United States Department of Labor
Employees' Compensation Appeals Board

BETTYE J. STOKES, Appellant	)	
and	)	**Docket No. 05-110**
	)	**Issued: June 8, 2005**
U.S. POSTAL SERVICE, POST OFFICE, West Bloomfield, MI, Employer	)	

Appearances:
Bettye J. Stokes, 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 October 13, 2004 appellant filed a timely appeal from a March 3, 2004 merit decision of the Office of Workers' Compensation Programs which terminated her compensation benefits and a June 18, 2004 decision which denied her request for a hearing. She also appealed a September 30, 2004 decision which denied modification of the March 3, 2004 decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the Office decisions.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective March 3, 2004 on the grounds that she no longer had residuals of her April 13, 1999 employment injury; (2) whether the Office properly denied her request for a hearing; and (3) whether appellant established that she had any continuing employment-related disability after March 3, 2004.

FACTUAL HISTORY

On November 8, 1997 appellant, then a 32-year-old distribution clerk, filed a Form CA-1, traumatic injury claim, alleging that on that day she injured her back when she was hit by a mail cart. On April 13, 1998 the Office accepted that appellant sustained back contusions and lumbosacral and thoracic sprains and strains. On July 7, 1999 the Office accepted that she sustained employment-related aggravation of cervical radiculitis, aggravation of right carpal tunnel syndrome and muscle spasms.[1]

On September 21, 2001 appellant filed a recurrence of disability claim, noting that she had continued to have chest, back, neck and hand pain. Her supervisor advised that appellant had been absent from work for several months. Appellant submitted a November 27, 2001 report from Dr. Martin M. Urburg, an attending Board-certified family physician, who advised that she had been under his care since August 2000 and had a recent exacerbation of upper back and chest pain accompanied by leg weakness. He reported that an August 5, 2001 magnetic resonance imaging (MRI) scan of the cervical spine revealed a significant rupture at C5-6, and referred her to a neurosurgeon. Appellant was advised that she needed surgical decompression with internal fixation, which was performed on October 17, 2001.

In a report dated May 16, 2002, Dr. Teck Mun Soo, a Board-certified neurosurgeon, noted that he had operated on appellant and reported complaints of back pain radiating to both legs which was consistent with discogenic syndrome. He advised that a recent MRI scan showed total desiccation but not collapse of the L4-5 disc with excruciating back pain of 10/10 with intolerance to sitting, standing or bending. Dr. Soo stated that appellant was totally disabled and recommended pain clinic evaluation. In a report dated July 1, 2002, Dr. Urburg noted the history of cervical spine surgery and a history of pain in the upper back and chest which was not completely explained by the neck lesion. He stated that appellant was wheelchair-bound and had difficulty ambulating without assistance. Dr. Urburg diagnosed severe myofascial pain disorder that was in addition to the ruptured cervical disc, noting that it was constant and had not responded to treatment. He concluded that appellant was permanently disabled due to pain.

On September 5, 2002 the Office referred appellant to Dr. Michael J. Geoghegan, a Board-certified orthopedic surgeon, for a second opinion evaluation. In reports dated September 24, October 2 and 21, 2002, Dr. Geoghegan advised that appellant's ruptured disc at C5-6 was employment related and that she was currently unable to work. On October 30, 2002 the Office accepted that the ruptured disc at C5-6 was employment related and authorized the surgery of October 17, 2001.[2] Pain clinic treatment was authorized, and appellant was placed on the periodic rolls. On November 6, 2002 she filed a schedule award claim.[3]

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[1] These claims were adjudicated by the Office under file numbers 090434769 and 090453759 respectively and were doubled by the Office with the former number becoming the master file. File number 090409307, a claim for a right arm and hand injury sustained on October 5, 1995, was also doubled into the master file.

[2] Although requested by the Office, a copy of the October 17, 2001 operative report is not contained in the case record.

[3] The record does not indicate that the Office has issued a final decision regarding appellant's entitlement to a schedule award.

Dr. Soo requested authorization for a discogram that was approved on December 4, 2002. Appellant came under the care of Dr. Jeffrey J. Kimpson, a Board-certified anesthesiologist, for treatment of her pain and also underwent physical therapy. On January 7, 2003 Dr. Kimpson performed lumbar discography, which demonstrated minimal contrast at L4-5. He concluded that appellant's dominant pain was related to an L4-5 disc. He recommended intradiscal electrothermography (IDET) that was done on March 4, 2003.

In treatment notes dated March 6 and 13, 2003, Dr. Kimpson reported that appellant's pain had increased. In a March 26, 2003 note, Dr. Jeffrey J. Kirouac, also Board-certified in anesthesiology and an associate of Dr. Kimpson, reported that there had been no change in appellant's pain with numbness and weakness in the right lower extremity. In notes dated April 23 and May 28, 2003, Dr. Kimpson noted minimal change in appellant's pain after the IDET procedure. He graded her pain at 10/10.

A July 24, 2003 MRI scan of the lumbar spine was interpreted by Dr. Adam J. Frank, Board-certified in diagnostic radiology, as demonstrating minor disc bulges at L1-2 and L4-5 which were compatible with degenerative disc disease. The examination was otherwise unremarkable.

On October 29, 2003 the Office referred appellant, together with statement of accepted facts, a set of questions and the medical record, to Dr. Norman L. Pollak, Board-certified in orthopedic surgery, for a second opinion evaluation. In a report dated November 12, 2003, Dr. Pollak noted his review of the medical record, the statement of accepted facts and the questions presented. He advised that appellant presented in a wheelchair and noted her complaints of lower back pain with occasional radiation to the lower extremities and her report that she could not ambulate without a cane. Dr. Pollak noted physical findings of limitations in range of motion and generalized tenderness in the lumbar area to minimal palpatory pressure with no evidence of spasm. With the exception of an absent brachioradialis reflex on the left, reflexes in bilateral upper and lower extremities were normal. Motor examination revealed give-way weakness at both shoulders and very weak push-pull and minimal grip strength. Motor strength in the lower extremities was very weak. Sensory examination of the lower extremities was normal with decreased sensation of the tips of the index and middle fingers on the right and normal sensation of the entire ring and little fingers and thumb on the right. Straight leg raising was negative bilaterally to 90 degrees but did elicit complaints of low back pain. Tinel's test was negative bilaterally, and Phalen's caused complaints of immediate pain in the palm and volar forearm on the right and was negative on the left. Lumbosacral spine x-rays were normal, and cervical spine x-rays revealed the fusion at C5-6. Dr. Pollak concluded that there were no objective findings on physical or x-ray examination to indicate a disabling or pathological condition, noting that the recent MRI scan showed no disc pathology. He stated that, despite the lack of objective findings, "subjectively there is rather marked pain behavior which appears to be inconsistent and unrealistic." He stated that this was suggestive of secondary gain phenomenon. Dr. Pollak advised that other than the evidence of the C5-6 fusion, there was no evidence that any of her accepted conditions remained active and opined that she was medically capable of performing the duties of her date-of-injury job as a distribution clerk with no work limitations or need for further medical treatment. In an attached work capacity evaluation, Dr. Pollak noted the accepted conditions and advised that appellant could work eight hours per day without limitations.

In a December 17, 2003 supplemental report, Dr. Pollak advised that the findings of decreased motion and generalized tenderness were subjective in that they were entirely under the control of the person being examined. He noted that his final determination was based on the lack of objective findings.

By letter dated January 28, 2004, the Office informed appellant that it proposed to terminate her compensation benefits on the grounds that she no longer had residuals of the accepted conditions of aggravation of right carpal tunnel syndrome, aggravation of cervical radiculitis, muscle spasms of the neck, ruptured disc at C5-6 with subsequent surgery, lumbosacral contusion, lumbosacral strain and thoracic strain. Appellant submitted a February 5, 2004 report in which Dr. Kimpson reviewed his treatment of appellant beginning in November 2002, noting that she was lost to follow-up on July 31, 2003. He stated that the IDET procedure did not improve appellant's pain and, based on the results of the IDET procedure, no further improvement would be expected. He recommended that she undergo a functional capacity evaluation and noted that she was taking chronic narcotic medications which would prevent her from working with heavy machinery.

By decision dated March 3, 2004, the Office terminated appellant's compensation benefits effective that day, on the grounds that the medical opinion of Dr. Pollak established that she no longer had residuals of her employment-related conditions. In a letter postmarked on April 12, 2004, appellant requested a hearing. In a decision dated June 18, 2004, an Office hearing representative denied the request on the grounds that it was untimely filed.

On June 29, 2004 appellant requested reconsideration and submitted a treatment note dated July 3, 2003 in which Dr. Soo rated appellant's pain as 10/10 and noted the failed IDET procedure. In a May 15, 2004 report, he advised that she reported that she was in severe pain and stated that, on physical examination, "[c]lincally she had no weakness but her quality of life was significantly compromised." He noted that the July 24, 2003 MRI scan demonstrated slight desiccation at the L1-2 level, compatible with mild degenerative disc disease, and noted that she had an L4-5 "problem" on discogram. Dr. Soo recommended a disc replacement trial or fusion.[4]

By decision dated September 30, 2004, the Office denied modification of the March 3, 2004 decision, finding that Dr. Soo's treatment notes provided no explanation or opinion regarding why appellant remained totally disabled for work due to her accepted condition.

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.[5] The Office's burden of proof in terminating compensation includes the necessity

[4] Appellant also submitted a copy of the July 24, 2003 MRI examination, previously of record.

[5] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

ANALYSIS -- ISSUE 1

The Board finds the weight of the medical opinion evidence rests with Dr. Pollak, the second opinion examiner, and is sufficient to meet the Office's burden of proof to terminate appellant's compensation. In a comprehensive report dated November 12, 2003, he concluded that there were no objective findings on physical or x-ray examination to indicate a disabling or pathological condition, noting that the recent MRI scan showed no disc pathology. Dr. Pollak stated that despite the lack of objective findings, "subjectively there is rather marked pain behavior which appears to be inconsistent and unrealistic," which he stated was suggestive of secondary gain phenomenon. The physician advised that, other than the evidence of the C5-6 fusion, there was no evidence that any of her accepted conditions remained active and opined that she was medically capable of performing the duties of her date-of-injury job as a distribution clerk with no work limitations or need for further medical treatment. In an attached work capacity evaluation, he advised that appellant could work eight hours per day without limitations. Following a request by the Office that he explain his findings on physical examination, in a report dated December 17, 2003 Dr. Pollak advised that the findings of decreased motion and generalized tenderness were subjective in that they were entirely under the control of the person being examined. He concluded that his final determination was based on the lack of objective findings.

The accepted conditions in this case are back contusions, lumbosacral and thoracic sprains and strains, cervical radiculitis, aggravation of right carpal tunnel syndrome and muscle spasms and a ruptured disc at C5-6 that was surgically decompressed on October 17, 2001. None of the medical evidence of record indicates that appellant had continuing residuals of the accepted back contusion and lumbosacral and thoracic sprains and strains at the time the Office terminated her compensation benefits on March 3, 2004. The medical evidence submitted by appellant includes a July 2002 diagnosis by Dr. Urburg of myofascial pain syndrome. Drs. Soo and Kimpson treated appellant for severe back pain. Dr. Kimpson interpreted a January 7, 2003 discography as demonstrating that appellant's dominant pain was related to the L4-5 disc, and a July 24, 2003 MRI scan of the lumbar spine demonstrated degenerative disc disease at L1-2 and L4-5. The medical evidence most contemporaneous with the termination, a report dated February 5, 2004 in which Dr. Kimpson reviewed his treatment of appellant beginning in November 2002, noted that appellant was lost to follow-up on July 31, 2003. He stated that the IDET procedure did not improve appellant's pain and, based on the results of the IDET procedure, no further improvement would be expected. Dr. Kimpson recommended that she undergo a functional capacity evaluation and noted that she was taking chronic narcotic medications which would prevent her from working with heavy machinery.

For a condition to be accepted as employment related, the employee must submit rationalized medical evidence supporting a causal relationship[7] in which the physician reviews

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[6] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[7] *Manuel Gill*, 52 ECAB 282 (2001).

the employment factors identified by appellant as causing his or her condition and, taking these factors into consideration as well as findings upon examination and the medical history, state whether the employment injury caused or aggravated the diagnosed conditions and present medical rationale in support of his or her opinion.[8] In this case, neither degenerative disc disease of the lumbar spine nor a pain condition has been accepted as employment related. Furthermore, none of the medical reports submitted by appellant attribute her pain to the employment-related injuries. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[9] The record therefore does not support that appellant had residuals of her accepted lumbosacral and thoracic strains and sprains.

Regarding the accepted aggravation of carpal tunnel syndrome on the right, while Dr. Pollak noted findings of decreased sensation of the tips of the index and middle fingers on the right and that the Phalen's test caused complaints of immediate pain in the palm and volar forearm on the right, the physician also opined that appellant subjectively had marked pain behavior which appeared to be inconsistent and unrealistic which was suggestive of secondary gain phenomenon. He also provided a work capacity evaluation in which he stated that appellant had no physical restrictions due to her accepted conditions. Furthermore, the record does not support that a permanent aggravation of carpal tunnel syndrome was accepted as employment related. The Board therefore finds that the Office properly determined that appellant had no residuals of her employment-related aggravation of right carpal tunnel syndrome.

Regarding appellant's cervical condition, while cervical radiculitis and a ruptured disc at C5-6 was accepted as employment related, appellant underwent surgical decompression on October 17, 2001. In his November 12, 2003 report, Dr. Pollak advised that, other than evidence of the C5-6 surgical fusion, appellant had no objective findings on physical or x-ray examination to indicate a disabling or pathological condition and that the findings of decreased motion and generalized tenderness were subjective in that they were entirely under the control of the person being examined. The Board therefore finds that Dr. Pollak's opinion is sufficiently well rationalized and based upon a proper factual background to find that she had no residuals of these accepted conditions.

In conclusion, Dr. Pollak examined appellant and reviewed her medical records and opined that she had no evidence that her accepted conditions remained active. Appellant submitted no probative medical evidence to show that she had continuing residuals of any of the employment-related conditions. Accordingly, the Office met its burden of proof to terminate appellant's compensation benefits effective March 3, 2004.[10]

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[8] *Robert Broome, supra* note 7.

[9] *Michael E. Smith*, 50 ECAB 313 (1999).

[10] *See Gloria J. Godfrey, supra* note 5.

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought. If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.[11] The Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act,[12] has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.[13] The Office's procedures, which require the Office to exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.[14]

ANALYSIS -- ISSUE 2

The Office denied appellant's request for a hearing on the grounds that it was untimely filed. In a June 18, 2004 decision, the Office found that appellant was not, as a matter of right, entitled to a hearing as her request, postmarked April 12, 2004, had not been made within 30 days of the March 3, 2004 decision. The Office noted that it had considered the matter in relation to the issue involved and indicated that appellant's request was denied on the basis that the issue in the instant case could be addressed through a reconsideration application. The Board finds that, as appellant's request for a hearing was postmarked April 12, 2004, more than 30 days after the date of the March 3, 2004 decision, the Office properly determined that she was not entitled to a hearing as a matter of right as her request was untimely filed.

The Office also has the discretionary power to grant a request for a hearing when a claimant is not entitled to such as a matter of right. In the June 18, 2004 decision, it properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[15] In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a hearing which could be found to be an abuse of discretion. The Office therefore properly denied her request.

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[11] *Claudio Vazquez*, 52 ECAB 496 (2001).

[12] 5 U.S.C. §§ 8101-8193.

[13] *Marilyn F. Wilson*, 52 ECAB 347 (2001).

[14] *Claudio Vazquez, supra* note 11.

[15] *See Claudio Vazquez, supra* note 11; *Daniel J. Perea*, 42 ECAB 214 (1990).

LEGAL PRECEDENT -- ISSUE 3

As the Office met its burden of proof to terminate appellant's compensation benefits effective March 3, 2004, the burden shifted to her to establish that she had any continuing disability causally related to her accepted injuries.[16] To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.[17] Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.[18] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 the claimant.[19]

ANALYSIS -- ISSUE 3

The relevant medical evidence regarding any employment-related disability after March 3, 2004 includes treatment notes dated July 3, 2003 in which Dr. Soo rated appellant's pain and noted the failed IDET procedure. On May 15, 2004 he advised that she reported that she was in severe pain and stated that, on physical examination, "[c]lincally she had no weakness but her quality of life was significantly compromised," noting that the July 24, 2003 MRI scan demonstrated slight desiccation at the L1-2 level, compatible with mild degenerative disc disease, and noted that she had an L4-5 "problem" on discogram and recommended a disc replacement trial or fusion. A mere conclusion without medical rationale explaining how and why the physician believes that a claimant's accepted injury could result in a diagnosed condition is not sufficient to meet the claimant's burden of proof. The medical evidence must also include rationale explaining how the physician reached the conclusion he or she is supporting.[20] While Dr. Soo described appellant's severe back pain, he provided no rationale to show that appellant was disabled due to an accepted injury. The Board finds his reports are insufficient to meet her burden to establish that she has any continuing disability causally related to her accepted conditions.[21] As appellant has submitted insufficient medical evidence

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[16] *Manuel Gill, supra* note 7.

[17] *Id.*

[18] *Donna L. Mims*, 53 ECAB 730 (2002).

[19] *Leslie C. Moore*, 52 ECAB 132 (2000); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[20] *Beverly A. Spencer*, 55 ECAB ____ (Docket No. 03-2033, issued May 3, 2004).

[21] *Manuel Gill, supra* note 7.

establishing that she continues to be disabled from the accepted employment-related conditions, she has not met her burden of proof.[22]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective March 3, 2004. The Board further finds that the Office did not abuse its discretion in denying her request for a hearing, and that appellant failed to meet her burden of proof to establish that she had any disability after March 3, 2004 causally related to her accepted conditions.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated September 30, June 18 and March 3, 2004 be affirmed.

Issued: June 8, 2005
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member

[22] To the degree that appellant is now alleging that her current pain condition is a consequence of her employment-related conditions, the Board notes that the Office has not issued a decision on her claim that she suffers a consequential injury, and thus the Board does not have jurisdiction over this issue, and the Board's jurisdiction is limited to review of final decisions of the Office. 20 C.F.R. § 501.2(c).