United States Department of Labor
Employees' Compensation Appeals Board

B.I., Appellant	)	
and	)	**Docket No. 08-1786**
	)	**Issued: May 7, 2009**
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, Houston, TX, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 10, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated April 11, 2008, affirming the termination of compensation effective July 23, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office met its burden of proof to terminate compensation for wage-loss and medical benefits effective July 23, 2007.

FACTUAL HISTORY

The Office accepted that appellant, an air traffic controller, sustained a sacrum contusion and cervical and lumbar strains in the performance of duty on November 10, 1992 when the back of his chair broke and he fell to the floor. In a report dated May 26, 1993, an attending

orthopedic surgeon, Dr. David McChesney, diagnosed lumbar strain and indicated that appellant could return to full duty.

On September 3, 1993 appellant filed a traumatic injury claim alleging that on that date he sustained injury when the seat broke loose from a chair and he again fell to the floor. The Office accepted the claim for a lumbar sprain. Appellant returned to a light-duty position, stopped working in July 1995 and began receiving compensation for temporary total disability. He indicated in periodic reports to the Office that he worked for the Federal Emergency Management Agency (FEMA) for brief intermittent periods commencing in 2004.

In a report dated February 20, 2006, the attending orthopedic surgeon, Dr. Stephen Esses, stated that appellant continued to have significant back pain and, other than working at FEMA following the hurricane, he was unable to return to full-time work. He reported that appellant had been restricted to bed the prior three days and activity made his pain worse. Dr. Esses diagnosed facet syndrome and opined that appellant was unable to work full time.

Appellant was referred for a second opinion examination by Dr. Bernard Albina, an orthopedic surgeon. In a report dated February 22, 2006, Dr. Albina provided a history and results on examination. He noted x-rays showed mild degenerative osteoarthritis of the lumbar spine. Dr. Albina stated, "There is no medical evidence that the residuals of the 12-year-old lumbar strain are present at this time. The x-ray findings of mild degenerative disc disease and osteoarthritis of the lumbar spine is compatible with the patient's age and, in all medical probability, is unrelated to the lumbar strain that [appellant] sustained in 1992 and 1993." Dr. Albina stated that there was no clinical or objective findings to prevent appellant from returning to work as an air traffic controller.

In a May 16, 2006 report, Dr. Esses reviewed Dr. Albina's report. He disagreed with Dr. Albina and advised that appellant could not return to work.

The Office found a conflict in medical opinion and referred appellant for a referee examination by Dr. David Willhoite, a Board-certified orthopedic surgeon. In a July 17, 2006 report, Dr. Willhoite noted degenerative changes found on a January 2006 magnetic resonance imaging (MRI) scan. He indicated that there was no clinical or objective findings of a lumbar strain and stated that he did not feel the MRI scan changes were related to the 1992 or 1993 injuries. In an August 28, 2006 report, Dr. Willhoite indicated that he had reviewed a functional capacity evaluation and he agreed appellant was capable of light work.

By decision dated November 27, 2006, the Office terminated compensation for wage-loss and medical benefits.

Appellant requested a hearing before an Office hearing representative. In a decision dated February 23, 2007, the hearing representative found that Dr. Willhoite's opinion must be excluded from the record because it was obtained as a result of leading questions posed by the Office.[1] The hearing representative directed the Office to prepare a new statement of accepted

[1] A question regarding residuals of the employment asked the physician to explain "in light of the fact that lumbar strains normally resolve in six to eight weeks and that the claimant's most recent medical examination showed no structural deformity, neurologic involvement or motor weaknesses."

facts describing appellant's date-of-injury job duties and recent employment and refer appellant for a new referee examination.

The Office referred appellant to Dr. James Hood, a Board-certified orthopedic surgeon, for a referee examination. In a report dated May 23, 2007, Dr. Hood reviewed a history and results on examination. He noted normal muscle strength and no atrophy. Dr. Hood stated, "[That appellant] has had two normal MRI [scans]. He may have had a mild lumbar sprain 14 years ago after falling out of a chair playing cards. I cannot understand why this [appellant] who has a sore back could not return to some type of gainful employment since 1995. I find no evidence of any effects of the lumbar sprain from 1993 on today's examination." He indicated that appellant should not return to work as an air traffic controller without a complete psychiatric evaluation.

In a letter dated June 22, 2007, the Office notified appellant that it proposed to terminate compensation for wage-loss and medical benefits based on the medical evidence. By decision dated July 23, 2007, it terminated compensation for wage-loss and medical benefits.

Appellant requested a hearing before an Office hearing representative, which was held on February 8, 2008. In a report dated August 6, 2007, Dr. Esses stated that appellant continued to have back pain and remained unable to return to work. He stated that appellant had not improved since 1995 and, since it was determined that he was disabled in 1995, he remained disabled in 2007.

By decision dated April 11, 2008, the hearing representative affirmed the July 23, 2007 decision, finding the weight of the medical evidence rested with Dr. Hood.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[2] It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.[3] The right to medical benefits is not limited to the period of entitlement to disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[4]

It is well established that, when a case is referred to a referee 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.[5]

[2] *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

[3] *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

[4] *Frederick Justiniano*, 45 ECAB 491 (1994).

[5] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

ANALYSIS

The Office found that a conflict existed in the medical evidence with respect to appellant's continuing employment-related condition and disability. A second opinion physician, Dr. Albina, opined that appellant had no continuing residuals of the employment injuries and could return to work. The attending physician, Dr. Esses, disagreed with Dr. Albina, finding that appellant continued to have significant back pain and could not return to full-time work. Section 8123(a) provides that, when there is a disagreement between an attending physician and an Office physician, a third physician is selected to make an examination. This examination is known as a referee examination.[6]

The initial physician chosen as a referee, Dr. Willhoite, provided reports dated July 17 and August 28, 2006. On appeal, appellant contends that Dr. Willhoite should have been given greater weight by the Office and should have not been excluded. The Board notes that Dr. Willhoite did not support any continuing employment-related disability or condition, as he clearly opined the degenerative changes were not related to the 1992 or 1993 injuries. However, the hearing representative was correct in finding that medical opinions obtained by the Office using leading questions must be excluded from the record.[7] If the questions improperly lead the examiner toward a particular conclusion then the opinion is tainted and cannot be considered. The Office properly excluded the reports of Dr. Willhoite and did not rely on his opinion in terminating compensation on July 23, 2007.

The medical basis for the termination was the opinion of referee physician, Dr. Hood, who provided an accurate history and results on examination. Dr. Hood noted the 1992 injury, medical evidence indicating that appellant was released to full duty in May 1993 and discussed the September 3, 1993 injury. He provided an unequivocal opinion that appellant did not have a continuing employment-related condition, noting the examination and diagnostic test results. The Board finds that Dr. Hood provided a rationalized medical opinion based on a complete background. As noted above, the rationalized opinion of a referee physician is entitled to special weight. The attending physician, Dr. Esses, provided an August 6, 2007 report opining that, since appellant was disabled in 1995 and he still had back pain, he should still be considered disabled. He does not provide a rationalized opinion relating the continuing back pain to the employment injuries. Additional reports from a physician on one side of the conflict that is properly resolved by a referee are generally insufficient overcome the weight accorded the referee specialist's report or create a new conflict.[8]

Dr. Hood represents the weight of the medical evidence in this case. The Board accordingly finds that the Office met its burden of proof to terminate compensation effective July 23, 2007.

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[6] *See* 20 C.F.R. § 10.321(b).

[7] *Stanislaw M. Lech*, 35 ECAB 857 (1984); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.13 (November 1996).

[8] *See Harrison Combs, Jr.*, 45 ECAB 716 (1994); *Dorothy Sidwell*, 41 ECAB 857 (1990).

CONCLUSION

The medical evidence of record is sufficient to meet the Office's burden of proof to terminate compensation for wage-loss and medical benefits effective July 23, 2007.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated April 11, 2008 and July 23, 2007 are affirmed.

Issued: May 7, 2009
Washington, DC

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

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

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