

United States Department of Labor
Employees' Compensation Appeals Board

P.W., Appellant

and

DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Northport, NY, Employer

)
)
)
)
)
)
)
)
)
)
)

Docket No. 08-1561
Issued: February 9, 2009

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 6, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs merit decision dated April 21, 2008, which terminated her compensation 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 met its burden of proof to terminate appellant's wage-loss and medical benefits effective April 21, 2008.

FACTUAL HISTORY

This is the second appeal before the Board. In a November 12, 1998 decision, the Board found that the case was not in posture for decision on whether appellant sustained a recurrence of

disability in April 1995 causally related to her accepted lumbosacral sprain. The facts of the claim as set forth in the prior Board decision, are hereby incorporated by reference.¹

On remand, the Office accepted that appellant sustained recurrences of disability on April 30 and August 11, 1995. In a September 26, 2000 decision, it determined that her actual earnings as a modified licensed practical nurse fairly and reasonably represented her wage-earning capacity. In decisions dated February 22 and June 14, 2001, the Office affirmed the September 26, 2000 wage-earning capacity decision.

On August 29, 2005 appellant filed a recurrence of disability claim (Form CA-2a) on August 22, 2005, asserting back and leg pain and spasms when getting up from a chair. She stopped work on August 22, 2005 and did not return. In a November 18, 2005 letter, the Office advised appellant that her claim for a recurrence of disability on August 22, 2005 was being developed as a new injury claim. It assigned appellants' claim file number xxxxxx755 and accepted the condition lumbosacral radiculitis. The Office noted that the medical evidence provided did not establish that appellant's degenerative disc disease, herniated disc or bulging disc were employment related.

In a July 30, 2007 medical report, Dr. Robert A. Smith, a Board-certified orthopedic surgeon and Office referral physician, opined that the soft issue spine strain from the December 15, 1991 work incident had resolved. He noted that there was some persistent low grade neuritis in the right lower extremity related to the August 22, 2005 work incident. Dr. Smith explained that the mild atrophy in the right calf was a residual of the August 22, 2005 incident and was unlikely to completely resolve since it had been present for essentially two years. He advised that appellant was able to perform a sedentary or light-duty job with lifting restrictions. Dr. Smith further opined that appellant's current treatment, which essentially involved medication, was reasonable and related to the August 22, 2005 work incident.

In attending physician's reports, Dr. David Katz, a physiatrist and appellant's treating physician, found that she was totally disabled due to her L5-S1 radiculopathy and discogenic disease causally related to her August 22, 2005 employment injury. In an August 10, 2007 letter, Dr. Katz confirmed that appellant was on chronic narcotic medication and that such medication disabled her.

The Office found a conflict in medical opinion between Dr. Katz and Dr. Smith. By letter dated September 27, 2007, it referred appellant to Dr. Russell N. Worobec, a Board-certified orthopedic surgeon, for an impartial medical examination on her capacity for work.

In an October 22, 2007 report, Dr. Worobec reviewed appellant's history and noted that her initial diagnosis of lumbar strain/sprain was correct. He advised that the minor herniation noted on magnetic resonance imaging (MRI) scan was not responsible for her back complaints. Dr. Worobec stated that the changes at the disc level were not produced by trauma and that she had no motor or sensory changes in the lower extremities. He stated that physical examination failed to reveal any sign of radiculopathy involving the lower or upper extremities. Dr. Worobec found that she had degenerative disc changes and progressive changes of wear and tear, as noted

¹ Docket No. 97-933 (issued November 12, 1998).

on the recent MRI scan. He opined that appellant's pain was not caused by the herniated disc at L5-S1 but was produced by the degenerative changes noted at the disc level. Dr. Worobec noted that appellant followed the typical pattern associated with this condition and on many occasions by a variety of physicians it had been recorded that she had no motor, sensory or reflex changes and that her spinal motions were minimally altered. He opined that appellant's work-related disability initially in 1991 was due to a stress strain which had long subsided. Dr. Worobec also stated that the August 1995 work injury produced a mild strain. He opined that neither of those injuries produced any long-term disability. Dr. Worobec noted that appellant's physical status had changed appreciably since 1991 as she was now a Grade 2 diabetic, had thyroid cancer, had a major portion of the thyroid gland removed and had hypothyroidism. He opined that appellant could not return to any work activities due to her present medical conditions produced by endocrine imbalance, diabetes, cancer of the thyroid and generalized deconditioning. Dr. Worobec noted that she did not show any true radicular signs. He opined that the work injuries appellant sustained were temporary and could be classified as strain/sprain without any radicular involvement. Dr. Worobec further noted that the physical examination he conducted indicated no radicular problems originating in the lumbar spine.

Following additional testing,² Dr. Worobec stated in an October 29, 2007 addendum report that electrodiagnostic testing of both lower extremities were within normal limit with no evidence of lumbosacral radiculopathy or peripheral neuropathy.

On January 23, 2008 the Office proposed terminating appellant's compensation benefits based on the report of Dr. Worobec, the impartial medical examiner.

In a February 16, 2008 letter, appellant disagreed with the proposed termination. She contended that her December 15, 1991 work injury resulted in a herniated disc. Appellant enclosed copies of a March 18, 1996 EMG; a January 31, 1992 MRI scan; and a May 10, 2005 nerve conduction report.

In a June 28, 1996 letter, Dr. Jimmy Lim, a Board-certified orthopedic surgeon, opined that appellant's December 15, 1991 work injury was a disc herniation and not merely a lumbar sprain/strain. He advised that appellant had continuing complaints following the December 15, 1991 work injury and an MRI scan taken two months post injury showed a disc herniation at L5-S1. Dr. Lim noted that appellant's congenital posterior spinal fusion defect was not a contributing factor to her current condition and symptoms.

In attending physician reports and clinic notes dated January 24, February 20 and March 20, 2008, Dr. Katz opined that appellant was totally disabled due to discogenic disease and lumbosacral radiculopathy related to her accepted work injuries.

By decision dated April 21, 2008, the Office terminated appellant's wage-loss and medical benefits effective that date.

² An electromyogram (EMG) was performed for Dr. Worobec on October 22, 2007.

LEGAL PRECEDENT

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ 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.⁴ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which required further medical treatment.⁷

Section 8123(a) 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 an examination.⁸ It is well established that, when 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.⁹

ANALYSIS

The Office accepted the condition of lumbosacral strain and lumbosacral radiculitis and eventually placed her on the periodic rolls. It has the burden of justifying the termination of appellant's compensation for these medical conditions.

The Office found a conflict in medical opinion between appellant's treating physician, Dr. Katz, who stated that she was totally disabled due to her work injury and Dr. Smith, the second opinion physician, who advised that appellant could work sedentary duty. It referred the case to an impartial medical specialist, Dr. Worobec who concluded in reports dated October 22 and 29, 2007 that appellant's current condition and disability were no longer related to either of her work injuries. Dr. Worobec explained that the minor disc herniation noted on an MRI scan

³ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁴ *Id.*

⁵ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁶ *Roger G. Payne*, 55 ECAB 535 (2004).

⁷ *Pamela K. Guesford*, 53 ECAB 726 (2002).

⁸ 5 U.S.C. § 8123(a); *F.R.*, 58 ECAB ____ (Docket No. 05-15, issued July 10, 2007); *Regina T. Pellecchia*, 53 ECAB 155 (2001).

⁹ *See Gloria J. Godfrey*, 52 ECAB 486 (2001).

was not responsible for her back complaints as the changes noted at the disc level were not produced by trauma. Furthermore, a review of the medical evidence along with his examination findings revealed no motor or sensory changes in the lower extremities or any sign of radiculopathy involving the lower or upper extremities. Dr. Worobec found that the recent MRI scan revealed degenerative disc changes and progressive changes of wear and tear. He concluded that appellant's work-related disability had long subsided and neither of her work injuries produced any long-term disability. Dr. Worobec opined that appellant did not currently have any residuals from her work injuries as there was no radicular problems originating in the lumbar spine, which recent electrodiagnostic testing confirmed. He also addressed the role appellant's nonwork-related conditions play in appellant's disability as well as the role of her degenerative back condition. Dr. Worobec explained that appellant's continuing condition and disability was produced by degenerative and other conditions that were not caused by her employment injuries. The Office relied on Dr. Worobec's opinion in its April 21, 2008 decision, which found that appellant had no residuals or continuing disability stemming from her work-related employment injuries and was therefore not entitled to compensation benefits.

The Board finds that Dr. Worobec's impartial medical opinion establishes that appellant's accepted conditions resolved without continuing disability or residuals from her accepted employment injuries. His opinion is based on a thorough medical examination, a review of the medical evidence of record in both of appellant's cases and a thorough discussion of medical tests performed. Dr. Worobec's opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office properly accorded Dr. Worobec's opinion special weight¹⁰ and his report establishes that residuals of appellant's accepted conditions had resolved.

Appellant submitted additional medical reports from Dr. Katz, who opined that appellant was totally disabled from her discogenic disease and lumbosacral radiculopathy, which he opined was causally related to her work injuries.¹¹ The Board notes that he did not provide any new findings or rationale concerning appellant's ability to work or the continuation of her accepted lumbosacral radiculopathy. Additionally, Dr. Worobec found that recent electrodiagnostic testing of both lower extremities were all within normal limits with no evidence of lumbosacral radiculopathy or peripheral neuropathy. Furthermore, as Dr. Katz was on one side of the conflict which was resolved by Dr. Worobec, his additional reports are insufficient to overcome the weight accorded Dr. Worobec's report as the impartial medical specialist's report or to create a new conflict with it.¹²

Appellant also submitted electrodiagnostic testing from 1992, 1996 and 2005 and a June 28, 1996 report from Dr. Lim. This evidence was previously of record, predated the proposed termination and was reviewed by Dr. Worobec, who provided a full discussion as to

¹⁰ *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹¹ The Board notes that discogenic disease was not accepted by the Office as being employment related. The Board notes that, for conditions not accepted by the Office as employment related, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹² *Richard O. Brien*, 53 ECAB 234 (2001).

why the initial diagnosis of lumbar strain/sprain was correct and why the minor herniation noted on MRI scan was not responsible for appellant's current back complaints. Thus, these previously considered reports are insufficient to overcome the opinion of Dr. Worobec.

Accordingly, the Board finds that the Office properly terminated appellant's compensation benefits effective April 21, 2008, as the weight of the medical evidence established that her work-related conditions had resolved.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective April 21, 2008.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs decision dated April 21, 2008 is affirmed.

Issued: February 9, 2009
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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