

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

T.T., Appellant)
)
and)
)
DEPARTMENT OF THE NAVY, MARE)
ISLAND NAVAL SHIPYARD, Vallejo, CA,)
Employer)

Docket No. 08-128
Issued: June 4, 2008

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 16, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's merit decision dated September 17, 2007 terminating her compensation and medical benefits. Pursuant to 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 the Office met its burden of proof to terminate appellant's compensation and medical benefits effective April 15, 2007; and (2) whether appellant has any continuing disability or medical residuals on or after April 15, 2007.

FACTUAL HISTORY

This case has previously been before the Board. The Office accepted appellant's claim for aggravation of bulging discs at L3-S1 on April 28, 1989. The Office entered her on the periodic rolls on April 22, 1991. By decision dated April 24, 1991, the Office denied appellant's

additional claims for compensation from July 13, 1987 through November 7, 1988. By decision dated June 29, 1992, finalized July 2, 1992, the Branch of Hearings and Review found that appellant was not entitled to wage-loss benefits prior to April 7, 1991. In a decision dated December 21, 1993,¹ the Board found that appellant had not submitted sufficient medical evidence to establish her disability and affirmed the hearing representative's July 2, 1992 decision. The facts and the circumstances of the case are set out in the Board's prior decision and adopted herein by reference.

On February 13, 2004 the Office referred appellant to Dr. Aimee Hachigian-Gould, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Hachigian-Gould completed a report on May 12, 2004, noting appellant's history of injury, medical treatment and performed a physical examination. She diagnosed chronic lumbosacral strain with sciatica, degenerative disc disease in the lumbar spine and herniated L5-S1 disc. Dr. Hachigian-Gould stated, "Her underlying condition was aggravated and altered due to her work activities as evidenced by progression of her disc bulges and degenerative changes at facet joints of the lumbosacral spine along with disc space narrowing." She concluded, "This patient essentially has had a permanent aggravation of her underlying condition and should be considered permanently stable at this point." Dr. Hachigian-Gould opined that appellant could work four hours a day with restrictions.

Based on this report, the Office proposed to reduce appellant's compensation benefits based on her capacity to earn wages as a bookkeeper on March 31, 2005. Appellant disagreed with this proposal and submitted a May 11, 2005 report from Dr. John Stevens, an attending family practitioner, who diagnosed lumbar degenerative disc disease at multiple levels as well as facet degenerative changes contributing to her condition. Dr. Stevens opined that appellant remained totally disabled and that he did not anticipate improvement.

The Office found that there was a conflict of medical opinion between Dr. Hachigian-Gould and Dr. Stevens regarding appellant's ability to work. The Office referred appellant to Dr. James Burton, a Board-certified orthopedic surgeon for an impartial medical examination. In a report dated July 2, 2005, Dr. Burton reviewed the statement of accepted facts and the medical records. He performed a physical examination and diagnosed multiple level degenerative disc disease and herniated disc at L5-S1. Dr. Burton opined that appellant's present condition was unrelated to her work activities and that she had sustained a work-related temporary aggravation of her underlying degenerative condition which ceased six months after her last employment exposure. He found that appellant could not return to work as a procurement clerk due to her "chronic worsening degenerative condition, possibly related to [motor vehicle accidents] but not related to any work injury." Dr. Burton found that appellant was capable of performing part-time sedentary or light activity.

On July 27, 2005 the Office proposed to terminate appellant's compensation benefits based on Dr. Burton's report. Appellant objected to this proposal and submitted medical evidence previously of record. By decision dated August 29, 2005, the Office terminated appellant's medical and compensation benefits.

¹ Docket No. 92-2117 (issued December 21, 1993).

Appellant requested an oral hearing. In a report dated May 1, 2006, Dr. Stephens diagnosed lumbar degenerative disc disease at multiple levels, facet degenerative changes and myofascial pain with muscle contraction headaches. Dr. Stephens stated that he had reviewed his treatment notes regarding appellant and that her condition was related to her 1987 employment injury. He also concluded that appellant's work-related condition was permanent. Dr. Stephens found appellant to be totally disabled.

By decision dated November 2, 2006, the hearing representative set aside the Office's August 29, 2005 termination decision. The hearing representative found that appellant's claim should be expanded to include the additional condition of permanent aggravation of underlying degenerative disc disease as found by Dr. Hachigian-Gould. The Office was directed to revise the statement of accepted facts and request a supplemental report from Dr. Burton addressing appellant's continuing employment residuals and disability.

The Office revised the statement of accepted facts and requested a supplemental report from Dr. Burton. In a report dated January 19, 2007, Dr. Burton disagreed with the finding that appellant had sustained a permanent aggravation of her preexisting back condition. He stated, "One might see a temporary aggravation of one level that may cause a 'muscle strain' or perhaps even a mild disc bulge, but not at three separate levels simultaneously. This simply does not happen." Dr. Burton concluded that appellant sustained only a temporary aggravation of her low back condition which ended two months after her initial injury in 1987. He stated that he accepted that appellant sustained a permanent aggravation even though he "strongly disagreed with this finding." Dr. Burton advised that appellant had only sustained a temporary aggravation of her back condition that he did not believe that she had any residuals of any work-related injury. He found that appellant had a degenerative process and her condition would worsen with passing time. Dr. Burton stated, "The fact that she is gradually getting worse has nothing to do with the 'injury' that occurred in 1987." He concluded by stating that appellant's present condition was not due to her work injury and provided work restrictions.

In a letter dated March 8, 2007, the Office proposed to terminate appellant's medical and compensation benefits based on Dr. Burton's reports. On March 26, 2007 appellant asserted that Dr. Burton's rationale that she was merely aging did not change the fact that the Office had accepted a permanent aggravation of her underlying condition.

By decision dated April 13, 2007, the Office terminated appellant's compensation benefits effective April 15, 2007. The Office noted that Dr. Burton's report was entitled to special weight as he was the impartial medical examiner and that his January 19, 2007 report established that appellant no longer had disability or residuals due to her accepted work-related condition.

Appellant requested a review of the written record on May 2, 2007. By decision dated September 17, 2007, an Office hearing representative affirmed the April 13, 2007 termination decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.² The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.³ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement of disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.⁵

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for permanent aggravation of degenerative disc disease at L3-S1. On April 13, 2007 the Office terminated appellant's compensation and medical benefits on the grounds that the accepted conditions had resolved. The Office, therefore, bears the burden of proof to justify a termination of benefits.

A conflict in medical opinion arose between appellant's attending physician, Dr. Stevens and Dr. Hachigian-Gould, a Board-certified orthopedic surgeon, and the Office referral physician, on the extent of appellant's injury-related disability. To resolve the conflict, the Office referred appellant to Dr. Burton, a Board-certified orthopedic surgeon, who diagnosed multilevel degenerative disc disease and herniated disc at L5-S1. He opined that appellant had sustained only a temporary employment-related aggravation of this condition which ended between two to six months after her last employment exposure. Dr. Burton stated that she did not sustain a permanent aggravation of bulging discs at three levels simultaneously. He explained that appellant was unable to perform her duties as a procurement clerk, but the basis of her disability was degenerative disc disease, which he repeated was not related to the work incident of 1987. Dr. Burton reiterated that appellant's precedent degenerative disc disease was only temporarily aggravated by her work injury for a few months. He concluded that her current disability was not related to the work incident of 1987.

As noted by the hearing representative, Dr. Burton is not an impartial medical examiner for the issue of whether appellant has any continuing residuals due to her accepted employment injury, as both Dr. Stevens and Dr. Hachigian-Gould agreed that she experienced continuing medical residuals. The Board finds that Dr. Burton's opinion cannot be accorded sufficient weight to establish that appellant has no disability due to her accepted employment injury. Dr. Burton made statements that were clear and unequivocal, but he offered little medical rationale to support his stated conclusion. He cited no clinical findings to substantiate his

² *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

³ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁴ *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001).

⁵ *Mary A. Lowe*, *supra*, note 3.

assertion. Dr. Burton provided no comparative analysis of appellant's condition before and after her injury to show that it had no impact on her underlying back condition. Instead, he concluded that appellant's employment injury could not have resulted in a permanent aggravation of her bulging discs at L3-S1 as found by Dr. Hachigian-Gould and as accepted by the Office. Therefore, she could have no disability or medical residuals related to such a permanent aggravation.

The Board has held that medical conclusions unsupported by rationale are of little probative value. A physician's opinion on causal relationship must be one of reasonable medical certainty, but it must also be supported with affirmative evidence, explained by medical rationale and based on a complete and accurate medical and factual background. In this case, the certainty with which Dr. Burton expressed his opinion cannot overcome the lack of medical rationale.⁶

Dr. Burton was of the opinion that appellant's 1987 employment injury caused only a temporary aggravation of her preexisting degenerative disc disease and, therefore, her current disability was unrelated to her employment. However, the Office terminated compensation benefits on the grounds that all residuals of the accepted employment injury had ceased. This is not what Dr. Burton reported. The Board has held that it is a denial of administrative due process for the Office to terminate compensation benefits on the grounds that a claimant no longer has residuals of an accepted condition, where the record supports that the reason for the Office's action was that the condition was not causally related to the claimant's employment and should not have been accepted as such. The Office must inform claimants correctly and accurately of the grounds on which a decision rests, so as to afford them an opportunity to meet, if they can, any defect appearing therein.⁷

CONCLUSION

The Board finds that the Office has not met its burden of proof. Dr. Burton offered little if any medical rationale to support his conclusion that appellant sustained only a temporary aggravation of degenerative disc disease and his opinion deviated from the statement of accepted facts. His opinion has little probative value, does not represent the weight of the medical evidence and is insufficient to resolve the conflict at issue. Further, the Office improperly terminated benefits on grounds that are inconsistent with the opinion offered by Dr. Burton.

⁶ *Willa M. Frazier*, 55 ECAB 379, 384 (2004).

⁷ *Id.* at 385; *Sylena Wilkes*, Docket No. 05-1402 (issued June 2, 2006).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 4, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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