

**United States Department of Labor
Employees' Compensation Appeals Board**

R.J., Appellant)
and) Docket No. 08-2151
DEPARTMENT OF THE ARMY, CORPS OF) Issued: June 19, 2009
ENGINEERS, Vicksburg, MS, Employer)

)

Appearances:

James R. Clary, Jr., Esq., for the appellant

No appearance, for the Director

Oral Argument May 7, 2009

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2008 appellant, through his attorney, filed a timely appeal from an April 25, 2008 merit decision of the Office of Workers' Compensation Programs, denying modification of its termination of his compensation and authorization for medical treatment. 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 compensation effective November 14, 2003 on the grounds that he had no further disability causally related to his August 19, 2001 employment injury; (2) whether the Office properly terminated his authorization for medical treatment; and (3) whether appellant has established that he had any continuing employment-related disability after November 14, 2003.

FACTUAL HISTORY

On August 19, 2001 appellant, then a 40-year-old revetment worker, filed a traumatic injury claim alleging that on that date he injured his lower back and neck when he fell backwards onto rocks after he was struck below the abdomen by a swaying spring line. He stopped work on that date.¹ The Office accepted appellant's claim for cervical strain.

Appellant was in a nonwork-related motor vehicle accident in November 2001.² A magnetic resonance imaging (MRI) scan study of the cervical spine, obtained on November 1, 2002, revealed degenerative changes and a slight diffuse disc bulge at C3-4.³ An MRI scan study of the lumbar spine dated November 2, 2001 showed degenerative changes and a disc bulge at L1-2 contracting the ventral surface of the conus medullaris and diffuse disc bulges at L2-3, L3-4, L4-5 and L5-S1. In a report dated February 12, 2002, Dr. Joseph Bourcree, a Board-certified orthopedic surgeon, evaluated appellant for neck, arm, back and leg pain. He stated:

"[Appellant] reports on August 19, 2001, he sustained a work[-]related accident as he was hit by a cable in the groin area and knocked down. In November 2001, [he] was involved in a motor vehicle accident as a passenger, restrained with lap seat belt only in which the vehicle turned over several times. [Appellant] reports that his neck, arm, back and leg pain has been worse following the motor vehicle accident."

Dr. Bourcree diagnosed cervical, thoracic and lumbar spondylosis and degenerative disc disease with radiculitis.

In a treatment note dated November 7, 2002, Dr. Warren Williams, Sr., a Board-certified neurosurgeon, diagnosed failed back syndrome and found that appellant was disabled from work. On January 9, 2003 he diagnosed lumbar pain/strain and indicated that his work status was unknown.⁴

On April 2, 2003 the Office referred appellant to Dr. Alonso Diodene, Jr., a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated May 1, 2003, Dr. Diodene found that appellant had symptoms of chronic cervical and lumbar strain unsupported by objective findings. He diagnosed chronic pain syndrome of the cervical and lumbar spine which might have a psychological component. Dr. Diodene opined that appellant did not have residuals of the August 19, 2001 work injury and noted that his symptoms "could

¹ In a statement accompanying the claim, appellant's supervisor indicated that he asked the physician at the emergency room whether he could perform light-duty work. The physician said yes but appellant responded that he wanted 14 days off as stated on the report. Appellant further related that he was not going to return to work.

² Although the Office requested that appellant provide a copy of the motor vehicle accident report, none was in the record.

³ The record contains only the first page of the cervical MRI scan study.

⁴ On May 1, 2003 Dr. Williams diagnosed cervical and lumbar pain/strain of the right leg and opined that his work status was unknown. On May 30, 2003 he diagnosed cervical and lumbar strain/sprain and found that appellant was disabled.

easily be related to the motor vehicle accident in which he was involved in November 2001.” He found that appellant could work full time with restrictions. In a May 21, 2003 addendum, Dr. Diodene checked “yes” that appellant’s cervical strain due to his August 19, 2001 employment injury had resolved.

The Office determined that a conflict in medical opinion existed between Dr. Williams and Dr. Diodene on the issue of appellant’s disability for employment. On August 1, 2003 it referred him to Dr. Donald C. Faust, a Board-certified orthopedic surgeon, for an impartial medical examination. On August 19, 2003 Dr. Faust reviewed the history of injury and the medical evidence of record. He listed findings on examination of pain with neck motion with absent two-point discrimination in the left hand and absent bilateral pinpoint discrimination. Dr. Faust noted that an MRI scan study of the cervical spine dated November 2, 2001 showed degenerative changes and a nonconforming disc herniation at C5-6 slightly contacting the cord. He stated:

“[Appellant] appears to have been struck by a cable in August 2001. He was involved in a motor vehicle accident in November 2001, also. [Appellant] has numerous subjective complaints without any objective signs of permanent injury. His physical examination does not point to any orthopedic condition involving the bones and joints or neurologic dysfunction. The radiographic and MRI [scan] studies to date do not point to a pathology caused by the event in August 2001. The abnormal changes are more consistent with degenerative changes appropriate for his age and level of activity.”

Dr. Faust found that appellant did not require any further treatment or restrictions on activities. In an accompanying work restriction evaluation, he advised that appellant could perform his usual employment without any limitations.

On October 10, 2003 the Office notified appellant of its proposal to terminate his compensation and authorization for medical treatment on the grounds that he had no further residuals of his work injury. By decision dated November 14, 2003, it finalized its termination of appellant’s compensation and medical benefits effective that date.

In progress reports dated October 10 and November 7, 2003, Dr. Williams diagnosed cervical and lumbar pain/strain and indicated that appellant’s work status was unknown. On December 5, 2003 he diagnosed lumbar pain and again found work status unknown.

On June 15, 2004 the Office received appellant’s request for an oral hearing. By decision dated July 8, 2004, it denied his request for an oral hearing as untimely.

On November 11, 2004 appellant, through his attorney, requested reconsideration. He submitted progress reports from Dr. Williams dated September 17, 2001 through July 13, 2004 and a report dated April 11, 2003 from Dr. James E. Hines, III, an internist, who noted that appellant sustained injuries on October 3, 2001 while working for the employing establishment. Dr. Hines diagnosed cervical sprain, low back sprain, arthritis. He concluded that appellant sustained work injuries on August 15, 2001.

By decision dated December 7, 2004, the Office denied his request for reconsideration as the evidence was insufficient to warrant reopening his case for further merit review.

Appellant submitted additional progress reports from Dr. Williams.

By decision dated February 3, 2006, the Board affirmed the Office's July 8, 2004 decision, denying appellant's request for an oral hearing as untimely.⁵

In a decision dated April 12, 2006, the Office denied appellant's request for reconsideration as it was untimely and the evidence submitted was insufficient to warrant reopening the case for merit review.

Appellant appealed to the Board. In an order dated November 9, 2006, the Board granted the Director's motion to remand the case and cancel oral argument.⁶ The Director noted that the Office had not retained the envelope containing appellant's reconsideration request and thus erred in denying his request as untimely. The Director advised that, on remand, the Office would conduct a "merit reconsideration decision pursuant to 20 C.F.R. § 10.606."

By decision dated February 8, 2007, the Office denied modification of its prior decisions.

On February 7, 2008 appellant, through his attorney, requested reconsideration. He submitted a September 2, 2002 report from Dr. Hines, who opined that appellant was under his care and unable to work. In a report dated February 7, 2008, Dr. Hines discussed his treatment of appellant from August 29, 2001 to the present and the results of the November 2, 2001 MRI scan studies of the cervical and lumbar spine. He stated:

"I have continued to treat [appellant] continuously following both the work-related accident and resultant injury and also subsequent to the intervening accident that it alleged to be the factor causing his current permanent disability. It is my professional opinion that the injuries evidenced by the MRI [scan studies] dated November 2, 2001 of [appellant's] cervical and lumbar spine were the direct result of the work-related injury. I referred him to Dr. Bourcree for further evaluation and following limited remedial treatment, [appellant] was subsequently involved in an automobile accident. However, while his injuries may have been exacerbated by this intervening accident, it is clear to me that the work[-]related accident started a chain of events that have led to his permanent disability.

"I would once again defer to the opinion of an orthopedic surgeon to determine the extent to which each of the two accidents contributed to his current medical condition. However, his initial injuries, all as evidenced by the November 2001

⁵ In an order dated December 8, 2004, the Board dismissed appellant's appeal of the July 8, 2004 decision, docketed as No. 05-860, for lack of attorney authorization. Order Dismissing Appeal, Docket No. 05-76 (issued December 8, 2004). The Board subsequently reinstated the appeal but dismissed the appeal again in an order dated February 10, 2005. Order Dismissing Appeal, Docket No. 05-76 (issued February 10, 2005).

⁶ Docket No. 06-1280 (issued November 9, 2005).

MRI [scan studies] were caused by the work-related accident which occurred on August 19, 2001."

By decision dated April 25, 2008, the Office denied modification of its prior 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. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ 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.⁸

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.⁹ 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.¹⁰ 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.¹¹

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained cervical strain on August 19, 2001. Appellant stopped work on that date and did not return. The Office determined that a conflict existed between Dr. Williams, his attending physician, and Dr. Diodene, an Office referral physician, on the extent of his disability for employment. It referred appellant to Dr. Faust for an impartial medical examination.

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.¹² The Board finds that the opinion of Dr. Faust, a

⁷ *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁸ *Jaja K. Asaramo*, 56 ECAB 200 (2004); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁹ 5 U.S.C. § 8123(a).

¹⁰ 20 C.F.R. § 10.321.

¹¹ *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

¹² *Id.*

Board-certified orthopedic surgeon, selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Faust accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.¹³ On August 1, 2003 he reviewed the medical evidence of record, including the results of diagnostic studies. Dr. Faust found subjective complaints on examination without any objective findings of an orthopedic condition. He provided rationale for his opinion by noting that the MRI scan studies showed changes "consistent with degenerative changes appropriate for [appellant's] age and level of activity" rather than anything caused by the August 2003 work injury. As Dr. Faust's report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.¹⁴ The Office met its burden of proof to terminate appellant's compensation benefits.

LEGAL PRECEDENT -- ISSUE 2

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹⁵ 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.¹⁶

ANALYSIS -- ISSUE 2

The Office met its burden of proof to terminate authorization for medical benefits through the opinion of Dr. Faust, the impartial medical examiner, who found that appellant had no need for further medical treatment due to his accepted condition of cervical strain. Dr. Faust explained that, based on his physical examination and the diagnostic studies, he required no further treatment. He reported that there were no objective findings of an orthopedic condition supportive of appellant's subjective complaints, noting that the MRI scan results revealed degenerative changes consistent with appellant's age and level of activity. As Dr. Faust's opinion is detailed and well rationalized, it is entitled to the special weight accorded an impartial medical examiner and establishes that appellant has no further residuals of his accepted employment injury.

LEGAL PRECEDENT -- ISSUE 3

Once the Office properly terminates appellant's compensation benefits, the burden shifts to him to establish that he has continuing disability after that date related to his accepted injury.¹⁷ To establish a causal relationship between the condition as well as any attendant disability

¹³ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁴ *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹⁵ *Katheryn E. Demarsh*, *supra* note 7; *Pamela K. Guesford*, 53 ECAB 727 (2002).

¹⁶ *Id.*

¹⁷ *Manual Gill*, *supra* note 13.

claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.¹⁸ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹⁹

ANALYSIS -- ISSUE 3

Subsequent to the Office's termination of compensation, appellant submitted progress reports from Dr. Williams dated October 2003 to July 2005. As Dr. Williams was on one side of the conflict in medical opinion resolved by the impartial medical examiner and his progress reports contain no new rationale, his reports are insufficient to overcome the special weight accorded the impartial medical examiner or to create a new conflict.²⁰

In a report dated April 11, 2003, Dr. Hines diagnosed cervical sprain, low back sprain and arthritis. He found that appellant had sustained an injury in August 2001. Dr. Hines, however, did not address the relevant issue of whether he was disabled subsequent to November 14, 2003 and thus his report is of little probative value.

On February 7, 2008 Dr. Hines reviewed his treatment of appellant and the results of diagnostic studies. He attributed the findings on the MRI scan studies of November 2, 2001 to the accepted employment injury. Dr. Hines opined that the motor vehicle accident may have aggravated appellant's condition but that the employment injury began the "chain of events that have led to his permanent disability." He deferred to a specialist to determine the percentage that the work injury and the motor vehicle accident contributed to appellant's disability. Dr. Hines did not directly address the pertinent issue of whether appellant remained disabled after November 14, 2003 due to his August 19, 2001 work injury. Instead, he recommended that a specialist evaluate him and determine the extent of his employment-related disability. Dr. Hines report is insufficient to overcome the weight accorded Dr. Faust, the impartial medical examiner. Consequently, appellant has not met his burden of proof to establish that he had any continuing disability after November 14, 2003.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation and authorization for medical treatment effective November 14, 2003 on the grounds that he had no further disability causally related to his August 19, 2001 employment injury. The Board further finds that he has not established that he had any continuing employment-related disability after November 14, 2003.

¹⁸ *Id.*

¹⁹ *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

²⁰ *Barbara J. Warren*, 51 ECAB 413 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 25, 2008 is affirmed.

Issued: June 19, 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