United States Department of Labor
Employees' Compensation Appeals Board

R.S., Appellant	)	
and	)	**Docket No. 10-365**
	)	**Issued: September 1, 2010**
U.S. POSTAL SERVICE, WESTERN NEW YORK PERFORMANCE CLUSTER, Buffalo, NY, Employer	)	

Appearances:
David W. Covino, 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 November 20, 2009 appellant, through her representative, filed a timely appeal from the October 2, 2009 decision of the Office of Workers' Compensation Programs terminating his compensation and medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation and medical benefits effective October 2, 2009.

On appeal, appellant, through his attorney, argues in primary part that the Office erred in relying on the second opinion physician in terminating benefits. He also argues that the Office erred in finding the reports of appellant's chiropractor inadmissible.

FACTUAL HISTORY

The record reveals that on April 24, 1996 appellant, then a 38-year-old mail handler, injured his back in the performance of duty. The Office assigned File No. xxxxxx433. The statement of accepted facts indicated that appellant had been working full-time limited duty for 11 years. On August 13, 2007 appellant alleged a recurrence of disability on August 3, 2007 due to the April 24, 1996 employment injury. He specifically noted that on that date he felt pains in his lower back when loading full trays onto a tiered pie cart.

Appellant received treatment from Dr. Todd E. Plinke, a chiropractor. In an undated report, received by the Office on November 8, 2007, Dr. Plinke noted that he has been treating appellant for a low back condition for several years which was the result of a work injury of April 24, 1996. He indicated that appellant has been subject to episodes of exacerbations caused by workload, which occurred most recently on August 3, 2007, when he was lifting a box of mail and felt pain in his lower back. Dr. Plinke noted that appellant was taken off work from August 6 through November 5, 2007 and will remain on limited duty through January 7, 2008. In a December 14, 2007 report, he diagnosed lumbar subluxation confirmed by x-rays,[1] neuritis/radiculitis and lumbar intervertebral disc syndrome. Dr. Plinke stated that it was his opinion that appellant had a permanent partial disability with regard to his lumbar spine. He believed that appellant should continue with chiropractic spinal adjustment.

The Office treated appellant's claim for a recurrence of disability as a claim for a new injury and on February 6, 2008 accepted his claim for sprain of back, lumbar region under File No. xxxxxx409, the subject of the current appeal.

By report dated August 27, 2008, Dr. Ronald Fernia, a radiologist, noted results of a magnetic resonance imaging (MRI) scan of the lumbosacral spine of both disc protrusion and subluxation.

In an October 15, 2008 report, Dr. Plinke noted that appellant sustained a recurrence of disability on August 25, 2008 and that his treating diagnosis was: subluxation, lumbar vertebra; lumbar intervertebral disc syndrome; lumbago (low back pain) and neuritis/radiculitis.

By letter dated October 30, 2008, the Office referred appellant to Dr. David Nichols, a Board-certified orthopedic surgeon, for a second opinion and provided him a statement of accepted facts. It noted that appellant's claim had been accepted for lumbar strain.

In a report dated November 18, 2008, Dr. Nichols listed the diagnosis as degenerative disc disease of the lumbar spine as established by an MRI scan. He opined that, as a result of the August 3, 2007 work injury, appellant sustained a temporary aggravation of his long-standing chronic condition of degenerative lumbar disc disease and that the temporary aggravation has now ceased. Dr. Nichols noted no current injury-related factors of disability. He did note that the underlying degenerative disease of the spine will cause persistent pain and some degree of

[1] Dr. Plinke indicated that anterior/posterior and lateral views of the lumbar spine reveal osteoarthritic changes at L3-5 with anterior lipping and spurring; soft tissue calcifications of the abdominal aorta and positive views of lumbar subluxation from L1-5 with a P/L listing.

disability, but noted that he was not totally disabled. Dr. Nichols opined that appellant had no residual affects of his injury. In an addendum dated February 23, 2009, he noted that appellant's conditions noted on the MRI scans were degenerative in nature and could cause a disability from work. Dr. Nichols reiterated that degenerative disease of the spine takes many years to develop and that appellant's work injury caused a temporary aggravation of the underlying condition.

On August 18, 2009 the Office issued a notice of proposed termination of medical and compensation benefits. It indicated that the weight of the evidence was represented by Dr. Nichols' report finding that appellant's accepted medical condition of lumbar strain had ceased.

By letter to the Office dated September 9, 2009, appellant argued that the Office should not give any credibility to the report of Dr. Nichols because he spent less than 15 minutes in his office, of which only about 5 minutes were spent conducting the examination and the other 10 minutes were spent reviewing appellant's medical and work history.

A disability report of Dr. Plinke, dated September 22, 2009, noted that appellant could return to work eight hours, with restrictions.

By decision dated October 2, 2009, the Office finalized the termination of appellant's medical and wage-loss benefits effective October 2, 2009.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] Having determined that an employee has a disability causally related to his federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[3] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition that require further medical treatment.[4]

Under the Federal Employees' Compensation Act, a physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulation by the Secretary.[5]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint

[2] *Curtis Hall*, 45 ECAB 316 (1994).

[3] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[4] *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey* 49 ECAB 166 (1997).

[5] 5 U.S.C. § 8102(2).

a third physician who shall make an examination.[6] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the second opinion physician, 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.[7] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[8]

ANALYSIS

The Office accepted that on August 3, 2007 appellant sustained a sprain of the back, lumbar region in the performance of duty. It terminated his medical and compensation benefits effective October 2, 2009 as the Office found that he no longer had any disability or residuals due to his accepted condition. In making this determination, the Office accorded determinative weight to the opinion of Dr. Nichols, the second opinion specialist.

The Board finds that there is a disagreement between Dr. Plinke, appellant's chiropractor, and the second opinion physician, Dr. Nichols, with regard to whether appellant remains disabled as a result of the accepted August 3, 2007 incident and as to whether there remain any continuing residuals of the accepted condition.[9]

When the Office accepted appellant's claim for sprain of the back, lumbar region, it made this determination based on the opinion of Dr. Plinke. The Board notes that Dr. Plinke's diagnoses included lumbar subluxation confirmed by x-rays, for which he was treating appellant with chiropractic spinal adjustment. As Dr. Plinke was manually manipulating appellant's spine to correct a subluxation diagnosed by x-ray, Dr. Plinke should be treated as a physician under the Act. The second opinion physician, Dr. Nichols, opined in his October 30, 2008 report that appellant no longer had any residuals from his employment injury. Rather he found appellant's injury caused a temporary aggravation of degenerative disc disease now resolved. Accordingly, there was an unresolved conflict between appellant's treating physician and the second opinion

[6] *Id.* at § 8123(a).

[7] 20 C.F.R. § 10.321.

[8] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch* 54 ECAB 313 (2003).

[9] In a September 12, 2007 report, a physician's assistant for Dr. Joseph M. Kowalski, a Board-certified orthopedic surgeon, noted that appellant had complaints of back pain which radiated into his buttocks, bilaterally. She noted that this was most likely the result of some degenerative disc disease at L4-5. The physician's assistant noted that appellant had a history of back pain and that on August 3, 2007 while lifting and loading heavy sacks of mail, he experienced sudden severe back pain with stabbing pain into the right buttock. As this report was not signed by Dr. Kowalski, it is not medical evidence under the Act. Healthcare providers such as nurses, acupuncturists, physician's assistants and physical therapists are not considered physicians under the Act and their reports do not constitute competent medical evidence. *D.I.*, 59 ECAB __ (Docket No. 07-1534, issued November 6, 2007); *Ruth R. Price*, 16 ECAB 688, 91 (1965).

physician with regard to whether appellant still had any disability associated with his accepted work condition and as to whether appellant still needed medical treatment. When such conflicts in medical opinion arise, 5 U.S.C. § 8123(a) requires the Office to appoint a referee physician, also known as an impartial medical examiner, to resolve the conflict.[10] The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits due to an unresolved conflict in medical opinion.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation and medical benefits effective October 2, 2009.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 2, 2009 is reversed.

Issued: September 1, 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

[10] 5 U.S.C. § 8123(a).