United States Department of Labor
Employees' Compensation Appeals Board

V.N., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, IMMIGRATION & CUSTOMS ENFORCEMENT, DEPORTATION & REMOVAL OPERATIONS, San Francisco, CA, Employer	)	**Docket No. 09-1600** **Issued: June 28, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 8, 2009 appellant filed a timely appeal from a February 12, 2009 decision of the Office of Workers' Compensation Programs that denied his claim for wage-loss compensation and a February 13, 2009 decision that terminated his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he is entitled to wage-loss compensation for any period on or after January 18, 2008; and (2) whether the Office met its burden of proof to terminate appellant's compensation benefits effective February 12, 2009 on the grounds that he had no residuals of the accepted condition.

On appeal appellant asserts that the referee physician was biased and his opinion should not be given weight as he ignored appellant's bladder and bowel issues.

FACTUAL HISTORY

On November 16, 2007 appellant, then a 50-year-old immigration enforcement agent, filed a Form CA-1, traumatic injury claim, alleging that he injured his low back and arm on November 14, 2007 when his government vehicle was rear-ended.[1] He submitted a brief accident report and a November 15, 2007 report in which Dr. Mark W. Wilbur, a chiropractor, reported that appellant was under his care for treatment of injuries sustained in a work-related motor vehicle accident and should remain off work for 45 days. In a November 28, 2007 response to an Office inquiry for additional information, appellant stated that he injured his low back and neck. He submitted a "visit verification" dated November 14, 2007 from Dr. Edward Anthony Bayer, Board-certified in family medicine. No diagnosis was provided but Dr. Bayer advised that appellant should be off work until November 16, 2007. In a November 26, 2007 attending physician's report, Dr. Wilbur diagnosed lumbar and cervical sprain/strain and advised that appellant was totally disabled until December 31, 2007. In a December 7, 2007 report, he provided physical examination findings and advised that appellant could return to work the first week in January 2008.

By letter dated December 21, 2007, the Office informed appellant of the definition of a physician and limitation on chiropractic treatment under section 8101(2) of the Federal Employees' Compensation Act.[2]

The employing establishment submitted a position description, and a January 7, 2008 statement from Claudio McCoy, appellant's supervisor, who advised that appellant traveled to Thailand and Laos on December 1, 2007, returning on December 22 or 23, 2007. In a January 3, 2008 report, Dr. Wilbur advised that appellant's lower back injury had not improved enough to return to work. On January 8, 2008 he referred appellant to Dr. Susan Gutierrez, a Board-certified physiatrist. On January 14, 2008 Dr. Wilbur advised that he had multiple discussions with appellant about the long flight to Thailand. The airline had deluxe economy seats which reclined and were located on the aisle so that appellant could get up frequently. Dr. Wilbur found it appropriate to allow appellant to travel and that this situation did not reflect how he would do sitting in a fixed position performing light-duty desk work. He advised that appellant required further testing and remained totally disabled. Appellant returned to part-time modified duty on January 15, 2008. In a January 22, 2008 decision, the Office denied the claim.

On February 12, 2008 appellant requested reconsideration and submitted a traffic collision report concerning the November 14, 2007 motor vehicle accident. In a report received on January 28, 2008,[3] Dr. Gutierrez reported a history that appellant developed headaches, neck, right shoulder and low back pain when his vehicle was struck from behind. She stated that appellant had regular chiropractic treatment but that radiating low back pain continued and that he denied bladder or bowel changes. Dr. Gutierrez provided findings on physical examination including tenderness along the lumbosacral paraspinal musculature and sacroiliac joint and negative straight leg raising. Strength was 5/5 and sensation was intact to light touch and

[1] The record reflects that appellant filed a third-part claim for the accident.

[2] 5 U.S.C. § 8101(2).

[3] Dr. Gutierrez later amended the report showing a date of examination of January 14, 2008.

pinprick in upper and lower extremities. Dr. Gutierrez diagnosed lumbosacral fascetogenic pain, sacroiliitis and lumbar sprain. She advised that appellant could return to work for four hours daily with restrictions to his physical activity and recommended magnetic resonance imaging (MRI) scan testing. A February 5, 2008 MRI scan of the lumbar spine demonstrated degenerative disc disease with irregular asymmetric bulges at L4-5 and L5-S1 causing spinal stenosis and severe foraminal narrowing. In a February 22, 2008 report, Dr. Gutierrez reviewed the MRI scan findings and reported an episode of urinary incontinence. She recommended epidural injection and consultation with an orthopedic surgeon. On February 26, 2008 Dr. Wilbur advised that appellant had an acute reaction to the November 14, 2007 motor vehicle accident causing complications of his underlying degenerative disease but he could continue to work limited duty.

In March 2008 appellant began working full-time modified duty. On May 8, 2008 the Office accepted that he sustained an employment-related lumbar sprain.[4]

On May 19, 2008 the Office referred appellant to Dr. Aubrey A. Swartz, Board-certified in orthopedic surgery, for a second opinion evaluation.

In a May 27, 2008 work capacity evaluation, Dr. Gutierrez advised that appellant could not perform his usual job duties due to severe back pain from spinal stenosis and provided restrictions to his physical activity. A June 6, 2008 electromyography and nerve conduction study of the lower extremities was interpreted by Dr. Gutierrez as demonstrating electrophysiological evidence of bilateral L5 and S12 radiculopathy.

Appellant stopped work on June 6, 2008 and on June 10, 2008 filed a Form CA-7 claim for compensation. On June 10, 2008 Dr. Gutierrez advised that appellant was totally disabled. In a June 11, 2008 duty status report, she advised that he had clinical findings of cauda equina-type symptoms and reiterated that he was totally disabled.

In a June 9, 2008 report, Dr. Swartz reviewed the history of injury and medical record. He noted appellant's complaint of low back pain radiating to the left lower extremity. On physical examination appellant had extensive areas of hypesthesias in both lower extremities. Dr. Swartz diagnosed central spinal stenosis from L3 to S1 as seen on MRI scan testing and advised that this condition was not medically related to the November 14, 2007 employment injury. He explained that the accident would have resulted in a soft tissue strain with a temporary exacerbation of the preexisting extensive spinal stenosis, with maximum medical improvement reached on January 14, 2008. Dr. Swartz advised that, based on the work injury, appellant would have been capable of returning to unrestricted duty as of January 15, 2008. In a work capacity evaluation dated June 22, 2008, Dr. Swartz advised that appellant could work eight hours a day without restrictions and could lift 50 to 70 pounds.

In a June 17, 2008 report, Dr. Jason Smith, a Board-certified orthopedic surgeon, noted the history of injury, appellant's complaint of radiating low back pain, and his review of the February 5, 2008 MRI scan study. He diagnosed three-level spinal stenosis secondary to disc bulging and recommended decompression surgery at L3-4, L4-5 and L5-S1.

[4] Appellant received compensation for the hours he did not work from January 15 to February 28, 2008.

In a July 21, 2008 report, Dr. Gutierrez disagreed with the findings by Dr. Swartz. She stated that appellant reported that he was asymptomatic prior to the November 14, 2007 motor vehicle accident and advised that his incontinence and neurological symptoms were becoming worse. On examination his lower extremity deep tendon reflexes were absent. Although appellant's spinal stenosis developed gradually over many years, the trauma of the November 14, 2007 motor vehicle accident caused his current soft tissue and neurological complications, especially bladder and bowel incontinence. Dr. Gutierrez agreed with Dr. Smith's recommendation for surgery.

The Office determined that a conflict in medical opinion arose between Dr. Gutierrez and Dr. Swartz regarding whether appellant had residuals of the accepted lumbar sprain and whether he had any employment-related limitations or periods of disability. On September 9, 2008 it referred him to Dr. Clarence A. Boyd, a Board-certified orthopedic surgeon, for an impartial evaluation.

In a report dated November 7, 2008, Dr. Boyd reviewed the history of injury and medical treatment records. On examination, appellant complained of daily constant sharp low back pain and leg numbness. Dr. Boyd advised that appellant walked easily without a limp and stood erect without a list. Examination of the lumbosacral spine demonstrated no tenderness or bony deformity over the spinous processes and no tenderness, spasm or atrophy over the paralumbar musculature or gluteal musculature of the buttocks. Appellant demonstrated full active lumbosacral spine range of motion. Heel and toe walking were normal. Neurologic examination demonstrated intact sensation to pinprick symmetrically in the lower extremities in the L1 through S1 distributions with normal lower extremity reflexes. Straight leg raising in the sitting position was negative at 90 degrees bilaterally. It was limited at 75 degrees bilaterally in the supine position by hamstring tightness. Sciatic stretch tests were negative. Dr. Boyd reviewed the MRI scan studies that demonstrated preexisting degenerative changes but no evidence for acute injury. He advised that the most consistent diagnosis caused by the November 14, 2007 automobile accident was a lumbar muscle strain with a secondary diagnosis of preexisting degenerative disc and joint disease, not caused or aggravated by the accident. Dr. Boyd stated that the underlying degenerative disease would be at its current state absent the November 14, 2007 lumbar strain and noted that there were no objective findings or residuals of the lumbar strain, which resolved within four to eight weeks or by January 17, 2008. He stated that appellant's physical examination did not reveal findings consistent with ongoing effects of a lumbar strain but was consistent with underlying degenerative disc and joint disease. Dr. Boyd commented that appellant's trip to Thailand and Laos following the motor vehicle accident was inconsistent with his claim of total disability. He concluded that there were no physical limitations resulting from the November 14, 2007 lumbar strain and that any symptoms or limitations were due to appellant's underlying degenerative disease. In an attached work capacity evaluation, Dr. Boyd advised that appellant had reached maximum medical improvement and should limit bending and stooping to two to three hours daily with a 40-pound lifting restriction. He attached medical literature to support his conclusion.[5]

[5] Alan S. Hilibrand & Nahshon Rand, "Degenerative Lumbar Stenosis: Diagnosis and Management," 7 J. Am. Acad. Orthop. Surg. 239-49 (1999).

On January 5, 2009 the Office proposed to terminate appellant's compensation benefits on the grounds that the weight of medical evidence, as represented by Dr. Boyd's opinion, established that he no longer had disability or residuals of the accepted lumbar sprain.

Appellant submitted a February 2, 2009 report from Dr. Wilbur who reviewed appellant's medical history and disagreed with the opinions of Dr. Swartz and Dr. Boyd. In a February 3, 2009 report, Dr. Gutierrez reviewed Dr. Boyd's report and disagreed with his conclusions, reiterating that appellant had been asymptomatic prior to the November 11, 2007 motor vehicle accident. She opined that the accident caused appellant's severe symptoms, especially urinary incontinence.

By decision dated February 12, 2009, the Office denied appellant's claim for wage loss on or after January 1, 2008. In a February 13, 2009 decision, the Office terminated appellant's compensation benefits effective February 12, 2009 on the grounds that he had no residuals or disability due to the accepted condition.

LEGAL PRECEDENT -- ISSUE 1

Under the Act, the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[6] Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act,[7] and whether a particular injury causes an employee to be disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial medical evidence.[8]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence establishes that light duty can be performed, the employee has the burden to establish by the weight of reliable, probative and substantial evidence a recurrence of total disability. As part of this burden of proof, the employee must show either a change in the nature and extent of the injury-related condition, or a change in the nature and extent of the light-duty requirements.[9]

The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[10] The issue of whether a claimant's disability is related to an

[6] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[7] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

[8] *Tammy L. Medley*, 55 ECAB 182 (2003).

[9] *Shelly A. Paolinetti*, 52 ECAB 391 (2001); *Terry R. Hedman*, 38 ECAB 222 (1986).

[10] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

accepted condition is a medical question which must be established by a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disability is causally related to employment factors and supports that conclusion with sound medical reasoning.[11] Medical conclusions unsupported by rationale are of diminished probative value.[12]

Section 8123(a) of the Act 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.[13] 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.[14]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet his burden of proof to establish that he was disabled on or after January 18, 2008 due to the accepted lumbar sprain. Appellant did not establish that the nature and extent of the injury-related condition changed so as to prevent him from continuing to perform his modified-duty assignment. The Board has held that a partially disabled claimant who returns to a light-duty job has the burden of proving that he or she cannot perform the light duty, if a recurrence of total disability is claimed.[15] The issue of whether an employee has disability from performing a modified position is primarily a medical question and must be resolved by probative medical evidence.[16] A claimant's burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the condition is causally related to the employment injury and supports that conclusion with sound medical rationale. Where no such rationale is present, the medical evidence is of diminished probative value.[17]

The Board notes that Dr. Wilbur's reports do not constitute probative medical evidence. Section 8101(2) of the Act provides that the term "physician" includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.[18] Dr. Wilbur did not diagnose a subluxation by x-ray, therefore it is not established that he is a "physician" under the Act.[19]

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[11] *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[12] *Albert C. Brown*, 52 ECAB 152 (2000).

[13] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

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

[15] *See William M. Bailey*, 51 ECAB 197 (1999).

[16] *Cecelia M. Corley*, 56 ECAB 662 (2005).

[17] *Mary A. Ceglia*, 55 ECAB 626 (2004).

[18] 5 U.S.C. § 8101(2); *see A.O.*, 60 ECAB ____ (Docket No. 08-580, issued January 28, 2009).

[19] *Id*.

The Office found a conflict in medical opinion was created between Dr. Gutierrez, an attending Board-certified physiatrist, and Dr. Swartz, a Board-certified orthopedic surgeon, who performed a second opinion evaluation for the Office. The conflict pertained to whether appellant had residuals of the accepted lumbar sprain or any periods of disability due to the accepted condition. On September 9, 2008 appellant was referred to Dr. Boyd for an impartial evaluation. In his November 7, 2008 report, Dr. Boyd noted his review of the medical record and provided examination findings. He noted that appellant had preexisting lumbar degenerative disc and joint disease that was not aggravated by the November 17, 2007 motor vehicle accident which caused a lumbar strain that had resolved no later than January 17, 2008. Dr. Boyd specifically stated that appellant's physical examination did not reveal findings consistent with ongoing effects of a lumbar strain but rather was consistent with degenerative disc and joint disease.

Appellant received wage-loss compensation through February 28, 2008. Dr. Boyd advised that any disability related to residuals of the November 17, 2007 injury would have ceased no later than January 17, 2008. Appellant submitted a June 17, 2008 report in which Dr. Smith recommended decompression surgery for three-level spinal stenosis secondary to disc bulging; however, he did not provide an opinion regarding the cause of the condition. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[20] Dr. Smith's report is therefore insufficient to establish the period of claimed disability. Dr. Gutierrez noted her disagreement with Dr. Boyd's conclusions in a February 3, 2009 report, a subsequently submitted report of a physician on one side of a resolved conflict of medical opinion is generally insufficient to overcome the weight of the impartial medical specialist or to create a new conflict of medical opinion.[21] She did not express an awareness of appellant's lengthy trip to Thailand and Laos shortly after the November 14, 2007 motor vehicle accident, noting only that he was symptomatic prior to the accident. A medical opinion that states that a condition is causally related to an employment injury because the employee was asymptomatic before the injury but symptomatic after is insufficient, without supporting rationale, to establish causal relationship.[22]

Dr. Boyd provided a comprehensive, well-rationalized opinion in which he found that appellant had no periods of disability after January 17, 2008. On appeal appellant asserts that the impartial specialist was biased. The Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.[23] Regarding appellant's assertion that Dr. Boyd ignored his bladder and bowel issues, the physician carefully described appellant's complaints, provided a review of the medical records and listed findings on physical examination. Dr. Boyd concluded that appellant's symptoms and limitations were due to his underlying degenerative joint and disc disease and not to residuals of the November 14, 2007 lumbar sprain. His report is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical

[20] *Willie M. Miller*, 53 ECAB 697 (2002).

[21] *Richard O'Brien*, 53 ECAB 234 (2001).

[22] *T.M.*, 60 ECAB ____ (Docket No. 08-975, issued February 6, 2009).

[23] *L.W.*, 59 ECAB ____ (Docket No. 07-1346, issued April 23, 2008).

evidence.[24] The Board finds that appellant did not establish that he was disabled for any period subsequent to January 17, 2008.

LEGAL PRECEDENT -- ISSUE 2

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[25] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[26]

ANALYSIS -- ISSUE 2

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits. As noted, the Office determined that a conflict in medical evidence had been created between the opinions of Drs. Gutierrez and Swartz and referred appellant to Dr. Boyd. The conflict included whether appellant continued to have residuals or limitations due to the accepted lumbar sprain.

Dr. Boyd's November 7, 2008 report thoroughly discussed appellant's complaints, noted his review of the medical record, and provided examination findings. He advised that the lumbar strain caused by the November 17, 2007 motor vehicle accident had resolved no later than January 17, 2008 with no objective findings or residuals of the employment injury. While Dr. Boyd restricted appellant's bending and stooping to two to three hours daily and lifting to 40 pounds, he clearly stated that these were due to appellant's preexisting degenerative disc and joint disease that was not aggravated by the employment injury.

Appellant submitted a February 2, 2009 report in which Dr. Wilbur noted his disagreement with the conclusions of Drs. Swartz and Boyd, but as discussed above, Dr. Wilbur's reports do not constitute probative medical evidence as he is not a physician under the Act.[27] Dr. Smith did not provide an opinion regarding the accepted lumbar sprain, and Dr. Gutierrez was on one side of the conflict resolved by Dr. Boyd.[28]

Dr. Boyd provided a comprehensive, well-rationalized opinion in which he clearly advised that any residuals of appellant's accepted conditions had resolved and that the restrictions provided were due to the nonemployment-related degenerative disc and joint disease.

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

[25] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[26] *Id.*

[27] *Supra* note 18.

[28] *Richard O'Brien, supra* note 21.

His report is therefore entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.[29]

CONCLUSION

The Board finds that appellant did not establish that he was entitled to wage-loss compensation for any period after January 17, 2008 and that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that he had no residuals or disability due to the accepted lumbar sprain.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 13 and 12, 2009 be affirmed.

Issued: June 28, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[29] *See Sharyn D. Bannick, supra* note 24.