United States Department of Labor
Employees' Compensation Appeals Board

S.Z., Appellant	)	
and	)	**Docket No. 10-1764**
	)	**Issued: May 25, 2011**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION HOSPITAL, Hines, IL, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 22, 2010 appellant filed a timely appeal from an Office of Workers' Compensation Programs' decision dated June 10, 2010. Pursuant to the Federal Employees' Compensation Act[1] and 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 met its burden to terminate appellant's compensation benefits on June 13, 2008; (2) whether the Office met its burden of proof to rescind its acceptance of appellant's claim for a major depression condition; and (3) whether appellant met his burden of proof to establish continuing disability after June 13, 2008.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

Appellant, a 56-year-old supply technician, injured his right groin and low back when he slipped on a wet floor on July 27, 2005. He filed a claim for benefits on July 29, 2005, which the Office accepted for right inguinal sprain/strain. The claim was later accepted for bilateral hip/thigh sprain, bilateral aggravation of trochanteric/bursitis of the left hip, aggravation of degenerative lumbar disease and major depression.

In an August 23, 2005 report, Dr. Tariq B. Iftikhar, Board-certified in orthopedic surgery, stated that appellant was examined for complaints of right groin pain, which commenced when he fell at work on July 27, 2005. Appellant advised that his pain was located on the medial and anterior aspect of the right hip, with local tenderness over the adductor into the groin area and pain on the internal rotation of the hip. Dr. Iftikhar did not have any history of injury prior to the work incident, although he stated that appellant was undergoing physical therapy for a lumbar spine problem. He diagnosed a groin pull with adductor tendinitis. In a September 27, 2005 report, Dr. Iftikhar stated that appellant underwent a magnetic resonance imaging (MRI) scan which was negative for any fracture or avascular necrosis. He noted fluid in the right hip joint, a little bit more than on the left, which suggested a strain, in addition to synovitis secondary to the trauma. Dr. Iftikhar noted that appellant's symptoms were mild, he ambulated well and the examination was essentially normal.

In a November 21, 2005 report, Dr. Iftikhar noted continued complaints of pain in the left hip, with improvement in the right hip. He reiterated that the MRI scan showed fluid accumulation in the hips secondary to trauma, with no other gross abnormality. Dr. Iftikhar advised that appellant had moderately severe tenderness over the greater trochanter of the left hip and diagnosed trochanteric bursitis of the left hip joint.

In a January 31, 2006 report, Dr. Michael J. Hejna, Board-certified in orthopedic surgery, noted that appellant had returned to work but was experiencing significant lower back pain. He opined that this was mostly a muscular problem and that appellant should continue with physical therapy for the hip and back.

By letter dated March 17, 2006, appellant advised the Office that he had become clinically depressed due to his constant hip pain. In an April 4, 2006 report, Dr. David B. Levy, a family practitioner, stated that appellant was experiencing chronic hip pain, resulting in depression.

By letters dated June 2 and July 3, 2006, appellant indicated his intention to file a consequential claim for depression caused by constant hip pain he had experienced since the July 27, 2005 employment injury.

In order to determine appellant's current condition and whether he had residuals from his July 27, 2005 work injury, the Office referred him to Dr. Richard H. Sidell, Board-certified in orthopedic surgery, for a second opinion examination. In an October 6, 2006 report, Dr. Sidell stated that the July 27, 2005 work injury constituted a temporary aggravation of preexisting lumbar spinal stenosis and spondylosis resulting in the gradual development of spinal claudification. He advised that this temporary aggravation should have been present for an

estimated six to eight weeks. Dr. Sidell opined that appellant's current condition and all residuals were related to the underlying condition of spiral claudication secondary to spinal stenosis and spondylosis, which preceded the injury and was progressive in nature. He opined that appellant had reached maximum medical improvement from the condition attributable to the July 27, 2005 employment injury. Dr. Sidell advised that appellant could perform sedentary work. He did not render an opinion as to whether appellant's other accepted conditions -- right inguinal sprain/strain bilateral hip/thigh sprain/strain and bilateral aggravation of bursitis/trochanteric of the left hip -- had resolved.

In an October 13, 2006 report, Dr. Hejna advised that appellant had recently experienced increased pain in his right hip. Appellant underwent an MRI scan on September 26, 2006 which showed disc bulge and posterior osteophytes at L5-S1 with narrowing of the right neural foramen and severe canal stenosis at L4-5 and mild to moderate canal stenosis at L3-4. Dr. Hejna advised that appellant's symptoms might be caused by stenosis with a radicular component.

Appellant underwent an MRI scan of the lumbar spine on November 1, 2005, received by the Office on December 18, 2006, that showed degenerative changes of the lumbar spine from L2-3 to L5-S1. These included moderate collapse of disc space and disc desiccation at L5-S1, with mild facet arthritis and mild right-sided foraminal stenosis; moderate to severe facet arthritis and facet joint effusion at L4-5, with broad-based disc bulges at the ventral sac and moderate spinal stenosis and lateral recess stenosis due to disc bulge and facet disease and ligamentum flavum thickening; disc desiccation at L3-4 with moderate facet arthritis and ligamentum flavum thickening; and mild to moderate spinal stenosis and lateral recess stenosis; and disc desiccation and mild facet arthritis at L2-3.

The Office determined that there was a conflict in the medical evidence between Dr. Hejna, appellant's treating physician, and Dr. Sidell, the second opinion physician, regarding whether appellant had any residuals from his July 27, 2005 work injury. It referred appellant to Dr. Charles W. Mercier, Board-certified in orthopedic surgery, for a referee medical examination to resolve the conflict in the medical evidence. The referral letter advised Dr. Mercier that the conflict was in regard to "whether or not the new diagnosed conditions: clinical depression and fifth metacarpal break, should be considered consequential and accepted as work related."

In a January 16, 2006 report, received by the Office on December 18, 2006, Dr. Francisco Espinosa, Board-certified in neurosurgery, stated that appellant continued to experience severe low back pain and left hip pain. He advised that he originally treated appellant for neck pain on September 13, 2005 at which time he diagnosed a herniated disc at C6-7 and C7-T1. Dr. Espinosa stated that appellant's cervical problem had improved with physical therapy; he stated, however, that he continued to experience persistent back pain and occasionally low back pain which radiated to the left leg. He asserted that appellant remained incapacitated due to his low back problem.

In a January 23, 2007 report, Dr. Mercier, provided findings on examination and reviewed the statement of facts, the history of injury and the medical evidence of record. He advised that the only injury appellant sustained on July 27, 2005 was a right groin muscle ligamentous strain, which resolved with conservative medical care. All subsequent medical care, testing, work restrictions and periods of disability were based on other conditions not related to

the July 27, 2005 injury. Based on Dr. Mercier's review of the medical record, there was no indication that appellant's claimed bilateral hip or low back conditions were related to the July 2005 injury. He advised that appellant currently had no groin or medial proximal side pain and had good range of motion of both hips. Dr. Mercier concluded that appellant was at maximum medical improvement with regard to the July 2005 work injury and could return to work at his regular job; he stated that there were no objective findings on his physical examination of functional permanent impairment.

In a report dated April 3, 2007, Dr. Hejna stated that appellant had continued complaints of pain on the lateral aspect of his left hip radiating into the groin. He stated that a lumbar MRI scan he underwent the previous fall showed severe canal stenosis at L4-5 as well and stenosis at L3-4. Dr. Hejna stated that on examination appellant had some mild tenderness over the greater trochanteric bursa. He opined that his symptoms were due to radiculopathy and recommended an epidural injection. Dr. Hejna also recommended continued follow up with appellant's psychiatrist.

In a supplemental report dated May 2, 2007, Dr. Mercier stated that appellant had made a full recovery from his right inguinal sprain/strain, bilateral hip/thigh sprain/strain, bilateral aggravation of (left hip) bursitis/trochanteric and aggravation of degenerative lumbar/ lumbosacral disease without objective evidence on his physical examination of functional permanent impairment. He stated that appellant's fifth metatarsal fracture was not a consequential injury and was unrelated to the above diagnoses. Dr. Mercier indicated that he was not qualified to render an opinion regarding appellant's clinical depression condition because he was not an expert in the field.

Appellant missed work for intermittent periods and was released to full duty with restrictions by Dr. Hejna on May 21, 2007. He continued to work but filed claims for wage loss for intermittent periods of disability.

In a report received by the Office dated June 4, 2007, Monica Schwartz, a clinical social worker, noted that she had treated appellant for depression since March 13, 2007. She asserted that his depression stemmed from the July 27, 2005 work injury. Ms. Schwartz advised that appellant also saw a psychiatrist.

Dr. Hejna referred appellant for a functional capacity evaluation, which appellant underwent on July 3, 2007. On July 6, 2007 he stated the results of the evaluation showed that appellant was not capable of squatting, crouching or lifting from the floor. Dr. Hejna demonstrated an ability to sit continuously for more than one hour, stand continuously for 20 minutes and walk continuously for 9 minutes with a cane. Appellant showed no deficits in grasping, light or firm pinching, reaching forward or writing. Dr. Hejna recommended that appellant be referred to a pain management specialist. He continued to submit periodic reports addressing appellant's bilateral hip and low back pain.

In order to clarify whether appellant had developed a depression condition as a consequence of his July 27, 2005 employment injury, the Office referred him to Dr. Amin N. Daghestani, a Board-certified psychiatrist, for a second opinion examination. In a report dated August 17, 2007, Dr. Daghestani diagnosed major depression secondary to a chronic pain

condition caused by the July 27, 2005 employment injury. He stated that appellant's psychiatric symptoms of clinical depression developed after the injury-related pain. Dr. Daghestani advised that appellant had not reached maximum medical or psychiatric improvement from his work-related conditions and continued to experience severe depression, sleep problems and functional difficulties. He opined that appellant would require further psychiatric treatment, medication and supportive psychotherapy.

On November 2, 2007 Dr. Daghestani submitted an OWCP-5, work capacity evaluation form where he noted that appellant continued to have severe depression due to his work-related condition. He reiterated that appellant was not at maximum medical and psychological improvement. Dr. Daghestani recommended psychotherapy treatment in order to work part time. Based on his reports, the Office accepted the condition of major depression.

On January 23, 2008 the Office issued a notice of proposed termination of compensation to appellant. It advised that there was little medical evidence of record subsequent to the July 27, 2005 injury documenting that he had residuals of his right hip, left hip or low back conditions. The Office noted that Dr. Hejna, the treating physician, had released appellant to full duty with restrictions on May 21, 2007. Although the July 3, 2007 functional capacity test showed appellant had permanent restrictions, Dr. Hejna did not indicate whether these restrictions were related to the July 27, 2005 work injury. The Office determined that the weight of the medical evidence, as represented by the opinion of Dr. Mercier, the impartial examiner, established that his accepted conditions had resolved and appellant had no residuals of the employment injury.

The Office also proposed to rescind acceptance of appellant's depression condition. It stated that, because his accepted physical conditions had resolved as of January 23, 2007, the evidence of record was not sufficient to support an emotional condition arising as a consequence of these conditions after that date.

Dr. Hejna referred appellant to Dr. Krishna Parameswar, Board-certified in physical medicine and rehabilitation. In a June 6, 2008 report, Dr. Parameswar advised that appellant continued to experience low back and bilateral hip pain. He recommended continued treatment with physical therapy and recommended referral to an orthopedic surgeon in the event appellant's conditions did not improve.

By decision dated June 13, 2008, the Office terminated appellant's compensation benefits, finding that he had no residuals from the physical conditions accepted as a result of his July 27, 2005 employment injury. It rescinded its acceptance of a consequential depression condition due to the resolution of all accepted orthopedic conditions, effective January 23, 2007.[2]

By letter dated January 21, 2009, appellant requested reconsideration of the June 13, 2008 decision.

In reports dated September 12 and December 5, 2008, received by the Office on February 3, 2009, Dr. Levy reviewed appellant's extensive medical history and indicated that

[2] The Office denied appellant's claim for a consequential fifth metatarsal injury. This determination is not contested on appeal.

appellant continued to have significant lower back and bilateral hip pain. He stated that appellant was unable to perform his previous job as a supply technician but could perform sedentary work while seated at desk, with permanent restrictions of no more than 5 to 10 minutes of standing/walking every hour and limited walking, standing, bending, stooping, pushing, pulling and lifting. Dr. Levy recommended that the employing establishment provide reasonable accommodations for appellant's restrictions. He stated that appellant had received approximately 11 steroid spinal injections over the past three years to provide temporary, moderate pain relief and lumbar stabilization. Dr. Levy also noted that appellant was undergoing psychotherapy treatment for his major depression condition, which was secondary to his chronic pain condition.

In a December 15, 2008 report, Dr. Lee Weiss, a Board-certified psychiatrist, stated that when initially examined on March 1, 2007, appellant presented with signs and symptoms consistent with major depression, which stemmed from his July 2005 employment injury. He asserted that appellant's depression was due to the chronic pain associated with his employment injury, as he was unable to sit, stand or walk for any period of time. Dr. Weiss stated that appellant had also sustained a stroke which affected his vision and exacerbated his depression.

By decision dated February 12, 2009, the Office denied reconsideration on the grounds denied that appellant did not raise a substantive legal question or include new and relevant evidence sufficient to warrant further merit review.

Appellant filed an appeal to the Board. By order dated March 17, 2010,[3] the Board set aside the February 12, 2009 decision and remanded the case for reconsideration of his evidence to determine whether he had established to continuing disability.

By decision dated June 10, 2010, the Office denied modification of the June 13, 2008 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.[4] Following a proper termination of compensation benefits, the burden of proof shifts back to the claimant to establish continuing employment-related disability.[5]

Section 8123(a) 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 an examination.[6] It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the

[3] Docket No. 09-1019 (issued March 17, 2010).

[4] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[5] *John F. Glynn*, 53 ECAB 562 (2002).

[6] *Regina T. Pellecchia*, 53 ECAB 155 (2001).

opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[7]

ANALYSIS -- ISSUE 1

The Board finds that the Office did not meet its burden to terminate appellant's compensation benefits. The Office determined that a conflict existed in the medical evidence between Dr. Hejna, appellant's treating physician, and Dr. Sidell, the Office's second opinion physician, as to whether appellant had continuing residuals of the accepted injuries. It thereafter based its decision to terminate appellant's compensation on the opinion of Dr. Mercier, the independent medical examiner. The Board, however, finds that the Office erred in finding that there was a conflict in the medical evidence regarding the accepted conditions of right inguinal sprain/strain, bilateral hip/thigh sprain, bilateral aggravation of bursitis/trochanteric of the left hip at the time it referred appellant to Dr. Mercier. While Dr. Sidell discussed the medical evidence of record, he did not render an opinion as to whether appellant still had residuals of these conditions. There was no conflict regarding residuals of these accepted conditions at the time of the referral to Dr. Mercier. Therefore, his opinion is not entitled to the weight of the evidence as that of an impartial medical specialist.

The Board finds that Dr. Mercier's reports are not sufficient to constitute the weight of the medical evidence. Dr. Sidell did opine that appellant had sustained an aggravation of lumbar stenosis and spondylosis on July 27, 2005, but that this aggravation was temporary and had since resolved. Thus, there was a conflict in the medical evidence regarding the residuals of this condition. Dr. Mercier stated in his January 23, 2007 report that there was no indication that appellant's lower back conditions were related to the July 2005 work injury. His opinion is of diminished probative value, as his report disregarded elements contained in the statement of accepted facts. The Office accepted aggravation of degenerative lumbar disease.

Dr. Mercier thereafter submitted a May 2, 2007 supplemental report, in which he stated that appellant had made a full recovery from his aggravation of degenerative lumbar/lumbosacral disease. His opinion is of limited probative value for the further reason that it is generalized in nature and equivocal in that he only noted summarily that appellant's conditions had resolved. Dr. Mercier did not provide any current findings to support his conclusion. His conclusion was an unsupported opinion.

The Office did not sustain its burden of proof to establish that appellant's right inguinal sprain/strain, bilateral hip/thigh sprain, bilateral aggravation of bursitis/trochanteric of the left hip, aggravation of degenerative lumbar disease had ceased. The termination of compensation for these conditions will be reversed.

LEGAL PRECEDENT -- ISSUE 2

Section 8128 of the Act provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or on application.[8] The Board

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

[8] 5 U.S.C. § 8128.

has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128 of the Act and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[9] The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.[10]

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provisions, where there is good cause for so doing, such as mistake or fraud. It is well established that, once the Office accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, the Office later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, the Office is required to provide a clear explanation of the rationale for rescission.[11]

ANALYSIS -- ISSUE 2

The Office accepted a consequential claim for major depression based on the August 17 and November 2, 2007 reports of Dr. Daghestani, the second opinion examiner, who stated that appellant developed symptoms of clinical depression which stemmed from his July 2005 work injury. Dr. Daghestani advised that appellant had a chronic pain condition and was currently experiencing severe depression, sleep problems and functional difficulties. He found that he had not reached maximum medical or psychological improvement and his symptoms required additional psychiatric treatment.

In the January 23, 2008 notice of proposed termination, the Office notified appellant it would rescind acceptance of the consequential major depression condition. Because appellant's accepted physical findings had resolved, the grounds for its acceptance of the consequential depression were no longer valid. The Office rescinded acceptance of this condition in the June 13, 2008 decision.

The Board notes, however, that in order to rescind acceptance of the consequential depression condition, the Office must show that the weight of the evidence establishes that acceptance was erroneous. The Office has presented no evidence that its acceptance of the major depression condition was in error. Dr. Dhagestani's opinion that appellant developed a major depression condition as a consequence of his accepted physical conditions stemming from the July 27, 2005 work injury is unrefuted. The Board notes that it is a fundamental principle of the law on rescission that the Office should not be second-guessing a prior adjudicating claims examiner and simply arrive at a different conclusion on the same evidence.[12] Appellant provided

[9] *John W. Graves*, 52 ECAB 160, 161 (2000).

[10] *See* 20 C.F.R. § 10.610.

[11] *John W. Graves, supra* note 9.

[12] *See, e.g., Delphia Y. Jackson*, 55 ECAB 373 (2004); *Gareth D. Allen*, 48 ECAB 438 (1997); *Major Jefferson, III*, 47 ECAB 295 (1996); *Carolyn F. Allen*, 47 ECAB 240 (1995); *Daniel E. Phillips*, 40 ECAB 1111 (1989), *petition for recon. denied*, 41 ECAB 371 (1990).

additional evidence supporting a consequential depression condition from Dr. Levy and Dr. Weiss. The Office did not meet its burden of proof to rescind acceptance of a consequential major depression condition. The Board finds that it was improper for the Office to base rescission of this condition on its finding that appellant's physical conditions had resolved. As noted, the report of Dr. Mercier upon whom the Office relied to rescind acceptance of the major depression, was not adequate to establish that appellant's physical conditions had resolved. The weight of the evidence remains with Dr. Dahgestani, the Board-certified psychiatrist selected as a second opinion medical specialist.[13]

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits. The Board also finds that the Office did not meet its burden of proof to rescind acceptance of appellant's major depression condition.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 25, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

[13] Given the disposition of the first two issues, it is not necessary for the Board to address the issue of continuing disability.