United States Department of Labor
Employees' Compensation Appeals Board

R.M., Appellant	)	
	)	
and	)	**Docket No. 07-1274**
	)	**Issued: October 16, 2007**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Seattle, WA, Employer	)	

Appearances:
Ranier Brown, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 9, 2007 appellant, through his representative, filed a timely appeal from a February 8, 2007 merit decision terminating his compensation and a March 15, 2007 nonmerit decision denying his request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the March 15, 2007 nonmerit decision.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's authorization for medical benefits effective February 8, 2007 on the grounds that he had no further residuals of his August 19, 2005 employment injury; and (2) whether it properly denied his request for merit review under 5 U.S.C. § 8128.

FACTUAL HISTORY

On August 19, 2005 appellant, then a 34-year-old mail handler, filed a claim alleging that he sustained low back pain on that date after lifting sacks of mail. The Office accepted his claim

for lumbar strain. Appellant stopped work on August 20, 2005 and returned to work with restrictions on August 21, 2005.

In a duty status report dated June 27, 2006, Dr. Abid Haq, a Board-certified internist, listed permanent work restrictions. On June 28, 2006 he opined that appellant had a permanent impairment of the back. On April 21, 2006 the Office referred appellant to Dr. Joan Sullivan, a Board-certified orthopedic surgeon, for a second opinion evaluation. On May 19, 2006 Dr. Sullivan diagnosed lumbar strain due to appellant's employment injury. She stated, "[Appellant] has no focal neurologic findings and he should be cleared to return to his regular duty without restrictions." In a supplemental report dated August 29, 2006, Dr. Sullivan asserted that appellant required no additional medical treatment.

On August 29, 2006 Dr. R. Anton Posch, Board-certified in family practice, diagnosed lumbar sprain and strain. He opined that appellant should continue working "with long-term restrictions" and should return in one month for follow-up care. Dr. Posch disagreed with Dr. Sullivan's conclusions and referred to Dr. Haq's June 27, 2006 report finding permanent work restrictions.

The Office determined that a conflict existed between Dr. Sullivan, the Office referral physician, and Dr. Posch and Dr. Haq, appellant's attending physicians, on the issue of whether he could resume his regular employment and whether his condition had resolved. The Office referred him to Dr. Donald D. Hubbard, a Board-certified orthopedic surgeon, for an impartial medical examination. On November 24, 2006 Dr. Hubbard reviewed the evidence of record and performed a physical examination. He noted that a computerized tomography (CT) scan dated December 23, 2005 revealed no pelvic or sacroiliac joint abnormality. A magnetic resonance imaging (MRI) scan dated May 14, 2006 showed "early severe disc desiccation with features consistent with degenerative disc changes." On examination, Dr. Hubbard listed findings of normal sensation, reflexes and motor strength. He found tenderness to palpation over the left more than right sacroiliac joints. Dr. Hubbard diagnosed lumbosacral strain/sprain by history and "[p]ossibly subjective aggravation without objective verification of radiographic evidence of preexisting asymptomatic age-related L3-4, L5-S1 and L4-5 disc degeneration." He further diagnosed low back pain by history secondary to left more than right sacroiliac joint pain. Dr. Hubbard attributed the low back pain to either preexisting but undiagnosed inflammatory arthritis or "[p]ossible [b]ilateral sacroiliac joint sprains related to the August 19, 2005 work injury." He found that appellant had no objective evidence of the lumbosacral strain but had objective evidence of inflammatory arthritis by HLA-B27 blood test and evidence of the arthritis and bilateral sacroiliac joint sprains by the history of his responses to left sacroiliac joint injections. Dr. Hubbard stated, "The work injury of August 19, 2005 caused the accepted diagnosis of lumbosacral strain/sprain; and possibly unrecognized bilateral sacroiliac joint sprain." He opined that the lumbosacral strain and possible bilateral sacroiliac joint sprains "may have in part, been injury-related conditions reflecting the symptomatic onset of an underlying nonspecified anti-inflammatory arthrosis condition of the lumbosacral spine and sacroiliac joints. In other words, [appellant's] lower back region of the spine and sacroiliac joints may have been more susceptible to injury on August 19, 2005 due to the underlying inflammatory arthrosis condition." Dr. Hubbard asserted, "Objective findings of lumbosacral strain/sprain and bilateral sacroiliac joints sprains has resolved. Low back area pain and left greater than right sacroiliac joint pain persists." Dr. Hubbard found that the accepted condition

of lumbosacral strain would not prevent appellant from performing his usual employment. He opined that appellant was unable to perform his regular employment duties because of his nonemployment-related bilateral sacroiliitis. Dr. Hubbard additionally asserted that appellant required continuing medical treatment for the nonemployment-related left greater than right sacroiliitis. He reiterated that he had no objective evidence of his August 19, 2005 employment injury.

On December 28, 2006 the Office notified appellant that it proposed to terminate his compensation and authorization for medical benefits on the grounds that he had no further employment-related condition or disability. On January 17, 2007 appellant authorized a representative on his behalf before the Office. He submitted a January 24, 2007 statement from a workers' compensation case manager and reports from a physician's assistant. In a progress report dated January 24, 2007, Dr. Posch indicated that he found Dr. Hubbard's conclusions confusing and opined that the case "should have been closed with permanent restrictions." By decision dated February 8, 2007, the Office terminated appellant's compensation and medical benefits effective that date.

Appellant, through his representative, requested reconsideration on February 15, 2007. He argued that he was not provided the opportunity to participate in the selection of the impartial medical examiner. In a report dated February 2, 2007, Dr. Posch disagreed with Dr. Hubbard's conclusion that appellant's symptoms were caused by nonemployment-related sacroiliitis. He asserted that a small percentage of individuals had positive HLA-B27 blood test results without an inflammatory condition and noted that a rheumatologist concluded that appellant did not have sacroiliitis. Dr. Posch agreed with Dr. Haq that appellant had permanent employment-related work restrictions. Appellant also submitted reports from a physician's assistant dated February 26, 2007 and massage therapy notes.

By decision dated March 15, 2007, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant reopening the case for merit review.

LEGAL PRECEDENT -- ISSUE 1

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[1] 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.[2]

Section 8123(a) provides that, 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.[3] The implementing regulation states that, if a

[1] *Pamela K. Guesford*, 53 ECAB 727 (2002).

[2] *Id*.

[3] 5 U.S.C. § 8123(a).

conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[4] 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.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained lumbar strain due to an August 19, 2005 employment injury. Appellant stopped work on August 20, 2005 and returned to full-time limited-duty employment on August 21, 2005.

Dr. Sullivan, an Office referral physician, found that appellant had no neurological findings and could resume his usual employment without restrictions. She further opined that he required no further medical treatment. Dr. Posch, an attending physician, disagreed with Dr. Sullivan's findings. He diagnosed lumbar strain and opined that appellant required permanent work restrictions due to his employment injury.

The Office determined that a conflict existed on the issue of whether appellant had any further condition or disability due to his accepted employment injury. It referred him to Dr. Hubbard for an impartial medical examination. Based on the opinion of Dr. Hubbard, the Office terminated appellant's authorization for medical benefits effective February 8, 2007.[6]

When there exists a conflict in medical opinion 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.[7] The Board finds that the opinion of Dr. Hubbard, a Board-certified orthopedic surgeon, selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Hubbard accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.[8] He interpreted a December 23, 2005 CT scan as showing no pelvic or sacroiliac joint abnormality and a March 14, 2005 MRI scan as revealing degenerative changes and early severe disc desiccation. On examination, Dr. Hubbard found normal strength

[4] 20 C.F.R. § 10.321.

[5] *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

[6] The Office, in its February 8, 2007 decision, indicated that it was terminating appellant's compensation and entitlement to medical treatment. As the Office was not paying him compensation, however, it improperly characterized the issue as termination of wage-loss compensation. The issue is whether appellant has residuals of his employment injury entitling him to further medical treatment.

[7] *Id*.

[8] *Manual Gill*, 52 ECAB 282 (2001).

and sensation and tenderness over the sacroiliac joints bilaterally. He diagnosed lumbosacral strain by history and a possible subjective aggravation of preexisting disc degeneration. Dr. Hubbard also diagnosed low back pain by history due to either inflammatory arthritis or a possible employment-related sprain of the bilateral sacroiliac joints. He found that appellant had evidence of inflammatory arthritis by HLA-B27 blood test and that his nonemployment-related sacroilitis would prevent him from performing his regular employment duties. Dr. Hubbard stated, "Objective findings of lumbosacral strain/sprain and bilateral sacroiliac joint sprains have resolved." In response to the question of whether appellant had any residuals of his employment injury, he again advised that he saw no evidence of the accepted employment injury. Dr. Hubbard recommended further medical treatment of appellant's nonemployment-related condition of left greater than right sacroiliitis. As Dr. Hubbard's report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner and is sufficient to meet the Office's burden of proof to terminate appellant's entitlement to medical treatment due to his accepted employment injury.[9]

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[10] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[11] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[12] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[13]

The Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.[14] The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[15] While the reopening of a case may be predicated

[9] *Id*.

[10] 5 U.S.C. §§ 8101-8193. Section 8128(a) of the Act provides that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application."

[11] 20 C.F.R. § 10.606(b)(2).

[12] 20 C.F.R. § 10.607(a).

[13] 20 C.F.R. § 10.608(b).

[14] *Arlesa Gibbs*, 53 ECAB 204 (2001); *James E. Norris*, 52 ECAB 93 (2000).

[15] *Ronald A. Eldridge*, 53 ECAB 218 (2001); *Alan G. Williams*, 52 ECAB 180 (2000).

solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.[16]

ANALYSIS -- ISSUE 2

The Office terminated appellant's authorization for medical treatment based on the opinion of Dr. Hubbard, the impartial medical examiner. With his request for reconsideration, appellant contended that he was not allowed to participate in Dr. Hubbard's selection. He, however, has not raised any specific argument showing how he was prejudiced by not participating in the selection of the impartial medical examiner. Thus, appellant's contention does not have a reasonable color of validity such that it would warrant reopening his case for merit review.[17]

Appellant submitted a progress report dated February 2, 2007 from Dr. Posch who disagreed with Dr. Hubbard's conclusions that sacroiliitis caused appellant's symptoms. Dr. Posch opined that appellant had permanent work restrictions due to his August 19, 2005 employment injury. His report, however, is substantially similar to his prior reports finding that appellant had a continuing employment-related condition and disability and thus, does not constitute relevant new evidence.[18]

Appellant also submitted February 26, 2007 reports from a physician's assistant. The reports of a physician's assistant are entitled to no weight as a physician's assistant is not a "physician" as defined by section 8102(2) of the Act.[19]

Appellant did not show that the Office erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by the Office or submit pertinent new and relevant evidence not previously considered. He did not meet any of the necessary regulatory requirements and, therefore, he is not entitled to further merit review.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's authorization for medical benefits effective February 8, 2007 on the grounds that he had no further residuals of his August 19, 2005 employment injury. The Board further finds that the Office properly denied his request for merit review under 5 U.S.C. § 8128.

[16] *Vincent Holmes*, 53 ECAB 468 (2002); *Robert P. Mitchell*, 52 ECAB 116 (2000).

[17] *Elaine M. Borghini*, 57 ECAB ___ (Docket No. 05-1102, issued May 3, 2006).

[18] *See Severiano Marquez*, 41ECAB 637 (1990).

[19] *See* 5 U.S.C. § 8101(2); *Allen C. Hundley*, 53 ECAB 551 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 15 and February 8, 2007 are affirmed.

Issued: October 16, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board