

**United States Department of Labor
Employees' Compensation Appeals Board**

S.S., Appellant)	
)	
and)	Docket No. 10-67
)	Issued: November 9, 2010
)	
U.S. POSTAL SERVICE, NORTH BAY)	
PROCESSING & DISTRIBUTION CENTER,)	
Petaluma, CA, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On October 9, 2009 appellant filed a timely appeal of the July 21, 2009 merit decision of the Office of Workers' Compensation Programs terminating his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective July 23, 2008 on the grounds that he no longer had any residuals or disability causally related to his employment-related injury.

On appeal, appellant contends that he has continuing residuals and disability due to his accepted employment injury.

FACTUAL HISTORY

On December 1, 2005 appellant, then a 61-year-old manual clerk, filed an occupational disease claim alleging that on June 22, 2004 he first became aware of his lower back strain. On

June 28, 2004 he first realized that his back condition was caused by handling Express Mail parcels since 1997. Appellant threw parcels into sacks weighing 1 to 20 pounds and pulled down heavy sacks weighing 30 to 40 pounds day after day. Following his injury, he worked as a modified mail processing clerk, eight hours per day.

By letter dated February 22, 2006, the Office accepted appellant's claim for temporary aggravation of preexisting lumbar sprain/strain.

In a March 22, 2006 medical report, Dr. Howard A. Ballinger, an attending physician Board-certified in occupational medicine, permanently reduced appellant's work hours to seven per day with restrictions. The Office paid compensation for temporary partial disability.

By letter dated May 2, 2007, the Office referred appellant, together with a statement of accepted facts and medical record, to Dr. Joseph W. McCoy, a Board-certified orthopedic surgeon, for a second opinion medical examination to determine the nature and extent of his employment-related injury and disability. In a June 15, 2007 report, Dr. McCoy obtained a history of appellant's employment-related injury and medical treatment. He noted his complaints of significant low lumbar achiness with extension into both legs. The achiness increased with prolonged standing and sitting or any significant lifting or bending. Appellant achieved some sense of comfort while lying down. On physical examination, Dr. McCoy found that palpation of the lumbar spine failed to show any obvious spasm despite appellant's complaints of rather diffuse tenderness to palpation throughout the lumbar area. On neurological examination, he found that straight leg raising caused some tightness in the calf and thigh musculature although there was no obvious signs of radiculitis. There was also no focal neurologic deficit. Dr. McCoy found rather considerable skin breakdown and subcutaneous edema in the skin of the groin, inner thigh and lower abdomen which appeared to be due to a combination of radiation damage and chronic fungal infection.

Dr. McCoy diagnosed chronic work-related lumbar strain that was likely superimposed upon by significant lumbar degenerative disc disease. He found that it appeared appellant's symptoms of his accepted employment-related injury had never completely resolved. Dr. McCoy noted that minimal objective testing had been performed and his symptoms were subjective in nature without measurable neurologic deficit. He stated that appellant's significant radiation and fungal cutaneous difficulties accounted for some of his work restriction and modification dating back to 1998. Dr. McCoy did not believe that his ongoing cutaneous difficulties were related to his occupational exposure. Appellant had long-standing nonindustrial related insulin-dependent diabetes, hypertension and hypercholesterolemia. Dr. McCoy opined that his lumbar strain was directly caused by his federal employment in June 2004. He stated that appellant sustained permanent aggravation of his preexisting lumbar disc disease with measurable deterioration in function when compared to his level of function prior to the accepted employment injury. Dr. McCoy suspected that diagnostic testing would show substantial degenerative disc disease partly secondary to the general aging process and to appellant's diabetes and obesity. He stated that other than continued exercise and substantial weight loss, no further medical treatment was warranted or likely to provide substantial relief. Dr. McCoy found that the accepted employment-related injury did not justify a seven-hour workday limit although it justified substantial limitations in appellant's ability to perform vigorous activities based on his lumbar problems. He stated that appellant's nonwork-related conditions substantially impaired

his mobility. Dr. McCoy's prognosis was poor. In a June 18, 2007 work capacity evaluation (Form OWCP-5c), he listed appellant's physical restrictions.

By letter dated June 27, 2007, the Office requested that Dr. Ballinger review Dr. McCoy's June 15, 2007 report and provide an opinion regarding appellant's disability and prognosis. In an August 13, 2007 report, Dr. Ballinger listed essentially normal findings on physical examination with limited range of motion of the lower extremities. He diagnosed chronic low back pain. Dr. Ballinger reiterated his opinion that appellant could not work more than seven hours per day. He stated that, there were no objective findings regarding appellant's employment injury to provide an opinion on his ability to work any schedule. Dr. Ballinger's opinion regarding appellant's disability was based on the presence or absence of pathology to account for his symptoms, his self-reported tolerance for a given activity over a given length of time and estimation of his reliability. He agreed with Dr. McCoy's opinion that appellant's morbid obesity, lumbar degenerative disc disease and other nonindustrial conditions contributed to his limitations. Dr. Ballinger then listed his permanent restrictions.

On June 19, 2008 the Office issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. McCoy's June 15, 2007 medical opinion. Appellant was afforded 30 days to respond to this notice.

In a June 26, 2008 letter, appellant contended that he could not work more than seven hours per day due to continuing residuals of his employment injury. After working six hours, he struggled to work the seventh hour due to increased pain which he had experienced during the past six months.

In a July 14, 2008 report, Dr. Ballinger reiterated his opinion that appellant could not work more than seven hours per day due to his employment-related injury.

By decision dated July 24, 2008, the Office finalized the termination of appellant's compensation for wage-loss and medical benefits with regard to his accepted employment-related injury, effective July 23, 2008. It found that Dr. Ballinger's July 14, 2008 report had diminished probative value as he did not provide a rationalized medical opinion based on objective evidence establishing that appellant's disability was caused by his accepted employment injury.

On August 11, 2008 appellant requested an oral hearing before an Office hearing representative. In reports dated June 27 to November 21, 2008, Dr. Ballinger reiterated his diagnosis of chronic low back pain and opinion that appellant could not work more than seven hours per day due to his accepted employment injury. In an August 5, 2008 report, Dr. Ballinger cited to the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and found that appellant's employment-related injury and subsequent aggravations accounted for more than 50 percent of his spinal impairment.

In a July 21, 2009 decision, an Office hearing representative affirmed the July 24, 2008 termination decision. The medical evidence submitted was found insufficient to outweigh Dr. McCoy's June 15, 2007 medical opinion.¹

LEGAL PRECEDENT

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 his employment, it may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.² The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.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 requires further medical treatment.⁴

Under the Federal Employees' Compensation Act,⁵ when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation.⁶ When the aggravation is temporary and leaves no permanent residuals, compensation is not payable for periods after the aggravation has ceased.⁷

ANALYSIS

The Office accepted appellant's claim for temporary aggravation of preexisting lumbar sprain/strain and paid appropriate wage-loss compensation and medical benefits. By decision dated July 24, 2008, it terminated his compensation benefits effective July 23, 2008 on the basis that the weight of the medical opinion evidence rested with Dr. McCoy, an Office referral physician. This decision was affirmed by an Office hearing representative in a July 21, 2009 decision.

¹ Subsequent to the Office hearing representative's July 21, 2009 decision, the Office received additional evidence. On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision. See 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (January 7, 2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003). Appellant may resubmit this evidence and legal contentions to the Office accompanied by a request for reconsideration. 5 U.S.C. § 8128; 20 C.F.R. § 10.606.

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Raymond W. Behrens*, 50 ECAB 221, 222 (1999); *James L. Hearn*, 29 ECAB 278, 287 (1978).

⁷ *Id.*

The Board finds that Dr. McCoy's medical opinion is not sufficient to terminate appellant's compensation benefits. In a June 15, 2007 report, Dr. McCoy diagnosed chronic employment-related lumbar strain that was likely superimposed upon by significant degenerative disc disease. He found that while the accepted condition justified appellant's restrictions, it did not justify his seven-hour workday schedule. Dr. McCoy stated that his nonwork-related conditions substantially impaired his mobility. The Board notes, however, that Dr. McCoy, stated that, appellant's employment condition had never resolved and he continued to have residuals. Moreover, he stated that, the accepted condition permanently, not temporarily, aggravated appellant's preexisting lumbar disc disease with measurable deterioration in function. As noted, when employment factors cause an aggravation of an underlying condition, the employee is entitled to compensation for the periods of disability related to the aggravation.⁸

The Board finds that Dr. McCoy's opinion is insufficient to meet the Office's burden of proof. His report indicates that appellant has ongoing employment-related aggravation of preexisting lumbar degenerative disc disease which limits his ability to perform his work duties. Absent rationalized medical evidence supporting that appellant's employment-related condition had resolved without residuals or any disability, the Office did not meet its burden of proof to terminate compensation benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof in terminating appellant's compensation benefits effective July 23, 2008.

⁸ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the July 21, 2009 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 9, 2010
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