does not, of itself, establish a conflict. To constitute a true conflict of medical opinion, the opposing physician's reports must be of virtually equal weight and rationale. 20 C.F.R. §§ 10.321(a), 10.502 (1999); see *Robert D. Reynolds*, 49 ECAB 561, 565-66 (1998).

appellant was not disabled. Dr. Foddai's opinion is sufficiently well rationalized and based upon a proper factual background. He not only examined appellant, but also reviewed appellant's medical records. Dr. Foddai also reported accurate medical and employment histories. The Office properly accorded determinative weight to the impartial medical examiner's December 31, 2001 and January 31, 2002 findings.

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. 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.¹⁶

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.¹⁷

ANALYSIS -- ISSUE 2

Subsequent to the Office's April 12, 2002 decision, the burden of proof in this case shifted to appellant, who thereafter submitted both argument and medical evidence. The Board notes that the issue is whether appellant continues to suffer any injury-related disability. Accordingly, appellant's representative's arguments are of no probative value as they fail to offer any new medical evidence or opinion on the issue of disability.

The medical reports submitted by appellant subsequent to the termination include those from appellant's treating physician, Dr. Pizzaro, dated March 5 and 10, 2003. In his March 5, 2003 report, he repeated his previous diagnosis. He also opined that prior to her injury she had not missed work. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after it is insufficient, without supporting rationale, to establish causal relationship.¹⁸ In his March 10, 2003 report, he merely opined that appellant's disability was caused by the May 19, 1994 injury. In these reports, Dr. Pizarro merely reiterated previously stated findings and conclusions regarding appellant's condition. As the physician had been on one side of the conflict in the medical opinion that the impartial specialist resolved, the treating

¹⁶ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹⁷ *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

¹⁸ *John F. Glynn*, 53 ECAB ____ (Docket No. 01-1184, issued June 4, 2002).

physician's reports were insufficient to overcome the special weight accorded the impartial specialist or to create a new medical conflict.¹⁹ Additionally, Dr. Pizarro indicated that appellant had not missed work until her work-related injury and that her disc disease and work injury were not directly related. However, he did not explain how the disc disease would not affect her disability. Without such medical rationale addressing the crucial issues of causal relationship and continuing disability, his reports are of greatly diminished probative value.²⁰

Appellant also submitted diagnostic reports previously of record dated May 16, 1997 and December 10, 2001. However, these reports merely reported findings and did not contain an opinion regarding the cause of the reported condition. Medical reports not containing rationale on causal relation are entitled to little probative value and are generally insufficient to meet an employee's burden of proof.²¹ It is appellant's burden of proof to establish continuing disability. As these reports did not address appellant's disability status as of April 21, 2002, they are of limited probative value in this regard.

Consequently, appellant has not established that she was disabled on and after April 21, 2002 due to her accepted employment injury.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective April 21, 2002. Further, the Board finds that appellant did not meet her burden of proof to establish that she had any injury-related disability after April 21, 2002 causally related to the May 19, 1994 employment injury.

¹⁹ *Alice J. Tysinger*, 51 ECAB 638 (2000); *Barbara J. Warren*, 51 ECAB 413 (2000).

²⁰ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

²¹ *Lois E. Culver (Clair L. Culver)*, 53 ECAB ____ (Docket No. 01-640, issued March 5, 2002).

ORDER

IT IS HEREBY ORDERED THAT the June 17, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 30, 2004
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member