

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JULIA M. BUTLER and DEPARTMENT OF THE TREASURY,  
INTERNAL REVENUE SERVICE, DALLAS FIELD OFFICE, Dallas, TX

*Docket No. 03-1100; Submitted on the Record;  
Issued September 23, 2003*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective February 23, 2003 on the grounds that her accepted shoulder, knee and wrist injuries had resolved by that date.

The Office accepted that on November 28, 2000, appellant, then a 66-year-old customer service representative, sustained low back, left shoulder and left elbow strains and bilateral knee contusions, when she slipped and fell on a wet floor, landing on her left side. The physical demands of her date-of-injury position included prolonged sitting, light lifting and using a telephone headset. Appellant stopped work on November 28, 2000 and did not return.<sup>1</sup> She received benefits on the periodic rolls as of February 25, 2001.

On December 5, 2000 appellant was diagnosed with a "mild contusion with cervical [a] spasm" by Dr. Charles W. Simpson, a Board-certified neurosurgeon. Appellant then sought treatment from Dr. Margarita Conanan, an attending Board-certified orthopedic surgeon, who submitted periodic reports from December 2000 to May 30, 2001, diagnosing contusions of the left elbow, shoulder and wrist, with "residual musculoligamentous problems" through March 20,

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<sup>1</sup> Appellant received medical management services from an Office field nurse from May to September 2001.

2001,<sup>2</sup> lumbar strain and cervical and lumbar disc disease. She released appellant to light duty as of March 26, 2001, with restrictions against reaching above shoulder level and lifting more than 10 pounds.<sup>3</sup>

Beginning on July 13, 2001, appellant sought treatment from Dr. Charles D. Marable, a Board-certified neurologist and psychiatrist, who provided a history of injury and treatment, reviewed medical records and related appellant's account of neck and lumbar pain with radiation to all extremities and bilateral knee and left elbow pain. On examination Dr. Marable observed limited cervical and lumbar motion and diagnosed multiple herniated cervical and lumbar discs, and contusions of the knees, elbows and shoulders. Beginning on July 20, 2001, he opined that appellant was totally disabled due to "multiple neurological problems" and "injuries ... from the slip and fall."<sup>4</sup> Dr. Marable submitted periodic reports through December 2002, finding appellant totally disabled for work due to the November 28, 2000 incident, noting appellant's pain symptoms, paraspinal spasms and decreased upper and lower extremity strength.<sup>5</sup>

The Office then referred appellant to Dr. Robert Chouteau, a Board-certified orthopedic surgeon, for a second opinion examination. He submitted an April 30, 2002 report diagnosing cervical, thoracic and lumbar spondylosis, Kienbock's disease of the lunate bone of the left wrist, degenerative arthritis, degenerative joint disease of both knees and resolved contusions of the left shoulder, wrist and elbow. Dr. Chouteau commented that appellant was "very noncompliant" with a functional capacity evaluation. He opined that the November 28, 2000 injury aggravated preexisting bilateral medial compartment arthritis, and "hastened" appellant's degenerative knee disease." Dr. Chouteau opined that appellant was able to work eight hours per day light duty, but had not reached maximum medical improvement.

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<sup>2</sup> A series of magnetic resonance imaging (MRI) scans performed for Dr. Conan on February 15, 2001 showed a small bone bruise in the humeral head on the left with a tiny bone bruise on the humeral neck, a small effusion of the left elbow, Kienbock's disease of the left wrist due to repetitive trauma, arthritic change of the distal clavicle on the left, minimal subacromial and subdeltoid bursitis, degenerative disc disease from C2 to T3 with spurring, spondylosis and disc bulges and degenerative disc disease with small disc bulges from L1 to L5.

<sup>3</sup> In response to the Office's inquiries as to whether appellant was able to return to work, Dr. Conan referred appellant to Dr. Charles E. Graham, a Board-certified orthopedic surgeon, to obtain an impairment rating. He submitted a May 21, 2001 report finding decreased range of motion of the shoulders, elbows, cervical and lumbar spine and swelling and effusion of the left knee. Dr. Graham also noted inconsistent effort on grip and pinch strength testing and positive Waddell's signs. He diagnosed degenerative disc disease of the cervical, thoracic and lumbar spinal regions, trochanteric bursitis and degenerative arthritis of the thumbs, wrists, elbows and shoulders. He opined that appellant had reached maximum medical improvement as of May 1, 2001 and had no impairment of the whole person according to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5<sup>th</sup> ed). *Arguendo*, the Act does not contain any provision for an impairment of the whole person.

<sup>4</sup> In a September 12, 2001 letter, the Office requested that Dr. Marable explain why appellant remained totally disabled for work due to the accepted contusions, which should have resolved by January 28, 2001, eight weeks after the date of injury.

<sup>5</sup> In a January 8, 2002 report, Dr. Paul A. Vaughn, a Board-certified orthopedic surgeon to whom appellant was referred by her chiropractor, Dr. Mark Laning, noted possible neurologic abnormalities of the left lower extremity, bilaterally positive Tinel's and Phalen's signs, hypesthesia in the C6-7 dermatome and degenerative disc disease from C4 to 6 and L4-5 with severe stenosis. Dr. Vaughn recommended cervical decompression.

In a May 17, 2002 letter, the Office provided Dr. Marable a copy of Dr. Chouteau's report and asked whether he agreed with Dr. Chouteau that appellant was able to work eight hours per day limited duty. In a May 22, 2002 note, Dr. Marable replied "no." Thus, the Office found that there was a conflict of medical opinion between Dr. Chouteau, for the government and Dr. Marable, for appellant, regarding whether appellant continued to be disabled for work due to the accepted November 28, 2000 injuries.

To resolve this conflict of opinion, the Office referred appellant, the medical record and a statement of accepted facts to Dr. William F. Blair, Jr., a Board-certified orthopedic surgeon, who submitted a November 21, 2002 report, relating appellant's symptoms of "total body pain" most likely due to "long-standing degenerative changes ... consistent with generalized osteoarthritis ... commensurate with her age" and tendinitis of the left shoulder. Dr. Blair found no surgical issues in appellant's presentation and stated that there were no ongoing conditions resulting from the November 28, 2000 injuries that required further medical care. He ordered a functional capacity evaluation showing suboptimal effort on grip and strength testing. In a November 21, 2002 work capacity evaluation (Form OWCP-5), Dr. Blair stated that appellant could work eight hours per day and proscribed climbing.

By notice dated December 19, 2002, the Office advised appellant that it proposed to terminate her monetary compensation benefits on the grounds that the weight of the medical evidence, represented by Drs. Blair and Chouteau, established that she was capable of returning to full-time work. The Office noted that Dr. Marable provided no rationale supporting his finding that appellant remained totally disabled for work. Appellant was afforded 30 days in which to submit new evidence or argument.

In response, appellant submitted a December 13, 2002 report from Dr. Marable, who explained that appellant's lumbar degenerative disc disease and stenosis were asymptomatic prior to the November 28, 2000 slip and fall and that, therefore, her lumbar condition was work related. In a February 19, 2003 form report, Dr. Marable again found appellant totally disabled for work due to degenerative disc disease.<sup>6</sup>

By decision dated February 28, 2003, the Office terminated appellant's compensation benefits effective February 23, 2003 on the grounds that any residuals of the accepted conditions

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<sup>6</sup> On February 18, 2003 the Office found a conflict between Dr. Marable, for appellant, and Dr. Blair, for the government, regarding the necessity for lumbar or cervical decompression. To resolve this conflict, the Office referred appellant, a statement of accepted facts and the medical record to Dr. David L. Wilhoite, a Board-certified orthopedic surgeon, who submitted a March 3, 2003 report diagnosing degenerative disc disease of the cervical and lumbar spine and degenerative arthritis of the left knee, all preexisting the November 28, 2000 incident. He opined that appellant was not a surgical candidate. The record contains a March 28, 2003 notice of a proposed termination of medical benefits. The issue to be resolved was whether appellant had "residuals of the accepted November 28, 2000 work incident that would entitle [her] to continuing medical and monetary benefits." The discussion of the evidence notes that appellant was referred to Dr. Wilhoite to "resolve the question whether [she had] a continuing need for medical care from the November 28, 2000 incident." Also, the Board notes that the February 28, 2003 decision terminating appellant's monetary compensation benefits did not explicitly terminate appellant's entitlement to continuing medical benefits. As the March 28, 2003 notice does not constitute a final decision of the Office, the issue of terminating appellant's entitlement to medical treatment and related benefits under the Act is not before the Board on the present appeal.

had ceased on or before that date.<sup>7</sup> The Office found that Dr. Blair's opinion, as an impartial medical examiner, was sufficient to establish that appellant was able to return to full-time sedentary work as of November 21, 2002. The Office also found that Dr. Marable's December 13, 2002 and February 19, 2003 reports did not contain sufficient medical rationale explaining how and why the accepted November 28, 2000 contusions would continue to disable appellant for work more than two years following the injuries.

Appellant filed her appeal with the Board on March 27, 2003.<sup>8</sup>

The Board finds that the Office properly terminated appellant's compensation benefits.

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination or modification of compensation benefits.<sup>9</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>10</sup> The Office's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>11</sup>

In the instant case, the Office accepted that on November 28, 2000, appellant slipped and fell on a wet floor, sustained strains of her left shoulder, elbow and lumbar spine and bilateral knee contusions. Dr. Conanan, an attending Board-certified orthopedic surgeon, found appellant fit for full-time light duty as of March 26, 2001. Appellant then sought treatment from Dr. Marable, an attending Board-certified neurologist, who found appellant totally disabled for work due to the accepted injuries as of July 13, 2001. The Office then referred appellant to Dr. Chouteau, a Board-certified orthopedic surgeon and second opinion physician. In an April 30, 2002 report, he opined that appellant had no objective residuals of the accepted injuries, but that the November 28, 2000 incident had "hastened" preexisting degenerative knee disease.

As Dr. Marable opined that appellant was totally disabled due to the accepted contusions, while Dr. Chouteau found that appellant was able to perform full-time light duty, the Office

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<sup>7</sup> The record demonstrates that on February 21, 2003, the employing establishment offered appellant her date-of-injury position as a customer service representative and directed her to report for duty as of March 9, 2003. This offer may indicate that the employing establishment was intending to request that the Office terminate appellant's compensation benefits if appellant refused an offer of suitable work under section 8106(c) of the Act. However, the Office did not pursue a termination of compensation under 5 U.S.C. § 8106. The Office stated in a February 28, 2003 file note that the claims examiner would issue a final termination of compensation and delete appellant's case from the periodic rolls, as "no job offer needed -- released to date[-]of[-]injury] job per SECOP [second opinion physician] and IME [impartial medical examiner]."

<sup>8</sup> Appellant submitted additional medical and factual evidence accompanying her request for appeal and accompanying a letter to the Board dated May 21, 2003. The Board may not consider new evidence for the first time on appeal that was not before the Office as of the date of the final decision in the case. 20 C.F.R. § 501.2(c). Appellant may submit this additional evidence to the Office accompanying a valid request for reconsideration.

<sup>9</sup> *Raymond W. Behrens*, 50 ECAB 221 (1999).

<sup>10</sup> *Carl D. Johnson*, 46 ECAB 804, 809 (1995).

<sup>11</sup> *Raymond W. Behrens*, *supra* note 9.

found a conflict of medical opinion. Because of the conflict in medical opinion between Drs. Chouteau and Marable pursuant to section 8123(a) of the Federal Employees' Compensation Act, the Office referred appellant to a third physician for an impartial medical examination, Dr. Blair, a Board-certified orthopedic surgeon.<sup>12</sup> He examined appellant on November 21, 2002. Dr. Blair provided an accurate and comprehensive review of appellant's medical history and performed a thorough orthopedic examination. Based on this review and examination, he found no objective evidence of any disability related to the accepted November 28, 2000 injuries. Dr. Blair explained that appellant's symptoms were likely caused by degenerative disc disease in the cervical, thoracic and lumbar vertebrae, degenerative arthritis of the left knee and generalized osteoarthritis. He concluded that appellant had fully recovered from the November 28, 2000 injuries and was capable of resuming her duties as a customer service representative.

Appellant subsequently submitted a December 13, 2002 report from Dr. Marable explaining that her lumbar condition was work related as her preexisting degenerative disc disease was asymptomatic prior to the November 28, 2000 fall. A February 19, 2003 report provided no additional rationale. The Board finds that Dr. Marable did not provide his medical reasoning for finding that the sequelae of the accepted November 28, 2000 injuries, including the lumbar strain, would continue to disable appellant for all work more than two years following those injuries. Without such rationale, this report is of very little probative value.<sup>13</sup> Also, Dr. Marable did not distinguish between the effects of appellant's many preexisting degenerative orthopedic pathologies, including generalized osteoarthritis, cervical and lumbar stenosis and bulging discs and any residuals of the accepted injuries. Considering appellant's complex orthopedic presentation, the absence of a detailed explanation distinguishing between occupational conditions and preexisting, nonoccupational disease further diminishes the value of Dr. Marable's opinion.

The Board finds that Dr. Blair's opinion is well rationalized, based on a thorough clinical examination and relies on a complete medical and factual background. Therefore, his opinion must be accorded special weight on the issue of whether appellant had any residuals or disability resulting from the accepted lumbar, left elbow and left shoulder strain and bilateral knee contusions.<sup>14</sup> As the weight of the medical opinion evidence, Dr. Blair's report justifies the Office's termination of appellant's compensation benefits.

The Board notes, however, that the effective date of termination, February 23, 2003, is prior to the date of the Office's decision, February 28, 2003. As the formal decision terminating compensation should be effective on or after the date of the decision, the February 28, 2003 decision is hereby modified to reflect the effective date of benefits being terminated as the date

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<sup>12</sup> Section 8123(a) of the Act provides that, "[I]f there is disagreement between the physician making the examination for the United States and the physician for employee, the Secretary shall appoint a third physician who shall make an examination." 5 U.S.C. § 8123(a).

<sup>13</sup> *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

<sup>14</sup> *Irene M. Williams*, 47 ECAB 619, 622 (1996); *Roger Dingess*, 47 ECAB 123, 126 (1995); *Carl Epstein*, 38 ECAB 539 (1987).

of the decision, February 28, 2003.<sup>15</sup> On return of the case, the Office shall conduct appropriate development to determine the amount of compensation to which appellant is entitled for the period February 23 to 28, 2003 and for prompt payment of any compensation due and owing.

Consequently, appellant has not established that her condition on and after February 28, 2003 is causally related to the accepted lumbar, left elbow and left shoulder strains and bilateral knee contusions, as she submitted insufficient rationalized medical evidence to establish a causal relationship between that condition and her continuing signs and symptoms.

The decision of the Office of Workers' Compensation Programs dated February 28, 2003 is hereby affirmed as modified.

Dated, Washington, DC  
September 23, 2003

Alec J. Koromilas  
Chairman

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member

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<sup>15</sup> *Earl G. Stannard*, Docket No. 97-1088 (issued December 3, 1998).