United States Department of Labor
Employees' Compensation Appeals Board

W.T., Appellant	)	
and	)	**Docket No. 08-812**
	)	**Issued: April 3, 2009**
DEPARTMENT OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, Hindman, KY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 23, 2008 appellant filed a timely appeal from an Office of Workers' Compensation Programs' merit decision dated November 20, 2007. 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 met its burden to terminate compensation benefits as of November 25, 2007; and (2) whether the Office abused its discretion by denying appellant authorization for L5-S1 lumbar microdiscectomy surgery.

FACTUAL HISTORY

On February 10, 1986 appellant, a 38-year-old mine inspector, injured his lower back while crawling through a coal shaft. He filed a claim for benefits on February 13, 1986, which the Office accepted for lumbar strain and herniated disc at L4-5 with radiculopathy. Appellant returned to work as a clerk on October 18, 1992. The Office commenced payment for partial

disability compensation. Appellant obtained employment as a mine safety specialist on August 11, 2002.

In progress notes dated April 11 and 25, 2007, Dr. John Pellegrini, a Board-certified surgeon, noted that appellant had lower back pain syndrome, degenerative disc syndrome and sciatica and "bloated" discs. He scheduled appellant to undergo a magnetic resonance imaging (MRI) scan of the lumbar spine on April 30, 2007. The MRI scan results indicated mild degenerative disc disease at L1-2 and L4-5 with a moderate annular disc bulge and a small focal central disc protrusion and a mild annular disc bulge and a moderate size left-sided disc herniation at L5-S1. Dr. Pellegrini reiterated these findings in a May 7, 2007 progress note and referred appellant for a neurological examination with Dr. Phillip A. Tibbs, Board-certified in neurosurgery.

In a June 13, 2007 report, Dr. Tibbs noted that appellant underwent a myelogram in July 1986 which showed a herniated nucleus pulposus at L4-5; an epidural steroid block was administered and appellant's condition improved. He related, however, that appellant had recently experienced increasing episodes in which his low back pain exacerbated, which caused him to take off numerous work days.[1] Dr. Tibbs related that appellant had pain radiating to the left back into his abdomen and leg which worsens with activity and walking. He stated that the pain was beginning to interfere with work and his quality of life. Dr. Tibbs noted that the April 30, 2007 lumbar MRI scans showed a left L5-S1 herniated nucleus pulposus. He stated:

> "We believe that [appellant's] current herniation is a direct result of his documented work injury from 1986, that has continued to progress. He has obviously tried conservative measures and he has exhausted these. We are currently recommending a left L5-S1 lumbar microdiscectomy."

On June 22, 2007 Dr. Tibbs requested authorization for surgery to repair appellant's herniated disc at L5-S1. The surgery was proposed for July 7, 2007.

On July 2, 2007 appellant filed a Form CA-7 claim for compensation for wage loss based on total disability for the period July 3 to August 4, 2007. In a July 2, 2007 form report, Dr. Pellegrini outlined restrictions of no more than three to four hours of sitting, walking, lifting and standing and prohibited bending, squatting, climbing, kneeling or twisting. He also restricted appellant from lifting more than 20 to 50 pounds. Dr. Pellegrini opined that appellant required microdiscectomy excision surgery and rehabilitation, after which he could return to work in three or four months. He advised that if appellant did not have the recommended surgery he would be totally disabled from his usual job.

[1] In a May 4, 2007 interoffice memorandum, the Office noted that appellant did not have to file a claim for recurrence of disability in this case, as part of its review would encompass a consideration of whether his surgery was connected to the original injury.

In a report dated July 16, 2007, an Office medical adviser reviewed the medical record and recommended that the Office deny authorization for the requested left L5-S1 lumbar microdiscectomy surgery. He stated:

> "The L5-S1 disc lesion is not a consequential condition due to the L4-L5 lesion -- one level below the level accepted. The disc lesion at L5-S1 is not caused by causation, aggravation or precipitation from the lesion at L4-L5. The originally treated lesion would put much more mechanical stress and wear and tear demands on the level above L4-L5, not the level below. [Appellant's] request for surgical treatment at the L5-S1 level cannot be authorized by [the Office]."

In a July 25, 2007 report, Dr. Pellegrini responded to the Office medical adviser's denial of authorization of the requested left L5-S1 lumbar microdiscectomy surgery. He stated:

> "[Appellant] is not vocationally rehabilitated! He needs a repair of *herniated disc* proven by MRI scan and agreed to by a certified neurosurgeon.... [Emphasis in original]. He has a severe limp, is in chronic pain and experiences [decreased] mobility and range of motion of his back and hips due to [pain] from a herniated disc. The condition is progressive and needs surgical relief to prevent worsening, allow proper rehabilitation and to prevent him from requiring total disability to live with this infirmity, dating from an original 1986 injury. Walking and sitting are impacted negatively by his ... condition."

Dr. Pellegrini also submitted a July 25, 2007 progress note in which he reiterated his previous findings of lower back pain syndrome, severe lower back pain and degenerative disc disease syndrome.

In order to determine appellant's current condition and to determine whether the proposed lumbar surgery was related to his accepted condition, the Office referred appellant to Dr. Richard T. Sheridan, Board-certified in orthopedic surgery, for a second opinion examination. In an August 22, 2007 report, Dr. Sheridan stated:

> "My diagnosis of [appellant's] lumbar condition as it relates to the work injury is resolved lumbar strain and resolved L4-5 radiculopathy. The lumbar dis[c]ectomy proposed by Dr. Tibbs at L5-S1 is not the result of the February 10, 1986 injury. [Appellant] had a lumbar myelogram on July 9, 1986 which did not show a herniated disc at L5-Sl. As a matter of fact it was deemed normal. In my opinion the L5-S1 dis[c]ectomy is due to something that has occurred since, either in reference to trauma or the natural aging process or some combination of both since the work event in 1986.
>
> "I believe the surgical procedure proposed by the treating physician would be appropriate because he has signs of a left S1 radiculopathy. The operative intervention would likely accomplish, cure, give relief and/or reduce the degree of the period of disability or aid in lessening the amount of the monthly compensation. [Appellant] has indications of a S1 radiculopathy on the left. There is a herniated disc seen on the MRI [scan] of April 30, 2007 and I think an

> L5-S1 dis[c]ectomy would likely cure or give relief and reduce the degree or the period of disability and aid in lessening the amount of the monthly compensation."
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> In a report dated September 18, 2007, Dr. Sheridan stated:
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> "There were no objective findings on my physica1 exam[ination] of August 22, 2007 to indicate that the accepted L4-5 herniated disc is still active. There are no signs of ES hypesthesia. There is no evidence of L5 innervated muscle weakness. I do believe the accepted condition of L4-5 herniated disc has resolved."

In a notice of proposed termination dated October 3, 2007, the Office, based on Dr. Sheridan's referral opinion, found that the weight of the medical evidence demonstrated that appellant was no longer disabled and no longer had residuals due to his accepted 1986 employment injury.

Appellant contested the proposed termination and submitted an October 17, 2007 progress report from Dr. Pellegrini, who opined that appellant had a disc "fragment" in the L4-5 area since 1986, which was work related. Dr. Pellegrini stated that the present disc "fragment" appellant had "may" be at the L4-5 level, not the L5-S1 level as indicated, though he needed to confirm this through x-rays. In a November 14, 2007 progress report, he indicated that, since he was unable to locate the x-rays verifying that appellant's disc "fragment" was presently lodged at the L4-5 level, he was unable to ascertain the opinion he expressed in his October 17, 2007 report.

By decision dated November 20, 2007, the Office terminated appellant's compensation. It found that appellant had no continuing disability or residuals stemming from his accepted 1986 work injury and that Dr. Sheridan's referral opinion represented the weight of the medical evidence. The Office also denied authorization for the L5-S1 lumbar microdiscectomy surgery, finding again that Dr. Sheridan's referral opinion represented the weight of the medical evidence. It determined that the recommended surgical intervention was not related to a work-related condition.

LEGAL PRECEDENT -- ISSUE 1

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] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3]

[2] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[3] *Id.*

ANALYSIS -- ISSUE 1

In this case, the Office based its decision to terminate appellant's compensation on the May 29, 2006 report of Dr. Sheridan, its referral physician, who found that appellant's accepted conditions of lumbar strain, L4-5 herniated disc and L4-5 radiculopathy had resolved. Dr. Sheridan noted no objective findings in his August 22, 2007 examination, which indicated that appellant had any residuals from the accepted L4-5 herniated disc. He advised that the L5-S1 herniated disc, shown by MRI scan, was attributable to something that has occurred since the 1986 work injury, either through trauma, the natural aging process or a combination of both.

The Board finds that the Office properly found that Dr. Sheridan's referral opinion represented the weight of the medical evidence and negated a causal relationship between appellant's current condition and his accepted lumbar strain, L4-5 herniated disc and L4-5 radiculopathy conditions. Appellant submitted Dr. Tibbs' June 2007 report and numerous reports from Dr. Pellegrini indicating that he had recently experienced an increase in lower back pain and had a herniated disc at L5-S1 as shown by April 2007 MRI scan. These physicians advised that appellant required surgery; Dr. Pellegrini opined that appellant needed to ameliorate this condition if he wished to continue working at his usual job and avoid being totally disabled. However, appellant's current L5-S1 herniated disc has not been accepted as causally related to the accepted 1986 employment injury. Dr. Pellegrini indicated in his October 17, 2007 report that appellant might have a disc "fragment" which was actually located at the L4-5 level, as opposed to the L5-S1 level, since 1986, when he first injured his lumbar spine. However, he subsequently noted that he was unable to verify this supposition by x-ray.[4] Dr. Sheridan's reports, in contrast, conclusively demonstrated that appellant had no residuals from the L4-5 herniated disc diagnosed in 1986 and that his current L5-S1 herniated disc was not attributable to the 1986 work injury. He therefore properly found that appellant had no longer had any residuals from the accepted conditions and his report is sufficiently probative, rationalized and based upon a proper factual background. The Board will affirm the November 20, 2007 termination decision.

LEGAL PRECEDENT -- ISSUE 2

Section 8103 of the Federal Employees' Compensation Act[5] provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.[6] In interpreting this section of the Act, the Board has recognized that it has broad discretion in approving services provided under the Act.

[4] The Board notes that Dr. Pellegrini's opinion on causal relationship is of limited probative value in that he did not provide adequate medical rationale in support of his conclusions. *William C. Thomas*, 45 ECAB 591 (1994). Dr. Pellegrini's opinion is of limited probative value for the further reason that it is generalized in nature and equivocal in that he only noted summarily that appellant "may" have a disc "fragment" in the L4-5 area, as opposed to a herniated disc in the L5-S1 area, which was shown definitively by MRI scan.

[5] 5 U.S.C. § 8101 *et seq.*

[6] 5 U.S.C. § 8103.

The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. It therefore has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[7]

Section 8123(a) of the Act 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]

ANALYSIS -- ISSUE 2

In the present case, there was disagreement between the Office medical adviser, Dr. Sheridan and Drs. Pellegrini and Tibbs, regarding whether appellant's herniated disc at L5-S1 arose as a consequential injury from his accepted 1986 employment injury, which requires left L5-S1 lumbar microdiscectomy surgery to ameliorate his condition. Dr. Tibbs stated in his June 2007 report that appellant's current L5-S1 disc herniation is a direct result of his 1986 work injury that has continued to progress. The Office medical adviser and Dr. Sheridan opined that the L5-S1 disc herniation was not a consequential injury which resulted from the original work injury. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a third or "referee" physician, also known as an "impartial medical examiner."[9] It was therefore incumbent upon the Office to refer the case to a properly selected impartial medical examiner, using the Office procedures, to resolve the existing conflict. Accordingly, as the Office did not refer the case to an impartial medical examiner, there remains an unresolved conflict in medical opinion.

Accordingly, the case is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to an appropriate impartial medical specialist selected in accordance with its procedures, to resolve the outstanding conflict in medical evidence. It should therefore, on remand, refer the case to an appropriate medical specialist to submit a rationalized medical opinion on whether appellant's herniated disc at L5-S1 was a consequential injury stemming from his accepted 1986 work injury which requires left L5-S1 lumbar microdiscectomy surgery to ameliorate his condition. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.[10]

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[7] *Dale E. Jones*, 48 ECAB 648 (1997); *Daniel J. Perea*, 42 ECAB 214 (1990).

[8] 5 U.S.C. § 8123 (a).

[9] Section 8123(a) of the Federal Employees' Compensation Act provides 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 Dallas E. Mopps*, 44 ECAB 454 (1993).

[10] The Board notes that the Office also denied appellant's request to modify his January 13, 1993 loss of wage-earning capacity determination.

CONCLUSION

The Board finds that the Office has met its burden of proof to terminate appellant's compensation benefits in its November 20, 2007 decision. The Board finds that the case is not in posture for a decision regarding whether the Office properly denied appellant authorization for L5-S1 lumbar microdiscectomy surgery.

ORDER

IT IS HEREBY ORDERED THAT the November 20, 2007 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside and remanded in part, in accordance with this decision.

Issued: April 3, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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