United States Department of Labor
Employees' Compensation Appeals Board

E.J., Appellant	)	
and	)	**Docket No. 08-1350**
	)	**Issued: September 8, 2008**
DEPARTMENT OF THE ARMY, MAINE ARMY NATIONAL GUARD, CAMP KEYES, Augusta, ME, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., 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 7, 2008 appellant, through counsel, timely appealed the March 27, 2008 merit decision of the Office of Workers' Compensation Programs, which terminated his benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective April 13, 2008.

FACTUAL HISTORY

On January 28, 1999 appellant, then a 41-year-old support services supervisor, struck his right thigh against a glass tabletop and twisted his lower back. The Office accepted his claim for

right-side sciatica.[1] Following his injury, appellant returned to work with limitations on carrying, sitting, standing and bending. Over the next 21 months, he continued to work as a support services supervisor with some modification to his regular duties. Appellant was an Army reservist and he eventually lost his membership in the National Guard due to medical reasons. Because he lost his military membership, the employing establishment terminated his services effective September 6, 2000. At that time there was no medical evidence indicating that appellant was totally disabled from performing his duties as a support services supervisor. However, maintaining military membership in the National Guard was a prerequisite for appellant's continued civilian employment. Once appellant was medically discharged from the National Guard, the employing establishment was required to relieve him of his civilian duties as well.

The Office paid appellant wage-loss compensation for total disability beginning September 6, 2000. Effective December 3, 2000, the Office placed him on the periodic compensation rolls and he continued to receive wage-loss compensation for more than seven years.

Dr. Michael J. Totta, a Board-certified physiatrist, had treated appellant for his back condition since January 2000. Appellant saw Dr. Totta for a follow-up examination on February 12, 2007.[2] Dr. Totta diagnosed chronic backache (ICD-9 Code 724.5). He also submitted a work capacity evaluation (OWCP-5c) indicating that, while appellant was unable to perform his regular duties, he was capable of performing full-time, sedentary or light-duty work with restrictions. Dr. Totta also noted that appellant had reached maximum medical improvement and that his impairment was permanent. Appellant next saw him on September 21, 2007. Dr. Totta diagnosed work-related chronic backache and indicated that appellant could perform modified-duty work.

Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on January 23, 2008. He noted that appellant had preexisting radiculopathy that was treated with surgery in July 1998.[3] Dr. Hanley explained that following the January 28, 1999 employment injury there was an increase in symptomatology, but no evidence of any significant anatomical changes in appellant's spine. He further indicated that diagnostic and imaging studies obtained soon after the January 1999 injury failed to disclose any evidence of nerve root compression. Dr. Hanley opined that appellant sustained a "self-limited soft tissue type of injury." He diagnosed "[h]istory of musculoligamentous straining injury to the lumbar spine without significant objective residuals."

[1] Appellant had a preexisting lumbar condition at L4-5 that required surgical intervention in July 1998.

[2] A February 9, 2007 magnetic resonance imaging (MRI) scan revealed a focal disc protrusion at L3-4 and a broad-based eccentric disc protrusion at the L4-5 level. The scan also showed evidence of a prior laminectomy at the left L4-5 level.

[3] Dr. Hanley also noted that the statement of accepted facts incorrectly listed the date of surgery as "July 28, 1999," which gave the mistaken impression that the January 28, 1999 employment injury lead to the need for surgical intervention.

Dr. Hanley further noted that after the January 28, 1999 injury appellant continued to perform work activities and was only discharged from work because he was not "deployable," meaning he could not be sent to an area where the demands of his job would be significantly different. He believed appellant was fit to do any kind of work activity that did not include very heavy lifting and repeated bending, stooping and twisting. However, these limitations were the result of appellant's preexisting problem, which had required surgery in the past. Dr. Hanley found no evidence of residuals that would be reasonably attributed to appellant's January 28, 1999 employment incident. In contrast, he attributed appellant's current back problems to deconditioning and a degenerative spine, as evidenced by the February 9, 2007 MRI scan. Dr. Hanley explained that the latest MRI scan showed disease at the L3-4 level that was not evident on various studies obtained at the time of the January 28, 1999 injury. He further explained that this was a developmental problem that should be considered a naturally occurring disease of life.

On February 26, 2008 the Office advised appellant of its intention to terminate his benefits. The Office provided appellant a copy of Dr. Hanley's January 23, 2008 report and further advised that if appellant disagreed with the proposed termination, he should submit any evidence or argument within 30 days of the date of the notice.

Appellant obtained legal counsel on or about March 11, 2008. Under cover letter dated March 12, 2008, appellant's counsel advised the Office of his representation and provided proof of authorization to act on appellant's behalf. Counsel also noted there was a February 26, 2008 proposed termination of benefits pending in the case. He requested that the Office provide him a copy of appellant's case file as soon as possible. In the event that the Office could not accommodate his Privacy Act request prior to the expiration of the 30-day pretermination response period, counsel apparently presumed the Office would postpone issuing a final decision until two weeks after he received appellant's case file.

On March 17, 2008 the Office received a copy of Dr. Totta's March 10, 2008 treatment records. He noted subjective complaints of low back pain radiating into the left buttock, down the left leg and into appellant's great toe. Appellant also complained of anterior right thigh pain. Dr. Totta diagnosed work-related backache "by patient."[4] He also recommended obtaining additional imaging studies to rule out L5 nerve root compression secondary to degeneration and stenosis. The treatment records further indicated that Dr. Totta spoke with appellant regarding his deconditioning and use of medication. Appellant also received prescription refills for Vicodin and Valium.

Beginning March 17, 2008, appellant's counsel made a series of calls to the Office. He contacted the claims examiner and several high-ranking Office personnel and insisted that the Office either expedite his request for a copy of appellant's record or grant an extension of time to respond to the February 26, 2008 pretermination notice. Counsel's repeated requests for at least a two-week extension were uniformly denied. The Office advised him to timely submit whatever evidence or argument he had to refute the proposed termination. It further indicated

[4] The March 10, 2008 treatment notes were accompanied by a State of Maine "Practitioner's Report." This form report included a box for designating whether a condition was "work related." Dr. Totta checked the "work-related" box.

that efforts were being made to process the file request as quickly as possible, but at a minimum the request would be addressed within the program time frame (30 days).

On March 25, 2008 counsel wrote to the Office reiterating his request to suspend the proposed termination until the Office "deigns to provide ... the file." Appellant's counsel also noted that Dr. Hanley had not mentioned in his report the "actual accepted condition." Counsel questioned how a medical report that did not even mention the accepted condition could be relied upon as a basis for determining that the accepted condition no longer existed. Counsel also pointed out that Dr. Hanley had not mentioned the results of a previous second opinion evaluation.[5]

By decision dated March 27, 2008, the Office terminated appellant's wage-loss compensation and medical benefits.[6] It provided appellant's counsel a copy of the case file five days later on April 1, 2008.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[7] 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.[8] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[9] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[10]

ANALYSIS

On appeal, counsel argues that the Office committed reversible error by issuing a final decision without first providing him a copy of appellant's case record. The Office issued its pretermination notice on February 26, 2008. Appellant secured legal representation exactly two weeks later. His newly-designated counsel wrote to the Office the following day, March 12,

[5] Appellant's counsel referenced a 2000 directed examination, but no such record exists. Dr. Victor M. Parisien, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on February 28, 2001. He diagnosed nonspecific low back pain with elements of chronic pain syndrome. At that time, Dr. Parisien believed that appellant still suffered from residuals of the January 28, 1999 employment injury. He also noted that appellant's pain considerably limited his activities. However, appellant was able to work four to eight hours with limitations.

[6] The termination was effective April 13, 2008.

[7] *Curtis Hall*, 45 ECAB 316 (1994).

[8] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[9] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

[10] *Calvin S. Mays*, 39 ECAB 993 (1988).

2008, requesting both a copy of appellant's case record and at least a two-week extension to respond to the February 26, 2008 pretermination notice. Pursuant to the Privacy Act, 5 U.S.C. § 552a, the Office granted counsel's record request on April 1, 2008, which was well within the 30-day time frame for responding to such requests.[11] However, the Office issued its final decision terminating benefits five days prior to releasing the requested records.

Where the evidence establishes that compensation should be either reduced or terminated, the Office will provide the beneficiary with written notice of the proposed action and give him or her 30 days to submit relevant evidence or argument to support entitlement to continued payment of compensation.[12] If the beneficiary submits evidence or argument prior to the issuance of the decision, the Office will evaluate it in light of the proposed action and undertake such further development as it may deem appropriate, if any.[13] If the beneficiary does not respond within 30 days of the written notice, the Office will issue a decision consistent with its prior notice.[14]

Appellant waited two weeks before taking any action in response to the Office's February 26, 2008 proposed termination of benefits. After being retained on March 11, 2008, counsel's first act was to request a copy of the case record and attempt to postpone the issuance of a final decision. The Office timely responded to counsel's Privacy Act request, albeit after issuing its final decision. Appellant's counsel provided no relevant authority to support his argument that issuing the decision before providing a copy of the record constituted reversible error. The February 26, 2008 pretermination notice afforded appellant 30 days to submit a written response in the form of evidence and/or argument, which is consistent with the applicable regulations.[15] The regulations further provide that the Office "will not grant any request for an extension of this 30-day period."[16]

During the 30-day time frame provided appellant, the Office received Dr. Totta's March 10, 2008 treatment records as well as counsel's March 25, 2008 challenge to Dr. Hanley's report. The additional evidence and counsel's argument were both addressed in the March 27, 2008 final decision terminating benefits. Having a copy of the case record might have provided some benefit to appellant's counsel in preparing a response. However, counsel's eleventh-hour enlistment in the adjudication process did not justify suspending or postponing further action on an otherwise properly issued pretermination notification. The Board finds that the Office did not commit reversible error by issuing its March 27, 2008 decision prior to providing counsel a copy of appellant's case record.

The Board further finds that the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits. The latest reports from appellant's treating

[11] 20 C.F.R. §§ 71.1 and 71.4(a); 20 C.F.R. §§ 10.11 and 10.12 (2008).

[12] 20 C.F.R. § 10.540(a).

[13] 20 C.F.R. § 10.541(a).

[14] *Id.*

[15] 20 C.F.R. § 10.540(a).

[16] 20 C.F.R. § 10.541(a).

physician, Dr. Totta, provided a diagnosis of unspecified backache (ICD-9 Code 724.5). The March 10, 2008 treatment records included the notation "by patient," indicating that Dr. Totta's diagnosis was based on appellant's subjective complaints. And while Dr. Totta noted that appellant's condition was work related, his form report did not otherwise include an explanation of how the current diagnosis was causally related to the January 28, 1999 employment injury.

In contrast, Dr. Hanley provided a documented and reasoned opinion attributing appellant's current back condition to a degenerative spine as well as deconditioning.[17] He reviewed various diagnostic and imaging studies and conducted his own physical examination on January 23, 2008. Based on the available information, Dr. Hanley concluded there was no evidence of "any residual findings that would be reasonably attributed to the January 28, 1999 incident." He also submitted a work capacity evaluation (Form OWCP-5c), which noted that the claim had been accepted for "right side sciatica."[18] Although appellant was unable to perform his usual job, Dr. Hanley indicated that appellant was capable of working an eight-hour day with restrictions.[19] He further indicated that appellant's permanent restrictions were "unrelated to work injury." According to Dr. Hanley, these limitations were the result of appellant's "preexisting problem [that] … required surgery in the past."

The Board finds that Dr. Hanley's January 23, 2008 report established that appellant no longer had residuals of his accepted condition of right side sciatica, which arose on January 28, 1999. Accordingly, the Office properly terminated appellant's wage-loss compensation and medical benefits based on Dr. Hanley's opinion.

CONCLUSION

The Office met its burden of proof to terminate appellant's compensation and medical benefits effective April 13, 2008.

[17] It is noteworthy that Dr. Totta similarly mentioned appellant's deconditioning when he conducted his March 10, 2008 follow-up examination.

[18] Contrary to counsel's argument, Dr. Hanley was aware of appellant's "actual accepted condition." Dr. Hanley also referenced Dr. Parisien's February 28, 2001 examination on behalf of the Office.

[19] Dr. Hanley imposed a four-hour limitation on twisting and bending. He also noted that appellant could perform eight hours of pushing, pulling and lifting, with a 50-pound weight restriction.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 2008
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