United States Department of Labor
Employees' Compensation Appeals Board

K.B., Appellant	)	
and	)	**Docket No. 10-525**
	)	**Issued: November 9, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Sioux Falls, SD, Employer	)	

Appearances:
Thomas Parliman, 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 December 18, 2009 appellant filed a timely appeal from a November 6, 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.

ISSUES

The issues are: (1) whether appellant established an employment-related disability from May 6 to 23, 2009; and (2) whether the Office properly determined the employment-related neck and shoulder conditions had resolved as of November 6, 2009.

FACTUAL HISTORY

On April 4, 2007 appellant, then a 46-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that she sustained a neck and shoulder injury on March 28, 2007 when she lifted a bucket of ice. The claim was denied by decision dated December 14, 2007. On January 9, 2008 appellant underwent a C5-6 cervical discectomy. In an

April 29, 2008 decision, the Office vacated the December 14, 2007 decision and accepted the claim for a bilateral shoulder strain.

In a report dated June 11, 2008, Dr. Timothy O'Shea, an attending internist, stated that a magnetic resonance imaging (MRI) scan showed multilevel cervical degenerative disc disease. He stated that the condition was aggravated by working conditions.

The Office referred appellant for a second opinion examination with Dr. David Hoversten, an orthopedic surgeon. It requested that he provide an opinion as to the employment-related conditions and whether there was a cervical condition causally related to the March 28, 2007 employment injury. In a report dated August 5, 2008, Dr. Hoversten provided a history and results on examination. He diagnosed cervical degenerative disc disease, left shoulder tendinitis with a small tear of the rotator cuff and right shoulder tendinitis with rotator cuff swelling. With respect to the cervical spine, Dr. Hoversten found that the March 28, 2007 employment incident aggravated the condition. As to the shoulder conditions, he opined that these were not causally related to the employment injury, stating that these were "age and more genetic in basis and a certain amount of wear and tear has also been occurring in the shoulders through the years." Dr. Hoversten completed a work capacity evaluation outlining appellant's work restrictions.

On August 11, 2008 the Office advised appellant that the claim had been accepted for degeneration of cervical intervertebral disc. On August 11, 2008 it asked Dr. Hoversten to address whether the aggravation was temporary or permanent. In a report dated August 21, 2008, Dr. Hoversten stated that the aggravation was temporary, "back to original condition at six months postinjury *i.e.*, [September 28, 2007]."

In a February 23, 2009 report, Dr. Thomas Ripperda, a physiatrist, reviewed the history and provided results on examination. He stated that appellant's neck seemed to be doing fairly well at that time. Appellant had more rotator cuff pathology of the left shoulder and Dr. Ripperda recommended an MRI scan. In a letter dated March 31, 2009, the Office asked Dr. Ripperda whether he concurred with Dr. Hoversten that the employment-related condition was limited to the neck and there was a temporary aggravation that returned to baseline six months after the injury. On May 11, 2009 Dr. Ripperda stated that he agreed with the second opinion. He advised that appellant also had a left rotator cuff tear with tendinitis and her current symptoms were related to the left shoulder.

Appellant submitted an April 22, 2009 report from Dr. Jeffrey Kalo, an osteopath, who diagnosed mild (acromioclavicular) joint arthrosis of the left shoulder and significant cuff tearing of the left shoulder. Dr. Kalo stated that it appeared that appellant had a cuff tear from the initial injury that maybe was missed as part of the cervical spine process.

In a May 1, 2009 report, Dr. Stephanie Broderson, a family practitioner, advised that appellant could work four hours a day as of May 8, 2009 until her surgery. A time analysis form dated May 20, 2009 noted that appellant worked four hours per day. A claim for compensation (Form CA-7) was filed for intermittent hours from May 6 to 23, 2009.

In a June 4, 2009 report, Dr. Ripperda stated that appellant had a left rotator cuff tear "that in my opinion occurred at the time of her injury." He stated, "The mechanism of injury, the objective findings, primarily the MRI [scan] demonstrating a left full thickness rotator cuff injury, persistent left shoulder pain despite surgery all are consistent with the injury of March 28, 2007."

The Office found a conflict arose between Dr. Ripperda and Dr. Hoversten regarding appellant's left shoulder. In a letter dated June 24, 2009, it advised appellant that it found a conflict based on the June 4, 2009 report from Dr. Ripperda. In a letter dated July 1, 2009, appellant's representative argued that there was no conflict in the medical evidence. He stated that Dr. Hoversten did not have the benefit of an MRI scan of the shoulder. The representative also questioned the unilateral selection of the referee physician without input from appellant. The record indicates that appellant underwent a left rotator cuff repair surgery on June 26, 2009. In a letter dated August 7, 2009, the Office advised appellant's representative as to the procedures for selecting a referee physician using the Physician's Directory System (PDS) and enclosed a copy of the appointment worksheet.

The Office selected Dr. John Dowdle, a Board-certified orthopedic surgeon, as the impartial referee. In a report dated August 17, 2009, Dr. Dowdle provided a history, reviewed medical records and provided results on examination. He diagnosed diffuse degenerative disc disease of the cervical spine and status post left rotator cuff repair. With respect to the degenerative cervical condition, Dr. Dowdle indicated that the degenerative changes preexisted the employment injury and there were no structural changes to the neck as a result of the March 28, 2007 injury. He opined that the injury did not alter the natural course of the underlying condition and any neck strain had resolved. As to the left shoulder, Dr. Dowdle opined that the work injury of March 28, 2007 resulted in temporary shoulder strains. He explained that "the medical record documentation which indicates that [appellant's] initial complaints related to the trapezius muscles. It was not until more than a year later that she had significant left shoulder complaints that were evaluated with MRI [scan]. Before that time, [appellant] had no localized findings to indicate a problem with the left rotator cuff. Certainly, there are no examination findings or anything in the medical records indicating the presence of a rotator cuff tear until more than a year after the work injury at issue." Dr. Dowdle concluded that appellant had no continuing employment-related work restrictions.

By letter dated September 9, 2009, the Office advised appellant that it proposed to terminate medical benefits and wage-loss compensation based on the medical evidence. By letter dated October 6, 2009, appellant's representative argued that Dr. Dowdle was not a referee physician as there was no conflict. He also argued that Dr. Dowdle omitted critical facts and offered unsupported conclusions.

In a decision dated October 6, 2009, the Office denied the claim for compensation from May 6 to 23, 2009. In a decision dated November 6, 2009, it terminated medical benefits and entitlement to compensation for wage loss based on the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under the Federal Employees' Compensation Act[1] has the burden of establishing the essential elements of his or her claim, including that any disability or specific condition for which compensation is claimed is causally related to the employment injury.[2] The term disability is defined as the incapacity because of an employment injury to earn the wages the employee was receiving at the time of the injury, *i.e.*, a physical impairment resulting in loss of wage-earning capacity.[3]

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.[4] Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.[5] Rationalized medical evidence is medical evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[6] Neither the fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[7]

ANALYSIS -- ISSUE 1

The October 6, 2009 Office decision was limited to the claim for compensation from May 6 to 23, 2009. Appellant's work history is not entirely clear from the record, but according to the compensation payment history she had not received compensation for wage loss since June 2008. With respect to the claimed period May 6 to 23, 2009, the time analysis indicated that appellant generally was working four hours per day from May 8, 2009 and it would be her burden of proof to establish compensation for the additional hours claimed. Dr. Broderson recommended four hours of work as of May 8, 2009 but did not discuss causal relationship between any disability and the March 28, 2007 employment injury. None of the other physicians

[1] 5 U.S.C. §§ 8101-8193.

[2] *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[3] 20 C.F.R. § 10.5(f); *see e.g.*, *Cheryl L. Decavitch*, 50 ECAB 397 (1999) (where appellant had an injury but no loss of wage-earning capacity).

[4] *See Fereidoon Kharabi*, 52 ECAB 291 (2001).

[5] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[6] *Leslie C. Moore*, 52 ECAB 132 (2000).

[7] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

of record provided a rationalized opinion as to disability from May 6 to 23, 2009 causally related to the employment injury.

It is appellant's burden of proof with regard to the claimed period of compensation. The Board finds that she did not meet her burden of proof in this case.

LEGAL PRECEDENT -- ISSUE 2

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, it may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[8] 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 establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[9]

The 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.[10] 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.[11]

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.[12]

ANALYSIS -- ISSUE 2

The November 6, 2009 Office decision referred to termination of both compensation for wage-loss and medical benefits. As noted, however, appellant had not been receiving compensation for wage loss and it would be her burden to establish a specific period of disability. The November 6, 2009 decision did find that the accepted neck and left shoulder conditions resolved and it is the Office's burden of proof on this issue.

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[8] *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993).

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

[10] 5 U.S.C. § 8123.

[11] 20 C.F.R. § 10.321 (1999).

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

With respect to a cervical condition, the second opinion physician Dr. Hoversten indicated that the employment-related aggravation would have ceased six months after the March 28, 2007 employment injury. The attending physician, Dr. Ripperda, indicated in his report received on May 11, 2009 that he agreed with the second opinion physician. On the issue of a continuing cervical condition, therefore, there was no disagreement. The referral to Dr. Dowdle was as a second opinion physician regarding the cervical condition.[13]

The Board notes that Dr. Dowdle opined that the March 28, 2007 employment injury did not alter the underlying cervical condition and he did not find a continuing employment-related condition. Based on the opinions of Drs. Hoversten, Ripperda and Dowdle, the Board finds that the weight of the medical evidence supports the finding that the employment-related cervical condition had resolved by November 6, 2009.

With respect to the issue of a left shoulder rotator cuff tear causally related to the March 28, 2007 employment injury, there was a disagreement between Dr. Hoversten and Dr. Ripperda. Dr. Hoversten noted the rotator cuff diagnosis but found that it was not related to the employment injury. Dr. Ripperda opined that the rotator cuff was torn in the March 28, 2007 employment incident. The Board finds that the Office properly found a conflict under 5 U.S.C. § 8123(a) on this issue.

In an August 17, 2009 report, Dr. Dowdle provided a rationalized opinion that the rotator cuff tear was not employment related and the accepted left shoulder condition had resolved. He explained his opinion, noting the medical record and the lack of medical evidence demonstrating a tear until a year after the injury. Dr. Dowdle provided a detailed medical report with a rationalized medical opinion. As noted above, a well-rationalized opinion from a referee physician is entitled to special weight. The Board finds Dr. Dowdle represents the weight of the medical evidence.

On appeal, appellant argues that there was no conflict in the medical evidence. As noted there was no disagreement regarding the cervical condition but there was a disagreement regarding the left shoulder. Dr. Hoversten provided a reasoned medical opinion based on an accurate background. Appellant also argued that Dr. Dowdle's opinion was based on an inaccurate factual and medical background, without identifying specific inaccuracies. Dr. Dowdle was provided with a complete background and his report reviewed at length the relevant medical record.

Appellant also contended that Dr. Dowdle was selected over her objections and she was not advised that she had an option for another referee. A referee physician is selected from the PDS using a strict rotational system in accord with Office procedures.[14] The Office's obligation is to notify appellant of the nature of the conflict and that a referee physician is selected under 5 U.S.C. § 8123(a).[15] A claimant has an opportunity to object to the selected physician and, in

[13] Even though Dr. Dowdle is not a referee physician with respect to the cervical condition, his opinion can still be considered for its own intrinsic value. *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[14] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003).

[15] *See N.M.*, 60 ECAB __ (Docket No. 08-2081, issued September 8, 2009).

this case, she presented contentions that there was no conflict. Appellant also referred to the "unilateral selection" of the referee but the Office followed its procedures in selecting the referee through the PDS. If a claimant raises a valid objection to the selected referee, then she may receive a list of three physicians.[16] Appellant did not raise a valid objection and there is no evidence of error with respect to the selection of the referee physician.

CONCLUSION

The Board finds that appellant did not establish an employment-related disability from May 6 to 23, 2009. The Board further finds that the Office met its burden of proof in determining that the employment-related neck and shoulder conditions had resolved by November 6, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated November 6 and October 6, 2009 are affirmed.

Issued: November 9, 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

[16] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(4) (May 2003).