U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EDWARD C. GREY, JR. and U.S. POSTAL SERVICE, TACONY STATION, Philadelphia, Pa.

Docket No. 97-996; Submitted on the Record;
Issued November 4, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits effective November 7, 1996 on the grounds that appellant no longer had any residuals of his September 20, 1995 employment injury.

The Board has duly reviewed the case record in this appeal and finds that the Office properly terminated appellant's compensation benefits effective November 7, 1996 on the grounds that appellant no longer had any residuals of his September 20, 1995 employment injury.

On September 20, 1995 appellant, then a letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date, he twisted his back while carrying the mail, and experienced pain in his lower back and right shoulder. Appellant stopped work on September 20, 1995 and returned to light-duty work on November 14, 1995.[1]

The Office accepted appellant's claim for a lumbosacral strain.

The Office found a conflict in the medical opinion evidence between Dr. Menachem M. Meller, an orthopedic surgeon and appellant's treating physician, and Dr. Frank Mattei, a Board-certified orthopedic surgeon and second opinion physician, regarding appellant's continued disability causally related to the September 20, 1995 employment injury.

By letter dated July 1, 1996, the Office referred appellant to Dr. Samuel F. Broudo, a Board-certified orthopedic surgeon, along with a statement of accepted facts, a list of specific

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[1] On November 16, 1995 appellant filed a claim (Form CA-2a) alleging that on November 14, 1995 he sustained a recurrence of disability. Appellant stopped work on November 15, 1995 and returned to light-duty work on March 18, 1996. There is no Office decision in the record regarding appellant's recurrence claim; therefore, the Board has no jurisdiction to consider this claim. 20 C.F.R. § 501.2(c)

questions and medical records for an impartial medical examination. By letter of the same date, the Office advised Dr. Broudo of the referral. Dr. Broudo submitted an August 9, 1996 medical report revealing that appellant's September 20, 1995 employment injury had resolved.

In a notice of proposed termination of compensation dated September 11, 1996, the Office advised appellant that it proposed to terminate his compensation because the weight of the medical evidence of record rested with Dr. Broudo's August 9, 1996 medical report. The Office also advised appellant to submit additional medical evidence supportive of his continued disability within 30 days.

In a September 19, 1996 letter, appellant disagreed with the Office's notice of proposed termination of compensation accompanied by medical evidence.

By decision dated November 8, 1996, the Office terminated appellant's compensation effective November 7, 1996 because the medical evidence of record established that appellant had no residuals of his September 20, 1995 employment injury based on Dr. Broudo's August 6, 1996 medical report.[2]

Section 8123(a) of the Federal Employees' Compensation Act provides that "[i]f 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 an examination."[3] In situations where there are 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 on a proper factual background, must be given special weight.[4]

In the present case, the Office found a conflict in the medical opinion evidence between Dr. Meller, appellant's treating physician, and Dr. Mattei, a second opinion physician, and referred appellant to Dr. Broudo for an impartial medical examination. In a January 19, 1996 medical report, Dr. Meller opined that appellant had a preexisting condition of spondylolisthesis at L5-S1 which was aggravated by the September 20, 1995 employment injury. In an April 2, 1996 medical report, Dr. Mattei opined that appellant's September 20, 1995 employment injury had resolved, but that appellant would likely remain disabled from any heavy manual labor due to his preexisting condition. Inasmuch as there was a conflict in the medical opinion evidence regarding appellant's back condition, the Office properly referred appellant to Dr. Broudo for an impartial medical examination pursuant to section 8123(a) of the Act.

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

[2] The Board notes that subsequent to the Office's November 8, 1996 decision, the Office received additional medical evidence. The Board, however, cannot consider evidence that was not before the Office at the time of the final decision; *see* 20 C.F.R. § 501.2(c)(1).

[3] 5 U.S.C. § 8123(a).

[4] *Nancy Lackner Elkins*, 44 ECAB 840, 847 (1993).

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.[5]

In terminating appellant's compensation benefits by decision dated November 8, 1996, the Office relied upon Dr. Broudo's August 9, 1996 medical report. In this report, Dr. Broudo provided a history of the September 20, 1995 employment injury, appellant's medical treatment, and family and social background. He further provided a review of medical records and his findings on physical examination. Dr. Broudo opined that at that time there were no objective findings to demonstrate a current lumbosacral strain and that the lumbosacral strain sustained on September 20, 1995 had resolved. He stated that appellant's current condition of Grade I spondylolisthesis of L5 on S1 was a preexisting developmental condition and was not due to or causally related to the September 20, 1995 employment injury. Dr. Broudo also stated that there was no evidence of a current work-related condition. He further stated that any recovery that may have been prolonged was not related to the September 20, 1995 employment injury, but was causally related to the underlying developmental defect at the pars interarticularis at L5-S1 and resulting in Grade I spondylolisthesis of L5 on S1 based on appellant's November 21, 1995 x-rays. Dr. Broudo concluded that appellant had no residuals from the employment injury and that appellant could return to full-time work with no restrictions.

In response to the Office's September 11, 1996 notice of proposed termination of compensation, appellant submitted Dr. Mattei's February 14 and April 2, 1996 medical reports and Dr. Broudo's August 9, 1996 medical report which were already part of the record. Appellant also submitted an authorization for medical attention dated July 18, 1996 revealing his work restrictions. This authorization for medical attention failed to address whether appellant had any residuals caused by his September 20, 1995 employment injury.

Inasmuch as Dr. Broudo provided a well-rationalized opinion based on a complete medical and factual background, the Board finds that Dr. Broudo's August 9, 1996 medical report represents the weight of the evidence in this case and establishes that appellant no longer had any employment-related disability. The Office therefore met its burden in terminating appellant's continuing entitlement to compensation effective November 7, 1996.

[5] *Jason C. Armstrong*, 40 ECAB 907 (1989).

The November 8, 1996 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
November 4, 1998

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member