United States Department of Labor
Employees' Compensation Appeals Board

RONALD F. BOSLEY, JR., Appellant	)	
and	)	**Docket No. 06-483**
	)	**Issued: July 27, 2006**
DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTION INSTITUTION, Phoenix, AZ, Employer	)	

Appearances:
Ronald F. Bosley, Jr., 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 December 22, 2005 appellant filed a timely appeal from a September 21, 2005 decision of the Office of Workers' Compensation Programs terminating his wage-loss and medical compensation benefits and denying his request for a change of physicians. Pursuant to 20 C.F.R. §§ 501.2(c) and 501(d)(3), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's wage-loss and medical compensation benefits on the grounds that an accepted left shoulder condition had ceased without residuals; and (2) whether the Office properly exercised its discretion in declining to authorize a change in treating physicians.

FACTUAL HISTORY

The Office accepted that on December 13, 1994 appellant, then a 35-year-old corrections officer, sustained a left shoulder strain with internal derangement during a combat training

exercise. He sought treatment from Dr. J.F. James Davidson, an attending Board-certified orthopedic surgeon. After conservative treatment failed to improve appellant's condition, the Office authorized June 12, 1995 arthroscopy to repair a partial rotator cuff tear. Dr. Davidson submitted progress notes through November 1995. In a November 14, 1995 note, he permanently restricted appellant from combat situations. Appellant was separated from the employing establishment as there was no light duty available. He received wage-loss compensation on the daily and periodic rolls.

On October 28, 1996 appellant worked as a package tracing agent and delivery driver in the private sector. In February 2000, he sought treatment for left shoulder pain. On February 15, 2000 Dr. Davidson administered a corticosteroid injection and diagnosed left rotator cuff tendinitis, noting that he had not seen appellant in four years. He released appellant to full duty on March 7, 2000, reiterating the restriction against participating in combat situations. Dr. Davidson submitted progress notes through December 12, 2000 noting that appellant had full strength and range of motion in his left shoulder, with occasional pain due to cold weather. He stated that appellant required "supportive care only." In November 2001, appellant relocated from Arizona to Michigan.

By decision dated October 28, 1997, the Office reduced appellant's compensation, finding that his actual earnings as a tracing investigator were representative of his wage-earning capacity. Appellant continued work as a private sector delivery driver through 2005.

In an April 5, 2005 letter, the Office requested that appellant submit updated medical information as he had not done so in several years. He then selected Dr. Rodney L. Kilpatrick, a Board-certified osteopath specializing in family practice. In a May 12, 2005 report, he reviewed medical records and provided a history of injury and treatment. On examination of appellant's left shoulder, Dr. Kilpatrick found no atrophy, normal strength, a full range of motion with minimal crepitance and no neurologic deficits. He opined that the "rotator cuff appear[ed] strong. [Appellant could] perform the baseball throw with his left arm in normal fashion without pain" but reported mild tenderness on the drop-arm test. Dr. Kilpatrick opined that appellant had an excellent surgical recovery as he had regained full use of the shoulder and was in excellent physical condition. He questioned why appellant received wage-loss compensation based on his restriction against combat situations, opining that appellant was at no higher risk of reinjury due to his postsurgical status. Dr. Kilpatrick stated that, as appellant had normal strength and range of motion in his left shoulder, the restriction against combat participation could be removed. He noted that he was "not sure how well this will set with him." In a May 17, 2005 addendum, Dr. Kilpatrick noted that appellant had telephoned two or three times, wanting "to keep the restriction about not being involved in combat" and requested a second opinion with Dr. Richard Mogerman, a Board-certified orthopedic surgeon. Dr. Kilpatrick stated that he encouraged appellant "to get the mid set that he was functionally intact," … "physically fit and in good shape and [muscular] tone."

Appellant submitted May 15, 18 and 31 letters, asserting that Dr. Kilpatrick's opinion was insufficient as he did not obtain x-rays or base his report on a complete history. He commented that Dr. Kilpatrick's suggestion to change his mindset was irrelevant as the pain was in his left shoulder. The Office contacted Dr. Mogerman to ascertain if he would become

appellant's treating physician for conservative care. In a June 27, 2005 memorandum, the Office noted that Dr. Mogerman would not treat appellant "considering the circumstances" of the case.

The Office obtained a second opinion evaluation from Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon, who submitted a July 25, 2005 report reviewing the medical record and a statement of accepted facts. He noted appellant's employment as a package delivery driver, with lifting up to 70 pounds. Dr. Obianwu related appellant's complaints of slight rotator cuff tenderness with heavy lifting, an occasional catching sensation and occasional trouble elevating the left arm above the shoulder. On examination, he found a full range of passive left shoulder motion with pain, without instability or impingement. Dr. Obianwu diagnosed a resolved left shoulder injury. He noted that the corticosteroid injection in February 2000 was "not uncommon in delivery workers." Dr. Obianwu stated that he did not observe any ratable impairment or any deficit that would "interfere with whatever activity [appellant] want[ed] to engage in…. No disability remains with regard to the left shoulder." Dr. Obianwu noted that, as appellant had performed physically demanding delivery work for the past five years "with very little ill effect," there was no reason to restrict appellant from combat situations.

By notice dated August 18, 2005, the Office advised appellant that it proposed to terminate his wage-loss compensation and medical benefits on the grounds that the accepted left shoulder condition had ceased. The Office noted that both the second opinion physician and Dr. Kilpatrick found no objective evidence of any work-related disability.

Appellant responded in a September 10, 2005 letter, asserting that the Office should "discard" Dr. Kilpatrick's report as it was too short and did not thoroughly review the medical record. He asserted that Dr. Kilpatrick was not qualified as he was an osteopath and not an orthopedic surgeon. Appellant also asserted that Dr. Obianwu did not properly review his medical history. He submitted a December 1995 report from Dr. Davidson, imposing a permanent restriction against combat situations.

By decision dated September 21, 2005, the Office terminated appellant's wage-loss and medical benefits effective that day on the grounds that the accepted left shoulder strain and internal derangement had ceased without residuals. The Office found that both Dr. Obianwu and Dr. Kilpatrick found no objective signs of the accepted condition and opined that appellant had no work-related disability. The Office also denied appellant's request to change physicians from Dr. Kilpatrick to Dr. Mogerman on the grounds that the request appeared "more for finding a doctor to find [him] disabled than to receive care." The Office noted that appellant "only requested the change after [his] physician released [him] to work and after a second opinion exam[ination] was authorized."

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[1] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate

[1] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[2]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[3] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[4]

ANALYSIS -- ISSUE 1

The Office accepted that, on December 13, 1994, appellant sustained a left shoulder strain with internal derangement, treated by arthroscopic surgery. He received wage-loss compensation on the daily and periodic rolls, as well as appropriate medical benefits. The Office terminated appellant's wage-loss and medical compensation benefits effective September 21, 2005, based on the report of Dr. Obianwu, a Board-certified orthopedic surgeon and second opinion physician. He submitted a July 25, 2005 report, opining that appellant had no objective findings of the accepted left shoulder condition. Dr. Obianwu found a full range of left shoulder motion without instability, weakness or impingement. He opined that the accepted left shoulder condition had resolved completely, there was no objective basis for continuing the restriction against combat situations. While Dr. Obianwu related appellant's occasional complaints of pain, the Board notes that pain is considered a symptom, not a diagnosis and does not constitute a basis for payment of compensation.[5]

In response to Dr. Obianwu's opinion, appellant submitted a December 1995 report from Dr. Davidson, an attending Board-certified orthopedic surgeon, imposing a permanent restriction against appellant's participation in combat situations. However, Dr. Davidson's opinion was rendered nearly 10 years prior to that of Dr. Obianwu. The Board has consistently held that a physician's contemporaneous medical opinion is of greater probative value on appellant's ability to work at a given time than the opinion of another physician who did not examine him during the same interval.[6] As of July 25, 2005, Dr. Obianwu found no objective residuals of the accepted left shoulder condition. He, therefore, opined that Dr. Davidson's restriction against combat, first imposed in November 1995, should be withdrawn.

The Board finds that, as Dr. Obianwu's report is adequately rationalized and based upon a complete and accurate history, his opinion is sufficient to represent the weight of the medical evidence in this case. Therefore, the Board finds that the Office properly terminated appellant's wage-loss and medical compensation benefits effective September 21, 2005, as the weight of the

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[2] *Id.*

[3] *Roger G. Payne*, 55 ECAB ___ (Docket No. 03-1719, issued May 7, 2004); *Furman G. Peake*, 41 ECAB 361 (1990).

[4] *Pamela K. Guesford*, 53 ECAB 726 (2002).

[5] *See Robert Broome*, 55 ECAB ___ (Docket No. 04-93, issued February 23, 2004).

[6] *Michael Stockert*, 39 ECAB 1186 (1988).

competent medical evidence established that the accepted December 13, 1994 left shoulder strain with internal derangement had ceased without residuals.

LEGAL PRECEDENT -- ISSUE 2

Under section 8103(a) of the Federal Employees' Compensation Act,[7] an employee is permitted the initial selection of a physician. However, Congress did not restrict the Office's power to approve appropriate medical care after the initial choice of a physician. The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing the means to achieve this goal within the limitation of allowing an employee the initial choice of a doctor. An employee who wishes to change physicians must submit a written request to the Office fully explaining the reasons for the request. The Office may approve the request in its discretion if sufficient justification is shown.[8] The only limitation on the Office's authority is that of reasonableness.[9] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken, which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[10]

ANALYSIS -- ISSUE 2

In the instant case, appellant initially chose Dr. Davidson, a Board-certified orthopedic surgeon, as his treating physician. After relocating from Arizona to Michigan in November 2001, appellant chose Dr. Kilpatrick, a Board-certified osteopath specializing in family practice. He expressed his dissatisfaction with Dr. Kilpatrick's opinion in three May 2001 letters, alleging that the physician did not obtain x-rays or provide a complete history of injury and treatment. Appellant contended that it was futile for Dr. Kilpatrick to suggest he change his mindset about his level of functioning. Dr. Kilpatrick noted that appellant had telephoned several times, seeking reinstatement of the work restriction against combat situations, a limitation which entitled him to continued monetary compensation.

After issuance of the August 18, 2005 notice of proposed termination, appellant newly asserted that Dr. Kilpatrick's opinion should be "discarded" as he was an osteopath and not an orthopedic surgeon. However, the fact that Dr. Kilpatrick is a Board-certified osteopath does not

[7] 5 U.S.C. § 8103(a).

[8] *See Elizabeth Stanislav*, 49 ECAB 540 (1998); 20 C.F.R. § 10.316(b) (2002).

[9] *Daniel J. Perea*, 42 ECAB 214 (1990).

[10] *Rosa Lee Jones*, 36 ECAB 679 (1985).

establish that his opinion was inadequate.[11] While Dr. Kilpatrick is a family practitioner and not an orthopedic surgeon, this does not establish that his opinion is defective or that he could not render appropriate treatment.[12] Thus, appellant has failed to provide medical evidence that Dr. Kilpatrick's opinion was unprofessional or inadequate. Appellant, therefore, has not demonstrated that the Office's decision to deny the change of physicians was unreasonable. As such, appellant has failed to establish that the Office abused its discretion by refusing to authorize a change of physicians on the basis of inadequate treatment or improper care. Based on the evidence of record, the Office acted reasonably in determining that a change of physicians was not necessary to treat appellant's accepted condition.[13]

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss and medical compensation benefits on the grounds that the accepted left shoulder condition had ceased without residuals. The Board further finds that the Office properly denied appellant's request to change physicians.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 21, 2005 is affirmed.

Issued: July 27, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

[11] The Board notes that the Office has recognized that osteopathic physicians Board-certified by the American Osteopathic Association (AOA) have qualifications equivalent to medical doctors Board-certified by the American Board of Medical Specialties (ABMS). The Office's procedures provide that "all qualified Board-certified specialists, including those certified by the AOA and the ABMS of the American Medical Association" are to be used as impartial medical specialists. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4.b.(1) (issued May 2003). Although Dr. Kilpatrick is not an impartial medical examiner in this case, the principle of recognizing AOA Board-certified osteopaths as the equals of medical doctors certified by the ABMS is instructive.

[12] *Beverly A. Spencer*, 55 ECAB ___ (Docket No. 03-2033, issued May 3, 2004) (the Board found that the opinion of a physician who was not a specialist in the germane medical field was entitled to lesser weight).

[13] *Rosa Lee Jones*, *supra* note 10.