United States Department of Labor
Employees' Compensation Appeals Board

L.E., Appellant	)	
and	)	**Docket No. 09-1855**
	)	**Issued: July 2, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Alexandria, LA, 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 July 13, 2009 appellant filed a timely appeal from an April 30, 2009 merit decision of the Office of Workers' Compensation Programs. 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 appellant's medical benefits on March 24, 2008 on the grounds that he had no disabling residuals of an October 8, 1994 employment injury. On appeal appellant asserts that his condition has worsened and he cannot work.

FACTUAL HISTORY

On October 8, 1994 appellant, then a 42-year-old nursing assistant, filed a Form CA-1, traumatic injury claim, alleging that he injured his lower back that day when he was slammed against the wall by an agitated patient. The claim was accepted for lumbar strain and appellant

returned to modified duty.[1] By decision dated October 17, 1995, the Office found that his actual earnings as a modified nursing assistant fairly and reasonably represented his wage-earning capacity, noting that he had zero loss and, in a September 10, 2004 decision, it determined that a clerical assistant position fairly and reasonably represented his wage-earning capacity, again noting a zero loss. By decision dated May 17, 2005, an Office hearing representative affirmed the September 10, 2004 decision.[2] Appellant stopped work on June 29, 2006, and began filing CA-7 claims for compensation, beginning that day. He received wage-loss compensation for the date June 29, 2006 only.

In a September 25, 2006 report, Dr. Robert E. Holladay, IV, a Board-certified orthopedic surgeon, and Office referral physician, diagnosed lumbar strain/sprain with preexisting degenerative disc disease and advised that appellant could work eight hours with permanent restrictions. The employing establishment submitted an investigative report dated November 22, 2006 advising that appellant was under surveillance from November 18 to 22, 2006. The report concluded that appellant was viewed running errands each day and showed no restrictions in his movements. On November 28, 2006 Dr. Davidson disagreed with Dr. Holladay's report and recommended a functional capacity evaluation (FCE) and neurosurgical evaluation. She continued to advise that appellant was totally disabled.

The Office determined that a conflict in medical evidence had been created regarding the extent of appellant's disability and work capabilities and on November 21, 2006 referred him to Dr. David R. Willhoite, Board-certified in orthopedic surgery, who provided a December 11, 2006 report in which he diagnosed chronic lumbar strain with a chronic pain syndrome and advised that appellant could work 32 hours a week with permanent restrictions. On January 24, 2007 the employing establishment offered appellant a modified position of medical support assistant for 32 hours a week that was in agreement with Dr. Willhoite's restriction and, in a response dated January 25, 2007, appellant stated that he could not accept or decline the position until it had been reviewed by Dr. Davidson. The Office determined that the offered position was suitable and, by decision dated March 16, 2007, terminated appellant's wage-loss compensation and schedule award compensation benefits on the grounds that he declined an offer of suitable work. He timely requested a hearing that was held on July 9, 2007.

[1] Appellant initially returned to four hours of modified duty daily and on July 19, 1995 to eight hours of modified duty. In 1999 he underwent nonemployment-related cervical spine surgery. Based on an April 13, 2004 report from Dr. John P. Sandifer, an Office referral physician Board-certified in orthopedic surgery, appellant was detailed to a light-duty medical assistant position on June 2, 2004.

[2] On July 11, 2005 appellant began modified duty in a medical support position in the medical administrative service, based on restrictions provided by Dr. Vanda Davidson, an attending Board-certified orthopedic surgeon, of sitting and standing as tolerated, walking up to 1 hour; no pushing, pulling, squatting, climbing or twisting; no lifting more than five pounds; reaching above shoulder up to 1.5 hours daily; and bending, stooping and kneeling up to 0.5 hours daily. Appellant also submitted reports from Dr. Stephen P. Katz, who practices pain management, in which he noted appellant's complaints of chronic neck and back pain and described his medication regimen. In reports beginning on June 29, 2006, Dr. Davidson diagnosed a degenerative lumbar disc aggravated with prolonged sitting and advised that appellant should be off work and that he could only work sedentary duty with sitting and standing at liberty. An August 3, 2006 magnetic resonance imaging (MRI) scan of the lumbar spine was interpreted as essentially negative with minimal disc bulges at L4-5 and L5-S1. In September 2006, appellant was seen by Dr. Arsham Naalbandian, a Board-certified neurologist, who diagnosed persistent and progressive symptoms of pain involving the low back and lower extremities with sensory involvement at L5. Electromyography (EMG) and nerve conduction study on September 6, 2006 demonstrated possible mild L5 radiculopathy.

In a September 25, 2007 decision, an Office hearing representative remanded the case to the Office, noting that the Office did not make a formal determination regarding appellant's claims for wage loss subsequent to June and July 2006. She found that the statement of accepted facts provided Dr. Holladay did not discuss appellant's physical requirements of either his regular or light-duty jobs, noted that appellant was initially referred to Dr. Parsons for an impartial evaluation and then to Dr. Willhoite without further explanation which would not allow him to be considered an impartial specialist.[3] The hearing representative concluded that, due to the numerous problems in the record, the Office's determination that the January 24, 2007 job offer was suitable was premature, further noting that, because appellant received no wage-loss compensation, the burden remained with him to prove his inability to work. She found that appellant had not established that he was forced to work outside his restrictions and further noted that the Office had the obligation to seek clarification from Dr. Holladay. Upon remand, the Office was to seek employment information from the employing establishment, update the statement of accepted facts to reflect the physical requirements of appellant's regular and modified duties and obtain a supplementary report from Dr. Holladay regarding appellant's work capabilities.

On November 9, 2007 the Office forwarded an updated statement of accepted facts to Dr. Holladay and asked that he provide a report regarding appellant's work capabilities.[4] In a December 3, 2007 report, Dr. Holladay advised that the September 25, 2006 evaluation did not demonstrate any objective residual of the lumbar strain/sprain, that appellant's ongoing clinical complaints could only be explained as related to preexisting degenerative disc disease and that he could physically perform the job duties of medical support assistant, the position offered on January 24, 2007. In a December 6, 2007 report, Dr. Davidson noted appellant's complaint of aching, throbbing lower back pain, paraspinous muscle spasm on examination and positive straight leg raising.

On December 27, 2007 the Office determined that a conflict in medical evidence had been created regarding whether appellant continued to have residuals due to the October 8, 1994 employment injury, and referred him to Dr. John G. Andrew, a Board-certified orthopedic surgeon, for an impartial evaluation. In a January 29, 2008 report, Dr. Andrew noted the history of injury, his review of the medical records and appellant's complaint of continuous back pain with radiation to both lower extremities. He provided physical examination findings, advising that there was no muscle spasm or tenderness noted. Active straight leg raising was positive and passive straight leg raising negative. All joints of the lower extremities demonstrated full normal range of motion and appellant walked on his heels and toes without difficulty. Dr. Andrew reported that appellant complained of hyposthesias in a stocking distribution of the left lower extremity from the waist to the toes and found no other sensory deficits. Deep tendon reflexes and the lower extremities were symmetrical and equal. In answer to specific Office questions, Dr. Andrew advised that there were no clinical or objective findings of lumbar strain and that the record did not support a material worsening of appellant's work-related condition. He concluded

[3] An Office appointment schedule notification form found in the record identifies the physician as "Dr. Parsons." On that same day, the Office referred appellant to Dr. Willhoite.

[4] The statement of accepted facts included a description of the physical requirements of the medical support position appellant was performing when he stopped work and the physical requirements of the medical support assistant position he was offered on January 24, 2007.

that, based on his examination, there was no objective evidence to prevent appellant from acting as a normal uninjured man.[5]

On February 22, 2008 the Office proposed to terminate appellant's compensation benefits on the grounds that the medical evidence, as characterized by Dr. Andrew's report, established that he no longer suffered disabling residuals due to the accepted lumbar strain. It noted that appellant failed to participate in a scheduled FCE but that this examination was not necessary because Dr. Andrew provided an unequivocal and well-rationalized medical opinion.[6] A March 3, 2008 FCE noted that appellant demonstrated inconsistent effort but that he could safely work an eight-hour day in a light physical demand position with restrictions to prolonged sitting, standing, bending and stooping and that he be allowed frequent postural breaks. In a March 3, 2008 work capacity evaluation, Dr. Andrew advised that appellant could work eight hours daily in a light category, with sitting, walking and standing limited to four hours continuously and no bending or stooping. Appellant did not respond to the proposed termination and, by decision dated March 24, 2008, the Office finalized the termination of appellant's medical and wage-loss benefits.

On August 22, 2008 appellant, through his attorney, requested reconsideration and submitted treatment notes from Dr. Davidson dated March 11, 2008 through April 23, 2009 in which the physician advised that appellant had been followed by her since 1994. She advised that appellant was retired and that he complained of persistent radiating back pain, worse in cold weather and with standing, occasional numbness and tingling in both feet, burning and stinging of the legs at night and muscle cramps, and that he was unable to do a lot of things around the house that he would like to. Examination findings included paraspinous muscle spasm, decreased back range of motion and low back soreness. In reports dated April 15, 2008 to March 31, 2009, Dr. Katz noted appellant's ongoing complaints of neck and low back discomfort. He diagnosed intervertebral disc disease with L5 radiculopathy and failed back syndrome and described appellant's medication regimen for pain relief.

In a merit decision dated April 30, 2009, the Office denied modification of the March 24, 2008 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits. After it has determined that an employee has disability causally related to his or her 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. Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To

[5] Appellant was also scheduled for an FCE following his evaluation by Dr. Andrew, but he did not attend the test, and by letter dated January 30, 2008 was advised to reschedule the examination within 15 days or face suspension of benefits. By decision dated February 19, 2008, the Office finalized the proposed suspension. In a February 14, 2008 letter received by the Office on February 20, 2008, appellant's attorney stated that appellant was told by Dr. Andrew's office manager that he was free to go after his examination and he then returned home.

[6] *Id*.

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.[7]

Section 8123(a) of the Federal Employees' Compensation Act[8] provides that if there is 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.[9] When 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 Office, in its March 24, 2008 and April 30, 2009 decisions, indicated that it was terminating appellant's compensation and entitlement to medical treatment. As the Office was not paying him compensation, however, it improperly characterized the issue as termination of wage-loss compensation. The issue is whether appellant has residuals of his employment injury entitling him to further medical treatment.

The Board finds that the Office met its burden of proof to terminate appellant's medical benefits on March 24, 2008. The accepted condition is lumbar strain due to an October 8, 1994 employment injury. The Office determined that a conflict in medical evidence had been created regarding whether appellant continued to have residuals of the employment injury and properly referred him to Dr. Andrew, Board-certified in orthopedic surgery, for an impartial evaluation. In a January 29, 2008 report, Dr. Andrew noted the history of injury, his review of the medical records and appellant's complaint of continuous back pain. He provided physical examination findings and advised that there were no clinical or objective findings of lumbar strain, that the record did not show a worsening of appellant's work-related condition and concluded that, based on his examination, there was no objective evidence to prevent appellant from acting as a normal uninjured man.

The Board finds that, as Dr. Andrew provided a comprehensive, well-rationalized opinion in which he clearly advised that there were no clinical or objective findings of lumbar strain, that the record did not support a material worsening of appellant's work-related condition and that, based on his examination, there was no objective evidence to prevent appellant from acting as a normal uninjured man, his opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.[11] The Office therefore properly terminated appellant's medical benefits on March 24, 2008.[12]

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[7] *Fred Simpson*, 53 ECAB 768 (2002).

[8] 5 U.S.C. §§ 8101-8193.

[9] *Id*. at § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[10] *Manuel Gill*, 52 ECAB 282 (2001).

[11] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

[12] *Manuel Gill*, *supra* note 10.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's medical benefits effective March 24, 2008.[13]

ORDER

IT IS HEREBY ORDERED THAT the April 30, 2009 decision of the Office of Workers' Compensation Programs be affirmed.

Issued: July 2, 2010
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

[13] The Board notes that the Office has not adjudicated appellant's claim for compensation for the period after he stopped work on June 29, 2006. The record indicates that in a September 10, 2004 decision, the Office determined that his clerical position fairly and reasonably represented his wage-earning capacity, noting a zero loss. Office procedures provide that if a formal loss of wage-earning capacity decision has been issued, the rating should be left in place unless the claimant requests resumption of compensation for total wage loss. In that instance, the claims examiner will need to evaluate the request according to the customary criteria for modifying a formal loss of wage-earning capacity." Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(a) (December 1995). 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, in fact, erroneous. The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination. *Stanley B. Plotkin*, 51 ECAB 700 (2000).