

**United States Department of Labor
Employees' Compensation Appeals Board**

M.M., Appellant)	
)	
and)	Docket No. 10-2326
)	Issued: July 13, 2011
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Los Angeles, CA, Employer)	

Appearances: *Case Submitted on the Record*
Appellant, pro se
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 16, 2010 appellant filed a timely appeal from an August 26, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 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 OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits as of February 22, 2010.

FACTUAL HISTORY

The case was before the Board on a prior appeal. By decision dated November 25, 2008, the Board found appellant's fall at work on April 25, 2006 was in the performance of duty, as it

¹ 5 U.S.C. § 8101 *et seq.*

was an unexplained fall.² The history of the case as provided in the Board's prior decision is incorporated herein by reference.

OWCP accepted the claim for syncope and aggravation of bilateral shoulder conditions and spondylolisthesis. In a report dated February 16, 2009, Dr. Curtis Spencer, an attending orthopedic surgeon, stated that appellant had bilateral rotator cuff disease, had been disabled since July 26, 2006 and had not returned to his preinjury condition. He noted that appellant also had back problems that complicated the issue. OWCP referred appellant for a second opinion examination by Dr. G.B. Ha'Eri, a Board-certified orthopedic surgeon.

In a report dated April 15, 2009, Dr. Ha'Eri provided a history and results on examination. He diagnosed chronic bilateral rotator cuff tears with osteoarthritic changes and lumbar spondylolisthesis. Dr. Ha'Eri advised that these conditions preexisted the April 25, 2006 injury, and were temporarily aggravated by the work injury, with no material change caused by the fall at work. He found that the aggravations of the shoulders and back had resolved; the chronic rotator cuff tears were associated with atrophy of the muscles and osteoarthritis, while the lumbar spondylosis was worsening as a result of the normal progression of a degenerative condition.

In a report dated June 3, 2009, Dr. Spencer noted that he had reviewed Dr. Ha'Eri's report, but disagreed as to the nature of the work-related aggravation. He stated that a fall could cause additional cartilaginous damage and he believed appellant's shoulder condition had been permanently aggravated by the work injury.

On July 9, 2009 OWCP determined that a conflict arose in medical opinion under 5 U.S.C. § 8123(a). It referred appellant to Dr. Saeed Malekafzali, a Board-certified orthopedic surgeon selected as a referee physician. On July 28, 2009 appellant submitted a July 2, 2009 report from Dr. David Morrison, an orthopedic surgeon, who provided a history of shoulder problems since 1989 and stated, "These are work-related injuries." Dr. Morrison provided results on examination and diagnosed massive bilateral rotator cuff tears.

In a report dated October 12, 2009, Dr. Malekafzali reviewed the history of injury and medical evidence and reported results on physical examination. He found that appellant had a severe preexisting condition in both shoulders and the lumbosacral spine, which was well documented in the medical record. The referee physician opined that these conditions were mildly aggravated by the April 25, 2006 injury, but should have resolved in six to eight weeks and there were no residuals of the work injuries. Dr. Malekafzali stated:

"To answer your [fourth] question,³ the patient has a normal progression of the ruptured rotator cuff. The subjective complaints started with impingement syndrome and osteoarthritis at the acromioclavicular joint in the mid 1990's. Some treatment was given including a cortisone injection and physical therapy. Due to lack of cooperation between the patient and his physician, the progress of this impingement syndrome developed into a ruptured rotator cuff and gradually

² Docket No. 08-1510 (issued November 25, 2008).

³ The question posed was whether Dr. Malekafzali concurred with Dr. Ha'Eri that there was no material alteration to the progression of the underlying shoulder and spine conditions from the April 25, 2006 work injury.

is reaching the end stage of this problem that we call rotator cuff osteoarthopathy, on both sides. This was documented in 2004. The lumbar spine was mildly aggravated and his condition of the lumbar spine, even after five years, the x-ray is almost the same. He has a stable lumbosacral spine with degeneration. There is a normal neurovascular evaluation of both lower extremities. Again, the reason for this opinion is the same as I mentioned in my history and physical and discussion.”

Dr. Malekafzali found that appellant did not have residuals of the April 25, 2006 work injury in the shoulders.

In a report dated September 29, 2009 and received by OWCP on October 20, 2009, Dr. Morrison provided a history and results on examination. He stated that the rotator cuff tears were unrepairable due to atrophy and the chronic nature of the tears. Dr. Morrison stated that, while appellant had rotator cuff tears before his April 2006 injury, he had been able to work but following the injury he could not perform his normal job duties. He opined that this would be considered a significant alteration in the underlying condition and an increase in the pathology.

In a letter dated November 18, 2009, OWCP advised that appellant it proposed to terminate compensation for wage-loss and medical benefits. It explained that it found the weight of the medical evidence rested with the referee physician and he had 30 days to respond with additional evidence or argument.

In a letter dated December 17, 2009, appellant’s representative argued that the medical evidence was insufficient to terminate benefits. Appellant also submitted a December 24, 2007 magnetic resonance imaging (MRI) scan report.

By decision dated February 22, 2010, OWCP terminated compensation for wage-loss and medical benefits. It found the weight of the medical evidence was represented by the referee physician.

On June 3, 2010 appellant submitted a May 19, 2010 letter requesting reconsideration of his claim. He argued that a review of his own physicians would establish that his employment-related condition had not resolved. Appellant also submitted additional medical evidence. In a report dated August 18, 2009, Dr. Morrison indicated that appellant had received a pain medication injection in his left shoulder.

By decision dated August 26, 2010, OWCP reviewed the case on its merits and denied modification of the termination decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement

⁴ *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

to compensation for disability. 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

It is well established that, when a case is referred to a referee medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁶

ANALYSIS

Appellant received compensation for wage-loss and medical benefits resulting from a fall at work on April 25, 2006. An attending physician, Dr. Spencer, advised in a February 16, 2009 report that appellant still had ongoing shoulder problems, had not returned to his preinjury status and also had back problems that “complicated” the issue. A second opinion physician, Dr. Ha’Eri, found that appellant’s continuing shoulder and back symptoms were due to his underlying preexisting conditions, and the temporary aggravations caused by the work injury had resolved. Dr. Spencer disagreed in a June 3, 2009 report, stating that appellant sustained a permanent aggravation to his shoulders from the April 25, 2006 work injury.

FECA 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 the examination.⁷ 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 this case, the referee physician selected was Dr. Malekafzali, who provided an October 12, 2009 report.

Dr. Malekafzali provided a detailed medical report that reviewed the medical history and results on examination. He opined that appellant had sustained a mild aggravation of the chronic rotator cuff tears, as well as spondylolisthesis and osteoarthritis of the lumbosacral spine from the April 25, 2006 work injury. Based on his review of the extensive medical record and results on examination, Dr. Malekafzali opined that residuals of the employment injury had ceased. He found that appellant’s continuing shoulder and back complaints were caused by the underlying chronic, degenerative conditions, not the employment injury.

As noted above, a well-rationalized opinion from a referee physician is entitled to special weight. Section 8123(a) provides a method to resolve a conflict between an attending physician and an OWCP physician, and OWCP followed its procedures and resolved the disagreement. The Board finds that the opinion of Dr. Malekafzali represents the weight of the medical evidence in this case.

On appeal, appellant states that he does not believe OWCP properly considered the reports from Dr. Spencer and Dr. Morrison, who found his ongoing condition was employment

⁵ *Furman G. Peake*, 41 ECAB 361 (1990).

⁶ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

⁷ 5 U.S.C. § 8123.

⁸ 20 C.F.R. § 10.321 (1999).

related. As to Dr. Spencer, his reports were considered and created a conflict in medical opinion with Dr. Ha'Eri, the second opinion physician. Dr. Morrison also opined that there was a more permanent aggravation to the shoulders caused by the fall at work on April 25, 2006. Appellant initially submitted the September 29, 2009 report from Dr. Morrison on October 20, 2009, after the conflict had been created and appellant was referred for a referee examination. Dr. Morrison's opinion is not of such probative value to outweigh the referee's report or create a new conflict.⁹ He did not provide a complete factual and medical history. Dr. Morrison briefly described the fall at work, stating that appellant reported that he injured his shoulders again. In addition, Dr. Morrison did not provide medical rationale explaining how the fall at work had materially changed the underlying condition. The referee physician constituted the weight of the medical evidence and OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits effective February 22, 2010.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits effective February 22, 2010.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 26, 2010 is affirmed.

Issued: July 13, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

⁹ See *M.A.*, Docket No. 10-1814 (issued May 11, 2011).