

October 11, 2005, October 18, 2006 and October 12, 2007, the Board set aside merit decisions of the Office that denied appellant's claim and remanded the case for further development.¹ The facts and the law contained in those decisions are incorporated herein by reference.

On remand the Office referred the case to Dr. Agarwal for another second opinion examination. Dr. Agarwal was asked to explain the etiology of appellant's diagnosed lumbar spondylosis and spinal canal stenosis, and to provide an opinion as to whether her job activities had aggravated her diagnosed conditions and, if so, whether the aggravation had ceased. In a November 14, 2007 report, he stated that he had reviewed the entire file, since the case was one year old. Dr. Agarwal opined that "the etiology of the lumbar spondylosis and spinal canal stenosis [was] due to preexisting conditions of life" and that her work duties did not aggravate her diagnosed conditions. Noting that there were no obvious physical findings or neurological deficit other than mild lower back pain, he stated, "She possibly suffered a temporary exacerbation at work and I believe this has resolved." Dr. Agarwal also indicated that the restrictions previously imposed were "because of preexisting conditions and [were] given to preclude further exacerbation of those preexisting conditions."

On December 6, 2007 the Office asked Dr. Agarwal to provide a supplemental report that included a thorough history, examination findings, and a careful review of the medical records. Dr. Agarwal was asked to clarify his statement that appellant possibly suffered a temporary exacerbation at work but that he believed it had resolved. The Office asked him to identify when the exacerbation occurred and when it ceased, and to give detailed medical rationale explaining why he believed it ceased at that time.

In a letter dated December 12, 2007, Dr. Agarwal stated: "This incident occurred so long ago (four years) and I did not follow [appellant] closely, I would say that the exacerbation of her symptoms ceased on November 20, 2006, at the time I examined her."

On January 28, 2008 the Office accepted appellant's claim for temporary aggravation of degeneration of lumbar intervertebral disc. It found that the aggravation ceased on November 20, 2006 pursuant to Dr. Agarwal's December 12, 2007 report, and that any work restrictions were due to preexisting conditions of age, weight and other factors unrelated to work.

Appellant submitted a July 23, 2007 report from Dr. Kevin J. Folchert, a Board-certified family practitioner, who first examined appellant on June 21, 2007 for chronic severe low back pain. Dr. Folchert related appellant's complaints that she began experiencing back pain in May 2003 while she was working at the employing establishment sorting mail. Appellant attributed the pain to repetitive motions of bending, pushing and lifting bins filled with mail, rather than to a specific injury. Dr. Folchert noted that an August 26, 2003 magnetic resonance imaging (MRI) scan of the lumbar spine showed an L4-5 mild broad posterior disc herniation, which produced mild central canal stenosis with bilateral mild facet hypertrophy. There was also

¹ Docket No. 07-1214, issued October 12, 2007; Docket No. 06-1459, issued October 18, 2006; Docket No. 05-1395, issued October 11, 1995. In its October 12, 2007 decision, the Board found that the November 22, 2006 report of the Office's second opinion physician, Dr. Anil K. Agarwal, a Board-certified orthopedic surgeon, provided insufficient medical rationale to support his opinion that appellant's diagnosed orthopedic conditions, lumbar spondylosis and spinal canal stenosis, were caused by her age, weight and a lack of exercise, rather than by her strenuous job duties.

moderate disc dessication and minimal disc space narrowing at the L4-5 level. On examination, appellant had palpable tenderness involving her lumbar spine and low back pain with range of motion. Dr. Folchert diagnosed chronic low back pain, which was exacerbated by her employment activities. On July 31, 2008 he stated: “This patient continues to be under my care for chronic back pain secondary to a previous work[-]related injury. She continues to have troubles, including pain in her back. This is a permanent disability.”

The record reflects that appellant resigned from the employing establishment on August 11, 2007.

On January 27, 2009 appellant, through her representative, requested reconsideration of the Office’s January 28, 2008 decision, which found that her accepted condition had resolved as of November 20, 2006. Counsel contended that Dr. Agarwal’s opinion contained no rationale and was therefore not sufficient to establish that appellant’s condition had resolved.

In a decision dated May 6, 2009, the Office found that appellant’s accepted condition had resolved by November 20, 2006, based on Dr. Agarwal’s second opinion report, which constituted the weight of the medical evidence.

LEGAL PRECEDENT

The United States shall pay 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 justifying modification or termination of compensation. After it has determined that an employee has disability causally related to his employment, it may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.³ The fact that the Office accepted an employee’s claim for a specified period of disability does not shift the burden of proof to the employee. The burden is on the Office to demonstrate an absence of employment-related disability or residuals in the period subsequent to the date of termination or modification.⁴

ANALYSIS

On the same day, the Office advised appellant of the acceptance of her claim for temporary aggravation of degeneration of lumbar intervertebral disc, the Office also found that the accepted condition had resolved effective November 20, 2006. Its acceptance of a claim for a specified period of disability does not shift the burden of proof to the claimant to demonstrate that she remains disabled thereafter.⁵ It is the Office’s burden to demonstrate the absence of

² 5 U.S.C. § 8102(a).

³ *Edwin Lester*, 34 ECAB 1807 (1983).

⁴ See *Elsie L. Price*, 54 ECAB 734, 739 (2003); *Raymond M. Shulden*, 31 ECAB 297 (1979); *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

⁵ *Elsie L. Price*, *supra* note 4.

employment-related disability for the period following termination or modification of benefits.⁶ The Office based its decision to terminate compensation and medical benefits on Dr. Agarwal's November 14 and December 12, 2007 reports. The Board finds that the medical evidence of record is insufficient to establish that appellant's accepted condition had resolved.

Dr. Agarwal opined that "the etiology of the lumbar spondylosis and spinal canal stenosis [was] due to preexisting conditions of life" and that her work duties did not aggravate her diagnosed conditions. Noting that there were no obvious physical findings or neurological deficits other than mild lower back pain, he stated, "[appellant] possibly suffered a temporary exacerbation at work and I believe this has resolved." Stating that "this incident occurred so long ago (four years)" and that he did not follow appellant closely, Dr. Agarwal speculated that the exacerbation of her symptoms ceased on November 20, 2006, the date he examined her. He did not explain the basis for his conclusion that the effects of the aggravation would be limited in time. In spite of the Office's specific request to provide a thorough history, a careful review of the medical records, examination findings, and detailed medical rationale explaining why he believed her accepted condition had ceased by November 20, 2006, Dr. Agarwal provided no objective findings or rationale for his conclusion. His scant reports, therefore, are of limited probative value.

On appeal, counsel contends that appellant's condition is permanent in nature, as evidenced by Dr. Connolly's April 10, 2006 report and Dr. Folchert's July 23, 2007 and July 31, 2008 reports. The issue in this case, however, is whether the Office properly determined that appellant's accepted aggravation had resolved by November 20, 2006. By virtue of its date, Dr. Connolly's report does not address appellant's medical condition on November 20, 2006. Dr. Folchert's reports do not contain an opinion as to whether appellant's accepted condition resolved or, if so, when.⁷ Therefore, these reports are not relevant to the issue at hand.

The Board finds that the medical evidence of record does not establish that the accepted temporary aggravation of degeneration of the lumbar intervertebral disc ceased by November 20, 2006. The Office, therefore, failed to meet its burden of proof.

CONCLUSION

The Board finds that the Office did not meet its burden to establish that appellant's accepted condition had resolved as of November 20, 2006.

⁶ *Id.*

⁷ The Board notes that Dr. Folchert's reports would be relevant to the issue of continuing disability, had the Office properly terminated appellant's benefits.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 8, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board