

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

L.S., Appellant

and

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Las Vegas, NV, Employer**

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**Docket No. 10-2020
Issued: June 3, 2011**

Appearances:

*Alan J. Shapiro, 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 August 3, 2010 appellant's counsel timely appealed the July 6, 2010 merit decision of the Office of Workers' Compensation Programs, which affirmed the termination of compensation and medical 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 case.²

¹ 5 U.S.C. §§ 8101-8193 (2006).

² The record on appeal contains evidence received after the Office issued its July 6, 2010 decision. The Board is precluded from considering evidence that was not in the case record at the time the Office rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2010).

ISSUE

The issue is whether the Office properly affirmed the termination of appellant's income and medical benefits because her accepted employment injury had resolved as of September 30, 2008.

FACTUAL HISTORY

Appellant, a 53-year-old supervisory transportation security officer, sustained an injury in the performance of duty on March 31, 2008 while moving stanchions. She reported experiencing severe pain in both shoulders and in her lower back. Appellant was off work for approximately three weeks following her injury.³ After initially denying the claim, the Office accepted the March 31, 2008 employment injury for neck, lumbar and thoracic sprains, left shoulder acromioclavicular and supraspinatus sprains and temporary aggravation of degenerative cervical and lumbar intervertebral discs. The January 6, 2010 decision accepting appellant's claim also found that the above-noted conditions had resolved as of September 30, 2008, six months after the date of injury.

The Office based its decision on the July 28, 2009 report of Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and Office referral physician, who found that the March 31, 2008 employment injury consisted of a soft tissue strain of the cervicothoracic and lumbar regions, in addition to a left shoulder strain. Dr. Swartz reported evidence of underlying disc degeneration at L4-S1 with mild central disc protrusions. He also noted evidence of degenerative changes in the left shoulder and cervical spine.⁴ Dr. Swartz indicated that the March 31, 2008 employment injury caused only a temporary aggravation of appellant's underlying cervical, lumbar and left shoulder degenerative conditions. There was no evidence of any permanent changes referable to the March 31, 2008 injury, and Dr. Swartz surmised that the temporary aggravation would not have been expected to continue longer than approximately six months from the date of injury. Dr. Swartz explained that his physical examination revealed no valid findings or residuals referable to the March 31, 2008 injury. Many of appellant's responses on physical examination were either of questionable validity or medically invalid. Dr. Swartz indicated that appellant's prognosis with respect to her actual injuries was favorable. However, appellant's prognosis with respect to observed chronic pain behavior was less favorable.⁵ Dr. Swartz found that appellant's employment-related total disability ceased as of April 24, 2008, and she was currently capable of performing her usual job.⁶

³ Appellant accepted a limited-duty assignment effective April 24, 2008.

⁴ Appellant had a prior history of multilevel cervical disc herniation for which she underwent surgery on March 6, 2007.

⁵ Appellant's then-current prescription pain medications included morphine and Oxycodone. Dr. Swartz stated there was no indication for either of these two different types of higher risk narcotics.

⁶ Dr. Swartz imposed a 35- to 40-pound weight restriction with respect to pushing, pulling and lifting. However, he did not attribute these particular limitations to appellant's March 31, 2008 accepted employment injury.

Appellant's treating physicians, including Dr. Jeremy M. Lipshutz, continued to diagnose lumbar disc disorder and restricted her to limited-duty work on the premise that performing her normal duties would aggravate her condition and increase appellant's pain.⁷ In a July 27, 2009 report, Dr. Lipshutz indicated that he had been seeing appellant since March 31, 2008 when she injured herself moving stanchions. He noted that appellant injured her lower back and bilateral shoulders, right greater than left. Dr. Lipshutz also noted a previous back injury that was asymptomatic prior to March 31, 2008. An April 2, 2008 lumbar magnetic resonance imaging (MRI) scan revealed early disc degeneration, which Dr. Lipshutz explained was fairly typical for someone appellant's age. Dr. Lipshutz also noted that the MRI scan showed a central disc herniation at L4-5 and L5-S1, which "could" be a result of appellant's injury. He reported other MRI scan findings relative to appellant's hips and right shoulder which were either "consistent with" or "most likely" related to her injuries. Dr. Lipshutz concluded that, based on history, physical and imaging studies, appellant's condition was consistent with the injury she described on March 31, 2008.

Dr. John S. Thalgott, a Board-certified orthopedic surgeon, examined appellant on March 9, 2010 and reviewed an almost two-year-old lumbar MRI scan. He diagnosed internal disc disruption at L5-S1, with bilateral radicular complaints. Dr. Thalgott proposed surgical intervention. Although he characterized appellant's condition as having occurred on a "traumatic basis," he did not identify a specific date of injury or describe a particular mechanism of injury.

In an April 8, 2010 report, Dr. Thalgott commented on Dr. Swartz's opinion. He noted that Dr. Swartz clearly and correctly pointed out that a sprain/strain should last a maximum of six months. However, appellant's symptoms had unfortunately endured for two years and were much more severe than a sprain/strain. Dr. Thalgott found appellant's symptoms much more compatible with a diagnosis of internal disc disruption superimposed on an age-appropriate lumbar degenerative condition. He recommended a discography at L5-S1 to assist in the diagnosis and determination of the particular symptomatic segment of the lumbar spine. Dr. Thalgott reiterated that appellant's symptoms and duration were incompatible with a simple sprain/strain of the lumbar spine. He noted that appellant's preexisting degenerative disease was asymptomatic prior to the March 31, 2008 industrial accident. Dr. Thalgott did not otherwise describe the purported mechanism of injury.

By decision dated July 6, 2010, the Branch of Hearings & Review affirmed the Office's January 6, 2010 decision.

LEGAL PRECEDENT

Where the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁸ Having determined that an employee has a disability

⁷ Appellant was regularly seen at the Las Vegas Pain Institute & Medical Center. In addition to Dr. Lipshutz, her physicians included Dr. Daniel E. Fabito, Dr. Godwin O. Maduka, Dr. Brian T. Le and Dr. Sudhir S. Khemka, all of whom are Board-certified anesthesiologists specializing in pain medicine.

⁸ *Curtis Hall*, 45 ECAB 316 (1994).

causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has either ceased or that it is no longer related to the employment.⁹ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.¹⁰ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹¹ Once it has properly modified or terminated benefits, the burden of reinstating benefits shifts to the employee.¹²

ANALYSIS

Based on Dr. Swartz's July 28, 2009 examination findings, the Office accepted appellant's claim for neck, lumbar and thoracic sprains, left shoulder acromioclavicular and supraspinatus sprains, and temporary aggravation of degenerative cervical and lumbar intervertebral discs. It also relied upon Dr. Swartz's opinion as a basis for finding as of September 30, 2008, appellant no longer had any residuals of her accepted March 31, 2008 employment injury. Dr. Swartz explained that appellant's March 31, 2008 injury consisted of a soft tissue strain of the cervicothoracic and lumbar regions, in addition to a left shoulder strain. There was also evidence of preexisting degenerative changes in the lumbar spine, left shoulder and cervical spine. Dr. Swartz indicated that appellant's March 31, 2008 injury caused only a temporary aggravation of her underlying cervical, lumbar and left shoulder degenerative conditions. He found no evidence of any permanent changes referable to the March 31, 2008 injury. Moreover, Dr. Swartz explained that the temporary aggravation would not have been expected to continue longer than approximately six months from the date of injury. His physical examination revealed no valid findings or residuals referable to the March 31, 2008 injury. Dr. Swartz characterized appellant's responses on physical examination as either of questionable validity or medically invalid. According to him, appellant's employment-related total disability ceased as of April 24, 2008 and her accepted conditions did not currently preclude her from performing her usual job.

Dr. Lipshutz and his colleagues continued to diagnose lumbar disc disorder. They also restricted appellant to limited-duty work because performing her normal duties would aggravate her low back condition. In his July 27, 2009 report, Dr. Lipshutz indicated that appellant's lumbar disc herniations "could" be a result of her injury. Then, without further explanation, he stated that appellant's condition was consistent with the injury she described on March 31, 2008. Neither Dr. Lipshutz nor his colleagues have adequately explained how appellant's ongoing lumbar complaints are causally related to her accepted employment injury. Disc herniations at L4-5 and L5-S1 have not been accepted as arising from appellant's March 31, 2008 employment

⁹ *Jason C. Armstrong*, 40 ECAB 907 (1989).

¹⁰ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

¹¹ *Calvin S. Mays*, 39 ECAB 993 (1988).

¹² *Joseph A. Brown Jr.*, 55 ECAB 542, 544 n. 5 (2004).

injury. With respect to her low back, the Office only accepted lumbar sprain and temporary aggravation of degenerative lumbar intervertebral disc.¹³

Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury.¹⁴ The mere fact that appellant's preexisting degenerative condition was asymptomatic prior to the March 31, 2008 employment injury does not establish that her reported symptoms some two years post injury are causally related. Moreover, Dr. Swartz was not entirely convinced that appellant's reported symptoms and her responses on physical examination were entirely genuine or medically valid. The Board finds that the Office properly determined that appellant's accepted conditions had resolved as of September 30, 2008 based on Dr. Swartz's opinion.

Once the Office has properly modified or terminated benefits, the burden of reinstating benefits shifts to the employee.¹⁵ Dr. Thalgott's March 9 and April 8, 2010 reports do not establish that appellant's lumbar internal disc disruption is causally related to her March 31, 2008 employment injury. He noted that appellant was asymptomatic prior to her March 31, 2008 industrial accident. Again, a temporal relationship alone will not suffice for purposes of establishing causal relationship. Furthermore, Dr. Thalgott did not identify a specific mechanism of injury. Consequently, his report does not appear to have been based on a complete factual background. Appellant has not established that she has any continuing employment-related residuals on or after September 30, 2008.

CONCLUSION

The Office properly terminated medical benefits and entitlement to future wage-loss compensation effective September 30, 2008.

¹³ There appears not to be any disagreement with respect to the resolution of appellant's left shoulder, cervical and thoracic conditions.

¹⁴ *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004). Causal relationship is a medical question, which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factors must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factors. *Id.*

¹⁵ *Joseph A. Brown Jr.*, 55 ECAB 542, 544 n. 5 (2004).

ORDER

IT IS HEREBY ORDERED THAT the July 6, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 3, 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