United States Department of Labor
Employees' Compensation Appeals Board

D.G., Appellant	)	
and	)	**Docket No. 09-1606**
	)	**Issued: May 13, 2010**
SOCIAL SECURITY ADMINISTRATION, JERSEY CITY TELESERVICE, Jersey City, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 of a May 21, 2009 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration and a February 2, 2009 decision affirming the termination of her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss and medical compensation benefits effective June 2, 2008; and (2) whether the Office properly refused to reopen her claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 16, 2004 appellant, then a 49-year-old contact representative, injured her neck, right shoulder and back on January 16, 2004 when an elevator malfunctioned. It dropped

to a lower floor, went up to the ninth floor and down again. The Office accepted a cervical sprain and cervical and lumbar radiculopathy. Appellant stopped work on January 26, 2004 and returned intermittently in part-time positions. She stopped work again on February 14, 2007 and received wage-loss compensation.

In a July 17, 2007 report, Dr. Michel S. Badin, a Board-certified internist, advised that appellant was disabled from February 14 through September 3, 2007 due to a relapse of cervical and lumbar pain related to her work injuries. Appellant was seen every week since February 2007 and presented with significant findings related to pain in the cervical and lumbar spine with radiculopathy in the right leg, left shoulder and left arm. In a January 10, 2008 work capacity evaluation (Form OWCP-5c), Dr. Badin advised that appellant was permanently restricted to working four hours a day within limitations.

To determine whether appellant continued to have disabling residuals of her January 16, 2004 injury and whether she was capable of working her date-of-injury position without restrictions, the Office referred her to Dr. Andrew M. Hutter, a Board-certified orthopedic surgeon, for a second opinion. In an April 8, 2008 report, Dr. Hutter reviewed the history of injury, the medical records and statement of accepted facts and presented findings on examination. The neck revealed a full range of motion with minimal tenderness to palpation of the paraspinal musculature and no palpable spasm. Manual motor testing was 5/5 in the upper extremities with symmetrical reflexes. Sensory examination was intact to light touch to both upper extremities. Examination of the lower back revealed minimal tenderness to palpation of the lumbar paraspinal musculature to very light touch palpation. Dr. Hutter found that appellant was able to sit upright on the examination table without difficulty, but resisted range of motion of the lumbar spine in the standing position. Flexion and extension were limited by about 50 percent with full lateral bending. Appellant was able to stand on her toes and heels without difficulty and straight leg raising test was negative bilaterally. Examination of the lower extremities was normal for manual motor testing and symmetrical reflexes at the knees and ankles were present. Sensory examination was also intact to light touch in both lower extremities. Dr. Hutter diagnosed herniated disc at C4-5 with cervical strain and lumbar strain. He stated that her orthopedic examination was within normal limits. While there was evidence of a disc herniation in the cervical spine, there was no clinical correlation with that finding. Dr. Hutter advised that appellant reached maximum medical improvement and could perform her full-time duties as a contact representative. In an accompanying work restriction evaluation, he advised that appellant could work her usual job and that she had no work restrictions.

By notice dated May 2, 2008, the Office proposed to terminate appellant's wage-loss and medical benefits as the weight of the medical evidence established that the accepted conditions ceased or were no longer injury related. It accorded weight to the opinion of Dr. Hutter, the second opinion specialist. Appellant was provided 30 days to submit additional medical evidence or arguments.

In response, the Office received a May 20, 2008 letter from appellant, who contended that she had ongoing neck, shoulder and back pain that required continuous medical treatment. No medical evidence was submitted.

By decision dated June 2, 2008, the Office terminated appellant's wage-loss and medical benefits effective that day.

On June 24, 2008 appellant's attorney requested a hearing that was held on October 28, 2008. Appellant testified that she returned to work for four hours a day as a contact representative on September 2, 2008. She used headphones and got up from her desk as necessary. Appellant stated that she still had pain in her neck, right leg and shoulder as well as cervical and lumbar spasms and was under medical treatment. Appellant's attorney argued that Dr. Hutter's second opinion was not well reasoned and Dr. Badin's January 10, 2008 work capacity evaluation was sufficient to create a conflict of medical evidence.

Appellant submitted physical therapy notes. In a November 13, 2008 report, Dr. Badin noted appellant's work injury and her diagnosed conditions. He advised that she was limited to four hours of work a day and needed pain medication, muscle relaxants and anti-inflammatory medication. Dr. Badin stated that appellant continued to be symptomatic and required serious medical attention in spite of the aggressive treatment. He advised that her condition was chronic and required treatment for chronic pain.

By decision dated February 2, 2009, an Office hearing representative affirmed the June 2, 2008 decision.

In a February 24, 2009 letter, appellant's attorney requested reconsideration. He contended that appellant still had residuals of her January 16, 2004 work injury. Counsel further argued that there was a conflict of medical opinion. In a January 6, 2009 report, Dr. Mark Dawoud, a chiropractor, noted the history of injury and advised that the work-related elevator injury resulted in cervical and lumbar herniated discs with bilateral upper and lower extremity radiculopathy, as well as right shoulder and arm peripheral neuropathy. Dr. Dawoud opined that these injuries were permanent and a direct result of the accepted injury. He advised that appellant could work no more than four hours daily within restrictions. Appellant also submitted physical therapy records.

In a December 16, 2008 report, Dr. Amir Hanna, a Board-certified internist, advised that appellant had been under his care since March 31, 2005 and provided a brief description of clinical findings. He diagnosed peripheral neuropathy and cervical and lumbar radiculopathy. Dr. Hanna stated that appellant should not work for more than four hours a day with restrictions.

In a January 8, 2009 report, Dr. Badin reiterated appellant's complaints. He reported that Dr. Hanna had evaluated appellant and found that she had cervical disc disease with cervical and lumbar radiculopathy and peripheral neuropathy and recommended that she not work more than four hours a day with restrictions. Dr. Badin noted that appellant underwent medical treatment and physical therapy for her cervical and lumbar pain, she was unable to work more than four hours per day, and she needed pain medicine and a nap after returning home from work. Appellant often woke up in the middle of the night with pain.

By decision dated May 21, 2009, the Office denied appellant's reconsideration request on the grounds she did not submit any relevant or pertinent evidence to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim and pays compensation, it has the burden to justify modification or termination of benefits.[1] 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.[2] 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.[3]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[4] 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.[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained cervical strain and cervical and lumbar radiculopathy as a result of the January 16, 2004 work incident. It terminated appellant's compensation benefits effective June 2, 2008 on the grounds that the accepted conditions had resolved with residuals. The Office accorded determinative weight to the opinion of Dr. Hutter, the second opinion specialist.

The Board finds Dr. Hutter's second opinion report is sufficiently rationalized to establish that appellant's employment-related cervical strain and cervical and lumbar radiculopathy had resolved. In a comprehensive report dated April 8, 2008, Dr. Hutter reviewed the statement of accepted facts and the medical record. He noted his findings upon examination and advised that the objective orthopedic examination was within normal limits. Dr. Hutter noted that, while appellant resisted range of motion of the lumbar spine in the standing position, she was able to sit upright on the examination table without difficulty. He indicated that motor testing was normal and sensory examination was intact to light touch in both legs. Dr. Hutter noted that while there was evidence of disc herniation in the cervical spine, there was no clinical correlation with that finding. Thus, he opined that appellant was at maximum medical improvement and could perform her date-of-injury position as a contact representative. Dr. Hutter advised that appellant had no work restrictions.

In his January 10, 2008 work capacity evaluation, Dr. Badin opined that appellant was permanently restricted to working four hours a day. He did not provide any objective findings to

[1] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[2] *Id.*

[3] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[4] *Roger G. Payne*, 55 ECAB 535 (2004).

[5] *Pamela K. Guesford*, 53 ECAB 726 (2002).

support a need to continue working with restrictions due to the accepted conditions or provide an explanation as to how appellant's work-related conditions remained active or disabling. In his November 13, 2008 report, Dr. Badin opined that appellant was permanently restricted to working four hours a day and needed continued medical attention and treatment for her pain. While he noted the January 16, 2004 work injury and the accepted conditions, he did not provide an explanation as to how appellant's work-related conditions remained active or disabling. 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.[6] Thus, Dr. Badin's January 10, 2008 work capacity evaluation and his November 13, 2008 report are of limited probative value regarding any ongoing residuals of the accepted conditions.

Appellant also submitted physical therapy notes, but under the Federal Employees' Compensation Act,[7] a physical therapist is not considered a physician. Therefore, these notes are of no probative value.[8]

The weight of the medical evidence, as represented by Dr. Hutter's report, establishes that appellant was no longer disabled as a result of her accepted conditions and had no injury-related residuals. Dr. Hutter's report is based on an accurate factual background and provides sufficient medical rationale for his conclusion.[9] The Office, therefore, met its burden of proof to terminate appellant's compensation benefits as the weight of the medical evidence indicates that the accepted conditions had ceased effective June 2, 2008.

On appeal, appellant's attorney argues that Dr. Badin's reports are sufficient to create a conflict in medical opinion or on the contrary that Dr. Hutter's report is insufficient to carry the weight of the medical evidence. The Board finds these arguments to be without merit. While Dr. Hutter diagnosed herniated disc at C4-5 and cervical and lumbar strains, he specially found the orthopedic examination was within normal limits. He did not relate any findings on examination to the accepted condition. While Dr. Hutter noted that there was evidence of cervical spine disc herniation, he found no clinical correlation with that finding. He did not note any residuals of the accepted conditions and found that appellant could perform her regular job without restrictions.

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

[7] 5 U.S.C. §§ 8101-8193.

[8] *See A.C.*, 60 ECAB ___ (Docket No. 08-1453, issued November 18, 2008) (records from a physical therapist do not constitute competent medical opinion in support of causal relation as a physical therapist is not a physician as defined under the Act); 5 U.S.C. § 8101(2) (provides that the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

[9] *Michael S. Mina*, 57 ECAB 379 (2006) (in assessing medical evidence, the weight of such evidence is determine by its reliability, its probative value and its convincing quality; the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion, are facts which determine the weight to be given to each individual report).

LEGAL PRECEDENT -- ISSUE 2

To require the Office to reopen a case for merit review under section 8128(a) of the Act,[10] the Office regulations provide that the evidence or argument submitted by a claimant must: (1) show that the Office erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by the Office; or (3) constitute relevant and pertinent new evidence not previously considered by the Office.[11]

To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.[12] When a claimant fails to meet one of the above standards, the Office will deny the application for reconsideration without reopening the case for review on the merits.[13] The Board has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.[14] Further, evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review.[15]

ANALYSIS -- ISSUE 2

In the present case, appellant has not shown that the Office erroneously applied or interpreted a specific point of law; nor has she advanced a relevant legal argument not previously considered by the Office.

The evidence she submitted is not pertinent to the underlying medical issue, whether she has continuing residuals or disability causally related to her January 16, 2004 employment injury. The Board has held that the submission of evidence which does not address the particular issue involved in the case does not constitute a basis for reopening the claim.[16] In support of her request for reconsideration, appellant submitted a January 6, 2009 report from Dr. Mark Dawoud, a chiropractor. The report from Dr. Dawoud does not constitute competent medical evidence as he is not a physician under section 8101(2) of the Act unless his report contained a

[10] Under section 8128 of the Act, [t]he Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application. 5 U.S.C. § 8128(a).

[11] 20 C.F.R. § 10.606(b)(2).

[12] *Id.* at § 10.607(a).

[13] *Id*. at § 10.608(b).

[14] *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

[15] *Denis M. Dupor*, 51 ECAB 482 (2000).

[16] *See David J. McDonald*, 50 ECAB 185 (1998).

diagnosis of subluxation as shown by x-ray.[17] As no such diagnosis was included in the record, his report, while new, is not relevant.

Appellant also submitted a December 16, 2008 report from Dr. Hanna and a January 8, 2009 report from Dr. Badin. Dr. Hanna's report is not relevant as the physician does not mention the employment injury and does not address the underlying issue, whether appellant has continuing residuals or disability due to the January 16, 2004 employment injury. Dr. Badin's report notes appellant's status, including findings and work restrictions, but this report also did not address whether appellant had continuing residuals or disability due to her 2004 work injury. Thus, these reports do not warrant a merit review of the claim.

Appellant also submitted physical therapy prescriptions and physical therapy records but these documents are not relevant because they do not contain a physician's opinion supporting that appellant has ongoing residuals or disability due to the January 16, 2004 employment injury.

Appellant's attorney also argued that the medical reports created a conflict in medical evidence requiring additional development. However, where there are opposing medical reports of virtually equal weight and rationale the case can be referred to an independent medical specialist to resolve the conflict.[18] As none of the reports of Drs. Badin, Dawoud and Dr. Hanna are well rationalized as to the cause of appellant's condition, they are not sufficient to create a conflict in medical evidence.

Because appellant's request for reconsideration does not meet at least one of the three standards for reopening her case, the Board finds that the Office properly denied her request.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss and medical compensation benefits effective June 2, 2008. The Board further finds that the Office did not abuse its discretion in denying her request for reconsideration.

[17] *See* 5 U.S.C. § 8101(2) (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); *see also Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

[18] *Carl Epstein*, 38 ECAB 539 (1987); *James R. Roberts*, 31 ECAB 1010 (1980).

ORDER

IT IS HEREBY ORDERED THAT the May 21 and February 2, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: May 13, 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