U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

In the Matter of CHRISTIAN E. RASMUSSEN and U.S. POSTAL SERVICE, POST OFFICE, Hauppauge, NY

*Docket No. 02-658; Submitted on the Record; Issued April 18, 2003*

## DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON, WILLIE T.C. THOMAS

The issues are: whether the Office of Workers' Compensation Programs properly terminated appellant's compensation effective January 23, 2001; and (2) whether the Office properly suspended eligibility for further compensation based on his refusal to participate in an impartial medical evaluation.

On January 27, 2000 appellant, then a 57-year-old rural carrier, filed a notice of traumatic injury and claim for compensation, alleging that on January 25, 2000 he sustained multiple injuries when he slipped and fell on hard-packed snow while delivering a parcel in the performance of duty. In duty status reports dated January 27 and February 7, 2000, appellant was listed as disabled due to right shoulder, right arm, hip and lower back pain. The Office accepted the claim for a lumbar strain and a right rotator cuff strain. Appellant stopped work on the date of injury and has not returned. He has been under the care of Dr. Stephen Kottmeier, a Board-certified orthopedist.

Multiple x-rays showed negative findings with respect to appellant's right hip, right shoulder, right wrist and the left shoulder. Appellant had x-rays of the lumbar spine and right hip joint taken on January 25, 2000 that showed osteoarthritis degenerative changes. Appellant also had x-rays of the cervical spine performed on March 16, 2000 that were consistent with degenerative disc disease at C5-6 and C6-7.

In a February 9, 2000 report, Dr. Kottmeier related that appellant complained of right posterior hemipelvic pain, right buttock pain, right hip discomfort, left paracervical and left shoulder discomfort following a slip and fall accident on ice on January 25, 2000. He indicated that appellant was ambulating with a cane on the left side to manage right hip and pelvic pain. Dr. Kottmeier recorded physical findings and diagnosed the conditions of a lumbar strain with possible radiculitis and left rotator cuff strain.

In an Office memorandum dated February 23, 2000, it was noted that appellant had contacted the employing establishment to advised that at the time of his work injury he lost

consciousness. He further stated that he was hospitalized "last week" for a possible blood clot to the lungs due to the accident.

On March 1, 2000 appellant was seen by Dr. Thomas J. Mango, a Board-certified orthopedist, on referral from Dr. Kottmeier. In a March 16, 2000 report, Dr. Mango noted that appellant complained of aching pain and numbness in his neck, upper back, left arm and shoulder. The physician opined that appellant appeared to have left-sided cervical radiculopathy, probably more secondary to a spur than a disc herniation. He recommended a magnetic resonance imaging (MRI) scan to further evaluate appellant's cervical condition.

Although the Office did not accept a cervical condition as arising out of the employment injury of January 25, 2000, the Office authorized appellant to receive the testing recommended by Dr. Mango including an MRI scan of the lumbar spine on May 9, 2000 that revealed spondylosis from C3-4 and C6-7. Appellant also received physical therapy for the lower back and right shoulder.

In a May 23, 2000 report, Dr. Mango reported that appellant's cervical MRI scan findings revealed a "left-sided disc bone spur at the level of the left neuroforamen at C5-6 and C6-7," which he opined would account for appellant's left arm symptoms. He also noted that appellant complained of increased lumbar pain with radiation of the pain down the right leg. The diagnosis was listed as cervical radiculopathy from a disc herniation at C5-6 and lumbar radiculopathy on the right side. Dr. Mango recommended physical therapy and possible surgery to correct the cervical condition.

In a report dated May 24, 2000, Dr. Kottmeier noted that appellant had some diminishment of the left arm discomfort following physiotherapy, although appellant still showed signs of impingement. He stated that "[c]oncern has been appropriately directed towards subacromial versus cervical sources of discomfort." Dr. Kottmeier indicated that a left subacromial injection had been performed that day and that appellant would be assessed again in one month. He concluded that appellant continued to be disabled from work.

In a September 12, 2000 report, Dr. Mango indicated that appellant was seen in follow-up from physical therapy and continued to have significant spasm and pain in his back and cervical spine. He also noted that appellant complained of an increase of symptoms in the lumbar spine with pain radiating down his leg to the knee. Dr. Mango recommended that an MRI scan of the lumbar spine be obtained.

Because the last medical evidence pertaining to the accepted work injuries had been received by the Office in April 2000, the Office decided to obtain a second opinion evaluation to ascertain the nature and extent of appellant's continuing disability and residuals due to the accepted work injuries of lumbar strain and right rotator cuff strain. Medical reports received after April 2000 pertained to the cervical condition and left arm pain. These had not been accepted by the Office as work related.

By letter dated September 21, 2000, the Office referred appellant for a second opinion evaluation with Dr. Richard Goodman, a Board-certified orthopedic surgeon. In a report dated September 20, 2000, Dr. Goodman noted that appellant presented wearing a cervical collar and a

knee immobilizer. He discussed appellant's history of injury and symptoms of right shoulder, neck and left arm pain. On physical examination, full range of motion of the cervical spine in flexion and extension was recorded. Appellant was noted as having limited right rotation to 30 degrees, left rotation to 20 degrees and right and left lateral flexion to 10 degrees. He also had limited lumbar motion to 30 degrees of flexion, 5 degrees of extension, 25 degrees of right rotation, 30 degrees of left rotation and 5 degrees of right and left lateral flexion. The left knee was noted as being swollen and there was decreased sensory perception on the extensor of the left upper extremity compared to the right upper extremity. Dr. Goodman concluded that there were no objective organic findings related to the lumbar strain or rotator cuff condition that would preclude appellant from returning to work. He stated that appellant was no longer disabled due to the January 25, 2000 work injury.

On November 16, 2000 the Office issued a notice of proposed termination of compensation based on the opinion of the Office referral physician.

In a decision dated December 20, 2000 and finalized on January 23, 2001, the Office terminated appellant's compensation on the grounds that he had no continuing disability or residuals due to the accepted work injury of January 25, 2000.

On May 30, 2001 appellant requested reconsideration and submitted a report from Dr. Kottmeier dated December 18, 2000. He related appellant's history of injury, his symptomology and treatment to date. The physician indicated that appellant's work injury resulted in rotator cuff tendinopathy as well as cervical radicular problems as noted by Dr. Mango. He stated that appellant work injury resulted in "findings as described to the left shoulder disallowing work-related activities for an extended period of time."

The Office determined that the December 18, 2000 report from Dr. Kottmeier created a conflict in the medical evidence with the second opinion physician as to whether appellant had any continuing disability or residuals due to his accepted work injury.

The Office referred appellant for an impartial medical evaluation with Dr. Donald I. Goldman, a Board-certified orthopedic surgeon, on August 6, 2001. In a report dated August 13, 2001, Dr. Goldman discussed appellant's history of work injury, the medical record and a statement of accepted facts. He noted physical findings of the lumbar and cervical spine. He concluded that he was unable to evaluate appellant's condition and the extent of his continuing disability without obtaining an MRI scan of the lumbar spine to better diagnosis appellant's back condition.

On September 12, 2001, MEDLINK Healthcare Networks, Incorporated at the request of the Office notified appellant that he had been scheduled to undergo an MRI scan of the lumbar spine in conjunction with Dr. Goldman's evaluation on September 26, 2001. The record reveals that appellant did not appear for this evaluation.

In an October 1, 2001 letter, the Office advised appellant that he had 14 days to provide an explanation showing good cause as to why he failed to attend the scheduled MRI scan examination. Appellant was advised that if he failed to respond or his explanation failed to

provide good cause for his failure to keep the appointment, his compensation would be suspended until such time as his obstruction of the evaluation stopped.

In a decision dated October 15, 2001, the Office denied modification of its prior decision. The Office specifically noted that appellant had refused to attend a scheduled examination on September 26, 2001; therefore, the Office was unable to determine his entitlement to compensation.

The Board finds that the Office properly terminated appellant's compensation effective January 23, 2001.

Once the Office accepts a claim it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability casually related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.[1]

In this case, the Office accepted that appellant sustained a lumbar strain and a right rotator cuff strain when on January 25, 2000 he slipped and fell on ice in the performance of duty. The Office paid compensation for wage loss and authorized a series of physical therapy. The last medical evidence relevant to the accepted conditions and pertaining to disability for work was received in April 2000. The Office, therefore, properly scheduled a second opinion evaluation with Dr. Goodman to determine whether appellant had any continuing disability or residuals due to the accepted work injury.

Dr. Goodman opined that appellant's lumbar strain and right rotator cuff injury had resolved as there was no objective findings to support appellant's complaints of pain. The Board finds that the weight of the medical evidence rests with Dr. Goodman's opinion as it is reasoned and based on a thorough and complete understanding of appellant's work injury and the medical record. Although appellant's treating physician maintained that he was disabled, he made no distinction between the accepted conditions and the conditions that were not accepted by the Office. Accordingly, the Board finds that the Office met its burden of proof in terminating appellant's compensation.

The Board finds that the Office properly suspended appellant's eligibility to compensation on the grounds that she obstructed a medical examination.

Section 8123(a) of the Federal Employees' Compensation Act provides:

> "An employee shall submit to examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required...."[2]

[1] *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

[2] 5 U.S.C. § 8123(a).

Section 8123(d) provides:

"If an employee refuses to submit to or obstructs an examination, [her] right to compensation under this subchapter is suspended until the refusal or obstruction stops. Compensation is not payable while a refusal or obstruction continues and the period of the refusal or obstruction is deducted from the period, for which compensation is payable to the employee."[3]

Additionally, the Office's Federal (FECA) Procedure Manual provides:

"*Failure to Appear.* If the claimant does not report for a scheduled appointment, he or she should be asked in writing to provide an explanation within 14 days. If good cause is not established, entitlement to compensation should be suspended in accordance with 5 U.S.C. § 8123(d) until the date, on which the claimant agrees to attend the examination."[4]

The Board has reviewed the evidence of record and finds that the Office properly determined that a conflict exists in the record as to whether appellant has any continuing disability or residuals due to the accepted work injury.[5] The Board also finds that appellant obstructed the September 26, 2001 MRI scan testing scheduled at the request of the impartial medical specialist.

By letter dated September 12, 2001, appellant was instructed to attend an MRI scan test requested by Dr. Goldman in order to ascertain the nature and extent of appellant's lumbar spine condition. The MRI scan was scheduled for September 26, 2001. The Office, however, was notified after September 26, 2001 that appellant failed to appear for the scheduled medical appointment. Although the Office advised appellant of the penalty for not submitting to an evaluation, appellant did not respond to the Office inquiries and did not provide any explanation for his refusal to attend the MRI scan evaluation. Consequently, insofar as appellant failed to provide sufficient justification for his failure to undergo an important aspect of the impartial medical evaluation with Dr. Goldman, the Board finds the Office's suspension of appellant's eligibility for compensation to be reasonable under the circumstances of this case.

Additionally, the Board finds that the Office properly denied modification of its prior decision terminating appellant's compensation effective January 23, 2001. Until such time as appellant undergoes an impartial medical evaluation, the medical evidence remains insufficient to establish that he has continuing disability or residuals due to the accept work injury. Therefore, the evidence remains insufficient to establish modification.

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[3] 5 U.S.C. § 8123(d).

[4] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.14(d) (November 1998).

[5] Section 8123(a) of the Act 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. 5 U.S.C. § 8123(a); *see Charles E. Burke*, 47 ECAB 185 (1995). The conflict arose in this case when appellant submitted a supplemental report from her treating physician along with a request for reconsideration.

The decisions of the Office of Workers' Compensation Programs dated October 15, 2001 and December 20, 2000 and finalized January 23, 2001 are hereby affirmed.[6]

Dated, Washington, DC
April 18, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

[6] On appeal, appellant, through his attorney submitted with his appeal brief letters dated October 16, 2001 allegedly addressed to the claims examiner by both first class mail and facsimile transmission. Because none of these letters are a part of the record certified to the Board, the Board is precluded from considering this evidence by section 5 of its regulations. Appellant may resubmit such evidence to the Office together with a request for reconsideration. *See* 20 C.F.R. § 501.2(c).