United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
and	)	**Docket No. 09-475**
	)	**Issued: December 24, 2009**
U.S. POSTAL SERVICE, POST OFFICE, St. Paul, MN, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 3, 2008 appellant filed a timely appeal from a June 25, 2008 decision of the Office of Workers' Compensation Programs affirming a February 28, 2008 decision that terminated his compensation and denied his claims for disability. 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 on appeal are: (1) whether the Office properly terminated appellant's compensation benefits effective February 28, 2008; and (2) whether appellant met his burden of proof to establish that he was disabled from February 26 to March 3, 2007 as a result of his employment-related conditions.

FACTUAL HISTORY

On April 9, 2001 appellant, then a 44-year-old tractor trailer operator, sustained injuries to his upper and lower back in a head on collision. He stopped work on that date and returned to

full-time limited duty on April 23, 2001.[1] The Office accepted his claim for cervical/lumbar strain and cervical and lumbar subluxations at C5-6 and L4-5. Appellant received compensation for injury-related disability for work.

Appellant received treatment from Dr. Robert D. Waddell, a chiropractor.[2] An August 14, 2001 magnetic resonance imaging (MRI) scan of the cervical spine, read by Dr. Vinton L. Abers, a chiropractic radiologist, revealed degenerative disc disease at the C4-5, C5-6 and C6-7 levels. Dr. Abers noted minimal posterior disc bulging and vertebral margin spurring at the C6-7 level. He advised that there was no evidence of cervical intervertebral disc herniation or spinal stenosis. An August 28, 2001 lumbar MRI scan, read by Dr. Anthony Cook, a Board-certified diagnostic radiologist, revealed lumbar spondylosis and disc bulging at the L1, L2, L3-4, L4-5 and L5-S1 levels. In an August 21, 2001 report, Dr. Ronald M. Tarrel, a Board-certified neurologist and osteopath, diagnosed cervical and lumbar strain. He also noted mild to moderate degenerative changes from C4-5 to C6-7 that accumulated over time. Dr. Tarrel opined that they did not appear to be injury related. Furthermore, he found no evidence of nerve root impingement.

In a June 4, 2002 report, Dr. John P. Eikens, a Board-certified family practitioner noted that appellant's work restrictions should continue. He advised no lifting more than 40 pounds, changing positions frequently and no truck driving.

The Office referred appellant to Dr. E. Harvey O'Phelan, a Board-certified orthopedic surgeon, for a second opinion examination. In a July 9, 2002 report, Dr. O'Phelan diagnosed degenerative intervertebral disc disease of the cervical and lumbar spine and advised that there were no objective findings. He indicated that appellant's disease was not related to the motor vehicle accident but to the process of aging, excessive weight and lack of exercise. Dr. O'Phelan advised that "there seems to be no clinical reason to continue chiropractic treatment." He found that appellant was capable of performing his regular duties as a tractor trailer operator, although appellant had limitations due to his degenerative condition. Dr. O'Phelan prescribed restrictions that included no lifting over 35 pounds and advised that they were not related to the motor vehicle accident. In a September 16, 2002 supplemental report, he opined that the effects of appellant's accepted cervical and lumbar strains and subluxation of the C5-6 and L4-5 interspace no longer existed and subsided in three months or less. Dr. O'Phelan advised that the persistence of symptoms was secondary to underlying cervical and lumbar degenerative disc disease. He noted that degenerative disc disease was a slow progressive dysfunction and was a recurrent condition. Dr. O'Phelan recommended that appellant continue to work light duty due to his degenerative condition.

[1] Appellant's restrictions included no lifting over 20 pounds, no repetitive lifting, no prolonged sitting and no semi driving.

[2] The record reflects that the chiropractor obtained x-rays and a subluxation was found on the L4 and L5 vertebrae.

On June 6, 2003 Dr. Waddell advised no lifting over 40 pounds, avoidance of repetitive motion and truck driving limited to two hours per day. On January 8, 2004 he indicated that appellant needed additional chiropractic care as this treatment was effective in allowing him to work full time.

On February 3, 2004 the Office found that a conflict in medical opinion was created between Dr. O' Phalen, the second opinion physician, and Dr. Waddell, appellant's treating physician, as to whether appellant's condition had resolved and he was able to work regular duty or with restrictions. It also noted that a determination was needed regarding his need for continuing chiropractic treatment.

On March 2, 2004 the Office referred appellant, together with a statement of accepted facts and the medical record to Dr. Paul T. Yellin, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.

A March 16, 2004 MRI scan read by Dr. Daniel J. Loes, a Board-certified diagnostic radiologist, revealed mild multi-level degenerative disc and facet disease with mild central canal stenosis at C5-6 and C6-7, with no evidence of focal disc herniation.

In a March 26, 2004 report, Dr. Yellin reviewed appellant's history of injury. He conducted a physical examination and noted findings, which included a normal range of motion on flexion, extension and lateral rotation. Dr. Yellin found that appellant was tender in the posterior cervical midline from C7 through T2 and nontender in the posterior lumbar midline. He found no tenderness on deep palpation over the sacroiliac joints. Dr. Yellin advised that examination of the shoulders revealed normal range of motion on abduction, forward flexion and internal/external rotation and no atrophy was noted. He concluded that appellant's cervical, thoracic and lumbar strains had resolved and stated there was "no objective pathology on examination to support that he has any continuing problems as the result of his motor vehicle accident of April 9, 2001." Although Dr. Yellin noted that appellant had subjective complaints, he reiterated that there were no objective findings. He explained that the findings on MRI scan and x-rays were consistent with mild degenerative changes and did not represent traumatic problems. Dr. Yellin advised that any continued discomfort in the neck, mid or low back, was not work related. Moreover, appellant's subjective complaints were not consistent with objective findings either by physical examination or MRI scan. Dr. Yellin opined that appellant reached maximum medical improvement and did not require further medical treatment. He explained that the chiropractic treatment for the prior three years was excessive in view of the lack of objective findings. Dr. Yellin noted that appellant no longer had any objective basis for any restrictions on his work activities and could return to his full-time duties without restriction.

On May 13, 2004 the Office issued a notice of proposed termination of compensation, on the basis that the weight of the medical evidence, as represented by the report of Dr. Yellin, established that residuals and disability due to the April 9, 2001 injury had ceased.

On June 1, 2004 appellant disagreed with the proposed termination and noted that he had continued problems from his work injury. He alleged that his ongoing left shoulder, neck and

lower back conditions were a result of the accident.[3] The Office received additional reports from appellant's treating physicians and copies of previously submitted evidence. Dr. Waddell submitted reports dating from June 2003 to September 13, 2005.

In an April 13, 2004 report, Dr. Tarrel reevaluated appellant and noted that he had not seen him for over a year. He advised that appellant was relatively stable but continued to have exacerbations of neck and low back pain. Dr. Tarrel noted that, until recently, it was appellant's low back that would become aggravated with semi truck driving, his work at the employing establishment, as well as prolonged sitting and other repetitive activity. He reported appellant's recent complaints of neck symptoms. Dr. Tarrel noted that a recent MRI scan of the cervical and thoracic spine was compared to a previous cervical MRI scan but did not show any dramatic change. There were degenerative changes throughout the spine, but no nerve root impingement. The same was true of a previous low back scan. Dr. Tarrel noted that a structural examination revealed persistent and chronic tissue texture change consistent with ongoing soft tissue dysfunction throughout the posterior cervical and upper back regions and the low back. He advised that appellant had limited range of motion. Dr. Tarrel found that appellant could continue to work with restrictions but could no longer drive a "semi." He recommended that appellant avoid repetitive flexion or rotation of his neck, lifting over 70 pounds, carrying more than 45 pounds, no pushing or pulling more than 60 pounds and nothing greater than 500 pounds on wheels. Dr. Tarrel recommended that appellant avoid prolonged periods of sitting, with no more than three hours per day during an eight-hour shift, with a break every hour to get up, stretch and move around. He advised that the restrictions were permanent and recommended continued treatment.

In a May 10, 2004 report, Dr. Eikens found that appellant continued to have left shoulder pain. He noted that appellant related that the "chiropractor thinks it is from a pinched nerve." Dr. Eikens advised that appellant also had right buttock pain that radiated down the backside of his leg. He recommended continued chiropractic manipulation. Dr. Eikens stated that "[a]ll of the problems seem to have come following a motor vehicle accident at work." In a May 26, 2004 report, he advised that appellant required chiropractic care twice a week. On May 28, 2004 Dr. Eikens opined that appellant had no disability from his shoulder problem and impairment of 3.5 percent for decreased range of motion in the lumbar spine. The Office also received chiropractic reports dated May 2004 to January 2008.

A January 5, 2007 MRI scan read by Dr. Steve C. Link, a Board-certified diagnostic radiologist, revealed mild acromion, a small spur, tendinisis and degenerative changes with no tear.

The Office also received several treatment notes for the period February 21 to 26, 2007 from an unidentified healthcare provider. Appellant was treated for low back pain radiating into this left hip and recommended continued chiropractic treatment. An annotation indicated that he could not work for two days and placed him off work from February 26 to 28, 2007.[4]

[3] On June 9, 2004 appellant requested a hearing. However, the Office had not yet rendered a decision on the proposed termination.

[4] These notes appear to be from a physical therapist.

On March 6, 2007 appellant filed a Form CA-7 claim for compensation for total disability from February 26 to March 3, 2007. By letter dated April 20, 2007, the Office informed appellant of the evidence needed to support his claim and to submit such evidence within 30 days.

In reports dated June 14 and December 4, 2007, Dr. Eikens advised that appellant presented with continued neck pain, headaches and low back pain. He indicated that appellant was in need of chiropractic treatment two to three times a week to function. The Office also received copies of previously submitted documents.

By decision dated February 28, 2008, the Office terminated appellant's compensation benefits effective that date. It found that the weight of medical evidence rested with Dr. Yellin and supported that appellant no longer had residuals of the accepted work-related conditions. The Office authorized payment for five days of intermittent disability from December 25, 2004 through August 19, 2005 and denied disability from February 26 through March 3, 2007.

Appellant requested review of the written record. In a March 25, 2008 report, Dr. Waddell noted that he had treated appellant since April 9, 2001 for injuries to his cervical and lumbar spine as a result of the work injury. He opined that appellant had a disc protrusion at the C6-7 level with radicular pain to the left upper extremity and preexisting degenerative disc disease that was "substantially aggravated on a permanent basis by the work injury." In a June 6, 2008 report, Dr. Waddell recommended that appellant continue with chiropractic treatment one to two times a week and as needed for flare ups.

In a decision dated June 25, 2008, the Office hearing representative affirmed the February 28, 2008 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[5] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[6]

The Federal Employees' Compensation Act[7] provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[8] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the

[5] *Curtis Hall*, 45 ECAB 316 (1994).

[6] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[7] 5 U.S.C. §§ 8101-8193, 8123(a).

[8] *Id*. at § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[9]

ANALYSIS -- ISSUE 1

The Office found that a conflict of medical opinion arose regarding the nature and extent of any ongoing residuals and disability from the April 9, 2001 injury. Dr. Waddell, appellant's physician, supported ongoing treatment and Dr. O'Phalen, an Office referral physician, opined that the employment-related condition had resolved without disability. The Office properly referred appellant to Dr. Yellin, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In a March 26, 2004 report, Dr. Yellin reviewed appellant's history of injury and medical treatment. He determined that appellant had normal range of motion on flexion, extension and lateral rotation. Dr. Yellin stated that appellant was tender in the posterior cervical midline from C7 through T2 and nontender in the posterior lumbar midline. Appellant did not have tenderness on deep palpation over the sacroiliac joints and normal range of motion on abduction, forward flexion and internal/external rotation in the shoulders with no atrophy. Dr. Yellin advised that appellant's cervical, thoracic and lumbar strains had resolved and there was no objective pathology on examination to support that he had any continuing problems as the result of his April 9, 2001 motor vehicle accident. Although appellant had subjective complaints there were no objective findings. Dr. Yellin also noted that findings on MRI scan and x-ray were consistent with mild degenerative changes and did not represent traumatic problems. He opined that any continued discomfort in the neck, mid back, or low back, was not work related. Dr. Yellin found that appellant reached maximum medical improvement and no longer required any further medical treatment. He stated that the prior chiropractic treatment was excessive and not based on any objective findings. Appellant no longer required any restrictions on his work activities and could return to his full duties.

The Board finds that Dr. Yellin's opinion is entitled to special weight as his reports are sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant's employment-related condition had resolved. Dr. Yellin examined appellant, reviewed his medical records and reported accurate medical and employment histories. He explained that appellant's accepted conditions had resolved and that appellant's continuing symptoms were subjective and attributable to degenerative conditions that were not work related. Accordingly, the Office met its burden of proof to justify termination of benefits.

The Office received an April 13 2004 report from Dr. Tarrel, who noted that he had not seen appellant for about a year. Dr. Tarrel compared a recent MRI scan to his previous MRI scan and advised that it failed to reveal any dramatic change. He noted that there were degenerative changes throughout, but no direct evidence of nerve root impingement. Dr. Tarrel determined that appellant had persistent and chronic tissue texture change which was consistent with ongoing soft tissue dysfunction throughout the posterior cervical and upper back regions

[9] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

and the low back and limited range of motion. He indicated that appellant continued to suffer from chronic injury. Dr. Tarrel opined that appellant could work with restrictions, but that he could no longer drive a truck. He recommended restrictions which included appellant avoiding any repetitive flexion or rotation of his neck and no lifting over 70 pounds. Dr. Tarrel also recommended that appellant avoid prolonged periods of sitting, no more than three hours a day, with hourly stretch breaks. He advised that the restrictions were permanent and recommended continued treatment. The Board notes that Dr. Tarrel did not specifically address whether these restrictions were a result of the employment injury, as opposed to the underlying degenerative disease. This in particularly important in light of the fact that he noted these degenerative changes in his August 21, 2001 report and opined that they did not appear to be injury related. The Board finds that this report is insufficiently rationalized to overcome or create a conflict with that of Dr. Yellin.

In a May 10, 2004 report, Dr. Eikens also determined that appellant continued to have left shoulder, right buttock, low back and cervical pain. While he advised that these problems stemmed from the work-related incident, he did not explain the basis for his conclusion. In a May 26, 2004 report, Dr. Eikens advised that appellant required chiropractic care twice a week to continue to be able to function. However, he did not address why such treatment was necessary for a diagnosed condition caused or aggravated by the work injury.

The reports from Dr. Waddell, his chiropractor, opined that appellant had a disc protrusion at the C6-7 level with radicular pain and preexisting degenerative disc disease. Dr. Waddell indicated that appellant's condition was aggravated on a permanent basis chronic and required ongoing chiropractic treatment. However, Dr. Waddell essentially reiterated previously stated findings and conclusions regarding appellant's condition. He was on one side of the conflict that was resolved by Dr. Yellin. The additional reports, in the absence of any new findings or rationale are insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[10]

The record also contains reports from unidentified healthcare providers. Such evidence is not probative if there is no indication that the person completing the report is a "physician" as defined in 5 U.S.C. § 8101(2). The Board has found that reports lacking proper identification, such as unsigned treatment notes, do not constitute probative medical evidence.[11]

The Board finds that the Office met its burden of proof to justify termination of benefits.

[10] *Jaja K. Asaramo*, 55 ECAB 200 (2004); *see Guiseppe Aversa*, 55 ECAB 164 (2003).

[11] *R.M.*, 59 ECAB ___ (Docket No. 08-734, issued September 5, 2008). Although some of these reports appear to be from a physical therapist, a physical therapist is not included in the Act's definition of a physician. *See* 5 U.S.C. § 8101(2); *A.C.*, 60 ECAB ___ (Docket No. 08-1453, issued November 18, 2008).

LEGAL PRECEDENT -- ISSUE 2

A claimant seeking benefits under the Act[12] ("Act") has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[13] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[14]

As used in the Act, the term "disability" means incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.[15] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in her employment, he is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[16]

Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.[17] Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[18] The Board has held that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[19] While there must be a proven basis for the pain, due to an employment-related condition can be the basis for the payment of compensation.[20] The Board, however, will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[21]

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[12] 5 U.S.C. §§ 8101-8193.

[13] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[14] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[15] *Richard T. DeVito*, 39 ECAB 668 (1988); *Frazier V. Nichol*, 37 ECAB 528 (1986); *Elden H. Tietze*, 2 ECAB 38 (1948); 20 C.F.R. § 10.5(f).

[16] *Bobby W. Hornbuckle*, 38 ECAB 626 (1987).

[17] *Edward H. Horton*, 41 ECAB 301 (1989).

[18] *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

[19] *John L. Clark*, 32 ECAB 1618 (1981).

[20] *Barry C. Peterson*, 52 ECAB 120 (2000).

[21] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

ANALYSIS -- ISSUE 2

In support of his claim for disability from February 26 to March 3, 2007, appellant provided treatment notes dated February to March 2007 from unidentified healthcare providers. As noted, such reports are not considered as probative medical evidence as there is no indication that the person completing the report was a "physician."[22] These notes do not establish that appellant's claimed disability is causally related to his employment injury.

Drs. Eikens and Waddell submitted reports that do not specifically address whether appellant's disability on the dates in question was causally related to his accepted conditions.[23] The medical evidence of record does not establish appellant's disability causally related to his accepted employment injuries. He failed to submit rationalized medical evidence establishing that his disability from February 26 to March 3, 2007 was causally related to his accepted employment injury.

On appeal, appellant contends that he has residuals from the work-related injury.[24] He also submitted a new report from Dr. Tarrel. However, the Board has no jurisdiction to review this evidence for the first time on appeal.[25]

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective February 28, 2008. The Board also finds that appellant did not meet his burden of proof to establish that he was disabled for the period February 26 to March 3, 2007 as a result of his employment-related condition.

[22] *See supra* note 11.

[23] *See S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship).

[24] The Board notes that, if appellant regards the cumulative effect of his history of alleged employment activities as causing a diagnosed condition and disability, he can file a claim for an occupational disease (Form CA-2).

[25] 20 C.F.R. § 501.2(c); *James C. Campbell,* 5 ECAB 35 (1952). This decision does not preclude appellant from seeking to have the Office consider such evidence pursuant to a reconsideration request filed with the Office.

ORDER

IT IS HEREBY ORDERED THAT the June 25, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 24, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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