United States Department of Labor
Employees' Compensation Appeals Board

F.H., Appellant	)	
and	)	**Docket No. 10-1267**
	)	**Issued: March 7, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Los Angeles, CA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 8, 2010 appellant filed a timely appeal from a February 17, 2010 merit decision of the Office of Workers' Compensation Programs finding that he had no further employment-related disability. 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 effective April 22, 2009 on the grounds that he had no further disability due to his accepted work injury; (2) whether it properly terminated authorization for medical treatment; (3) whether appellant sustained a consequential emotional condition; and (4) whether he has established that he had any further disability after April 22, 2009 due to his accepted employment injury.

FACTUAL HISTORY

The Office accepted that on June 5, 2001 appellant, then a 35-year-old payroll technician, sustained sprains of the cervical and lumbosacral spine in the performance of duty. It paid him compensation for total disability beginning March 2, 2002.

On July 3, 2007 the Office referred appellant to Dr. Ghol Bahman Ha'Eri, a Board-certified orthopedic surgeon, for a second opinion evaluation. On August 7, 2007 Dr. Ha'Eri opined that appellant's lumbosacral and cervical strain had resolved. In a supplemental report dated December 3, 2007, he reviewed October 24, 2007 magnetic resonance imaging studies and noted that it revealed no significant abnormality such as nerve impingement or disc herniations. Dr. Ha'Eri opined that appellant required no work restrictions.

On April 3, 2009 Dr. John Thomas Terrence, a clinical psychologist, discussed appellant's history of a work injury in June 2001 and his current complaints of depression and anxiety due to feelings of helplessness and the possibility that he could not support his family. He noted that appellant was shot in 1997 three times. Dr. Terrence reviewed the results of psychological testing and diagnosed depressive disorder. He stated, "[Appellant] is experiencing significant depression as is common in the preponderance of cases involving industrial injuries." Dr. Terrence indicated that he had been disabled since June 2001. He noted that appellant denied nonwork-related stress or trauma.

On July 25, 2008 the Office notified appellant of its proposed termination of his compensation benefits and authorization for medical treatment.

In a report dated August 14, 2008, Dr. William Simpson, an attending orthopedic surgeon diagnosed chronic cervical and lumbosacral musculoligamentous sprain, depression, insomnia and anxiety. He found that appellant continued to experience residuals of his accepted work injury and remained temporarily totally disabled.

On February 17, 2009 the Office referred appellant to Dr. Benjamin Broukhim, a Board-certified orthopedic surgeon, to resolve a conflict in medical opinion between Dr. Ha'Eri and Dr. Simpson.

On March 31, 2009 Dr. Broukhim performed an impartial medical examination. The letterhead on his report indicated that he worked for Studio City Orthopedics and Medical Group in association with Dr. Ha'Eri. Based on Dr. Broukhim's report, by decision dated April 22, 2009, the Office terminated appellant's compensation and authorization for medical benefits effective April 22, 2009.

On May 12, 2009 appellant requested a review of the written record. By decision dated September 25, 2009, an Office hearing representative affirmed the April 22, 2009 decision. He further found that appellant had not established a consequential emotional condition.

On November 10, 2009 appellant requested reconsideration. He submitted a report dated September 2, 2009 from Dr. Bing Hsu, a psychiatrist, who diagnosed post-traumatic stress

disorder and recurrent major depression with psychosis.[1] Dr. Hsu advised that appellant was disabled from employment.

By decision dated February 17, 2010, the Office denied modification of its September 25, 2009 decision.

On appeal, appellant argues that he continued to have residuals of his work injury and notes that the Social Security Administration determined that he was disabled.[2]

LEGAL PRECEDENT -- ISSUES 1 & 2

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[3] It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4] The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5] Additionally, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[6] 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.[7]

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 a third physician who shall make an examination.[8] 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.[9]

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[1] Appellant also submitted a report dated November 5, 2009 from Dr. Simpson, who found that appellant was disabled from work.

[2] Appellant also questions the deduction of health benefits from his compensation. The Board's jurisdiction, however, extends only to final decisions of the Office issued prior to the filing of the appeal. *See* 20 C.F.R. § 501.2(c).

[3] *Elaine Sneed*, 56 ECAB 373 (2005).

[4] *Fred Reese*, 56 ECAB 568 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[5] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[6] *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

[7] *Id*.

[8] 5 U.S.C. § 8123(a).

[9] *R.C.*, 58 ECAB 238 (2006); *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

The physician serving as the impartial medical specialist should be one who is wholly free to make a completely independent evaluation and judgment, untrammeled by a conclusion rendered on a prior examination.[10] An opinion of an associate who has already rendered an opinion on the claim cannot be considered completely independent and, therefore, his report cannot be used by the Office to resolve the conflict in medical evidence.[11] The importance of safeguarding the independence of impartial medical specialists is also recognized in the Office's procedures. Under the Office's procedures, "physicians previously connected with the claim or the claimant or physicians in partnership with those already so connected" may not be used as impartial medical specialists.[12]

ANALYSIS -- ISSUES 1 & 2

The Office properly determined that a conflict in medical opinion existed between appellant's attending physician, Dr. Simpson, who found that he had continuing disability due to his accepted cervical and lumbosacral sprains and Dr. Ha'Eri, an Office referral physician, who determined that his accepted conditions had resolved and he required no work restrictions. The Office referred appellant to Dr. Broukhim for resolution of the conflict in opinion.

Dr. Broukhim's letterhead indicates that he is professionally associated with Dr. Ha'Eri, who performed the second opinion examination. As noted, the Office's procedure manual states that a physician in partnership with those connected with the claim or claimant may not be used as an impartial medical examiner.[13] In *Ronald Santos*,[14] the Board defined the prohibition more broadly, noting that a physician who shared the same address, suite number, waiting area and examination room as one who previously examined the claimant for the Office could not serve as an impartial medical specialist based on "an appearance of impropriety due to the close association of the medical practice" of the two physicians, even though there was "no evidence in the record to indicate that the two doctors were in a medical partnership." In *Daniel A. Davis*,[15] the Board stated that "the Office must assure that the person designated as the impartial medical specialist has no prior association with any other physician who has examined the claimant or provided an opinion on the claim."

Dr. Broukhim's report is on stationary of the Studio City Orthopedics and Medical Group. Dr. Ha'Eri, who performed the second opinion examination, is listed on the letterhead as a member of the medical group. Consequently, there exists the appearance of impropriety due to the professional association of Dr. Broukhim and Dr. Ha'Eri. Accordingly, the Board finds that Dr. Broukhim cannot serve as an impartial medical examiner and his report does not resolve the

[10] *Ronald Santos*, 53 ECAB 742 (2002); *Raymond E. Heathcock*, 32 ECAB 2004 (1981).

[11] *Id*.

[12] Federal (FECA) Procedure Manual, Part 2 -- Medical, *Medical Examinations*, Chapter 3.500.4(3) (March 1994).

[13] *Id*.

[14] *See supra* note 10.

[15] 39 ECAB 151 (1967).

conflict in medical opinion. The Office did not meet its burden of proof to terminate appellant's compensation benefits and authorization for medical treatment.

LEGAL PRECEDENT -- ISSUE 3

It is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment unless it is the result of an independent intervening cause.[16] The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[17]

ANALYSIS -- ISSUE 3

Appellant alleged that he sustained an emotional condition as a consequence of his June 5, 2001 employment injury. He has not, however, submitted sufficient medical evidence to establish a consequential relationship between any emotional condition and his accepted lumbar and cervical strain. On June 26, 2008 Dr. Terrence reviewed appellant's history of a 2001 work injury, following psychological testing and diagnosed depression. He asserted that depression was "common in the preponderance of cases involving industrial injuries." The opinion of Dr. Terrence that depression was common after work injuries is a statement of general application, rather than specific to appellant's particular situation, and thus of limited probative value.[18] Moreover, he did not provide any rationale to explain how appellant's accepted lumbar and cervical strain caused or contributed to his condition other than to note that such an occurrence was common in work injuries. Without medical rationale, Dr. Terrence's opinion is of little probative value.[19]

On September 2, 2009 Dr. Hsu diagnosed post-traumatic stress disorder and recurrent major depression with psychosis. He opined that appellant was disabled from employment. Dr. Hsu did not address the cause of the diagnosed post-traumatic stress disorder and major depression. Medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.[20]

The Office has not accepted appellant's claim for consequential depression. Where a claimant claims that a condition not accepted or approved by the Office was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.[21] The

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[16] *See S.M.*, 58 ECAB 166 (2006); *Carlos A. Marrero*, 50 ECAB 117 (1998).

[17] A. Larson, *The Law of Workers' Compensation* § 10.01 (2005); *Charles W. Downey*, 54 ECAB 421 (2003).

[18] *Melvina Jackson*, 38 ECAB 443 (1998).

[19] *T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009); *Mary A. Ceglia*, 55 ECAB 626 (2004).

[20] *S.E.*, 60 ECAB ___ (Docket No. 08-2214, issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

[21] *JaJa K. Asaramo*, 55 ECAB 200, 204 (2004).

medical evidence is insufficient to discharge appellant's burden to establish that he sustained an emotional condition as a consequence of the accepted June 5, 2001 cervical and lumbosacral sprains.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation and authorization for medical benefits effective April 22, 2009 on the grounds that he had no further disability due to his accepted work injury. The Board further finds that appellant has not established that he sustained a consequential emotional condition.[22]

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 17, 2010 is reversed in part and affirmed in part.

Issued: March 7, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[22] In view of the Board's disposition of the Office's termination of compensation, the issue of whether he has established that he had any further disability after April 22, 2009 due to his accepted employment injury is moot.