

**United States Department of Labor
Employees' Compensation Appeals Board**

S.T., Appellant

and

**DEPARTMENT OF THE ARMY, NATIONAL
GUARD BUREAU, Austin, TX, Employer**

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**Docket No. 09-1500
Issued: March 1, 2010**

Appearances:
Appellant, pro se
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 May 8, 2009 appellant filed a timely appeal of a July 28, 2008 merit decision of the Office of Workers' Compensation Programs that terminated his benefits. He also appealed decisions dated December 8, 2008 and April 13 and May 7, 2009 denying modification of the termination decision. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective July 28, 2008.

On appeal, appellant contends that the second opinion referral physician spent less than 10 minutes with him.

FACTUAL HISTORY

On August 8, 1979 appellant, then a 43-year-old general mechanic, filed a traumatic injury claim alleging that on that date he injured his lower back when he stepped down from an

M125A1 track vehicle. The Office accepted his claim for displacement of lumbar intervertebral disc without myelopathy and paid appropriate compensation and medical benefits. On October 23, 1979 appellant underwent an injury-related lumbar laminectomy at L3-4. He was placed on the periodic rolls.

On March 3, 2003 the Office advised appellant that the most recent medical evidence of record was three years old. It requested that he submit a report from his attending physician. In a March 20, 2003 medical report, Dr. K. Allan Ward, a Board certified physiatrist, noted that he last examined appellant on July 6, 2000. Since that time, appellant continued to have low back pain with significant limitations. Dr. Ward noted that appellant was on multiple medications. He opined that the affects of appellant's postlaminectomy syndrome would continue to limit appellant.

In an April 17, 2007 letter, the Office again requested that appellant submit an updated medical report from an attending physician. On October 23, 2007 it referred him to Dr. George M. Cole, an osteopath, for a second opinion. In a report dated November 28, 2007, Dr. Cole conducted a physical examination and diagnosed lumbosacral spondylosis without myelopathy, degenerative joint disease of spine, postlaminectomy syndrome of the lumbar region with spinal stenosis. He advised that appellant's symptoms were currently due to naturally occurring degenerative changes in the lumbar spine that caused spinal stenosis. Appellant had a good result from spine surgery and Dr. Cole opined that there was no indication that he needed further medical care related to the 1979 employment injury.

On June 25, 2008 the Office issued a notice of proposed termination of compensation benefits.

In response, appellant submitted a May 30, 2007 medical report from Dr. Mary F. Burgesser, a Board-certified physiatrist with a subspecialty in spinal cord injury medicine. Dr. Burgesser listed appellant's diagnoses as degenerative disc disease; spinal stenosis; and status multiple surgical procedures including decompressive laminectomy L1-S1 and fusion from L5-S1. With regard to whether appellant had residuals of his accepted injury, she noted that, because of his herniated disc, he required a discectomy and decompressive laminectomy, which contributed to multiple segmental instability. Dr. Burgesser found that he continued to experience back pain on a daily basis and advised that he was permanently disabled for work.

By decision dated July 28, 2008, the Office terminated appellant's compensation benefits effective.

On August 14, 2008 appellant requested reconsideration. He submitted a July 24, 2008 report from Dr. Burgesser, who reiterated his current diagnoses. In a decision dated December 8, 2008, the Office denied modification of the July 28, 2008 decision.

On February 10, 2009 appellant requested reconsideration. By decision dated April 13, 2009, the Office denied reconsideration of the merits.

On August 12, 2009 appellant again requested reconsideration and submitted a January 2, 2009 magnetic resonance imaging scan. In a February 3, 2009 report, Dr. Bejan J. Daneshfar, a Board-certified anesthesiologist, diagnosed chronic lumbosacral spondylosis, chronic

postlaminectomy syndrome/lumbar and chronic thoracic or lumbosacral radiculitis/neuritis. On February 9, 2009 Dr. Laxman Bhatia, a Board-certified internist, noted that appellant had chronic back pain and was under the care of another physician.

In a decision dated May 7, 2009, the Office denied modification of its prior merit decisions.

LEGAL PRECEDENT

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 federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.² Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.³

Section 8123(a) 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.⁴ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the second opinion physician, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁵

ANALYSIS

The Office accepted that on August 8, 1979 appellant sustained a displacement of lumbar intervertebral disc at L3-4 without myelopathy. It placed him on the periodic rolls in receipt of compensation for total disability. The Office terminated appellant's benefits effective July 28, 2008 on the basis that he had no residuals from his accepted employment injury. It based the termination on the report of Dr. Cole, a second opinion physician. The Board finds that there was a conflict in medical opinion at the time of the July 28, 2008 termination decision between Dr. Cole and Dr. Burgesser as to the extent of residuals due to the accepted injury and appellant's capacity for work.

¹ *Curtis Hall*, 45 ECAB 316 (1994).

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

³ *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey* 49 ECAB 166 (1997).

⁴ 5 U.S.C. § 8123(a).

⁵ 20 C.F.R. § 10.321.

Dr. Cole provided a November 28, 2007 report, in which he attributed appellant's lumbar condition to the natural progression of his degenerative disease. He noted that appellant had a good result from spinal surgery in 1979 and that his ongoing condition was not related to the accepted injury. Dr. Cole advised that appellant did not require further medical care related to the accepted condition.

On May 30, 2007 Dr. Burgess provided a report noting appellant's accepted injury and a preexisting history of a disc herniation at L5-S1 in 1967 and L4-5 in 1973, for which he underwent lumbar laminectomies. He provided findings on examination and advised that he was permanently restricted from work due to residuals of his back condition.

There is an unresolved conflict between appellant's treating physician and the second opinion referral physician with regard to whether appellant had disabling residuals of his accepted lumbar condition and whether he required medical treatment. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a referee physician to resolve the conflict.⁶ The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits due an unresolved conflict in medical opinion.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective July 28, 2008 due to an unresolved conflict in medical opinion.

⁶ *Elsie L Price*, 54 ECAB 734 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs May 7 and April 13, 2009 and December 8 and July 28, 2008 are reversed.

Issued: March 1, 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