United States Department of Labor
Employees' Compensation Appeals Board

H.G., Appellant	)	
and	)	**Docket No. 09-88**
	)	**Issued: June 3, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Baltimore, MD, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 8, 2008 appellant filed a timely appeal of the Office of Workers' Compensation Programs' September 20, 2007 and June 27, 2008 decisions that denied his claim. 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 met its burden of proof to terminate appellant's compensation benefits effective September 20, 2007; (2) whether appellant established that he was totally disabled between May 19, 2006 and August 31, 2007 causally related to his May 19, 2006 employment-related injury; and (3) whether appellant has established that he is entitled to a schedule award due to his employment injury.

FACTUAL HISTORY

On May 20, 2006 appellant, then a 57-year-old city letter carrier, filed a traumatic injury claim alleging that on May 19, 2006 he sustained head and neck pain after a vehicle door hit his

head. He stopped work on May 19, 2006 and did not return. Appellant was subsequently terminated from his position on June 20, 2006. The employing establishment controverted the claim.

Appellant sought treatment from Dr. Philip Bovell, an orthopedic surgeon, on May 25, 2006. Dr. Bovell's disability certificate of the same date stated that appellant would be unable to work for two weeks beginning May 25, 2006. Subsequent disability certificates continued to indicate that appellant was disabled from his regular work. In a June 9, 2006 report, Dr. Bovell noted appellant's complaint of pain in his neck, shoulder, upper and lower back. He indicated that the injury to the neck and head areas were secondary to a van door that hit appellant's head while at work. Dr. Bovell noted appellant's history of prior low back injuries in 1994, 1998 and 2001. He diagnosed post-traumatic headaches, persisting dizziness and lightheadedness, cervical strain with spasms, muscular skeletal pain of the shoulders and upper mid-thoracic area, tingling numbness over the upper extremities to the elbow bilaterally, lumbar sacral strain with sciatic pain down the right leg down to the thigh area, sleep and appetite discomfort, right lower leg pain resolving and blurred vision resolving. Dr. Bovell noted appellant's neck flexion and extension to be five degrees and two degrees respectively with pain, and rotation to be five degrees with pain for the left and right. He advised avoiding heavy lifting, pulling and pushing.

In a June 12, 2006 report, Dr. Shobha Chidambaram, a neurologist, noted that appellant sustained a head injury on May 19, 2006 when hit by a car door at work. She noted appellant's complaint of neck pain, severe headache, dizziness and moderate back pain. Physical examination revealed paraspinal muscle spasm in the neck, cervical and lower lumbar region. Dr. Chidambaram listed an impression of post-traumatic cephalgia, dizziness, cervical sprain, degenerative arthritis, hypertension and lumbosacral sprain. She also noted that appellant had marked difficulty moving the neck, moving nearly 10 to 20 degrees angle.

In attending physician's reports, Form CA-20, dated July 18 and 28, 2006, Dr. Bovell noted the history of appellant being hit by a van door at work and also checked a box indicating a history of concurring or preexisting injury. He diagnosed headaches, dizziness, cervical strain, lumbosacral strain with sciatica down the right leg, and musculoskeletal pain from the shoulders to the mid back. Dr. Bovell checked a box "yes" indicating that appellant's condition was caused or aggravated by the employment activity.

On July 21, 2006 appellant filed a claim for compensation, Form CA-7, for wage-loss compensation for the period beginning May 19, 2006. He subsequently filed additional CA-7 forms claiming wage-loss compensation beginning May 19, 2006.

On August 1, 2006 the Office accepted appellant's claim for cervical and lumbar sprain. It noted that appellant would need to provide a detailed medical report to support a claim for wage-loss compensation.

Appellant subsequently submitted a July 24, 2006 report from Dr. Chidambaram who indicated that the results from appellant's electroencephalogram (EEG) were normal. Dr. Chidambaram noted that appellant was concerned about a small knot in his right occipital

area from the accident. She noted that appellant had limited neck movement and back spasms. Dr. Chidambaram diagnosed post-traumatic cephalgia, cervical sprain and lumbosacral sprain.

In an August 18, 2006 report, Dr. Bovell noted that appellant requested that he correct his account of appellant's history. He noted that appellant related that he had been discharged from the military with a 40 percent disability rating for his lumbosacral spine and cervical disc syndrome. Dr. Bovell indicated that appellant was still disabled from a 1994 work-related motor vehicle accident. He also indicated that appellant was still being treated for 1998 and 2001 nonwork-related injuries.

On August 29, 2006 Dr. Chidambaram noted appellant's complaint of frontotemporal headache. She listed an impression of severe frontotemporal headache, cervical sprain, lumbosacral sprain and occipital neuralgia. In a September 28, 2006 report, Dr. Chidambaram noted normal lumbosacral x-rays. Cervical spine x-ray indicated degenerative arthritis, degenerative changes from C4-7, worse at C6-7 and no evidence of fractures. On October 13, 2006 she noted appellant's continued complaint of neck pain, dizziness and extreme headache. A computerized tomography (CT) scan of the brain showed no bleeding. Dr. Chidambaram noted appellant's cervical range of movement was limited in all planes and that the electromyogram (EMG) results were abnormal, compatible with mild chronic cervical radiculopathy mainly affecting the C5-6 nerve root, probably secondary to an underlying cervical spinal pathology and moderate bilateral carpal tunnel syndrome. In subsequent reports, she reiterated previous diagnoses.

In an October 2, 2006 letter, the Department of Veterans Affairs noted that its records disclosed that appellant was 100 percent disabled due to service-connected disabilities.

In an October 20, 2006 report, Dr. Bovell noted degenerative changes at multiple levels based on cervical spine x-rays. A magnetic resonance imaging (MRI) scan of the cervical spine revealed mild spondylosis and disc disease throughout as well as a small herniation at C5-6. Dr. Bovell also noted that appellant's ability to return to full duty was still pending. On December 15, 2006 he noted that appellant's dizziness and lightheadedness had subsided and that neck and shoulder discomfort was slowly improving. Dr. Bovell advised that appellant not return to regular duty but that he could be retrained if wanted to return to work. In a February 16, 2007 report, he noted appellant's continued pain in both shoulders, the lumbosacral spine and cervical spine. Dr. Bovell also noted that the Department of Veterans Affairs considered appellant 100 percent disabled and that he also considered appellant to be "100 percent disabled from the multiplicity of problems … from this accident." On June 15, 2007 he noted no change in appellant's status. In an August 1, 2007 CA-20 form, Dr. Bovell indicated that there was no history of preexisting injuries, and he checked a box "yes" supporting that appellant's condition was work related. He advised that appellant remained disabled. Dr. Bovell continued submitting similar reports.

On July 17, 2007 the employing establishment advised the Office that appellant was seeking a schedule award.

On July 25, 2007 the Office referred appellant for a second opinion examination with Dr. Robert Smith, a Board-certified orthopedic surgeon. In an August 2, 2007 report, Dr. Smith

summarized the history of appellant's May 19, 2006 injury and subsequent treatment as well as his prior injuries. His examination revealed no spasm, atrophy, trigger points or deformity of the neck or back. Dr. Smith also noted a small knot of the right parietal region of the scalp without evidence of a break in the skin, which was a possible residual from a contusion. He noted that appellant's self-limiting range of motion of the neck and inappropriate pain behavior of the back indicated symptom magnification. Dr. Smith diagnosed soft tissue sprain of the neck and back. He concluded that appellant's radiculopathy and herniated disc at C5-6 were consistent with his military disability and unrelated to the work injury because the mechanism of injury was unlikely to cause these findings. Dr. Smith noted that appellant's carpal tunnel syndrome was also not related to his work injury. He found that appellant had reached maximum medical improvement and that the soft tissue sprains had completely resolved. Dr. Smith also noted that appellant's cervical spine chronic radiculopathy was not totally disabling and was preexisting as he was able to work prior to his May 19, 2006 injury. He opined that appellant could return to full duty with no further medical treatment for the accepted cervical and lumbar conditions as the work injury was not disabling. Dr. Smith noted complete resolution of residuals due to the work injury except for a small knot on the scalp which was not disabling. He also attached a work capacity evaluation form of the same date indicating that appellant could perform his usual job and that he had reached maximum medical improvement.

In a September 20, 2007 decision, the Office denied appellant's claim for compensation from May 19, 2006 through August 31, 2007 finding that the medical evidence failed to support disability due to his work-related injury during the claimed period. In another September 20, 2007 decision, it terminated appellant's medical benefits and wage-loss compensation effective that date finding that the weight of the medical evidence, Dr. Smith's opinion, demonstrated that appellant no longer had any disability or residuals due to the accepted conditions. Also in a September 20, 2007 decision, the Office denied appellant's claim for a schedule award on the grounds that the medical evidence did not support permanent impairment to a member or function of the body.

Appellant continued submitting medical evidence. In reports dated September 18 and December 5, 2007, Dr. Chidambaram noted appellant's complaint of back pain and restricted neck and back movements. She also noted that appellant could not move his neck more than 30 degrees. Dr. Chidambaram's examination revealed marked limitation of movements in the lumbar and cervical spine with paraspinal muscle spasm.

On October 19, 2007 Dr. Bovell responded to Dr. Smith's report. Regarding the small knot on appellant's scalp, he stated that it was hard to believe that a contusion to the head could last that long without giving appellant more severe symptoms. Dr. Bovell also clarified that the 100 percent disability rating was given only by the Department of Veterans Affairs. He could not justify that it was related to the May 19, 2006 work injury. Dr. Bovell opined that appellant's injury to the head, neck, shoulder and lumbosacral spine on May 19, 2006 was a severe injury that aggravated preexisting conditions, although much of the symptomatic problems had reduced. He concluded that the May 19, 2006 work incident was the direct cause of the aggravation of all symptoms mentioned in this and prior reports. In a December 14, 2007 report, Dr. Bovell noted treating appellant's continuing symptoms due to his May 19, 2006 work injury.

Appellant requested an oral hearing, which was held on February 28, 2008. He submitted a partial Department of Veterans Affairs' report dated March 17, 2008 regarding his spine. The Department of Veterans Affairs noted the history of appellant's upper and lower back pain and indicated the onset in 1983. The report also noted appellant's history of injuries sustained in the military and at the employing establishment.

In a June 27, 2008 decision, an Office hearing representative affirmed the Office's September 20, 2007 decision finding that the weight of the medical evidence rested with Dr. Smith and that appellant had no disability or condition causally related to the May 19, 2006 work injury.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[2] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[3] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must establish that the claimant no longer has residuals of an employment-related condition, which requires further medical treatment.[4]

ANALYSIS -- ISSUE 1

The Office's September 20, 2007 decision terminated compensation benefits effective that day finding that appellant no longer had any residuals of the accepted employment condition. However, it failed to comply with its procedures in terminating benefits for appellant's lumbar and cervical condition as it did not provide him notice of the termination and an opportunity to respond before the termination of benefits became effective.

The Office's procedures state that a notice of proposed termination of medical benefits must be provided before terminating: an authorization for treatment, the services of a specific physician, a specific service or all medical treatment.[5] The procedures also state that notice of proposed termination of medical benefits is not required when "the physician indicates that

[1] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

[2] *Vivien L. Minor*, 37 ECAB 541 (1986).

[3] *T.P.*, 58 ECAB ___ (Docket No. 07-60, issued May 10, 2007); *Larry Warner*, 43 ECAB 1027 (1992).

[4] *E.J.*, 59 ECAB ___ (Docket No. 08-1350, issued September 8, 2008).

[5] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6(b) (March 1997).

further medical treatment is not necessary or that treatment has ended" or the Office "denies payment for a particular charge on an exception basis."[6]

In the present case, the Office accepted appellant's lumbar strain and cervical sprain and paid for appropriate medical treatment. None of the reports from appellant's treating physicians, Drs. Bovell and Chidambaram, indicated that treatment for an employment-related condition had ended.[7] The Office referred appellant to Dr. Smith for a second opinion evaluation to determine whether appellant's work-related lumbar and cervical condition had resolved and whether further treatment for the accepted work injury was required. On August 2, 2007 Dr. Smith concluded that appellant's accepted lumbar and cervical condition had resolved and no further treatment was needed. Based on Dr. Smith's report, the Office terminated appellant's compensation benefits.

The Board finds that under the Office's procedures a notice of proposed termination should have been sent to appellant allowing him 30 days to respond. Since there is no evidence that the Office provided notice and an opportunity to respond prior to termination of all medical benefits, the termination was improper in this case.

The Board further finds that there currently exists a conflict in the medical evidence between appellant's treating physician, Dr. Bovell, and the Office's second opinion physician, Dr. Smith, regarding whether appellant's accepted lumbar and cervical condition resolved. As noted, Dr. Bovell submitted numerous reports indicating that residuals of appellant's employment injury had not ceased while Dr. Smith opined that the accepted conditions had resolved without residuals. 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]

Consequently, the Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits.

LEGAL PRECEDENT -- ISSUE 2

For each period of disability claimed, appellant has the burden of proving by the preponderance of the reliable, probative and substantial evidence that he is disabled for work as a result of his employment injury. Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[9] Findings on

[6] *See id.* at Chapter 2.1400.6(d). These procedures also require pretermination notice in most situations before wage-loss benefits are terminated. *See id*. at 2.1400.6(a), 6(c). The Board notes that the record does not indicate that appellant was in receipt of wage-loss compensation at the time of the September 20, 2007 termination decision.

[7] *See Marsha K. Stanowski*, 48 ECAB 607 (1997) (where the Board has held that the Office must issue a pretermination notice when it proposes to terminate medical benefits by formal decision).

[8] 5 U.S.C. § 8123(a).

[9] *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that he hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[10] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[11]

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on whether there is a causal relationship between the employee's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[12]

ANALYSIS -- ISSUE 2

The Board finds there currently exists a conflict in the medical evidence between appellant's treating physician, Dr. Bovell, and the Office's second opinion physician, Dr. Smith, regarding whether appellant's claimed disability is causally related to his May 19, 2006 work injury.

The Board notes that Dr. Bovell submitted numerous medical reports attributing appellant's continuing disability to his May 19, 2006 work injury. On the other hand, Dr. Smith examined appellant on August 2, 2007 and found no basis on which to attribute any disability to the work injury.

To resolve the conflict of medical opinion, the Office should, pursuant to section 8123(a) of the Act,[13] refer appellant, the case record and a statement of accepted facts to an appropriate Board-certified medical specialist for a reasoned opinion as to whether appellant's claimed disability and continuing condition is due to his May 19, 2006 employment injury. After such further development as it deems necessary, the Office shall issue a *de novo* decision.

On appeal, appellant also asserts that he is entitled to compensation under the Act because he was found disabled under the standards of the Office of Personnel Management and

[10] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *see Huie Lee Goal*, 1 ECAB 180, 182 (1948).

[11] *G.T., supra* note 10; *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[12] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[13] *See supra* note 8 and accompanying text.

the Department of Veterans Affairs. However, this contention is without merit as the Board has held that a finding of disability under another federal statute does not establish disability under the Act.[14]

LEGAL PRECEDENT -- ISSUE 3

The schedule award provision of the Federal Employees' Compensation Act[15] and its implementing regulations set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. The Act, however, does not specify the manner in which the percentage loss of a member shall be determined. The method used in making such determination is a matter which rests in the sounds discretion of the Office. For consistent results and to ensure equal justice, the Board has authorized the use of a single set of tables so that there may be uniform standards applicable to all claimants. American Medical Association, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001) has been adopted by the Office for evaluating schedule losses and the Board has concurred in such adoption.[16]

Not all medical conditions accepted by the Office result in permanent impairment to a scheduled member.[17] It is the claimant's burden to establish that he or she sustained a permanent impairment of a scheduled member or function as a result of an employment injury.[18] Office procedures provide that, to support a schedule award, the file must contain competent medical evidence which shows that the impairment has reached a permanent and fixed state and indicates the date on which this occurred (date of maximum medical improvement), describes the impairment in sufficient detail to include, 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 description of the impairment and the percentage of impairment should be computed in accordance with the A.M.A., *Guides*.[19]

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[14] *See Daniel Deparini*, 44 ECAB 657 (1993) (the findings of the Department of Veterans Affairs are not determinative of appellant's capacity for work under the Act as the statutes have different standards of medical proof on the question of disability); *Earl L. Swanson*, 29 ECAB 707 (1978) (unlike the Civil Service Retirement Act, under FECA, even though an employee is unable to perform the duties of the position he held when injured, he is not totally disabled if he has the capacity to perform the duties of another position for which he is qualified).

[15] 5 U.S.C. §§ 8101-8193. *See* 5 U.S.C. § 8107.

[16] *See* 20 C.F.R. § 10.404; *R.D.*, 59 ECAB ___ (Docket No. 07-379, issued October 2, 2007).

[17] *Thomas P. Lavin*, 57 ECAB 353 (2006).

[18] *Tammy L. Meehan*, 53 ECAB 229 (2001).

[19] *J.P.*, 60 ECAB ___ (Docket No. 08-832, issued November 13, 2008); *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6 (August 2002).

ANALYSIS -- ISSUE 3

The Office accepted that appellant sustained a sprained neck and back. However, the back is not listed as a scheduled member under the Act.[20] While an injury to the spine or back may cause impairment in an extremity, the Board finds that the medical evidence is insufficient to establish that appellant's accepted back or neck condition caused any permanent impairment to a scheduled member of the body.[21]

None of the medical reports of record contained an opinion supporting that appellant's accepted conditions caused any permanent impairment to a scheduled member of the body. Likewise, there are no medical reports of record that offer an opinion on permanent impairment of a scheduled member of the body as derived under the standards of the A.M.A., *Guides*. Dr. Smith, the Office's second opinion physician, while finding that appellant had reached maximum medical improvement, did not support that appellant's accepted conditions caused permanent impairment in a scheduled body member such as appellant's arms or legs.

Similarly, appellant's treating physicians, Drs. Bovell and Chidambaram, failed to offer a specific opinion that appellant's accepted conditions caused a permanent impairment of a scheduled member of the body. Furthermore, they did not otherwise describe appellant's medical condition in sufficient detail to allow for an impairment determination.[22] Therefore, these reports are an insufficient basis on which to find any permanent impairment of a scheduled body member that is causally related to appellant's accepted neck and back strain.

Consequently, the medical evidence does not support that appellant is entitled to a schedule award.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits compensation and that there is currently a conflict in the medical evidence regarding this matter. The Board also finds that there is conflict in the medical evidence regarding the period of disability claimed by appellant. The case is remanded for referral of appellant to an appropriate medical specialist to resolve the conflict. The Board further finds that appellant is not entitled to a schedule award for permanent impairment to his neck and back.[23]

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[20] *See* 5 U.S.C. § 8101(19); *see also George E. Williams*, 44 ECAB 530 (1993) (finding that as neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award).

[21] *See D.H.*, 58 ECAB ___ (Docket No. 06-2160, issued February 12, 2007) (as the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine).

[22] *See A.L.*, 60 ECAB ___ (Docket No. 08-1730, issued March 16, 2009) (an impairment 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).

[23] Appellant submitted new evidence on appeal. However, the Board may only review evidence that was in the record at the time the Office issued its final decision. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decisions dated June 27, 2008 and September 20, 2007 are affirmed in part, set aside in part and the case remanded for further action consistent with this decision.

Issued: June 3, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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