United States Department of Labor
Employees' Compensation Appeals Board

M.C., Appellant	)	
and	)	**Docket No. 09-1940**
	)	**Issued: February 23, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Grand Rapids, MI, Employer	)	

Appearances:
Stuart H. Deming, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 27, 2009 appellant, through counsel, filed a timely appeal of a June 22, 2009 decision of the Office of Workers' Compensation Programs' terminating his compensation for wage-loss and medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation for wage-loss and medical benefits effective June 22, 2009 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injury.

FACTUAL HISTORY

On January 16, 1998 appellant, then a 39-year-old automotive mechanic, filed a traumatic injury claim under File No. xxxxxx043 alleging that he injured his lower back while working on an engine. His claim was accepted for back strain. On June 26, 2001 he alleged a new back

injury on March 29, 2001 while repairing a brake system (File No. xxxxxx048).[1] The Office accepted this claim for a lumbar herniated disc. On August 27, 2002 appellant filed an occupational disease claim alleging a deteriorating disc condition as a result of his employment activities, File No. xxxxxx628. The claim was accepted for an aggravation of a herniated lumbar disc. The Office subsequently consolidated appellant's claims under master File No. xxxxxx048. Appellant worked light duty until September 9, 2003, when he was placed on the periodic rolls.

On November 3, 2003 Dr. Bryan Visser, an attending Board-certified physiatrist, opined that appellant remained totally disabled due to work-related facet joint arthritis and discogenic disease. In a November 19, 2003 report, the Office's second opinion physician, Dr. Donald Paarlberg, a Board-certified orthopedic surgeon, opined that he could return to work with restrictions. The Office referred appellant to Dr. James H. Coretti, an osteopath,[2] to resolve the conflict between Dr. Visser and Dr. Paarlberg. In a referee report dated June 18, 2004, Dr. Coretti opined that appellant was unable to perform the duties of an automotive mechanic, but that he could work in a sedentary position with restrictions. He diagnosed developmental deficit at L5, facet arthritis in the lower three lumbar vertebrae and disc rupture at L4-5, which he opined were causally related to the accepted March 29, 2001 injury.

Appellant filed claims for total disability from September 8, 2003 through September 21, 2006, when he retired on disability. On December 6, 2006 the Office accepted his claim for a recurrence of disability as of September 8, 2003 and paid compensation from September 20, 2003 through the date of his retirement on July 21, 2006.[3]

The Office referred appellant to Dr. Joseph E. Burkhardt, a Board-certified orthopedic surgeon, for a second opinion evaluation and an opinion as to appellant's work capabilities. In a July 18, 2007 report, Dr. Burkhardt opined that appellant's accepted conditions had resolved. Physical examination revealed normal lumbar lordosis. On range of motion testing of the back, flexion was 90 degrees, extension 10 degrees, side bending to the right and left was 20 degrees, and rotation to the right and left was 20 degrees. Appellant was able to reach within 2 inches of the floor with the knees extended. Deep tendon reflexes (patellar and Achilles) were 2/4, equal and symmetrical bilaterally, and straight leg raising was negative, both seated and supine. Noting that x-rays of the lumbar spine revealed facet arthrosis and degenerative disc disease, Dr. Burkhardt found no objective evidence to support disc herniation or lumbar strain. He stated that aggravation of the herniated disc was considered to have been temporary and had resolved. Dr. Burkhardt opined that appellant had no residuals from his accepted conditions that precluded his return to work as an automotive mechanic or which required restrictions or further treatment. He indicated, however, that appellant's degenerative disc disease would require restrictions on an ongoing prophylactic basis against twisting, bending, stooping, squatting, kneeling, climbing, pushing/pulling, or lifting greater than 10 pounds.

[1] Appellant originally filed a notice of recurrence on June 26, 2001; however, after determining that he was claiming that he had sustained a new injury on March 29, 2001, the Office developed the claim as a traumatic injury claim.

[2] Dr. Coretti identified himself as an osteopath; however, his credentials cannot be verified.

[3] The Board notes that on May 3, 2007, appellant elected to receive benefits under the Federal Employees' Compensation Act in lieu of federal retirement benefits.

The Office forwarded a copy of Dr. Burkhardt's second opinion report to Dr. Visser for his review. It asked him to state whether he agreed with Dr. Burkhardt's opinion that appellant's accepted conditions had resolved and, if not to provide objective findings and medical reasons to support his opinion.

On September 25, 2007 Dr. Visser stated that he had never contended that appellant had a disc herniation causing a lumbar radiculopathy. He noted that appellant had an anular tear and facet joint irritation, and that multiple attempts to return him to work as a mechanic had resulted in a flare-up of his back pain. On January 28, 2008 Dr. Visser indicated that there was no new clinical information in Dr. Burkhardt's report. He stated, "We are not dealing with a disc herniation causing his symptoms, but we are dealing with pain originating from a facet joint and from compression of the neural foramen by the work activity." Dr. Visser reiterated that appellant was unable to return to his regular duties.[4]

The Office found a conflict in medical opinion between Dr. Visser and Dr. Burkhardt as to whether appellant's accepted conditions had resolved and whether he was able to return to his regular duties based on his work-related condition. It referred appellant, together with a statement of accepted facts and the entire medical record, to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, to resolve the conflict.

In an October 10, 2008 report, Dr. Obianwu reviewed a complete medical and factual history, provided findings on examination and addressed the medical record. He found that appellant's accepted conditions had resolved. On physical examination, appellant was able to walk on his toes and heels without difficulty. He had 20 degrees of flexion of the thoracolumbar spine, 10 degrees of extension, and lateral bending to either side of 5 degrees. There was tenderness along the midline, and some tightness of the muscles of the lumbar spine. The straight leg raising test was negative, bilaterally, both in the sitting position and in recumbency. The extensor hallucis longus strength was adequate, bilaterally. The deep tendon reflexes were brisk, but equal, bilaterally. There were no sensory changes in the lower extremities. The foraminal closure test appeared to be vaguely positive. There was no atrophy of any of the muscle groups in the lower extremities, and no irritability of the hip joints was noted. The Patrick's test was negative, bilaterally. Appellant ambulated without a limp. In the sitting position, Dr. Obianwu was able to bring both of appellant's lower extremities up so that the hips were flexed at 90 degrees, and the knees were fully extended. He tolerated this position for some time, casting doubt on his apparent inability to flex the thoracolumbar spine beyond 20 degrees.

Dr. Obianwu diagnosed chronic lumbar disc disease; multi degenerative disc disease, with mild canal stenosis at the L4-5 and L5-S1 levels. He found no clinical evidence of lumbar radiculopathy. He stated that, based on the CT myelogram from April 15, 2003 as well as his clinical assessment, he found no evidence of a herniated disc that could be impinging on any nerve root or vital structure. Therefore, the accepted condition of herniated disc in the lumbar spine no longer existed and had resolved. By extension, the accepted condition of aggravation of herniated disc had resolved. He also opined that the lumbar sprain condition had resolved.

[4] The record contains an October 4, 2007 criminal investigative report wherein the sypnopsis reflects that appellant demonstrated physical activity and ability beyond his physician's previously stated restrictions. The record also contains a videotape, which reportedly records appellant's activities as described in the report.

Dr. Obianwu agreed with Dr. Visser's opinion that appellant's back pain was a result of neuroforaminal narrowing and facet joint disease. However, noting that these conditions had not been accepted by the Office, he stated that they were age-related, and, therefore, not attributable to a work condition. He recommended that, because of the arthritic changes in his lumbar spine, appellant should avoid engaging in work activities that involve lifting above 40 pounds, or repetitive bending of the trunk.

On December 17, 2008 the Office proposed to terminate appellant's compensation and medical benefits. Based on Dr. Obianwu's report, it found that appellant's injury-related disability had ceased and he no longer had residuals of his accepted conditions. Appellant was afforded 30 days within which to submit any additional evidence.

On January 19, 2009 appellant's representative informed the Office that he was unable to provide an adequate response on behalf of appellant, given the failure of the Office to produce records furnished to Dr. Obianwu. He contended that Dr. Burkhardt's opinion should not have been given any credence concerning his finding that there was no disc herniation as it was contrary to the finding of Dr. Coretti, a previous independent medical examiner, and the statement of accepted facts. The representative also argued that a referee examination was not necessary because Dr. Burkhardt's opinion was insufficient to create a conflict, as it was conclusory in nature and not rationalized. He contended that Dr. Obianwu's opinion was factually inaccurate, as appellant had not taken Aleve in the past, as stated, and was never involved with lifting a snowmobile in 2001. He also stated that Dr. Obianwu had not reviewed Dr. Coretti's referee report and had failed to make a finding that no residuals existed of a work-related condition.

On January 16, 2009 Dr. Visser reiterated his opinion that appellant's current symptoms were secondary to his accepted injuries. He explained that a disc herniation will result in narrowing of the disc level where the disc herniation occurs. Over time arthritic changes will occur in the facet joints at the level of the disc herniation. An individual who has facet joint arthritis caused by the increased motion at the level of the disc herniation, will also have an increased risk of developing foraminal stenosis, especially with back extension. The disc herniation also increased the chance of an individual developing discogenic pain secondarily that allows small nerves which are normally not present in the disc to grow into the disc in order to heal up the rent in the disc.

On January 30, 2009 appellant's representative repeated his argument that Dr. Obianwu did not address "the concept of residuals," despite his findings of the neuroforaminal narrowing, facet joint disease and canal stenosis. He contended that the referee report was deficient, as it did not contain an opinion or explanation as to whether the herniated disc at L4-5 had any relationship to canal stenosis at L4-5.

By decision dated June 22, 2009, the Office finalized the termination of appellant's compensation and medical benefits effective that date. It found that the weight of the evidence rested with the opinion of Dr. Obianwu, the impartial medical examiner.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.[5] After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[6] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7]

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[8] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.[9]

In situations where there are 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 on a proper factual background, must be given special weight.[10]

ANALYSIS

The Board finds that the Office properly terminated appellant's wage-loss compensation and medical benefits effective June 22, 2009.

The Office properly found a conflict in the medical opinion evidence between Dr. Visser, appellant's attending physician, and Dr. Burkhardt, the Office's second opinion physician, as to whether appellant had any continuing residuals or disability causally related to his accepted condition. On the one hand, Dr. Visser opined that appellant had continuing employment-related residuals and was unable to perform his regular duties. On the other hand, Dr. Burkhardt concluded that appellant's accepted conditions had resolved.

In order to resolve the conflict, the Office referred appellant, a statement of accepted facts and the medical record to Dr. Obianwu for an impartial medical examination. In an October 10, 2008 report, he provided a complete medical and factual history, as well as detailed examination findings. Dr. Obianwu found no objective evidence of residuals or disability directly attributable to appellant's accepted employment injury, and opined that all of his accepted conditions had resolved. He stated that, based on the CT myelogram from April 15, 2003 as well as his clinical

[5] *A.W.*, 59 ECAB ___ (Docket No. 08-306, issued July 1, 2008).

[6] *J.M.*, 58 ECAB 419 (2007).

[7] *See Del K. Rykert*, 40 ECAB 284 (1988).

[8] *T.P.*, 58 ECAB 524 (2007).

[9] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[10] *Gloria J. Godfrey*, 52 ECAB 486 (2001).

assessment, he found no evidence of a herniated disc that could be impinging on any nerve root or vital structure and that, therefore, the accepted condition of herniated disc in the lumbar spine no longer existed. By extension, the accepted condition of aggravation of herniated disc had resolved. He also opined that the lumbar sprain condition had resolved. Dr. Obianwu diagnosed chronic lumbar disc disease, multi degenerative disc disease, with mild canal stenosis at the L4-5 and L5- SI levels, but he found no clinical evidence of lumbar radiculopathy. He agreed with Dr. Visser's opinion that appellant's back pain was a result of neuroforaminal narrowing and facet joint disease; however, noting that these conditions had not been accepted by the Office, he stated that they were age related, and, therefore, not attributable to a work condition. The Board finds that Dr. Obianwu's opinion is well rationalized and based on a proper factual and medical background.

On appeal, appellant's representative contends that Dr. Obianwu's report is deficient for several reasons, namely that he relied upon an incorrect statement of accepted facts; he was not provided with accepted definitions associated with work-related injuries; and he failed to review Dr. Coretti's June 18, 2004 report. The Office noted that Dr. Obianwu was provided with the record, which included a correct statement of accepted facts, as well as accepted definitions associated with work-related injuries. Additionally, Dr. Obianwu reviewed the medical record, which included Dr. Coretti's June 18, 2004 report. The issue for resolution by Dr. Obianwu was whether appellant's accepted conditions had resolved by the date of his examination on October 10, 2008. The fact that his report does not contain a discussion of appellant's condition in June 2004 does not diminish its probative value.

Counsel also contends that the referee's opinion was not well rationalized, noting that he failed to explain when or why the accepted conditions had ceased, and that Dr. Obianwu's own medical findings, which were in part, consistent with the attending physician's findings, confirmed the existence of residuals related to an accepted condition. While Dr. Obianwu agreed with Dr. Visser's opinion that appellant's back pain was a result of neuroforaminal narrowing and facet joint disease, he found that these conditions were age related, and, therefore, not a consequence of the accepted injuries. The Board finds that Dr. Obianwu's report is well rationalized and represents the weight of the medical evidence. Although Dr. Visser opined on January 16, 2009 that appellant's current symptoms were secondary to his accepted injuries, his report is insufficient to overcome the weight given to the opinion of the impartial medical examiner.

Appellant's representative raised other issues on appeal, including the Office's alleged failure to produce a videotape related to an October 4, 2007 criminal investigative report to the representative or appellant; the improper consideration of the report of the second opinion physician, because he was not provided with the entire case file; and the employing establishment's act of telephoning appellant's treating physician. Neither the fact that the employing establishment telephoned the treating physician, nor the Office's failure to provide a videotape, are relevant to the medical issues at hand, namely, whether appellant has residuals or disability related to his accepted conditions. Further, the Office is not required to provide a second opinion physician with the entire case file.

Dr. Obianwu's well-rationalized report constitutes the special weight of the medical opinion evidence afforded an impartial medical specialist and establishes that appellant no longer

has residuals from, and is not disabled due to, his accepted conditions. The Board, therefore, finds that the Office met its burden of proof to terminate appellant's compensation and medical benefits effective June 22, 2009.

CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss and medical benefits, effective June 22, 2009, on the grounds that he had no residuals or disability related to his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the June 22, 2009 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 23, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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