

FACTUAL HISTORY

On October 16, 2007 appellant, then a 41-year-old mail handler, sustained an injury to the middle right side of her back when she threw a parcel into a tub. Dr. Indu Garg, a Board-certified physiatrist, saw her on October 18, 2007 and diagnosed disabling mid low back pain. Findings on October 30, 2007 included bilateral tenderness of the paraspinal muscles with muscle guarding and painful active range of motion. Dr. Garg gave appellant a muscle relaxant and painkiller and recommended physical therapy. On January 3, 2008 she related appellant's history of injury and noted muscle spasm and swelling to the mid back around T8, 9 and 10 and shortness of breath, which she attributed to thoracic spine T8, 9 and 10 muscle strain.

On April 17, 2008 the Office accepted appellant's claim for thoracic back sprain. It paid compensation for temporary total disability on the periodic rolls. Dr. Garg continued to support disabling mid back pain or strain.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Stanley Soren, a Board-certified orthopedic surgeon, for a second opinion. On June 13, 2008 Dr. Soren related her history of injury, chief complaint of mid back spasms that "come and go" and his findings on physical examination. He noted no spasm in the thoracic spine, no tenderness and no limitation of motion. Dr. Soren diagnosed thoracic spine sprain but noted a dearth of positive objective findings. He concluded that appellant had well recovered from her October 16, 2007 thoracic spine strain with no clinical findings. Dr. Soren believed that her persistent symptomatology could be related to a preexisting and ongoing weight-height discrepancy, for which a medically supervised weight-reduction program would be helpful. He did not feel that further physical therapy was indicated or any other treatment relative to the thoracic spine. Dr. Soren stated that appellant could return to her usual occupation on a full-time basis.

Dr. Garg reiterated the mid thoracic strain diagnosis and prescribed physical therapy for the mid back. On September 30, 2008 she reported that appellant could return to part-time limited duty on September 29, 2008.

In a decision dated November 14, 2008, the Office terminated appellant's compensation. It found that Dr. Soren's report was sufficient to establish that the October 16, 2007 injury was completely resolved and that work-related disability had ceased. The Office added that Dr. Garg's recent reports listed no objective findings of continuing disability related to the October 16, 2007 work injury.

On March 31, 2009 Dr. Garg reviewed appellant's history and urged continuing physical therapy to return her to full-time duty. She noted that appellant still complained of stiffness and muscle guarding, which caused limited range of motion and limited time in a sitting or standing posture. Findings on physical examination included tenderness on palpation at the right paraspinal muscles of the thoracic spine with some muscle guarding and pain on rotation and side flexion. She diagnosed mid back straining.

In a decision dated July 2, 2009, the Office reviewed the merits of appellant's claim and denied modification of its November 14, 2008 decision. It noted that Dr. Garg's only findings,

tenderness and pain, were subjective. Dr. Garg reported muscle guarding. The Office also noted that Dr. Soren reported no objective findings. It found that in the absence of objective findings substantiating the need for medical treatment or establishing disability, modification of the termination of compensation was unwarranted.

On appeal, appellant argues that Dr. Garg stated that she was not ready to return to full duty as was found by Dr. Soren.

LEGAL PRECEDENT

The Federal Employees' Compensation Act provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Once the Office accepts a claim, it has the burden of proof to justify 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 Having accepted a claim and initiated payments, the Office may not terminate compensation without a positive demonstration by the weight of evidence that entitlement to benefits has ceased.⁵ The inadequacy or absence of a report in support of continuing benefits is not sufficient to support termination and benefits should not be suspended for that reason.⁶

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.⁷

ANALYSIS

The Office based its termination of benefits on the June 13, 2008 opinion of Dr. Soren, a Board-certified orthopedic surgeon who offered a second opinion. Dr. Soren reported a dearth of positive objective findings and concluded that appellant had well recovered from her October 16, 2007 thoracic spine strain with no clinical findings. He did feel that no further treatment was indicated and that she could return to her usual occupation on a full-time basis.

Dr. Garg, the attending Board-certified physiatrist, disagreed. She reiterated the diagnosis of disabling mid back strain and prescribed physical therapy. As of March 31, 2009,

² 5 U.S.C. § 8102(a).

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

⁶ *Id.*, Chapter 2.812.8(c)(1) (June 2003).

⁷ 5 U.S.C. § 8123(a).

Dr. Garg reported that appellant still complained of stiffness and muscle guarding, which caused limited range of motion and limited sitting and standing. On examination she noted tenderness on palpation at the right paraspinal muscles of the thoracic spine with some muscle guarding and pain on rotation and side flexion.

The Board finds that a conflict in medical opinion exists between Dr. Soren and Dr. Garg on whether appellant has disabling residuals from her October 16, 2007 thoracic back sprain. Dr. Soren reported that she was recovered from it; Dr. Garg continued to diagnose and treat the condition. He advised that appellant may return to regular duty full time; Dr. Garg released her to only limited duty. As there is a conflict in opinion between appellant's physician and the Office physician on whether appellant has recovered from her accepted employment injury without disabling residuals or the need for further medical attention, the Board finds that the Office did not meet its burden of proof to terminate her compensation for the accepted employment injury. The Board will reverse the November 14, 2008 and July 2, 2009 decisions.

Appellant notes on appeal that Dr. Garg was not ready to return her to full duty, as Dr. Soren had. This reflects the conflict between these two physicians that the Office has not resolved.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation for the accepted thoracic back sprain.

ORDER

IT IS HEREBY ORDERED THAT the July 2, 2009 and November 14, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: July 6, 2010
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