

In a report dated January 22, 2003, Dr. David Rubinfeld, a Board-certified orthopedic surgeon and Office referral physician, related appellant's history, current complaints and findings on physical examination. After noting his review of various documents, he reported that the accepted work-related condition was not still active, that there was no injury-related disability and that appellant was capable of performing his date-of-injury position as a mail handler with no work limitations. In an addendum dated March 5, 2003, Dr. Rubinfeld clarified his opinion: "The video surveillance tape shows the claimant involved in stressful activities without pain. The findings on physical examination can be controlled by the claimant particularly if he is familiar with the tests being done."

On April 15, 2003 the Office proposed to terminate appellant's compensation benefits based on Dr. Rubinfeld's opinion.

Appellant requested authorization for back surgery and submitted additional medical evidence. On February 28, 2003 Dr. Christopher B. Michelsen, a Professor of Clinical Orthopaedic Surgery, reported that appellant had persistent lower back pain with lifting or bending and had difficulty feeling his knees after sitting for any period of time. He noted positive findings on diagnostic testing and physical examination and offered appellant options that included spinal surgery.

On March 3, 2003 Dr. Felix E. Roque reported that he had treated appellant for lumbar radiculopathy, lumbar compressed nerve roots, lumbar degenerative disc disease and lumbar myofascial disease. He stated that appellant underwent a series of lumbar epidural steroid injections in May 2002 with little improvement.

On April 22, 2003 Dr. Michelsen acknowledged that appellant was videotaped at an amusement park participating with his children on numerous rides: "When questioned about this he stated that he had taken enough medication to allow him to do so."

The Office determined that a conflict in medical opinion existed between Dr. Rubinfeld on the one hand and Drs. Michelsen and Roque on the other. To resolve the conflict, the Office referred appellant, together with the case file and a statement of accepted facts, to Dr. Howard L. Blank, a Board-certified orthopedic surgeon.

On July 6, 2003 Dr. Blank reported that he had reviewed the available medical records, obtained an orthopedic history and conducted an orthopedic examination. He stated that he also reviewed a surveillance video of appellant from September 21 to October 2, 2002. Dr. Blank related appellant's history and described his findings on physical examination. After diagnosing several conditions, including history of lumbar sprain and hip pain and probable malingering, he offered his opinion on whether appellant continued to experience residuals of the accepted employment injury, as follows:

"This patient, in my opinion, based on the [accepted] facts, sustained a sprain of his lumbar spine and possibly a temporary radiculopathy in August of 2000.

"He had an MRI [magnetic resonance imaging] scan which showed a minimal bulging disc which is an absolutely normal scan. His myelogram CT [computerized tomography] scan showed borderline congenital stenosis and

minor bulging discs without any major herniation. This should not limit his function.

“The normal course of a sprain would be approximately two to three months.

“This patient has had extensive treatment. He has not worked for approximately two years.

“I observed him in the surveillance videos dated September 21, 2002 and October 2, 2002, functioning extremely well. It is not possible, to a reasonable degree of probability, that this patient had any significant problem with his low back and was able to participate at the amusement park in the way I observed him do so, on September 21, 2002. That coupled with his using a cane on October 2, 2002 essentially for show and his ability to get into a car without any difficulty, clearly indicates that this patient is probably malingering.

“Observing him today in my office, his examination was most consistent with a workers’ compensation back syndrome where there is significant hope of secondary gain. He most likely has a significant element of malingering.

“I realize that Dr. Michelsen, who is at Columbia Presbyterian Medical Center, has recommended the possibility of surgery. As I stated earlier, this is totally wrong in my opinion. It is not indicated by any objective medical physical findings or scanning studies. In the workers’ compensation setting, in my opinion, invasive surgery to this patient would be a disaster.

“I do feel this patient is capable of working in his stated occupation as a mail handler without restrictions.

“Patients [who] had prolonged workers’ compensation issues, based on my personal experience and in the medical literature, have significant psychological and social difficulty returning to work. From an objective point of view as an orthopedist, this patient is clearly capable of working in his stated profession, which is dramatically demonstrated in the surveillance videos.”

Responding to Office questions, Dr. Rubinfeld reported that appellant had no objective findings related to his work injury of August 16, 2000 and that the accepted condition had resolved with no residual disability or restrictions to his occupation as a mail handler. He added:

“This patient’s prognosis is good for his work[-]related injury of August 16, 2000 and he appears to have recovered. If he is not working at the present time, it is unrelated to his injury of August 16, 2000 and is most likely related to a combination of malingering and hopes of workers’ compensation secondary gain. Orthopedic treatment at this time would not facilitate this patient’s return to work. Counseling including psychological and social types, might be the only way that this patient would ever return to work as a mail handler.

“Objectively from an orthopedic point of view, [he] is physically capable of working as a mail handler.”

In a decision dated October 28, 2003, after appropriate notice, the Office terminated appellant’s compensation benefits effective November 2, 2003. Appellant requested an oral hearing before an Office hearing representative, which was held on July 1, 2004.

In a decision dated October 5, 2004, the hearing representative affirmed the October 28, 2003 termination of appellant’s compensation benefits.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.¹ 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.²

Section 8123(a) of the Federal Employees’ Compensation Act provides in 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.”³ When 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.⁴

ANALYSIS

The Office found a conflict between Dr. Rubinfeld, the Office referral physician and Drs. Michelsen and Roque, appellant’s physicians. Dr. Rubinfeld reported that the accepted work-related condition was not still active, that there was no injury-related disability and that appellant was capable of performing his date-of-injury position as a mail handler with no work limitations. Dr. Michelsen and Dr. Roque, attending physicians, reported persistent lower back complaints with positive findings and treatment for a number of lumbar conditions. Dr. Michelsen suggested spinal surgery.

The Office properly referred appellant to Dr. Blank, a Board-certified orthopedic surgeon, to resolve the conflict under section 8123(a) of the Act. The Office provided Dr. Blank with appellant’s case file and a statement of accepted facts so that he could base his opinion on a

¹ *Harold S. McGough*, 36 ECAB 332 (1984).

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ 5 U.S.C. § 8123(a).

⁴ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

proper background. Dr. Blank explained that the normal course of a sprain would be approximately two to three months, that appellant received extensive treatment and that his studies were either absolutely normal or so borderline or minor as not to limit his function. He also explained that, based on his viewing of surveillance videos, it was not possible that appellant had any significant problem with his low back while being able to participate at the amusement park in the way he was observed to do so. This, coupled with appellant's use of a cane essentially for show and his ability to get into a car without any difficulty, clearly indicated to Dr. Blank that appellant was probably malingering. He added that surgery was not indicated by any objective medical physical findings or scanning studies. In response to specific questions posed by the Office, Dr. Blank made clear that the accepted condition had resolved with no residual disability or restrictions to appellant's occupation as a mail handler.

The Board finds that Dr. Blank's opinion is sufficiently well rationalized and based upon a proper factual background that it must be given special weight in resolving the conflict between Dr. Rubinfeld and Drs. Michelsen and Roque. As the weight of the medical opinion evidence establishes that appellant no longer suffers from residuals of the accepted conditions, the Board finds that the Office has met its burden of proof to justify the termination of appellant's compensation benefits.

CONCLUSION

The Office met its burden of proof to justify the termination of appellant's compensation benefits effective November 2, 2003. The weight of the medical opinion evidence rests with the opinion of the impartial medical specialist and establishes that residuals of the accepted conditions ceased by November 2, 2003.⁵

⁵ The burden of proof rests with appellant to establish that any other medical condition for which he seeks compensation is causally related to the employment incident on August 16, 2000.

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 23, 2005
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member