

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

GAYLE A. PINSKE, Appellant

and

**DEPARTMENT OF AGRICULTURE,
AGRICULTURAL MARKETING SERVICE,
Fresno, CA, Employer**

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**Docket No. 04-1172
Issued: November 23, 2004**

Appearances:
Gayle A. Pinske, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 30, 2004 appellant filed a timely appeal of a January 15, 2004 decision of the Office of Workers' Compensation Programs which denied modification of a September 29, 2003 decision, in which an Office hearing representative affirmed the termination of her compensation 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 benefits effective October 18, 2002 on the grounds that she no longer had residuals of her January 27, 2002 employment injury; and (2) whether appellant established that she had any continuing employment-related disability after October 18, 2002. On appeal appellant contends that the opinion of the second opinion examiner, Dr. Aubrey A. Swartz, should be afforded limited probative value.

FACTUAL HISTORY

On February 27, 2002 appellant, a 48-year-old agricultural commodity grader, filed a Form CA-1 claim for compensation alleging that, on that day, she slipped and fell on her left side and hip, twisted her right knee and injured her mid and low back. She stopped work that day and did not return. Appellant submitted a March 1, 2002 report in which Dr. Donald A. Poladian, a chiropractor, noted tenderness on examination and diagnosed subluxations at T8 and L2-4, lumbosacral sprain/strain and thoracic sprain/strain. Dr. Poladian's associate, Dr. Mark E. Simons, a chiropractor, provided disability slips dated March 11, 18 and 25 and April 9, 2002. By letter dated April 19, 2002, the Office accepted that appellant sustained an employment-related lumbar subluxation and she received appropriate continuation of pay and compensation.

Dr. Simons continued to submit reports and a May 2, 2002 magnetic resonance imaging (MRI) scan of the lumbar spine was read by Dr. Larry De St. Jeor, Board-certified in diagnostic radiology, as demonstrating multilevel degenerative changes, most severe at L4-5 and T11-12, with a small broadly-based central protrusion at L4-5 in the midline and a questionable small annular tear. In a work capacity evaluation dated May 23, 2002, Dr. Simons advised that appellant could work with the restrictions that she sit for 4 hours, walk and stand for 10 minutes each hour, could not reach above the shoulder or twist, could operate a motor vehicle for 1 to 2 hours and could not push, pull, squat, kneel or climb with lifting limited to 5 pounds.

By letter dated May 31, 2002, the Office referred appellant, along with a set of questions, the medical record and a statement of accepted facts, to Dr. Aubrey A. Swartz, Board-certified in orthopedic surgery, for a second-opinion evaluation. In a report dated June 27, 2002, he noted his review of the medical record, including the history of injury and that appellant had gastric bypass surgery five years previously, appellant's complaints and Dr. Swartz' findings of tenderness "everywhere" on physical examination. He diagnosed chronic degenerative disc disease of the lumbar spine and myofascial pain of the cervical and thoracic spines and opined that appellant's current diagnoses were not causally related to the employment injury. Dr. Swartz stated:

"The aggravating factor appeared to be primarily in the form of muscle and ligament strain and was unrelated to degenerative spinal pathology. There was a twisting of the back, which was muscular and soft tissue in nature, and which cleared up within six weeks. The aggravation was temporary and ceased within six weeks, or by April 15, 2002."

In an attached work-capacity evaluation, Dr. Swartz advised that appellant could work 8 hours per day with restrictions that she could sit for 2 hours, walk for 2 hours, stand for 3 hours, reach for 4 hours, reach above her shoulders for 2 hours, twist for 4 hours, operate a motor vehicle for 4 hours, push, pull and lift 15 pounds for 4 hours and squat, kneel and climb for 1/2 hour.

In form reports dated July 15, August 13 and September 12, 2002 Dr. Poladian reiterated his diagnoses of subluxations at T8 and L2-4, and Dr. Simons continued to opine that appellant was disabled. In a report dated August 2, 2002, Dr. Poladian noted his disagreement with Dr. Swartz' report which he had reviewed, opining that appellant could only work 4 hours per

day with sedentary restrictions, that she could not sit for more than 30 minutes at a time or 4 hours in one day with no standing for more than 15 minutes and no repetitive bending, twisting, squatting, kneeling, pushing, pulling, overhead reaching or climbing and lifting restricted to 10 pounds.

By letter dated August 28, 2002, the Office informed appellant that it proposed to terminate her compensation benefits on the grounds that her back condition had resolved. She disagreed with the proposed termination and requested another evaluation. In a report dated September 25, 2002, Dr. Simons noted his review of the report of Dr. Swartz. He stated that appellant could not return to work due to her mid-back, upper back, low back and neck pain “which becomes more severe with the duties required by her job.” Dr. Simons noted the MRI scan findings, advised that these changes rendered appellant more susceptible to further injury and requested authorization for an MRI scan of her mid and upper thoracic back.

In a decision dated October 18, 2002, the Office terminated appellant’s compensation benefits effective that day on the grounds that the medical opinion evidence as provided by Dr. Swartz established that she no longer had residuals of her employment-related back injury.¹

On November 12, 2002 appellant requested a hearing and submitted a number of form reports from Drs. Simons and Poladian, who reiterated their diagnoses of subluxations at T8 and L2-4 and continued to advise that she was disabled.

By report dated December 11, 2002, Dr. Frank L. Cantrell, a Board-certified neurologist, stated that appellant presented “with an extremely disjointed rambling history,” describing low back pain and thoracic and lumbar spine tenderness. She further described pain, numbness and a burning sensation in her upper back, left lower rib pain, numb hands, right lower limb pain, bilateral groin pain, weak knees, tingly, numb and cramping feet. Dr. Cantrell reported that appellant sustained a slip and fall injury on February 27, 2002, stating that she fell on her right hip. Dr. Cantrell noted his review of the medical record including the MRI scan and Dr. Swartz’ June 27, 2002 report and advised, “In my opinion, the chiropractic care has been done well to excess.” He further noted appellant’s past medical history and review of systems that showed irritable bowel syndrome and depression. On physical examination, appellant demonstrated tenderness over the right flexor forearm musculature with negative Tinel’s sign, a mild ataxic gait, intact sensation and modest tenderness over her right hip and left mid ribs. Dr. Cantrell’s impression was low back pain, probably due to lumbar straining injury, degenerative disc disease, probably aggravated by the employment injury, thoracic back pain, hand numbness, probably due to carpal tunnel syndrome not specifically related to the fall, right greater trochanteric bursitis with bilateral groin pain due to the February 27, 2002 fall, probable meralgia paresthetica, paresthesias of both lower limbs, consider significant B12 deficiency, left rib pain, probably due to contusion and gastric bypass surgery, consider B12 deficiency or peripheral neuropathic process. Dr. Cantrell recommended further diagnostic studies and concluded: “It is my opinion that [appellant’s] slip-and-fall accident caused her to have a contusion to her right hip, which has resulted in a greater trochanteric bursitis and meralgia paresthetica of the right

¹ The Board notes that the record also contains evidence regarding a third-party claim appellant made against the California Olive Growers.

lower limb. It is my opinion that [she] probably cannot do a job in which she performs prolonged sitting or standing or, for that matter, climbing up and down stairs.”

In a report dated February 5, 2003, Dr. Poladian noted examination findings of tenderness in the entire paravertebral musculature with decreased range of motion of the cervical and lumbar spine and positive straight-leg raising test. He diagnosed subluxations at L2-4 and T8, lumbosacral sprain/strain and thoracic sprain/strain and concluded that appellant was unable to perform her regular work duties.

By report dated March 20, 2003, Dr. Zafar Sheikh, a Board-certified internist, noted that he had examined appellant on November 6, 2002 for complaints of daily pain from the cervical spine to lower back and hips with radiation into both legs. He stated: “She has underlying osteoarthritis and fibromyalgia for many years but the magnitude of pain has been far more since the injury of February 27, 2002.” Findings on examination included tenderness over the lumbosacral, thoracic and cervical spine and at both sacroiliac joints with obvious pain upon weight bearing, greater on the right. Dr. Sheikh stated that reexamination on February 20, 2003 did not show any significant difference in his findings and he agreed with Dr. Cantrell’s opinion that the February 27, 2002 injury aggravated her symptoms.

In a report dated July 16, 2003, Dr. Poladian reported the history of injury and his review of the medical records. Range of motion of the cervical spine revealed slight restriction in flexion and mild restriction in extension, left lateral flexion, right lateral flexion, left rotation and right rotation. Lumbar spine range of motion was severely restricted in flexion and extension. Straight-leg raising test was positive bilaterally. He reiterated his previous diagnoses and conclusion that appellant could not work, noting that she experienced pain from her neck down into her lower back. Dr. Poladian repeated his disagreement with Dr. Swartz’ report and opined that her injuries were caused by the February 27, 2002 work injury.

At the hearing, held on July 23, 2003, appellant testified regarding the employment injury and her condition. She also submitted statements from a friend, Leann M. Richardson, and her husband, David C. Pinske, who described her condition.

Subsequent to the hearing, appellant submitted additional form reports from Dr. Poladian and an August 20, 2003 report, in which Dr. John C. Chiu, a Board-certified neurosurgeon, reported the history that appellant slipped and fell on her left hip on February 27, 2002. He related his review of the medical record. The physician stated that on physical examination appellant was “in distress” from spinal symptoms with tenderness and muscle spasms noted. Dr. Chiu’s diagnostic impression was post-traumatic lumbar disc herniation with lumbar radiculopathy, post-traumatic cervical disc herniation with cervical radiculopathy and post-traumatic thoracic strain/disc disease with thoracic pain around the waist area. Regarding the cause of her condition, Dr. Chiu stated: “There is no question that [appellant] suffered industrial injury ... on February 27, 2003.” He noted that she worked as an agricultural commodity grader and stated that her job duties required a lot of walking, climbing on equipment, picking up products off the line for inspection, inspecting products weighing approximately 40 pounds which entailed a lot of bending, prolonged standing, lifting and walking. Dr. Chiu further stated that, after appellant returned to work in 1987, after an employment injury, she had a 30-pound lifting restriction but was required to lift products weighing 40 pounds. He concluded that appellant had not reached a permanent and stationary status because of her persistent symptoms,

positive neurological findings, positive MRI scan findings and positive electrodiagnostic findings. Dr. Chiu recommended lumbar and cervical endoscopic spinal discectomy.

By decision dated September 29, 2003, an Office hearing representative affirmed the October 18, 2002 decision.

On October 14, 2003 appellant requested reconsideration and submitted additional medical evidence, including form reports from Dr. Poladian and an August 19, 2003 electrodiagnostic study of the paraspinal musculature from C3 to T1 and L3 to S1, which Dr. Thomas Clifford, a Board-certified neurosurgeon, advised demonstrated bilateral L4-5 radiculopathy. She also submitted reports of MRI scan and x-ray examinations performed on August 19, 2003 interpreted by Dr. Larry Chespak, Board-certified in diagnostic radiology. Lumbar spine x-ray revealed scoliosis with mild disc space narrowing at L4-5. MRI scan of the lumbar spine demonstrated a three millimeter paracentral disc protrusion at L4-5. Mild degenerative changes were noted on x-ray of the cervical spine. Cervical spine MRI scan demonstrated a focal two-millimeter anterior extradural defect at C5-6. Thoracic spine x-ray was normal.

By decision dated January 15, 2004, the Office denied modification of the September 29, 2003 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² 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.³

ANALYSIS -- ISSUE 1

In terminating compensation benefits on October 18, 2002, the Office relied on the opinion of Dr. Swartz, the second opinion examiner, as the weight of the medical evidence to establish that appellant had no residuals of her accepted lumbosacral subluxation. The Board notes that Dr. Poladian and Dr. Simons, appellant's attending chiropractors, consistently diagnosed subluxations at T8 and L2-4 and opined that appellant continued to be disabled from the accepted condition. In a June 27, 2002 report, Dr. Swartz diagnosed chronic degenerative disc disease of the lumbar spine and myofascial pain of the cervical and thoracic spines. He opined that these diagnoses were not causally related to the employment injury which caused a temporary aggravation that would have ceased by April 15, 2002. The Board finds that there is an unresolved conflict of medical opinion regarding whether appellant's accepted lumbosacral

² *Gloria J. Godfrey*, 52 ECAB 486 (2001).

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

subluxation has resolved.⁴ The Office did not meet its burden of proof in terminating appellant's compensation benefits.

In view of the Board's disposition of the first issue, the issue of whether appellant has any continuing disability or residuals due to her accepted condition after October 18, 2002, the date the Office terminated her compensation benefits, is moot.

CONCLUSION

The Board finds that a conflict in medical opinion exists regarding whether appellant residuals of her accepted lumbosacral subluxation.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 15, 2004 and September 29, 2003 be reversed.

Issued: November 23, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

⁴ 5 U.S.C. § 8123(a), in pertinent part, provides: "If there is a 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."