

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

R.V., Appellant

and

**DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE,
Twenty-Nine Palms, CA, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 06-1086
Issued: August 9, 2006**

Appearances:
R.V., pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 5, 2006 appellant filed a timely appeal from the Office of Workers' Compensation Programs' June 27, 2005 and January 18, 2006 merit decisions concerning the termination of his compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation effective June 10, 2005 on the grounds that he no longer had residuals of his September 19, 2002 employment injury after that date.

FACTUAL HISTORY

On September 19, 2002 appellant, then a 61-year-old maintenance worker, filed a traumatic injury claim alleging that he sustained injury to his back and right leg when he tripped over a rock and fell to the ground at work on that date.

The Office accepted that appellant sustained a lumbar strain and temporary aggravations of a preexisting right leg radiculopathy, degenerative arthritis at L5-S1 and mild spinal stenosis.¹ He stopped work on September 19, 2002 and received appropriate compensation for periods of disability.² In September 2003, appellant began to participate in a vocational rehabilitation program. In June 2004, the Office referred him to Thomas R. Dorsey, a Board-certified orthopedic surgeon, for additional evaluation of his back and lower extremity condition.

In a report dated July 2, 2004, Dr. Dorsey discussed appellant's 1974 military-related injury and his September 19, 2002 injury at the employing establishment. On examination appellant exhibited some limited flexion and no significant motor loss of the lower extremities. Dr. Dorsey diagnosed preexisting lumbar stenosis and right lower extremity radiculopathy and a resolved lumbar strain/sprain which was initially related to the September 19, 2002 injury. He indicated that the residuals of appellant's September 19, 2002 injury would have completely resolved within a month and noted that his continuing problems were due to his military-related back injury and surgery.

Appellant submitted an August 19, 2004 report in which Dr. Gilbert L. Hyde, an attending Board-certified orthopedic surgeon, discussed his military-related injury and his September 19, 2002 employment injury. Dr. Hyde indicated that appellant had back tenderness and spasms and exhibited moderate limited back motion. He concluded that appellant continued to experience an aggravation of lumbar spondylosis with a right leg radiculopathy due to the September 19, 2002 employment injury.

The Office determined that there was a conflict in the medical evidence between Dr. Dorsey and Dr. Hyde regarding whether appellant continued to have residuals of his September 19, 2002 employment injury. It referred appellant and the case record to Dr. Ronald P. Portnoff, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated February 14, 2005, Dr. Portnoff provided a description of appellant's military-related 1974 injury and his September 19, 2002 employment injury. He examined him for 45 minutes and detailed his back and right leg complaints. Dr. Portnoff stated that appellant exhibited some limited motion of his back upon all motions but that there were no strength or sensory deficits associated with the lower extremities. Straight leg and Waddell testing results were normal and diagnosed resolved lumbar strain, resolved temporary aggravation of preexisting lumbar disc disease at L5-S1 and preexisting degenerative arthritis at L4-5 and L5-S1. Dr. Portnoff indicated that appellant's factual and medical history, his current complaints and medical examination and the results of diagnostic testing showed that the initial cause of his injuries was the military-related low back injury which occurred in 1974. He noted that the September 19, 2002 back injury caused a temporary aggravation of the preexisting degenerative

¹ In 1974, appellant injured his back when he fell and twisted his back during basic training exercises for the U.S. Army. In 1975, he underwent laminectomy and discectomy surgery of his low back. In February 2000, a Department of Veterans Affairs physician diagnosed right L5-S1 neuropathy with degenerative disc disease at L2-3 and L5-S1.

² Appellant returned to limited-duty work on December 2, 2002 but stopped work again on January 29, 2003.

disc disease at L4-5 and L5-S1 with an associated preexisting L5-S1 radiculopathy. Dr. Portnoff stated that appellant had completely recovered from the effects of the September 19, 2002 injury and no longer had any residuals of that injury. He agreed with Dr. Dorsey, who had concluded that appellant's continuing problems were related to the natural progression of his preexisting degenerative back condition and the military-related accident.

Appellant submitted several reports of Dr. Hyde, dated between January and June 2005, which included a diagnosis of aggravation of lumbar spondylosis with associated right leg radiculopathy and indicated that appellant was totally disabled.

By letter dated May 23, 2005, the Office advised appellant that it proposed to terminate his compensation based on the opinion of Dr. Portnoff and informed him that he had 30 days to submit additional evidence or argument.

By decision dated June 27, 2005, the Office finalized its proposed termination of appellant's compensation. The Office based its termination, effective June 10, 2005, on the opinion of the impartial medical specialist, Dr. Portnoff.

In a statement dated August 29, 2005, appellant requested reconsideration of his claim and argued that the opinion of Dr. Portnoff was insufficient to justify termination of his compensation. He asserted that Dr. Portnoff did not adequately review the prior medical evidence incorrectly listed his age as 53 rather than 63 years old, improperly listed his job title at the time of injury as maintenance worker and did not spend 45 minutes examining him, as reported, but rather spent less than 26 minutes.³

In an August 2, 2005 report, Dr. Hyde stated that examination revealed back tenderness and spasms with limited back motion. He diagnosed aggravation of lumbar spondylosis with associated lumbar stenosis at L3-4, L4-5 and L5-S1 and radiculitis of the lower extremities and indicated that, based on the available history, these conditions were "industrially related." Dr. Hyde indicated that 75 percent of appellant's disability was attributable to the September 19, 2002 injury and that 25 percent was attributable to his preexisting conditions.

By decision dated January 18, 2006, the Office affirmed its June 27, 2005 decision.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,⁴ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁵ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ The Office's burden of proof includes the necessity of

³ Appellant submitted a February 7, 2005 receipt from a home improvement store and argued that the time stamped on receipt showed that the examination could not have lasted 45 minutes.

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁶ *Id.*

furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Section 8123(a) of the 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.”⁸ 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.⁹

ANALYSIS

The Office accepted that on September 19, 2002 appellant sustained a lumbar strain and temporary aggravations of a preexisting right leg radiculopathy, degenerative arthritis at L5-S1, and mild spinal stenosis. The Office terminated his compensation effective June 10, 2005 based on the opinion of an impartial medical specialist.

The Office properly determined that there was a conflict in the medical opinion between Dr. Hyde, an attending Board-certified orthopedic surgeon, and Dr. Dorsey, a Board-certified orthopedic surgeon acting as an Office referral physician, on the issue of whether appellant continued to have residuals of the September 19, 2002 employment injury.¹⁰ In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Portnoff, a Board-certified orthopedic surgeon, for an impartial medical examination.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Portnoff, the impartial medical specialist selected to resolve the conflict in the medical opinion. His February 14, 2005 report establishes that appellant had no disability due to his September 19, 2002 employment injury after June 10, 2005.

Dr. Portnoff stated that appellant exhibited some limited motion of his back upon all motions, that there were no strength or sensory deficits associated with the lower extremities and that straight leg and Waddell testing results were normal. He diagnosed resolved lumbar strain, resolved temporary aggravation of preexisting lumbar disc disease at L5-S1 and preexisting degenerative arthritis at L4-5 and L5-S1. Dr. Portnoff indicated that the initial cause of appellant’s injuries was the military-related low back injury of 1974. He stated that he had

⁷ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ 5 U.S.C. § 8123(a).

⁹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁰ In a report dated July 2, 2004, Dr. Dorsey concluded that the residuals of appellant’s September 19, 2002 injury would have completely resolved within a month and noted that his continuing problems were due to his military-related back injury and surgery. In contrast, Dr. Hyde indicated in a report dated August 19, 2004, that he continued to suffer an aggravation of lumbar spondylosis with a right leg radiculopathy due to the September 19, 2002 employment injury.

completely recovered from the effects of the September 19, 2002 injury and no longer had any residuals of that injury.

The Board has carefully reviewed the opinion of Dr. Portnoff and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹¹ Dr. Portnoff provided medical rationale for his opinion by explaining that the September 19, 2002 back injury was of such a limited nature that it only caused a temporary aggravation of the preexisting degenerative disc disease at L4-5 and L5-S1 with an associated preexisting L5-S1 radiculopathy. He further explained that appellant's factual and medical history, his current complaints and medical examination and the results of diagnostic testing showed that his continuing back and right leg problems were related to the natural progression of his preexisting degenerative back condition and to residuals of the military-related 1974 accident.¹²

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective June 10, 2005 on the grounds that he no longer had residuals of his September 19, 2002 employment injury after that date.

¹¹ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹² Appellant argued that Dr. Portnoff did not adequately review his medical records and that he made mistakes in his February 14, 2005 report regarding the length of the examination, his age and his occupation. However, the Board has determined that Dr. Portnoff's opinion is well reasoned with regard to the relevant issue of the present case. Appellant submitted an August 2, 2005 report in which Dr. Hyde stated that the diagnosis of aggravation of lumbar spondylosis with associated lumbar stenosis at L3-4, L4-5 and L5-S1 and radiculitis of the lower extremities was "industrially related." This report, however, is of limited probative value on the relevant issue of the present case in that Dr. Hyde did not provide adequate medical rationale in support of his conclusion on causal relationship. See *Leon Harris Ford*, 31 ECAB 514, 518 (1980). Moreover, as Dr. Hyde was on one side of the conflict, his additional report is essentially duplicative of his stated opinion and insufficient to give rise to a new conflict. See *Richard O'Brien*, 53 ECAB 234 (2001).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' January 18, 2006 and June 27, 2005 decisions are affirmed.

Issued: August 9, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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