United States Department of Labor
Employees' Compensation Appeals Board

P.P., Appellant	)	
and	)	**Docket No. 08-1709**
	)	**Issued: April 13, 2009**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY INSPECTION SERVICE, St. Paul, MN, Employer	)	

Appearances:
Brent Kleffman, 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 June 2, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 7, 2008, affirming the termination of compensation effective June 9, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate compensation for wage-loss and medical benefits effective June 9, 2007.

FACTUAL HISTORY

The Office accepted that appellant, a food inspector, sustained the following injuries in a motor vehicle accident in the performance of duty on August 19, 2004: right forearm abrasion; thoracic back sprain; cervical sprain; left shoulder sprain and exacerbation of cervical radiculitis.

Appellant returned to work in a light-duty position, worked his regular job October 5 to 7, 2004, then stopped working.

The attending family practitioner, Dr. Michael Ulrich, indicated in a June 13, 2006 report that appellant was capable of sedentary work at six hours per day, including driving time. The Office referred appellant for a second opinion examination by Dr. Daniel Lachance, a neurologist. By report dated September 12, 2006, Dr. Lachance provided a history and results on examination. He diagnosed dystonia or complex regional pain syndrome, stating that the consequences of the work injury were still active. Dr. Lachance also indicated that there was no evidence of a cervical radiculitis. He indicated that appellant could do light duty, with no repetitive use of the left arm or shoulder. In a work capacity evaluation (OWCP 5c), Dr. Lachance indicated that appellant could start working at four hours per day, increasing to six hours and then eight hours after two to four months.

According to the Office, a conflict in the medical evidence was created and appellant was referred to Dr. Thomas Raih, a Board-certified orthopedic surgeon. By report dated March 21, 2007, Dr. Raih provided a history and results on examination. He noted appellant had a history of a cervical spine injury, with a C6-7 fusion in 1988. Dr. Raih reported that a magnetic resonance imaging scan dated October 25, 2004 was essentially normal, and an electromyogram dated November 1, 2004 showed no structural injury to the neck back or left arm. He opined that appellant sustained soft tissue and musculoligamentous injuries on August 19, 2004 and appellant had some preexisting degenerative cervical disc disease. Dr. Raih noted that Dr. Lachance indicated this appeared to have become a chronic situation. He further stated, "There is a significant subjective element regarding his symptoms. In my opinion, any soft tissue injuries from the work-related motor vehicle accident of August 19, 2004 have completely resolved. Any ongoing subjective complaints are related to [appellant's] degenerative disc disease as discussed."

By letter dated April 16, 2007, the Office advised appellant that it proposed to terminate compensation for wage-loss and medical benefits based on the weight of the medical evidence. In a decision dated May 31, 2007, it terminated compensation for wage-loss and medical benefits effective June 9, 2007.

Appellant requested a hearing before an Office hearing representative, which was held on February 20, 2008. He submitted additional medical evidence, including a November 4, 2007 report from Dr. Ulrich, who reviewed the medical treatment and diagnosed cervicalgia and cervical syndrome. Dr. Ulrich stated that appellant had intermittent discomfort after the cervical fusion surgeon, but since the August 19, 2004 accident he had significant problems. He opined that "the motor vehicle accident of August 19, 2004, contributed on a more probable than not basis to [appellant's] disabling condition. In my opinion, [appellant] suffered soft tissue and musculoligamentous injuries during the August 19, 2004 accident. Given the fact that there has been little recovery to date, this appears to be a permanent disability."

By decision dated May 7, 2008, the hearing representative affirmed the May 31, 2007 Office decision. The hearing representative found that Dr. Raih represented the weight of the medical evidence.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1]

ANALYSIS

The Office referred appellant to Dr. Raih as a referee physician pursuant to 5 U.S.C. § 8123(a).[2] The Board concurs with appellant that there was no disagreement between Dr. Ulrich, the attending physician, and the second opinion examiner, Dr. Lachance, warranting a referee examination. Dr. Ulrich referred to "sedentary" work without further explanation, limiting appellant to six hours per day of work, including driving time. Dr. Lachance reported that appellant continued to have residuals of the employment injury and could work initially at four hours per day, with a gradual increase in hours. Both physicians indicated that appellant had residuals of the employment injury and could work part time with restrictions. There was no conflict in the evidence under 5 U.S.C. § 8123(a) requiring a referee examination. The referral to Dr. Raih is as a second opinion examination.[3]

Since Dr. Raih is not a referee physician, his report is not entitled to the special weight accorded a referee physician. While Dr. Raih provided a rationalized medical opinion, the second opinion examiner, Dr. Lachance, provided a rationalized opinion that does not support termination of compensation for wage-loss and medical benefits. Dr. Lachance provided a complete report indicating that appellant continued to have employment-related disability. The Board finds that Dr. Raih did not constitute the weight of the medical evidence. In addition, appellant submitted probative medical evidence from the attending physician, Dr. Ulrich, supporting a continuing employment-related disabling condition. This evidence is sufficient to create a conflict with Dr. Raih under 5 U.S.C. § 8123(a) that was not resolved.

It is the Office's burden of proof to terminate compensation for wage-loss and medical benefits effective June 9, 2007. Based on the evidence of record, the Office did not meet its burden of proof in this case.

CONCLUSION

The Board finds the evidence was not sufficient to meet the Office's burden of proof to terminate compensation for wage-loss and medical benefits effective June 9, 2007.

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[1] *Patricia A. Keller*, 45 ECAB 278 (1993).

[2] This section provides that, if there is a 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 the examination. This is called a referee examination. 20 C.F.R. § 10.321(b).

[3] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 7, 2008 is reversed.

Issued: April 13, 2009
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