

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

R.D., Appellant)	
)	
and)	Docket No. 10-235
)	Issued: October 4, 2010
U.S. POSTAL SERVICE, MID-ISLAND)	
PROCESSING & DISTRIBUTION, Melville, NY,)	
Employer)	
)	

Appearances:
Paul Kalker, 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 November 3, 2009 appellant, through counsel, filed a timely appeal from a September 25, 2009 decision of the Office of Workers' Compensation Programs that denied authorization for surgery. The Office also denied modification of a September 8, 2008 decision which terminated appellant's compensation benefits. 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 the Office properly terminated appellant's compensation benefits effective September 27, 2008; (2) whether appellant had any residuals or disability after September 27, 2008; and (3) whether the Office properly denied authorization for a thoracic laminectomy decompression and fusion surgery.

FACTUAL HISTORY

On December 12, 2003 appellant, then a 39-year-old mail processor, sustained injury to his low back. The Office accepted the claim for lumbosacral sprain and placed appellant on the periodic rolls for temporary total disability effective March 21, 2004.

In an August 11, 2006 report, Dr. Yan Q. Sun, a second opinion Board-certified orthopedic surgeon, reviewed the medical and employment injury histories and performed a physical examination. A magnetic resonance imaging (MRI) scan of the lumbar spine was reviewed and showed bulging discs. Dr. Sun advised that the accepted lumbar condition had resolved as there were no objective findings. In an attached work capacity evaluation (Form OWCP-5c), he found that appellant was capable of working eight hours with restrictions. In a September 25, 2006 addendum, Dr. Sun reiterated that appellant's lumbar sprain was resolved. He related that, while appellant continued to be symptomatic, there were no objective findings. Dr. Sun also opined that appellant's cervical and thoracic conditions were not due to the December 12, 2003 employment injury.

In progress notes date October 9, 2006, Dr. Victor Katz, a treating Board-certified orthopedic surgeon, diagnosed an L5-S1 herniated disc and associated lumbar radiculopathy. In a work capacity evaluation form of that date (OWCP-5c), he found that appellant was totally disabled due to chronic pain and noted diagnoses of herniated lumbar disc with radiculopathy and bilateral foot numbness. In a December 6, 2006 progress note, Dr. Katz diagnosed thoracic cord compression at T10-11 due to facet hypertrophy and central disc bulge. He recommended surgery for laminectomy, decompression and possible fusion.

On February 12, 2007 the Office received reports dated May 26 to November 8, 2006 from Dr. Poonam S. Dulai, an examining Board-certified psychiatrist and neurologist, who noted that appellant injured his neck, back and low back on December 12, 2003. On neurological examination appellant had lumbar and cervical spine tenderness and lumbar/paraspinal muscle spasm.

On March 21, 2007 Dr. Katz diagnosed T10-11 central disc herniation with central disc herniation secondary to facet hypertrophy and disc herniation, degenerative disc disease, discogenic back pain and L5-S1 central disc herniation. He reported that appellant's physical examination was essentially unchanged and that he continued to have paraspinal muscle spasms and tenderness. Dr. Katz recommended thoracic laminectomy, decompression and fusion surgery.

On April 11, 2007 the Office received an undated progress note from Dr. Katz, who attributed appellant's T10-11 herniated disc to the accepted employment injury. Dr. Katz again requested authorization for surgery.

In an April 25, 2007 report, Dr. Katz diagnosed degenerative disc disease at L5-S1, L5-S1 central herniation, T10-11 cord compression, T10-11 central herniated disc with facet hypertrophy and myelomalacia of the cord at that level. He reiterated his request for surgery.

The Office found a conflict in the medical opinion between Dr. Katz and Dr. Sun on the issue of whether appellant had any residuals or disability as a result of his accepted lumbar strain and on whether his thoracic condition was due to the December 12, 2003 employment injury necessitating surgery. On June 22, 2007 it referred appellant to Dr. Mitchell Goldstein, a Board-certified orthopedic, to resolve the conflict.

In a July 11, 2007 report, Dr. Goldstein reviewed the medical record, history of injury, a statement of accepted facts and set out findings on physical examination. He concluded that

appellant's employment-related lumbar strain had resolved. On physical examination, there was tenderness over the lumbar, paraspinal and thoracic areas. Dr. Goldstein related that an electromyography showed mild lumbar radiculopathy and an MRI scan showed thoracic compression at T10 and T11, mild cervical spine discogenic changes and a bulging lumbar disc. He stated:

“[T]hough he had [an] injury date of [December] 12, [20]03, what he was describing is he was describing minimal activity at that time that I would not expect that to cause his clinical problems though at the same time he gives no other history of precipitating trauma and stress to the spine and the symptoms can be due to chronic lifting and bending that are work related. Due to his continued clinical symptoms and compression noted at T10 and T11 surgical and failure to respond to the current treatment to this date, surgery is reasonable and appropriate.”

In an August 29, 2007 supplemental report, Dr. Goldstein opined that appellant's December 12, 2003 work injury did not cause his thoracic condition. He stated that, while the surgical procedure recommended by Dr. Katz was reasonable, it was not related to a condition caused by appellant's accepted employment injury. Based on appellant's description of how the injury occurred on December 12, 2003, Dr. Goldstein did not believe that appellant's current orthopedic condition was causally related.

On October 15, 2007 the Office received progress notes from Dr. Katz dated October 9, 2006 to May 12, 2008 and a September 27, 2007 report from Dr. Dulai. Dr. Katz again requested authorization to perform surgery and reiterated his opinion that appellant's thoracic condition was a result of the December 12, 2003 employment injury.

On June 30, 2008 Dr. Dulai diagnosed thoracic and lumbar injuries as a result of appellant's December 12, 2003 employment injury. He noted that appellant continued to have low back pain complaints, intermittent lower extremity spasms and numbness in his feet. A neurological examination revealed muscle spasm and tenderness of the lumbar paraspinal and lower thoracic areas.

By decision dated July 31, 2008, the Office denied authorization for the thoracic laminectomy, decompression and fusion surgery, finding that Dr. Goldstein's impartial medical opinion represented the weight of the medical evidence. It determined that the recommended surgical intervention was not related to the work-related condition.

Thereafter, the Office received a July 21, 2008 progress note from Dr. Katz who noted appellant's condition was unchanged. Dr. Katz again requested authorization for surgery.

On August 4, 2008 the Office proposed to terminate appellant's compensation. It found that the weight of the medical evidence was represented by the opinion of Dr. Goldstein, the impartial medical examiner, and established that the accepted lumbosacral strain had resolved and that he had no residuals or disability due to his accepted condition. The Office also found that Dr. Goldstein determined that appellant did not require further medical treatment. It allowed appellant 30 days to submit additional evidence.

In response, appellant noted that he continued to have residuals and disability due to his accepted employment injury. He also contended that his thoracic and cervical conditions were due to his December 12, 2003 employment injury.

By decision dated September 8, 2008, the Office terminated appellant's compensation benefits effective September 27, 2008 finding that his accepted lumbosacral sprain had resolved. It found that Dr. Goldstein's opinion constituted the weight of the medical evidence.

By decision dated May 20, 2009, the Office denied authorization for surgery. It relied upon Dr. Goldstein's impartial opinion that appellant's thoracic condition was not employment related.

In a letter dated June 24, 2009, appellant's counsel requested reconsideration of both decisions.

By decision dated September 25, 2009, the Office denied modification of the September 8, 2008 and May 20, 2009 decisions.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.¹ After it has determined that an employee has disability causally related to his federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.² The Office's burden of proof 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.⁴ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁵

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "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 Where a case is referred to an impartial medical specialist for the purpose of

¹ *S.F.*, 59 ECAB ____ (Docket No. 08-426, issued July 16, 2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

² *I.J.*, 59 ECAB 524 (Docket No. 07-2362, issued March 11, 2008); *Elsie L. Price*, 54 ECAB 734 (2003).

³ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁴ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁵ *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

⁶ 5 U.S.C. § 8123(a); *see also R.H.*, 59 ECAB ____ (Docket No. 07-2124, issued March 7, 2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

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.⁷

ANALYSIS -- ISSUE 1

The Office accepted appellant's claim for lumbosacral sprain and placed him on the periodic rolls in receipt of temporary total disability as of March 21, 2004. The burden is on the Office to support the termination of appellant's compensation. The Office found that termination of appellant's compensation was justified based on the impartial medical opinion of Dr. Goldstein.

Appellant's attending Board-certified orthopedic surgeon, Dr. Katz, opined that appellant had residuals of his accepted lumbosacral sprain and attributed appellant's T10-11 central disc herniation to the December 12, 2003 employment injury. Dr. Sun, a second opinion Board-certified orthopedic surgeon, concluded that appellant's lumbar sprain had resolved and that there were continuing disability or residuals due to the December 12, 2003 employment injury. Dr. Sun found that the T10-11 central disc herniation condition was unrelated to the accepted employment injury. The Office determined there was a conflict in the medical opinion evidence as to whether appellant had any continuing residuals or disability due to his accepted lumbosacral sprain and whether the December 12, 2003 employment injury caused appellant's thoracic condition. It referred appellant to Dr. Goldstein, a Board-certified orthopedic surgeon, to serve as the impartial medical examiner.

The Board finds that Dr. Goldstein's opinion is not entitled to the special weight accorded an impartial medical examiner as his opinion is not well rationalized. On July 11, 2007 Dr. Goldstein conducted a physical examination of appellant and reviewed the medical records. He noted an MRI scan which found a bulging lumbar disc and an EMG report showed mild lumbar radiculopathy. However, Dr. Goldstein stated that the findings were mostly subjective and that he saw no specific problems which would hinder appellant's recovery. When asked to clarify his opinion regarding appellant's thoracic condition, in an August 29, 2007 supplemental report, he noted that the MRI scan he reviewed did show a L4-S1 small central herniation which he did not comment on in his report. Dr. Goldstein stated that he did not believe appellant's orthopedic problems were due to the December 12, 2003 employment injury based on appellant's description of the events that day. He did not provide any further explanation or rationale for his conclusion. The Board has held that medical opinion that is not fortified by rationale is of diminished probative value.⁸ Dr. Goldstein's supplemental report addressed the issue of whether appellant's thoracic condition was employment related and noted that he did not mention an L5-S1 small central disc herniation seen in an MRI scan he reviewed. His report is not sufficient to establish that all residuals of the accepted condition ceased. In neither report did Dr. Goldstein provide sufficient medical explanation to support his conclusion that appellant's accepted condition had fully resolved. Therefore, Dr. Goldstein's opinion is of diminished probative value as it contains insufficient medical rationale to support that appellant no longer has residuals of his work injury or that his thoracic condition is not employment related.

⁷ *V.G.*, 59 ECAB ___ (Docket No. 07-2179, issued July 14, 2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

⁸ *Cecilia M. Corley*, 56 ECAB 662 (2005).

For these reasons, the Board finds that the opinion of Dr. Goldstein is not sufficient to establish that appellant was no longer disabled or residuals from his accepted employment injury. The Board finds that the Office did not meet its burden of proof to terminate his compensation benefits as there remains an unresolved conflict in the medical evidence.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation benefits as of September 27, 2008.⁹

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 25, 2009 is reversed with respect to the termination of appellant's compensation benefits and set aside and remanded on the issue of the denial of authorization for surgery.

Issued: October 4, 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

⁹ In light of the Board's disposition on the first issue, the second and third issues are moot.