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| R.M., Appellant |) | |
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| and |) | Docket No. 09-1890 |
| |) | Issued: August 13, 2010 |
| DEPARTMENT OF DEFENSE, DEFENSE |) | |
| CONTRACTING MANAGEMENT AGENCY |) | |
| EAST, Stratford, CT, Employer |) | |
| |) | |

Case Submitted on the Record

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

On July 20, 2009 appellant filed a timely appeal of a May 5, 2009 decision of the Office of Workers' Compensation Programs affirming the September 22, 2008 termination of her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective September 22, 2008.

On April 18, 2003 appellant, then a 45-year-old contract administrator, filed a traumatic injury claim alleging that on April 17, 2003 she fell on a sidewalk and injured her low back and right knee in the performance of duty. She stopped work on April 17, 2003 and did not return.

The Office accepted appellant's claim for low back strain and right knee strain and paid appropriate compensation benefits.

Initial reports from Dr. Kristen Kaczanowski, a chiropractor, dated between April 21 and June 10, 2003 diagnosed lumbar and cervical strain/sprain and possible right knee meniscal ligamentous injury. He advised that appellant was totally disabled for work beginning April 21, 2003 and it was unknown when she could return.

In a May 17, 2003 magnetic resonance imaging (MRI) scan report of appellant's right knee, Dr. Ruben Kier, a Board-certified diagnostic radiologist, found degenerative articular changes of the right knee, most prominent in the patellofemoral compartment, including the chondromalacia patella as well as the medial joint compartment. Dr. Kier also found right knee effusion.

On August 21, 2003 the Office referred appellant with a statement of accepted facts to Dr. Peter Naiman, a Board-certified orthopedic surgeon, for a second opinion. In a September 11, 2003 report, Dr. Naiman diagnosed lumbosacral syndrome with questionable radicular component, contusion of the right knee with patellofemoral degenerative change and medial compartment degenerative change. He advised that appellant was able to work light duty with restrictions. Dr. Naiman noted that her weight placed greater stress on her lumbosacral spine area which could be a contributing factor to her condition. In a work-capacity evaluation dated September 22, 2003, Dr. Naiman indicated that appellant could work eight hours per day with restrictions.

On March 1, 2004 the Office referred appellant with a statement of accepted facts to Dr. David Brown, a Board-certified orthopedic surgeon, for an evaluation to resolve the conflict in medical opinion between Dr. Kaczanowski and Dr. Naiman.¹ In a March 30, 2004 report, Dr. Brown indicated that appellant sought treatment for right knee and right side back pain from Anniston Orthopedic Associates on April 15, 2003 two days before her work injury. He diagnosed myofascial strain of the lumbar spine and chondromalacia patella of the right knee. Dr. Brown opined that appellant could work full time with restrictions. He noted minimal objective orthopedic findings. Dr. Brown also noted that weight reduction would decrease appellant's back and knee complaints. He further noted that she had not sustained any significant orthopedic disability to either her lumbar spine or right knee resulting from a work

¹ The Board notes that the Office improperly identified Dr. Brown as an impartial medical specialist as there was no medical conflict under the Act. 5 U.S.C. § 8123(a) 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." See *Delphia Y. Jackson*, 55 ECAB 373 (2004) (a conflict under section 8123(a) cannot exist unless there is a conflict between an attending physician and an Office physician). The Office found a conflict between Drs. Kaczanowski, for appellant and Naiman, for it. However, Dr. Kaczanowski was not a physician under the Act as she did not diagnose a spinal subluxation based on x-ray. 5 U.S.C. § 8101(2) provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x ray to exist. See *Mary A. Ceglia*, 55 ECAB 626 (2004) (a chiropractor is not a physician under the Act unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist). As Dr. Kaczanowski is not a physician, she did not create a medical conflict under 5 U.S.C. § 8123(a).

injury. In a work-capacity evaluation of the same date, Dr. Brown advised that appellant was able to return to work for eight hours per day with permanent restrictions.

On July 30, 2004 the Office found a job offer made to appellant by the employing establishment to be suitable based on Dr. Brown's work restrictions. In a November 4, 2004 decision, the Office terminated appellant's entitlement to compensation benefits effective November 4, 2004 as she had refused suitable work.

In an August 22, 2006 decision, an Office hearing representative reversed the November 4, 2004 decision and reinstated appellant's compensation benefits finding that the Office did not follow its procedures in providing notice to appellant regarding the termination. The hearing representative directed appellant's referral to Dr. Brown for an updated evaluation.

In a September 29, 2006 supplemental report, Dr. Brown diagnosed myofascial strain of the lumbar spine and chondromalacia patella of the right knee. He noted that during his March 30, 2004 examination, he advised that appellant could return to working her previous position with restrictions. Dr. Brown indicated that his opinion remained the same and that he strongly believed that appellant was capable of resuming her previous job as a contract administrator without restrictions. He opined that appellant's ongoing complaints were mostly subjective with minimal objective findings. Dr. Brown did not believe that she sustained any prominent disability or physical impairment due to her 2003 fall. He advised no further diagnostic testing or orthopedic treatment although he indicated that chiropractic treatment was palliative for subjective complaints. In a work-capacity evaluation dated September 26, 2006 Dr. Brown indicated that appellant could return to full duty with no restrictions.

On November 13, 2006 the Office issued a proposed termination of compensation benefits finding that the weight of the medical evidence rested with Dr. Brown.² In a January 4, 2007 decision, the Office terminated appellant's compensation benefits effective that day.

On January 26, 2007 appellant requested reconsideration and asserted that the Office did not send correspondence to her authorized representative's current address. She noted that her representative did not receive copies of decisions dated between November 4, 2004 and January 4, 2007 or a copy of appellant's referral to Dr. Brown.

In x-ray reports dated April 25, 2003 of appellant's lumbosacral spine and right knee, Dr. Tatiana Kain, a Board-certified diagnostic radiologist, found no evidence of fracture or dislocation, but noted degenerative changes at the L1-2 level. Appellant also submitted several reports from Dr. Kaczanowski.

In an April 26, 2007 decision, the Office vacated the January 4, 2007 decision and reinstated appellant's compensation benefits retroactive to January 21, 2007 finding that the Office failed to properly notify her representative of her referral to Dr. Brown.

² A copy of this notice was sent to an old address of appellant's representative. The notice was returned to the Office indicating "forwarding order expired."

On April 30, 2007 appellant filed a claim for compensation beginning January 27, 2007.

On May 17, 2007 the Office referred appellant with a statement of accepted facts to Dr. Frank Schildgen, a Board-certified orthopedic surgeon, for a second opinion regarding the extent of any residuals or disability due to her work injury. In a June 5, 2007 report, Dr. Schildgen provided a detailed history of injury and noted that appellant denied any history of low back or right knee problems. He also noted that Dr. Brown's March 30, 2004 report mentioned that appellant sought orthopedic evaluation on April 15, 2003 for low back and right knee pain, which she denied. Dr. Schildgen found that appellant ambulated with normal gait and station and could heel and toe walk without difficulty. His findings also included diffuse tenderness over the lower lumbar spine, no sciatic notch tenderness, moderately restricted lumbar range of motion in all directions and no palpable muscle spasm with range of motion testing. Dr. Schildgen noted that extreme sensitivity to light touch over the lower lumbar spine and no focal, motor or sensory deficits present in the lower extremities. Straight-leg raising was negative and appellant was able to arise from a chair without hesitation. He diagnosed degenerative disease of the lumbar spine and right knee. Dr. Schildgen opined that appellant did not have any continued residuals or disability that was work related. He further stated that any symptoms appellant experienced in her low back or right knee in all medical probability attributed to degenerative conditions preexisting her April 17, 2003 injury. Dr. Schildgen noted that medical records showed that appellant was previously diagnosed with strains in the low back and right knee, but that she was not presently dealing with these issues. He reviewed appellant's job duties and opined that she could resume position. Dr. Schildgen noted that no further medical treatment was necessary, but that appellant would benefit from a weight reduction program. In a work-capacity evaluation dated September 10, 2003³ he indicated that appellant could perform her usual job and listed restrictions.

On June 22, 2007 the Office issued a notice of proposed termination of compensation benefits finding that Dr. Schildgen represented the weight of the medical evidence finding that appellant no longer had any disability or residuals due to the accepted work injury.

In a July 20, 2007 statement, appellant disagreed with the proposed termination of compensation benefits asserting that Dr. Schildgen's opinion insufficiently supported modification to her benefits. She also asserted there was no reliable and probative medical evidence of record for Dr. Schildgen to conclude that appellant's lumbar and right knee conditions were degenerative and preexisting. In particular, appellant submitted a document from Anniston Orthopaedic Associates indicating that it had no history of her in its files.

On October 16, 2007 the Office requested a supplemental report from Dr. Schildgen regarding whether appellant's degenerative disease of the lumbar spine and right knee preexisted her April 17, 2003 injury or whether her work injury contributed to her degenerative conditions. It noted that the evidence indicated that appellant was not treated with Anniston Orthopedic Associates. It also requested Dr. Schildgen to explain with medical rationale whether appellant's work-related conditions had resolved without residuals or disability.

³ The Board notes that the date of this evaluation is a typographical error as the record reflects that Dr. Schildgen first examined appellant on June 5, 2007.

In a November 2, 2007 supplemental report, Dr. Schildgen opined that appellant's degenerative conditions preexisted her April 17, 2003 fall as x-rays of her lumbar spine and right knee dated April 25, 2003 showed significant degenerative change. He opined that it was medically extremely improbable that these degenerative conditions could have developed from the April 17, 2003 fall. Dr. Schildgen further noted that at the time of the fall appellant did not sustain any significant injury, fracture or disability of any great extent. He indicated that appellant had significant degenerative change in the lumbar spine and right knee that in all medical probability continued to be symptomatic and that the fall could have temporarily aggravated these degenerative conditions, but would not have permanently worsened them.

In a September 22, 2008 decision, the Office terminated appellant's compensation benefits effective that day.

On September 29, 2008 appellant requested a telephone hearing, which was held on February 12, 2009. At the hearing, she testified that her right knee was better, but that she still had low back pain.

In a May 5, 2009 decision, an Office hearing representative affirmed the September 22, 2008 decision finding that the weight of the medical evidence rested with Dr. Schildgen who found that appellant's injury-related conditions and disability had ceased. The hearing representative directed that the Office pay wage-loss compensation from January 21, 2007 to September 22, 2008.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ After it has determined that an employee has disability causally related to 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.⁵ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that the claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁷

⁴ *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986).

⁶ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁷ *E.J.*, 59 ECAB ____ (Docket No. 08-1350, issued September 8, 2008).

ANALYSIS

The record reflects that appellant sustained an injury on April 17, 2003 to her right knee and low back. The Office accepted her claim for right knee and low back strain. It terminated her compensation benefits effective September 22, 2008 based on reports from Dr. Schildgen.

In a June 11, 2007 report, Dr. Schildgen noted the history of the April 17, 2003 work injury and advised that appellant had degenerative lumbar and right knee conditions that preexisted her work injury. He advised that appellant's low back and right knee symptoms attributed to these preexisting conditions and, therefore, were not related to the April 17, 2003 work injury. Dr. Schildgen's examination revealed normal gait, diffuse tenderness over the lower lumbar spine and moderately restricted lumbar range of motion. Straight-leg raising was negative and appellant was able to arise from a chair without hesitation. Dr. Schildgen diagnosed degenerative disease of the lumbar spine and right knee. After reviewing appellant's record and conducting his own examination, he determined that she did not have any work-related continued residuals or disability and that she could resume her position.

In order to address whether appellant's work injury contributed to her degenerative lumbar and right knee conditions and whether her work-related conditions had resolved without residuals and disability, Dr. Schildgen submitted a supplemental report dated November 2, 2007. He reiterated his opinion that appellant's degenerative conditions preexisted the April 17, 2003 work injury. Dr. Schildgen explained his opinion by noting that x-ray taken on April 25, 2003 revealed significant degenerative change in the lumbar spine and right knee and that it was "medically extremely improbable" that such degenerative conditions could have developed from the April 17, 2003 injury that occurred only one week prior. He further explained that at the time of injury, appellant did not sustain any significant injury, fracture or disability and that any aggravation the injury may have caused to her degenerative conditions would not have been permanent.

The Board finds that Dr. Schildgen's reports represent the weight of the medical evidence and that the Office properly relied on his reports in terminating appellant's benefits. Dr. Schildgen's opinion is based on proper factual and medical history and his report contained a detailed summary of relevant medical evidence. Moreover, he analyzed this information in addition to his own examination findings to reach a reasoned conclusion regarding appellant's condition.⁸ He found no basis on which to attribute any residuals or continued disability to her employment injury.

Appellant provided no additional medical evidence to support that she continued to have any residuals or disability due to her accepted injury. Consequently, the Board finds that the weight of the medical evidence establishes that appellant's lumbar and right knee condition had ceased and that she had no residuals or continued disability due to her accepted condition.

⁸ See *Naomi Lilly*, 10 ECAB 560 (1959) (the opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the doctor's opinion are factors which enter into the weight of an evaluation).

Therefore, the Office met its burden of proof to terminate appellant's compensation benefits effective September 22, 2008.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective September 22, 2008.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decisions dated May 5, 2009 and September 22, 2008 are affirmed.

Issued: August 13, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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