United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 10-259**
	)	**Issued: November 30, 2010**
DEPARTMENT OF THE AIR FORCE, HILL AIR FORCE BASE, Ogden, UT, Employer	)	

Appearances:
Theodore E. Kanell, Esq., for the appellant
No appearance, for the Director

Oral Argument September 15, 2010

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 4, 2009 appellant filed a timely appeal from a June 3, 2009 decision of the Office of Workers' Compensation Programs reducing her wage-loss compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly reduced appellant's compensation under 5 U.S.C. §§ 8106 and 8115 based on her ability to perform the selected position of customer service representative.

On appeal, counsel contends that the opinion of an impartial medical examiner, Dr. Robert Hansen, a Board-certified orthopedic surgeon, was insufficiently rationalized to represent the weight of the medical evidence.

FACTUAL HISTORY

This case was previously before the Board. In a decision dated September 28, 1994,[1] the Board reversed a March 12, 1993 decision terminating appellant's compensation benefits on the grounds her accepted injuries had resolved without residuals.[2] The Board also reversed a June 30, 1993 decision denying her hearing request. The law and facts of the case as set forth in the Board's decision and order are incorporated by reference.

On remand, in December 1994, the Office found a conflict of medical opinion between Dr. Charles P. Bean, an attending Board-certified orthopedic surgeon, and Dr. John Joshua, a second opinion physician. To resolve the conflict, the Office selected Dr. Albert F. Martin, a Board-certified orthopedic surgeon, who attributed appellant's back pain to an extra lumbar vertebra.

Dr. Bean submitted periodic reports from August 31, 1998 to August 2001, diagnosing herniated L4-5 and L5-S1 discs with degenerative disc disease attributable to the 1987 injury. Appellant also had neck pain with radiculopathy.

On February 2, 2001 Dr. Lynn Stromberg, an attending Board-certified orthopedic surgeon, performed an L5-S1 fusion, decompressive laminectomy and foraminotomies, authorized by the Office. He submitted reports through 2002 noting lower extremity radiculopathy and persistent postsurgical urinary retention requiring home catheterization.

In reports from December 2001 through January 2008, Dr. Bean noted progressive bladder problems requiring daily catheterizations,[3] chronic neurologic problems in both legs and chronic neck and back pain.[4] He found appellant disabled for work.

On May 3, 2004 the Office obtained a second opinion from Dr. Dewey C. McKay, III, a Board-certified orthopedic surgeon. He opined that the January 7, 1987 injuries caused or aggravated degenerative cervical and lumbar disc disease and hypotonic bladder. Dr. McKay found appellant totally disabled for work.

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[1] Docket No. 93-2108 (issued September 28, 1994).

[2] The Office accepted that on January 7, 1987 appellant, then a 32-year-old parachute inspector, sustained a lumbar muscle spasm, thoracic strain and L2 and L4 subluxations when she slipped and fell on an icy dock then fell from the dock. It later accepted herniated lumbar discs at L4-5 and L5-S1.

[3] In a February 28, 2002 report, Dr. Richard F. Labasky, an attending Board-certified urologist, opined that appellant's urinary retention in 2001 was related to the lumbar fusion necessitated by the accepted 1987 injury. The Board notes that the Office did not accept a consequential neurologic bladder condition.

[4] Dr. Bean ordered periodic imaging studies. June 28, 2004 x-rays showed six lumbar vertebrae, postoperative changes from L6 to S1, degenerative disc disease at C5-6 and C6-7 and L2-3, degenerative facet changes at C6-7 and minimal retrolisthesis at C2-3 and C3-4. A January 5, 2006 magnetic resonance imaging scan showed degenerative disc disease at C5-6, C6-7 with mild canal stenosis, a broad-based disc herniation at L5-S1 with moderate canal stenosis and fixation hardware from L6-S2. A January 21, 2008 electromyography study showed nerve root irritation at L4-5 and S1 on the right.

On April 26, 2008 the Office obtained a second opinion from Dr. Allan R. Wilson, a Board-certified orthopedic surgeon, who noted that appellant self-catheterized as she was unable to void since the 2001 lumbar surgery. On examination, Dr. Wilson noted point tenderness over the superior iliac crests and no palpable fixation hardware. He diagnosed chronic neck and low back pain. Dr. Wilson found appellant able to work eight hours a day with restrictions.

The Office found a conflict of opinion between Dr. Bean, for appellant, and Dr. Wilson, for the government, regarding which of appellant's conditions were work related, the presence of ongoing residuals and whether appellant remained disabled for work. To resolve this conflict, it referred her to Dr. Hansen. The Office provided Dr. Hansen with a statement of accepted facts and copies of medical records on which to base his opinion. It requested that he provide medical rationale explaining whether appellant had continuing residuals of the accepted injuries, and how any residuals affected her work capacity. The Office also requested that Dr. Hansen explain if appellant's bladder and cervical spine conditions were work related.

Dr. Hansen provided a July 3, 2008 report of his June 19, 2008 examination. He reviewed four imaging studies from the medical record. Dr. Hansen noted that appellant had to self-catheterize since lumbar fixation. On examination, he observed limited cervical and lumbar motion and diffuse paraspinal tenderness. Dr. Hansen diagnosed chronic low back pain syndrome, status post L5-S1 discectomy and fusion and chronic cervical degenerative disc disease unrelated to the accepted injury. He stated that appellant had "complaints of pain and does have objective findings of decreased range of motion of her lumbar spine as residuals of her original injury." Dr. Hansen found appellant able to work eight hours a day with pulling and pushing limited to 10 pounds, lifting limited to 5 pounds, sitting limited to two to three hours intermittently, twisting, bending, stooping, standing and walking limited to one hour, and no squatting, kneeling or climbing.

In a July 11, 2008 letter, the Office noted that Dr. Hansen's restrictions would not allow full-time employment. It requested that he change the restrictions to conform to the requirements of an eight-hour workday. Dr. Hansen modified appellant's restrictions on June 19, 2008, finding that she could sit for six hours a day, walk for one hour a day and stand for one hour a day. He did not provide any additional medical opinion.

On July 31, 2008 the Office referred appellant to a vocational rehabilitation counselor to assist her in finding a job within Dr. Hansen's restrictions. In an August 19, 2008 job analysis, the counselor identified the position of customer service representative, Department of Labor, *Dictionary of Occupational Titles* (*DOT* #239.362-014), a sedentary clerical position requiring six to eight hours of sitting each day. The counselor found the position appropriate for appellant's prior work experience as a secretary, general clerk, sewing machine operator, parachute rigger and key punch operator. A labor market survey showed that entry level customer service representative positions were readily available in appellant's commuting area at an average weekly wage of $452.40.

By notice dated April 20, 2009, the Office proposed to reduce appellant's compensation as the medical and factual evidence established she was no longer totally disabled for work due to the January 7, 1987 injuries. It found that she had the capacity to earn $452.40 a week as a customer service representative. The Office calculated a 37 percent loss of wage-earning

capacity.[5] In response, appellant submitted a May 18, 2009 report from Dr. Bean noting a T7 fracture in 2006. She continued to have severe cervical and lumbar pain with radiculopathy into all extremities.

By decision dated June 3, 2009, the Office reduced appellant's compensation effective June 7, 2009 under 5 U.S.C. §§ 8106 and 8115 based on her ability to earn $452.40 a week as a customer service representative. It found that Dr. Bean's reports indicated she could perform the position, which was also within Dr. Hansen's restrictions.

LEGAL PRECEDENT

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction of benefits.[6] Under section 8115(a), wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent his or her wage-earning capacity, or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regard to the nature of the injury, the degree of physical impairment, his or her usual employment, age, qualifications for other employment, the availability of suitable employment and other factors and circumstances which may affect wage-earning capacity in his or her disabled condition.[7]

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor, *DOT* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service. Finally, application of the principles set forth in *Albert C. Shadrick*,[8] will result in the percentage of the employee's loss of wage-earning capacity.[9]

Section 8123 of the Federal Employees' Compensation 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.[10] In situations where there exist opposing medical reports of virtually equal weight

[5] On March 24, 2009 the Office obtained wage information from the employing establishment. Appellant's date and step on the date of injury was WG-05-03, with wages of $9.55 an hour. As of January 9, 2009, a WG-05-03 would earn $18.02 an hour.

[6] *David W. Green*, 43 ECAB 883 (1992).

[7] *Karen L. Lonon-Jones*, 50 ECAB 293 (1999).

[8] 5 ECAB 376 (1953).

[9] *James A. Birt*, 51 ECAB 291 (2000); *Francisco Bermudez*, 51 ECAB 506 (2000).

[10] 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

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.[11] However, in a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.[12]

ANALYSIS

The Office accepted that appellant sustained herniated L4-5 and L5-1 discs requiring lumbar fusion and cage fixation, subluxations at L2 and L4, lumbar muscle spasm and a thoracic strain. Dr. Bean, an attending Board-certified orthopedic surgeon, found appellant disabled for work due to residuals of the accepted lumbar injuries from 1998 through January 2008. He opined that appellant's cervical disc disease and neurogenic bladder were also caused by the accepted injuries. In April 2008, the Office obtained a second opinion from Dr. Wilson, a Board-certified orthopedic surgeon, who found appellant able to perform full-time limited duty. He opined that the cervical disc disease was idiopathic. The Office found a conflict of medical opinion between Dr. Bean and Dr. Wilson regarding the presence of continuing residuals, the relationship of chronic conditions to the accepted injuries and whether appellant remained disabled for work. Dr. Hansen, a Board-certified orthopedic surgeon, was appointed to resolve this conflict.

Dr. Hansen provided brief comments about residuals of the accepted injuries, noting restricted lumbar motion and back pain. He did not render a detailed description of these impairments. Although instructed to do so, Dr. Hansen did not explain whether appellant's bladder dysfunction was related to the accepted injuries or lumbar fusion. He noted that appellant had to self-catheterize since the 2001 lumbar fusion but did not address if this was related to the surgery. Similarly, Dr. Hansen stated that appellant's cervical degenerative disc disease was unrelated to the accepted injuries but did not adequately explain the basis for his conclusion. The absence of medical rationale on these critical issues diminishes the probative value of his opinion.[13]

Dr. Hansen's opinion regarding appellant's work capacity is also problematic. Based on his clinical examination, he found appellant able to work eight hours a day limited duty, with sitting limited to two to three hours intermittently and standing and walking limited to one hour. The Office then requested that Dr. Hansen change these restrictions to qualify her for full-time employment. Dr. Hansen complied, increasing appellant's sitting tolerance to six hours a day. He did not set forth any medical basis for this change. The Office relied on the revised restrictions in finding the selected customer service position medically suitable. The Board finds that Dr. Hansen's revised restrictions are of diminished probative value as they are unsupported

[11] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[12] *Margaret M. Gilmore*, 47 ECAB 718 (1996).

[13] *Jacqueline Brasch (Ronald Brasch), supra* note 11.

by medical reasoning.[14] The speculative nature of these restrictions casts substantial doubt as to whether the selected position is medically suitable.[15]

The Board finds that Dr. Hansen did not provide thorough answers to the Office's questions. He did not adequately discuss the accepted conditions and their effect on appellant's ability to work, nor explain if the bladder and cervical spine conditions were causally related to the accepted injuries. Dr. Hansen also provided conflicting work restrictions. Thus, his opinion is of insufficient weight to resolve the conflict between Dr. Bean and Dr. Wilson. The Office's June 3, 2009 decision reducing appellant's compensation will be reversed.

On appeal, counsel contends that Dr. Hansen's opinion was insufficient to resolve the conflict of medical opinion. The Board concurs that Dr. Hansen's opinion is insufficiently rationalized to represent the weight of medical evidence. The Office's June 3, 2009 decision will be reversed.

CONCLUSION

The Board finds that the Office improperly reduced appellant's compensation benefits. The June 3, 2009 decision will be reversed and the case returned to the Office for payment of all appropriate compensation from June 7, 2009 onward.

[14] *Deborah L. Beatty*, 54 ECAB 340 (2003).

[15] *Anna M. Delaney*, 53 ECAB 384 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 3, 2009 is reversed.

Issued: November 30, 2010
Washington, DC

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

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board