United States Department of Labor
Employees' Compensation Appeals Board

CARLOS FLORES, Appellant	)	
and	)	**Docket No. 06-109**
	)	**Issued: May 5, 2006**
DEPARTMENT OF THE ARMY, ARMY COMMISSARY, Fort Bliss, TX, Employer	)	

Appearances:
Carlos Flores, 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 October 18, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' decision dated October 3, 2005 which terminated his compensation effective that day. 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 on appeal is whether the Office properly terminated appellant's compensation and medical benefits effective October 3, 2005.

FACTUAL HISTORY

This case has previously been on appeal before the Board. In a May 27, 1994 decision, the Board found that the Office properly terminated its authorization of physical therapy for appellant effective September 4, 1992. The facts and history contained in the prior appeal are incorporated by reference.[1]

[1] Docket No. 93-666 (issued May 27, 1994).

The Office continued to develop appellant's claim, which was accepted for lumbar sprain and cervical sprain.[2] The record reflects that he stopped work on July 13, 1988 and was placed on the periodic rolls.

Appellant's treating physician, Dr. Jose Luna, Jr., Board-certified in family medicine, advised that appellant had "chronic intractable muscle spasms and degenerative joint disease of his neck and back." He opined that appellant was "100 percent totally and permanently disabled."

On January 5, 2005 the Office referred appellant for a second opinion, together with a statement of accepted facts, a set of questions and the medical record, to Dr. Randy Pollet, a Board-certified orthopedic surgeon. In a report dated February 11, 2005, he noted appellant's history of injury and treatment and conducted a physical examination. Dr. Pollet opined that there were no objective findings and that appellant's sprains/strains had resolved. He noted that appellant's current symptoms were related to aging and advised that he "should be encouraged to return to full duty without restrictions."

By letter dated March 7, 2005, the Office provided Dr. Luna with a copy of Dr. Pollet's February 11, 2005 report and requested an opinion with as to whether he believed appellant's current disability was related to the accepted November 5, 1987 injury.

On April 11, 2005 the Office issued a notice of proposed termination of compensation, stating that the weight of the medical evidence, as represented by the report of Dr. Pollet, established that the residuals of the work injury of November 5, 1987 had ceased. The Office allotted appellant 30 days to submit additional relevant evidence or argument.

The Office subsequently received a statement dated April 19, 2005 from appellant. He described Dr. Pollet's examination as discriminatory and humiliating. Appellant also alleged that he was verbally harassed by Dr. Pollet and that the physician did not review the medical reports that he brought to the examination.

In an April 20 2005 response, Dr. Luna explained that he had been treating appellant for 23 years and that, in May 2000, he was given a total disability rating.[3] Dr. Luna advised that he disagreed with Dr. Pollet's conclusions that appellant no longer had residuals from his work-related injuries.

In a May 3, 2005 statement, appellant indicated that he disagreed with Dr. Pollet's report and explained that he was removed from his position as a meat cutter because of his medical condition on September 16, 1992.

[2] Appellant had nonwork-related injuries including: broken arteries, left carpal tunnel syndrome, degenerative disc disease, cervical and lumbar, and depression.

[3] Dr. Luna referred to the May 22, 2000 report of Dr. Anthony Ghiselli, a Board-certified orthopedic surgeon. The report found that appellant was partially disabled based his complaints of pain.

The Office found a conflict of medical opinion between Dr. Luna and Dr. Pollet. On May 11, 2005 the Office referred appellant, together with a statement of accepted facts, and the medical record, to Dr. David R. Willhoite, a Board-certified orthopedic surgeon, for an impartial medical evaluation. He was asked to determine whether appellant's continuing medical disability was a result of his work-related injury.

In a May 23, 2005 report, Dr. Willhoite noted appellant's history of injury and treatment. He examined the cervical spine and noted moderate tenderness to palpation along the medial border of the left scapula to the left of the posterior cervical spine. He noted moderate restriction of motion of the cervical spine and deep tendon reflexes in the upper extremities and motor or sensory deficits in the upper extremities. Dr. Willhoite also noted that appellant had moderate tenderness to palpation in the lumbar region over L5-S1 and limited flexion of 35 degrees, extension of 5 degrees, right and left lateral bending to 10 degrees. He determined that straight leg raising was negative in the sitting position. However, in the supine position on the right, raising the leg 50 degrees produced pain in the low back and on the left, 15 degrees produced pain in the calf of the left leg and low back. Dr. Willhoite explained that there were no apparent motor or sensory deficits in the lower extremities. In response to the Office's question regarding whether appellant had any current objective findings of residuals related to the November 5, 1987 injury, Dr. Willhoite opined that there were objective findings of limitation of motion of the cervical spine and tenderness in the cervical area and the medial border of the left scapula. He also indicated that there was tenderness and limitation of motion in the lumbar spine and positive straight leg raising in the supine position, which was negative in the sitting position. Dr. Willhoite opined that appellant had a cervical and lumbar strain which was superimposed upon preexisting degenerative disc disease in the cervical and lumbar spine. He determined that "it is likely that the preexisting conditions of degenerative disc disease were worsened by the injury but not caused by the injury itself." Dr. Willhoite opined that "the cervical and lumbosacral sprain resolved a long time ago." Appellant's problems with degenerative disc disease of the cervical and lumbar spine slowly increased as he got older and his condition was a result of aging and not of any injury. Dr. Willhoite added that appellant had a "fairly significant functional overlay regarding this problem, which is the major reason why he has not been able to return to work." He noted that appellant was scheduled for a functional capacity evaluation (FCE) and that he would complete the appropriate forms, regarding his ability to work, once he received the results.

By letter dated June 22, 2005, the Office requested clarification from Dr. Willhoite regarding the aggravation of appellant's preexisting conditions.

In an August 17, 2005 report, Dr. Luna noted that degenerative disease was a normal aging process. He referred to previous findings and opined that he disagreed that appellant's work-related injuries had ceased as of February 24, 2005.

In a September 8, 2005 work capacity evaluation, Dr. Willhoite reviewed the August 11, 2005 FCE and indicated that appellant could work eight hours a day with physical restrictions. In a September 16, 2005 addendum, he advised that appellant's "medical problem with degenerative disc disease are due to the normal aging process and has nothing to do with the one-time work injury in 1987." Dr. Willhoite explained that appellant already had degenerative disc

disease in 1987 when the injury occurred, and that the injury most likely resolved within a few months. Dr. Willhoite explained that as appellant "aged, his degenerative disc disease worsened as well. However, again this would have nothing to do with the work injury in 1987."

By decision dated October 3, 2005, the Office terminated appellant's compensation benefits effective that day on the grounds that the 1987 work-related injuries had ceased. The Office found that the opinion of Dr. Willhoite, the impartial medical examiner, was of special weight.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[4] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[5]

The Federal Employees' Compensation Act[6] provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[7] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

ANALYSIS

The Office determined that a conflict of medical opinion existed regarding the nature and extent of any ongoing residuals of the work injury of November 5, 1987. This was based on the opinions of Dr. Luna, appellant's physician, who supported ongoing employment-related condition and disability, and Dr. Pollet, an Office referral physician, who opined that the employment-related condition had resolved. The Office properly referred appellant to Dr. Willhoite, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In a May 23, 2005 report, Dr. Willhoite noted appellant's history of injury and treatment and conducted an examination. He opined that there were objective findings of limitation of motion of the cervical spine and tenderness in the cervical area and the medial border of the left scapula. Dr. Willhoite also indicated that there was tenderness and limitation of motion in the

[4] *Curtis Hall*, 45 ECAB 316 (1994).

[5] *Jason C. Armstrong*, 40 ECAB 907 (1989)

[6] 5 U.S.C. §§ 8101-8193, 8123(a).

[7] 5 U.S.C. § 8123(a); *Shirley Steib*, 46 ECAB 309, 317 (1994).

[8] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

lumbar spine and positive straight leg raising in the supine position which was negative in the sitting position. He opined that appellant had a cervical and lumbar strain which was superimposed upon preexisting degenerative disc disease in the cervical and lumbar spine. Dr. Willhoite determined that "it is likely that the preexisting conditions of degenerative disc disease were worsened by the injury but not caused by the injury itself." He opined that "the cervical and lumbosacral sprain resolved a long time ago. Dr. Willhoite indicated that appellant's problems with degenerative disc disease of the cervical and lumbar spine had increased with appellant's age and explained "this is a result of aging and not of any injury." He also added that he had a "fairly significant functional overlay regarding this problem, which is the major reason why he has not been able to return to work." After reviewing the August 11, 2005 FCE, Dr. Willhoite advised that appellant could work eight hours a day with restrictions.

When the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.[9] As the Office needed further clarification regarding whether the employment-related condition had resolved, it properly requested clarification from Dr. Willhoite.

In a supplemental report dated September 16, 2005, Dr. Willhoite opined that appellant's accepted injury would have resolved in a few months and indicated that the current pain and disability were due to his preexisting degenerative conditions. He noted that appellant's "medical problem with degenerative disc disease are due to the normal aging process and has nothing to do with the one-time work injury in 1987." Dr. Willhoite found that appellant already had degenerative disc disease in 1987 when this injury occurred. He opined that the injury resolved within a few months and explained that appellant's degenerative disc disease worsened with age and was unrelated to the employment-related injury.

The Board finds that Dr. Willhoite's opinion is entitled to special weight as his reports are sufficiently well rationalized and based upon a proper factual background. The Office properly relied upon his reports in finding that appellant's employment-related condition had resolved. Dr. Willhoite examined appellant, reviewed his medical records and reported accurate medical and employment histories. In his supplemental report, the physician emphasized that the employment injury had resolved and that the only factors precluding any return to work were his preexisting conditions. Accordingly, the Office met its burden of proof to justify termination of benefits.

Appellant submitted an August 17, 2005 report in which Dr. Luna noted his disagreement that appellant's condition had resolved. However, this report is insufficient to overcome the weight of Dr. Willhoite's or to create a new conflict in the medical evidence. Dr. Luna was on one side of the conflict resolved by Dr. Willhoite and did not otherwise present new findings or rationale to support his opinion.[10]

[9] *Roger W. Griffith*, 51 ECAB 491 (2000).

[10] *See Jaja K. Asaramo*, 55 ECAB ___ (Docket No. 03-1327, issued January 5, 2004). Submitting a report from a

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective October 3, 2005.

ORDER

IT IS HEREBY ORDERED THAT the October 3, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 5, 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

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physician who was on one side of a medical conflict that an impartial specialist resolved is, generally, insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.