United States Department of Labor
Employees' Compensation Appeals Board

VERTIS A. PRYOR, Appellant	)	
and	)	**Docket No. 05-1181**
	)	**Issued: June 6, 2006**
DEPARTMENT OF DEFENSE, DEFENSE DISTRIBUTION DEPOT, RED RIVER, Texarkana, TX, Employer	)	

Appearances:
Vertis A. Pryor, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 4, 2005 appellant filed a timely appeal of decisions of the Office of Workers' Compensation Programs dated June 8 and December 10, 2004 and February 1, 2005 denying his claim for compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether appellant has established that he was disabled on or after September 15, 1997 causally related to employment injuries of May 20, 1994 or December 12, 1995.

FACTUAL HISTORY

On May 23, 1994 appellant, a 45-year-old material handler filed a traumatic injury claim alleging that he injured his left hip and lower back on May 20, 1994 while unloading a mail truck. The claim was assigned file number 16-0243656. The Office accepted the claim for left

hip and lower back strain. Appellant returned to limited-duty work. On June 21, 1995 the Office issued a loss of wage-earning capacity decision which found that his actual earnings as a material handler fairly and reasonably represented his wage-earning capacity. The Office found that appellant had no lost wages.

On December 12, 1995 appellant sustained injury in file number 16-0274828, accepted by the Office for a lumbar strain. On May 11, 1996 he was placed on the periodic rolls in receipt of compensation for total disability. Based on reports by Dr. Gregory J. Smolarz, an attending Board-certified orthopedic surgeon, and Dr. Norris C. Knight, a Board-certified orthopedic surgeon who examined appellant at the request of the Office, appellant's wage-loss and medical benefits were terminated in a September 15, 1997 decision. In an October 20, 2000 decision, the Board affirmed the termination of appellant's compensation benefits.[1]

On November 1, 2001 appellant filed a claim for a recurrence of disability, contending that he was entitled to medical treatment and wage loss due to his May 20, 1994 employment injury. He also submitted a claim for compensation (Form CA-7) for the period commencing September 15, 1997.[2]

On March 21, 2002 the Office referred appellant to Dr. Samuel Bierner, a Board-certified physiatrist with a subspecialty in pain management, for examination. Dr. Bierner was requested to provide an opinion as to whether appellant had any residuals due to the accepted May 20, 1994 lumbar strain.[3]

In a report dated April 1, 2002, Dr. Bierner reviewed appellant's history of low back injuries, including the accepted strains in 1994 and 1995, and medical treatment by Dr. Smolarz. He noted that appellant was now treated by Dr. Huntly G. Chapman, a Board-certified orthopedic surgeon, for spinal stenosis and degenerative disc disease of the lumbosacral spine. Dr. Bierner addressed appellant's complaint of burning and numbness in the low back region with occasional leg symptoms. He added that appellant was positive for diabetes since 1984 and treated for hypertension. On physical examination, he described appellant as 5'8," 248 pounds and exhibiting negative straight leg raising in the seated and supine positions. Reflexes were equal bilaterally with an absent left ankle jerk and sensation to light touch diminished in the left lateral leg. Dr. Bierner reviewed appellant's x-rays and a lumbar magnetic resonance imaging scan dated July 18, 2001. He stated that diagnostic testing revealed severe disc and facet disease at L5-S1 and disc herniation at L4-5 with right-sided foraminal narrowing. He noted that the findings were "primarily degenerative in nature." Dr. Bierner addressed appellant's lumbar strain condition, stating that it had resolved. He noted that range of motion of the lumbar spine

[1] *See* Docket No. 99-180 (issued October 20, 2002). The facts of the case are set forth in the Board's decision and are incorporated herein by reference.

[2] Appellant noted that he received retirement benefits under the Civil Service Retirement System from the Office of Personnel Management beginning October 1997. The Office doubled the case files together under master file number 16-243656 on January 4, 2001.

[3] The record indicates that the Office referred to Dr. Bierner as an impartial medical specialist. However, no conflict existed at the time of the referral and it did not refer to Dr. Bierner as an impartial medical examiner in its subsequent decisions.

was within normal limits and attributed appellant's ongoing back pain to underlying degenerative disc disease which he characterized as an ordinary disease of life in this particular case. Dr. Bierner noted that appellant was significantly obese and recommended weight loss to reduce or lessen the incidents of reported back pain. He opined that appellant had a three percent impairment of the left lower extremity in the distribution of the sciatic nerve and stated that appellant was unlikely to improve unless there was a significant amount of weight loss.

On May 3, 2002 Dr. Chapman reported, on an examination of appellant, that lumbar spine range of motion was 50 percent, with normal stability and no evidence of dislocation or subluxation. The lower extremities revealed normal reflexes, muscle strength with no wasting or atrophy. Palpation of the lumbar spine revealed tenderness at the lumbosacral junction. He diagnosed back and leg pain.

In a May 31, 2002 report, the Office requested clarification from Dr. Bierner regarding whether appellant continued to have any residuals of his May 20, 1994 employment injury. It requested that he clarify why he found a three percent impairment of appellant's left lower extremity due to the accepted employment injury when he had concluded that there was no current lumbar strain and that the underlying degenerative disc disease was unrelated to the injury. In a July 16, 2002 response, Dr. Bierner stated that he based the impairment rating upon appellant's accepted hip injury. He noted that examination revealed an absence of the left ankle reflex and decreased lateral leg sensation, findings compatible with the S1 nerve root or sciatic nerve. Because he could not assess impairment of the spine, he chose to rate sciatic nerve root impairment. Dr. Bierner stated that "the sciatic nerve passes through the posterior hip area" and addressed the tables of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* he utilized in making the impairment rating.

In an August 16, 2002 decision, the Office denied appellant's claim for compensation benefits on or after September 15, 1997. It found that the medical evidence did not establish that he had residuals of the 1994 lumbar and hip strain. It noted that the medical evidence indicated that his ongoing complaints were due to his underlying degenerative disc disease and spinal stenosis.

Dr. Chapman submitted periodic treatment notes which discussed appellant's complaint of back and leg pain. On August 6, 2002 Dr. Chapman opined that there were no objective findings to support a current lumbar strain and that the "strain itself has probably healed." He noted that lumbar strains were generally self-limiting, usually lasting six weeks' duration. Rather, Dr. Chapman stated that appellant was experiencing residuals of a sciatic nerve injury.

On October 17, 2002 appellant requested reconsideration and submitted additional reports from Dr. Chapman. On January 7, 2003 the physician diagnosed left leg sciatica and back pain and reported that appellant was "[w]orking part time with restrictions."

In a decision dated February 18, 2003, the Office denied modification of the August 16, 2002 decision, finding that the evidence was not sufficient to establish ongoing disability due to the accepted lumbar strain.

In a February 28, 2003 letter to the Office, Dr. Chapman stated:

> "I read with interest your letter to [appellant] of February 18, 2003. Under discussion of the evidence is the opinion of report that my reports do not provide objective evidence of the injury of lumbar strain still exists and is disabling. With respect to the objective evidence of sprain, the only way one would have that is with persistent muscle spasm, which [appellant] has had on and off on visits to this office."

On February 28, 2003 Dr. Chapman diagnosed chronic back pain and noted that appellant had been fired from his part-time job. On April 11, 2003 he reported that appellant was "fit for light duty," and opined that appellant's "back pain is the residual from a sprain back in 1994, which exacerbates and remits."

Appellant requested reconsideration in a letter dated May 24, 2003. In a June 11, 2003 report, Dr. Chapman again discussed appellant's back pain.

By decision dated June 30, 2003, the Office denied modification of the February 18, 2003 decision.

The Office received additional treatment notes from Dr. Chapman, who found appellant totally disabled for work. On July 29, 2003 he diagnosed spondylosis without myelopathy, diabetes, back pain and leg pain. Dr. Chapman noted that he had referred appellant to pain management for treatment of his symptoms.

In a decision dated August 14, 2003, the Office denied modification of June 30, 2003 decision.

Appellant requested reconsideration on August 18, 2003. On August 13, 2003 Dr. Chapman addressed appellant's right leg sciatica and back pain. He concluded that appellant was disabled from his federal job. An October 3, 2003 note repeated that diagnoses of bilateral leg and back pain.

In a decision dated October 23, 2003, the Office denied modification of the August 14, 2003 decision.

On December 5, 2003 appellant again requested reconsideration and submitted additional treatment notes from Dr. Chapman related to appellant's back and leg pain. In a January 14, 2004 report, Dr. Peter B. Polatin, an attending neurologist, diagnosed chronic lumbar syndrome, severe chronic deconditioning syndrome, chronic peripheral neuropathy due presumptively to diabetes and chronic pain syndrome. He described appellant as an extremely debilitated, pain focused, later middle-age male. Inspection of the lumbar spine revealed decreased lordosis with diffuse superficial tenderness. Lumbar flexion was 20 degrees only with no extension and segmental rigidity bilaterally.

In a decision dated February 19, 2004, the Office denied modification of the October 23, 2003 decision, noting that appellant remained entitled to medical care.

On March 22, 2004 appellant requested reconsideration and submitted treatment notes from Dr. Chapman. On March 19, 2004 he reported lumbar range of motion 50 percent normal with no identified contracture or crepitation. He recommended appellant go to pain management with Dr. Polatin. A March 12, 2004 note indicated that appellant's work restrictions were unchanged and related to the March 20, 1994 injury. The treatment notes of Dr. Polatin recommended an interdisciplinary rehabilitation and a disability assessment. He listed conditions including chronic lumbar syndrome, chronic pain syndrome, severe chronic deconditioning syndrome and chronic peripheral neuropathy presumptively due to diabetes. Dr. Polatin found that appellant was totally disabled. On January 26, 2004 Dr. Polatin diagnosed depression, anxiety, stress, pain sensitivity and overuse of narcotic medication. An April 13, 2004 assessment reported a "Lumbar QFE documents high self-report, particularly for pain and disability, with markedly limited lumbar mobility and neuromuscular inhibition" and "severe deconditioning with associated psychosocial barriers."

By decision dated June 8, 2004, the Office denied modification of the February 19, 2004 decision.

Appellant requested reconsideration and submitted additional treatment records from Dr. Polatin. In a June 30, 2004 functional capacity evaluation (FCE), Dr. Chapman reported that appellant was totally disabled due to chronic pain and recommended referral to "an MHMR program to address severe psychosocial and/or psychiatric problems." Additional notes of treatment were also submitted dated through November 16, 2004. On August 23, 2004 Dr. Polatin advised that he was referring appellant back to his managing physician.

On October 4, 2004 the Office received reports dated December 10 and 11, 2003 by Carla B. Pulliam, Ph.D., a clinical psychologist, and a November 17, 2003 report from Dr. Carl E. Noe, a Board-certified anesthesiologist. Dr. Pulliam diagnosed pain disorder due to a general medical condition and psychological factors, spinal stenosis, diabetes and hypertension. She recommended referral to PRIDE for comprehensive treatment. Dr. Noe noted that appellant had been referred based on complaint of pain and diagnosed spinal stenosis. He recommended an interdisciplinary pain evaluation. Dr. Noe stated that appellant "had an on-the-job injury years ago" and reported constant pain of "6 on a visual analog scale of 0 to 10."

In a December 10, 2004 decision, the Office denied modification of the June 8, 2004 decision.

Appellant again requested reconsideration and submitted additional treatment notes from Dr. Pulliam, Dr. Noe and Dr. Chapman, who repeated the diagnosis of bilateral leg and back pain. In a December 17, 2004 note, Dr. Chapman stated:

> "Had he not had the injury, in reasonable probability, he would be at work now. The reason I can say that with a great deal of certainty is that most diabetics work and most diabetics his age have degenerative disc disease. Therefore, despite the fact that this man has ordinary diseases of life as does everyone, not everyone has an on-the-job that left him with chronic pain. The combination of the preexisting condition and the aggravation thereof has made [appellant] what [appellant] is. To say that his problems are ordinary disease of life were not reasonably

probable. The reason they are not reasonably probably is that people of his age with diabetes and with degenerative disc disease, do not have back pain, so these problems are not probable as a sole cause being ordinary disease of life. They are probable in his case as having had an injury. Having had the injury and all of the other things that he has, has rendered him the way he is and therefore it is my opinion that this man has problems that keep him from working and therefore, they are directly related to his on-the-job injury, not related to ordinary diseases of life."

By decision dated February 1, 2005, the Office denied modification of the December 10, 2004 decision.[4]

LEGAL PRECEDENT

An employee who claims a recurrence of disability due to an accepted employment-related injury had the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which he claims compensation is causally related to the accepted injury. This burden of proof requires the claimant to furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports this conclusion with sound medical reasoning.[5]

The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence, which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between appellant's diagnosed condition and the implicated employment factors.[6] The opinion of the physician must be based on a complete factual and medical background of appellant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by appellant.[7]

ANALYSIS

Appellant sustained injury on May 20, 1994 and December 12, 1995, accepted for strains of the left hip and lumbar spine. He received appropriate compensation benefits until

[4] Subsequent to the February 1, 2005 decision, the Office received new evidence. The Board has no jurisdiction to review evidence for the first time on appeal that was not before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c); *Robert D. Clark*, 48 ECAB 422, 428 (1997). The Board notes that a December 31, 2001 report by Dr. Robert E. Deck received on February 1, 2005 had been previously received and considered by the Office.

[5] *See Ronald A. Eldridge*, 53 ECAB 218 (2001).

[6] *Juanita Pitts*, 56 ECAB ___ (Docket No. 04-1527, issued October 28, 2004).

[7] *Bobbie F. Cowart*, 55 ECAB ___ (Docket No. 04-1416, issued September 30, 2004); *Victor J. Woodhams*, 41 ECAB 345 (1989).

September 15, 1997. In an October 20, 2000 decision, the Board found that the Office met its burden of proof to terminate compensation benefits effective September 15, 1997. Therefore, to establish his entitlement to continuing compensation after September 15, 1997, appellant must submit probative medical evidence establishing that his disability is causally related to the May 20, 1994 or December 12, 1995 employment injuries.

Appellant was referred for examination by Dr. Bierner for a determination as to whether he had continuing disability or residuals of his accepted conditions. He provided an accurate history of injury and reviewed the medical records of Dr. Smolarz and Dr. Chapman. Dr. Bierner noted that appellant was receiving treatment for spinal stenosis and degenerative disc disease of the lumbosacral spine. He reported findings on physical examination and noted that diagnostic testing revealed severe disc and facet disease at L5-S1 and an L4-5 disc herniation. Dr. Bierner stated that these findings were degenerative in nature and that appellant's accepted lumbar strains had resolved. He attributed appellant's ongoing back pain to the degenerative disease process and recommended weight loss in order to lessen the incident of back pain. The Board finds that the opinion of Dr. Bierner is based on an accurate factual background of the injuries accepted in this case. Further, he provided findings on examination of appellant and a review of the diagnostic test results. Dr. Bierner found that the accepted lumbar strains had resolved and that appellant's continuing back symptoms were related to the underlying degenerative disc disease of the lumbar spine.

Appellant submitted periodic reports from Dr. Chapman pertaining to his ongoing medical treatment. On August 6, 2002 he noted that there was no current objective evidence of a lumbar strain, noting that strains were usually self-limiting at six weeks' duration. Dr. Chapman indicated that appellant's continuing symptoms were "from the residuals of a sciatic nerve injury or something of that sort." In terms of a prognosis, he indicated that appellant had "persistent pain and the continuing of stresses on your back allowed you to continue in the pain mode that you have been in." On January 7, 2003 Dr. Chapman noted that appellant was working part time with restrictions. On February 23, 2003 he noted no wasting or atrophy of the lower extremity muscles and described the lumbar spine clinical stability as normal. Dr. Chapman indicated that appellant complained of back pain and noted that he had been working part-time security but was recently fired. On April 11, 2003 he opined that appellant's back pain was a residual from a sprain in 1994 "that exacerbates and remits." Subsequent reports advised that appellant was totally disabled due to spondylosis with symptoms of back and bilateral leg pain. Dr. Chapman referred appellant for pain management. On June 30, 2004 he noted that appellant was disabled due to chronic pain and recommended referral for unspecified psychosocial problems.

The Board notes that Dr. Chapman generally agreed that appellant's accepted lumbar strains had resolved, noting that such conditions were generally self-limiting of six weeks duration. His reports supporting continuing disability are not well rationalized and do not provide an adequate history of appellant's activities. Dr. Chapman attributed appellant's symptoms to residuals of a "sciatic nerve injury or something of that sort." This diagnosis is speculative at best and he did not provide a discussion of appellant's diagnosed spinal stenosis with disc and facet disease. Dr. Chapman also attributed appellant's persistent pain to continuing stresses on his back. In this regard, appellant indicated that he retired on disability in October 1997; however, the reports of Dr. Chapman indicate that appellant obtained employment working part-time security until he was fired. There is no discussion of the work activities in

which appellant became engaged. This renders his opinion relating appellant's back pain to residuals of the 1994 back strain of diminished probative value.

The reports of Dr. Polatin are also insufficient to support appellant's entitlement to continuing compensation. Dr. Polatin noted the history of appellant's employment injury and diagnosed chronic lumbar syndrome, chronic pain syndrome, severe chronic deconditioning syndrome and chronic peripheral neuropathy presumptively due to diabetes. He opined that appellant was temporarily totally disabled, but offered no opinion regarding the cause of the diagnosed conditions or disability. The Board has held that medical evidence that does not address the cause of a claimant's disability is of diminished probative value.[8] Dr. Polatin's reports are insufficient to establish any continuing disability due to the accepted employment injuries.

CONCLUSION

The Board finds that appellant has not established that he sustained disability on or after September 15, 1997 due to residuals of his accepted employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the decisions the Office of Workers' Compensation Programs dated February 1, 2005 and December 10 and June 8, 2004 be affirmed.

Issued: June 6, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[8] *Ellen L. Noble*, 55 ECAB ___ (Docket No. 03-1157, issued May 7, 2004).