

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

TOMMY SCALES, Appellant

and

**U.S. POSTAL SERVICE, RICHMOND
HEIGHTS POST OFFICE,
Richmond Heights, OH, Employer**

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**Docket No. 04-1979
Issued: February 2, 2005**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
WILLIE T.C. THOMAS, Alternate Member

JURISDICTION

On August 5, 2004 appellant filed a timely appeal of the Office of Workers' Compensation Programs' hearing representative's merit decision dated July 12, 2004, and the Office's October 16, 2003 decision. In its October 16, 2003 decision, the Office terminated appellant's compensation effective that date on the grounds that he no longer had any residuals or disability causally related to his September 26, 2002 accepted employment injury. The hearing representative affirmed the termination on July 12, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this termination case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective that date on the grounds that he no longer had any residuals or disability causally related to his September 26, 2002 employment injury.

FACTUAL HISTORY

On September 26, 2002 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim assigned number A9-2026010 alleging that on that date he hurt his left hip bone when he was struck by a hamper. Appellant stopped work on the date of injury. By letter dated October 18, 2002, the Office accepted appellant's claim for a left hip contusion.

Appellant received medical treatment from Dr. Curtis W. Smith, an orthopedic surgeon, who found that he continued to be disabled from work. Appellant received appropriate compensation.

On February 24, 2003 appellant underwent a magnetic resonance imaging (MRI) scan which revealed no focal abnormality of the left hip. In a March 12, 2003 progress note, Dr. Smith indicated that appellant continued to experience pain in his left hip despite physical therapy. He provided his findings on physical examination and diagnosed a left hip contusion. Dr. Smith discussed his findings and options with appellant and the rehabilitation nurse; he recommended a functional capacity evaluation and considered pain management and appellant's return to work in a modified setting. A March 28, 2003 functional capacity evaluation found that appellant could return to sedentary work.

Based on the medical evidence of record providing that appellant was disabled, the Office referred him along with medical records, a statement of accepted facts and a list of specific questions to Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon, for a second opinion medical examination. Dr. Kaffen submitted a June 11, 2003 report providing a history of appellant's September 26, 2002 employment injury and medical treatment. He noted appellant's complaint of persistent pain in the left hip. On physical examination, Dr. Kaffen found tenderness in appellant's left hip and lumbar spine. He reviewed appellant's medical records, including the results of the February 24, 2003 MRI scan, which demonstrated no abnormality. Dr. Kaffen opined:

"2. There are no objective findings on examination or review of medical records, to indicate that [appellant] has continued to suffer from residuals of the allowed condition in this claim. I have no satisfactory explanation for why [appellant] should continue to have subjective complaints of pain in the left hip. One would expect a contusion of the left hip to have subsided since the injury of September 26, 2002.

"3. It is my opinion that [appellant] is capable of returning to work as a letter carrier for the [employing establishment] based on the allowed condition of this claim. There are no objective residuals on examination or review of medical records."

The Office received the May 30, 2003 emergency room treatment notes from Dr. Mohamad A. Marouf, a Board-certified internist, indicating that appellant suffered from right elbow pain and treatment notes from a physician whose signature is illegible regarding appellant's left hip condition. The Office also received Dr. Smith's June 25, 2003 progress note indicating that appellant had a left hip contusion and that he was totally disabled.

By letter dated August 4, 2003, the Office requested that Dr. Smith review Dr. Kaffen's report. Meanwhile, the Office received Dr. Smith's July 23, 2003 progress note reiterating that appellant had a left hip contusion and that he was totally disabled.

In an August 13, 2003 progress note, Dr. Smith responded to the Office's August 4, 2003 letter. He stated that, although he agreed that appellant's diagnosis of a left hip contusion should have yielded a satisfactory return to full function considering the elapsed time, it remained his medical opinion that appellant was still significantly compromised with respect to the ability to perform the duties of a letter carrier. He further stated that appellant continued to be significantly limited in his ability to stand, walk and otherwise perform the duties of a regular letter carrier. Dr. Smith noted that he had known appellant professionally for a number of years and that he believed appellant was being forthright. He did not see any secondary gain in this situation. Dr. Smith recommended further attempts at physical reconditioning with long-term physical therapy and possibly pain management to include a physical rehabilitation/reconditioning program with the aim of returning appellant to full-duty work status.

By letter dated September 3, 2003, the Office issued a notice of proposed termination of appellant's compensation based on Dr. Kaffen's June 11, 2003 report. The Office found that Dr. Smith's progress notes failed to provide any objective findings to support a finding that appellant's continuing residuals were causally related to his September 26, 2002 employment injury. The Office provided 30 days in which appellant could respond to this notice.

The Office received Dr. Smith's August 27, 2003 progress note in which he stated that appellant had a left hip contusion, that he continued to be temporarily totally disabled and that he was able to perform limited-duty work, but he was unable to perform the duties of a letter carrier.

In an August 26, 2003 letter, appellant's attorney contested that appellant's claim only allowed a left hip injury. He advised the Office that appellant's claim assigned number A9-2020172 involved a more extensive injury and appeared to be the reason he could not work.¹ He requested that this claim be combined with the instant claim because it also involved the back area. In a response letter dated September 12, 2003, the Office advised appellant's attorney that appellant's claim assigned number A9-2020172 did not involve the back area and, thus, it could not be combined with the instant claim.

The Office received Dr. Smith's September 10, 2003 progress note in which he stated that appellant continued to experience symptoms of his left hip contusion. In his September 24, 2003 progress note, Dr. Smith reiterated his opinion that appellant was temporarily totally disabled from performing his regular work and that he was primarily available for sitting jobs only.

By decision dated October 16, 2003, the Office finalized its proposed termination of appellant's compensation effective that date. The Office found the medical evidence submitted by appellant insufficient to establish that he had residuals or disability caused by his

¹ The record reveals that appellant's claim assigned number A9-2020172 was accepted by the Office for a right elbow contusion, right elbow sprain and right shoulder strain which he sustained on April 11, 2002.

September 26, 2002 employment injury and accorded greater weight to Dr. Kaffen's June 11, 2003 report.

In an October 29, 2003 letter, appellant requested an oral hearing before an Office hearing representative. The Office received duplicate copies of Dr. Smith's progress notes indicating that appellant had a left hip contusion and that he was totally disabled and Dr. Marouf's May 30, 2003 emergency room treatment notes regarding appellant's right elbow pain. The Office also received treatment notes from appellant's physical therapists. A report with an illegible 2002 date and physician's signature provided a diagnosis of left hip contusion, appellant's restrictions and duration of his physical therapy. An unsigned report dated March 5, 2004 from Dr. Joseph W. Jasser, a Board-certified internist, revealed that appellant underwent a return to work examination. Dr. Jasser found that appellant could return to work at the employing establishment with the physical restrictions provided by his primary care physician although he did not believe the restrictions were appropriate or warranted at that time due to the level of symptom magnification and the longevity of the case.

By decision dated July 12, 2004, the hearing representative affirmed the Office's October 16, 2003 decision. The hearing representative found that Dr. Kaffen's June 11, 2003 report constituted the weight of the medical opinion evidence.

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.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³ If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.⁴

ANALYSIS

In terminating appellant's compensation, the Office relied on the June 11, 2003 report of Dr. Kaffen, an Office referral physician. In this report, Dr. Kaffen provided an accurate factual and medical background. He conducted a thorough medical examination and a detailed review of appellant's medical records. Dr. Kaffen opined that appellant did not have any residuals or disability for work as a letter carrier due to his September 26, 2002 employment injury. He explained that there were no objective findings to support a determination that appellant's continuing residuals or disability for work as a letter carrier were caused by his accepted employment injury. Dr. Kaffen pointed out that he was unable to explain appellant's continued

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁴ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

complaints of left hip pain as appellant's contusion of the left hip should have resolved by this time.

The Board finds that Dr. Kaffen's opinion constitutes the weight of the medical evidence in finding that appellant no longer has any residuals or disability due to his September 26, 2002 employment injury as it is sufficiently rationalized and based on a proper factual and medical background.

Subsequent to Dr. Kaffen's June 11, 2003 report and the Office's September 3, 2003 notice of proposed termination, the Office received Dr. Smith's progress notes dated August 27 and September 24, 2003 finding that appellant was temporarily totally disabled from performing the duties of a letter carrier. He did not explain how or why appellant's disability was causally related to his September 26, 2002 employment injury, or why it was so debilitating as to preclude appellant from resuming his duties of a letter carrier. Therefore, Dr. Smith's progress notes are insufficient to outweigh the probative value of Dr. Kaffen's second opinion medical report, which specifically concluded that appellant no longer had any objective evidence of residuals or any disability causally related to his accepted employment injury.

Similarly, Dr. Smith's September 10, 2003 progress note is insufficient to outweigh the probative value of Dr. Kaffen's second opinion medical report as he failed to address whether appellant's continuing symptoms relating to his left hip contusion were caused by his September 26, 2002 employment injury.

After the Office's October 16, 2003 decision terminating his compensation, appellant submitted additional medical evidence. Given that the Board has found that the Office properly relied on the opinion of Dr. Kaffen in terminating appellant's compensation effective October 16, 2003, the burden shifts to appellant to establish that he is entitled to compensation after that date.⁵

The medical evidence submitted, subsequent to the October 16, 2003 decision terminating appellant's compensation, includes duplicate copies of Dr. Smith's progress notes finding that appellant had a left hip contusion and that he was temporarily totally disabled and Dr. Marouf's emergency room treatment notes regarding appellant's right elbow pain which were previously of record and considered by the Office. Dr. Smith's notes failed to provide any medical rationale explaining how or why appellant's residuals and disability were causally related to his September 26, 2002 employment injury and prevented him from working as a letter carrier and contained no objective evidence. Dr. Marouf's treatment notes failed to address a causal relationship between appellant's left hip contusion and his accepted employment injury.

⁵ See cases cited *supra* note 4.

The treatment notes of appellant's physical therapists do not constitute medical evidence and cannot establish that he continues to have any residuals or disability due to his September 26, 2002 employment injury because a physical therapist is not considered to be a "physician" under the Act.⁶

Dr. Jasser's report was unsigned. The Board has held that unsigned medical reports are of no probative value.⁷ Accordingly, as appellant has not submitted additional probative medical opinion evidence establishing that he had continuing residuals or disability causally related to his accepted September 26, 2002 employment injury, he has not met his burden of proof.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective October 16, 2003 on the grounds that he no longer had any residuals or disability causally related to his September 26, 2002 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2004 and October 16, 2003 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 2, 2005
Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁶ 5 U.S.C. §§ 8101-8193, 8101(2); *Vickey C. Randall*, 51 ECAB 357, 360 (2000) (a physical therapist is not a physician under the Act).

⁷ See *Merton J. Sills*, 39 ECAB 572 (1988).