United States Department of Labor
Employees' Compensation Appeals Board

G.B., Appellant	)	
and	)	**Docket No. 09-1275**
	)	**Issued: January 6, 2010**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Holtsville, NY, 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
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 17, 2009 appellant timely appealed the March 13, 2009 nonmerit decision of the Office of Workers' Compensation Programs, which found that he abandoned his request for a hearing. He also timely appealed the Office's September 24, 2008 merit decision terminating benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation and medical benefits effective September 24, 2008; and (2) whether appellant abandoned his request for an oral hearing.

FACTUAL HISTORY

This case has previously been before the Board.[1] Appellant, a 55-year-old tax-examining technician, was involved in an employment-related fall on August 18, 2005. He has an accepted claim for lumbago, lumbar sprain, neck sprain, cervicalgia, cervicobrachial syndrome and right knee sprain. In November 2006, appellant returned to work in a part-time, limited-duty capacity. He initially worked only four hours a day, but in February 2007 he increased his workday to six hours. The Office subsequently issued a loss of wage-earning capacity (LWEC) determination based on appellant's six-hour work schedule. In a decision dated January 8, 2009, the Board affirmed the Office's August 23, 2007 LWEC determination.[2]

When the case was last before the Board, appellant challenged the Office's denial of wage-loss compensation for various periods of temporary total disability between October 2005 and November 2006. He had also been denied compensation for intermittent wage loss for various periods between June and December 2007. In a decision dated August 29, 2008, the Branch of Hearings & Review affirmed three separate Office decisions denying wage-loss compensation for the above-noted periods. The hearing representative based his August 29, 2008 decision, in part, on the February 25, 2008 report of Dr. Jerrold M. Gorski, a Board-certified orthopedic surgeon and Office referral physician. The Office had referred appellant to Dr. Gorski to resolve a perceived conflict in medical opinion.

Dr. Gorski diagnosed degenerative arthritis of the neck and lumbar spine, severe tri-compartmental osteoarthritis of the right knee and obesity. He explained that these conditions were preexisting and not medically connected to appellant's work conditions, which Dr. Gorski characterized as a "sedentary job." Dr. Gorski further explained that appellant may have had a temporary aggravation due to the August 2005 work incident; however, his current complaints were due entirely to his preexisting condition. He also indicated that the employment-related aggravation would have lasted no more than three months. Dr. Gorski concluded that appellant had returned to his preinjury status. As to disability, he stated that appellant was totally disabled due to the work-related conditions "from the date of injury -- [August 10] (sic) until perhaps [October 6, 2005]."

By decision dated September 25, 2009, the Board set aside the hearing representative's August 29, 2008 decision.[3] The Board noted, *inter alia*, that Dr. Gorski's February 25, 2008 opinion was not entitled to "'special weight'" because there was no prior conflict in medical opinion regarding appellant's claimed disability from October 2005 through November 2006. The Board further found that Dr. Gorski's opinion regarding the cause of appellant's post October 6, 2005 disability was not properly rationalized.

[1] Docket No. 08-401 (issued January 8, 2009); Docket No. 08-2470 (issued September 25, 2009).

[2] The Board also affirmed an October 25, 2007 decision denying appellant's request for review of the written record.

[3] Docket No. 08-2470 (issued August 29, 2008). The Board's January 8 and September 25, 2009 decisions are incorporated herein by reference.

The Office also relied upon Dr. Gorski's February 25, 2008 report to terminate appellant's compensation and medical benefits effective September 24, 2008. It issued a notice of termination on August 21, 2008 identifying Dr. Gorski's "referee examination" as the basis for its proposed termination of compensation and medical benefits. The Office explained that this report established a "substantial change" in appellant's injury-related condition sufficient to modify the August 23, 2007 LWEC determination.

In response to the August 21, 2008 notice, appellant submitted a February 14, 2008 letter from the U.S. Department of Health & Human Services. The letter was authored by Dr. Sylvie I. Cohen, a Board-certified occupational medicine consultant, who offered her opinion on whether his desire to change his evening work schedule (4:30 p.m. until 10:30 p.m.) to a daytime shift was considered a reasonable accommodation under the ADA/Rehabilitation Act. Appellant was undergoing physical therapy and was reportedly too tired to work his evening shift on the days he attended therapy. Dr. Cohen concluded that his desire to change shifts did not constitute a request for a reasonable workplace accommodation.

Appellant also submitted a September 15, 2008 letter indicating that he had accepted a job with the employing establishment's "SB/SE" collection division. His work schedule was reportedly Monday through Friday, 7:30 a.m. until 4:00 p.m. Appellant also indicated that his annual salary was $43,839.00.

In a decision dated September 24, 2008, the Office terminated compensation and medical benefits based on Dr. Gorski's referee examination. It also indicated that appellant's September 15, 2008 letter further supported that his condition had improved and that he had "vocationally rehabilitated himself" by accepting a new position with the SB/SE collection division and "completing" the on-the-job training required to work in that position. The Office explained that vocational rehabilitation was grounds for modifying the previous LWEC determination.

In a separate letter also dated September 24, 2008, the Office advised the employing establishment that appellant had recently informed it that he accepted a job in the SB/SE collection division. It requested a statement regarding what, if any, training appellant received for the position.

On October 1, 2008 appellant requested an oral hearing. The Branch of Hearings & Review acknowledged his request by letter dated October 14, 2008. On December 29, 2008 the Branch of Hearings & Review notified appellant that his hearing was scheduled for February 23, 2009. However, the hearing did not occur as scheduled.

By decision dated March 13, 2009, the Office's hearing representative found that appellant had abandoned his request for an oral hearing. Appellant had not appeared for the February 23, 2009 hearing and there was no indication in the record that he contacted the Office either prior or subsequent to the scheduled hearing to explain his absence.

LEGAL PRECEDENT

A wage-earning capacity determination is a finding that, a specific amount of earnings, either actual earnings or earnings from a selected position, represents a claimant's ability to earn wages.[4] Compensation payments are based on the wage-earning capacity determination and it remains undisturbed until properly modified.[5] Once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was erroneous.[6] The burden of proof is on the party seeking modification of the wage-earning capacity determination.[7]

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[8] 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.[9] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[10] 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.[11]

ANALYSIS

In his February 25, 2008 report, Dr. Gorski stated that appellant's employment-related aggravation was "temporary ... and would be expected to have lasted no more than [three] months." He further stated that appellant was "totally disabled due to the work[-]related conditions from the date of injury -- [August 10, 2005] (sic) until perhaps October 6, 2005." Dr. Gorski opined that any "subsequent disability ... would be due to [appellant's] underlying and preexisting condition." Based on this information, the Office terminated appellant's compensation and medical benefits effective September 24, 2008. For the reasons outlined in our September 25, 2009 decision (Docket No. 08-2470), the Board finds that Dr. Gorski's February 25, 2008 opinion regarding the cause of appellant's post October 6, 2005 disability is not sufficiently rationalized.

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[4] 5 U.S.C. § 8115(a) (2006); *see Mary Jo Colvert*, 45 ECAB 575 (1994); *Keith Hanselman*, 42 ECAB 680 (1991).

[5] *See Katherine T. Kreger*, 55 ECAB 633, 635 (2004).

[6] *Tamra McCauley*, 51 ECAB 375, 377 (2000).

[7] *Id.*

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

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

[10] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

[11] *Calvin S. Mays*, 39 ECAB 993 (1988).

As previously explained, Dr. Gorski stated that the August 2005 employment-related aggravation was "temporary ... and would be expected to have lasted no more than [three] months." However, he failed to explain why appellant's temporary aggravation reportedly ceased within less than two month's time. The Board found that absent such an explanation, the October 6, 2005 date identified by Dr. Gorski seemed arbitrary. The Board also found suspect Dr. Gorski's opinion that appellant had returned to his preinjury status. Appellant had ongoing right knee complaints, which he did not have prior to the August 18, 2005 employment injury. Mindful of these factors, it was difficult to ascertain how Dr. Gorski concluded that appellant had returned to his preinjury status. Lastly, the Board questioned the emphasis Dr. Gorski's placed on appellant's "sedentary job" in forming his opinion on causal relationship. The Board noted that it was unclear how appellant's "sedentary job" duties factored into an opinion on causal relationship in a traumatic injury claim. In view of these deficiencies, Dr. Gorski's February 25, 2008 report is insufficient to justify termination of compensation and medical benefits. The report is similarly insufficient to warrant modification of the Office's August 23, 2007 LWEC determination.

The Office also appears to justify modification of the prior LWEC determination based on appellant's purported vocational rehabilitation. However, appellant's unsubstantiated September 15, 2008 letter does not establish that he has been vocationally rehabilitated. He claimed to have accepted a full-time position with an annual salary of $43,839.00. However, there was no information about appellant's particular duties or when he presumably returned to full-time employment. The Office's September 24, 2008 decision indicated that he had completed on-the-job training required to work in the SB/SE collection division, but there was no such evidence in the record at the time the Office issued its decision terminating benefits. In fact, it wrote to the employing establishment that same day inquiring whether appellant had received any training for the position in the SB/SE collection division.

The Board finds that the record does not justify termination of compensation and medical benefits. Furthermore, the Office has not otherwise demonstrated a basis for modifying the August 23, 2007 LWEC determination.

CONCLUSION

The Office has not met its burden to justify termination of benefits. In light of the Board's determination on the merits of the claim, the March 13, 2009 decision finding that appellant abandoned his hearing request is moot.

ORDER

IT IS HEREBY ORDERED THAT the September 24, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 6, 2010
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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