United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 09-318**
	)	**Issued: November 16, 2009**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Lyons, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 13, 2008 appellant filed a timely appeal from the January 9 and July 25, 2008 decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective January 20, 2008 on the grounds that she had no disability or residuals of her accepted injury.

On appeal, appellant, through her attorney, contends that the Office erred in referring her to orthopedic surgeons for second opinion and impartial evaluations rather than a vascular specialist; the referral physicians were provided an incomplete statement of accepted facts and were not asked whether her preexisting diabetic condition was aggravated by the employment injury or subsequent skin grafting in 2001 and 2002. As the Office paid for rehabilitation and medical treatment, counsel contends that it tacitly acknowledged responsibility to cover continued compensation.

FACTUAL HISTORY

On August 6, 2001 appellant, then a 50-year-old psychiatric nursing assistant, who had preexisting diabetes mellitus, lacerated her left calf when she struck it on a metal desk. She stopped work on August 24, 2001 and did not return. In an April 1, 2002 report, Dr. Errol Warner, a Board-certified surgeon, noted the history of injury and advised that when he saw appellant on August 31, 2001 she had a necrotic ulcer of the left leg with surrounding cellulitis and edema. He treated her with debridement and antibiotics and performed extensive debridement on November 17, 2001 with continued aggressive care.

On May 20, 2002 the Office accepted that appellant sustained an employment-related laceration and cellulitis of the left leg. She received appropriate wage-loss compensation. Dr. Warner submitted reports regarding appellant's condition, noting that she had a nonhealing ulcer on her left leg. On August 10, 2002 he performed a split thickness skin graft to the ulcer. Appellant was placed on the periodic rolls in March 2003 and continued under Dr. Warner's care. In October 2003 she was hospitalized for a stroke. In an admitting note, Dr. Edward A. Alder, a Board-certified internist, reported an extensive old, nonhealing ulcer on the left leg with necrotic base and indurate margins. In August 2004 appellant was hospitalized for recurrent stroke, uncontrolled hypertension, and type II diabetes. A chronic nonhealing left leg ulcer was noted. Appellant was readmitted in October 2004, for progressive worsening of the left leg ulcer. At that time, Dr. Alder noted a history that the ulcer started three years previously when she injured her leg at work. A bilateral lower extremity venous study on October 20, 2004 demonstrated no evidence for deep or superficial thrombophlebitis. A segmental arterial Doppler and pulse volume recording on October 21, 2004 demonstrated bilateral iliac occlusive disease, left worse than right, consistent with claudication. On November 10, 2004 Dr. Gary B. Breitbart, a Board-certified vascular surgeon, performed a split thickness skin graft to a granulating wound of the left leg.

Appellant moved to Florida, and was hospitalized on January 29, 2005. In a February 7, 2005 report, Dr. Michael A. Abrahams, a Board-certified orthopedic surgeon, noted physical findings of dry gangrene of the left foot in its entirety. The foot was cold and pulseless to the level of the ankle. The distal portion of the calf showed gangrenous avascular changes in the skin. Dr. Abrahams diagnosed dry gangrene of the left foot and left lower extremity and recommended a below the knee amputation that was performed on February 7, 2005. On February 17, 2005 appellant was transferred to a rehabilitation facility. She was readmitted on March 7, 2005 for gangrene of the left stump. On March 13, 2005 Dr. Abrahams performed a left above-the-knee amputation. Appellant was discharged on April 4, 2005 to a nursing facility. She was hospitalized again in May 2005 for colitis. On July 15, 2005 appellant had a right breast biopsy for a benign cyst.[1] In a September 28, 2006 report, Dr. Narendra K. Maheshwari, a Board-certified internist, noted that appellant was seen for hyperkalemia.[2]

[1] The record includes medical records from hospitalizations, rehabilitation facilities and nursing facilities.

[2] On December 4, 2006 appellant filed a schedule award claim, and by letter dated January 5, 2007, the Office informed her that, because she was receiving compensation for lost wages, a schedule award was not payable.

On May 29, 2007 the Office referred appellant to Dr. David B. Lotman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 14, 2007 report, Dr. Lotman reviewed the statement of accepted facts and medical record, and noted that appellant was wheelchair bound. He advised that appellant's insulin-dependent diabetes was under fair control, and that she had renal failure and difficulty with mutation. Examination of the left lower extremity demonstrated an above-the-knee amputation with a well-healed stump that was nontender to palpation, with no erythema and no evidence of drainage. Examination of the right lower extremity revealed diminished pulses and sensation but no pregangrenous changes in the right foot. Dr. Lotman diagnosed status post above-the-knee amputation and advised that appellant's current condition was not causally related to the August 6, 2001 employment injury. He stated that, following her two skin grafts, appellant developed dry gangrene of the left foot. Dr. Lotman stated that, if appellant had wet gangrene, a case could be made that it was due to an ongoing infection in the calf, but with dry gangrene, no such connection existed. He concluded that the accepted condition was not causing any disability for work and any disability was due to appellant's diabetes and renal failure.

The Office determined that a conflict in medical opinion arose as to whether appellant's work-related disability had resolved. On August 20, 2007 it referred her to Dr. Peter F. Merkle, Board-certified in orthopedic surgery, for an impartial evaluation.[3] In a September 13, 2007 report, Dr. Merkle noted the history of injury and appellant's medical history including insulin-dependent diabetes mellitus, coronary artery disease for which she had angioplasty, and a stroke, and that she was wheelchair bound. He reviewed the medical record and advised that the current objective findings and diagnosis for the left lower extremity were that appellant had undergone a left above-the-knee amputation and had scarring from a previous femoral/popliteal bypass. Dr. Merkle advised that appellant's current condition was not due to the 2001 employment injury and that she had no work-related disability. Appellant had had multiple episodes of uncontrolled diabetes and demonstrated occlusive vessel disease in multiple areas of her body which caused the development of gangrene of the left foot. Dr. Merkle concluded that the occlusive vessel disease was not caused by the work-related laceration.

On November 27, 2007 the Office proposed to terminate appellant's compensation benefits on the grounds that the medical evidence, as represented by the reports of Drs. Lotman and Merkle, established that she no longer had disability or residuals due to the accepted condition. Appellant, through her attorney, disagreed with the proposed termination.

By decision dated January 9, 2008, the Office finalized the termination, effective January 20, 2008, finding that the weight of the medical evidence established that appellant had no disability or residuals due to the accepted employment-related left leg laceration and cellulitis.

On January 15, 2008 counsel requested a hearing that was held on April 22, 2008. Appellant argued that the statement of accepted facts was inaccurate in that it did not acknowledge additional authorized medical treatment including amputation, and that the reports of Dr. Lotman and Dr. Merkle were insufficient to meet the Office's burden to terminate.

[3] Appellant was initially referred to Dr. William McKay, who declined to examine appellant.

By decision dated July 25, 2008, an Office hearing representative affirmed the January 9, 2008 decision.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4] Its burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

Section 8123(a) of the Federal Employees' Compensation Act[6] 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.[7] When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[8]

ANALYSIS

The Board notes that there was no conflict in medical evidence. A conflict may only exist between a physician for an employee and that of the United States.[9] In August 2007 when the Office determined a conflict in medical evidence was created, the record did not contain a medical report from an attending physician regarding appellant's current medical condition or its relationship to the August 6, 2001 employment injury. No conflict in medical opinion existed prior to the referral to Dr. Merkle. Therefore, Dr. Merkle is a second opinion physician.[10]

Regarding the argument on appeal that the physicians were provided an incomplete statement of accepted facts, the record supports that the statement of accepted facts contained a history of injury and described the accepted conditions. The fact that the Office authorized and paid for some medical treatment from the date of injury in August 2001 up to the termination in

[4] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[5] *Id.*

[6] 5 U.S.C. §§ 8101-8193.

[7] *Id*. at § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[8] *Manuel Gill*, 52 ECAB 282 (2001).

[9] *S.G.*, 58 ECAB ____ (Docket No. 07-30, issued February 26, 2007).

[10] *Mary L. Henninger*, 52 ECAB 408 (2001).

January 2008 does not establish that the condition for which appellant received treatment was employment related.[11]

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits because the medical evidence of record is not sufficiently well rationalized. Appellant had preexisting diabetes and peripheral vascular disease prior to the August 6, 2001 employment injury. The Office accepted as employment related a laceration to her left calf and subsequent cellulitis. Within weeks of the injury, Dr. Warner noted that appellant developed a necrotic ulcer to the left leg which was treated with surgical debridement in 2002. The ulcer did not heal, and on August 10, 2002, Dr. Warner performed a skin graft. At the time appellant was admitted to the hospital with a stroke on October 9, 2003, Dr. Alder noted an old nonhealing ulcer involving the left leg with necrotic base and indurate margins. When appellant was rehospitalized for a recurrent stroke in August 2005, the nonhealing left leg ulcer was again noted. The ulcer worsened and caused readmission in October 2004, when Dr. Alder noted the history of injury, advising that the nonhealing left lower leg ulcer began with a laceration at work. On November 10, 2004 Dr. Breitbart performed split thickness skin graft to the wound on her left leg. After appellant's move to Florida, she was hospitalized for gangrene of the left foot. Dr. Abrahams performed a left below-the-knee amputation on February 7, 2005. The gangrene recurred and Dr. Abrahams performed a left above-the-knee amputation on March 13, 2005. The medical evidence, therefore, supports that appellant had a significant necrotic ulcer condition that began shortly after the August 6, 2001 employment laceration. She ultimately underwent an above-the-knee amputation of her left leg.

While Dr. Lotman advised in his June 14, 2007 report that the calf contusion appellant sustained on August 6, 2001 did not cause either cellulitis or gangrene of her left leg, the Office had accepted a laceration and cellulitis as employment related. He disregarded a critical element of the statement of accepted facts and his report is of diminished probative value.[12] Furthermore, Dr. Merkle's September 13, 2007 report is not well rationalized in addressing causal relation, especially the issue of aggravation or contribution. In discussing the range of compensable consequences, once the primary injury is shown as causally connected with the employment a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[13] Dr. Merkle did not adequately address causal relationship or appellant's medical history, especially as provided by Drs. Warner and Alder. He did not explain whether the preexisting venous insufficiency or diabetic condition was the sole cause of the leg wound not sufficiently healing or whether appellant's condition was contributed to by the August 6, 2001 employment injury. Dr. Merkle did not address whether the accepted cellulitis infection resulted in the failed skin grafts or whether the skin grafts led to ulcerations, the development of gangrene or the need for surgical amputations.

[11] *Glen E. Shriner*, 53 ECAB 165 (2001).

[12] *See Paul King*, 54 ECAB 356 (2003).

[13] Larson, *The Law of Workers' Compensation* § 10.01 (December 2000); *see Charles W. Downey*, 54 ECAB 421 (2003).

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective January 20, 2008.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective January 20, 2008.

ORDER

IT IS HEREBY ORDERED THAT the July 25, 2008 decision Office of Workers' Compensation Programs be reversed.

Issued: November 16, 2009
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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