United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 08-811**
	)	**Issued: August 21, 2008**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Newark, NJ, Employer	)	

Appearances:
James D. Muirhead, Esq., 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On September 25, 2007 appellant filed a timely appeal from an October 25, 2007 merit decision of the Office of Workers' Compensation Programs terminating authorization for compensation and medical benefits and a January 11, 2008 decision denying her request for reconsideration. 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 the Office has met its burden of proof to terminate appellant's entitlement to compensation and medical benefits effective October 25, 2007, on the grounds that her accepted lumbar strain/sprain and right knee ligament tear conditions had resolved; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 23, 2005 appellant, a 42-year-old transportation security officer, sustained an injury to her back and right knee while walking under a baggage belt. Her claim was accepted for lumbar sprain/strain and right knee ligament tear and she was placed on the periodic rolls.[1]

In a report dated February 16, 2006, Dr. Jonathan H. Lustgarten, a Board-certified neurological surgeon, diagnosed lumbar strain and sprain, noting that appellant had experienced chronic back pain since her work-related accident. On February 27, 2006 Dr. Bernard P. Murphy, a Board-certified orthopedic surgeon, diagnosed lumbosacral sprain and right knee sprain, with a tear of the posterior horn of the medial meniscus. He opined that she needed lower back support and recommended work restrictions which precluded heavy lifting of luggage.

The Office referred appellant to Dr. I. Ahmad, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion as to whether she had any continuing residuals or disability related to her accepted injury. In a report dated August 29, 2006, Dr. Ahmad opined that appellant's work-related condition had resolved. He diagnosed lumbar sprain; right knee sprain; and preexisting degenerative changes and arthritis of the right knee and of the lumbar spine. Dr. Ahmad opined that appellant was able to work full time and that there was no need for further treatment, therapy, tests, injections or surgery. In a letter dated October 30, 2006, James Muirhead informed the Office that he represented appellant in her claim before the Office and requested a copy of the entire case file. The record contains a copy of an agreement dated May 8, 2006, received by the Office on November 6, 2006, wherein appellant authorized Mr. Muirhead to represent her in her traumatic injury claim. On January 4, 2007 it forwarded a copy of the entire case file to appellant's representative.

The Office found a conflict in medical opinion between appellant's treating physicians and its second opinion physician. By letter dated February 1, 2007, it informed appellant that she was being referred to Dr. Robert Dennis, a Board-certified orthopedic surgeon, in order to resolve the conflict. The record does not reflect that a copy of the Office's February 1, 2007 letter was sent to appellant's representative. On February 20, 2007 appellant was examined by Dr. Dennis. In a report of that date, Dr. Dennis opined that appellant had fully recovered from her accepted conditions and was able to return to full-time unrestricted employment. In a letter dated August 14, 2007, appellant's representative objected to the referee examination, stating that the Office had not notified him of the examination and that he was not aware that the examination had occurred until August 6, 2007.

On August 28, 2007 the Office issued a notice of proposed termination of compensation and medical benefits, based on Dr. Dennis' February 20, 2007 report, which represented the weight of the medical evidence. Appellant was advised to submit additional evidence or argument within 30 days. On September 11, 2007 her representative objected to the proposed termination, contending that the recommendation to terminate benefits was improperly based on

[1] The Office's October 25, 2007 decision reflects that appellant returned to full-time employment on March 5, 2000 and was therefore not in receipt of compensation benefits when her benefits were terminated by the Office on October 25, 2007.

Dr. Dennis' examination, of which he was not notified. On October 25, 2007 the Office finalized appellant's compensation and medical benefits effective that date.

On December 17, 2007 appellant, through her representative, requested reconsideration of the Office's October 25, 2007 decision. In support of the request, she submitted a December 2, 2007 report from Dr. Nasser Ani, a Board-certified orthopedic surgeon, who opined that she suffered from work-related degenerative disc disease of the lumbar spine. By decision dated January 11, 2008, the Office denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant merit review.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[2] It may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[5] 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.[6]

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part 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.[7] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[8]

The Office procedure manual provides that, once it has been determined that an impartial medical examination is necessary in order to resolve a conflict, the Office's medical management assistant will contact the physician directly and make the appointment for examination, then notify the claimant and her representative of the existence of a conflict; the name and address of the physician; any request(s) to forward x-rays, electrocardiograms, etc. to the specialist; copies

[2] *See Beverly Grimes*, 54 ECAB 543 (2003).

[3] *Id.*

[4] *James M. Frasher*, 53 ECAB 794 (2002).

[5] *See Beverly Grimes*, *supra* note 2. *See also Franklin D. Haislah*, 52 ECAB 457 (2001).

[6] *See Beverly Grimes*, *supra* note 2.

[7] 5 U.S.C. § 8123(a).

[8] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

of Forms SF-1012, SF-1012A and instructional Form CA-77 to claim travel expenses; and a warning that benefits may be suspended for failure to report for examination.[9]

Office regulations provide that a properly appointed representative who is recognized by the Office may make a request or give direction to the Office regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on the facts or the law and obtaining information from the case file, to the same extent as the claimant.[10] Any notice requirement contained in the regulations or the Act[11] is fully satisfied if served on the representative and has the same force and effect as if sent to the claimant.[12] The Board has held that decisions under the Act are not deemed to have been properly issued unless both appellant and the authorized representative have been sent copies of the decision.[13]

ANALYSIS

The Board finds that the Office has not met its burden of proof to terminate appellant's compensation and medical benefits on the ground that her accepted back and knee conditions had resolved by October 25, 2007. Appellant's claim was accepted for a lumbar sprain/strain and right knee ligament tear. The Office determined that a conflict existed between appellant's treating physicians, Dr. Lustgarten and Dr. Murphy, and the second opinion physician, Dr. Ahmad, regarding the nature and extent of her employment-related condition and disability. The Office referred appellant to Dr. Dennis for resolution of the conflict. Based on Dr. Dennis' opinion, the Office terminated appellant's entitlement to compensation benefits and medical treatment. However, the Office failed to follow its own procedures in selecting the impartial medical examiner. Therefore, Dr. Dennis cannot serve as an impartial medical examiner.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(d).

[10] 20 C.F.R. § 10.700(c).

[11] 5 U.S.C. §§ 8101-8193.

[12] 20 C.F.R. § 10.700 (c); *see also Sara K. Pearce*, 51 ECAB 517, 518 (2000).

[13] *See Travis L. Chambers*, 55 ECAB 138 (2003) (holding that 20 C.F.R. § 10.127 requires that a copy of an Office decision be sent to the authorized representative and that any other interpretation of the language of the regulation would be inconsistent with the clear language of its initial provisions). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Communications*, Chapter 2.300.4e (February 2000) (where the employee has an attorney or other legal representative, the original of any letter to the claimant should be sent to that person, with a copy to the claimant). Similarly, *see* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Development of Claims*, Chapter 2.800.3c(1) (April 1993) (the Office must provide information about procedures involved in establishing a claim, including detailed instructions for developing the required evidence to all interested parties the claimant, the employing establishment and the representative, if any); *Sara K. Pearce*, *supra* note 12 at 518-19 (holding that failure to notify appellant's authorized representative effectively denied appellant the opportunity to have [the representative] assist her in remedying the deficiencies of her claim and the full opportunity to exercise her appeal rights in a timely fashion); and *Thomas H. Harris*, 39 ECAB 899, 899-900 (1988).

well rationalized and based upon a proper factual background, is entitled to special weight.[14] Owing to the special weight accorded to these opinions, the Office's procedure manual sets out certain specific requirements.

The Office's procedure manual provides, in pertinent part, that when an employee is referred for a referee (impartial) medical examination pursuant to section 8123(a) of the Act, the following specific information must be provided to the claimant and to the claimant's representative:

> "Information [s]ent to [c]laimant: The [Office] will contact the physician directly and make an appointment for examination, then notify the claimant and representative of the following --
>
> > (1) The existence of a conflict in the medical evidence and the specific nature of the conflict. Notification that the examination is being arranged under the provisions of 5 U.S.C. § 8123 will give the claimant an opportunity to raise any objection to the selected physician prior to examination.
> >
> > (2) The name and address of the physician to whom claimant is being referred as well as the date and time of the appointment."[15]

In this case, the Office failed to notify appellant's representative that a conflict had been created or of the selection of the impartial medical examiner. Consequently, he was deprived of the opportunity to participate in the selection process or to present any objections to the selection of Dr. Dennis.[16] The record reflects that Mr. Muirhead was properly authorized to represent appellant in this claim and that the Office recognized his representation, as evidenced by the fact that the Office sent a copy of the entire case file to him on January 4, 2007. The Office was required to notify appellant's representative of the selection of Dr. Dennis as the impartial medical examiner.[17] However, although appellant was notified of and attended, the February 20, 2007 examination, her representative was not notified of the examination and did not become aware of it until several months after it occurred. Accordingly, Dr. Dennis cannot serve as an

[14] *Aubrey Belnavis*, 37 ECAB 206, 212 (1985). 5 U.S.C. § 8123(a) states, in pertinent part "[i]f there is a 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." *See, e.g., William C. Bush*, *supra* note 8.

[15] Federal (FECA) Procedure Manual, *supra* note 9.

[16] *See Sara K. Pearce*, *supra* note 12.

[17] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(d). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Communications*, Chapter 2.300.4e (February 2000) (where the employee has an attorney or other legal representative, the original of any letter to the claimant should be sent to that person, with a copy to the claimant).

impartial medical examiner.[18] The Board finds that there remains an unresolved conflict in the medical evidence. In view of the foregoing, the Office has not met its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that the Office has not met its burden of proof to terminate appellant's entitlement to compensation and medical benefits.[19]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 25, 2007 is reversed.

Issued: August 21, 2008
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

[18] *See Henry J. Smith, Jr*., 43 ECAB 524 (1992) (where appellant was not notified of the selection of the impartial medical examiner, the physician could not serve as the impartial medical examiner in the case). *Cf E.S.*, Docket No. 07-2253, issued February 12, 2008 (Where a decision of an Office hearing representative found that a conflict existed in the medical evidence which required referral of appellant to an impartial medical specialist, appellant and her representative were adequately appraised of the decision to refer appellant for an impartial medical examination).

[19] Given the Board's finding as to the first issue, the second issue is moot.