

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

MAYNARD D. COUNTS, Appellant

and

**DEPARTMENT OF LABOR, MINE SAFETY &
HEALTH ADMINISTRATION, Norton, VA,
Employer**

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**Docket Nos. 06-157 & 06-158
Issued: July 12, 2006**

Appearances:
Maynard D. Counts, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge

JURISDICTION

On October 31, 2005 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs' hearing representative dated August 23, 2005 denying his claim for a recurrence of disability on and after March 11, 2004 and denied his request for authorization for surgery. The Board docketed the appeal as No. 06-157. Appellant also filed timely appeals from decisions of the Office dated October 14 and 21, 2005. By the October 14, 2005 decision, the Office terminated appellant's compensation benefits effective October 18, 2005. In the October 21, 2005 decision, the Office denied appellant's schedule award claim on the grounds that the evidence failed to establish a measurable impairment. The Board assigned Docket No. 06-158 to this appeal. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of these appeals.

ISSUES -- Docket No. 06-157

The issues are: (1) whether the Office properly determined that the issue presented was a recurrence of disability on and after March 11, 2004 causally related to his accepted January 13, 1997 employment injuries; and (2) whether the Office properly denied authorization of his request for surgery.

FACTUAL HISTORY -- Docket No. 06-157

On April 1, 1992 appellant, a 41-year-old mine safety and health inspector, filed a traumatic injury claim alleging he injured his lower back on March 31, 1992 while moving office furniture.¹ The Office accepted the claim for a low back strain. Appellant returned to his regular full-time work on April 5, 1993 with subsequent intermittent periods of disability. On July 29, 1994 the Office accepted a claim for a recurrence of disability beginning April 3, 1993.

On June 29, 1995 appellant filed a traumatic injury claim alleging he injured his lower back on June 28, 1995 in the performance of duty.

On January 5, 1996 appellant filed a traumatic injury claim alleging he injured his neck, shoulders and lower back on January 4, 1996 due to his employment duties.² The Office accepted the claim for lumbar and cervical strains.

On January 14, 1997 appellant filed a traumatic injury claim alleging he injured his lower back, neck and shoulders on January 13, 1997 in the performance of duty.³ The Office accepted the claim for low back strain and cervical strain.

On December 29, 1998 the Office issued a loss of wage-earning capacity decision which reduced his wages effective June 23, 1997 based upon his ability to earn wages as a mine safety and health specialist.⁴

On September 28, 2000 the Office modified the December 29, 1998 loss of wage-earning capacity decision to accept a recurrence of disability for the period May 1 to July 28, 2000.

On January 29, 2001 the Office approved modification of the December 29, 1998 loss of wage-earning capacity decision and expanded his January 13, 1997 injury claim to include aggravation of preexisting cervical degenerative disc disease and L5-S1 radiculopathy.

On March 30, 2001 the Office adjusted appellant's wages which reduced his wages effective March 19, 2001 to reflect his ability to earn wages as a mine safety and health specialist.

On August 9, 2001 appellant filed a claim for a schedule award for his 10 percent whole body impairment.

¹ This was assigned claim number A11-116747.

² This was assigned claim number A11-146685.

³ This was assigned claim number 11-0154209. The claim numbers 11-0154209, A11-146685 and A11-116747 were combined with 11-116747 as the master file number.

⁴ The date of injury is listed as January 13, 1997 and the file number is 11-0154209.

By decision dated July 14, 2004, the Office denied appellant's claim for a recurrence of disability beginning March 11, 2004 and denied authorization for three-level cervical fusion and PLIF at L5-S1 surgery.⁵

In a letter dated July 29, 2004, appellant requested an oral hearing on the denial of his claim for a recurrence of disability beginning March 11, 2004. Appellant noted that he received the denial on July 14, 2004. A hearing was held on March 30, 2005 at which appellant testified and submitted evidence.

On January 10, 2005 appellant filed a claim for a recurrence of disability beginning December 28, 2004 due to his accepted January 13, 1997 employment injury.

By decision dated August 23, 2005, the Office hearing representative affirmed the July 14, 2004 decision which denied appellant's claim for a recurrence of disability beginning March 11, 2004 and denying authorization for cervical fusion and lumbar fusion surgeries.⁶

ISSUES -- Docket No. 06-158

The issues are: (1) whether the Office met its burden of proof in terminating appellant's compensation and medical benefits effective October 18, 2005; and (2) whether appellant is entitled to a schedule award.

FACTUAL HISTORY -- Docket No. 06-158

As noted above, appellant sustained injuries to his back, shoulders and neck on January 13, 1997 while walking in an airway. The Office accepted the claim for low back strain, cervical strain, aggravation of lumbar and cervical degenerative disc disease, L5-S1 radiculopathy and L5-S1 laminotomy microdiscectomy.

By decision dated September 29, 2003, the Office terminated appellant's wage-loss compensation for his January 13, 1997 employment injury effective September 19, 2003 on the grounds that he was no longer disabled from working due to his accepted employment injuries.

In response to an inquiry by appellant following the issuance of the September 29, 2003 decision, in a letter dated April 8, 2004, the Office informed appellant that a wage-earning capacity decision had been issued on September 29, 2003 and advised him of the medical and factual evidence required to modify this decision.

Appellant submitted a report, dated April 28, 2004, by Dr. Morgan P. Lorio, an examining Board-certified orthopedic surgeon, who diagnosed neck pain, bilateral upper

⁵ The July 14, 2004 decision together with the actual claim for a recurrence of disability filed on March 18, 2004 were contained in the record for Docket No. 06-158.

⁶ After affirming the July 14, 2004 decision, the hearing representative instructed the Office to issue a notice of proposed termination of benefits of "all prior accepted conditions under this claim have resolved" based upon Dr. Richard T. Sheridan, a second opinion Board-certified orthopedic surgeon's, report and determine whether appellant was receiving retirement benefits from the Office of Personnel Management (OPM).

extremity radiculopathy, cervical spine stenosis, low back pain with radiculopathy, degenerative disc disease changes at L3-S1, left side L5-S1 disc herniation, L5-S1 modic end plate changes and C4-7 degenerative with disc disease with bulging disc at C4-7. A “three-level anterior cervical fusion and C4-7” and PLIF L5-S1 was recommended.

On May 21, 2004 appellant informed the Office that his treating physician took him off work until his neck and back surgery had been authorized.

On May 24, 2004 the Office received a May 13, 2004 report from Dr. Dwight L. Bailey, a treating Board-certified family practitioner, who diagnosed herniated cervical and lumbar discs due to the January 13, 1997 employment injury. He stated that appellant’s disability is a recurrence and a referral physician recommended surgery.

In a June 24, 2004 report, Dr. Sheridan diagnosed “resolved low back and cervical strains and resolved temporary aggravation of degenerative disc disease of the lumbar and cervical spines” and “resolved recurrences of same from the work event of March 11, 2004.” With regards to the proposed surgery, he opined that there was no evidence of active radiculopathy and thus the recommendation for “a three-level cervical fusion and PLIF L5-S1 is not supported by clinical finding and is not medically necessary.” Next, he concluded that the July 11, 2002 functional capacity evaluation was no longer valid and concluded that appellant was capable of performing the duties of a mine safety and health specialist.

By decision dated July 14, 2004, the Office denied appellant’s claim for a recurrence of disability beginning March 11, 2004 and denied authorization for three-level cervical fusion and PLIF at L5-S1 surgery.

In a letter dated July 28, 2004, appellant requested an impartial examination due to the conflict in the medical opinion evidence between Dr. Sheridan and his treating physician. In support of his request, he submitted reports dated April 28, May 19 and July 21, 2004 by Dr. Lorio and a September 2, 2004 report and September 21, 2004 treatment note by Dr. Bailey.

As was also noted in the factual history of Docket No. 06-157, in a letter dated July 29, 2004, appellant requested an oral hearing on the denial of his claim for a recurrence of disability beginning March 11, 2004. In an August 23, 2005 decision, an Office hearing representative affirmed the July 14, 2004 decision which denied appellant’s claim for a recurrence of disability beginning March 11, 2004 and denying authorization for cervical fusion and lumbar fusion surgeries. The hearing representative also instructed the Office to issue a notice of proposed termination of benefits because “all prior accepted conditions under this claim have resolved.”

In keeping with the Office hearing representative’s directives, on September 8, 2005 the Office issued a notice of proposed termination of wage-loss and medical compensation as

appellant no longer had any disability or residuals due to his accepted January 13, 1997 employment injury. The Office found that the weight of the evidence rested with the report of Dr. Sheridan.⁷

By decision dated October 14, 2005, the Office finalized the termination of appellant's compensation benefits based upon his election of benefits from OPM. The Office also finalized the termination of appellant's wage-loss and medical benefits effective October 18, 2005 on the grounds that he no longer had any residuals or disability due to his accepted January 13, 1997 employment injury.

By decision dated October 21, 2005, the Office denied appellant's schedule award claim on the grounds that the evidence of record failed to demonstrate a measurable impairment.

LEGAL PRECEDENT -- ISSUES 1, 2, 3 & 4

The Office's procedure manual provides:

"Doubling is the combination of two or more case files. It occurs when an employee has sustained more than one injury and it is necessary to combine all of the records in one case folder. The case records are kept separately but travel under one claim number, which is known as the master file."⁸

Regarding when to double cases, the Office's procedure manual states:

"Cases should be doubled when correct adjudication of the issues depends on frequent cross-reference between files. Cases meeting one of the following tests must be doubled:

- (1) A new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body. For instance, a claimant with an existing case for a back strain submits a new claim for a herniated lumbar disc."⁹

Office procedures further provide that cases should be doubled as soon as the need to do so becomes apparent.¹⁰

⁷ In a letter dated April 29, 2005, appellant informed the Office that he took early retirement effective April 3, 2005 and requested all compensation checks be stopped due to his retirement. Appellant filed an election form opting to receive benefits from OPM instead of under the Federal Employees' Compensation Act effective April 13, 2005.

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance and Management*, Chapter 2.400.8(a) (February 2000).

⁹ *Id.* at Chapter 2.400.8(c)(1).

¹⁰ *Id.* at Chapter 2.400.8.

ANALYSIS -- ISSUES 1, 2, 3 & 4

The Board finds that these cases are not in posture for decision. In this regard, the Office previously accepted that appellant sustained injuries to his neck, back and shoulders on March 31, 1992 and January 4, 1996. The Office assigned the cases file numbers A11-116747 and A11-146685, respectively. Appellant filed a claim for an injury to his neck and back due to a traumatic injury on January 13, 1997. The Office expanded its acceptance to include L5-S1 radiculopathy and aggravation of preexisting cervical degenerative disc disease. The Office initially issued a loss of wage-earning capacity decision on December 29, 1998 based on the effects of the January 13, 1997 employment injury, which was modified on September 28, 2000, January 29 and March 30, 2001 and September 29, 2003. On March 18, 2004 and January 10, 2005 (Docket No. 06-157), appellant filed claims alleging a recurrence of disability beginning March 11 and December 28, 2004 due to his accepted January 13, 1997 employment injury. The Office hearing representative's August 23, 2005 decision is contained in both Docket No. 06-157 and Docket No. 06-158, in which he affirmed the denial of the claim for a recurrence in Docket No. 06-157 and also terminated all compensation benefits in Docket No. 06-158.¹¹ The medical evidence referenced in the hearing representative's decision is divided between Docket Nos. 06-157 and 06-158. Furthermore, the case record for Docket No. 06-157 contains the medical and factual evidence up to March 14, 2002 and the August 23, 2005 hearing representative's decision for the January 13, 1997 injury, but does not contain Dr. Sheridan's June 24, 2004 second opinion, which was the basis for the termination of all compensation benefits under the accepted claims in Docket Nos. 06-157 and 06-158.

Office procedures provide that cases should be doubled when a new injury is reported for an employee who previously filed an injury claim for a similar condition and further indicates that the cases should be doubled as soon as the need to do so becomes apparent.¹² In this case, as appellant filed multiple claims for injuries to the same part of his body, the Office should have doubled the case files in accordance with its procedures. As the Office either incompletely associated the records of the current claims filed by appellant or failed to properly associate the evidence therein, the Board is unable to properly address and adjudicate all issues presented. The Board will remand the case to the Office for consolidation of all appellant's prior claims for the same part of the body and for reconstruction and proper assemblage of the record, to be followed by any further development and a *de novo* decision on the merits of the claim to protect his appeal rights.

CONCLUSION

The Board finds that the cases are not in posture for decision. The cases will be remanded for consolidation of the case records and reconstruction and proper assemblage of the record to be followed by any necessary further development and a *de novo* decision on all aspects of appellant's claims.

¹¹ It also appears that the Office had previously terminated appellant's compensation in a September 29, 2003 decision in Docket No. 06-157 in response to a request for modification of appellant's loss of wage-earning capacity determination.

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision dated August 23, 2005 in Docket Nos. 06-157 and 06-158 and the decisions dated October 14 and 21, 2005 in Docket No. 06-158 of the Office of Workers' Compensation Programs are set aside and the case is remanded for further proceedings consistent with this decision by the Board.

Issued: July 12, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board