United States Department of Labor
Employees' Compensation Appeals Board

D.A., Appellant	)	
and	)	**Docket No. 11-103**
	)	**Issued: September 13, 2011**
DEPARTMENT OF THE NAVY,	)	
Portsmouth, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On October 19, 2010 appellant filed a timely appeal from a September 23, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed the termination of his compensation benefits. Pursuant to the Federal Employees' Compensation Act (FECA)[1] and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's compensation benefits on April 10, 2010 for his accepted injury effective.

FACTUAL HISTORY

On March 18, 2009 appellant, then a 48-year-old paint blaster, filed a traumatic injury claim alleging that on March 10, 2009 he injured his right shoulder and neck when lifting hoses

[1] 5 U.S.C. §§ 8101-8193.

at work. OWCP accepted neck sprain, right wrist sprain and right sacroiliac joint sprain. Appellant stopped work on the date of injury and received continuation of pay and wage-loss compensation for periods of disability.

Appellant came under the treatment of Dr. Arthur Wardell, a Board-certified orthopedic surgeon, who diagnosed cervical spine sprain, radiculopathy, right shoulder sprain, dorsolumbar spine sprain, right sacroiliac joint sprain, acromioclavicular joint sprain, right carpal tunnel syndrome and left sciatica. In reports dated April 6 to June 25, 2009, Dr. Wardell noted appellant's complaints of persistent pain radiating down the right arm and leg and recommended epidural steroid injections which were performed on July 24, August 6 and 21, 2009. He found that appellant was totally disabled and recommended a spinal fusion. A May 5, 2009 electromyogram revealed right carpal tunnel syndrome but no evidence of cervical radiculopathy on the right. On June 24, 2009 appellant underwent a magnetic resonance imaging scan of the cervical spine which revealed degenerative changes at C5-6 with mild canal stenosis.

OWCP referred appellant to Dr. Steven C. Blasdell, a Board-certified orthopedic surgeon, for a second opinion. In a September 17, 2009 report, Dr. Blasdell reviewed the records provided and examined appellant. On examination of the neck he found tenderness to light touch, absent cervical extension and restriction of cervical flexion. There was no effusion or tenderness of the right wrist, tenderness of the lumbar spinous process, minimal back extension with positive straight leg raises. Dr. Blasdell diagnosed cervical degenerative disc disease, status post L5-S1 discectomy, lumbar degenerative disc disease, bilateral carpal tunnel syndrome and chronic neck and back pain behavior. He noted that appellant's examination revealed multiple nonphysiologic findings including tenderness to light touch, positive axial compression test and discrepancy between supine and straight leg raising which indicated symptom magnification. Dr. Blasdell found that appellant recovered from the orthopedic injury resulting from the March 10, 2009 work injury and had no injury-related disability within a reasonable degree of medical probability. He opined that appellant had nonindustrial disability related to preexisting cervical and lumbar disc disease. Dr. Blasdell noted that appellant could return to work with restrictions based on his cervical and lumbar degenerative disc disease with no work restrictions related to any orthopedic injury sustained on March 10, 2009. He required no further treatment for his work injury. Dr. Blasdell noted appellant's C5-6 fusion might be indicated based on his symptoms but the surgery would be unrelated to the March 10, 2009 work injury.

Appellant submitted reports from Dr. Waddell dated July 14 to December 3, 2009. Dr. Waddell diagnosed sprain and strain of the lumbar and cervical spine and continued to opine that appellant was totally disabled from work. On December 24, 2009 he noted reviewing Dr. Blasdell's report and disagreed with his findings. Dr. Waddell opined that appellant did not have a nonindustrial disability related to preexisting cervical degenerative disc disease.

OWCP found a conflict in medical opinion between Dr. Waddell, appellant's treating physician, who stated that appellant had residuals of his work-related injuries and was totally disabled and Dr. Blasdell, the referral physician, who determined that appellant's work-related conditions had resolved and he could return to work with restrictions related only to his nonindustrial cervical and lumbar degenerative disc disease.

On January 7, 2010 OWCP referred appellant to, Dr. Jeffrey D. Moore, a Board-certified orthopedic surgeon, selected to resolve the conflict. In a January 19, 2010 report, Dr. Moore reviewed the records provided to him and examined appellant. He noted appellant's history, including 1988 lumbar spine decompression surgery. Dr. Moore reviewed appellant's job requirements, the work injury and treatment following the injury. During examination, appellant exhibited pain behaviors with distinct inconsistencies consistent with signs of symptom magnification. Dr. Moore explained that, throughout the examination, appellant exhibited pain behaviors as follows:

> "[Appellant] was very slow with his movements and transitional changes such as standing from seated position. I also noticed distinct inconsistencies with his examination with signs of over magnification in that he had a lot of hypersensitivity and would restrict his movement with focusing on certain anatomical regions such as a cervical spine and lumbar spine, as well as shoulder. However, when not focusing on this during the interview process, it was apparent that [appellant] had very fluid movement in his cervical spine and also had better movement in his shoulder than demonstrated on focal testing. In addition, he had no difficulty with moving his lumbar spine on transitional movement to the examining table and getting in different positions. However, with focal examination in the standing position, [appellant's] lumbar and cervical movement were minimal. He resisted almost any movement relating pain in these areas when he moved through a very small range of motion. Therefore, I did not consider my examination to be accurate and complete as a result of these pain reflex type of behaviors and over magnification signs."

Dr. Moore noted diffuse tenderness and hypersensitivity to light touch throughout the cervical spine, axial compression testing was positive, straight leg raises were negative bilaterally, deep tendon reflexes were bilateral and symmetric in the upper and lower extremities, sensory examination was intact and motor examination revealed diffuse weakness in the lower and upper extremities. On general inspection appellant had a "very muscular body habitus and very large muscular arms that demonstrated generalized weakness that seemed inconsistent." Examination of both hands revealed no apparent atrophy but diffuse diminished grip strength bilaterally. Dr. Moore opined to a reasonable degree of medical certainty that appellant sustained a strain to his cervical, lumbar and right shoulder which resolved within six months of injury or September 10, 2009 and any symptoms existing beyond that time would be attributed to chronic preexisting degenerative disease. He found that appellant did not have any residuals of his work-related injury of March 10, 2009 but demonstrated symptoms of over magnification which suggested secondary gain or poor motivation to return to work. Dr. Moore advised that appellant was not a surgical candidate and could return to work subject to restrictions that were not due to the March 10, 2009 work injury but rather due to chronic degenerative condition.

On February 4, 2010 OWCP issued a notice of proposed termination of compensation benefits on the grounds that Dr. Moore's report established no residuals of the work-related conditions.

In a February 23, 2010 statement, appellant disagreed with the proposed termination of benefits and asserted that he still had residuals of the work injury. He questioned the validity of

Dr. Blasdell's evaluation contending that the physician did not review his entire medical record and only took an x-ray of his right wrist.[2] From December 18, 2009 to February 3, 2010, Dr. Wardell noted appellant's treatment for neck pain and found that appellant was totally disabled. In a February 3, 2010 attending physician's report, he diagnosed cervical spine sprain, lumbar spine radiculopathy and noted with a checkmark "yes" that appellant's condition was caused or aggravated by his work. Dr. Wardell noted that appellant was totally disabled. In a February 3, 2010 duty status report, he diagnosed cervical and lumbar sprain and strain and noted that appellant was totally disabled. Also submitted were physical therapy notes.

By decision dated March 29, 2010, OWCP terminated appellant's compensation benefits effective April 10, 2010, finding that the weight of the medical evidence as represented by Dr. Moore established that he had no residuals or disability due to his accepted employment injuries.

Appellant requested a telephonic hearing which was held on July 7, 2010. He submitted a cervical spine x-ray dated June 9, 2009, which revealed dextroscoliosis with mild degenerative disc disease. Also submitted were prescription notes from Dr. Wardell dated May 4 to December 24, 2009, previously of record. In a March 25, 2010 attending physician's report, Dr. Wardell diagnosed sprain/strain of the cervical spine, radiculopathy of the lumbar spine and chronic lumbar spine sprain and noted with a checkmark "yes" that appellant's condition was caused by a work activity. Appellant submitted physical therapy notes dated March 12 to April 1, 2010.

In a decision dated September 23, 2010, an OWCP hearing representative affirmed the December 1, 2009 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[4] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.[5]

[2] Appellant noted that he had prior neck injuries in 2002 and 2004 and that he saw Dr. Blasdell for the 2004 injury. Any claims pertaining to these prior injuries are not before the Board on the present appeal.

[3] *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

[4] *Mary A. Lowe*, 52 ECAB 223 (2001).

[5] *Id.; Leonard M. Burger*, 51 ECAB 369 (2000).

ANALYSIS

OWCP accepted appellant's claim for work-related neck sprain, right wrist sprain, right sacroiliac joint sprain. It reviewed the medical evidence and determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Wardell, a Board-certified orthopedic surgeon, who indicated that appellant had residuals of his work-related injuries and was totally disabled from work and Dr. Blasdell, OWCP's referral physician, who determined that appellant's work-related conditions had resolved and appellant had no residuals due to the work. Consequently, OWCP referred appellant to Dr. Moore to resolve the conflict.

The Board finds that, under the circumstances of this case, the opinion of Dr. Moore is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that residuals of appellant's work-related neck sprain, right wrist sprain, right sacroiliac joint sprain have ceased. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[6]

In his report of January 19, 2010, Dr. Moore reviewed appellant's history, reported findings and noted that appellant exhibited no objective complaints or findings due to the accepted conditions. He opined to a reasonable degree of medical certainty appellant sustained a strain to his cervical, lumbar and right shoulder which resolved within six months of injury and any symptoms existing beyond this time would be attributed to chronic preexisting degenerative disease. Dr. Moore explained that, throughout the examination, appellant exhibited pain behaviors noting signs of over magnification in that he had a lot of hypersensitivity and would restrict his movement with focusing on certain anatomical regions such as a cervical spine and lumbar spine, as well as shoulder but, when not focusing on this during the interview process, it was apparent that he had very fluid movement in his cervical spine and also had better movement in his shoulder than demonstrated on focal testing. He opined that appellant did not have any residuals of his March 10, 2009 work injury but demonstrated symptom magnification which suggested secondary gain or poor motivation to return to work. Dr. Moore advised that appellant could return to work subject to restrictions that were not due to the March 10, 2009 work injury but rather were due to chronic degenerative condition. He opined that appellant required no treatment for the work-related injury.

Thereafter, appellant submitted reports from Dr. Wardell dated March 18 to December 24, 2009 and December 18, 2009 to February 3, 2010, who noted appellant's treatment for neck pain and advised that appellant was totally disabled. Similarly, attending physician's reports dated February 3 to March 25, 2010, diagnosed sprain of the cervical spine, radiculopathy of the lumbar spine and noted with a checkmark "yes" that appellant's condition was caused or aggravated by a work activity. Dr. Wardell noted that appellant was totally disabled. Likewise, in a February 3, 2010 duty status report, he diagnosed cervical and lumbar sprain and strain and noted that appellant was totally disabled. However, none of Dr. Wardell's reports specifically provide medical reasoning addressing how any continuing condition or

[6] *Solomon Polen*, 51 ECAB 341 (2000). *See* 5 U.S.C. § 8123(a).

disability was causally related to the March 10, 2009 work injury. He was also on one side of a conflict that was resolved by Dr. Moore[7] and his reports do not otherwise provide new findings or medical rationale sufficient to establish that any continuing condition or residuals are causally related to the March 10, 2009 work injury.

Appellant also submitted physical therapy notes dated July 6, 2009 to April 1, 2010. However, the Board has held that treatment notes signed by a physical therapist is not considered medical evidence as these providers are not a physician under FECA.[8] Other reports including an x-ray of the cervical spine dated June 9, 2009 fail to address continuing disability.

Consequently, the medical evidence submitted after Dr. Moore's report is insufficient to overcome his report or to create another conflict in the medical evidence. The Board finds that Dr. Moore's opinion constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of benefits for the accepted conditions of neck sprain, right wrist sprain and right sacroiliac joint sprain.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate benefits effective April 10, 2010.

[7] *See Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board notes that Dr. Wardell's report did not contain new findings or rationale on causal relationship upon which a new conflict might be based.

[8] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 23, 2010 is affirmed.

Issued: September 13, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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