United States Department of Labor
Employees' Compensation Appeals Board

N.B., Appellant	)	
and	)	**Docket No. 09-35**
	)	**Issued: April 6, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, North Chicago, IL, Employer	)	

Appearances:
John S. Evangelisti, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 8, 2008 appellant, through his attorney, filed a timely appeal from a July 20, 2008 merit decision of the Office of Workers' Compensation Programs terminating compensation benefits and a March 20, 2008 merit decision by a hearing representative affirming termination of benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office met its burden of proof in terminating appellant's compensation effective July 28, 2007; and (2) whether appellant established that he had any continuing disability after July 18, 2007, causally related to his accepted injury. On appeal, appellant contends that his injury is related to prior work-related injuries in 1996 and 1999.

FACTUAL HISTORY

On December 2, 2002 appellant, then a 46-year-old electric industrial control mechanic, filed a traumatic injury claim (Form CA-1) alleging that on November 13, 2002 he sustained an

upper hip and back injury when his left leg gave out while he was climbing out of a pit, causing him to fall to the ground.[1] The Office accepted appellant's claim for lumbar back strain, aggravation of lumbar stenosis and aggravation of neurogenic claudication. Appellant stopped work on the date of injury and did not return.

Appellant completed a treatment course at a pain clinic on May 2, 2003, at which time the pain clinic prepared a functional capacity evaluation (FCE).[2] In the FEC dated June 2, 2003, a therapist determined that she was capable of working in a sedentary position and set forth recommended work restrictions by appellant's physician, including sitting for no more than 45 minutes at a time, limited standing and walking not to exceed ten minutes and restricted stair climbing, squatting and climbing ladders.

On August 6, 2003 the Office referred appellant to Dr. Cass Terry, a Board-certified neurologist, for a second-opinion evaluation of appellant's ability to work and determination of continuing residuals from the November 13, 2002 injury.[3]

By letter dated December 23, 2003, the Office requested appellant's treating physician, Dr. Rafi M. Rafiullah, a Board-certified neurological surgeon, review the FCE and provide an opinion on appellant's ability to return to work.

In a January 5, 2004 medical report, Dr. Rafiullah responded to the Office's request, stating that he concurred with the assessment in the FCE. He indicated that appellant reached maximum medical improvement and could return to modified work, within the permanent restrictions provided in the FCE.

In a medical report dated February 14, 2004, Dr. Terry opined that appellant sustained only a temporary aggravation of his lumbosacral spine as a result of the employment injury. He maintained that appellant did not currently have any residuals as a result of the injury and that any remaining symptoms were caused by his nonwork-related degenerative spinal condition and stenosis and not due to the November 13, 2002 employment injury.

The case lay dormant until the Office referred appellant to Dr. Marc J. Novom, a Board-certified internist and neurologist, for a second-opinion evaluation of appellant's ability to work and determination of continuing residuals related to the employment injury.

In an October 17, 2006 medical report, Dr. Novom opined that appellant did not sustain any permanent residuals as a result of the November 13, 2002 employment injury. He concurred with the medical opinion of Dr. Terry, finding that the employment injury, at worse, caused a

[1] The record reveals that appellant had a long history of knee and back injuries, however, there is no evidence of prior accepted claims.

[2] Appellant attended the pain treatment course from March 10 through 18, 2003, but stopped due to an unrelated-heart condition. He resumed the course on April 21, 2003.

[3] Appellant failed to attend his first appointment with Dr. Terry scheduled for August 6, 2003. In an August 12, 2003 decision, the Office proposed suspension of compensation. Appellant subsequently attended a second appointment on September 11, 2003.

temporary aggravation of a preexisting low back condition, which was resolved not more than a couple months after the event. Dr. Novom maintained that there was no work restrictions imposed as a result of the injury.

The Office determined that a conflict of medical evidence existed with regards to the extent of residuals from the accepted work-related conditions and appellant's ability to return to work. On April 3, 2007 it referred appellant, with a statement of accepted facts and a full medical record, to an impartial medical examiner, Dr. Paul Barkhaus, a Board-certified neurologist.

In a medical report dated April 5, 2007, Dr. Barkhaus detailed appellant's medical history and described his full examination. He opined that appellant sustained a lumbosacral myoligamentous strain as a result of the November 13, 2002 employment injury, but that the injury was not as significant as appellant alleged and would have represented only a temporary aggravation of his preexisting subjective low back complaints. Dr. Barkhaus stated that, with a reasonable degree of neurological certainty, appellant's current condition was related to a preexisting injury and that the degenerative changes in his spine were not explained by the November 13, 2002 employment injury.

On June 13, 2007 the Office issued a notice of proposed termination of appellant's medical benefits and wage-loss compensation based on the finding by Dr. Barkhaus that appellant did not continue to suffer any residuals or disability related to the accepted employment injuries.

In a July 9, 2007 statement, appellant contended that prior work injuries in 1996 and 1999 contributed to his current back condition, which he stated that the Office continued to ignore. Appellant further objected to Dr. Barkhaus' medical examination, arguing that the doctor was rude, abusive and that he was not provided a complete medical record. He also submitted a June 13, 2007 finding of disability from the Social Security Administration and a series of medical records dated November 7, 1996 through September 10, 1998.

By decision dated July 18, 2007, the Office terminated appellant's benefits, finding that the evidence submitted was not sufficient to alter the recommendation to terminate medical benefits and wage-loss compensation.

On August 22, 2007 appellant filed a request for a telephonic hearing before an Office hearing representative. A telephonic hearing took place on January 4, 2008 where he testified, through his attorney, that the heavy work required by various positions with the Federal Government and the employing establishment caused degenerative changes in his spine.

In an undated statement, appellant discussed alleged work-related incidents on October 10, 1996 and May 25, 1999. He also detailed his employment history from 1978 through 2002.

In a brief dated February 1, 2008, appellant, through his attorney, argued that his claim should be developed as an occupational disease and that Dr. Barkhaus' medical report should be excluded.

In a March 6, 2008 medical report, Dr. John W. Ellis, Board-certified in family medicine, described appellant's 1996 and 1999 alleged work incidents and the 2002 accepted injury, who performed a medical examination and reviewed various medical records dated November 7, 1996 through September 28, 2005. He stated that multiple injuries to appellant's lumbar spine occurring in 1996, 1999 and 2002 caused structural damage resulting in disc derangement with central canal narrowing, disc derangement with forminal protrusion and lumbar spondylosis, which also resulted in central canal nerve impingement at L4-5, as well as nerve root impingement at L5-S1. Dr. Ellis stated that the diagnosed injuries and impairments arose out of and in the course of appellant's employment and that his employment and work duties aggravated and/or caused these injuries and impairments. He further opined that appellant was temporarily totally disabled from November 2002 to present as a result of his injuries.

By decision dated March 20, 2008, the hearing representative affirmed the termination of benefits finding that the weight of medical evidence established that appellant did not have any disabling residuals from his November 13, 2002 employment injury.

On April 14, 2008 appellant, through his attorney, filed a request for reconsideration.

In a July 30, 2008 decision, the Office denied modification on the grounds that while Dr. Ellis's report supported a continuing condition, it did not establish employment-related disability or warrant changing the claim to an occupational disease.[4]

LEGAL PRECEDENT -- ISSUE 1

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

The Federal Employees' Compensation Act provides that, if 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.[8] The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second-opinion physician or an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination.

[4] The Board notes that on July 7, 2006 appellant filed a claim for a schedule award (Form CA-7). The Office has not issued a decision on this basis, thus the issue is not before the Board on appeal.

[5] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga,* 13 ECAB 102, 104 (1961).

[6] *J.M.*, 58 ECAB ___ (Docket No. 06-661, issued April 25, 2007); *Anna M. Blaine,* 26 ECAB 351 (1975).

[7] *T.P.*, 58 ECAB ___ (Docket No. 07-60, issued May 10, 2007); *Larry Warner*, 43 ECAB 1027 (1992).

[8] 5 U.S.C. §§ 8101-8193, 8123.

This is called a referee examination and it will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.[9]

ANALYSIS -- ISSUE 1

The Office accepted that on November 13, 2002 appellant sustained a lumbar back strain, aggravation of lumbar stenosis and aggravation of neurogenic claudication as a result of falling while climbing out of a pit at work. Appellant received medical benefits and wage-loss compensation.

In a January 5, 2004 report, appellant's treating physician, Dr. Rafiullah, determined that appellant could return to modified duty within the work restrictions provided. The Office subsequently referred appellant to Dr. Novom for a second-opinion evaluation regarding continual residuals related to the November 13, 2002 injury. In an October 17, 2006 medical report, Dr. Novom found that the employment injury only caused a temporary aggravation of a preexisting low back condition and that there were no continuing residuals as a result of the injury.

The Office properly determined that a conflict in medical evidence existed, as to the continuing residuals from the accepted injury and referred appellant to an impartial medical examiner, Dr. Barkhaus, a Board-certified neurologist. In an April 5, 2007 medical report, Dr. Barkhaus opined that the November 13, 2002 employment injury resulted in a temporary aggravation of a preexisting back condition and, with a reasonable degree of neurological certainty, appellant's current condition was related to degenerative changes from a prior injury and were not explained by the accepted traumatic incident. He based his opinion on a detailed review of appellant's medical records and a prepared statement of accepted facts pertaining to the November 2, 2002 employment injury and after a full physical examination

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.[10]

The Board finds that Dr. Barkhaus' April 5, 2007 medical report is sufficiently detailed, is based on a proper factual background and contains sufficient correlation between his findings and conclusions to represent the special weight of the medical opinion evidence and resolve the existing conflict regarding the residuals from the November 13, 2007 injury.

The Board notes that appellant's contentions that his preexisting injuries were a result of 1996 and 1999 work-related injuries and that his current disabilities are solely related to employment factors. The issue in this case is whether appellant has a disability related to the November 13, 2002 traumatic injury. As the Office has not accepted the alleged 1996 and 1999 work incidents, appellant's claims that they are the cause of his disability are irrelevant. Dr. Barkhaus determined that appellant did not sustain any permanent disability, related to the

[9] 20 C.F.R. § 10.321.

[10] *Elaine Sneed*, 56 ECAB 373 (2005).

November 13, 2002 trauma and that any ongoing disability is unrelated to the accepted work event. His report constitutes the special weight of the medical opinion evidence, thus the Office properly terminated appellant's benefits on July 18, 2007.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the employee. In order to prevail, the employee must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.[11]

ANALYSIS -- ISSUE 2

The Office properly terminated appellant's claim for compensation benefits on July 18, 2007 based on the opinion of the impartial medical specialist, Dr. Barkhaus. Thus, appellant has the burden of proof to establish that he has continuing disability related to the accepted employment injury.

In a March 6, 2008 medical report, Dr. Ellis, Board-certified in family medicine, opined that appellant sustained structural lumbar spine damage resulting from employment injuries in 1996, 1999 and 2002 and that appellant was temporarily totally disabled from November 2002 through the present.

The Board finds that this evidence is not sufficient to overcome the special weight accorded Dr. Barkhaus' April 5, 2007 report. Dr. Ellis relied on appellant's alleged history of employment injuries in 1996 and 1999 in determining that appellant has continuing disability due to his employment. As discussed above, the only accepted incident is the traumatic injury on November 13, 2002. In order to establish continuing disability, appellant must show that he is disabled as a result of the accepted employment injury. Dr. Ellis' determination of disability, based on the alleged 1996 and 1999 incidents, is irrelevant to this issue and does not support appellant's claim for continuing disability.

Thus, the Board finds that appellant did not meet his burden of proof in establishing continuing disability after July 18, 2007.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective July 18, 2007. The Board further finds that appellant failed to establish that he had any continuing disability after July 18, 2007, causally related to his November 13, 2002 employment injury.

[11] *Id.*, *Gary R. Sieber*, 46 ECAB 215, 222 (1994). *See Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

ORDER

IT IS HEREBY ORDERED THAT the July 20, 2008 decision of the Office of Workers' Compensation Programs and the March 20, 2008 decision of the hearing representative are affirmed.

Issued: April 6, 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