United States Department of Labor
Employees' Compensation Appeals Board

C.D., Appellant	)	
and	)	**Docket No. 08-1266**
	)	**Issued: January 28, 2009**
DEPARTMENT OF AGRICULTURE, Riverdale, MD, Employer	)	

Appearances:
Norman R. McNulty, Jr., Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On March 24, 2008 appellant, through her attorney, filed a timely appeal from a March 29, 2007 merit decision of the Office of Workers' Compensation Programs terminating her compensation and from October 4, 2007 and January 9, 2008 nonmerit decisions of the Office denying her request for reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case and over the October 4, 2007 and January 9, 2008 nonmerit decisions.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective September 18, 2006 on the grounds that she had no further employment-related disability; (2) whether the Office properly terminated authorization for medical treatment; and (3) whether the Office, in its October 7, 2007 and January 9, 2008 decisions, properly denied her requests for merit review of her claim.

FACTUAL HISTORY

On June 1, 2000 appellant, then a 48-year-old mediator, filed a claim alleging that on March 20, 2000 she injured her back lifting bags on an airplane while traveling in the performance of duty. She did not stop work. On March 22, 2002 the Office accepted the claim for an exacerbation of preexisting lumbar and cervical degenerative disc disease.[1] It paid appellant's compensation beginning October 24, 2001.

In a report dated May 17, 2005, Dr. Barbara E. Quattrone, a Board-certified physiatrist and appellant's attending physician, discussed her history of chronic pain in her neck and back. She diagnosed a history of cervical and lumbar degenerative disc disease, chronic generalized pain syndrome and right hip pain of uncertain etiology. On May 31, 2005 Dr. Quattrone diagnosed chronic low back pain and a history of degenerative disc disease.[2] In a June 13, 2005 work restriction evaluation, Dr. Edwin C. Fulton, a Board-certified orthopedic surgeon, found that appellant's injury-related conditions prevented her from resuming employment.

On November 22, 2005 the Office referred appellant to Dr. Allan Wilson, a Board-certified orthopedic surgeon, for a second opinion evaluation. It enclosed an addendum to the statement of accepted facts informing Dr. Wilson that it had accepted that appellant sustained an aggravation of lumbar/lumbosacral degeneration and an aggravation of degeneration of the C4 cervical disc due to her March 20, 2000 work injury. In a report dated December 8, 2005, Dr. Wilson discussed the history of injury, reviewed the medical evidence of record and listed detailed findings on physical examination. He diagnosed cervical degenerative disc disease both pre and postdating her March 20, 2000 work injury, a history of right shoulder strain due to the March 20, 2000 injury and multiple medical problems unrelated to the March 20, 2000 work injury. Dr. Wilson stated:

> "In my opinion, the cervical, dorsal and lumbar spines in all probability preexisted and were not objectively worsened by the lifting occurrence while at work on March 20, 2000. Based on my review of the medical records there was no aggravation of her preexisting neck and low back condition dating to the date of the assigned injury of March 20, 2000. There was no worsening of her neck or low back condition dating to the date of assigned injury of March 20, 2000."

Dr. Wilson noted that he did not have an original statement of accepted facts. He asserted that he could discuss appellant's ability to perform her date-of-injury position if he received a job description. Dr. Wilson related that he could not explain how the work incident on March 20, 2000 contributed to the objective findings as there was no specific injury. Instead, he noted that it appeared that it was the "act of overhead lifting and putting the materials in the

[1] On January 9, 2001 appellant filed a claim alleging that she experienced muscle spasms and new pain due to her March 20, 2000 injury. By decision dated March 26, 2001, the Office denied her claim for a traumatic injury on March 20, 2000 and a recurrence of disability on January 8, 2001. On November 15, 2001 an Office hearing representative vacated the March 26, 2001 and remanded the case for the Office to refer appellant for a second opinion examination.

[2] In a clinic note dated July 26, 2005, Dr. Quattrone diagnosed chronic low back pain with right radicular symptoms.

bin that brought about [appellant's] exacerbation of pain." Dr. Wilson concluded that he could "find nothing in the medical record that indicates the preexisting degenerative disc disease was objectively made worse or aggravated by the lifting incident on the job on March 20, 2000, enough to supply a material change that occurred to alter the underlying disease process. I do not think, quite frankly, there were any changes." He found that appellant had a "natural progression of her underlying degenerative disc disease" rather than an aggravation. Dr. Wilson found that she could work eight hours per day with restrictions due to her pain. He opined that she had "significant functional self-imposed limitations…." In an accompanying work restriction evaluation, Dr. Wilson diagnosed an aggravation of lumbar and cervical degenerative disc disease and listed work restrictions.

On January 17, 2006 the Office requested that Dr. Quattrone review and comment on Dr. Wilson's opinion that appellant could work eight hours per day with restrictions. In a response received January 27, 2006, Dr. Quattrone declined to comment as she had not seen appellant in six months.

On April 6, 2006 the Office provided Dr. Wilson with a copy of the position description of a mediation conflict resolution specialist and requested that he provide an opinion on whether appellant could perform the duties of the position. In an April 15, 2006 response, Dr. Wilson opined that appellant could work as a mediation conflict resolution specialist. By letter dated May 17, 2006, the Office requested that Dr. Wilson review the statement of accepted facts and discuss whether the limitations on the work restriction evaluation were due to her work injury. On June 1, 2006 Dr. Wilson asserted that his conclusion was unaltered by reading the statement of accepted facts and that the work restrictions listed on the work restriction evaluation were "put in place because of medical conditions preexisting the reported injury of March 20, 2000."

On June 29, 2006 the Office notified appellant of its proposed termination of her compensation and authorization for medical benefits on the grounds that she had no further condition or disability causally related to her March 20, 2000 employment injury. In a July 25, 2006 response, appellant's attorney argued that Dr. Wilson did not opine that her disability ceased but instead found that it had not aggravated her preexisting condition. Counsel noted that the Office had accepted an aggravation of her preexisting lumbar and cervical degeneration as related to her March 20, 2000 employment injury.

By decision dated September 18, 2006, the Office terminated appellant's compensation and entitlement to medical benefits effective that date after finding that she had no further employment-related disability or condition. It determined that the opinion of Dr. Wilson established that she had no further residuals of her March 20, 2000 employment injury.

On September 21, 2006 appellant requested a telephonic oral hearing.[3] At the hearing, held on February 6, 2007, appellant's attorney related that Dr. Wilson disagreed with the

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[3] In a report dated December 18, 2006, Dr. Mark A. Williams, an osteopath, reviewed appellant's history of low back and neck pain with radiculopathy. He diagnosed cervical, thoracic and low back pain with degenerative disc and joint disease, bilateral greater trochanteric bursitis and multiple medical problems including a history of cererbral aneurisms.

occurrence of the accepted condition in violation of Board case law. In a decision dated March 29, 2007, the Office hearing representative affirmed the September 18, 2006 decision.

On September 27, 2007 appellant, through her attorney, requested reconsideration. He indicated that he was submitting a September 5, 2007 report from Dr. John W. Ellis, Board-certified in family practice, in support of his request for reconsideration. Counsel argued that Dr. Ellis' opinion created a conflict in medical opinion. In a decision dated October 4, 2007, the Office denied appellant's request for reconsideration on the grounds that the evidence submitted was insufficient to warrant merit review of the March 29, 2007 decision. It noted that it had not received a medical report from Dr. Ellis.

On October 11, 2007 appellant, through her attorney, again requested reconsideration. He submitted a medical report dated September 5, 2007 from Dr. Ellis, who found that her work injury exacerbated preexisting lumbar and cervical degenerative disc disease. By decision dated January 9, 2008, the Office denied appellant's request for merit review under section 8128.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. 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]

The Office procedure manual provides as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[6]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained an exacerbation of preexisting lumbar and cervical degenerative disc disease due to a March 20, 2000 work injury. It paid her compensation for total disability beginning October 24, 2001.

The Office referred appellant to Dr. Wilson for a second opinion examination. Based on his November 22, 2005 and April 15 and June 1, 2006 reports, it terminated her compensation.

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[4] *Kenneth R. Burrow*, 55 ECAB 157 (2003); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[5] *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[6] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *Willa M. Frazier*, 55 ECAB 379 (2004).

The Board finds, however, that Dr. Wilson's opinion is of diminished probative value and thus insufficient to constitute the weight of the medical evidence.

The Office provided Dr. Wilson with a statement of accepted facts which advised him that it had accepted an aggravation of lumbar/lumbosacral degeneration and an aggravation of degeneration of the C4 cervical disc as employment related. To assure that the report of a medical specialist is based upon a proper factual background, it provides information to the physician through the preparation of a statement of accepted facts.[7] The Office procedure manual provides as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[8]

Dr. Wilson diagnosed cervical degenerative disc disease both pre and postdating appellant's work injury, a history of right shoulder strain due to the March 20, 2000 injury and multiple unrelated medical problems. He found that the March 20, 2000 employment incident did not aggravate or objectively worsen appellant's preexisting neck and low back condition. Dr. Wilson asserted that he could "find nothing in the medical record that indicates the preexisting degenerative disc disease was objectively made worse or aggravated by the lifting incident on the job on March 20, 2000, enough to supply a material change that occurred to alter the underlying disease process. I do not think, quite frankly, there were any changes." He therefore did not find that appellant no longer had any residuals of her aggravation of preexisting cervical and lumbar degenerative disc disease, but instead he found that she had not experienced the accepted conditions. As Dr. Wilson's opinion is outside the framework of the statement of accepted facts, it is insufficient to meet the Office's burden of proof on the relevant issue of whether appellant has further employment related residuals of her accepted conditions.[9]

The Office did not address whether it was attempting to rescind acceptance of appellant's claim based on Dr. Wilson's report. It did not inform her that it was contemplating rescission or actually rescind acceptance of her aggravation/exacerbation of cervical and lumbar degenerative disc disease in its termination decision. The Office must inform a claimant correctly and accurately of the grounds on which a rejection rests so as to afford the claimant an opportunity to meet, if possible, any defect appearing therein.[10] It may not, therefore, find that residuals of an accepted employment injury have ceased by a particular date when the evidence upon which the decision rests tends to support that, in fact, the injury never occurred.[11]

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[7] *Helen Casillas*, 46 ECAB 1044 (1995).

[8] *Supra* note 6.

[9] *Id.*

[10] *John M. Pittman*, 7 ECAB 514 (1955).

[11] *See Willa M. Frazier*, *supra* note 6.

Accordingly, the Office did not meet its burden of proof to terminate appellant's compensation benefits.[12]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation effective September 18, 2006 on the grounds that she had no further employment-related disability.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 9, 2008 and October 4 and March 29, 2007 are reversed.

Issued: January 28, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

[12] In view of the Board's disposition of the termination of compensation, the issues of whether appellant has established continuing disability and whether the Office properly denied her requests for reconsideration are moot.