United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant	)	
and	)	**Docket No. 09-1791**
	)	**Issued: June 17, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Antioch, CA, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 9, 2009 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated August 14, 2008 and June 24, 2009. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective August 31, 2008.

On appeal, appellant asserts that the Office failed to properly develop his claim, the impartial examiner was improperly selected and he was found disabled by the Office of Personnel Management (OPM) for spondylosis.

FACTUAL HISTORY

On July 17, 2001 appellant, then a 44-year-old letter carrier, sustained an employment-related lumbar strain when he slipped and fell on a wet step while delivering mail. In reports dated August 6 and September 6, 2001, Dr. Santi Rao, a Board-certified orthopedic surgeon, diagnosed lumbar musculoligamentous sprain, right foot contusion and sprain and plantar

fasciitis, resolving slowly. He advised that appellant work with restrictions. The Office accepted that appellant sustained employment-related bilateral plantar fasciitis. Appellant began modified duty and received compensation for intermittent periods of disability.

In a January 10, 2002 report, Dr. Paul B. Nottingham, a Board-certified orthopedic surgeon, noted the history of injury and appellant's complaint of persistent low back pain. He provided findings on physical examination and diagnosed bilateral L5 spondylolysis and Grade 1 spondylolisthesis of L5 on S1 as demonstrated on x-ray that day. Dr. Nottingham noted that appellant had had this condition for some time and was asymptomatic until the fall at work. A February 7, 2002 magnetic resonance imaging (MRI) scan of the lumbosacral spine demonstrated L5-S1 bulging, Grade 1, L5-S1 spondylolisthesis due to bilateral pars defects, moderate bilateral foraminal narrowing and mild L2-3 disc degeneration and bulging. On February 21, 2002 Dr. Nottingham reviewed the MRI scan findings and reiterated his diagnoses. On an Office form report, he checked a box "yes," indicating the diagnosed conditions were employment related and advised that appellant could not return to work. On April 4, 2002 Dr. Nottingham discussed the possibility of surgical intervention.

On June 11, 2002 the Office referred appellant to Dr. Thomas Dorsey, Board-certified in orthopedic surgery, for a second opinion evaluation. In a June 28, 2002 report, Dr. Dorsey provided findings on examination and diagnosed symptomatic spondylolysis and spondylolisthesis of the lumbar spine and minimal bilateral plantar fasciitis. He did not believe that the conditions were related to the July 17, 2001 employment injury but were related to the cumulative trauma of appellant's work duties on the basis of acceleration. Dr. Dorsey provided restrictions to appellant's physical activity. Appellant continued modified duty until January 8, 2003 when he underwent right heel shockwave treatment. On May 14, 2003 he had left heel shockwave treatment and returned to modified duty on June 9, 2003.[1]

Dr. James R. Boccio, a podiatrist, began treating appellant on September 21, 2001. He performed a plantar fascial release and excision of a plantar calcaneal spur on the left foot on February 2, 2005. Appellant did not return to work and was placed on the periodic rolls.

In a May 26, 2005 report, Dr. Nottingham noted the recent left foot surgery and advised that appellant was totally disabled. On August 4, 2005 he noted that appellant felt that he had significant back problems since his fall at work in 2001 with continued progression. Dr. Nottingham reported that a July 18, 2005 MRI scan showed a degenerative L5-S1 disc with mild to moderate foraminal stenosis, Grade 1 anterolisthesis of L5 on S1 and more modest degenerative changes at the L2-3 level.[2] He advised that appellant's condition was an ongoing worsening of the symptoms he experienced in 2001 and recommended surgery. On August 31, 2005 appellant had a plantar fascial release and excision of a plantar calcaneal spur on the right foot.

On May 23, 2006 the Office referred appellant to Dr. Matthew Mitchell, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a June 15, 2006 report, Dr. Mitchell

[1] From the record it would appear that appellant was working eight hours a day casing letters and flats, loading his vehicle and driving his route, with limited walking.

[2] The MRI scan study is not found in the case record.

reviewed the medical record and provided findings on examination. He diagnosed status post bilateral plantar fascia releases and lumbar degenerative disc disease with spondylolisthesis. Dr. Mitchell advised that the plantar fasciitis was directly caused by appellant's injury but that the degenerative disc disease was not related to the July 2001 employment injury. Dr. Mitchell noted that appellant's foot pain caused difficulty standing and he provided permanent restrictions, including walking and standing for three hours a day, bending, stooping, pushing, pulling, lifting, kneeling, squatting and climbing for two hours a day with a 20-pound lifting restriction.

In July 2006 the employing establishment offered appellant a position within the restrictions provided by Dr. Mitchell. Appellant refused the job offer. Dr. Boccio advised that appellant could not return to either regular or modified duties. In an August 17, 2006 report, Dr. Nottingham reviewed Dr. Mitchell's report and advised that, from his history, appellant's back problems were work related. When he first saw appellant in January 2002, he complained of severe low back pain and subsequent studies showed both a spondylolysis bilaterally at L5 and spondylolisthesis. By report dated September 8, 2006, Dr. Larry H. Woodcox, a podiatrist and chiropractor, noted appellant's report that he injured his back and both feet in an employment injury on July 17, 2001 had low back pain. He provided findings on examination and diagnosed bilateral nerve entrapment and probable tarsal tunnel syndrome and status post bilateral foot surgery and moderate strain/sprain of the lumbar spine, complicated by spondylolysis and spondylolisthesis. On November 28, 2006 Dr. Nottingham advised that appellant did not want to have back surgery. On December 11, 2006 Dr. Boccio advised that appellant could return to modified duty, beginning 2 hours daily with restrictions of sitting, standing and walking for 20 minutes, driving and performing repetitive wrist and elbow activity for 2 hours, pushing, pulling, lifting, squatting, kneeling, climbing for 10 minutes with a weight limitation of 10 pounds and 15-minute breaks every 30 minutes and no mail delivery.[3]

On February 7, 2007 Dr. Jacob Rosenberg, Board-certified in anesthesiology and pain management, noted appellant's complaint of radiating low back pain. He provided physical findings on examination and diagnosed chronic low back pain, lumbar disc disease, lumbar spondylolisthesis at L5-S1, lumbar radiculopathy and depressed mood secondary to chronic pain with limited function, activity and employment. On February 13, 2007 Dr. Rosenberg advised that appellant could work modified duty for 4 hours daily with intermittent standing and walking of 2 hours; sitting, bending, twisting, carrying and pushing 20 pounds for 4 hours; bending, twisting and stooping for 1 hour and that he alternate positions every 30 minutes. Appellant began pain management therapy. On February 16, 2007 Dr. Boccio agreed with the restrictions provided by Dr. Rosenberg. A May 9, 2007 electromyography (EMG) and nerve conduction study (NCS) of the lower extremities demonstrated evidence of chronic right L5 lumbar radiculopathy. In a May 22, 2007 report, Howard P. Rome, Ph.D., a pain management psychologist, diagnosed adjustment disorder with depressed mood, mild to moderate and lumbar degenerative disc disease with radiculopathy, chronic low back pain, and status post foot surgery. In May 2007 the employing establishment prepared a modified-duty job offer that Dr. Rosenberg approved on May 24, 2007. On May 29, 2007 Dr. Rome advised that appellant could no longer perform the offered position because his condition had worsened with increased foot pain and

[3] Dr. Nottingham provided the same restrictions.

decreased ability to ambulate. A June 12, 2007 x-ray of the lumbar spine demonstrated L5 spondylolysis with Grade 1 spondylolisthesis and degenerative disc disease.

The Office determined that a conflict in medical opinion arose between Dr. Boccio and Dr. Mitchell regarding whether appellant's degenerative disc disease was employment related. On October 11, 2007 it referred appellant to Dr. Howard Sturtz, a Board-certified orthopedic surgeon, for an impartial medical evaluation. On October 24, 2007 appellant telephoned the Office and objected to examination by Dr. Sturtz because he had previously examined his wife and that Dr. Rosenberg had a conflict with Dr. Sturtz. He asked whether he could be involved in the selection of the referee physician. In an October 25, 2007 report, Dr. Rosenberg expressed his opinion that Dr. Sturtz was biased. On November 5, 2007 appellant contended that Dr. Sturtz was biased and noted that he had previously met with him on September 27, 2002 when the physician evaluated his wife. He attached an incomplete page from an October 21, 2002 report on Dr. Sturtz's letterhead. On December 18, 2007 the Office informed appellant that his reasons for objecting to the appointment with Dr. Sturtz had no factual basis, noting that the document he submitted was incomplete and there was no way to confirm its validity.

In a February 18, 2008 report, Dr. Sturtz reviewed the history of appellant's slip and fall injury, the statement of accepted facts and medical record, and noted appellant's complaint of low back pain radiating into the right lower extremity to both feet. He noted that appellant walked with a normal gait without evidence of limp but stated that he could not walk on his heels or toes. Squatting was at 20 percent of normal and produced low back pain. There was no tenderness or spasm on neck and shoulder examination and slight tenderness on back examination. Leg lengths, thigh and calf circumferences were equal, and there were no motor or reflex deficits in the lower extremity. Decreased sensation was nonanatomical and present with both pinprick and vibration. Double leg straight leg raising in the sitting position was possible to 90 degrees bilaterally without pain and to 45 degrees supine. Dr. Sturtz stated that, after evaluating appellant and a review of the medical records, he had sustained a lumbosacral strain and contusion to his right foot as a result of the July 17, 2001 injury. He advised that appellant's spondylolysis and spondylolisthesis were preexisting conditions and were not caused or aggravated by the employment injury. Appellant did not exhibit any radiculopathy of the right lower extremity, noting positive Waddell's signs and symptom magnification. Dr. Sturtz stated that it was possible that appellant developed bilateral plantar fasciitis and, despite numerous interventions, remained symptomatic. He concluded that appellant did not have residuals of the accepted employment conditions. In an attached work capacity evaluation, Dr. Sturtz advised that appellant had minor limitations due to plantar fasciitis in that he should stand and walk only four hours daily and provided a 70-pound weight restriction. He also submitted publications on nonorganic physiological signs of low back pain, examinations of the spine, spinal surgery, heel pain and spondylosis.

Appellant continued pain management with therapy with Dr. Rosenberg. On March 18, 2008 Dr. Rosenberg noted disagreed with the report of Dr. Sturtz especially his finding of symptom magnification. He stated that Dr. Sturtz ignored the EMG findings. Dr. Rosenberg advised that appellant's sacroiliac joint irritation and S1 nerve root irritation were caused by the employment injury. In an April 19, 2008 report, Dr. Boccio noted that appellant's foot condition was recalcitrant to treatment and that he continued to have bilateral foot pain.

On July 10, 2008 the Office proposed to terminate appellant's compensation benefits on the grounds that the weight of medical opinion was given to Dr. Sturtz's report. It established that appellant's employment-related conditions had resolved with no residuals or disability.

Appellant disagreed with the proposed reduction and submitted brief reports from Dr. Boccio dated June 23 to July 21, 2008. Dr. Boccio noted appellant's complaints of pain to both feet and with palpation of the plantar fascia band. He advised that appellant ambulated with pronated feet and diagnosed plantar fasciitis. In reports dated July 22 and 31, 2008, Dr. Kenneth Kim, Board-certified in physiatry and pain medicine and an associate of Dr. Rosenberg, noted appellant's complaint of low back pain. Lumbar spine examination demonstrated tenderness and tightness and range of motion was limited. Dr. Kim diagnosed lumbar degenerative disc disease, low back pain and sacroiliac pain.

By decision dated August 14, 2008, the Office terminated appellant's compensation as of August 31, 2008. It found that the referee opinion of Dr. Sturtz constituted the weight of medical opinion.

On August 22, 2008 appellant requested a hearing. In an August 18, 2008 report, Dr. Boccio reiterated that appellant remained disabled due to his accepted conditions. At the January 21, 2009 hearing, appellant testified regarding his work history and medical condition, stating that he could perform little physical activity due to excruciating pain. His attorney argued that Dr. Sturtz's opinion was inconsistent and that depression and additional back conditions should be accepted. On January 29, 2009 counsel reiterated that appellant had objected to Dr. Sturtz as the impartial physician because he had previously met the physician. She argued that Dr. Sturtz should be disqualified to serve as an impartial examiner.

On October 10, 2008 the Office of Personnel Management (OPM) advised that appellant was disabled due to a temporamandibular joint (TMJ) condition, depression, insomnia, erectile dysfunction, spondylolysis, hypertension, and pain to both feet, and that he was disabled for the position of city carrier due to TMJ, spondylolysis and hypertension only. In a February 1, 2009 statement, appellant's wife, stated that on or about October 21, 2002 she evaluated by Dr. Sturtz in regard to a claim for disability benefits and that appellant met and talked to the physician. In a February 2, 2009 statement, appellant confirmed that he met Dr. Sturtz on or about October 21, 2002. Appellant also submitted two pages of a September 27, 2002 report regarding his wife with the letterhead of Dr. Sturtz.

By decision dated June 24, 2009, an Office hearing representative affirmed the August 14, 2008 decision, finding the weight of the medical evidence rested with the referee opinion of Dr. Sturtz. She found the fact that the physician examined appellant's wife was not sufficient reason to disqualify the physician.

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. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4]

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

The Office's 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]

Section 8101(2) of the Act defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law.[9]

ANALYSIS

The Board initially notes that the Office improperly determined that a conflict in medical evidence had been created between the opinions of Dr. Boccio and Dr. Mitchell regarding whether appellant's degenerative disc disease was work related. The term physician, as defined under section 8101(2) of the Act, includes podiatrists within the scope of their practice as defined by state law.[10] California law defines podiatric medicine to mean "the diagnosis, medical, surgical, mechanical, manipulative and electrical treatment of the human foot, including the ankle and tendons that insert into the foot and the nonsurgical treatment of the muscles and tendons of the leg governing the functions of the foot."[11] Thus, as Dr. Boccio is not qualified as a physician to render an opinion on the subject of a back condition, and a conflict may only exist between a physician for an employee and that of the United States, no conflict in medical opinion was created.[12] As such, Dr. Sturtz is not an impartial examiner but an Office referral physician rendering a second opinion evaluation. The medical evidence establishes that a conflict exists between appellant's physicians, Drs. Nottingham and Rosenberg, and the opinions of Drs. Mitchell and Sturtz regarding whether appellant's preexisting degenerative disc disease, spondylolysis and spondylolisthesis of the lumbosacral spine were caused or aggravated by the July 17, 2001 employment injury.

The Board also finds that the medical evidence does not establish that the residuals of appellant's accepted bilateral plantar fasciitis had ceased. Dr. Boccio found that appellant had

[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] 5 U.S.C. § 8101(2); *see Paul Foster*, 56 ECAB 208 (2004).

[10] *Id*.

[11] Calif. Business & Professions Code, Section 2472, Chapter 5, Article 22.

[12] *See S.G.*, 58 ECAB 383 (2007).

residuals of this condition and provided restrictions that appellant could work four hours of modified duty daily and could not deliver mail. In a June 15, 2006 second opinion evaluation, Dr. Mitchell noted that appellant's foot pain caused difficulty standing and provided physical restrictions. On February 18, 2008 Dr. Sturtz provided contradictory statements regarding appellant's accepted plantar fasciitis. While he advised that appellant had no residuals of his employment injuries, the physician also noted that appellant remained symptomatic due to plantar fasciitis and provided limitations due to this condition. The medical evidence is insufficient to establish that appellant no longer had residuals of the accepted bilateral plantar fasciitis condition. For the foregoing reasons, the Office did not meet its burden of proof in terminating appellant's compensation and medical benefits on the grounds that he had no residuals or disability due to his employment injuries.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective August 31, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated June 24, 2009 and August 14, 2008 be reversed.

Issued: June 17, 2010
Washington, DC

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

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

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