United States Department of Labor
Employees' Compensation Appeals Board

C.R., Appellant	)	
and	)	**Docket No. 10-1273**
	)	**Issued: February 8, 2011**
FEDERAL JUDICIARY, FEDERAL PUBLIC DEFENDER SERVICE, Washington, DC, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On April 6, 2010 appellant, through his attorney, filed a timely appeal from a March 15, 2010 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective November 25, 2007 on the grounds that he had no further disability due to his accepted employment injury; (2) whether it properly terminated authorization for medical treatment; and (3) whether appellant has established that he has continuing disability as a result of his February 8, 1984 work injury.

FACTUAL HISTORY

The Office accepted that on February 8, 1984 appellant, then a 35-year-old criminal investigator, sustained a neck sprain, lumbsosacral sprain and lumbar disc displacement at L5-S1

when he was in a motor vehicle accident. He stopped work on February 8, 1984 and did not return.

On December 19, 2006 the Office referred appellant to Kevin F. Hanley, a Board-certified orthopedic surgeon, for a second opinion examination,[1] who evaluated appellant on January 9, 2007. Dr. Hanley diagnosed a history of a "musculoligamentous straining injury of the lumbar spine and cervical spine." On examination, he found no evidence of any "significant ongoing musculoskeletal problem." Dr. Hanley advised that appellant had no residuals from the February 8, 1984 work injury and could return to work without restrictions.

In a report dated January 30, 2007, Dr. Charles F. Colao, a Board-certified internist, discussed appellant's symptoms of neck and low back pain with radiculopathy bilaterally. He diagnosed cervical sprain with radiculopathy and possible herniated discs, lumbosacral strain with radiculopathy and lumbar disc herniation. Dr. Colao found that appellant was disabled from his usual employment. On April 10, 2007 he noted that magnetic resonance imaging (MRI) scan studies of the cervical and lumbar spine revealed "marked abnormalities and progression of his disc damage and significant disc damage in his neck, which in my opinion, based on a reasonable degree of medical certainty, are all due to the injuries of [February 8, 1984]."[2]

On June 5, 2007 the Office referred appellant to Dr. Robert Smith, a Board-certified surgeon, for an impartial medical examination. In a report dated June 19, 2007, Dr. Smith reviewed appellant's history of injury and discussed his complaints of back pain radiating into the knee on the right side and into the left buttock. He listed normal findings on physical examination. Dr. Smith noted that an MRI scan study dated March 21, 2007 revealed "a very small calcified disc at L5-S1" without high grade spinal stenosis. He found that appellant's accepted neck and back sprain had long resolved and that his displaced L5-S1 disc had "remained static" for 20 years. Dr. Smith related that a March 1989 MRI scan study showed a small paracentral disc herniation at L5-S1 and an August 1986 computerized tomography (CT) scan revealed a calcified disc herniation at L5-S1 which had "been there for quite some time and probably way before the 1984 work incident. Those studies from almost 20 years ago essentially

[1] On December 6, 2006 the Office noted that it had been three years since appellant submitted a medical report.

[2] A March 22, 2007 MRI scan study of the lumbar spine revealed at L5-S1 a "focal right paracentral osteophyte v[ersus] herniation superimposed on a broader osteophytic ridge that causes narrowing of the lateral recesses and inferior neural foramina at this level bilaterally." Appellant also had severe degenerative disc disease at L4-5 with "crowding of the lateral recesses and inferior neural formamina with possible contact of the right L4 nerve root" and a small disc protrusion at L3-4.

mirror the lumbar MRI [scans] that was done just a few months ago in 2007."[3] Dr. Smith concluded:

> "Based on the current examination and review of the imaging studies, there appears to be no objective residuals from the work incident that happened more than 20 years ago on February 8, 1984. Certainly, there is no finding of any ongoing soft tissue sprains or strains of the neck or back. The small disc herniation noted at L5-S1 that was accepted as part of the claim appears to have been static over these 20 years and, in my opinion, also appears to have been preexisting, since it was noted to be calcified in a study that was done way back in 1989.
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> "It does not appear that [appellant] would require any work restrictions for the accepted condition."

In an accompanying work restriction evaluation, Dr. Smith found that appellant could work without restrictions.

On August 2, 2007 the Office notified appellant of its proposed termination of his compensation and authorization medical benefits on the grounds that he had no further employment-related condition or disability. In response appellant submitted an April 2, 2007 report from Dr. Colao, who asserted that diagnostic studies revealed a progression of his disc condition at L5-S1 due to his work injury. On August 28, 2008 he challenged the termination of his compensation, noting that Dr. Hanley's and Dr. Smith's examinations were cursory.

By decision dated October 24, 2007, the Office terminated appellant's compensation and authorization for medical treatment. It found that the opinion of Dr. Smith represented the weight of the evidence and established that he had no further disability or need for medical treatment due to his work injury.

On November 21, 2007 appellant requested a review of the written record. He submitted additional medical evidence, including an August 15, 2007 report from Dr. George Mathews, a Board-certified neurosurgeon, who discussed appellant's work history and advised that the most recent MRI scan study, when compared to the March 23, 1989 MRI scan study, was "significantly worse." Dr. Mathews diagnosed post-traumatic disc degeneration at L4-5 and L5-S1, a disc hernation at L4-5 and L5-S1 and post-traumatic cervical disc degeneration at C5-6. He opined that appellant was totally disabled.

In a report dated November 10, 2007, Dr. Colao provided a detailed report challenging the conclusions of Dr. Hanley and Dr. Smith.

[3] A CT scan dated August 11, 1986 showed a bulging disc "with some calcification at L5-S1" with no definite acute herniation. A February 9, 1987 MRI scan study showed a herniated nucleus pulposus at L4-5 on the left and a central herniated disc at L5-S1. An MRI scan study performed March 23, 1989 showed a small right paracentral L5-S1 disc herniation that "may or may not" be impinging on the S1 root and a central disc hernation at L4-5.

By decision dated March 27, 2008, the Office hearing representative affirmed the March 27, 2008 termination decision. On March 25, 2008 appellant, through his attorney, requested reconsideration. He submitted medical reports from 1984 onward. In a decision dated March 15, 2010, the Office denied modification of its March 27, 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.[4] The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] 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.[6]

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, the Secretary shall appoint a third physician who shall make an examination.[7] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[8] In situations where there exist opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.[9]

The Office procedure manual provides as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[10]

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[4] *Elaine Sneed*, 56 ECAB 373 (2005).

[5] *Fred Reese*, 56 ECAB 568 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[6] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[7] 5 U.S.C. § 8123(a).

[8] 20 C.F.R. § 10.321.

[9] *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

ANALYSIS

The Office accepted that appellant sustained neck and back sprain and a displaced disc at L5-S1 due to a February 8, 1984 motor vehicle accident. Appellant stopped work at the time of his injury and did not return. The Office determined that a conflict existed between Dr. Hanley, the second opinion physician and Dr. Colao, appellant's attending physician, regarding whether he had any continuing disability or residuals of his accepted employment injury. It referred him to Dr. Smith for an impartial medical examination.

Where there exists a conflict in medical opinion and 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 upon a proper factual background, must be given special weight.[11] The Board finds, however, that Dr. Smith's opinion is of diminished probative value and thus does not represent the special weight of the medical evidence. On June 19, 2007 Dr. Smith listed normal findings on examination and asserted that appellant had no further evidence of his accepted neck or back sprain and that his disc herniation at L5-S1 had been static for 20 years. He noted that a CT scan from August 1986 showed a calcified disc herniation. Dr. Smith opined that, consequently, the disc herniation at L5-S1 probably preexisted the employment injury. He advised that appellant required no work restrictions for the accepted condition. It is unclear, however, whether Dr. Smith included the disc herniation at L5-S1 as an accepted condition in reaching this conclusion. He found that appellant's L5-S1 disc displacement, accepted by the Office as employment related and disabling, had been "static" for 20 years. Dr. Smith did not explain, however, whether the fact that the condition was static meant that it caused no further disability or had resolved such that he required no further medical treatment. He implied that the L5-S1 disc herniation was not work related as a CT scan from 1989, five years after the work injury, was calcified. However, the impartial medical examiner's opinion must be based on the statement of accepted facts for the probative value of the opinion is significantly diminished.[12] Dr. Smith, rather than providing a distinct opinion that appellant had no further residuals from his L5-S1 disc herniation, instead found that the accepted condition preexisted the work injury. As his opinion is outside the framework of the statement of accepted facts, it is insufficient to meet the Office's burden of proof on the relevant issue of whether appellant had any further employment-related residuals of his back condition.[13]

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation and medical benefits effective November 25, 2007 on the grounds that he had no further disability due to his accepted employment injury.[14]

[11] *J.M.*, 58 ECAB 478 (2007); *Glen E. Shriner*, 53 ECAB 165 (2001).

[12] *Willa M. Frazier*, 55 ECAB 379 (2004).

[13] *Id*.

[14] In view of the Board's disposition of the termination, the issue of whether appellant has established continuing disability due to his February 8, 1984 work injury is moot.

ORDER

IT IS HEREBY ORDERED THAT the March 15, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 8, 2011
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