United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
	)	**Docket No. 08-881**
and	)	**Issued: September 22, 2008**
U.S. POSTAL SERVICE,	)	
Detroit, MI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On February 4, 2008 appellant filed a timely appeal of the January 9, 2008 decision of the Office of Workers' Compensation Programs.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits on March 21, 2004 on the grounds that his accepted conditions had resolved.

FACTUAL HISTORY

On May 18, 2004 appellant filed a traumatic injury claim alleging that on May 11, 2004 he sustained a back injury while distributing heavy bundles of catalogs.

On June 29, 2004 the Office denied appellant's claim on the grounds that the evidence did not support his claim.

On June 10, 2005 the Office vacated the June 29, 2004 decision and accepted appellant's claim for sprain and strain of the lumbar region. It also noted that appellant was totally disabled from work for the period May 11 to June 30, 2004. Appellant stopped work in July 27, 2004.

In an August 17, 2005 letter, Dr. Russell Chavey, Board-certified in family medicine addressed appellant's complete medical disability. He described appellant's history of back problems since 2000 and opined that appellant's current medical disability was due to a herniated disc which resulted in painful lumbar radiculopathy all of which was related to a work injury. Dr. Chavey opined that appellant's work-related injury triggered his current disability.

In an October 28, 2005 letter, Dr. Chavey stated that appellant was currently totally disabled from work due to an acute injury suffered on May 11, 2004. He explained that appellant has a history of prior work-related back injuries. Dr. Chavey stated that the day before the injury appellant had no symptoms and no restrictions and from the date of the injury forward appellant had been suffering from ongoing symptoms which prohibited him from working his normal job.

On October 27, 2005 the Office informed appellant that a second opinion examination was necessary. In the statement of accepted facts it noted that appellant had accepted claims for a work-related medical condition of lumbosacral strain which was later expanded to include sciatica, (related to a November 14, 2000 traumatic injury[1]) and that both conditions were found to have resolved as of April 16, 2003. The statement of accepted facts also noted that the May 11, 2004 claim was accepted for lumbar sprain/strain.

The Office provided questions for the specialist including whether appellant's condition of "back contusion and left elbow abrasion" had resolved, whether appellant suffers from degenerative disc disease and herniated lumbar disc and if so whether the conditions were due to the May 11, 2004 work injury. It also wanted to know whether there were current active residuals of these conditions, and whether appellant's work injury prevented him from performing the duties of his date-of-injury job as a clerk and if so what type of work he was capable of performing.

On November 28, 2005 appellant was evaluated by Dr. Scott T. Monson, Board-certified in orthopedic surgery. In his November 28, 2005 report, Dr. Monson noted that the MRI scan report suggested a disc protrusion at L5-S1 and a small annular tear at L4. He also reviewed the films and noted that the bottom three levels showed degenerative disc disease with a small L5-S1 central disc protrusion. Dr. Monson opined that appellant's central disc protrusion was most likely related to his degenerative disc disease but could also be related to the lifting incident and that he had no means of knowing with one hundred percent medical certainty which it was. He stated that appellant may have had a sprain/strain at the time of the lifting incident but they usually resolve within 12 weeks. Dr. Monson also opined that any soft tissue injury sustained would now be resolved.

In a February 7, 2006 letter, the Office requested clarification from Dr. Monson regarding his medical report. It wanted to know whether the May 11, 2004 work event aggravated

[1] The November 14, 2000 traumatic injury is a separate claim.

appellant's degenerative disc disease at L5-S1 and whether appellant was capable of performing the modified assignment.

In a March 17, 2006 supplemental report, Dr. Monson stated that a herniated nucleus pulposus can occur at the time of lifting and may have temporarily aggravated the degenerative disease. He stated that the disc protrusions at L5-S1 could be related to appellant's preexisting lumbar disc disease as well as the May 11, 2004 work injury but he had no way of knowing with certainty as either could be the cause. Dr. Monson also found that appellant was capable of working with restrictions in a job that did not involve repetitive bending, had a sitting and standing option and where appellant did not have to lift more than 20 pounds.

In a June 7, 2006 letter, the Office requested clarification from Dr. Monson as to whether the May 11, 2004 injury caused or contributed to the degenerative disc disease and herniated disc at L5-S1, and if so did it worsen to the point that appellant was unable to perform the modified duties as of July 27, 2004 and whether any of these conditions had resolved.

In a September 26, 2006 supplemental report, Dr. Monson stated that it did not appear that the incident caused the degenerative disc disease or herniated disc at L5-S1. He further stated that appellant may have sustained a sprain, strain or aggravation to his preexisting condition, however, any aggravation sustained would now be resolved. Dr. Monson opined that appellant was capable of working with restrictions.

In an October 13, 2006 letter, the Office requested that Dr. Monson clarify whether the restrictions outlined in his report were due to the preexisting degenerative disease or the May 11, 2004 injury.

In a November 6, 2006 supplemental report, Dr. Monson opined that the work restrictions were due to appellant's preexisting condition.

In a December 12, 2006 letter, the Office requested that Dr. Chavey review and offer an opinion as to whether he agreed with Dr. Monson's opinion and findings.

In a December 15, 2006 letter, Dr. Chavey agreed with the objective findings of Dr. Monson that appellant's injuries were primarily soft tissue related, superimposed on degenerative changes and that the soft tissue should have resolved by this time. However, Dr. Chavey pointed out that appellant did not received medical treatment, consisting of physical therapy, for weeks or months after the injury due to a refusal of authorization by the Office and that the lack of effective medical treatment of the soft tissue injury resulted in a chronic medical disability impairing appellant's ability to return to work.

The Office determined that a conflict of opinion existed between Dr. Chavey and Dr. Monson as to whether appellant's continuing disability was related to his employment, the degree of disability associated with appellant's work-related conditions and the physical restrictions imposed by residuals from appellant's work injury and sent him to another physician. On April 16, 2007 appellant was evaluated by Dr. William Higginbotham, Board-certified in orthopedic surgery.

In his April 16, 2007 report, Dr. Higginbotham took appellant's history, evaluated his physical capabilities and reviewed previous MRI scan reports. Dr. Higginbotham reviewed the MRI scan films and found evidence of a small central disc bulge or herniation at L5-S1 and evidence of changes at the posterior aspect of the disc L4-5. He opined that appellant showed subjective findings consistent with mild lumbar radiculopathy. Dr. Higginbotham stated that there was nothing specific about the findings on the MRI scan that related to appellant's complaints of pain. He further explained that the MRI scan did not constitute objective criterion suggesting that there was pathology in his lumbar spine. Dr. Higginbotham opined that based on the information in appellant's files that he would be capable of performing his work activities and there were no findings that appellant was suffering from residuals related to his May 11, 2004 incident.

On June 13, 2007 the Office requested a supplemental report from Dr. Higginbotham to address whether appellant's lumbar sprain and strain had ceased and if so on what date.

In his June 18, 2007 supplemental report, Dr. Higginbotham opined that lumbar sprain or strain usually recovers in two to three months or up to six months but is not usually an ongoing condition. He diagnosed appellant with lumbar radiculopathy based on reports from appellant's treating physicians. Dr. Higginbotham opined that, based on the records that as of January 2005 the diagnosis of lumbar sprain/strain had changed to lumbar degenerative disc disease with lumbar radiculopathy. He further stated that there was nothing specific about appellant's changes which would relate them to his work incident on May 11, 2004. Dr. Higginbotham found there to be subjective findings consistent with mild left lumbar radiculopathy but no objective findings consistent with the diagnosis. He also stated that appellant did not appear to be incapacitated from work.

On June 11, 2007 the Office issued a notice of proposed termination of compensation and medical benefits based on medical reports from Dr. Higginbotham.

In a July 31, 2007 letter, Dr. Chavey reviewed Dr. Higginbotham's reports and disagreed with the conclusions. He opined that appellant's sprain and strain evolved into lumbar radiculopathy due to lack of treatment for months and that appellant continues to have symptoms similar to the ones immediately following the May 11, 2004 injury. Dr. Chavey also noted that Dr. Higginbotham's conclusions were not consistent with the examination of his letter.

On August 20, 2007 the Office terminated appellant's compensation and medical benefits based on the medical evidence which established that appellant no longer had residuals of the accepted condition and found that the weight of medical evidence was with Dr. Higginbotham.

Appellant, through his representative, requested an oral hearing which was held on November 26, 2007.

On January 9, 2008 the Office issued a decision affirming the August 20, 2007 termination of appellant's medical benefits and compensation.

LEGAL PRECEDENT

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.[2] The Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

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.[5] Where 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 a proper factual and medical background must be given special weight.[6]

When the Office obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, the Office must secure a supplemental report from the specialist to correct the defect in his original report.[7]

ANALYSIS

The Board finds that the Office did not meet its burden of proof in this case. As there was a conflict in opinion between Dr. Chavey and Dr. Monson, appellant was properly referred to Dr. Higginbotham for an impartial medical examination. The issue to be resolved by Dr. Higginbotham was whether there were any residuals of appellant's employment injury and whether these residuals precluded him from performing his work duties. Dr. Higginbotham opined that the diagnosis of lumbar sprain/strain had changed to lumbar degenerative disc disease with lumbar radiculopathy in January 2005. While appellant's physician, Dr. Chavey, explained that appellant's accepted diagnosis of lumbar sprain/strain had evolved into lumbar radiculopathy due to lack of medical treatment, Dr. Higginbotham appeared to agree with the assessment that appellant's diagnosis "evolved" from sprain/strain to lumbar disc disease.

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[2] *See Kathryn E. Demarsh*, 56 ECAB 267 (2005). *See also Beverly Grimes*, 54 ECAB 543 (2003).

[3] *Id.*

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

[5] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

[6] *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

[7] *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.0810(11)(c)(1)-(2) (April 1993).

Dr. Higginbotham however without further explanation or medical rationale concluded that this condition was not causally related to the accepted injury.

Furthermore, Dr. Higginbotham reviewed MRI scan films and found a small central disc bulge or herniation at L5-S1 and changes at L4-5, but went on to opine that the MRI scan films did not constitute objective criterion of pathology in the lumbar spine. Again, he did not adequately explain how he concluded that there were no objective findings of pathology when the MRI scan studies and appellant's complaints were consistent with lumbar radiculopathy.

As Dr. Higginbotham's report was not sufficiently rationalized to resolve the conflict in the medical opinion evidence, the Office did not meet its burden of proof in this case.

CONCLUSION

The Board finds that Office did not meet its burden of proof to terminate compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 22, 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