United States Department of Labor
Employees' Compensation Appeals Board

W.A., Appellant	)	
and	)	**Docket No. 08-1029**
	)	**Issued: October 17, 2008**
U.S. POSTAL SERVICE, POST OFFICE, New York, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2008 appellant filed a timely appeal from the merit decision of the Office of Workers' Compensation Programs dated December 17, 2007 terminating his medical and wage-loss benefits effective December 22, 2007. He also filed a timely appeal of the January 28, 2008 decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction to review the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective December 22, 2007 on the grounds that he no longer had any residuals due to his accepted employment injury; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On December 15, 2004 appellant, then a 44-year-old mail handler, filed a traumatic injury claim alleging that on December 2, 2004 he suffered neck pain and pain in his shoulder while taking mail via "post-con" from the fifth floor to the third floor. On January 28, 2005 the Office accepted appellant's claim for cervical sprain. When appellant was able to return to work with restrictions, he was rehired by the agency for 90 days (July 7 through October 21, 2005) and then was terminated. Appropriate compensation and medical benefits were paid.

Appellant began receiving treatment from Dr. Carolyn Martin, a Board-certified neurologist, in January 2005. In addition to continuing treatment from Dr. Martin, he has received treatment from Dr. Robert D. Kramberg, a Board-certified physiatrist, beginning January 5, 2005 and Dr. Astaire K. Selassie, a Board-certified anesthesiologist with a subspecialty in pain medicine, beginning August 8, 2005. Both Dr. Kramberg and Dr. Selassie are associates of Dr. Martin.

By letter to appellant's physician dated September 18, 2006, the employing establishment noted that appellant was hired as a casual employee, which is seasonal and temporary employment. The employing establishment further noted that, after appellant's December 2, 2004 injury, he was on total disability, then was rehired for another temporary assignment effective July 2, 2005, which expired on October 21, 2005, he has not worked since that date. The employing establishment asked Dr. Martin to complete a work capacity form indicating appellant's current condition. On September 18, 2006 Dr. Martin completed this form, indicating that appellant could work 8 hours a day sitting, walking and standing; could work 2 hours a day bending/stooping, operating a motor vehicle to and from work, operating a motor vehicle at work, kneeling and climbing; could work 1 hour a day reaching above shoulder, twisting and squatting; could work 30 minutes a day doing repetitive movements with wrists (limited to 5 pounds) and 30 minutes a day performing repetitive movements with elbow (limited to 10 pounds). Appellant could not perform any duties involving pushing and pulling.

On September 26, 2006 the Office, through a medical consultants firm, referred appellant to Dr. David I. Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated October 10, 2006, Dr. Rubinfeld diagnosed cervical sprain. He noted that appellant had no objective findings of the accepted condition of sprain of the neck, that sufficient orthopedic care and treatment has been provided and no additional orthopedic treatment was necessary. Dr. Rubinfeld opined that appellant was currently able to perform the full duties of his federal employment as a mail handler, the job he held as of the injury of December 2, 2004. He noted that appellant's condition had totally resolved, that he had reached maximum medical improvement and was able to return to work without restrictions.

On November 10, 2006 the Office proposed terminating appellant's medical and compensation benefits noting that the weight of the medical evidence established that appellant no longer had any residuals or disability that was due to the work injury.

In a December 26, 2006 letter, Dr. Kramberg indicated that he first saw appellant on January 5, 2005 for complaints of neck pain and right shoulder pain which appellant stated that he had been suffering from since injuring himself at work on December 2, 2004. He reviewed

the history of his treatment of appellant. Dr. Kramberg listed his final diagnoses as cervical strain and sprain with radiculitis, right parencentral disc herniation C6-7, right C7 radiculopathy, status post cervical epidural steroid injections times two and right shoulder impingement syndrome at the supraspinatus musculotendinous junction. He opined that these diagnoses were directly and causally related to appellant's work accident and that these injuries "are permanent in nature in that they have not healed to function normally and will not heal to function normally with further medical treatment." In a follow-up note dated January 17, 2007, Dr. Kramberg indicated that it was his opinion that appellant was unable to perform the duties of mail handler and was therefore disabled. He further noted his disagreement with Dr. Rubinfeld's opinion with regard to appellant's disability. Dr. Kramberg noted that on numerous occasions appellant had subjective complaints of neck pain and right shoulder pain with significant objective findings on multiple physical examinations as well as diagnostic testing including a magnetic resonance imaging (MRI) scan and electrodiagnostic testing, and that Dr. Rubinfeld's examination on one occasion cannot reveal the distinct clinical findings in regard to appellant's case.

In a medical report dated January 22, 2007, Dr. Selassie noted that he first saw appellant on July 18, 2005 at which point he was complaining of right shoulder blade pain and pain radiating down his arm in a C6 dermatornal. He noted that appellant still complained of numbness in the C6 dermatomal distribution, pain on extension of his neck and right interossei weakness of 4/5. Dr. Selassie opined that appellant has a permanent disability from his former occupation. He noted that, although appellant gets good relief from epidural steroid injections, the pain recurs, that he should keep his neck in a neutral position throughout the workday which was preempted by his former occupation. In a report dated March 14, 2007, Dr. Selassie noted that appellant still had pain with flexion of his spine to 45 degrees and extension to 25 degrees. In a May 23, 2007 letter to Dr. Kramberg, he noted that it was his impression that appellant's injury was related to his work injury in that he did not have any pain before the accident and that he had neck pain and arm pain after the accident. Dr. Selassie noted that appellant remained totally disabled from his former occupation.

On June 25, 2007, in order to resolve the conflict between Drs. Kramberg and Rubinfeld with regard to whether appellant had any continuing work-related disability or residuals from the accepted injury, the Office referred appellant to Dr. Soon Choi, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a medical report dated July 30, 2007, Dr. Choi reviewed appellant's history and the results of his examination and diagnosed: (1) right cervical radiculopathy associated with advanced degenerative disc disease at the C4-5, C5-6 and C6-7 level with temporary aggravation by work-related injury; and (2) chronic impingement syndrome, right shoulder, temporary aggravation by work-related injury. He further opined:

> "The MRI [scan] findings of the cervical spine performed on January 11, 2005, within five weeks after the injury already showed preexisting degenerative process not caused by the work-related injury of December 2, 2004. The mild paracentral disc herniation at the C6-7 is a part of degenerative process and there was no evidence of spinal canal or forminal stenosis impinging nerve root. Traumatic cervical disc herniation in a healthy person requires very high-energy injury, much more than simply pulling a heavy mail container. Dr. Selassie's

> letter[s] of August 22, 2005, September 26, 2005 and November 9, 2005 mentioned that [appellant] had 'no longer neck or arm pain and his strength is 5-5 throughout.' This clearly indicated that [appellant] fully recovered from the temporary aggravation of the preexisting back and shoulder conditions. In my opinion, his current residual symptoms in his neck and shoulder are a result of the natural progression of his previous existing degenerative disc disease in the cervical spine and chronic impingement syndrome related to the hypertrophic degenerative arthritis of the [acromioclavicular] joint combined with type III acromion of his right shoulder joint, which was not caused by his work-related injury. The degenerative disc disease of the cervical spine is a permanent condition and most likely progressive in nature. [Appellant] may not be able to return to any type of job requiring heavy lifting or pulling and, in my opinion, he reached maximum improvement possible and no further treatment will improve his condition. However, he should be able to perform light or sedentary-type work activity without problems."

In a letter dated August 22, 2007, Dr. Selassie indicated that appellant had 70 percent relief of his neck pain and no relief of his arm pain. He indicated that it was his impression that appellant's neck pain was coming from a C6-7 herniation. Dr. Selassie further noted that it was unclear whether appellant's arm pain was coming from C6 radiculpathy. He recommended physical therapy with epidural steroid injections to build endurance.

On November 7, 2007 the Office issued a notice of proposed termination of appellant's medical benefits and compensation.

In a February 22, 2007 letter, received by the Office on November 26, 2007, Dr. Martin noted that she first saw appellant on January 3, 2005. She discussed appellant's history of injury and her history of treatment. Dr. Martin noted that, by her appointment with appellant on January 11, 2007, he was using Norflex and Mobic and they were helping with his pain. She noted that he had stopped therapy and was having more pain in the back and upper right posterior shoulder, that his right hand was numb and tingling and he was having tender spasms over the right paraspinal area and trapezius muscles. Dr. Martin noted that she had reviewed Dr. Rubinfeld's report and disagrees with his opinion that appellant is able to return to work duties and that appellant only has a cervical sprain. She opined that appellant had a herniated disc in the cervical area and had significant radiculopathy from the injury to his neck and cervical radiculopathy has continued to be a problem. Dr. Martin further noted that, although he had improvement in the pain and spasm, he still has need for medications and for protecting himself by not doing anything that would cause either herniation or a flareup of the condition. She noted that appellant could not go back to the full duty as a mail handler because this would require him to be pulling and pushing heavy carts and doing things beyond his ability. Dr. Martin opined that appellant was totally disabled from his usual work but noted that he could do light-duty work which did not require him to lift, push or pull anything more than 15 to 20 pounds.

By decision dated December 17, 2007, the Office terminated appellant's medical and wage-loss benefits effective December 22, 2007.

By letter dated January 7, 2008, appellant, through his attorney, requested reconsideration. Appellant's attorney contended, *inter alia*: (1) that the medical evidence, if fully considered and properly developed, showed that appellant had more extensive injuries than accepted by the Office; (2) that the Office erred in referring appellant for a second opinion and impartial medical examination; (3) that the opinion of the impartial medical examiner was deficient; and (4) that determinative weight should be given to the opinion of Dr. Martin which supported causally related continuing work-related disability.

Evidence submitted after the December 17, 2007 decision included medical notes dated October 3 and December 12, 2007 wherein Dr. Kramberg indicated that appellant still had persistent right shoulder pain as well as neck pain radiating into his right arm. Appellant also submitted a note by Dr. Martin dated December 12, 2007 wherein she noted right cervical sprain and spasm with cervical radiculopathy at C5-6 and right herniated nucleus pulposus C6-7 causally related to his work injury of December 2, 2004.

By decision dated January 28, 2008, the Office denied appellant's claim without reviewing the merits of the case.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[1] After it has determined that an employee has disability causally related to his 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.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[4] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[5]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee of the Secretary shall appoint a third physician who shall make an examination.[6] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the

[1] *Paul L. Stewart*, 54 ECAB 824 (2003).

[2] *Elsie L. Price*, 54 ECAB 734 (2003).

[3] *See Del K. Rykert*, 40 ECAB 284 (1988).

[4] *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Furman G. Peake*, 41 ECAB 361 (1990).

[5] *T.P.*, 58 ECAB __ (Docket No. 07-60, issued May 10, 2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[6] *F.R.*, 58 ECAB __ (Docket No. 05-15, issued July 10, 2007); *Regina T. Pellecchia*, 53 ECAB 155 (2001).

opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[7]

ANALYSIS -- ISSUE 1

In the instant case, the Office accepted appellant's claim for cervical sprain causally related to his December 2, 2004 work injury. Appellant received treatment from Drs. Martin, Kramberg and Selassie. In a September 18, 2006 work capacity form, Dr. Martin placed restrictions on appellant and stated that he must work within those restrictions. The Office referred appellant for a second opinion and in a report dated October 10, 2006, Dr. Rubinfeld noted that appellant had no objective findings of the accepted condition of sprain of the neck, that no further treatment was necessary, that his work-related condition had resolved and that he was currently able to perform the full duties of his federal employment as a mail handler. Dr. Kramberg, in a report dated December 26, 2006, noted his disagreement with Dr. Rubinfeld's conclusions. He noted that appellant's injuries sustained in the accident have not healed and in a January 17, 2005 note indicated that appellant was unable to perform his duties as a mail handler. Dr. Selassie also noted his disagreement with Dr. Rubinfeld. He opined that appellant has a permanent disability from his former occupation and that this was related to appellant's accepted work injury.

As there was a dispute between appellant's treating physicians and the second opinion physician, the Board finds that the Office properly referred appellant's case to an impartial medical examiner to resolve the issue of whether appellant had any continuing disability causally related to his federal employment.[8] The Office referred appellant to Dr. Choi for an impartial medical examination. Dr. Choi, after examining appellant and reviewing his medical history, opined that appellant had fully recovered from the temporary aggravation of his preexisting back and shoulder conditions and that the current residuals symptoms in his neck and shoulder are a result of the natural progression of his preexisting degenerative disc disease and chronic impingement syndrome. She noted that the MRI scan findings of the cervical spine performed on January 11, 2005, within five weeks after the injury, already showed this preexisting degenerative process. Dr. Choi concluded that appellant's current residual symptoms in his neck and shoulder are a result of the natural progression of his preexisting degenerative disc disease in the cervical spine and chronic impingement syndrome related to the hypertrophic degenerative arthritis of the acromioclavicular joint combined with type III acromion of his right shoulder joint not caused by his work injury. She found that appellant had fully recovered from the temporary aggravation of his preexisting back and shoulder conditions. The Board finds that the opinion of Dr. Choi, the impartial medical specialist, is based on a proper history and is medically well reasoned. Therefore, that opinion must be accorded special weight and, accordingly, the Office met its burden of proof to terminate compensation benefits.

Based on the well-rationalized medical opinion of the impartial medical examiner, Dr. Choi, on November 7, 2007, the Office proposed termination of appellant's medical benefits and compensation. After the proposed notice of termination, appellant submitted a February 22,

[7] *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[8] *Id.*

2007 letter by Dr. Martin, wherein she noted that she also disagreed with Dr. Rubinfeld's report and opined that appellant was totally disabled from his usual work but could perform light-duty work.

The Board finds that Dr. Martin's opinion is insufficient to overcome the weight accorded the opinion of the impartial medical specialist.[9] Furthermore, Dr. Martin did not state that appellant's remaining disability was causally related to the accepted work injury. Accordingly, the Board finds that the Office properly terminated benefits.

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under 5 U.S.C. § 8128(a), the Office's regulations provide that the application for reconsideration must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied to interpreted a specific point of law; (2) advances a legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.[10]

A timely request for reconsideration may be granted if the Office determines that the employee has submitted evidence and/or argument that meet at least one of these standards. If reconsideration is granted, the case is reopened and is reviewed on the merits.[11]

ANALYSIS -- ISSUE 2

Appellant advances various arguments that he considers new legal arguments. However, the arguments he presented on reconsideration basically amount to an argument that the Office improperly evaluated the medical evidence, which has no merit.[12] Appellant's attorney's argument that the Office did not fully develop the evidence is not borne out by the record. The Office referred the case for further medical development to a second opinion physician and then, when a conflict arose, to an impartial medical examiner. Appellant argues that the Office should not have referred appellant to a second opinion physician because this amounted to "doctor shopping." However section 8123(a) authorizes the Office to require an employee who claims disability as a result of an employment injury to undergo such physical examination as it deems necessary. Appellant argues that the opinions of the second opinion physician and impartial medical examiner were deficient in that these physicians were provided with an incomplete set of facts in that the Office did not accept appellant's claim for all the appropriate injuries. However, the medical reports and case history were provided to these physicians, who determined that appellant had no residual disability related to his employment. Dr. Choi, the impartial medical examiner, specifically noted that the mild paracentral disc herniation at C6-7 was part of the

[9] *See Kathryn E. Demarsh, supra* note 5.

[10] 20 C.F.R. § 10.606.

[11] 5 U.S.C. §§ 8101-8193, § 8128(a). The Board has found that the imposition of the one-year limitation does not constitute an abuse of discretionary authority granted the Office under section 8128(a) of the Act. *See Adell Allen (Melvin L. Allen)*, 55 ECAB 390 (2004).

[12] *See Annette Louise*, 54 ECAB 783, 785-86 (2003).

degenerative process and not caused by the work-related injury of December 2, 2004. Furthermore, although appellant may have some continuing disability, Dr. Choi found that it was not related to the work injury. Accordingly, the Board finds that the legal arguments presented by appellant on reconsideration have no merit.[13]

The only new evidence submitted on reconsideration were notes submitted by Dr. Kramberg and Martin that were repetitive of prior medical notes. Evidence that is duplicative or repetitive of evidence already in the record does not provide a basis for reopening the case for reconsideration.[14]

Accordingly, as appellant did not meet any of the criteria for reopening his case for review on the merits, the Office properly denied reconsideration.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective December 22, 2007 on the grounds that he no longer had any residuals from his accepted employment injury. The Board further finds that Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 28, 2008 and December 17, 2007 are affirmed.

Issued: October 17, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[13] *See id.*

[14] *Eugene F. Butler*, 36 ECAB 393 (1984).