United States Department of Labor
Employees' Compensation Appeals Board

F.S., Appellant	)	
and	)	**Docket No. 09-2337**
	)	**Issued: September 2, 2010**
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LOS ANGELES DISTRICT OFFICE, Las Vegas, NV, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
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 September 23, 2009 appellant, through counsel, filed a timely appeal from an August 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 this case.

ISSUE

The issue is whether the Office properly terminated medical benefits compensation effective August 10, 2009.

FACTUAL HISTORY

On February 14, 2008 appellant, then a 54-year-old mediator, filed a traumatic injury claim alleging that she injured her left knee on February 4, 2008 when she tripped and fell while getting out of her chair. The Office accepted the claim for lumbar and neck sprains.[1] Appellant

[1] The Office assigned claim number xxxxxx873. On May 30, 2008 it noted that appellant had filed two prior claims for back injuries which were denied.

stopped work on February 4, 2008 and returned to work on February 11, 2008. She stopped work again on February 12, 2008 and has not returned. The Office paid wage-loss compensation for the period March 25 to 31, 2008.

In a May 12, 2008 report, Dr. Steven A. Holper, a treating Board-certified physiatrist, noted that appellant's February 4, 2008 fall at work exacerbated a preexisting back condition. He stated that appellant's disabilities from her back injury limit her ability to walk around the office or to and from the office as well as limit her ability to stand or sit for prolonged periods of time.

By letter dated May 20, 2008, the Office noted receipt of appellant's claim for wage-loss compensation. It informed her that the medical evidence failed to establish that any disability she had was causally related to the accepted employment conditions. Appellant was advised to submit a detailed medical opinion with objective findings and given 30 days to provide this information.

On June 5, 2008 the Office referred appellant to Dr. Aubrey A. Swartz, a second opinion Board-certified orthopedic surgeon, to determine the nature of her condition, appropriate treatment and the extent, if any, of disability.[2] Dr. Swartz, in a June 16, 2008 report, noted that appellant returned for another evaluation and that her complaints were unchanged. A physical examination revealed no spasm, lumbar tenderness, appellant pulled her right leg away when touched, pain on right straight leg raising at 20 degrees and pain on left straight leg raising at 40 degrees. Range of motion included 90 degrees lumbar flexion, 5 degrees lumbar extension, 15 degrees lateral flexion for both sides, 30 degrees bilateral rotation. Dr. Swartz concluded that appellant no longer had any residuals from her accepted February 4, 2008 employment injury.

On July 14, 2008 the Office received a May 23, 2008 attending physician's report from Dr. Holper who reported an injury date of February 4, 2008 and indicated that appellant was totally disabled for the period February 4 to May 30, 2008.

On July 15, 2008 the Office issued a notice of proposed termination of appellant's compensation benefits based upon the report of Dr. Swartz. It noted that at the time she was referred to Dr. Swartz for a second opinion evaluation it was unaware of her prior medical treatment with the physician. Thus, the Office considered Dr. Swartz's opinion as that of a treating physician and not an Office referral physician.

On July 25, 2008 Dr. Holper reviewed and provided comments on Dr. Swartz's June 16, 2008 report. He concurred with Dr. Swartz's opinion that appellant was capable of working with restrictions, but disagreed with his conclusion that any aggravation caused by the February 4, 2008 employment injury had resolved. Dr. Holper opined that appellant sustained a permanent aggravation of her preexisting back conditions as a result of the February 4, 2008 employment injury. In support of this conclusion, he referenced abnormalities noted on magnetic resonance imaging (MRI) scans taken before and after her fall and his physical examination of appellant.

[2] Under claim number xxxxxx793, appellant submitted an April 29, 2008 report from Dr. Swartz in which he concluded that any aggravation of her low back condition as a result of the alleged September 25, 2007 incident had ceased as of January 30, 2008.

In an August 12, 2008 report, Dr. Holper noted that he had reviewed factual and medical evidence included in Dr. Swartz's report as well as the statement of accepted facts and questions furnished by the Office. He reiterated his opinion that appellant sustained a permanent aggravation of her preexisting conditions and not a temporary aggravation as Dr. Swartz opined. Dr. Holper also noted that there was an objective worsening of her condition as seen by comparing a January 15, 2008 MRI scan and a subsequent April 26, 2008 MRI scan. He opined that appellant's preexisting back condition caused her to be more susceptible for sustaining permanent damage as a result of the February 4, 2008 employment injury. In concluding, Dr. Holper opined that the employment injury "hastened the development of the underlying condition because she now [has] more symptoms [than] she ha[d] prior to the accident."

By decision dated August 21, 2008, the Office finalized the notice of proposed termination, finding the evidence established that appellant no longer had any residuals or disability from her accepted February 4, 2008 employment injury and terminated her compensation benefits. It found the weight of the evidence rested with the Dr. Swartz's reports that her condition had resolved.

On August 26, 2008 appellant requested an oral hearing before an Office hearing representative, which was held on December 9, 2008.

Subsequently appellant submitted a July 28, 2008 report by Dr. Barry R. Maron, an examining Board-certified orthopedic surgeon, and a November 13, 2008 report by Dr. Holper.

Dr. Maron, based upon a review of Dr. Swartz's April 29, 2008 report and an April 18, 2008 bone scan, concluded that Dr. Swartz's report was flawed and contradicted by the April 18, 2008 bone scan. He concluded that appellant sustained a lumbar fracture as a result of the February 4, 2008 employment injury and that she would require a minimum of three months recovery.

In a November 13, 2008 report, Dr. Holper reviewed Dr. Swartz's June 16, 2008 report and noted his disagreement that there were no objective findings attributable to the February 4, 2008 employment injury or any continuing residuals. In support of this conclusion, he noted the changes in an April 11, 2007 MRI scan with an MRI scan taken "after her fall of [January] 5, [20]08." Dr. Holper agreed with Dr. Swartz regarding appellant's work restrictions.

By decision dated February 3, 2009, the Office hearing representative found the evidence insufficient to terminate appellant's medical benefits due to a conflict in the medical opinion evidence. He noted that appellant's claim had also been accepted for a cervical condition and the record contained no medical opinion concluding that this condition had resolved or the aggravation had ceased. The hearing representative also stated that as appellant was not receiving wage-loss compensation benefits at the time the Office terminated her benefits they did not have to be reinstated, but that the Office was to address the issue of whether appellant was entitled to wage-loss compensation on and after March 31, 2008. He remanded the case to the Office for referral to an impartial medical examiner to resolve the conflict in the medical opinion evidence between Drs. Holper and Swartz on the issue of objective findings of any injury-related disability.

On April 9, 2009 the Office referred appellant to Dr. G. Mark Sylvain, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Holper and Swartz on the issue of objective findings of any injury-related disability.

In a May 18, 2009 report, Dr. Sylvain, based upon a review of the medical, statement of accepted facts and physical examination, concluded that appellant's accepted lumbar and cervical strains had resolved. He noted that appellant had a history of low back pain and had exacerbations of her condition on August 14 and September 25, 2007 and February 4, 2008. A physical examination revealed negative straight leg raising, 2+ biceps and brachioradialis upper extremity reflexes and intact upper extremity motor response. Dr. Sylvain reported that appellant "does tend to shift positions to seek position of comfort." A review of the MRI scans showed significant lumbar spine degenerative changes. Based upon his examination, Dr. Sylvain diagnosed ongoing low back pain which was mechanical in nature. He opined that the February 4, 2008 employment injury temporarily aggravated her ongoing low back pain. Dr. Sylvain reported that he found no objective findings on examination and that the question is when appellant returned to baseline following the February 4, 2008 employment injury. He agreed with the recommendations made by Drs. Swartz and Holper as to appellant's work restrictions including flexible positions and flex time. Based upon his examination, Dr. Sylvain opined that appellant's cervical and lumbar condition had resolved to their prior baseline and that "until her situation is resolved regarding work modifications, conflict will continue." In concluding, Dr. Sylvain opined that appellant's lumbar and cervical strains had resolved and there were no objective findings to support any residuals.

On July 9, 2009 the Office issued a notice proposing to terminate appellant's compensation benefits. It found the report of the impartial medical examiner, Dr. Sylvain, established that appellant no longer had any residuals due to her accepted February 4, 2008 employment injury.

By decision dated August 10, 2009, the Office finalized the termination of appellant's medical benefits effective that day.[3]

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[4] It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.[5]

[3] The Board notes that the Office has not issued a final decision on whether appellant was entitled to wage-loss compensation after March 31, 2008; thus, this issue is in an interlocutory posture. As there is no final decision on appellant's entitlement to wage-loss compensation after March 31, 2008 the Board lacks jurisdiction to consider this issue in the current appeal. 20 C.F.R. § 501.2(c); *see E.L.*, 59 ECAB ___ (Docket No. 07-2421, issued March 10, 2008); *Linda Beale*, 57 ECAB 429 (2006).

[4] *S.F.*, 59 ECAB ___ (Docket No. 08-426, issued July 16, 2008); *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

[5] *I.J., supra* note 4; *J.M.*, 58 ECAB 478 (2007); *Elsie L. Price*, 54 ECAB 734 (2003); *Anna M. Blaine*, 26 ECAB 351 (1975).

The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[7] 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.[8]

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.[9] Where 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.[10]

ANALYSIS

The Office determined that a conflict in medical opinion existed between Drs. Holper and Swartz on the issue of objective findings of any injury-related disability and residuals and referred appellant to Dr. Sylvain to resolve the conflict. The Board finds that the Office improperly declared a conflict in medical opinion between Drs. Holper and Swartz.

In this regard, Dr. Holper served as appellant's treating physician for the effects of the February 14, 2008 employment injury. In issuing its July 15, 2008 notice of proposed termination, the Office acknowledged that when it referred appellant to Dr. Swartz for a second opinion evaluation, it was unaware that he had previously served as appellant's treating physician. It thus concluded that he was a treating physician and not an Office referral physician. Nonetheless, in his February 3, 2009 decision, an Office hearing representative found a conflict in medical opinion between Drs. Holper and Swartz regarding whether appellant had any residuals resulting from the February 4, 2008 employment injury. As the disagreement arose between two treating physicians and not between a treating physician and a physician for the government as contemplated by 5 U.S.C. § 8123(a), the Board finds that there is no conflict in medical opinion.[11] Thus, Dr. Sylvain cannot be considered an impartial medical specialist and his opinion does not have the special weight afforded to one. Since the Office based the termination of appellant's medical benefits on Dr. Sylvain's medical report, the termination must

[6] *See T.P.*, 58 ECAB 524 (2007); *J.M.*, *supra* note 5; *Del K. Rykert*, 40 ECAB 284 (1988).

[7] *A.P.*, 60 ECAB ___ (Docket No. 08-1822, issued August 5, 2009); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[8] *E.J.*, 59 ECAB ___ (Docket No. 08-1350, issued September 8, 2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *James F. Weikel*, 54 ECAB 660 (2003); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[9] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, *supra* note 7.

[10] *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).

[11] *See e.g., C.M.*, 61 ECAB ___ Docket No 09-1268 (issued January 22, 2010).

be reversed as the Office has not met its burden of proof to terminate appellant's medical benefits effective August 10, 2009.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's medical benefits effective August 10, 2009.

ORDER

IT IS HEREBY ORDERED THAT the August 10, 2009 Office of Workers' Compensation Programs' decision is reversed.

Issued: September 2, 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