

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

MARCUS T. SMITH, Appellant)
and) Docket No. 05-594
U.S. POSTAL SERVICE, POST OFFICE,) Issued: August 12, 2005
Philadelphia, PA, Employer)
Philadelphia, PA, Employer)

)

Appearances:

Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 11, 2005 appellant filed a timely appeal of the December 21, 2004 merit decision of the Office of Workers' Compensation Programs, affirming a September 9, 2002 decision terminating his compensation benefits effective October 6, 2002. 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 met its burden of proof in terminating appellant's compensation benefits effective October 6, 2002.

FACTUAL HISTORY

On February 7, 2000 appellant, then a 28-year-old mail carrier, filed a traumatic injury claim alleging that on January 31, 2000 he injured his back, right shoulder and left knee and ankle when he slipped and fell down icy steps while in the performance of his duties.¹ On

¹ Docket No. 04-1486 (issued November 3, 2004). By order dated November 3, 2004, the Board issued an Order Remanding Case for reconstruction of the record.

May 10, 2000 the Office accepted his claim for a herniated disc at L5-S1 and paid appropriate benefits. Appellant eventually was placed on the periodic rolls to receive compensation for temporary total disability.² The record reflects that appellant subsequently underwent physical therapy, two thumb surgeries and multiple back surgery, including two discectomies and a discography. The record also reflects that appellant underwent a series of x-rays, magnetic resonance imaging (MRI) scans of the lumbosacral spine and of the cervical spine, electromagnetic and nerve conduction studies, x-rays of the right thumb, x-rays of the ankle, discography and computerized tomography nucleography.

In a May 31, 2002 letter, Dr. Jerry Murphy, a physician specializing in emergency medicine and a treating physician, to opine that appellant was totally disabled as a result of his work injury and that he required ongoing medical treatment, including surgery on his left elbow and wrist for persistent left cubital tunnel syndrome and ulnar neuropathy which had been confirmed by electrodiagnostic testing. Appellant's current diagnoses were persistent post-traumatic headache syndrome; persistent post-traumatic visual deficit; persistent cervical and lumbosacral strain and sprain with disc pathology; persistent post-traumatic left cubital tunnel syndrome and left ulnar neuropathy; and status post right thumb surgery.

In letters dated May 21, 2002, the Office notified appellant that he was being referred for second opinion examinations by Dr. Francis Bonner, Jr., Board-certified in physical medicine/rehabilitation; Dr. Richard H. Bennett, a Board-certified neurologist; and Dr. Anthony W. Salem, a Board-certified orthopedic surgeon.

In a June 4, 2002 report, Dr. Bennett, provided a history of appellant's illness, examination findings and reviewed the medical records. Dr. Bennett indicated that he saw no evidence that appellant had continuing physical residual injuries from the injury of January 31, 2000. He noted that the physical examination revealed complaints of pain with no clearly definable physical abnormalities and inconsistent findings suggestive of symptom magnification and embellishment of complaints, rather than true organic disease. There was no evidence of a cervical or lumbar radiculopathy. Although a hypersensitivity in the left hand was suggestive of a complex regional pain disorder, Dr. Bennett stated that the inconsistent examination suggested the lack of a biological confirmation of a condition which would result in the degree of pain expressed by appellant. Dr. Bennett noted that appellant had not been able to work due to his subjective complaints and considerable use of narcotic medication. He opined that appellant would be able to return to full-time sedentary work in his current state.

In a July 3, 2002 letter, the Office denied Dr. Murphy's May 31, 2002 request for authorization of medical services, including surgery. The Office provided Dr. Murphy with a copy of Dr. Bennett's June 4, 2002 report and requested that he provide a medical opinion on appellant's current condition and disability. The Office did not receive any response from Dr. Murphy.

In a July 24, 2002 report, Dr. Salem provided a history of appellant's illness, examination findings and his review of appellant's medical records. He noted that appellant would not look

² The record reflects that appellant attempted to return to work on February 14, 2000, but had not returned since then.

at him during the evaluation or examination and that appellant had related that he was going to have the license of Dr. Bennett revoked. Dr. Salem stated that it was impossible to examine appellant as "everything was painful and he would not cooperate with me in any manner." He agreed with Dr. Bennett's impressions and evaluations and concurred with Dr. Bennett's findings that there was no evidence of any interosseous, intrinsic, extrinsic, brachial, forearm or shoulder muscle atrophy. Dr. Salem noted that there was no muscle wasting, weakness or atrophy noted and that appellant had complained of pain everywhere he was touched. Dr. Salem reviewed the objective studies of record, noting that most were normal findings. He stated that, although the MRI scan report of appellant's lumbar spine mentioned subligamentous herniation, he felt it was most likely unrelated to appellant's fall and was more related to his obesity and poor conditioning. He noted that the reports from Dr. Daphne G. Golding, Board-certified in physical medicine and rehabilitation, were done two years prior and were insignificant at this time. He further noted that Dr. Bennett felt that there was no evidence of focal nerve entrapment or signs of radiculopathy. Dr. Salem stated that there was no question about the functional overlay and psychiatric problems and opined that appellant magnified his complaints. Dr. Salem opined that appellant had no residuals of his injury based on the fact that there were no objective changes as a result of the fall. Although appellant claimed disability related to his right ankle from the January 31, 2000 work injury, the examination was normal. He further opined that the herniated discs at L5-S1 were most likely unrelated to the January 31, 2000 work injury and related to obesity and poor conditioning. Dr. Salem was of the opinion that the diagnosis found, including the results of the cervical and lumbar spine MRI scans, were not related to the January 30, 2000 work injury. He noted that appellant had significant nonindustrial, preexisting disability due to arthritis in his neck and back. He stated that appellant's total period of disability due to his work injury should have been no more than six to eight weeks and that total disability should have ceased two years prior. He opined that appellant was malingering and was not disabled.

On August 8, 2002 the Office advised appellant that it proposed to terminate his wage-loss compensation and medical benefits based on the opinions of Dr. Bennett and Dr. Salem that he had no continuing disability or medical condition causally related to his accepted work injury. Appellant was given 30 days in which to provide additional evidence and argument. The Office did not receive any new evidence from appellant.

By decision dated September 9, 2002, the Office terminated appellant's compensation benefits effective October 6, 2002.

Appellant requested an oral hearing, which was held October 21, 2003. He submitted additional evidence in support of his claim.

In a July 2, 2002 report Dr. Bonner, the Office referral physician, noted the relevant history, the objective studies of record and his examination findings. He also provided responses to questions posed by the Office and completed a Form OWCP-5c work capacity evaluation form. Such responses, which noted diagnoses and disability, failed to state whether appellant had any injury-related disability. Dr. Bonner opined that the herniated disc could possibly be caused by direct trauma to his vertebral column.

In a May 31, 2002 report, Dr. Murphy diagnosed persistent post-traumatic headache syndrome; persistent post-traumatic visual deficit; persistent cervical and lumbosacral strain and

sprain with disc pathology; persistent post-traumatic left cubital tunnel syndrome and left ulnar neuropathy; and status post right thumb surgery, which he opined were related to the work injury of January 31, 2000. He also noted headaches and visual problems and requested authorization for left upper extremity surgery, evaluation by an anesthesiologist, a neurological reevaluation and an ophthalmological evaluation.

Dr. Golding submitted medical reports dated September 4, October 26 and March 1, 2002, in which she opined that appellant remained disabled as a result of the January 31, 2000 work injury. She advised that appellant had left ulnar entrapment neuropathy at the cubital tunnel, axial spine strain and sprain, trapezius myofascitis, post-traumatic cephalgia, complex regional pain syndrome involving the left upper extremity most likely type 2, cervical and lumbar disc disease, lumbar radiculopathy and unresolved left thumb ligamentous injury. Dr. Golding reported that there had been no improvement in his clinical examinations or his functions and noted some objective findings were reported pertaining to appellant's upper extremity and left leg. She expressed her disagreement with the opinion and findings of Dr. Bennett and Dr. Salem and justified the amount of narcotic pain medication prescribed for appellant.

By decision dated January 12, 2004, an Office hearing representative affirmed the Office's September 9, 2002 decision, terminating benefits on the basis that the weight of the evidence was represented by the medical opinion of Dr. Bennett. The Office hearing representative further found that the evidence submitted subsequent to the termination decision was sufficient to warrant further development of the claim. The case was remanded to the Office for further action.

On December 21, 2004 following reconstruction of the case record, the Office reissued the January 12, 2004 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.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.⁵

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The opportunity for and thoroughness

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *See Virginia Davis-Banks*, 44 ECAB 389 (1993).

of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts which determine the weight to be given to each individual report.⁶

ANALYSIS

The Office only accepted the condition of a herniated disc as being work related. Thus, the Office bears the burden of proof in establishing that appellant no longer has residuals of that employment-related condition.⁷

The Office terminated appellant's compensation benefits effective October 6, 2002 based on the weight of a second opinion examiner, Dr. Salem, who opined that appellant had no continuing disability or medical condition causally related to his accepted work injury. The Office hearing representative also affirmed the termination of benefits, but on the basis that the weight of the medical evidence should have been attributed to the medical opinion of Dr. Bennett, another second opinion examiner.

The Board finds that the Office properly terminated appellant's compensation benefits effective October 6, 2002 on the grounds that the weight of the medical evidence established that appellant ceased to have any disability or condition causally related to employment.

Although the Office attributed the weight of the medical evidence to Dr. Salem, the Board notes that Dr. Salem advised that he agreed with Dr. Bennett's impressions and evaluations since Dr. Bennett was able to obtain more of an evaluation. Dr. Bennett's findings were based on a history of the employment injury, the statement of accepted facts, a physical examination of appellant and a review of the medical records and objective tests. Dr. Bennett opined that despite appellant's subjective complaints of pain, there did not appear to be any clearly definable physical abnormalities and concluded that appellant had recovered from his employment injury. He noted that the examination revealed inconsistencies of findings suggestive of symptom magnification and embellishment of complaints, rather than true organic disease. He also opined that appellant was capable of working an eight-hour day with restrictions.

The medical reports from appellant's treating physicians, including diagnostic studies, diagnosed a number of conditions in addition to appellant's accepted injury-related condition; however, no discussion or medical reasoning was provided in support of continuing and current disability due to the accepted condition of herniated disc L5-S1. Additionally, none of the treating physicians reported objective examination findings in support of continuing injury-related medical residuals or disability.

Accordingly, the Board finds that, at the time the Office terminated appellant's compensation, the weight of the medical evidence rested with Dr. Bennett, who submitted a

⁶ *Jean Cullition*, 47 ECAB 728 (1996).

⁷ *Wiley Richey*, 49 ECAB 166 (1997); *Furman G. Peake*, 41 ECAB 361 (1990).

thorough medical opinion based on a complete and accurate factual and medical history. He performed a complete examination, reviewed the record and advised that appellant's accepted herniated disc condition had resolved and any employment-related residuals had resolved.⁸ Moreover, Dr. Salem advised that he concurred with Dr. Bennett's impressions and evaluations.

After the Office's September 9, 2002 decision terminating his compensation, appellant submitted additional medical evidence. Given that the Board has found that the Office properly relied on the weight of the medical opinion evidence in terminating appellant's compensation effective October 6, 2002, the burden shifts to appellant to establish that he is entitled to compensation after that date.⁹ The Board notes that the Office hearing representative found that the additional report from Dr. Bonner, a second opinion examiner, required further clarification. The Office has not issued a final decision on appellant's entitlement to benefits subsequent to October 6, 2002. This aspect of the claim is in an interlocutory posture and the Board has no jurisdiction to consider this on appeal.¹⁰

As such, the Board will affirm the termination decision. Upon return of the case record, the Office should further develop the medical evidence consistent with the direction of the hearing representative.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits causally related to his work-related herniated disc condition effective October 6, 2002. The Board finds that the case is not in posture for a decision regarding appellant's entitlement to benefits subsequent to October 6, 2002.

⁸ See *Joe Bowers*, 44 ECAB 423 (1993).

⁹ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. *Franklin D. Haislah*, 52 ECAB 457 (2001).

¹⁰ See 20 C.F.R. § 501.2(c); *Eugene Van Dyk*, 53 ECAB 706 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 21, 2004 be affirmed in part and remanded in part.

Issued: August 12, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

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