United States Department of Labor
Employees' Compensation Appeals Board

A.A., Appellant	)	
	)	
and	)	**Docket No. 09-2079**
	)	**Issued: May 3, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Mission Hills, CA, Employer	)	

Appearances:
Raquell Krueger-Denio, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On August 13, 2009 appellant filed a timely appeal from a May 11, 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 compensation effective June 14, 2007 with respect to appellant's accepted orthopedic injuries.

FACTUAL HISTORY

On February 4, 2002 appellant, then a 35-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that he sustained an upper back injury while lifting and carrying a parcel on January 27, 2002. The Office accepted the claim for lumbosacral and thoracic strains. Appellant returned to modified-duty work, reduced his work load to four hours a day on January 17, 2003 and stopped work on March 8, 2004.

The Office further developed the medical evidence with respect to appellant's employment-related condition. Appellant was referred to Dr. Harlan Bleeker, an orthopedic surgeon, for a second opinion examination. In a report dated February 11, 2003, Dr. Bleeker diagnosed L4-5 and L5-S1 mild degenerative changes with disc bulge. He stated that an L5-S1 annular tear appeared to have healed and a lumbar discogram was not indicated. By report dated April 7, 2003, Dr. James Thomas, an attending physician, opined that the annular tear had not healed and recommended a transforaminal epidural block.

The Office found a conflict in medical opinion existed under 5 U.S.C. § 8123(a) regarding the diagnosis and the need for specific treatment. Appellant was referred to Dr. Domenick Sisto, a Board-certified orthopedic surgeon. In a report dated September 5, 2003, Dr. Sisto opined that appellant "does have disability related to his work injury as he has tenderness in the lumbar spine as well as evidence of degenerative disc disease." He advised that appellant had reached a medical plateau, with further improvement of symptoms not expected. Dr. Sisto noted that appellant had "undergone a long period of treatment, which has been appropriate, but at this time no further treatment is indicated as there is no other care that will resolve his complaints."

In a report dated December 9, 2004, Dr. Thomas stated that appellant underwent neurological testing showing an S1 radiculopathy. He opined that the presence of radiculopathy indicated appellant did not have strain syndrome and was a candidate for discography and endoscopic laser treatment. Dr. Thomas concluded that appellant was totally disabled.

On March 30, 2006 the Office determined that a conflict existed between Dr. Thomas and Dr. Sisto regarding the period of total disability, the nature and extent of current employment-related disability and the need for surgery. Appellant was referred to Dr. David Heskiaoff, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.

In a report dated July 28, 2006, Dr. Heskiaoff reviewed a history of injury and results on examination. He diagnosed myofascial sprains of the dorsal and lumbar spine and multiple lumbar disc protrusions. Dr. Heskiaoff noted that appellant's symptoms did not seem to respond to any sort of treatment. He stated, "I believe that enough time has passed and that this man should be left alone and no further treatment should be given to him. No surgery is indicated." According to Dr. Heskiaoff, appellant should be limited to light duty with a 10-pound lifting restriction. He concluded there were degenerative processes and he apportioned 70 percent to "work activities and work-related trauma."

By letter dated August 23, 2006, the Office requested clarification from Dr. Heskiaoff. It asked him to discuss whether the accepted strains had resolved and whether the January 27, 2002 injury aggravated the degenerative disc disease.

In a November 10, 2006 report, Dr. Heskiaoff stated that appellant's myofascitis had resolved, but he continued to have degenerative disc disease. He opined that the January 27, 2002 work injury temporarily aggravated the degenerative disc disease, but this should have ceased when he stopped work in 2004. By letter dated December 11, 2006, the Office asked the physician to discuss whether the accepted strains had resolved and whether any work restrictions were due to the underlying degenerative disc condition or a work-related condition. On

December 21, 2006 Dr. Heskiaoff responded that the dorsal-lumbar sprain probably resolved when appellant returned to work at the beginning of 2003. With regard to any work restrictions, Dr. Heskiaoff advised they were due to the underlying degenerative disc disease.

By letter dated May 14, 2007, the Office advised appellant that it proposed to terminate compensation related to orthopedic conditions based on the medical evidence. In a separate letter dated May 14, 2007, the Office stated that the claim was accepted for a consequential dysthymic reaction.

In a decision dated June 14, 2007, the Office terminated appellant's compensation benefits for any orthopedic or back condition.[1]

On June 19, 2007 the Office received a March 12, 2007 report from Dr. Albert Simpkins, an orthopedic surgeon, who opined that, in light of appellant's S1 radiculopathy and back pain with annular tears, he was a candidate for surgical intervention.

Appellant requested a review of the written record. By decision dated April 9, 2008, an Office hearing representative affirmed the June 14, 2007 decision. The hearing representative found that the weight of medical opinion was represented by Dr. Heskiaoff.

In a letter dated January 28, 2009, appellant's representative requested reconsideration. Appellant argued that the Office did not meet its burden of proof to terminate compensation, as Dr. Heskiaoff's reports were not rationalized or based on an accurate background. In June 27 and August 8, 2008 report, Dr. Serge Obukhoff, a neurologist, diagnosed disc herniations at L4-5 and L5-S1, lumbar stenosis, bilateral radiculopathy, back pain syndrome, degenerative disc disease, lumbar spondylosis and musculoligamentous injury to the thoracic spine with disc protrusion at T7-8. He stated that appellant sustained additional injury to his back when he returned to work after the 2002 injury. Dr. Obukhoff noted appellant's job duties from 2003 to 2004, stating: "the additional development of this patient's condition was produced by the continued and repeated duties performed between 2003 and 2004." He opined that the work duties caused a permanent aggravation of appellant's "preexisting work-related lumbar injury."

By decision dated May 11, 2009, the Office denied modification of the April 9, 2008 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[2] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, the Office must

[1] The record indicates that appellant continued to receive wage-loss compensation every 28 days.

[2] *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[3]

The Federal Employees' Compensation Act provides that, if there is a 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 the examination.[4] The implementing regulations state that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, 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]

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[6]

ANALYSIS

The May 11, 2009 decision on appeal was limited to the issue of a termination of benefits for the accepted orthopedic conditions as of June 14, 2007. The Office accepted a consequential dysthymic reaction, and the record indicates appellant continues to receive compensation for wage loss based on this condition.

With respect to the continuing treatment for appellant's back condition, the Office found a conflict in the medical opinion evidence. Dr. Thomas, an attending physician, found that appellant had an S1 radiculopathy requiring treatment such as discography and endoscopic laser treatment, and was totally disabled. Dr. Sisto, who had been selected as a referee physician regarding other issues,[7] advised that appellant had reached a plateau and did not require any additional medical treatment. To resolve the conflict appellant was referred to Dr. Heskiaoff.

In reports dated July 28, November 10 and December 21, 2006, Dr. Heskiaoff found that the accepted conditions of lumbosacral and thoracic strains had resolved. He also found that, while appellant sustained a temporary aggravation of degenerative disc disease,[8] this resolved in

[3] *Furman G. Peake*, 41 ECAB 361 (1990).

[4] 5 U.S.C. § 8123.

[5] 20 C.F.R. § 10.321 (1999).

[6] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[7] Dr. Sisto was selected as a referee on such issues as the necessity for acupuncture and physical therapy. He would be considered a second opinion referral physician for issues outside the scope of the original conflict. *See Leanne E. Maynard*, 43 ECAB 482 (1992).

[8] Dr. Heskiaoff's opinion is sufficient to establish a temporary aggravation of degenerative disc disease and the condition should be accepted by the Office.

2004 when appellant stopped work. The referee physician concluded appellant did not need additional medical treatment for his accepted conditions.

The Board finds that Dr. Heskiaoff provided a rationalized medical opinion on the issue presented. Appellant contends that Dr. Heskiaoff did not have a complete factual background, as the statement of accepted facts did not discuss his work duties from 2002 through 2004, but the issue before the impartial specialist was continuing residuals of the January 27, 2002 employment injury. Dr. Heskiaoff provided a detailed history and his opinion was based on a complete and accurate background. As noted, an impartial referee's rationalized opinion based on a complete factual and medical background is entitled to special weight. The Board finds Dr. Heskiaoff's report is entitled to special weight and establishes that residuals of appellant's accepted orthopedic conditions resolved prior to June 14, 2007. The Office met its burden of proof.

Following the termination decision, appellant submitted additional evidence, including an August 8, 2008 report from Dr. Obukhoff, who opined that appellant continued to have employment-related back conditions. Dr. Obukhoff provided a number of diagnoses, such as disc herniations and lumbar stenosis, which were never accepted as employment related. It is appellant's burden of proof to establish a specific condition as employment related[9] with respect to accepted conditions, it is his burden of proof to establish continuing residuals or disability after a proper termination.[10] Dr. Obukhoff did not provide a rationalized medical opinion with respect to the January 27, 2002 injury. He discussed appellant's work duties after the January 27, 2002 injury. To the extent appellant is claiming injuries from these work duties, this would be a new claim for an occupational disease or illness.[11]

On appeal, appellant's representative contends that appellant still has residuals of the accepted lumbar and thoracic spine conditions and that the referee's reports were not sufficient to support the termination of benefits. As noted, the Board finds that the weight of the medical evidence establishes that the accepted strains causally related to the January 27, 2002 employment injury had resolved by June 14, 2007. The Office met its burden of proof to terminate compensation with respect to these orthopedic conditions.

CONCLUSION

The Board finds the Office met its burden of proof in determining that appellant's employment-related back conditions had resolved by June 14, 2007.

[9] *See, e.g., Willie J. Clements, Jr.*, 43 ECAB 244 (1991).

[10] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

[11] An occupational disease or illness is a condition produced by the work environment over a period longer that a single workday or shift. 20 C.F.R. § 10.5(q).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 11, 2009 is affirmed.

Issued: May 3, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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