United States Department of Labor
Employees' Compensation Appeals Board

R.A., Appellant	)	
and	)	**Docket No. 09-1754**
	)	**Issued: May 24, 2010**
U.S. POSTAL SERVICE, EASTMONT STATION, Oakland, CA, 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 June 29, 2009 appellant filed a timely appeal from a February 10, 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 the case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's medical benefits on May 5, 2008 on the grounds that she no longer experienced any continuing residuals from her employment injury; and (2) whether appellant established that she was disabled on or after April 7, 2006 due to her employment injury.

On appeal, appellant contends that she continues to suffer from the April 5, 2006 employment injury and she provided sufficient medical evidence from her treating physician.

FACTUAL HISTORY

On May 18, 2006 appellant, then a 37-year-old postal distribution clerk and sales and service associate, filed an occupational disease claim (Form CA-2) alleging that on April 5, 2006

she began experiencing pain and spasms in her neck, upper back, right arm and left shoulder due to her employment duties, including sorting parcels, letters and flat mail and servicing customers at a full service window. After April 5, 2006, she worked part-time, light duty intermittently.

In a May 30, 2006 medical report, Dr. Charan Kanwal Singh, a Board-certified neurologist, stated that on January 3, 2006 appellant sustained neck, back and right arm injuries after a motor vehicle accident. She opined that appellant experienced a recurrence of neck, shoulder and arm pain on the right side after returning to work on April 1, 2006. Dr. Singh further found that appellant experienced left neck, shoulder and arm pain at work while trying to rest her right side. She stated that appellant did not have any symptoms in her left side after the motor vehicle accident and that her right arm, neck and back symptoms from the car accident had substantially improved prior to her return to work. Dr. Singh diagnosed C5 radiculopathy, multilevel disc disease, nuchal muscle strain and shoulder pain bilaterally and opined that appellant experienced a definite worsening of her symptoms while at work.

By decision dated June 23, 2006, the Office denied appellant's claim on the grounds that she did not establish the factual or medical aspects of her claim.

On July 19, 2006 appellant filed a request for an oral hearing before an Office hearing representative, which was held on November 16, 2006.

In a January 25, 2007 decision, the Office hearing representative vacated the June 23, 2006 decision and remanded the case with instructions for the Office to further develop the medical evidence regarding whether appellant sustained an injury causally related to her employment.

On remand, the Office referred appellant to Dr. Robert S. Ferretti, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an April 9, 2007 medical report, Dr. Ferretti diagnosed history of neck, back and bilateral shoulder strain due to employment, history of pain and paresthesia in the neck, upper back and right shoulder due to a January 3, 2006 motor vehicle accident and history of subsequent development of increased pain in the left neck, upper back, shoulder and upper left extremity. He reported that there were no objective findings on physical examination despite subjective findings and complaints of pain. Dr. Ferretti stated that appellant continued to suffer subjective residuals of her motor vehicle accident and experienced a temporary aggravation from work-related activities. He recommended appellant only work six hours a day, for approximately six months, due to her employment-related aggravation of preexisting symptoms. Dr. Ferretti provided work restrictions.

By decision dated May 23, 2007, the Office accepted appellant's claim for neck, thoracic back and bilateral shoulder strain.

In a May 29, 2007 medical report, Dr. Singh stated that she disagreed with Dr. Ferretti's findings that appellant's conditions were not caused by her employment, that the employment-related injury was temporary and that appellant did not require pain management treatment. She also disagreed with Dr. Ferretti's findings of disability and appellant's current work restrictions. Dr. Singh reported that appellant experienced shoulder pain prior to her motor vehicle accident and suggested that the accident exacerbated a preexisting condition caused by her employment.

On June 12, 2007 the employing establishment offered appellant a part-time, light-duty position, which she accepted.

On June 28, 2007 appellant filed a claim for compensation (Form CA-7) for the period April 7, 2006 through June 22, 2007. She continued to file claims for total and intermittent wage-loss compensation through May 9, 2008.

The Office determined that a conflict of medical opinion existed between Drs. Ferretti and Singh regarding the residuals of appellant's work-related injury, her disability for work and whether she required medical treatment including cervical epidural injections and pain management. It referred her to Dr. Aubrey Swartz, a Board-certified orthopedic surgeon. The Office requested that Dr. Swartz provide an opinion on appellant's current condition, its relationship to her employment and any periods of work-related disability. An accompanying statement of accepted facts described appellant's occupational disease claim and a history of her January 3, 2006 motor vehicle accident.

In a March 3, 2008 medical report, Dr. Swartz diagnosed chronic, nonspecific complaints of pain in the neck and right upper extremity without objective verification of the complaints. He opined that there was no evidence to support a neck, right shoulder and right upper back work-related injury. Dr. Swartz noted that the medical evidence suggested that appellant sustained a cervical strain due to the January 3, 2006 automobile accident, which was not connected to her employment. He opined that appellant did not experience any disability due to an employment injury and that there was no work-related basis for physical restriction. Dr. Swartz further stated that, because there was no employment-related injury, there was no need for treatment of an employment injury.

Appellant continued to submit medical records from Dr. Singh providing work restrictions and excusing appellant from work for intermittent periods due to an exacerbation of neck, shoulder and arm pain from her employment duties.

On March 28, 2008 the Office notified appellant of a proposal to terminate her compensation benefits based on Dr. Swartz's opinion that she was not experiencing any residuals or disability connected to an employment injury. It provided appellant 30 days to submit additional evidence.

By decision dated May 5, 2008, the Office terminated appellant's compensation benefits effective May 5, 2008 on the grounds that the weight of the medical evidence rested with Dr. Swartz, who found that appellant did not continue to experience residuals from a work-related injury. Further, it denied appellant's claims for wage-loss compensation after April 7, 2006 based on Dr. Swartz's medical opinion.

On May 13, 2008 appellant, through her representative, filed a request for an oral hearing before an Office hearing representative. An oral hearing took place on October 27, 2008 where appellant's representative requested the record remain open to provide him time to submit additional medical evidence.

By decision dated February 10, 2009, the Office hearing representative affirmed the May 5, 2008 decision terminating medical benefits. She found that the weight of the medical evidence rested with Dr. Swartz, who did not find any evidence of an employment-related injury.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[1] It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.[2] To terminate authorization for medical treatment, it must establish that an employee no longer has residuals of an employment-related condition which require further medical treatment.[3] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

Section 8123(a) of the Federal Employees' Compensation Act[5] 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.[6] When the case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical evidence, the opinion of such specialist will be given special weight when based on a proper factual and medical background and sufficiently well rationalized on the issue presented.[7]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a neck, thoracic back and bilateral shoulder strain due to her employment duties. The issue is whether it properly terminated her medical benefits effective May 5, 2008.

The Office determined that a conflict of medical opinion evidence existed between Dr. Singh, appellant's treating physician, and Dr. Ferretti, a second opinion referral physician, regarding the nature and extent of appellant's employment-related condition and disability. It referred appellant to Dr. Swartz for an impartial medical evaluation to resolve the conflict.[8] Accompanying the referral was a statement of accepted facts which described appellant's

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[1] *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

[2] *J.M.*, 58 ECAB 478 (2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

[3] *T.P.*, 58 ECAB 524 (2007); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[4] *T.P., supra* note 3; *Larry Warner*, 43 ECAB 1027 (1992).

[5] 5 U.S.C. §§ 8101-8193.

[6] *Id.* at § 8123(a). *See Elsie L. Price*, 54 ECAB 734 (2003); *Raymond J. Brown*, 52 ECAB 192 (2001).

[7] *See Bernadine P. Taylor*, 54 ECAB 342 (2003); *Anna M. Delaney*, 53 ECAB 384 (2002).

[8] *See Rose V. Ford*, 55 ECAB 449 (2004).

occupational disease claim and her history of the January 3, 2006 motor vehicle accident. Dr. Swartz opined that appellant never sustained an employment-related injury and that her condition was solely related to the January 3, 2006 motor vehicle accident.

The Board finds that Dr. Swartz's medical opinion is of diminished probative value due to a deficiency in the statement of accepted facts. To assure that the report is based upon a proper factual background, the Office provides information to a referral physician through the preparation of a statement of accepted facts.[9] The Office procedure manual provides that a statement of accepted facts must include the conditions claimed or accepted by the Office.[10] It further states that, when a referral physician renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate, the probative value of the opinion is seriously diminished or negated altogether.[11]

The statement of accepted facts provided Dr. Swartz did not state that Office had accepted appellant's claim or include a list of the accepted conditions, including neck, thoracic back and bilateral shoulder strain. Further, it does not appear that Dr. Swartz was aware that the Office accepted appellant's claim. Dr. Swartz did not premise his opinion on the basis that appellant's claim had been accepted, rather, he provided an opinion in direct contradiction to this fact, finding that appellant never sustained an employment-related injury. As his opinion is based on a statement of accepted facts that does not accurately reflect the conditions the Office had accepted as employment related, it is of diminished probative value and insufficient to resolve the conflict of medical opinion.[12] As such, the Board finds that the Office did not meet its burden of proof in terminating medical benefits.[13]

LEGAL PRECEDENT -- ISSUE 2

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[14] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a

[9] *Helen Casillas*, 46 ECAB 1044 (1995).

[10] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

[11] *Id*.

[12] *See id.*

[13] *See A.C.*, Docket No. 07-2423 (issued May 15, 2008) (where the Board found that the Office did not meet its burden to terminate benefits on the grounds that the impartial medical examiner's report finding no residual of the employment injury was not based on a statement of accepted facts including all accepted conditions.)

[14] *See Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

basis for payment of compensation.[15] 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.[16]

The Office is not a disinterested arbiter but rather performs the role of adjudicator on the one hand and gatherer of the relevant facts and protector of the compensation fund on the other, a role that imposes an obligation to see that its administrative processes are impartially and fairly conducted.[17] Although the employee has the burden of establishing entitlement to compensation, the Office shares responsibility in the development of the evidence.[18] Once the Office starts to procure medical opinion, it must do a complete job.[19] The Office has the responsibility to obtain an evaluation that will resolve the issue involved in the case.[20]

ANALYSIS -- ISSUE 2

The Office accepted that appellant sustained a neck, thoracic back and bilateral shoulder strain due to her employment duties. The issue is whether appellant established that she was disabled on or after April 7, 2006 causally related to her employment injury. The Board finds this case is not in posture for a decision.

As discussed above, the Office found that a conflict of medical opinion existed regarding the nature and extent of appellant's employment-related condition. It referred appellant to Dr. Swartz to resolve the conflict and requested the physician provide a report including an opinion on whether appellant experienced any periods of employment-related disability. However, the statement of accepted facts provided to Dr. Swartz did not state that the Office had accepted appellant's claim or include a list of the conditions accepted as work related.[21] Dr. Swartz subsequently based his opinion, that appellant did not experience any work-related disability, on the premise that she did not sustain an employment-related injury. As he rendered his opinion on an incomplete factual background, it is of limited probative value.[22]

[15] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008). *See Huie Lee Goal*, 1 ECAB 180, 182 (1948).

[16] *G.T., id.*; *Fereidoon Kharabi, supra* note 14.

[17] *Richard F. Williams*, 55 ECAB 343, 346 (2004); *Thomas M. Lee*, 10 ECAB 175, 177 (1958).

[18] *D.N.*, 59 ECAB ___ (Docket No. 07-1940, issued June 17, 2008*); Mary A. Barnett*, 17 ECAB 187, 189-90 (1965).

[19] *Richard F. Williams*, 55 ECAB 343, 346 (2004); *William N. Saathoff*, 8 ECAB 769, 770-71 (1956).

[20] *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983).

[21] *See* Federal (FECA) Procedure Manual, *supra* note 10.

[22] *See Johana McCarthy*, 38 ECAB 680 (1987); *William H. Slade*, 13 ECAB 80 (1961).

The Office has the responsibility to obtain from its referral physician an evaluation that will resolve the issue involved in this case.[23] Accordingly, the Board finds that the case must be remanded for further medical development on the issue of whether appellant sustained any disability causally related to her employment-related injury.[24]

CONCLUSION

The Board finds that the Office improperly terminated appellant's medical benefits on May 5, 2008 on the grounds that she no longer experienced any continuing residuals of her employment injury. The Board also finds that the case is not in posture for decision to determine whether appellant established that she was disabled on or after April 7, 2006.

ORDER

IT IS HEREBY ORDERED THAT the February 10, 2009 decision of the Office of Workers' Compensation Programs is reversed and the case is remanded for further development consistent with this opinion of the Board.

Issued: May 24, 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

[23] *See Richard F. Williams*, 55 ECAB 343 (2004).

[24] *See Barbara A. Palmer*, Docket No. 06-591 (issued July 6, 2006) (where the Board remanded the case for further development on the issue of appellant's periods of disability as the statement of accepted facts provides that the referral physician did not include the accepted conditions or periods of accepted disability.)