United States Department of Labor
Employees' Compensation Appeals Board

R.P., Appellant	)	
and	)	**Docket No. 08-454**
	)	**Issued: December 11, 2008**
U.S. POSTAL SERVICE, POST OFFICE, St. Louis, MO, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 5, 2007 appellant filed a timely appeal from an October 31, 2007 decision of the Office of Workers' Compensation Programs terminating his compensation and medical benefits and denying his low back claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained an injury to his low back causally related to the accepted December 8, 2006 injury; and (2) whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective October 31, 2007.

FACTUAL HISTORY

While delivering mail on December 8, 2006, appellant, then a 71-year-old city mail carrier, sustained injuries to his upper extremities when a vehicle backed into him as he was walking past a driveway. He was hospitalized and placed on a ventilator. Appellant's claim was

accepted for closed fracture of the ribs and consequential respiratory failure, left scapular fracture, left shoulder contusion and left elbow contusion.

In a report dated December 8, 2006, Dr. Timothy J. Pratt, a Board-certified internist, stated that appellant had been taken to the St. Joseph's Hospital emergency department with severe left chest and shoulder pain, after being struck by a vehicle on that date. On December 13, 2006 he indicated that appellant's injuries were located in the chest, left shoulder, left elbow and left hip and noted that appellant denied any back pain. The record contains a January 23, 2007 discharge summary from Dr. Jennifer Page, a Board-certified physiatrist, who described the history of injury as a left scapula fracture and multiple rib fractures.

Appellant was treated by Dr. Richard C. Lehman, a Board-certified orthopedic surgeon. On April 10, 2007 Dr. Lehman noted the history of appellant's injury, which involved fractured ribs. He stated that appellant's main problem was pain in his left shoulder, but that he also experienced pain in his left leg, which appeared to be radiating into his back. Dr. Lehman diagnosed spinal stenosis or acute trauma to appellant's low back. He opined that appellant's back condition might be causally related to the work injury because he had never had any back problems prior to the injury.

On May 15, 2007 Dr. Lehman described the results of a magnetic resonance imaging (MRI) scan of the lumbar spine, which showed bulging of the annulus fibrosis at L2-3, L4-5 and L5-S1; hypertrophic changes of the posterior facet joints throughout the lumbar spine; a definite focal disc protrusion; and significant degenerative arthritis of the low back. An MRI scan of the shoulder revealed degenerative hypertrophic changes of the acromioclavicular (AC) joint, with mild impingement tendinitis; a possible tear in the distal end of the supraspinatus; and cystic degeneration in the anterior and posterior aspects of the glenoid. Dr. Lehman's examination reflected good range of motion in the lower back. Although appellant had no back pain, he did have pain in the lateral aspect of his leg, with radiculopathy. He also had pain and limited range of motion in the left shoulder.

In a May 27, 2007 report, a district medical adviser opined that Dr. Lehman's report was insufficient to establish that appellant's back condition was causally related to the accepted December 8, 2006 injury. He stated that the May 4, 2007 MRI scan of the lumbar spine did not show bulging of the annulus fibrosis at L2-3, L4-5, and L5-S1, and that the MRI scan findings were not uncommon in a man of appellant's age. The district medical adviser noted that Dr. Lehman did not provide examination findings regarding the lumbar spine or lower extremities or explain how the back condition could have resulted from the accepted injury. He noted that appellant's leg pain did not begin until three months after the accepted injury and might be due to lower extremity arterial disease.

On June 5, 2007 appellant was referred to Dr. Jack C. Tippett, a Board-certified orthopedic surgeon, for a second opinion examination. Dr. Tippett was asked to provide an opinion as to whether appellant still had residuals from his accepted conditions, and whether he had a lumbar condition that was causally related to the December 8, 2006 injury.

In a report of a June 27, 2007 examination, Dr. Tippett opined that appellant's accepted conditions had resolved. Examination revealed remarkably good range of motion in the left shoulder, with minimal tenderness, and normal range of motion in the wrists, hands and elbows. Both hips had normal range of motion and good stability. Examination of chest expansion showed 100 centimeters after exhaling and 103 cm on full inhalation, indicating that he had no difficulty breathing. A neurological examination showed no significant sensory changes in the lower extremities. Dr. Tippett diagnosed healed fracture of the left scapula, with very good motion in the left shoulder, and healed left rib fracture, asymptomatic.

Dr. Tippett also opined that appellant did not have a lumbar condition causally related to the December 8, 2006 injury. Examination of the back revealed no tenderness to external palpation, and the paravertebral musculature remained tense in the lumbar region. Appellant walked with a limp on the right side and was able to reach only half way between his knees and ankles when asked to bend forward at the waist, with straight knees. Dr. Tippett diagnosed chronic degenerative disc disease of the lumbar spine. However, noting that appellant's lower extremity pain did not begin until he started working out on a treadmill in March 2007, he agreed with the Office medical adviser's assessment that appellant's back condition was not causally related to his accepted injury. Dr. Tippett opined that appellant was unable to return to work due to pain in his right lower extremity, which was unrelated to his accepted conditions. The record contains a report of a June 27, 2007 MRI scan of the lumbar spine, which revealed multilevel degenerative disc disease and mild osteoarthritis of the right hip.

The Office found a conflict in medical opinion between Dr. Lehman and Dr. Tippett as to whether appellant's accepted conditions had resolved, and whether he had a lumbar condition causally related to the December 8, 2006 injury. It referred appellant, together with a statement of accepted facts and the entire medical record, to Dr. Marvin Mishkin, a Board-certified orthopedic surgeon, in order to resolve the conflict.

In a September 17, 2007 report, Dr. Mishkin indicated that he had reviewed the entire medical record and statement of accepted facts. After providing a history of injury and findings on examination, he opined that appellant had made a complete recovery from his accepted injuries and that his lumbar condition was not causally related to the December 8, 2006 accident. Examination of the neck revealed functional range of motion. Appellant was able to flex forward, extend to 45 degrees, and rotate right and left to 45 degrees, with no pain. The upper extremities were grossly symmetrical, with no evidence of motion weakness. Appellant could abduct the shoulders to 175 degrees, flex forward to 180 degrees, and rotate internally and externally to 90 degrees without pain. He had full range of motion of his elbows, wrists and hands. Palpation of the shoulders anteriorly, posteriorly and laterally, and over the right and left scapula elicited no pain. Appellant felt no pain with firm palpation in the lumbar region. He was able to bend forward while standing, and touch his knees with his fingertips without pain or spasm. Appellant could sit upright from a supine position, flexing his back and hips beyond 90 degrees with his knees extended, without pain or spasm. Examination of the lower extremities revealed some tightness on rotation of the hips. Sensation was intact to pinprick, and there was no evidence of weakness or pain.

Dr. Mishkin opined that appellant's accepted rib fractures and related respiratory distress, left shoulder trauma, left elbow contusion and left scapula injuries had resolved. Noting excellent functional range of motion, he stated that no further treatment was indicated with regard to appellant's accepted conditions. Dr. Mishkin diagnosed degenerative disc disease, osteoarthritis, facet degenerative changes and spinal stenosis. He opined, within a reasonable degree of medical certainty that these conditions were not caused by the December 8, 2006 injury. Noting that these lumbar conditions were preexisting and long-standing, Dr. Mishkin stated that there was no objective clinical evidence of a neurological deficit related to radiculopathy, such as sensory motor changes. In an accompanying work capacity evaluation, he indicated that appellant was not able to perform the functions of his usual job.

In an August 14, 2007 report of a left shoulder examination, Dr. Pratt stated that appellant's range of motion was "quite good," although he still had some weakness. On September 13, 2007 Dr. Lehman stated that the range of motion in appellant's left shoulder was outstanding, and that in six weeks he would be able to work without restrictions.

On September 27, 2007 the Office issued a notice of proposed termination of appellant's compensation and medical benefits, based on Dr. Mishkin's September 17, 2007 report. It found that the medical evidence established that appellant's accepted conditions had resolved, and that his back condition was not causally related to the December 8, 2006 injury. The Office provided 30 days for appellant to respond.

Appellant submitted hospital notes dated February 23, 2007; treatment notes from Dr. Pratt dated April 18, July 17 and August 28, 2007, addressing appellant's complaints of hip aches, low back pain and shoulder problems; and notes from Dr. Lehman dated August 14 to October 6, 2007, related to left shoulder complaints. In an October 6, 2007 response to the notice of proposed termination, appellant contended that his preexisting degenerative disc disease was exacerbated by the December 8, 2006 injury. He stated that he did not complain of back pain until three months after the accepted injury because he was bedridden, and did not realize that his back had been injured.

By decision dated October 31, 2007, the Office found that the special weight of Dr. Mishkin's report established that appellant had no residuals from the accepted conditions, and no consequential injuries to his back related to the accepted conditions or the December 8, 2006 injury. It terminated appellant's medical and wage-loss compensation benefits effective that day. The Office also denied the expansion of his claim to include a back condition.

LEGAL PRECEDENT -- ISSUE 1

Regarding consequential injuries, the basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[1]

[1] *S.M.*, 58 ECAB ___ (Docket No. 06-536, issued November 24, 2006) *citing* A. Larson, *The Law of Workers' Compensation* § 10.01 (2004).

Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury.[2] To establish a causal relationship between the condition claimed, as well as any attendant disability, and the employment event or incident, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a causal relationship.[3] Causal relationship is a medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[4] Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, 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 the claimant.[5] Neither the fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents, is sufficient to establish causal relationship.[6]

The Act provides that, if there is a disagreement between a physician making an examination for the United States and the physician of the employee, the Secretary must appoint a third physician to make an examination.[7] Likewise, the implementing regulation states that, if 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 or consultant, the Office must appoint a third physician to make an examination. This is called a referee examination, and the Office is required to select a physician who is qualified in the appropriate specialty, and who has had no prior connection with the case.[8] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on proper factual and medical background, must be given special weight.[9]

[2] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[3] *Jennifer Atkerson*, 55 ECAB 317 (2004).

[4] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[5] *Leslie C. Moore*, 52 ECAB 132 (2000).

[6] *Ernest St. Pierre*, 51 ECAB 623 (2000).

[7] 5 U.S.C. §§ 8101-8193, 8123(a).

[8] 20 C.F.R. § 10.321.

[9] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

ANALYSIS -- ISSUE 1

The Office denied appellant's claim for a low back condition. The issue is whether he has met the burden of proof to establish that his diagnosed back conditions are causally related to his accepted injury. The Board finds that appellant has not met his burden of proof.

The Office properly determined that a conflict existed in the medical opinion evidence as to whether appellant had a lumbar condition causally related to the December 8, 2006 injury. On the one hand, appellant's treating physician, Dr. Lehman, diagnosed spinal stenosis and opined that the back condition was causally related to the accepted injury. On the other hand, the Office's second opinion physician, Dr. Tippett, opined that appellant did not have a lumbar condition causally related to the December 8, 2006 injury. He diagnosed chronic degenerative disc disease of the lumbar spine. However, noting that appellant's lower extremity pain did not begin until he started working out on a treadmill in March 2007, he agreed with the Office medical adviser's assessment that appellant's back condition was not causally related to his accepted injury.

To resolve the conflict in medical opinion between Drs. Lehman and Tippett, the Office properly referred appellant to Dr. Mishkin for an impartial medical examination and an opinion as to whether appellant had a lumbar condition causally related to the December 8, 2006 injury. Dr. Mishkin reviewed the entire record and statement of accepted facts, performed a thorough examination of appellant, and provided detailed findings of his examination in his September 17, 2007 report. He diagnosed degenerative disc disease, osteoarthritis, facet degenerative changes and spinal stenosis. Dr. Mishkin opined, within a reasonable degree of medical certainty, that these conditions were not caused by the December 8, 2006 injury. Noting that these lumbar conditions were preexisting and long-standing, he stated that there was no objective clinical evidence of a neurological deficit related to radiculopathy, such as sensory motor changes.

The Board finds that the Office properly relied on Dr. Mishkin's September 17, 2007 report in determining that appellant did not have a lumbar condition causally related to the accepted employment injury. Dr. Mishkin's opinion is sufficiently well rationalized and based upon a proper factual background. He examined appellant thoroughly and reviewed the medical records. Dr. Mishkin reported accurate medical and employment histories. The Office properly accorded special weight to the impartial medical specialist's findings.[10]

Appellant did not submit sufficient medical evidence to overcome the weight of Dr. Mishkin's opinion or to create a new conflict. He submitted notes from Dr. Lehman, who was on one side of the conflict. Reports from a physician who was on one side of a medical conflict resolved by an impartial specialist, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict.[11] Appellant submitted hospital notes and treatment notes from Dr. Pratt reflecting appellant's complaints of hip aches, low back pain and shoulder problems. However, these reports did not explain how his

[10] *Bryan O. Crane*, 56 ECAB 713 (2005).

[11] *See Jaja K. Asaramo*, *supra* note 2.

condition was physiologically related to the accepted employment injury. Therefore, the reports are of limited probative value. Appellant contended that his preexisting degenerative disc disease was exacerbated by the accepted injury. However, his belief alone is insufficient to establish a causal relationship.[12]

The Board finds that appellant has not met his burden of proof to establish that his back condition was causally related to his accepted work injury. Therefore, the Office properly denied his request to expand his claim to include a back condition.

LEGAL PRECEDENT -- ISSUE 2

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[13] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[14] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[15] 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.[16]

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part 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.[17] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[18]

ANALYSIS -- ISSUE 2

The Office accepted appellant's claim for closed fracture of the ribs and consequential respiratory failure; left scapular fracture; left shoulder contusion; and left elbow contusion. It, therefore, bears the burden of justifying the termination of appellant's compensation and medical benefits for these medical conditions.

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[12] *Ernest St. Pierre, supra* note 6.

[13] *See Beverly Grimes*, 54 ECAB 543 (2003).

[14] *James M. Frasher*, 53 ECAB 794 (2002).

[15] *See Beverly Grimes, supra* note 13. *See also Franklin D. Haislah*, 52 ECAB 457 (2001).

[16] *See Beverly Grimes, supra* note 13.

[17] 5 U.S.C. § 8123(a).

[18] *William C. Bush*, 40 ECAB 1064, 1075 (1989).

The Office properly determined that a conflict existed in the medical opinion evidence as to whether appellant had any disability or residuals due to his accepted conditions. On the one hand, appellant's treating physician, Dr. Lehman, opined that he was unable to work in his date of injury job and had continuing residuals due to his accepted conditions. He found limited range of motion in the left shoulder. Dr. Lehman also noted considerable degenerative hypertrophic changes of the AC joint, with mild impingement tendinitis; a possible tear in the distal end of the supraspinatus; and cystic degeneration in the anterior and posterior aspects of the glenoid, pursuant to an MRI scan. On the other hand, the Office's second opinion physician, Dr. Tippett, opined that the accepted conditions had resolved.

In order to resolve the conflict, the Office referred appellant to Dr. Mishkin for an impartial medical examination and an opinion as to whether he had residuals from his accepted injury and, if so, whether his symptoms were disabling. Dr. Mishkin reviewed the entire record and statement of accepted facts, and performed a thorough examination of appellant. In his September 17, 2007 report, he provided detailed findings of his examination and opined that appellant had made a complete recovery from his accepted injuries. Examination of the neck revealed functional range of motion, with no pain. Appellant had full range of motion of his elbows, wrists and hands. The upper extremities were grossly symmetrical, with no evidence of motion weakness. Appellant could abduct his shoulders to 175 degrees, flex forward to 180 degrees, and rotate internally and externally to 90 degrees without pain. Palpation of the shoulders anteriorly, posteriorly and laterally, and over the right and left scapula, elicited no pain. Dr. Mishkin opined that appellant's accepted rib fractures and related respiratory distress, left shoulder trauma, left elbow contusion, and left scapula injuries had fully resolved, and that no further treatment was indicated with regard to his accepted conditions.

Dr. Mishkin also diagnosed degenerative disc disease, osteoarthritis, facet degenerative changes, and spinal stenosis, and concluded that appellant was unable to perform the duties of a mail carrier as a result of his back condition. The Board notes, however, that appellant's back condition was not accepted by the Office, and appellant has not established that he sustained a back injury as a result of the December 8, 2006 injury. Therefore, the evidence does not establish that appellant's disability for work is causally related to his accepted injury.

The Board finds that the Office properly relied on Dr. Mishkin's September 17, 2007 report in determining that appellant was not disabled as a result of, and had no residuals from, his accepted employment injury. As noted above, his opinion is sufficiently well rationalized and based upon a proper factual background. The Office properly accorded special weight to the impartial medical specialist's findings.[19]

Appellant did not submit sufficient medical evidence to overcome the weight of Dr. Mishkin's opinion, or to create a new conflict. As noted above, reports that do not explain how appellant's condition was physiologically related to the accepted employment injury, and reports from physicians on one side of the conflict, are of limited probative value. As the weight of the medical evidence establishes that appellant was no longer disabled as a result of, and had

[19] *Bryan O. Crane*, *supra* note 10.

no residuals from, his accepted conditions, the Office properly terminated his compensation and medical benefits.

CONCLUSION

The Board finds that appellant has not established that he sustained a back injury causally related to the accepted December 8, 2006 injury. The Board further finds that the Office properly terminated appellant's compensation and medical benefits effective October 31, 2007.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 31, 2007 is affirmed.

Issued: December 11, 2008
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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