

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

J.O., Appellant

and

**U.S. POSTAL SERVICE, MORGAN
PROCESSING & DISTRIBUTION CENTER,
New York, NY, Employer**

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**Docket No. 10-1980
Issued: June 13, 2011**

Appearances:

*Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 28, 2010 appellant, through her representative, filed a timely appeal from the March 18, 2010 merit decision of the Office of Workers' Compensation Programs terminating her compensation benefits. Pursuant to the Federal Employees' Compensation Act¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective March 18, 2010 on the grounds she no longer had any residuals or disability causally related to her accepted employment-related injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 9, 2002 appellant, then a 38-year-old mail processor, filed a traumatic injury claim alleging that on that day she felt pain in her lower back and right leg while lifting the cover of a machine to clear a jam. The Office accepted the claim for muscle spasms in the back and paid appropriate benefits. Appellant stopped work on July 9, 2002 and returned to a modified-duty position on September 23, 2003. On September 15, 2004 the Office accepted her recurrence claim of April 13, 2004. On November 16, 2004 it informally reduced appellant's compensation, effective September 29, 2003, to reflect her actual earning in her modified employment.

On March 28, 2008 the Office received a claim for a recurrence commencing March 21, 2005. Appellant stated that, while boxing mail on March 21, 2005, she had back pain and spasms and numbness and pain through her legs. She also indicated that she worked four hours a day in a modified mail processor position with restrictions. Appellant stopped work on March 21, 2005. She has not returned.

On April 2, 2008 the Office requested additional information about the claimed recurrence of March 21, 2005.

Appellant responded to the Office's request in an April 10, 2008 statement. In a March 17, 2008 letter, the employing establishment stated that she last worked on February 24, 2005 for four hours and was on sick leave between February 25 and March 2, 2005. As of March 3, 2005, appellant had not worked for the employing establishment.

In April 2008, the Office referred appellant for a second opinion examination to determine whether her current condition and disability was related to the accepted condition. In a May 6, 2008 report, Dr. Sanford R. Wert, a Board-certified orthopedic surgeon, noted the history of injury, his review of the medical record and the statement of accepted facts. He noted that appellant returned to work in a modified capacity 15 months following the injury with her last day at work March 21, 2005. Dr. Wert presented his examination findings and opined there were no objective findings of any compensable conditions. He stated that the injury-related conditions had resolved and there were no disabling residuals from the traumatic work-related injury. Dr. Wert opined that appellant reached maximum medical improvement and could resume full-time normal employment with no restrictions or limitations. He advised that appellant has a lumbosacral spine herniated disc which preexisted the work injury that could cause intermittent symptomatology and which also could prevent her from returning to full-time work without restrictions.

In an April 24, 2008 work capacity evaluation, Dr. Daniel W. Wilen, a Board-certified orthopedic surgeon, opined that appellant was totally disabled due to injuries from her July 9, 2002 work injury. He also opined that she was unable to work due to her lumbar spine disc herniations at L4-5 and disc bulges at L3-4 and L5-S2.

In June 2008, the Office scheduled appellant for an impartial medical examination with Dr. Stanley Soren, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion with regards to ongoing treatment, causal relationship and continued disability. In an

August 12, 2008 report, Dr. Soren noted the history of injury, his review of the medical record and statement of accepted facts and presented his examination findings. He provided diagnoses of lumbosacral sprain/strain with associated muscle spasm, herniated lumbar disc L4-5 and lumbar radiculopathy. Dr. Soren stated that appellant had recovered from the lumbosacral sprain/strain, which was a temporary aggravation of the preexistent lumbar disc herniation. He stated that her disc herniation with associated lumbar radiculopathy remained. Dr. Soren explained that there was no further need for any orthopedic treatment since she reached maximum medical improvement and the work-related injury had resolved. He opined that appellant could not work due to her preexistent herniated discs in the lumbar area and the associated lumbar radiculopathy, which was unrelated to the work injury.

On November 24, 2008 the Office proposed to terminate appellant's compensation benefits and deny the March 21, 2005 recurrence claim on the grounds that the medical evidence, as characterized by Dr. Soren's report, established that she no longer had any residual findings or disability from work due to the work injury.

In response to the proposed termination, the Office received a note from Dr. Paul T. Branda, an internist, a request for continued physical therapy and copies of physical therapy progress notes.

By decision dated December 24, 2008, the Office finalized the termination of appellant's compensation benefits effective January 18, 2009. On December 29, 2008 appellant, through her attorney, requested a telephonic hearing, which was held on April 20, 2009. Counsel argued that Dr. Soren had erroneously assumed appellant was suffering from lumbar radiculopathy at the time of the 2002 injury, noting that the condition was not addressed until October 2003 diagnostic testing. He further argued that appellant had worked in a restricted-duty position prior to June 2002, as a result of her herniated disc condition, but returned to her regular duties without restriction when the July 9, 2002 work injury occurred. Counsel asserted that the statement of accepted facts was misleading as it indicated a history of back conditions and sciatica, but appellant had not been diagnosed with any preexisting sciatica or radiculopathy conditions. Appellant also testified as to her working conditions prior to and after her work injury.

Copies of physical therapy reports were submitted. In a May 7, 2009 report, Dr. Branda discussed appellant's treatment and disagreed with Dr. Soren's conclusion regarding preexisting diagnoses of sciatica and radiculopathy stating there was no evidence of either condition prior to the July 2002 work event. He also stated that she had recovered from her preexisting disc injury to the extent she was able to return to work with limitation as of the July 2002 work injury. Dr. Branda stated that disc injury patients were more prone to additional injury and opined that appellant's disc injury became symptomatic as a result of the work injury which resulted in radiculopathy.

By decision dated July 9, 2009, an Office hearing representative set aside the Office's December 4, 2008 decision and remanded the case for further development. The Office hearing representative found that there continued to be a conflict regarding causal relationship of the diagnosed radiculopathy condition. The Office hearing representative requested that Dr. Soren be provided with the medical record and provide a supplemental report containing a rationalized

discussion concerning his conclusion regarding the diagnosed radiculopathy as preexisting the July 2002 work injury, his conclusion that the work injury caused a temporary aggravation and why appellant's ongoing condition was unrelated to or a result of the 2002 injury.²

Following the Office hearing representative's remand instructions, the Office referred appellant to Dr. Soren with a revised statement of accepted facts and additional medical reports on file. It continued to receive progress notes, physician's notes, physical therapy notes and requests for authorization.

In a November 10, 2009 report, Dr. Soren reviewed the medical record and provided new examination findings. Examination revealed no lumbar muscle spasm. While appellant walked with a cane, her gait was normal with the cane and without it. Straight leg raising on the right was normal and to 65 degrees on the left. Dr. Soren diagnosed lumbosacral sprain/strain with associated muscle spasms but noted that there was no spasm present on either of his examinations. He also diagnosed herniated lumbar disc L4-5 and lumbar radiculopathy. Dr. Soren indicated that the medical reports by two examiners which noted marked improvement in appellant's condition after her July 9, 2002 work injury indicated that there was a temporary aggravation of her preexisting lumbar disc herniation by the lumbosacral sprain/strain injury of July 9, 2002 and that she had improved. He stated that, when there is a preexisting diagnosis of a herniated disc, such as this case, it was possible for there to be specific activity induced exacerbations and remissions. Thus, Dr. Soren opined that the radiculopathy predated the July 9, 2002 work injury and was temporarily aggravated by the July 9, 2002 lumbosacral sprain/strain, which had resolved. He also stated ongoing symptomatology in the low back is not unusual when there is considerable discrepancy between the height and weight of the person, such as in appellant's case. Dr. Soren opined that the resolved lumbosacral sprain/strain related to the July 9, 2002 work injury had resolved as of the time of appellant's July 7, 2003 examination with Dr. Phillip Lewis³ which was confirmed on October 20, 2003 by Dr. Wert⁴ in that she was able to return to work full duty. He reiterated that appellant could not return to work due to her nonjob-related diagnoses of disc herniation and associated lumbar radiculopathy.

By decision dated March 18, 2010, the Office finalized the termination of appellant's medical and wage-loss benefits and denied the recurrence of disability claim. Special weight was accorded to Dr. Soren's November 10, 2009 medical opinion that there were no longer any residuals or disability referable to the July 9, 2002 work injury.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ The Office may not terminate compensation without

² The Office reinstated compensation benefits pending a final decision.

³ Dr. Lewis, an osteopath and orthopedic surgeon, conducted a second opinion examination, noted an impression of resolved lumbosacral sprain/strain and opined that no further treatment was required.

⁴ Dr. Wert diagnosed an aggravation of a preexisting lumbosacral spine injury but opined that appellant no longer had work-related disability or a need for further medical treatment.

⁵ *I.J.*, 59 ECAB 408 (2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

establishing that disability ceased or that it was no longer related to the employment.⁶ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Section 8123(a) provides that, 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.⁸ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁹

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.¹⁰ Where such clarification is required and is forthcoming, the opinion of the impartial specialist, if sufficiently well rationalized and based upon a proper factual background, is also entitled to special weight.¹¹

ANALYSIS

The Office accepted that appellant sustained employment-related muscle spasms in her back on July 9, 2002. Appellant filed a claim on March 28, 2008 for a recurrence commencing March 21, 2005. The Office found a conflict in medical opinion was created between her physician, Dr. Wilen, who opined appellant was totally disabled from the work-related injury, and the second opinion physician, Dr. Wert, who opined that she could return to full-time work with no restrictions as the injury-related conditions had resolved and there were no disabling residuals from the work injury. It referred appellant to Dr. Soren to resolve the conflict. Following a supplemental report from Dr. Soren clarifying that appellant had preexisting lumbar disc condition with radiculopathy unrelated to the July 9, 2002 work injury, the Office denied appellant's recurrence claim and terminated her entitlement to wage loss and medical benefits on March 18, 2010 on the grounds the medical evidence was insufficient to support continued work-related residuals or disability.

The Board finds that the thorough well-documented November 10, 2009 addendum report of Dr. Soren, the impartial medical specialist selected to resolve the medical conflict, is entitled to special weight. Dr. Soren reviewed appellant's complete medical history, examined

⁶ *J.M.*, 58 ECAB 478 (2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁷ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁸ 5 U.S.C. § 8123(a).

⁹ *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

¹⁰ *Harold Travis*, 30 ECAB 1071 (1979).

¹¹ *Aubrey Belnavis*, 37 ECAB 206, 212 (1985).

her for a second time and found no objective evidence of ongoing residuals or disability due to the accepted condition. He indicated that no muscle spasm was seen either in the November 10, 2009 or in the August 12, 2008 evaluation of her diagnosed lumbosacral sprain/strain with associated muscle spasms. Dr. Soren also diagnosed herniated lumbar disc L4-5 and lumbar radiculopathy, which he opined were preexisting to the July 9, 2002 work injury. He noted two medical examiners of record had noted marked improvement in appellant's condition after her July 9, 2002 work injury, which he indicated was a temporary aggravation of her preexisting lumbar disc herniation by the lumbosacral sprain/strain injury of July 9, 2002 and that she had improved. Dr. Soren explained that, when there is a preexisting diagnosis of a herniated disc, such as this case, it was possible for there to be specific activity induced exacerbations and remissions. Thus, he opined that the radiculopathy predated the July 9, 2002 work injury and was temporarily aggravated by the July 9, 2002 lumbosacral sprain/strain, which had resolved. Dr. Soren also stated as there was considerable discrepancy between appellant's height and weight, it was not unusual to have ongoing symptomatology in the low back. He opined that the lumbosacral sprain/strain related to the July 9, 2002 work injury had resolved as noted in Dr. Lewis' July 7, 2003 examination and confirmed by Dr. Wert on October 20, 2003, by the fact she was able to return to work full duty. Dr. Soren reiterated that appellant could not return to work on the basis of her nonjob-related diagnoses of disc herniation and associated lumbar radiculopathy.

The Office properly accorded special weight to the impartial medical examiner's November 10, 2009 findings. The Board finds that Dr. Soren's report is sufficiently well rationalized and based on a proper factual background and represents the weight of the medical evidence and establishes that the accepted lumbosacral sprain/strain injury of July 9, 2002 had resolved without residuals and appellant's nonjob-related diagnoses of disc herniation and associated lumbar radiculopathy had preexisted the July 9, 2002 work injury. Dr. Soren fully discussed the history of injury and explained that there were no objective findings to support that appellant had any continuing employment-related residuals or disability. He further provided rationale support by the medical record that appellant's radiculopathy condition preexisted the July 9, 2002 work injury. The Board finds that Dr. Soren's opinion is detailed, well rationalized and based upon a complete and accurate history and therefore represents the weight of the medical evidence. Accordingly, the Office met its burden of proof to terminate compensation.

The Board also notes that, as Dr. Soren found that appellant's work-related condition had resolved by October 2003, the evidence is insufficient to establish a recurrence of disability beginning March 21, 2005.¹² Dr. Soren found no basis on which to attribute appellant's disability to her accepted condition.

¹² See 20 C.F.R. § 10.5(x). A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations. In this case, there also is no evidence appellant's light duty was withdrawn.

On appeal, counsel for appellant contends that the supplemental report of Dr. Soren is vague and speculative and fails to provide an objective basis for his opinion that the radiculopathy preceded the July 9, 2002 work injury or explain why there is no evidence of radiculopathy prior thereto. He contends that Drs. Wilen and Branda give rationale supported by objective findings as to the herniated disc problem being present before July 9, 2002 but asymptomatic, *i.e.*, without radiculopathy, until the July 9, 2002 incident that caused the symptoms and radiculopathy. The Board notes that it was on the basis of Dr. Branda's report that the Office hearing representative remanded the case for a clarification report from Dr. Soren, who provided reasoning for his opinion addressing this matter while Dr. Branda's report is of limited probative value as it provided insufficient medical rationale in support of its conclusions.¹³ Dr. Wilen's opinion is insufficient as he was on one side of a conflict that was resolved by Dr. Soren.¹⁴ The Board finds that Dr. Soren's November 10, 2009 supplemental report establishes that the radiculopathy preexisted the July 9, 2002 work injury.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

¹³ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹⁴ See *I.J.*, 59 ECAB 408 (2008) (reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated March 18, 2010 is affirmed.

Issued: June 13, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board