United States Department of Labor
Employees' Compensation Appeals Board

D.V., Appellant	)	
and	)	**Docket No. 09-1011**
	)	**Issued: April 9, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Brooklyn, NY, Employer	)	

Appearances:
David Testone, for the appellant
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 March 6, 2009 appellant filed a timely appeal from the January 14, 2009 decision of the Office of Workers' Compensation Programs, which denied his request for reconsideration. He also appealed the Office's October 10, 2008 decision which terminated his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits effective October 10, 2008; and (2) whether the Office properly refused to reopen appellant's case for further review of the merits under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On April 29, 2003 appellant, then a 49-year-old letter carrier, sustained injury to his left knee while exiting a mail truck in the performance of duty. The Office accepted his claim for sprain of the left knee. It also accepted the claim for closed dislocation of the lumbar vertebra.

Appellant returned to work on April 30, 2003 at modified duty and missed intermittent hours due to work not being available. He received appropriate wage-loss compensation.

Appellant received treatment from Dr. Mario Introna, a chiropractor, who diagnosed sprain and strain of the left knee. In a May 8, 2003 report, Dr. Pavani R. Tipirneni, a Board-certified physiatrist, diagnosed lumbosacral sprain and right knee sprain. He treated appellant and recommended chiropractic treatment. On August 14, 2007 Dr. Introna advised that appellant had restrictions which included standing for 15 minutes a day, walking for 20 minutes a day, no climbing, no kneeling and only occasional bending or twisting. In an August 29, 2007 report, he diagnosed a spinal subluxation based on x-rays showing abnormal spacing of T12 on L1 as a result of wedging. Dr. Introna opined that the April 29, 2003 left knee injury caused an incomplete subluxation of the lumbar spine at T12-L1.

On April 14, 2008 the Office referred appellant for a second opinion to Dr. Michael Katz, a Board-certified orthopedic surgeon. In a May 6, 2008 report, Dr. Katz reviewed appellant's history of injury and medical treatment. He diagnosed closed dislocation of the lumbar vertebra and a sprain of the left knee. Dr. Katz completed a work capacity evaluation, finding that appellant had restrictions with no lifting over 20 pounds, standing for six hours a day, walking for six hours a day, climbing, kneeling and twisting four hours a day and bending six hours a day. He concluded that these restrictions would apply for three months. Dr. Katz found that appellant reached maximum medical improvement and advised that no further physical therapy or chiropractic treatment was needed with the exception of orthopedic care once every six weeks for pain management. The Office found a conflict in medical opinion between Drs. Introna and Katz regarding the extent of appellant's continuing employment-related disability.

On June 30, 2008 the Office referred appellant together with a statement of accepted facts noting the accepted conditions and the medical record to Dr. Stanley Soren, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a July 14, 2008 report, Dr. Soren reviewed appellant's history of injury and treatment. On examination, appellant's gait was normal without evidence of any list, limp, tilt or antalgia. He had range of motion of the trunk of 20 degrees, normal forward flexion of 90 degrees, normal extension, flexion and rotation. Dr. Soren diagnosed lumbosacral sprain and left knee sprain. He noted that an x-ray report of the lumbar spine revealed minor wedging of the T12 vertebral body. Dr. Soren opined that the lumbosacral sprain and left knee sprain were causally related to the employment injury but that the minor wedging of the T12 vertebral body was not causally related to the accepted work injury. He noted that there were no current findings pertaining to the knee and found that the accepted left knee sprain had resolved. Regarding the back, Dr. Soren explained that the findings were minimal and opined that there were no residuals related to the employment injury. He found that appellant could return to his regular duties as a letter carrier on a full-time basis and had reached maximum medical improvement in terms of the left knee and the low back.

On September 5, 2008 the Office issued a notice of proposed termination of compensation on the basis that the weight of the medical evidence, as represented by the report of Dr. Soren, established that all residuals of the accepted work injury of April 29, 2003 had ceased.

An August 28, 2008 diagnostic ultrasound read by Dr. F. Scott Nowakowski, a Board-certified diagnostic radiologist, revealed vertebral subluxation complex.

In a September 30, 2008 report, Dr. Y. Fill Slukhinsky, a Board-certified physiatrist, noted treating appellant for work injuries sustained on April 29, 2003. He diagnosed status postlumbar spine derangement, lumbar radiculopathy, status post left knee sprain and post-traumatic arthropathy of the left knee. Dr. Slukhinsky advised that appellant's injuries were permanent in nature causing chronic low back pain syndrome and post-traumatic left knee arthritis. He opined that appellant's ability to walk was impaired and he was unable to work full duties. Dr. Slukhinsky advised that the work restrictions were permanent.

In an October 1, 2008 report, Dr. Introna stated that appellant had a lumbar subluxation at L4, L5 and S1 radiculopathy and left knee dysfunction. He noted that appellant was partially disabled and could not lift over 10 pounds continuously in an eight-hour day but could sit and stand intermittently. Dr. Introna advised that appellant had limited lumbar range of motion in all directions and was partially disabled. He advised that appellant required continuous chiropractic care for relief of his lower back and left knee injuries. Dr. Introna also provided a letter of medical necessity, which was received on October 6, 2008.

By decision dated October 10, 2008, the Office terminated appellant's compensation benefits effective October 10, 2008.

Appellant requested reconsideration on November 7, 2008.

In an October 30, 2008 report, Dr. Slukhinsky listed appellant's history of injury and that he had treated appellant since October 2005 for post-severe lumbosacral spine derangement, post-traumatic discogenic disease with chronic lower back pain, status post left knee injury and post-traumatic progressive arthropathy of the left knee joint. On examination, appellant had a normal cervical spine and range of motion. The lumbar spine examination revealed a flattened lumbar lordosis and moderate paraspinal spasms extending from L1 to the S2 level. Dr. Slukhinsky advised that forward flexion was 52 degrees and normal flexion was 90 degrees. He stated that the left knee examination revealed moderate tenderness at the medial aspect of the left knee and prominent crepitation upon range of motion. Dr. Slukhinsky diagnosed status post lumbosacral spine derangement; post-traumatic radicular neuropathy; post-traumatic chronic radiculopathy left peroneal nerve compressive neuropathy; left tibial nerve compressive neuropathy. Appellant was status post left knee derangement and had post-traumatic chronic knee arthropathy. Dr. Slukhinsky advised that appellant's disability was permanent and partial. Appellant was able to work with permanent restrictions such as no lifting, no continuous standing or walking and was in need of continued chiropractic treatment.

In a November 3, 2008 report, Dr. James S. Kaufman, a chiropractor, reviewed Dr. Soren's report and found it was insufficiently reasoned.

By decision dated January 14, 2009, the Office denied appellant's request for reconsideration finding that the evidence was insufficient to warrant further review of the merits.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[1] 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.[2]

The Federal Employees' Compensation Act[3] provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[4] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[5]

ANALYSIS -- ISSUE 1

The Office found a conflict of medical opinion regarding the nature and extent of ongoing residuals due to the work injury of April 29, 2003. Dr. Introna, a treating chiropractor, who supported an ongoing employment-related disability and work restrictions, and Dr. Katz, an Office referral physician, who listed restrictions and advised that no further chiropractic treatment was required. The Office referred appellant to Dr. Soren, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In a July 14, 2008 report, Dr. Soren examined appellant and reviewed the medical record. On examination, he reported extensive findings which included a normal gait and no limp. Dr. Soren found that appellant had a normal range of motion of the knee. He explained that there were no findings in the knee and that the accepted left knee sprain had resolved. Dr. Soren reported no basis on which to attribute any continuing residuals or disability due to the accepted left knee sprain. The Board finds that Dr. Soren's report is sufficiently well rationalized and based upon a proper factual background with regard to the accepted left knee condition. It is entitled to special weight on this aspect of the claim. The Board will affirm the Office's termination of benefits as the report of Dr. Soren establishes that the accepted sprain resolved without residuals.

Regarding the accepted subluxation of the lumbar vertebra, the Board notes that Dr. Soren reported that an x-ray report of the lumbar spine revealed a minor wedging of the T12 vertebral body and opined that this condition was not causally related. He stated that there were

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[1] *Curtis Hall*, 45 ECAB 316 (1994).

[2] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[3] 5 U.S.C. §§ 8101-8193.

[4] *Id.* at § 8123(a). *See Shirley Steib*, 46 ECAB 309, 317 (1994).

[5] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

minimal findings pertaining to appellant's back and opined that there were no residuals of the April 29, 2003 work injury. The Board finds that Dr. Soren's report is not sufficient to resolve the conflict regarding whether appellant's accepted lumbar subluxation had resolved. In noting the wedging of the T12 vertebral body, Dr. Soren advised that the condition was not work related; however, the Office accepted a vertebral dislocation or subluxation. The question posed to Dr. Soren was whether the work-related condition had resolved, not whether appellant had sustained a work-related vertebral dislocation. The Board has held that a medical expert should only determine the medical question certified to him.[6] Dr. Soren improperly engaged in an analysis of the legal issues of the case when he stated that the wedging of the vertebral body at T12 was not work related where the Office had accepted a dislocation. He did not otherwise address the accepted dislocation of the lumbar vertebra in the portion of his report addressing whether appellant's accepted conditions had resolved. Dr. Soren did not offer any explanation or rationale regarding why appellant's accepted back condition had resolved.

The Board finds that Dr. Soren's opinion is not based upon a proper factual background and is not fully rationalized.[7] Consequently, his report does not resolve the medical conflict with regard to appellant's accepted back condition. Therefore, the Office did not meet its burden of proof to terminate compensation benefits on October 10, 2008.

CONCLUSION

The Board finds that the Office established that appellant's accepted left knee sprain resolved. However, the Office did not establish that appellant's accepted dislocation of the lumbar vertebra has resolved. Consequently, the Office improperly terminated appellant's compensation benefits effective October 10, 2008.[8]

[6] *See Jeannine E. Swanson*, 45 ECAB 325 (1994) (a medical expert should only determine the medical question certified to him; determination of the legal standards in regard to such medical questions is outside the scope of his or her expertise). *Cf.*, FECA Bulletin No. 84-33 (issued July 6, 1984) (Office medical consultant's opinion should not "explicitly address legal or adjudicating issues" when providing an opinion to the Office claims examiner, as questions relating to the acceptance or weight of medical evidence are in the province of the claims examiner and not the Office medical consultant).

[7] *See Vernon R. Stewart*, 5 ECAB 276, 280 (1953) (where the Board held that medical opinions based on histories that do not adequately reflect the basic facts are of little probative value).

[8] In light of the Board's disposition on the first issue, it is not necessary to address the second issue.

ORDER

IT IS HEREBY ORDERED THAT the October 10, 2008 decision of the Office of Workers' Compensation Programs is affirmed, in part, and reversed.

Issued: April 9, 2010
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