United States Department of Labor
Employees' Compensation Appeals Board

J.V., Appellant	)	
and	)	**Docket No. 09-314**
	)	**Issued: August 18, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Weirton, WV, Employer	)	

Appearances:
Alan J. Shapiro, 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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 13, 2008 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated March 31, 2008 and an Office hearing representative dated October 27, 2008 terminating his medical and compensation benefits effective March 31, 2008. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective March 31, 2008, for his accepted back injury; and (2) whether appellant met his burden of proof to establish that he had any disability or medical condition after March 31, 2008 causally related to his accepted employment injury.

FACTUAL HISTORY

On August 14, 2006 appellant, then a 53-year-old city letter carrier, filed a traumatic injury claim alleging that on that date he was in a motor vehicle accident during the performance

of his federal employment when a car ran the light and hit his employing establishment vehicle. In an August 28, 2006 report, Dr. Joseph G. Donzella, an osteopath, noted that he was treating appellant for follow up of low back pain secondary to a motor vehicle accident. He noted that appellant had a long-standing history of lumbar back dysfunction. Dr. Donzella listed assessments of low back pain with right radiculopathy, recent motor vehicle accident and history of lumbar disc disease. On October 5, 2006 the Office accepted appellant's claim for sprain of back, lumbar region.

By letter dated February 1, 2007, the Office referred appellant to Dr. T. Vertosick, a neurosurgeon, for a second opinion. In a medical opinion dated February 15, 2007, Dr. Vertosick noted that appellant had no external findings or objective findings of a strain/sprain at this time. He indicated that appellant should be able to return to work and noted that he would place no restrictions on him for the event of August 14, 2006. Dr. Vertosick further noted that appellant needed no further treatment and had no limitation with regard to the August 14, 2006 employment injury. He noted that there was a nonindustrial and preexisting disability from a previous automobile accident that was nonwork-related.

In a July 12, 2007 report, Dr. Donzella indicated that appellant was not able to lift weights of 35 to 75 pounds on an intermittent basis and carry mail. He noted that appellant was only capable of doing clerical work or retrieval of light objects weighing less than 10 pounds. Dr. Donzella indicated that appellant walked with a cane and with an antalgic gait. He noted minimal weakness in the lower extremities and positive 2 plus over 4 plus reflex in both at the patella tendons and at the Achilles tendon reflex points. Dr. Donzella also noted subjective complaints of pain on twisting and bending.

In a July 25, 2007 letter, Dr. G.P. Naum, a Board-certified family practitioner, noted that appellant had been his patient since April 2, 2007. He noted that appellant's September 2, 2006 magnetic resonance imaging (MRI) scan showed very significant problems despite prior surgery at L4-5. Dr. Naum noted that the disc at L3-4 showed a central disc herniation with moderate spinal stenosis and the disc at L4-5 showed moderate facet joint degenerative disc disease. He also noted that the MRI scan of this thoracic spine showed spinal stenosis T2-9. In a work capacity evaluation of the same date, Dr. Naum also indicated that appellant was unable to work due to prior surgery and failed back syndrome. He discussed at length appellant's medical history since the accident. Dr. Naum opined that, "There is no way [appellant] can fulfill his duties as a mail carrier at this time. Lifting 35 [pounds] is out of the question." Dr. Naum then concluded, "It is my opinion that [appellant] is completely and totally disabled from his occupation as a direct result of his occupational-related injury sustained on April 14, 2006.

In an August 9, 2007 addendum, Dr. Vertosick noted that he just received a position description for city carrier and the reports of Drs. Naum and Donzella. He noted that this information did not change his opinion as set forth in his report dated February 15, 2007. Dr. Vertosick noted that his release of appellant to his full-time position as city letter carrier was with regard to the April 14, 2006 work injury only. He noted that any restrictions appellant would have been based on the basis of nonwork-related problems which predated the 2006 event are not applicable. Dr. Vertosick noted that his opinion was that he saw no residual of a work-related event on August 2006.

By letter August 27, 2007, the Office authorized appellant's request to change his treating physician to Dr. Naum from Dr. Donzella as Dr. Donzella's Office terminated treatment of appellant.

In order to resolve the conflict between Drs. Naum and Donzella (appellant's treating physicians) and Dr. Vertosick (the second opinion physician) with regard to appellant's disability status and the need for additional medical treatment, the Office referred appellant to Dr. Donald M. Whiting, a Board-certified neurosurgeon, for an impartial medical examination. In a report dated December 14, 2007, Dr. Whiting diagnosed appellant with lumbar muscle strain, resolved, secondary to August 14, 2006 motor vehicle accident, right L4-5 herniated nucleous pulposus status post microdiscectomy with resolved lumbar radiculopathy unrelated to the August 14, 2006 work-related injury, degenerative changes and spinal stenosis of L3-4, L4-5 and L5-S1 unrelated to August 14, 2006 work injury, chronic low back pain unrelated to August 14, 2006 work injury and depression unrelated to August 14, 2006 work injury. He noted that prior to the August 14, 2006 motor vehicle accident, appellant had a chronic history of back, hip and thigh pain as well as a history of a lumbar radiculopathy and that these were unrelated to the August 14, 2006 injury. Dr. Whiting noted that appellant had been on light duty prior to the motor vehicle accident related to his chronic and preexisting conditions. He noted that at the present time appellant had no objective findings of neurologic deficit or musculoskeletal strain or sprain and that he could return to his previous occupation based on those findings today. Dr. Whiting further opined that appellant could return to his previous occupation as a city mail carrier.

On February 28, 2008 the Office issued a notice of proposed termination wherein it proposed to terminate appellant's medical benefits as well as compensation for wage loss. By decision dated March 31, 2008, it finalized the termination of appellant's wage-loss compensation and medical benefits effective the date of the decision.

By letter dated April 9, 2008, appellant, through his attorney, requested a telephonic hearing.

In a May 14, 2008 report, Dr. Naum noted that appellant had been his patient since April 2, 2007. He restated his opinion that appellant was completely and totally disabled from his occupation as a direct result of his occupationally-related injury sustained on August 14, 2006 and will never be able in the future to sustain gainful employment of any kind.

At the hearing held on August 12, 2008, appellant discussed the motor vehicle accident. He testified that at the time of the accident he was working modified duty due to prior back surgery, that at the time of the August 2006 motor vehicle accident he was not taking any prescription pain medication, that he has not returned to work since the August 2006 motor vehicle accident and noted that he went to see Dr. Naum because he is a pain specialist. Appellant testified that he was in a prior motor vehicle accident in 2004 that happened on his way to work and also noted a December 2005 work injury that was accepted for a back injury. He noted that he had back surgery in January 2006. At the hearing, counsel argued that Dr. Whiting did not understand that if a work injury aggravated a prior injury, it became part of the claim. He asks that the case be remanded for a further report from the impartial medical examiner.

By decision dated October 27, 2008, the hearing representative affirmed the March 31, 2008 termination of compensation.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[1] Having determined that an employee has a disability causally related to his federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[2] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.[3]

Section 8123(a) provides 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.[4] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the second opinion physician, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[5] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof in terminating appellant's compensation and medical benefits effective March 31, 2008.

The medical record and appellant's testimony indicate that at the time of his work-related motor vehicle accident August 14, 2006, he was working with restrictions due to a preexisting back condition. As a result the August 14, 2006 employment-related motor vehicle accident, the Office accepted his claim for sprain of back, lumbar region. Appellant's treating physicians, Drs. Donzella and Naum, opined that he continued to be totally disabled as a result of the work

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

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

[3] *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey* 49 ECAB 166 (1997).

[4] 5 U.S.C. § 8123(a).

[5] 20 C.F.R. § 10.321.

[6] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch* 54 ECAB 313 (2003).

accident. The second opinion physician, Dr. Vertosick, disagreed, and opined that appellant had no residuals from this work accident and that any disability was related to his prior injuries. Due to the conflict between appellant's treating physicians, Drs. Donzella and Naum, and the second opinion physician, Dr. Vertosick, the Office properly referred appellant to Dr. Whiting for an impartial medical examination. In his opinion dated December 14, 2007, Dr. Whiting opined that appellant's lumbar muscle strain related to the August 14, 2006 accident had resolved and that the remaining injuries from which appellant suffered were unrelated to the August 14, 2006 employment injury. He noted that appellant had been on light duty prior to the motor vehicle accident and stated at the present time he had no objective findings of neurologic deficit or musculoskeletal strain or sprain and that he could return to his position as a city mail carrier. Dr. Whiting's well-rationalized opinion as the impartial medical examiner represents the weight of the medical evidence.[7] Accordingly, the Office properly terminated appellant's compensation and medical benefits.

LEGAL PRECEDENT -- ISSUE 2

After a termination or modification of benefits which is clearly justified on the basis of the evidence, the burden or proof to reinstate compensation or medical benefits rests with the claimant. The claimant must establish by the weight of reliable, probative and substantial evidence that a disability related to employment continued to exist after termination of benefits.[8]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that he had any continuing disability or medical condition after the termination of benefits on March 31, 2008. After the termination of benefits based on the well-rationalized opinion of the impartial medical examiner, Dr. Whiting, submitted a May 14, 2008 opinion wherein Dr. Naum noted that he was completely and totally disabled from his occupation as a direct result of the occupational injury of August 14, 2006. This opinion is essentially repetitive of the physician's prior statements and is insufficient to overcome the special weigh given the impartial medical examiner. Moreover, as Dr. Naum was on one side of the conflict Dr. Whiting was selected to resolve, his report may not overcome the special weight of Dr. Whiting's report or create a new conflict in medical opinion.[9] Accordingly, appellant did not meet his burden of proof to establish that he was entitled to medical and compensation benefits after March 31, 2008.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits for his accepted back injury effective March 31, 2008. The Board further

[7] *Id.*

[8] *Franklin D. Haislah*, 52 ECAB 132 (2000); *Howard Y. Miyashiro*, 43 ECAB 1101(1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

[9] *See Jaja K. Asaramo*, 55 ECAB 104 (2004).

finds that appellant not met his burden of proof to establish that he had any disability or medical condition after March 31, 2008 causally related to his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 27 and March 31, 2008 are affirmed.

Issued: August 18, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board