United States Department of Labor
Employees' Compensation Appeals Board

DAN J. JARVIS, Appellant	)	
and	)	**Docket No. 04-1345**
	)	**Issued: April 20, 2005**
DEPARMENT OF AGRICULTURE, FOREST SERVICE, Smiths Ferry, ID, Employer	)	

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 27, 2004 appellant, through his representative, filed a timely appeal from a merit decision dated February 12, 2004, denying his request for modification of an October 15, 2003 decision, which terminated his compensation effective October 16, 2003 on the grounds that he no longer had any disability or residuals due to his March 4, 2002 employment injury. Pursuant to 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 the Office properly terminated appellant's compensation, effective October 16, 2003, on the grounds that he no longer had any remaining disability or residuals causally related to his March 4, 2002 employment injury.

FACTUAL HISTORY

On March 4, 2002 appellant, a 51-year-old pilot, filed a traumatic injury claim alleging that he hit his head when he slipped on ice. It was noted on the claim form that he did not have

any memory of the accident. The Office accepted the claim for closed head injury and subsequently expanded the claim to include concussion with closed head injury and post-concussion syndrome.

In an August 21, 2002 magnetic resonance imaging (MRI) scan, Dr. Neil C. Davey, a Board-certified radiologist, reported:

> "[N]oncontrast MRI [scan] of brain demonstrating a number of small focal hyperintense lesions within the supratentorial white matter. These are nonspecific findings and given the patient's age, likely the results of chronic small vessel ischemia. Other differential considerations include the changes of diffuse axonal injury. This would seem less likely given the lack of evidence of intraparenchymal blood on the gradient echo sequences."

In a report dated March 3, 2003, Dr. Allen C. Han, a second opinion Board-certified neurologist, diagnosed:

> "1. Status post minor head trauma on March 4, 2002 with residual symptoms of headaches dizziness and blurred vision. These symptoms resolved within one to two weeks out of head trauma; however, [appellant] has had persistent difficulties with visual tracking that has interfered with his ability to function safely as a pilot.
>
> "2. Abnormal MRI [scan] from August 21, 2002, revealed a number of small focal hyperintense lesions within the supratentorial white manner. In my experience these lesions can be due to a number of factors including old age, hypertensive small vessel cerebrovascular disease, sequelae of frequent and chronic migraine headaches and demyelinating disease of the central nervous system. Therefore, I would recommend further evaluation of [appellant] by a neurologist, including repeating a head MRI [scan] with and without contrast to followup on the abnormalities seen on the scan of August 28, 2002."

Dr. Han stated:

> "[It was] unclear whether [appellant]'s current symptoms are medically connected to the factors of employment in that it is unclear whether his current symptoms are due to the residual effects of minor head trauma on March 4, 2002 or due to another etiology such as demyelinating disease of the central nervous system which would be unlikely to be related to the employment or injury on March 4, 2002."

With regards to whether appellant's employment injury aggravated his condition, Dr. Han opined that, since a "definitive neurologic diagnosis" had not been diagnosed he "would not be able to indicate whether his current symptoms are temporary or permanent." He also opined that it was "unclear" if appellant's condition was related to his accepted employment injury. In regards to disability, Dr. Han concluded that appellant was totally disabled from performing his duties as a pilot due to his "symptoms of difficulty with visual tracking and his 'near accident' while flying an airplane ... in June 2002." Lastly, he opined that it was unclear

whether appellant's symptoms were due to his March 4, 2002 head trauma or due to a nonemployment factor.

Dr. Han, in an April 1, 2003 supplemental report,[1] diagnosed "episodic dizziness and visual disabilities while flying an airplane" which he opined was both current and historical. With regard to whether this condition was employment related, Dr. Han opined that he did not "believe the patient's current diagnosed symptoms are medically connected to the factors of employment" as appellant "did not sustain loss of consciousness" as a result of the March 4, 2002 head trauma and the "symptoms resolved after one to two weeks." With regards to the April 14, 2003 MRI [scan], Dr. Han noted:

> "According to the radiologist, these findings are nonspecific and are likely the result of chronic microvascular disease. The radiologist felt it is also unlikely that the MRI [scan] findings are due to a myelinating disease of the central nervous system such as multiple sclerosis."

In an April 14, 2003 MRI scan,[2] Dr. Davey noted that the MRI scan revealed "no acute cerebrovascular accident or intracranial hemorrhage" and "scattered nonenhancing foci of T2-weighted hypersensitive within the supratentorial white matter" which were "more likely related to chronic microvascular disease." Under impression, it was noted that the nonspecific findings were:

> "[L]ikely the result of chronic micromascular disease with other differential considerations those of prior axonal injury relating to the trauma or the changes of a primary demyelinating condition such as multiple sclerosis."

In a May 12, 2003 report, Dr. Michael S. Weiss, a treating Board-certified physiatrist, noted Dr. Han's report contained no reference to "the reports to the vestibular evaluation and consultation by Dr. A.C.C Jones, a Boise otolaryngologist," who concluded that appellant's vestibular problems were due to the March 4, 2002 head trauma. Dr. Weiss stated:

> "Since trauma is considered in the diagnostic differential of the MRI [scan] and the patient provides a history of onset following the trauma and given Dr. Jones' opinion, I cannot on a more likely than not basis, agree with Dr. Han's conclusion that the MRI [scan] establishes microvascular disease rather than the trauma as the cause of [appellant]'s vestibular complaints."

On July 17, 2003 the Office referred appellant to Dr. Richard E. Marks, a Board-certified neurologist, to resolve the conflict in the medical opinion evidence between Dr. Weiss, an attending physician, and Dr. Han, a second opinion physician, on the issue of whether he continues to have any disability and residuals due to the accepted March 4, 2002 employment injury.

[1] This report was received by the Office on May 8, 2003.

[2] This test was performed at the request of Dr. Han.

In an August 5, 2003 report, Dr. Marks, based upon a physical examination, employment injury history, review of the medical and objective evidence and statement of accepted facts, reported "full extraocular motion without nystagmus," "full visual fields by confrontation," symmetrical facial motor function and palatial elevation, a negative Romberg test and normal gait and station, muscle bulk, tone and strength. He reported a "[h]istory of vertigo with electronystagmographic evidence consistent with a peripheral vestibular lesion, not related to the blow to the head on more probably than not basis." Dr. Marks noted the medical evidence showed "that following the blow to the head, the patient did have a several day history of dizziness, memory difficulty, headaches and sleep difficulties." He opined:

> "In view of the medical record documenting [appellant] being asymptomatic for several weeks following the blow to the head, prior to the onset of significant vertigo, it is unlikely that the head injury of March 4, 2002 is the cause of the patient's subsequent development of vertigo, on a more probably than not basis. Various other causes of labyrinthine dysfunction would include a variant of Meniere's disease, viral etiology or idiopathic, the later also known as 'benign positional vertigo.'"

With regards to appellant's cognitive impairment, Dr. Marks concluded that this was unrelated to appellant's head injury as he "sustained a relatively minor blow to the head resulting in questionable or brief loss of consciousness" and typically a minor blow to the head results in "a complete physiologic recovery by approximately three months following the blow to the head." Dr. Marks opined that appellant had "a nonindustrial impairment related to vertigo due to a peripheral labyrinthine dysfunction that is not related to the head trauma." As to impairment, the physician concluded that appellant had no disability or impairment due to the accepted employment injury and that any impairment is due to the nonemployment-related condition of peripheral labyrinthine dysfunction. In concluding, Dr. Marks opined that he had "no objective residuals that can be related to the injury in question" and his current disability is not related to his employment injury.

On September 2, 2003 the Office issued a notice of proposed termination of benefits based upon the opinion of Dr. Marks that he had no disability or residuals due to the accepted March 4, 2002 head injury.

In response to the proposal to terminate benefits, appellant submitted a September 9, 2003 report by Dr. Karin M. Lindholm, an attending osteopath specializing in neurology. He reported symmetric reflexes, no nystagmus, full extraocular movements and intact sensation in the lower and upper extremities and "some improvement in the patient's ability to respond to questions quickly and appropriately." With regards to objective testing, she noted an "MRI [scan] of the brain was abnormal revealing nonspecific T2 changes for which there are multiple etiologies, prior axonal injury being one of them" and an August 20, 2002 evaluation "revealed potential left vestibular loss, possible vestibular concussion from head injury with gaze instability, vertigo and imbalance." Dr. Lindholm noted that during her physical evaluation appellant showed "slow response time suggestive of cognitive involvement from the head injury" and a review of follow up evaluations revealed appellant continued "to have days where gazes or positions provoked dizziness" and appellant believed "his exercises were getting easier." Based upon her physical examination and a review of the medical reports including the reports by

Drs. Han and Marks, she opined that appellant was disabled from performing the duties of his date-of-injury job due to his employment injury. In support of this opinion, Dr. Lindholm stated:

> "It is this examiner's opinion that the patient suffered a significant closed head injury that cannot be denied. The patient was a pilot flying for the forest service prior to his injury and after that date has been unable to fly. Dr. Marks reports that he may not return to being a pilot. I cannot ignore the temporal relationship between the patient's insult and his inability to perform his job. It is this examiner's opinion that his inability to return to work is due to [appellant's] work-related injury. The head injury caused a postconcussive syndrome, vertigo, poor visual judgment, processing and cognitive difficulties as well as disequilibrium. More probably than not these particular symptoms will keep him from returning to his previous career as a pilot."

Dr. Lindholm further noted her disagreement with the opinions of Drs. Han and Mark. In support of her disagreement, she stated:

> "The patient does not have any history, signs, or corroborating neurologic evidence of demyelinating disease. Dr. Marks' opinion that small vessel ischemic changes are the cause of his current symptoms do not logically explain the significant deterioration in this patient's level of functioning after his accident. Microvascular disease certainly can be a preexisting condition in this patient's case but this did not lead to his current inability to perform his job as pilot. If the T2 signal changes are presumed to be related to ischemic white matter changes, then this is a chronic and longstanding problem. [Appellant] was previously functioning well with that diagnosis. One cannot ignore the temporal relationship of his head injury to the inability to perform his job and his complaints post injury. There is no doubt in this examiner's mind that the work-related injury is the current cause of this patient's symptoms and inability to continue his work as a pilot."

In a decision dated October 15, 2003, the Office terminated appellant's compensation benefits effective October 16, 2003. In reaching this decision, the Office relied upon the opinion of Dr. Marks, the impartial medical examiner, who concluded that appellant had no disability or residuals due to his accepted employment injury.

In a January 9, 2004 letter, appellant's counsel disagreed with the decision to terminate his benefits and requested reconsideration. In support of his request, appellant submitted an October 28, 2003 report by Dr. Weiss, a November 10, 2003 report by Dr. Lindholm and an October 24, 2003 report by Clay H. Ward, Ph.D. He also provided legal argument including a contention that the Office improperly phrased the causation question to both Dr. Han and Dr. Marks.

Dr. Weiss, in an October 28, 2003 report, noted that appellant has had intermittent problems with balance and tracking since the March 4, 2002 employment injury. He attributed his vestibular abnormality and symptoms to the employment injury and that appellant continues to have residuals and disability due to the employment injury.

In her November 10, 2003 report, Dr. Lindholm noted that appellant "suffered from a concussive head injury with documented abnormalities on objective testing. She attributed his spatial orientation deficits and vestibular dysfunction to the March 4, 2002 closed head injury.

In a decision dated February 27, 2004, the Office denied appellant's request for modification of the decision terminating his benefits.[3]

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6] However the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss due to disability.[7] 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.[8]

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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."[9]

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.[10]

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[3] Subsequent to the issuance of the Office decision, appellant submitted additional evidence. As this evidence was not previously submitted to the Office for consideration prior to its decision of February 27, 2004, it represents new evidence which cannot be considered by the Board in the current appeal. The Board's jurisdiction is limited to reviewing the evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

[4] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[5] *Lynda J. Olson*, 52 ECAB 435 (2001).

[6] *Manuel Gill*, 52 ECAB 282 (2001).

[7] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[8] *Franklin D. Haislah*, 52 ECAB 457 (2001).

[9] 5 U.S.C. § 8123(a).

[10] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

ANALYSIS

In the instant case, the Office accepted appellant's claim for a closed head injury, concussion with closed head injury and postconcussion syndrome. Dr. Weiss, his treating Board-certified physiatrist, concluded that appellant continued to be disabled due to a vestibular problem which he attributed to the March 4, 2002 head trauma. Dr. Han, a second opinion Board-certified neurologist concluded, in an April 1, 2003 supplemental report, that appellant had no disability due to his employment-related head trauma as he "did not sustain loss of consciousness" and his symptoms resolved within one to two weeks of the injury.

Due to the disagreement between Dr. Weiss and Dr. Han on the issue of whether appellant continued to have residuals and be disabled from his date-of-injury job due to the March 4, 2002 employment injury, the Office properly referred appellant to Dr. Marks, a Board-certified neurologist, to resolve a conflict of medical opinion evidence of whether appellant had any residuals or disability as a result of the March 4, 2002 head trauma. In his August 5, 2003 report, Dr. Marks noted appellant's employment-injury history and the medical evidence submitted for his review. On physical examination Dr. Marks reported full extraocular motion without nystagmus," "full visual fields by confrontation," facial motor function and palatial elevation were symmetrical, a negative Romberg test and normal gait and station, muscle bulk, tone and strength. He reported a "[h]istory of vertigo with electronystagmographic evidence consistent with a peripheral vestibular lesion, not related to the blow to the head on more probably than not basis." Dr. Marks noted the medical evidence showed "that following the blow to the head, the patient did have a several day history of dizziness, memory difficulty, headaches and sleep difficulties." Based upon appellant "being asymptomatic for several weeks following the blow to the head, prior to the onset of significant vertigo," Dr. Marks opined that the March 4, 2002 head injury was unlikely to be the cause of appellant's "subsequent development of vertigo, on a more probably than not basis." As to his cognitive impairment, Dr. Marks concluded this was unrelated to appellant's head injury as he "sustained a relatively minor blow to the head resulting in questionable or brief loss of consciousness" and typically a minor blow to the head results in "a complete physiologic recovery by approximately three months following the blow to the head." He concluded that appellant had no disability or impairment due to the accepted employment injury and that any impairment is due to the nonemployment-related condition of peripheral labyrinthine dysfunction. The Board finds that the opinion of Dr. Marks selected to resolve the conflict in opinion, is based on a proper factual and medical history, is well rationalized and supports that appellant's concussion with closed head injury and postconcussion syndrome had ceased by October 16, 2003, the date the Office terminated his compensation benefits. His report thus, constitutes the special weight of the medical evidence.

The remaining evidence submitted subsequent to Dr. Marks' report is insufficient to overcome the weight accorded him as the impartial medical examiner. Appellant submitted a report from Dr. Lindholm, who opined that he "suffered a significant closed head injury" and that she could not "ignore the temporal relationship between the patient's insult and his inability to perform his job." She concluded that appellant was totally disabled from his date-of-injury position due to his employment injury. While Dr. Lindholm attributes appellant's current disability to his employment injury, she fails to provide medical reasoning beyond noting that she "cannot ignore the temporal relationship" between appellant's employment injury and his

disability. She failed to provide medical rationale to explain her conclusion that appellant was totally disabled due to his accepted employment injury and thus, her opinion is of diminished probative value.[11] The Board finds that Dr. Lindholm's report is of reduced probative value and insufficient to establish that appellant had any residual condition after October 16, 2003, due to his employment injury.

Similarly, the October 23, 2003 report by Dr. Weiss is insufficient to create a new conflict with Dr. Marks. Dr. Weiss attributed appellant's vestibular abnormality and symptoms to his accepted employment injury and concluded that appellant continued to have residuals and disability from the injury. The Office did not accept his claim for vestibular abnormality. Appellant bears the burden of establishing causal relationship for any condition not accepted by the Office.[12] Dr. Weiss provided no supporting rationale explaining how the vestibular abnormality was due to his employment injury. As noted previously, an opinion unsupported by medical rationale is entitled to diminished probative value.[13] Moreover, Dr. Weiss, appellant's attending physician, was on one side of the conflict resolved by Dr. Marks. Therefore, the physician's report is insufficient to overcome the weight of the impartial medical specialist's reports or to create a new conflict of medical opinion.[14]

The Board, therefore, finds that the reports of Dr. Lindholm and Dr. Weiss are not of such probative value that they are sufficient to create a conflict with the opinion of Dr. Marks that appellant's accepted conditions of concussion with closed head injury and postconcussion syndrome had resolved. The weight of the evidence remains with Dr. Marks, a Board-certified neurologist, selected as an impartial medical specialist.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective October 16, 2003 on the grounds that he had no further disability or residuals causally related to his March 4, 2002 employment injury.

[11] *Robert Broome*, 55 ECAB ___ (Docket No. 04-93, issued February 23, 2004) (The opinion of a physician supporting causal relationship must be based on a complete factual and medical background, supported by affirmative evidence, address the specific factual and medical evidence of record and provide medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment).

[12] *Charlene R. Herrera*, 44 ECAB 361 (1993).

[13] *Robert Broome*, *supra* note 11.

[14] *Michael Hughes*, 52 ECAB 387 (2001); *Dorothy Sidwell*, 41 ECAB 857 (1990) (After an impartial specialist resolves a medical conflict, submission of additional reports by a doctor who was on one side of the conflict that the impartial medical specialist resolved, are insufficient to overcome the opinion of the impartial specialist or to create a new medical conflict).

ORDER

IT IS HEREBY ORDERED THAT the decisions dated October 15, 2003 and February 4, 2002 are affirmed.

Issued: April 20, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member