United States Department of Labor
Employees' Compensation Appeals Board

D.S., Appellant	)	
and	)	**Docket No. 10-1597**
	)	**Issued: March 22, 2011**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Washington, DC, Employer	)	

Appearances:
Appellant, pro se
No appearance for the Director

Oral Argument December 16, 2010

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 30, 2010 appellant filed a timely appeal from the January 4 and 5, 2010 merit decisions of the Office of Workers' Compensation Programs. The record also contains an April 23, 2010 Office decision denying reconsideration. 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 compensation for wage-loss and medical benefits; (2) whether appellant established a recurrence of disability commencing August 29, 2009; and (3) whether the Office properly denied appellant's request for reconsideration without reviewing the merits of the claim.

FACTUAL HISTORY

On August 14, 2008 appellant, then a 38-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she sustained injuries to her back, neck and arm when she

slipped and fell in the performance of duty on that date. The Office accepted the claim for lumbar and cervical sprains on November 6, 2008. Appellant received compensation for wage loss as of September 29, 2008.

The Office prepared a statement of accepted facts (SOAF) and referred appellant for a second opinion examination. In a report dated March 25, 2009, Dr. Robert Draper, a Board-certified orthopedic surgeon, reviewed a history of injury and results on examination. He stated that physical findings supported continuing residuals of the accepted conditions. Dr. Draper found that appellant could work full time in a light-duty position, with no lifting over 20 pounds or 10 pounds frequently.

In a letter dated May 7, 2009, the Office requested that the attending orthopedic surgeon, Dr. Hampton Jackson, Jr., provide an opinion regarding appellant's ability to return to work. On May 11, 2009 Dr. Jackson advised that she could not return to work.

The Office found a conflict in the medical opinion arose between Dr. Jackson and Dr. Draper. It referred appellant, together with medical records and the SOAF, to Dr. James Tozzi, a Board-certified orthopedic surgeon. In a report dated July 15, 2009, Dr. Tozzi provided a history of injury and medical treatment. A magnetic resonance imaging (MRI) scan showed age-related degenerative changes without signs of trauma, cord compression or stenosis. Dr. Tozzi further stated that it was "nearly [11] months since the injury, there are no objective findings that would suggest impairment. I see no indication for ongoing medication or therapy. I see no reason why this [appellant] cannot return to full[-]time gainful employment."

By letter dated August 14, 2009, the Office advised appellant that it proposed to terminate his compensation for wage-loss and medical benefits based on the medical evidence. A memorandum of telephone call (CA-110) dated September 15, 2009 indicated that she had returned to work on August 26, 2009 and was filing a claim for a new injury.

On October 28, 2009 appellant filed a notice of recurrence of disability commencing August 29, 2009. She indicated that on August 29, 2009 she was picking up mail and her back spammed.

The record indicates that an addendum to the SOAF was prepared on December 3, 2009 indicating that appellant had filed a claim for a new injury on August 29, 2009. The Office referred her and the SOAF addendum to Dr. Stuart Gordon, an orthopedic surgeon, for a second opinion evaluation. In a report dated December 17, 2009, Dr. Gordon noted that the only SOAF he had reviewed was the addendum, which did not "state any accepted diagnoses." He stated that subjective complaints did not comport with the objective findings. Dr. Gordon stated that he did not find that a new event occurred on August 29, 2009, but found "this is continued abnormal illness behavior." He opined that appellant could work full duty.

In a decision dated January 4, 2010, the Office denied the claim for a recurrence of disability commencing August 29, 2009. By decision dated January 5, 2010, it terminated compensation for wage-loss and medical benefits on the grounds that residuals of the accepted conditions had ceased.

By letter dated January 26, 2010, appellant requested reconsideration of the January 4, 2010 Office decision. She submitted additional medical evidence. In a report dated March 3, 2010, Dr. Jackson diagnosed cervical and lumbar disc syndrome and he opined that the conditions were related to the August 14, 2008 employment injury.

In a decision dated April 23, 2010, the Office declined to review the merits of the recurrence of disability claim. It found that the evidence was insufficient to require a merit review.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[1]

The Federal Employees' Compensation Act provides that, if there is a 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 the examination.[2] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, 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.[3]

It is well established that, when 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.[4]

ANALYSIS -- ISSUE 1

The Office found that a conflict under 5 U.S.C. § 8123 existed with respect to appellant's continuing employment-related disability. The attending physician, Dr. Jackson, found that she remained disabled for work. A second opinion physician, Dr. Draper, opined that appellant could work light duty with an appropriate lifting restriction. To resolve the conflict, appellant was referred to Dr. Tozzi as a referee physician.

In a July 15, 2009 report, Dr. Tozzi found that the employment-related cervical and lumbar sprains had resolved. He provided an accurate factual and medical background. Dr. Tozzi noted the physical and diagnostic test results and found no objective evidence of a

[1] *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

[2] 5 U.S.C. § 8123.

[3] 20 C.F.R. § 10.321 (1999).

[4] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

continuing employment-related condition. As noted a rationalized opinion from a referee physician is entitled to special weight. Dr. Tozzi provided a rationalized medical opinion that the employment-related conditions had resolved. The Board finds that he represented the weight of the medical evidence in this case. The weight of the medical evidence was sufficient to support a termination of entitlement to wage-loss compensation and medical benefits.

LEGAL PRECEDENT -- ISSUE 2

The Office's regulations define the term recurrence of disability as follows:

> "Recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition, which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness. This term also means an inability to work that takes place when a light-duty assignment made specifically to accommodate an employee's physical limitations due to his or her work-related injury or illness is withdrawn or when the physical requirements of such an assignment are altered so that they exceed his or her established physical limitations."[5]

When an employee, who is disabled from the job he or she held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he or she can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he or she cannot perform such light duty. As part of this burden, the employee must show either a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[6] To establish a change in the nature and extent of the injury-related condition, there must be probative medical evidence of record. The evidence must include a medical opinion, based on a complete and accurate factual and medical history and supported by sound medical reasoning, that the disabling condition is causally related to employment factors.[7]

ANALYSIS -- ISSUE 2

After appellant filed a claim for a recurrence of disability commencing August 29, 2009, the Office further developed the medical evidence and referred her to Dr. Gordon for a second opinion examination. In his December 17, 2009 report, Dr. Gordon acknowledges that the only SOAF he was provided was an addendum which did not include the accepted employment-related conditions. The record contains a December 3, 2009 addendum which does not provide a detailed factual background or identify the accepted conditions.

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[5] 20 C.F.R. § 10.5(x).

[6] *Albert C. Brown*, 52 ECAB 152 (2000); *Mary A. Howard*, 45 ECAB 646 (1994); *Terry R. Hedman*, 38 ECAB 222 (1986).

[7] *Maurissa Mack* 50 ECAB 498 (1999).

The absence of a proper background diminishes the probative value of Dr. Gordon's opinion. The SOAF provides a frame of reference for the examining physician, allowing the physician to place the questions posed in the larger context of the mechanism of injury, the requirements of the claimant's job or the prevailing work conditions.[8] The SOAF should state the conditions claimed and accepted by the Office, so that the physician can assess whether the diagnoses given in the medical evidence to be reviewed, as well as his own diagnoses, are consistent with the condition(s) for which the claim was filed or accepted.[9] Office procedures indicate that an essential element of the SOAF is to identify the conditions accepted by the Office.[10]

The Board finds that Dr. Gordon did not have a complete and accurate background and his report is of diminished probative value. Since the Office further developed the medical evidence with respect to the recurrence of disability issue, it should secure an appropriate report on the issue.[11] The case will be remanded to the Office to secure a rationalized medical opinion as to a recurrence of disability commencing August 29, 2009. After such further development as the Office deems necessary, it should issue an appropriate decision. In view of the Board's decision, the Board will not review the April 23, 2010 decision denying merit review.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate compensation for wage-loss and medical benefits. With respect to a recurrence of disability, the case is remanded for further development.

[8] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.4 (June 1995).

[9] *Gwendolyn Merriweather*, 50 ECAB 411 (1999).

[10] Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.809.12 (June 1995).

[11] *See Robert Kirby*, 51 ECAB 474, 476 (2000); *Mae Z. Hackett*, 34 ECAB 1421 (1983); *Richard W. Kinder*, 32 ECAB 863 (1981).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 5, 2010 is affirmed. The decision dated January 4, 2010 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: March 22, 2011
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