United States Department of Labor
Employees' Compensation Appeals Board

T.M., Appellant **and** **DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, CHICKAMAUGA LOCK, Chattanooga, TN, Employer**	)))))))))	**Docket Nos. 08-2107 & 08-2542** **Issued: May 13, 2009**

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 28, 2008 appellant filed a timely appeal from decisions of the Office of Workers' Compensation Programs dated May 5, 2008 that denied his claims for leave buyback and disability compensation. On September 22, 2008 he timely filed an appeal from a June 16, 2008 Office decision that terminated 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 this case.

ISSUES

The issues are: (1) whether appellant established that he had an employment-related disability for the period September 6, 2007 to March 1, 2008 causally related to the March 24, 2004 employment injury that would have entitled him to leave buyback and/or wage-loss compensation; and (2) whether the Office met its burden of proof to terminate appellant's compensation and medical benefits on June 16, 2008. On appeal, appellant contends that his accepted condition should be expanded to include a herniated disc at the L5-S1 level.

FACTUAL HISTORY

On March 24, 2004 appellant, then a 39-year-old lock and dam operator, sustained injury when he lost his footing and fell in a pit, hitting the back of his head and bitting his tongue. In an emergency room report dated March 24, 2004, Dr. Suzanne Corrington, a Board-certified internist, noted a history that appellant hit the back of his head on a nut when he fell into a pit at work. Physical findings included a lump on the back of his head with no laceration and tenderness in the upper back between the shoulder blades. Dr. Corrington diagnosed musculoskeletal pain. A May 27, 2004 x-ray of the lumbar spine demonstrated disc space narrowing at the L5-S1 level with mild posterior osteophyte formation. A thoracic spine x-ray was normal. Appellant returned to full duty on June 3, 2004.

In reports dated June 3 and 15, 2004, Dr. S. Craig Humphreys, Board-certified in orthopedic surgery, noted a history that appellant fell about 10 feet at work and experienced low back and left lower extremity pain. He diagnosed age-appropriate degenerative changes of the lumbar spine, worse at L5-S1 and advised that appellant could return to full duty with time off for physical therapy. A whole body scan on July 8, 2004 was unremarkable. On July 16, 2004 the Office accepted that appellant sustained an employment-related low back strain.

In a January 20, 2005 report, Dr. Humphreys diagnosed low back and left hip pain and symptoms of sexual dysfunction. A February 2, 2005 magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated lower lumbar spondylosis with canal and neural foraminal stenosis at L4-5 and L5-S1. On August 21, 2006 Dr. Humphreys noted that appellant's pain was worsening and referred him for pain management.

By report dated September 12, 2006, Dr. Gregory N. Ball, a Board-certified anesthesiologist, reviewed the history of injury that appellant fell into a pit onto steel machinery, landing on his back, striking a bolt that was projecting out of the floor. He noted appellant's complaints of ongoing back pain and provided physical examination findings of tenderness of the thoracic and lumbar spines and positive straight leg raising on the right. Dr. Ball diagnosed lumbar stenosis, lumbar herniated nucleus pulposus, chronic low back pain, erectile dysfunction secondary to pain and medications, insomnia related to pain, depression and anxiety related to pain and opined that all were workers' compensation related.[1] An October 2, 2006 MRI scan of the thoracic spine demonstrated multilevel mild degenerative disc disease and no focal disc herniation or spinal stenosis. An October 2, 2006 MRI scan of the lumbar spine revealed no significant interval change from the February 2, 2005 MRI scan, showing multilevel degenerative disc disease at L2-3, L4-5 and most severe at L5-S1 with moderate right neuroforaminal narrowing at L5-S1.

On December 13, 2006 Dr. Ball performed an epidural steroid injection. He submitted additional reports describing appellant's condition. On August 15, 2007 Dr. Ball noted that appellant had increasing pain in the lower back and legs resulting in missed time at work and difficulty with activities of daily living. Physical findings of the lumbar spine included palpable spasms with decreased range of motion. He additionally diagnosed chronic pain syndrome,

---

[1] Appellant also provided an August 24, 2005 report from Linda Mocniak, a physician's assistant and an associate of Dr. Ball.

moderate to severe and persistent in nature, secondary to an injury that occurred at work on March 24, 2004.

By report dated August 20, 2007, Dr. James G. White, III, a Board-certified neurosurgeon, noted a history that appellant injured his back at work two-and-one-half years previously and had a chief complaint of worsening low back pain. Straight leg raising was positive bilaterally. Dr. White advised that appellant had severe degenerative disc disease as demonstrated by the 2006 MRI scan and recommended repeat diagnostic testing. Lumbar spine x-rays on September 4, 2007 demonstrated degenerative changes at L4-5 and, more marked, at L5-S1. A September 5, 2007 MRI scan of the lumbar spine demonstrated multilevel degenerative disc disease, greatest at L4-5 and L5-S1.[2]

On September 7, 2007 Dr. White advised that treatment options, including surgery, were discussed with appellant. In a September 13, 2007 report, Dr. Ball noted that appellant had been taken off work due to safety concerns and medication side effects. He advised that appellant had a moderate to severe chronic pain syndrome that was persistent in nature caused by the March 24, 2004 employment injury, which resulted in multilevel degenerative disc disease of the lumbar spine with moderate right neural foraminal narrowing at L5-S1 with L5 radiculopathy, lumbago and lumbar stenosis with expected sequelae of erectile dysfunction secondary to pain and medication, insomnia and depression/anxiety syndrome. In a September 21, 2007 letter, Dr. Ball advised that, due to increased medication side effects and the potential for creating an unsafe work environment, appellant was taken off work. On September 28, 2007 Dr. White reported that appellant was to be scheduled for surgery.

By letter dated October 2, 2007, the employing establishment contended that appellant's current back condition was not related to the March 24, 2004 employment injury and that his accepted low back strain had resolved.

On November 2, 2007 appellant filed Forms CA-7 for leave buyback and other wage loss for the period September 6 to November 2, 2007 and for leave without pay for the period November 2 to 24, 2007 and a Form CA-7b, leave buyback worksheet, for the period September 6 to November 2, 2007. On October 24, 2007 an Office medical adviser recommended that appellant's request for surgery be denied because the lumbar spine degenerative changes were not work related.

In letters dated December 19, 2007, the Office informed appellant that the evidence of record was insufficient to establish his claim for disability and leave buyback beginning September 6, 2007. It requested additional medical evidence. In a January 23, 2008 letter, Dr. White advised that appellant had two markedly degenerated discs in his lower back and that either his lumbar strain had progressed or the initial diagnosis was incorrect. On January 30

[2] Appellant also submitted reports dated July 23, 2004 and March 8, 2005 from Curt Palmer, an August 24, 2005 report from Linda Mocniak, both of whom are physician's assistants and associates of Dr. Humphreys and a September 5, 2007 report from Timothy Hocking, a nurse practitioner and associate of Dr. Ball. These reports are not considered medical evidence as these persons are not considered physicians under the Federal Employees' Compensation Act. Section 8101(2) defines the term "physician" to include surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by state law. 5 U.S.C. § 8101(2); *see Sean O'Connell*, 56 ECAB 195 (2004).

2008 appellant filed additional claims and worksheets for leave buyback for the period November 3 to 10, 2007 and November 24 to January 11, 2008 and leave without pay for the periods November 10 to 24, 2007 and January 6 and January 20 to March 1, 2008.

On February 14, 2008 Dr. Ball advised that appellant had limitations in activities of daily living and noted his complaint of constant stabbing pain. He provided examination findings and reiterated his diagnoses of chronic back pain due to the March 24, 2004 work injury, lumbar stenosis, lumbar degenerative disc disease and lumbar disc protrusion, failed injection therapy, insomnia, depression and anxiety related to his pain condition and erectile dysfunction secondary to chronic opioid use. Dr. Ball reviewed appellant's medical history and treatment regimen, noting that an MRI scan study was not done until February 2005. He opined that there had not been a recurrence of lumbar strain as originally diagnosed, but a chronic pain condition from lumbar degenerative disc disease, lumbar stenosis and lumbar disc herniation which, if not present at the time of the injury, was certainly aggravated by the 8 to 10 foot fall appellant sustained at work on March 24, 2004. Dr. Ball advised that at the present, due to the medication appellant required for his chronic pain condition, he could not work, but that with less medication and following surgery, he could return to work.

On March 7, 2008 the Office referred appellant to Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a March 28, 2008 report, he reviewed the history of injury and the medical record, including a statement of accepted facts and MRI scans. Physical examination demonstrated mild tenderness along the paralumbar muscles with negative straight leg raising test in the sitting and supine positions. Lower extremity deep tendon reflexes and sensory examination were normal with no sign of muscle atrophy. X-rays of the lumbar spine demonstrated significant degenerative disc disease at L4-5 and L5-S1 with facet joint sclerosis at L4-S1. In answer to Office questions, Dr. Doman advised that appellant had a long-standing degenerative condition of the lumbar spine. He found that the degenerative disc disease was not caused by the 2004 injury, which caused a temporary aggravation that ceased within 12 months of the injury. Dr. Doman stated that appellant had no residuals or limitations of the employment injury. He further advised that the proposed surgery was not causally related to the employment injury but was based on appellant's underlying degenerative condition. Dr. Doman opined that appellant had been over-medicated with heavy mood altering drugs including heavy narcotics. He recommended that appellant be weaned off these medications and an inversion table used in treatment of his underlying lumbar degenerative disc disease. In an attached work capacity evaluation, Dr. Doman advised that maximum medical improvement had been reached and that appellant could perform his usual job duties, noting that he had underlying degenerative lumbar spondylosis. A lower extremity nerve conduction study demonstrated mild right S1 radiculopathy.

Dr. Ball submitted additional reports and appellant returned to his regular duties on April 11, 2008.

By letter dated May 2, 2008, the Office proposed to terminate appellant's compensation benefits on the grounds that he no longer had residuals of the accepted low back strain. In decisions dated May 5, 2008, it denied appellant's claim for leave buyback for the period September 6 to November 2, 2007 and wage-loss compensation for the period November 3 to 24, 2007, for leave buyback for the period November 3 to 10, 2007, for compensation for the period

November 10 to 24, 2007, for leave buyback for the period November 24, 2007 to January 5, 2008, leave buyback for the period January 3 to 11, 2008 and wage-loss compensation for the period January 11 to 19, 2008 and his claim for compensation for the period January 20 to March 1, 2008.

Appellant disagreed with the proposed termination, arguing that he missed work due to medication prescribed for his accepted condition and that his claim be accepted for aggravation of degenerative disc disease with herniated disc. He submitted a May 20, 2008 report in which Dr. Ball reiterated his findings and conclusions.

By decision dated June 16, 2008, the Office finalized the termination of benefits, finding that Dr. Doman represented the weight of medical opinion.

LEGAL PRECEDENT -- ISSUE 1

Under the Act,[3] the term "disability" is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.[4] Disability is thus not synonymous with physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in the Act.[5]

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. 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.[6] When employment factors cause an aggravation of an underlying physical condition, the employee is entitled to compensation for the periods of disability related to the aggravation.[7] When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation ceased.[8]

Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the

---

[3] 5 U.S.C. §§ 8101-8193.

[4] *See Prince E. Wallace*, 52 ECAB 357 (2001).

[5] *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

[6] Larson, *The Law of Workers' Compensation* § 10.01 (December 2000); *see Charles W. Downey*, 54 ECAB 421 (2003).

[7] *Raymond W. Behrens,* 50 ECAB 221, 222 (1999); *James L. Hearn,* 29 ECAB 278, 287 (1978).

[8] *Id.*

reliable, probative and substantial medical evidence.[9] Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements regarding an employee's ability to work consist only of repetition of the employee's complaints that she hurt too much to work, without objective findings of disability being shown, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.[10] The Board will not require the Office to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.[11]

In a typical leave buyback case, an injured employee uses sick or annual leave to prevent wage loss after an employment injury. If a claim is accepted and the work absences would otherwise be compensable under the Act, the employee may wish to buyback this leave from the employing establishment. If the employing establishment agrees to allow the leave buyback, the absences previously covered by sick or annual leave are recorded as leave without pay, creating a wage loss for which the employee may claim compensation.[12] In situations where compensation is claimed for periods when leave was used, the Office has the authority and responsibility to determine whether the employee was disabled during the period for which compensation is claimed.[13] Office regulations at 20 C.F.R. § 10.425 regarding whether compensation may be claimed for periods of restorable leave, stated that the employee may claim compensation for periods of annual and sick leave, which are restorable in accordance with the rules of the employing establishment. Forms CA-7 and 7b are used for this purpose.[14]

Section 8123(a) of the Act 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.[15]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a low back strain caused by a March 24, 2004 fall. The Board finds a conflict in medical opinion has been created regarding whether appellant was disabled from September 6, 2007 to March 1, 2008 causally related to the employment injury. Dr. Ball, an attending pain management specialist, began treating appellant in September 2006, one year prior to his work stoppage in September 2007. On September 13, 2007 he noted that appellant had a moderate to severe chronic pain syndrome that was persistent

---

[9] *See Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

[10] *G.T.*, 59 ECAB ___ (Docket No. 07-1345, issued April 11, 2008); *see Huie Lee Goal,* 1 ECAB 180,182 (1948).

[11] *G.T., supra* note 10; *Fereidoon Kharabi, supra* note 9.

[12] *Lloyd E. Griffin, Jr.*, 46 ECAB 979 (1995).

[13] *Glen M. Lusco*, 55 ECAB 148 (2003).

[14] 20 C.F.R. § 10.425; *see Laurie S. Swanson*, 53 ECAB 517 (2002).

[15] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

in nature and caused by the March 24, 2004 employment injury. Dr. Ball noted multilevel degenerative disc disease of the lumbar spine with moderate right neural foraminal narrowing at L5-S1 with L5 radiculopathy, lumbago and lumbar stenosis with expected sequelae of erectile dysfunction secondary to pain and medication, insomnia and depression/anxiety syndrome. On January 23, 2008 Dr. White advised that appellant had two markedly degenerated discs in his lower back and that either his lumbar strain had progressed or the initial diagnosis was incorrect. Appellant's attending physicians advised that the diagnosed degenerative back condition was caused or permanently aggravated by the March 24, 2004 fall at work. Furthermore, Dr. Ball advised that appellant was totally disabled due to the medications he was prescribed.

Dr. Doman who provided a second opinion evaluation for the Office, advised that appellant's degenerative disc disease was not caused by the March 24, 2005 injury. He noted that the injury caused a temporary aggravation that ceased within 12 months. Dr. Doman stated that appellant had no residuals or limitations of the employment injury and advised that the proposed surgery was not causally related to the employment injury but would be for his underlying degenerative condition and that he could return to his usual employment.

Due to the difference of opinion between appellant's attending physicians, Drs. White and Ball, and the Office referral physician, Dr. Doman, the Board finds that there is a conflict of medical opinion regarding whether appellant had any periods of total disability beginning on September 6, 2007 due to the employment injury. On remand, the Office should refer appellant, a statement of accepted facts and a list of specific questions to an appropriate Board-certified physician for an impartial medical evaluation regarding these issues. After such further development as it deems necessary, the Office shall issue an appropriate decision.

LEGAL PRECEDENT -- ISSUE 2

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.[16] 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.[17]

ANALYSIS -- ISSUE 2

In the instant case, the Office relied on the opinion of the second opinion examiner, Dr. Doman, as the weight of the medical evidence in establishing that appellant had no residuals of his accepted lumbar strain and terminated his compensation benefits on June 16, 2008. As noted, appellant's physicians opined that appellant continued to be disabled due to residuals of the employment injury whereas Dr. Doman, who provided a second opinion evaluation for the Office, advised that appellant's current degenerative disc disease of the lumbar spine was not caused or aggravated by the March 24, 2004 employment injury. The Board finds that there is

[16] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[17] *Id.*

conflict of medical opinion regarding whether appellant's employment-related condition had resolved. The Office did not meet its burden of proof in terminating appellant's compensation benefits.

CONCLUSION

The Board finds that this case is not in posture for decision regarding whether appellant was disabled from September 6, 2007 to March 1, 2008 causally related to the March 24, 2004 employment injury. The Office did not meet its burden of proof to terminate appellant's compensation and medical benefits on June 16, 2008.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 5, 2008 are set aside and the case is remanded to the Office for development consistent with this opinion of the Board. The decision dated June 16, 2008 is reversed.

Issued: May 13, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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