

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

R.O., Appellant)	
)	
and)	
)	Docket No. 08-488
)	Issued: September 4, 2008
U.S. POSTAL SERVICE, QUEENS)	
PROCESSING & DISTRIBUTION CENTER,)	
Flushing, NY, Employer)	
)	

<i>Appearances:</i>	<i>Case Submitted on the Record</i>
<i>Paul L. Kalker, Esq., for the appellant</i>	
<i>Office of Solicitor, for the Director</i>	

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 10, 2007 appellant filed an appeal of April 4 and October 29, 2007 decisions of the Office of Workers' Compensation Programs terminating his compensation and medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation on the grounds that the accepted injuries had resolved. On appeal, appellant, through his attorney, contends that the Office improperly terminated his compensation benefits as there was no final decision regarding the suitability of an offered position. He also asserted that the Office improperly refused to accept additional conditions as related to his employment injury.

FACTUAL HISTORY

The Office accepted that on April 25, 2003 appellant, then a 43-year-old supervisor, sustained a concussion, blunt head trauma, head contusion, facial contusion, cervical sprain and lumbar sprain when a metal freight elevator gate came down on his head. Following a brief absence, he returned to full duty. Appellant stopped work on June 18, 2003 due to severe headaches and neck pain. He did not return to work. Appellant received wage-loss compensation beginning June 18, 2003 and appropriate medical benefits. His case was placed on the periodic rolls effective September 25, 2003.

Appellant submitted emergency room records from April 25, 2003, noting that he was struck on the top of his head at work by an elevator door. A computed tomography scan of his head and x-rays of the cervical vertebrae were within normal limits. Dr. E. Augustin, an emergency room physician, diagnosed head trauma and a neck sprain.

Beginning on June 30, 2003, appellant was followed by Dr. Ranga C. Krishna, an attending Board-certified neurologist and psychiatrist. In reports through August 17, 2003, Dr. Krishna provided a history of injury with onset of headaches, dizziness, lightheadedness and paresthesias of the neck, both arms, left leg and lumbar spine. On examination, he found 4/5 weakness in appellant's left arm and shoulder muscles, diminished left ankle and biceps reflexes, decreased pinprick sensation in the outer aspect of the left arm and leg and a bilaterally positive Tinel's sign. Dr. Krishna diagnosed post-traumatic cephalgia, post-traumatic cerebral and vestibular concussions, possible superimposed cervical and lumbar strains, possible superimposed cervical and lumbar disc herniations causing radiculopathy and a neuropathic pain syndrome.¹ He submitted periodic reports through November 18, 2003 stating that appellant's condition was work related. Dr. Krishna found appellant totally disabled for work due to neck, low back and shoulder pain, numbness in the left leg and persistent headaches.²

In an October 24, 2003 report, Dr. Jonathan Lewin, an attending Board-certified orthopedic surgeon, reviewed MRI scan reports showing disc bulging at C3-4, C5-6 and L1-2. He commented that appellant's symptoms were out of proportion to objective findings.

On November 3, 2003 the Office obtained a second opinion from Dr. Naunihal S. Singh, a Board-certified neurologist, who diagnosed resolved cervical and lumbar sprains and improved headaches. Dr. Singh opined that appellant could resume full duty.

In a November 20, 2003 report, Dr. Andrew M.G. Davy, an attending Board-certified anesthesiologist specializing in pain management, diagnosed neck and back pain secondary to degenerative disc disease, cervical radiculopathy, possible cervical facet syndrome, post-

¹ July 30, 2003 EMG and NCV studies showed C5-6 radiculopathy and left-sided L5-S1 radiculopathy. An August 8, 2003 cervical magnetic resonance imaging (MRI) scan showed herniated discs at C3-4 and C5-6. An August 12, 2003 MRI scan of the lumbar spine showed lumbar degenerative disc disease with annular bulging at L1-2.

² Appellant underwent physical therapy from August 2003 to February 2005. He was also treated by a chiropractor who did not diagnose a spinal subluxation by x-ray.

traumatic disc pathology, lumbar radiculopathy and possible lumbar facet syndrome. He prescribed medication and injections through October 2006.

The Office found a conflict of medical opinion between Dr. Singh, for the government, and Dr. Krishna, for appellant, regarding his continuing disability due to the accepted injuries and need for further treatment. To resolve the conflict, it referred appellant, the medical record and a statement of accepted facts to Dr. Marshall J. Keilson, a Board-certified neurologist. In a January 21, 2004 report, Dr. Keilson reviewed the medical record and noted that appellant was significantly obese at 340 pounds. On examination, he found no objective signs to explain appellant's symptoms. Dr. Keilson opined that the accepted injuries had resolved without residuals. He provided work restrictions due to appellant's subjective complaints.

In periodic reports from June 8, 2004 to November 3, 2005, Dr. Krishna reiterated his previous findings and diagnoses. As of November 2005, he newly diagnosed left knee meniscopathy. Dr. Krishna continued to find appellant totally disabled for work due to objective findings and the side effects of analgesic medication.

Beginning in April 2004, appellant was followed by Dr. Mark Kostin, an attending Board-certified internist, who provided a history of injury and treatment and diagnosed cervical and lumbar sprains. Dr. Kostin prescribed physical therapy for neck pain from May 2004 onward. In August 22 and October 27, 2005 reports, he newly diagnosed post-traumatic headaches, cervical radiculopathy and a myofascial pain syndrome. In a December 3, 2005 letter, Dr. Kostin opined that the April 25, 2003 injuries caused restricted spinal motion, an inability to lift or pull over 12 pounds, inability to sit or stand for prolonged periods or reach above shoulder level. He submitted periodic progress notes through January 2007 finding appellant totally disabled for work due to headaches, neck and back pain.³

On July 20, 2004 the employing establishment offered appellant a full-time position as a modified supervisor of distribution operations, based on Dr. Keilson's restrictions. Appellant declined the position. From July 2004 to September 2005, the Office developed the suitable work aspect of the case but did not issue a final decision on this issue. In September 2005, it advised the employing establishment that a second opinion examination would be scheduled to determine appellant's current work restrictions.

On May 9, 2006 the Office referred appellant to Dr. Robert A. Smith,⁴ a Board-certified orthopedic surgeon, to determine his current work restrictions. In a May 22, 2006 report, Dr. Smith reviewed the medical record and statement of accepted facts. He noted that appellant weighed 320 pounds. Dr. Smith found no orthopedic or neurologic abnormalities on examination. He opined that the accepted cervical and lumbar sprains and soft tissue contusions had resolved without residuals. Dr. Smith stated that appellant had "a level of symptomatology

³ Appellant also submitted reports from March 2005 to August 2006 from Dr. Eric Turk, a chiropractor, who did not diagnose a spinal subluxation.

⁴ The Office originally referred appellant to a physician within his Brooklyn, New York commuting area. However, appellant had relocated to Stroudsburg, Pennsylvania. The Office then rescheduled the second opinion examination with Dr. Smith.

far above the essentially normal clinical examination.” He released appellant to unrestricted full duty.

The Office found a conflict of medical opinion between Dr. Smith, for the government and Dr. Kostin, for appellant, as to whether the accepted injuries had resolved. It referred appellant, the medical record and a statement of accepted facts to Dr. Michael Raklewicz, a Board-certified orthopedic surgeon. In a September 15, 2006 report, Dr. Raklewicz provided a history of injury and treatment and reviewed the medical record. On examination, he advised that appellant was “massively overweight” at more than 350 pounds. Dr. Raklewicz found restricted lumbar motion, normal cervical range of motion and normal neurologic findings in the extremities. He diagnosed degenerative cervical and lumbar spondylosis “clearly related to [appellant’s] gross obesity and not to any work injury.” Dr. Raklewicz opined that appellant could perform full-time light-duty work and did not require further treatment.

By notice dated March 2, 2007, the Office advised appellant that it proposed to terminate his compensation benefits as the accepted injuries had resolved based on Dr. Raklewicz’ report. It afforded appellant 30 days to submit additional evidence or argument. Appellant, through his attorney, responded in a March 9, 2007 letter, contending that the Office misinterpreted the medical evidence to exclude disc herniations, cervical and lumbar radiculopathy as work related. He asserted that he remained totally disabled for work as he had to lay down for 10 to 15 minutes every hour. Appellant submitted additional evidence.

In a February 28, 2007 report, Dr. Kostin related appellant’s complaints of headaches, neck pain, lumbar pain, paresthesias in all extremities and radiculopathy into both legs. On examination, he found tenderness to palpation in the neck and both shoulders, restricted cervical and lumbar motion and decreased reflexes throughout the extremities. Dr. Kostin diagnosed a cervical sprain, myofascial pain syndrome and right shoulder pain. He found appellant totally disabled for work. Dr. Kostin prescribed four physical therapy sessions in February 2007.

By decision dated April 4, 2007, the Office terminated appellant’s medical and compensation benefits effective April 15, 2007, finding that the accepted injuries had resolved without residuals. It accorded Dr. Raklewicz’ opinion the special weight of the medical evidence as it was well rationalized and based on a complete, accurate factual and medical history and based on his status as the impartial medical examiner.

In a July 20, 2007 letter, appellant, through his attorney, requested reconsideration. He contended that Dr. Raklewicz’ report was deficient as he failed to provide objective test results proving the absence of the accepted conditions. Appellant alleged that the Office’s referral to Dr. Smith was doctor shopping.⁵

In March 27 and April 26, 2007 reports, Dr. Kostin repeated his previous findings and diagnoses. He continued to find appellant totally disabled for work. In a May 9, 2007 report of an April 27, 2007 examination, Dr. Krishna noted 4/5 weakness in left arm and shoulder, lumbosacral tenderness, “some nystagmus on the left head down position,” bilaterally positive straight leg raising tests, decreased pinprick sensation in the outer aspects of both legs and arms,

⁵ Appellant also submitted a largely illegible physical therapy prescription from Dr. Bhim S. Nangia.

restricted cervical and lumbar motion, bilaterally diminished ankle jerk and biceps jerk reflexes and a right carotid bruit. He diagnosed herniated cervical and lumbar discs causing a neuropathic pain syndrome. Dr. Krishna opined that, based on the medical record and history, appellant's symptoms and injuries were "causally related to the accident on April 25, 2003." He found appellant totally disabled for work. Dr. Krishna prescribed physical therapy.

Appellant also submitted a form report from Dr. Turk, a chiropractor. In a preprinted section of the report, Dr. Turk circled diagnoses of cervical and spinal subluxations. He did not indicate that he diagnosed the subluxations by x-ray.

By decision dated October 29, 2007, the Office denied modification of the April 4, 2007 decision. It found that Dr. Krishna's report did not discuss the two impartial medical opinions or appellant's morbid obesity.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁶ 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.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a concussion, blunt head trauma, head contusion, facial contusion, cervical sprain and lumbar sprain on April 25, 2003. Appellant was followed by Dr. Krishna, an attending Board-certified neurologist, who submitted reports from June to November 2003 diagnosing a concussion, post-traumatic headaches, lumbar and cervical disc herniations, radiculopathy and a pain syndrome. Dr. Krishna opined that these conditions were related to the accepted injuries and totally disabled appellant for work. Dr. Lewin, an attending Board-certified orthopedic surgeon, noted that appellant's symptoms were out of proportion to objective findings.

The Office obtained a second opinion from Dr. Singh, a Board-certified orthopedic neurologist, who opined on November 3, 2003 that the accepted injuries resolved without

⁶ *Linda D. Guerrero*, 54 ECAB 556 (2003); *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁷ *Id.*

⁸ *Roger G. Payne*, 55 ECAB 535 (2004).

⁹ *Pamela K. Guesford*, 53 ECAB 726 (2002).

residuals. It found a conflict of opinion between Dr. Krishna and Dr. Singh and referred appellant to Dr. Keilson, a Board-certified neurologist, for an impartial medical opinion. Dr. Keilson opined in a January 21, 2004 report that the accepted injuries had resolved and appellant's symptoms were due to morbid obesity.

Beginning in April 2004, appellant submitted periodic reports from Dr. Kostin, an attending Board-certified internist, who found appellant totally disabled for work due to post-traumatic headaches, cervical radiculopathy and a myofascial pain syndrome. The Office referred appellant to Dr. Smith, a Board-certified orthopedic surgeon, for an updated second opinion. In a May 22, 2006 report, Dr. Smith opined that the accepted injuries had resolved. The Office found a conflict of opinion between Dr. Smith and Dr. Kostin and selected Dr. Raklewicz, a Board-certified orthopedic surgeon, as impartial medical examiner. On September 15, 2006 Dr. Raklewicz explained that appellant's symptoms were due to degenerative cervical and lumbar disc disease caused by morbid obesity. He opined that accepted injuries had resolved completely and appellant could perform full duty.

Based on Dr. Raklewicz' report, the Office issued a March 2, 2007 notice of proposed termination. In response, appellant submitted a March 9, 2007 letter asserting that he sustained additional injuries on April 25, 2003. He also submitted a February 28, 2007 report from Dr. Kostin finding appellant totally disabled for work due to neck and shoulder pain. The Office then terminated appellant's compensation effective April 15, 2007 on the grounds that the medical evidence established that the accepted injuries had resolved without residuals. The Board finds that Dr. Raklewicz' opinion represents the weight of the medical evidence. His opinion is detailed, well rationalized and based on a complete factual and medical history.¹⁰ Dr. Kostin did not reference the complete medical record or provide sufficient rationale to establish that appellant continued to have residuals of the April 25, 2003 injuries on and after April 15, 2007. The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.¹¹ For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.¹² The fact that a condition's etiology is unknown does not relieve

¹⁰ *Conard Hightower*, 54 ECAB 796 (2003).

¹¹ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

¹² *Alice J. Tysinger*, 51 ECAB 638 (2000).

appellant of the burden of establishing a causal relationship by the weight of the medical evidence, nor shifts the burden of proof of the Office to disprove an employment relationship.¹³

ANALYSIS -- ISSUE 2

Appellant submitted additional medical evidence following the Office's April 4, 2007 decision terminating his compensation benefits. He asserted that these reports were sufficient to establish that he had continuing residuals of the April 25, 2003 injuries on and after April 15, 2007.

In March 27 and April 26, 2007 reports, Dr. Kostin diagnosed headaches, a pain syndrome and cervical radiculopathy totally disabling appellant for work. However, he did not explain how and why the accepted concussion, head contusions and cervical and lumbar sprains would continue to be disabling on and after April 15, 2007. Dr. Krishna stated in a May 9, 2007 report that appellant was totally disabled due to herniated cervical and lumbar discs and a neuropathic pain syndrome causally related to the accepted injuries. But he did not explain how and why the accepted April 25, 2003 incident would cause disc herniations and a pain syndrome or how the accepted injuries continued to be disabling on and after April 15, 2007. This lack of rationale diminishes the probative value of Dr. Kostin's and Dr. Krishna's opinions.¹⁴

Appellant also submitted a chiropractic form report from Dr. Turk, who diagnosed spinal subluxations but did not indicate that he diagnosed the subluxations by x-ray. Therefore, Dr. Turk is not a physician under the Act for the purposes of this case and his opinion is of no probative value.¹⁵

The Board finds that appellant submitted insufficient rationalized medical evidence to establish a causal relationship between his condition on and after April 15, 2007 and the accepted April 25, 2003 concussion, blunt head trauma, head contusion, facial contusion, cervical sprain and lumbar sprain. Therefore, he has failed to meet his burden of proof.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's compensation benefits. The Board also finds that appellant did not meet his burden of proof to establish continuing work-related disability after the termination of his compensation benefits on April 15, 2007.

¹³ *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

¹⁴ *Deborah L. Beatty*, 54 ECAB 340 (2003).

¹⁵ 5 U.S.C. § 8101(3), 20 C.F.R. § 10.311(a). See *Thomas W. Stevens*, 50 ECAB 288 (1999); *George E. Williams*, 44 ECAB 530 (1993).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 29 and April 4, 2007 are affirmed.

Issued: September 4, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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