United States Department of Labor
Employees' Compensation Appeals Board

W.O, Appellant	)	
and	)	**Docket No. 06-1973**
	)	**Issued: March 22, 2007**
U.S. POSTAL SERVICE, POST OFFICE, Las Cruces, NM, Employer	)	

Appearances:
Eugene McGuire, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 23, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs decisions dated March 10 and May 19, 2006. The March 10, 2006 decision was on the merits of the claim and 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 appellant established entitlement to continuing medical benefits after September 2, 2003; and (2) whether the Office properly determined that appellant's request for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

The case was before the Board on a prior appeal.[1] By decision dated January 12, 2005, the Board affirmed a September 2, 2003 decision terminating medical benefits. The Board found

[1] Docket No. 04-1553 (issued January 12, 2005).

that the weight of the evidence was represented by Dr. Robert Price, a neurologist, selected as a second opinion examiner. Appellant submitted a report from Dr. James Thomas, Jr., an orthopedic surgeon and the Office found a conflict in medical opinion was created. It referred appellant to Dr. David Schenkar, a Board-certified orthopedic surgeon, to resolve the conflict. The Board found that Dr. Schenkar was not provided a complete statement of accepted facts and failed to provide a rationalized medical opinion. A February 23, 2004 decision was set aside and the case remanded for further development. The history of the case is provided in the Board's January 12, 2005 decision and is incorporated herein by reference.

On remand, the Office prepared a statement of accepted facts and referred the case to Drs. William T. Thieme, a Board-certified orthopedic surgeon, and Richard E. Marks, a Board-certified neurologist. In a report dated July 14, 2005, Dr. Thieme provided a history and results on examination. He opined:

> "The cervical sprain, lumbar sprain, left shoulder sprain and left hip sprain were more probably than not resolved by the date of examination by Dr. Price on [March 25, 2002]."
>
> * * *
>
> "I believe all the accepted conditions have resolved. [Appellant's] work-related acute lumbar sprain is probable an aggravation of the preexisting chronic, recurrent low back pain and sciatica. This aggravation was temporary only. [Appellant's] current symptoms in the area relating to the accepted injuries were more probably than not the consequence of symptom magnification and do not correspond to any objective findings on examination."

Dr. Thieme concluded that there were no objective residuals of the work-related injuries.

In a report dated January 9, 2006, Dr. Marks provided a history and results on examination. With respect to the accepted head injuries, he indicated that it was likely appellant experienced symptoms consistent with postconcussion syndrome and one would expect the symptoms to resolve approximately three months following the injury. Dr. Marks stated:

> "Although [appellant] currently indicates [that] he is still having difficulties with his memory, it more-probable-than-not basis that such complaints can be related to any residual "brain damage" that occurred as a result of the injury in question. As noted above, it is likely [appellant's] concussion resolved by approximately three months following the slip and fall. In my opinion, therefore, from a neurologic view point, the patient's concussion likely resolved long before September 2, 2003."

Dr. Marks opined that there were no objective neurologic findings referable to the January 4, 1995 injury. He noted no objective evidence for cervical or lumbosacral radiculopathy. Dr. Marks also suggested that appellant may have a peripheral neuropathy likely related to diabetes and appellant had evidence of carpal tunnel syndrome, but in the absence of wrist trauma, it was unlikely the carpal tunnel was related to the employment injury.

By letter dated February 7, 2006, the Office notified appellant that it proposed to terminate medical benefits on the grounds that the medical evidence established residuals had ceased. In a decision dated March 10, 2006, the Office terminated medical benefits and compensation for wage loss.

Appellant requested reconsideration by letter dated May 7, 2006. He argued the medical evidence was not sufficient to terminate medical benefits. In a decision dated May 19, 2006, the Office determined that the request for reconsideration was not sufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative and substantial evidence that he had an employment-related condition, which continued after termination of compensation benefits.[2]

It is well established that when a case is referred to a referee examiner for the purpose of resolving a conflict,[3] the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[4]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained strains of her cervical and lumbar spine, left shoulder and left hip, as well as a head concussion and postconcussion syndrome, when he fell in the performance of duty on January 4, 1995. To resolve the conflict in the medical evidence regarding the accepted strains, appellant was referred to Dr. Thieme who provided an opinion that the accepted orthopedic conditions had resolved. Dr. Thieme noted the lack of objective findings and he based his opinion on a complete factual and medical background. As noted above, a rationalized opinion from a physician selected as a referee examiner is entitled to special weight. The Board finds Dr. Theime's opinion is entitled to special weight in this case.

With respect to the head contusion and postconcussion syndrome, Dr. Marks opined that these conditions had resolved. He noted that one would expect postconcussion symptoms to resolve in approximately three months. Dr. Marks also supported his opinion by noting the lack of objective findings and his opinion was based on a complete background. In addition, he indicated that he did not see any evidence of cervical or lumbosacral radiculopathy and the conditions of a peripheral neuropathy and carpal tunnel syndrome were not related to the

[2] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

[3] 5 U.S.C. § 8123 provides if there is a disagreement between a physician making the examination for the United States and a physician of the employee, a third physician shall be appointed by the Secretary. 20 C.F.R. § 10.321 states this is called a referee examination and the Office will select a physician qualified in the appropriate specialty who has no prior connection with the case.

[4] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

employment injury. Dr. Marks' opinion, as a referee examiner, is entitled to special weight and represents the weight of the evidence.

The weight of the medical evidence, therefore, indicated that appellant did not have any employment-related conditions after September 2, 2003. The Office properly determined that appellant was not entitled to continuing medical benefits after September 2, 2003.[5]

LEGAL PRECEDENT -- ISSUE 2

The Federal Employees' Compensation Act provides that the Office may review an award for or against compensation upon application by an employee (or his or her representative) who receives an adverse decision. The employee shall exercise this right through a request to the district office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."[6]

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[7]

A timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[8]

[5] The March 10, 2006 decision terminated compensation for wage loss as well. There is no indication that appellant was receiving compensation for wage loss. As the Board noted in its prior decision, the evidence indicated that appellant was receiving Office of Personal Management benefits.

[6] 20 C.F.R. § 10.605 (1999).

[7] *Id*. at § 10.606.

[8] *Id*. at § 10.608.

ANALYSIS -- ISSUE 2

Appellant did not submit any additional evidence on reconsideration. He argued that the evidence from Drs. Thieme and Marks were of diminished probative value, but as noted above, the reports were rationalized medical evidence based on a complete background. Appellant appeared to argue that Dr. Thieme gave unfounded weight to Dr. Schenkar's report. Dr. Thieme briefly mentioned Dr. Schenkar's report in his review of the evidence and there is no evidence of error in this regard.[9] Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit relevant and pertinent new evidence not previously considered by the Office.

Since appellant did not meet any of the requirements of section 10.606, he is not entitled to merit review of the claim. The Office properly denied the application for reconsideration without merit review of the claim

CONCLUSION

The conflict in the medical evidence was properly resolved by Drs. Thieme and Marks. On reconsideration, appellant did not meet any of the requirements of 20 C.F.R. § 10.606.

[9] Although Dr. Schenkar's report was found not to provide a rationalized medical opinion, it remains part of the medical record. Medical reports may be excluded from the record under certain circumstances not applicable in this case, such as a physician selected as a referee examiner who regularly performs fitness-for-duty examinations for the employing establishment. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13 (November 1996).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 19 and March 10, 2006 are affirmed.

Issued: March 22, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board