

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CARLETON E. RAINEY and DEPARTMENT OF LABOR,  
PENSION & WELFARE BENEFITS ADMINISTRATION,  
Washington, DC

*Docket No. 98-301; Submitted on the Record;  
Issued July 19, 2000*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
A. PETER KANJORSKI

The issues are: (1) whether appellant is entitled to wage-loss compensation after March 4, 1991 due to the September 4, 1990 employment injury; (2) whether appellant's residuals ceased August 6, 1996; (3) whether appellant is entitled to receive a schedule award for permanent impairment of his upper extremities; and (4) whether the Office of Workers' Compensation Programs properly denied merit review.

On September 4, 1990 appellant, then a 53-year-old office manager, filed a traumatic injury claim, alleging that he injured his neck and shoulder when documents fell from a shelf above his head, knocking him down.<sup>1</sup> By decision dated November 13, 1990, the Office denied the claim. Appellant requested a hearing that was held on September 17, 1991. In a November 8, 1991 decision, an Office hearing representative accepted that appellant sustained an injury and remanded the case for further development regarding disability. By letter dated March 2, 1992, the Office accepted that appellant sustained cervical and left shoulder strains and compensation was authorized through October 2, 1990. In a May 11, 1992 decision, the Office found that appellant had not sustained a head injury due to the September 4, 1990 employment injury and that he was not entitled to wage-loss compensation after October 2, 1990 on the grounds that he no longer suffered employment-related residuals. Appellant again requested a hearing and, upon preliminary review, in a September 16, 1992 decision, a second Office hearing representative found that there was an unresolved conflict in medical opinion and remanded the case for an impartial medical evaluation. On November 3, 1992 the Office referred appellant to Dr. Sam W. Wiesel, a Board-certified orthopedic surgeon and, based on his opinion, by letter dated April 2, 1993, expanded the accepted conditions to include aggravation of cervical disc disease at C6-7 with disc herniation.

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<sup>1</sup> The record indicates that appellant has filed numerous claims with the Office. The instant case was adjudicated by the Office under file number A11-104429.

On March 21, 1994 appellant filed a claim for a schedule award. The Office continued to develop the claim and on May 26, 1995 referred appellant to Dr. Carol Sheridan, a Board-certified psychiatrist. The Office was unable to obtain a report from Dr. Sheridan and, therefore, on March 28, 1996 referred appellant to Dr. James C. Cobey, a Board-certified orthopedic surgeon, who examined appellant on April 15, 22 and June 17 and 18, 1996. In a June 19, 1996 report, he advised that appellant could perform light-duty work with no lifting, twisting or bending due to arthritis in his neck. He concluded, “[s]ince [he] does not move his lower back, which should move normally and does not move his upper neck at all, I think most of the examination is fictitious.” In a supplementary report dated July 11, 1996, Dr. Cobey advised that appellant would have been disabled for approximately six months following the April 9, 1990 employment injury and had recovered. He opined that appellant’s residual impairment was caused by preexisting arthritis that was not employment related.

In an August 6, 1996 decision, the Office found that appellant was not entitled to a schedule award or wage-loss compensation after March 4, 1991. The Office also terminated his medical benefits, effective August 6, 1996. On August 14, 1996 appellant requested a hearing and submitted additional evidence. At the hearing, held on March 5, 1997, appellant testified that he was not seeking wage-loss compensation under the instant claim as he was in receipt of wage-loss compensation under a separate case. In a July 28, 1997 decision, an Office hearing representative affirmed the August 6, 1996 decision.

On August 1, 25, 26 and 27, 1997 appellant requested reconsideration and submitted additional medical evidence. By decision dated August 28, 1997, the Office denied his reconsideration requests. On August 29, September 16 and 18, 1997 appellant again requested reconsideration and submitted additional evidence. In an October 10, 1997 decision, the Office again denied his reconsideration requests, finding the evidence submitted repetitious and cumulative. The instant appeal follows.<sup>2</sup>

The Board finds this case is not in posture for decision due to an unresolved conflict in medical opinion regarding whether appellant is entitled to wage-loss compensation after March 4, 1991 and whether he is entitled to a schedule award.

Appellant’s attending physician, Dr. Michael E. Batipps, Board-certified in psychiatry and neurology and treating appellant since 1990, has been consistent in his opinion that appellant’s continuing condition is employment related. Dr. Cobey, who examined appellant for the Office,<sup>3</sup> however, opined that any continuing disability was caused by preexisting arthritis

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<sup>2</sup> The Board notes that on October 17, 1997 appellant requested reconsideration with the Office and on October 24, 1997 appealed to the Board. The Board and the Office may not have concurrent jurisdiction over the same issue in the same case. *Douglas E. Billings*, 41 ECAB 880 (1990). The Board further notes that appellant submitted additional evidence with his reconsideration request. The Board cannot consider this evidence, however, as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

<sup>3</sup> The Office’s procedure manual provides that when an employee is referred for a referee medical examination pursuant to section 8123(a) of the Federal Employees’ Compensation Act, a claimant and his representative must be informed of the existence of a conflict in the medical evidence and the specific nature of the conflict. Federal (FECA) Procedural Manual, Part 3 -- Medical Examinations, *Referee Examinations*, Chapter 3.500.4(d)(1) (October

and was not employment related. The Board, therefore, finds that a conflict remains regarding whether appellant's continued condition is causally related to the September 4, 1990 employment injury and whether he is entitled to a schedule award. Furthermore, as the issue of whether appellant has any continuing employment-related disability is unresolved, the Office has not met its burden of establishing that he no longer requires further medical treatment.<sup>4</sup> The termination of appellant's medical benefits is therefore reversed.

The case shall, therefore, be remanded to the Office for referral to an appropriate Board-certified specialist,<sup>5</sup> accompanied by a statement of accepted facts and the complete case record. After such development as it deems necessary, the Office shall issue a *de novo* decision regarding further entitlement to benefits and a schedule award.<sup>6</sup>

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1995); *see Henry J. Smith, Jr.*, 43 ECAB 524 (1992); *reaff'd on recon.*, 43 ECAB 892 (1992).

<sup>4</sup> *Carolyn F. Allen*, 47 ECAB 240 (1995).

<sup>5</sup> The Board notes that Dr. Wiesel, who provided a referee examination for the Office in 1992 stated that he would defer an opinion regarding appellant's right upper extremity to a neurologist. By letter dated April 17, 1995, the Office informed appellant that it was scheduling an appointment with a neurologist. Instead, on May 26, 1995 the Office referred him to Dr. Sheridan, a Board-certified physiatrist. When a report from her was not forthcoming, the Office referred appellant to Dr. Cobey, a Board-certified orthopedic surgeon.

<sup>6</sup> In light of the foregoing, the decisions dated October 9 and August 28, 1997, in which the Office denied a merit review of appellant's claim, are rendered moot.

The decision of the Office of Workers' Compensation Programs dated July 28, 1997 is hereby reversed regarding termination of appellant's medical benefits. The decision is set aside regarding appellant's entitlement to wage-loss compensation after March 4, 1991 and his entitlement to a schedule award, and the case is remanded to the Office for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
July 19, 2000

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member