United States Department of Labor
Employees' Compensation Appeals Board

L.B., Appellant	)	
and	)	**Docket No. 10-532**
	)	**Issued: October 22, 2010**
DEPARTMENT OF THE ARMY, U.S. ARMY MATERIAL COMMAND, Tobyhanna, PA, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 17, 2009 appellant filed a timely appeal from the August 20, 2009 merit decision of the Office of Workers' Compensation Programs terminating his medical benefits and the October 16, 2009 nonmerit decision denying his request for an oral hearing. 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 properly terminated appellant's medical benefits effective August 20, 2009; and (2) whether the Office properly denied his request for an oral hearing as untimely.

FACTUAL HISTORY

On February 4, 2008 appellant, then a 62-year-old electronics mechanic, slipped on ice in the employing establishment parking lot, hitting his head on the pavement. The Office accepted his claim for frontal subdural hematoma. Appellant returned to regular duty on March 13, 2008.

The record contains an unsigned request dated December 4, 2008 from Lackawanna Medical Group to expand appellant's claim to include a diagnosis for a neck injury. In a February 23, 2009 report, Dr. Richard E. Gratz, a Board-certified internist, diagnosed cervical radiculopathy; hyperlipidemia; "DM [diabetes mellitus]" and "CAD [coronary artery disease]."

In a March 6, 2009 report, Dr. Sheryl Oleski, a Board-certified physiatrist, stated that appellant had sustained a subdural hematoma at work on February 4, 2007, when he slipped and fell on ice. Since the work injury, appellant had been experiencing ongoing neck and left arm and hand pain, as well as occasional vertigo-type symptoms. Examination revealed no significant misalignment, atrophy, or asymmetry in the head, neck, shoulders, upper limbs and thoracolumbar spine and no evidence of acute dislocation, instability or fracture in the neck, thoracolumbar spine or either upper limb. Cervical flexion and extension was limited by 50 percent. Side bending was limited on the left by 50 percent and on the right by 25 percent. Bilateral shoulder forward flexion, internal and external rotation was functional. Strength testing was 5/5 in the deltoid, biceps, triceps, wrist extensors, finger flexors and hand intrinsics, as well as grossly in the neck and spine. Sensation to light touch and distal pulses were within normal limits in the upper limbs, neck and trunk without evidence of lymphadenopathy, edema or rash in these regions. Muscle stretch reflexes are symmetric in the biceps and triceps without upper motor neuron signs. Tinel's test was negative. Phalen's test was positive bilaterally. Impingement tests of the shoulder are equivocal with a positive Hawkins and a negative Neer's. Spurling's maneuver causes axial neck pain. There are multiple cervical and periscapular tender points. A December 24, 2008 report of a computerized tomography (CT) scan of the cervical spine showed degenerative disc disease at the C5-6 and C6-7 levels and mild right neuroforaminal stenosis at C5-6. A December 24, 2008 x-ray of the left shoulder showed evidence of mild glenohumeral joint, as well as mild acromioclavicular joint osteoarthritis. Results of an October 1, 2008 EMG/NCS test showed evidence of mild to moderate acute and chronic C5 and C6 radiculopathy bilaterally with asymptomatic bilateral carpal tunnel syndrome.

Dr. Oleski diagnosed EMG evidence of cervical radiculopathy without correlative findings on physical examination in addition to cervical CT scan; probable bilateral carpal tunnel syndrome; suspected mild left rotator cuff tendinitis with pain additionally from acromioclavicular joint osteoarthritis and probable mild impingement syndrome; multiple cervical and periscapular tender points as a result of the above with associated cervical degenerative disc disease and spondylosis. She stated that it was unclear whether appellant's symptoms were related to his cervical spine, as he had no right-sided symptoms, but had been diagnosed with a right-sided radiculopathy.

In an April 13, 2009 report, Dr. Oleski related appellant's complaints of neck and shoulder pain. She found no evidence of cervical radiculopathy pursuant to a March 25, 2009 EMG report.

The Office referred appellant to Dr. Peter A. Feinstein, a Board-certified orthopedic surgeon, for a second opinion examination as to whether he had continuing residuals from his accepted injury and, whether he had a cervical condition that was causally related to the February 4, 2008 injury.

In a July 1, 2009 report, Dr. Feinstein reviewed the medical record and statement of accepted facts. He reviewed the history of injury, stating that appellant sustained a subdural hematoma on February 4, 2008 while he was walking in the parking lot, slipped on ice, and fell, striking the back of his head on the pavement. On direct verbal history appellant informed Dr. Feinstein that he also injured his left shoulder and neck when he fell on February 4, 2008 and that he started having problems with his neck and his back within a month or two after the incident.

A December 24, 2008 CT scan revealed mild cervical spondylosis. An October 1, 2008 nerve conduction study and EMG showed mild to moderate, acute and chronic C5 and C6 radiculopathy and asymptomatic carpal tunnel syndrome. A March 25, 2008 NCS/EMG showed bilateral CTS and no evidence of left cervical radiculopathy or brachial plexopathy.

On physical examination, the only objective findings consisted of some discomfort in the left trapezius area, in addition to some left coracoid process discomfort in the shoulder region. Otherwise, the examination was unremarkable. Appellant had no right trapezius discomfort. He had full range of motion in flexion and extension, and right and left lateral rotation, with no paravertebral discomfort. There was no discomfort to palpation of the stemoclavicular, acromioclavicular, coracoid process, or greater tuberosity regions of either shoulder, other than the coracoid on the left. Appellant was able to reach overhead for the ceiling a full 180 degrees with both arms without any neck or arm discomfort, and had a negative drop test with scapulothoracic motion being synchronous when bringing his arm back down to his side, indicating the rotator cuff was intact. There was no pain or discomfort to anteroposterior and transverse compression of the rib cage and chest wall. Appellant's upper extremity evaluation revealed normal sensation bilaterally.

There was a negative Tinel's sign at the wrist, elbow, thoracic outlet and supraclavicular region bilaterally. Deep tendon reflexes were normal at the biceps, triceps and brachial nadialis bilaterally. Pinch and grip strength, resisted wrist flexion and extension, elbow flexion and extension, and rotator cuff muscle testing were normal in both upper extremities, and there was no atrophy of the arm or forearm muscles to direct measurement with a tape measure, right compared to left.

Dr. Feinstein opined that appellant did not have a diagnosable cervical or shoulder condition referable to the February 4, 2008 injury. His physical examination was essentially entirely benign for a cervical or shoulder condition, other than for two small trigger point areas of irritation that were not impressive and would be indicative of simply some muscle irritation or tendinitis. Appellant opined that neither of those conditions could be causally connected to the work injury by direct cause, aggravation, precipitation or acceleration. Noting that the EMG was negative for any cervical radiculopathy, Dr. Feinstein opined that appellant had no residuals from, and required no further treatment due to, the February 4, 2008 injury.

On July 17, 2009 the Office advised appellant of its intent to terminate his medical benefits based on Dr. Feinstein's July 1, 2009 report. It instructed him to submit any evidence or argument to the Office within 30 days of the date of the notice, if he disagreed with the proposed termination.

In an August 10, 2009 letter, appellant disagreed with the proposed termination, contending that he had sustained neck and shoulder injuries when he fell on February 4, 2008. He noted that x-rays and CT scans were ordered to address his complaints of neck and shoulder pain at the time of the accepted incident, and that he continued to experience dizzy spells and memory loss due to the injury. Appellant also contended that Dr. Feinstein's examination was insufficient to determine whether his accepted condition had resolved.

By decision dated August 20, 2009, the Office terminated appellant's medical benefits on the grounds that the weight of evidence established that his accepted conditions had resolved.

In an appeal request form postmarked September 29, 2009, appellant requested an oral hearing. By decision dated October 16, 2009, an Office hearing representative denied his request as untimely. He also found that appellant's concerns could be equally well addressed in a request for reconsideration.

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] 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 to compensation for disability. To terminate authorization for medical treatment, the Office must establish that an employee no longer has residuals of an employment-related condition which require further medical treatment.[4]

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof to terminate appellant's medical benefits on the grounds that he no longer had residuals from his accepted employment injury.

Dr. Oleski's March 6, 2009 report provided diagnoses of EMG evidence of cervical radiculopathy without correlative findings; probable bilateral carpal tunnel syndrome; suspected

[1] *I.J.*, 59 ECAB 408 (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); *Larry Warner*, 43 ECAB 1027 (1992).

[4] *Id. Furman G. Peake*, 41 ECAB 361, 364 (1990).

mild left rotator cuff tendinitis with pain additionally from acromioclavicular joint osteoarthritis and probable mild impingement syndrome; multiple cervical and periscapular tender points with associated cervical degenerative disc disease and spondylosis. Her diagnoses are speculative and the history of injury is inaccurate.[5] Dr. Oleski provided findings on examination; but she did not opine that appellant's conditions were causally related to the accepted February 4, 2008 injury. Rather, she stated that it was unclear as to whether appellant's symptoms were related to his cervical spine. Medical evidence which 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] As Dr. Oleski's April 27, 2009 report failed to provide an opinion as to the cause of appellant's claimed neck and shoulder conditions, it is of limited probative value. The Board notes that appellant's claim was accepted only for subdural hematoma, not for any cervical or shoulder condition. Dr. Oleski did not explain the medical process whereby appellant's accepted injury of striking the back of his head on the pavement, was competent to cause appellant's claimed shoulder or neck conditions. Her reports are of diminished probative value. The remaining medical evidence of record, including reports from Dr. Gratz and diagnostic test results, which do not contain an opinion on the cause of appellant's claimed condition, are also of limited probative value.

In contrast, Dr. Feinstein, a Board-certified orthopedic surgeon, provided a documented and reasoned opinion that appellant had no residuals from the February 4, 2008 injury. He provided extensive findings on physical examination and a review of the relevant diagnostic studies. Dr. Feinstein concluded that appellant did not have a diagnosable cervical or shoulder condition referable to the accepted injury. He reviewed the medical record, which included various diagnostic and imaging studies, and conducted his own physical examination on July 1, 2009. Other than two minor small trigger point areas of irritation that were indicative of tendinitis, he opined that appellant had no current objective residuals that were directly or indirectly attributable to the accepted work injury. Dr. Feinstein opined that with respect to the accepted injury, appellant had no work restrictions and required no further treatment.

The Board finds that Dr. Feinstein's medical report is comprehensive, well rationalized and based on an accurate factual and medical history.[7] There is no other contemporaneous medical evidence establishing that appellant continued to experience residuals from his employment-related injury. Thus, Dr. Feinstein's medical opinion constitutes the weight of the medical evidence.[8]

The Board finds that Dr. Feinstein's July 1, 2009 report established that appellant no longer has residuals from his February 4, 2008 employment injury. Accordingly, the Office properly terminated appellant's medical benefits based on his opinion.[9]

[5] Dr. Oleski identified the date of injury as February 4, 2007, rather than 2008.

[6] *Michael E. Smith*, 50 ECAB 313 (1999).

[7] *See K.E.*, 60 ECAB ___ (Docket No. 08-1461, issued December 17, 2008).

[8] *See E.J.*, 59 ECAB 695 (2008).

[9] *Id.*

On appeal, appellant contends that his neck and shoulder conditions were a direct result of his February 4, 2008 injury. For reasons noted, the Board finds that the weight of the medical evidence establishes that he has no residuals from the accepted injury.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Federal Employees' Compensation Act provides that, before review under section 8128(a) of the Act, a claimant not satisfied with a decision of the Office is entitled to an oral hearing on his claim, on request made within 30 days after the date of the issuance of the decision.[10]

The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.[11] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[12] In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.[13]

ANALYSIS -- ISSUE 2

Appellant had 30 calendar days from the Office's August 20, 2009 decision to request an oral hearing before an Office hearing representative. As the 30th day fell on Saturday, September 19, 2009, he had until the following Monday, September 21, 2009, to file his request.[14] Because appellant's request was postmarked September 29, 2009, it was untimely. Therefore, he was not entitled to an oral hearing as a matter of right under section 8124(b)(1) of the Act.

Exercising its discretion to grant a discretionary hearing, the Office denied appellant's request on the grounds that he could equally well address any issues in his case by requesting reconsideration. Because reconsideration exists as an alternative appeal right to address the issues raised by the Office's August 20, 2009 decision, the Board finds that the Office did not abuse its discretion in denying appellant's untimely request for an oral hearing.[15]

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[10] 5 U.S.C. § 8124(b)(1).

[11] 20 C.F.R. § 10.616(a).

[12] *G.W.***,** 61 ECAB ___ (Docket No. 10-762, issued April 23, 2010); *Herbert C. Holley*, 33 ECAB 140 (1981).

[13] *G.W.*, *id.*

[14] In computing a time period the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday. *See John B. Montoya*, 43 ECAB 1148, 1151 (1992); *Marguerite J. Dvorak*, 33 ECAB 1682 (1982). *See also* FECA Program Memorandum No. 250 (January 29, 1979).

[15] The Board has held that the denial of a hearing on these grounds is a proper exercise of the Office's discretion. *E.g.*, *Jeff Micono*, 39 ECAB 617 (1988). Appellant has one year to make a timely request for reconsideration of the Office's June 23, 2009 merit decision. *See* 20 C.F.R. § 10.607.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's medical benefits effective August 20, 2009. The Board further finds that the Office properly denied his request for an oral hearing.

ORDER

IT IS HEREBY ORDERED THAT the October 16 and August 20, 2009 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 22, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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