

**United States Department of Labor
Employees' Compensation Appeals Board**

C.T., Appellant)

and)

**DEPARTMENT OF HOMELAND SECURITY,
TRANSPORTATION SECURITY
ADMINISTRATION, Daytona Beach, FL,
Employer**)

_____)

**Docket No. 08-367
Issued: June 16, 2008**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On November 14, 2007 appellant filed a timely appeal from the Office of Workers' Compensation Programs' April 26, 2007 merit decision terminating his compensation and a July 24, 2007 nonmerit decision denying his reconsideration request. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2), the Board has jurisdiction over the merits of this case.¹

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation effective April 26, 2007 on the grounds that he no longer had residuals of his September 14, 2004 employment injury after that date; and (2) whether the Office properly denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

¹ The record also contains an April 17, 2007 schedule award decision of the Office. Appellant has not appealed this decision to the Board and the matter is not currently before the Board.

FACTUAL HISTORY

The Office accepted that on September 14, 2004 appellant, then a 30-year-old transportation security screener, sustained a left shoulder strain when he lifted a large duffel bag from the ground and threw it onto a conveyer belt.² It paid appellant compensation for periods of disability.

On November 11, 2004 Dr. Frank L. Denoff, an attending Board-certified orthopedic surgeon, indicated that appellant continued with left shoulder symptoms. He stated that appellant should have a neurology consultation to rule out a brachial plexus injury. In several reports dated in 2005 and 2006, Dr. Denoff continued to diagnose left shoulder pain with mild secondary tendinitis and “neurogenic injury.” He continued to indicate that appellant had a possible brachial plexus injury involving the left shoulder.

In late 2005 and early 2006, the Office referred appellant to Dr. Barry Lotman, a Board-certified orthopedic surgeon, and Dr. Gary Weiss, a Board-certified neurologist, for further evaluation of his employment-related condition.

In a January 6, 2006 report, Dr. Lotman stated that appellant mostly exhibited left neck, shoulder and arm symptoms. He noted that based on the examination and medical history he felt that appellant sustained a cervical disc herniation on September 14, 2004. Dr. Lotman indicated that appellant could not return to his date-of-injury job but could perform limited-duty work. He stated that he was attaching a work restrictions form, but the record does not contain any such form dated around that time. In a February 24, 2006 report, Dr. Lotman stated that the electromyogram (EMG) and nerve conduction velocity (NCV) studies obtained by Dr. Weiss on February 17, 2006 showed bilateral carpal tunnel syndrome and a suggestion of left brachial plexus injury, but that appellant’s examination was not consistent with a left brachial plexus injury.³

In a March 31, 2006 report, Dr. Lotman stated that March 27, 2006 magnetic resonance imaging (MRI) scan testing showed a right paramedian disc herniation at C5 with a mild central bulge at C4.⁴ Dr. Lotman noted that the EMG, NCV and MRI scan testing indicated that appellant did not have significant left-sided cervical disc disease. He stated, “The result of those studies is there is no clear definition of why this claimant has significant left-sided upper extremity pain.” In an accompanying April 3, 2000 work restriction form, Dr. Lotman wrote “no” in the portion of the form concerning “light duty” which asked if there was “any reason that this person cannot work for [eight] hours per workday.” He did not complete any other portion of the form.

In a March 20, 2007 letter, the Office advised appellant of its proposed termination of his compensation. The Office indicated that the opinion of Dr. Lotman showed that he could

² Appellant’s date-of-injury job required lifting up to 80 pounds.

³ The record contains a copy of this February 17, 2006 testing.

⁴ The record contains a copy of this March 27, 2006 testing.

perform his date-of-injury job. In an April 26, 2007 decision, the Office terminated appellant's compensation effective April 26, 2007 on the grounds that he no longer had residuals of his September 14, 2004 employment injury after that date. The Office noted that Dr. Lotman diagnosed a cervical disc herniation, by MRI scan evidence, which he related back to the September 14, 2004 work injury. The Office stated, "Your claim has been expanded to include the additional diagnosis and you have been advised under separate cover, regarding this. However, despite the diagnosis, Dr. Lotman opined you were capable of performed regular[-]duty work without restrictions."

Appellant requested reconsideration of his claim and submitted numerous medical notes, mostly dated in June and July 2007. In a July 24, 2007 decision, the Office denied appellant's request for reconsideration without reviewing the merits of his claim.

LEGAL PRECEDENT -- ISSUE 1

Under the Federal Employees' Compensation Act,⁵ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁶ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

ANALYSIS -- ISSUE 1

The Office accepted that on September 14, 2004 appellant sustained a left shoulder strain when he lifted a large duffel bag from the ground and then turned and threw it onto a conveyer belt. It paid appellant compensation for periods of disability.⁹ The Office terminated appellant's compensation effective April 26, 2007 on the grounds that he no longer had residuals of his September 14, 2004 employment injury after that date. It relied on the opinion of Dr. Lotman, a Board-certified orthopedic surgeon, who served as an Office referral physician, in justifying termination.

The Board finds that the Office did not present adequate medical evidence to justify its termination of appellant's compensation effective. The Office relied on a work restrictions form completed by Dr. Lotman and interpreted this form to provide an opinion that appellant could return to his date-of-injury job. However, such an interpretation is unwarranted. Dr. Lotman wrote "no" in the portion of the form concerning "light duty" which asked if there was "any reason that this person cannot work for [eight] hours per workday." He did not complete any

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁷ *Id.*

⁸ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ It also appears that the Office accepted that appellant sustained a C5 disc herniation on September 14, 2004.

other portion of the form. At best, the form could be interpreted to provide an opinion that appellant could perform eight hours of light-duty work without specifying the type of work that could be performed. It should be noted that, in a January 6, 2006 report, Dr. Lotman indicated that appellant could not return to his date-of-injury job but could perform limited-duty work.

Dr. Lotman did not provide any clear, well-rationalized opinion that appellant no longer had residuals of his September 14, 2004 employment injury. He did not explain how the employment injury had resolved and, in fact, his reports suggested that it had not. In his March 31, 2006 report, Dr. Lotman seemed uncertain why appellant continued to have symptoms on his left side, *i.e.*, the side where his employment injury occurred. He indicated that the EMG, NCV and MRI scan testing indicated that appellant did not have significant left-sided cervical disc disease. Dr. Lotman stated, "The result of those studies is there is no clear definition of why this claimant has significant left-sided upper extremity pain." Another reason that the reports of Dr. Lotman do not support termination of appellant's compensation, is that they contain an opinion that he sustained a cervical herniation on September 14, 2004, which remained symptomatic. The Office noted in its termination decision that it was expanding appellant's claim for a C5 herniation based on Dr. Lotman's reports.

For these reasons, the Office did not meet its burden of proof to terminate appellant's compensation effective April 26, 2007.¹⁰

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective April 26, 2007 on the grounds that he no longer had residuals of his September 14, 2004 employment injury after that date.

¹⁰ Given the Board's findings on the merit issue of the present case, it is not necessary for it to consider the nonmerit issue.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' April 26, 2007 decision is reversed.

Issued: June 16, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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