United States Department of Labor
Employees' Compensation Appeals Board

L.P., Appellant	)	
and	)	**Docket No. 09-124**
	)	**Issued: July 20, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Richmond, CA, Employer	)	

Appearances:
Hank Royal, 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 October 17, 2008 appellant, through her representative, filed a timely appeal from November 21, 2007 and August 18, 2008 merit decisions of the Office of Workers' Compensation Programs terminating her entitlement to medical benefits and from an April 16, 2008 merit decision denying her claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's entitlement to medical benefits effective November 21, 2007 on the grounds that she had no residuals of her employment-related injury; and (2) whether she has established that she sustained a permanent impairment due to her accepted work injury. On appeal appellant's representative contends that there remains an unresolved conflict in medical opinion.

FACTUAL HISTORY

This case is before the Board for the second time. By decision dated May 1, 2007, the Board reversed a November 7, 2005 Office decision terminating appellant's compensation and medical benefits and a February 9, 2006 decision denying her request for reconsideration.[1] The Board found that the June 12, 2002 and September 8, 2003 reports from Dr. Arthur M. Auerbach, a Board-certified orthopedic surgeon selected to resolve a conflict in medical opinion, were insufficiently rationalized to establish that she had no further aggravation of her employment-related lumbar condition. The Board concluded that, as the record contained an unresolved conflict in medical opinion, the Office had not met its burden of proof to terminate appellant's benefits for her December 16, 1999 work injury. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.

On May 22, 2007 the Office referred appellant to Dr. Matthew Mitchell, a Board-certified orthopedic surgeon, for a second opinion examination.[2] On June 5, 2007 Dr. Mitchell diagnosed lumbar degenerative disc disease unconnected to appellant's injury as described in the statement of accepted facts. He opined that appellant's symptoms were due to "underlying degenerative disc disease in the lumbar spine."

In a form report dated June 18, 2007, Dr. David Wren, Jr., an attending orthopedic surgeon, diagnosed chronic lumbosacral strain and noted that appellant had retired. On August 23, 2007 he diagnosed lumbar sprain/strain and found that she remained disabled from work.

In a supplemental report dated September 7, 2007, Dr. Mitchell found that appellant's 2001 electromyography/nerve conduction studies results were normal. He diagnosed lumbar degenerative disc disease unrelated to her accepted employment injury.

On September 26, 2007 the Office notified appellant of its proposed termination of her medical benefits based on the opinion of Dr. Mitchell. In a decision dated November 21, 2007, it finalized the termination of her medical benefits effective that date on the grounds that she had no further residuals of her accepted work injury.

On October 3, 2007 appellant filed a claim for a schedule award. On December 17, 2007 she requested an oral hearing on the November 21, 2007 termination decision. By decision dated April 16, 2008, the Office denied appellant's claim for a schedule award. It found that she had not submitted any medical evidence showing that she had a permanent impairment of a scheduled member.

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[1] Docket No. 07-155 (issued May 1, 2007). The Office accepted that on December 16, 1999 appellant sustained an aggravation of a lumbar spine condition when she stepped on a broken tile and fell through the floor. It had previously accepted that she sustained a strain of the neck, left shoulder and lumbar spine due to a May 6, 1999 motor vehicle accident, assigned file number xxxxxx616. The Office, in a decision dated November 7, 2005, found that appellant had continuing residuals of her May 6, 1999 work injury and expanded acceptance of the claim to include an aggravation of preexisting lumbar osteoarthritis and degenerative disc disease.

[2] The Office indicated in an updated statement of accepted facts that appellant had been released to full-time employment on March 14, 2002.

On May 20, 2008 appellant's representative requested a review of the written record in lieu of an oral hearing. In a statement dated June 12, 2008, he contended that Dr. Mitchell's opinion was outside of the statement of accepted facts and insufficient to resolve the conflict in medical opinion.

By decision dated August 18, 2008, an Office hearing representative affirmed the November 21, 2007 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[3] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[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]

Section 8123(a) of the Federal Employees' Compensation Act[6] 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.[7] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, 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.[8]

In situations where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.[9]

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[3] *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Pamela K. Guesford*, 53 ECAB 727 (2002).

[4] *Id*.

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

[6] 5 U.S.C. §§ 8101-8193.

[7] *Id.* at § 8123(a).

[8] 20 C.F.R. § 10.321.

[9] *See Phillip H. Conte*, 56 ECAB 213 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003).

ANALYSIS -- ISSUE 1

The Board previously found that the opinion of Dr. Auerbach, an impartial medical examiner, was insufficiently rationalized to establish that appellant had no further disability or medical condition caused by her December 16, 1999 work injury. The Board concluded that there remained an unresolved conflict in medical opinion.

On May 22, 2007 the Office referred appellant to Dr. Mitchell for a second opinion examination. As held by the Board, however, the record contained an unresolved conflict in medical opinion at the time of the Office's referral of appellant to Dr. Mitchell. Where the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion or if his supplemental report is also vague, speculative or lacking in rationale, the Office must submit the case record and a detailed statement of accepted facts to a second impartial specialist for the purpose of obtaining his or her rationalized medical opinion.[10] It previously requested that Dr. Auerbach clarify his June 12, 2002 report; however, the Board found that his September 8, 2003 supplemental report lacked sufficient rationale to meet the Office's burden of proof to terminate compensation. As Dr. Auerbach was unable to clarify his opinion, the Office should have referred appellant to a new impartial medical examiner to resolve the conflict in medical opinion. Consequently, as there remains an unresolved conflict in medical opinion, the Office failed to meet its burden of proof to terminate her medical benefits.

LEGAL PRECEDENT -- ISSUE 2

Section 8107 of the Act authorizes the payment of schedule awards for the loss or loss of use of specified members, organs or functions of the body. Such loss or loss of use is known as permanent impairment.[11] Before the American Medical Association, *Guides to the Evaluation of Permanent Impairment* can be utilized, a description of appellant's impairment must be obtained from his or her physician. The evaluation made by the attending physician must include a description of the impairment including, where applicable, the loss in degrees of active and passive motion of the affected member or function, the amount of any atrophy or deformity, decreases in strength or disturbance of sensation, or other pertinent descriptions of the impairment. This description must be in sufficient detail so that the claims examiner and others reviewing the file will be able to clearly visualize the impairment with its restrictions and limitations.[12]

A claimant seeking compensation under the Act has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.

[10] *Id.*; *see also Harold Travis*, 30 ECAB 1071 (1979).

[11] 20 C.F.R. § 10.404.

[12] *Peter C. Belkind*, 56 ECAB 580 (2005); *Vanessa Young*, 55 ECAB 575 (2004).

A claimant seeking a schedule award, therefore, has the burden of establishing that her accepted employment injury caused permanent impairment of a scheduled member, organ or function of the body.[13]

ANALYSIS -- ISSUE 2

Appellant has not submitted sufficient medical evidence to establish that she sustained any permanent impairment causally related to her accepted work injury. She requested a schedule award on October 3, 2007 but submitted no supporting medical evidence. In a form report dated June 18, 2007, Dr. Wren diagnosed chronic lumbosacral strain and noted that appellant had retired. On August 23, 2007 he diagnosed lumbar sprain/strain and asserted that she was disabled from work. Dr. Wren did not state that appellant had any permanent impairment causally related to her accepted lumbar conditions.[14]

As noted, the Office evaluates schedule award claims pursuant to the standards set forth in the A.M.A., *Guides*. Appellant has the burden of proof to submit medical evidence supporting that she has permanent impairment to a scheduled member of the body.[15] As she has not submitted such evidence, she has not established entitlement to a schedule award.

CONCLUSION

The Board finds that the Office improperly terminated appellant's entitlement to medical benefits effective November 21, 2007 on the grounds that she had no residuals of her employment-related injury. The Board further finds that she has not established that she sustained a permanent impairment due to her accepted work injury.

[13] *See A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009); *Annette M. Dent*, 44 ECAB 403 (1993).

[14] *See Peter C. Belkind*, *supra* note 12; *Noe L. Flores*, 49 ECAB 344 (1988).

[15] *See Annette M. Dent*, *supra* note 13.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 18, 2008 and November 21, 2007 are reversed and the decision dated April 16, 2008 is affirmed.

Issued: July 20, 2009
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