United States Department of Labor
Employees' Compensation Appeals Board

T.W. Appellant	)	
and	)	**Docket No. 08-607**
	)	**Issued: August 8, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Houston, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 26, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs' hearing representative dated September 18, 2007, which affirmed a January 23, 2007 decision terminating appellant's compensation 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 the Office properly terminated appellant's wage-loss compensation benefits effective January 23, 2007 on the grounds that her disability due to her accepted condition had ceased; and (2) whether appellant established that she continued to have residuals and partial disability on and after January 23, 2007 causally related to the June 17, 2002 employment injury.

FACTUAL HISTORY

On June 17, 2002 appellant, then a 35-year-old mail handler, filed a traumatic injury claim alleging that on that date she injured her neck and shoulders while lifting trays. She

stopped work on June 18, 2002. The Office accepted the claim for cervical radiculopathy. By letter dated August 29, 2002, it placed appellant on the periodic rolls for temporary total disability. On February 6, 2003 appellant was offered the modified position of mail handler technician working four hours per day, which she accepted. She returned to work for four hours per day on February 7, 2003, stopped on February 10, 2003 and returned to work on April 22, 2003.

By decision dated July 23, 2003, the Office issued a loss of wage-earning capacity determination. It found that the actual earnings appellant received as a modified mail handler technician beginning April 22, 2003 fairly and reasonably represented her wage-earning capacity.

By letter dated November 1, 2006, the Office referred appellant, together with the case record, a statement of accepted facts and a list of questions, to Dr. Gary C. Freeman, a Board-certified orthopedic surgeon, for a second opinion medical examination.[1] In the accompanying statement of accepted facts, it advised Dr. Freeman that it had accepted cervical radiculopathy/neuritis as resulting from her June 17, 2002 employment injury. In a December 18, 2006 medical report, Dr. Freeman provided a history of the June 17, 2002 employment injury and appellant's medical treatment. He provided a detailed review of the medical record. Dr. Freeman reported no sensory or motor defect bilaterally in the upper extremities and there was evidence of "significant symptom magnification." He noted appellant "asserts generalized nonanatomical, nonfocal discomfort thoughout the entire upper, mid, and low back areas in response to light palpation, percussion, lateral compression and axial loading." Basically, Dr. Freeman found appellant's low back examination to be "similarly unremarkable regarding clinical radiculopathy." He opined that appellant "had no significant injury other than perhaps a very limited soft tissue event consistent with the biomechanics and pathophysiologic analysis of the asserted injury event mechanism." Dr. Freeman opined that appellant is capable of performing her regular duties full time.

On December 22, 2006 the Office proposed to terminate appellant's compensation benefits. It determined that she no longer had any disability or residuals due to her accepted June 17, 2002 employment injury.

On December 22, 2006 the Office received a December 14, 2006 duty status report by Dr. Qaisar J. Yusuf, a treating physician, who diagnosed cervical radiculopathy as employment related and depression as another disabling condition. Dr. Yusuf indicated that appellant was capable of working four hours per day with restrictions.

On January 19, 2007 appellant noted her disagreement with the Office's proposal to terminate her benefits and requested additional time to provide medical evidence.

By decision dated January 23, 2007, the Office terminated appellant's compensation effective that date. It found that the evidence of record was insufficient to establish that she had any continuing residuals or total disability causally related to the June 17, 2002 employment.

[1] The Board notes that the record contains evidence relevant to another claimant.

The Office accorded determinative weight to Dr. Freeman's December 18, 2006 second opinion medical report.

In a letter dated February 17, 2007, appellant requested an oral hearing before an Office hearing representative, which was held on July 25, 2007.

On March 26, 2007 the Office received a December 14, 2006 clinic note by Dr. Yusuf who diagnosed acute lumbosacral, acute thoracolumbar strains/sprains, sacroiliitis and lumbosacral radiculopathy. A physical examination revealed marked tenderness in the lumbosacral area and across the back.

On July 12, 2007 the Office received an undated report by Dr. Yusuf, a July 18, 2007 electromyograph report and a July 13, 2007 magnetic resonance imaging (MRI) scan. Dr. Yusuf diagnosed depression, anxiety disorder, C5-6 cervical disc protrusion, degenerative spinal arthritis, L4-5 and L5-S1 lumbar disc bulges, chronic pain and fibromyalgia. He opined that appellant was unable to work full time due to her medical conditions and chronic pain. Dr. Yusuf noted a recent MRI scan shows C5-6 degenerative disc disease and a C5-6 disc protrusion.

Subsequent to the July 25, 2007 hearing, the Office received an undated report by Dr. Yusuf, a July 18, 2007 electromyograph report and a July 13, 2007 MRI scan. Dr. Yusuf opined that appellant "continues to suffer with chronic neck problems to the upper and mid[-] back area and the thoracic region." He noted that a recent MRI scan and electromyograph both showed continuing cervical problems. Based upon his evidence, Dr. Yusuf concluded that appellant "has problems in the base of her neck that continue to cause her neck pain and chronic recurrent bouts of pain."

By decision dated September 18, 2007, an Office hearing representative affirmed the January 23, 2007 termination decision. The hearing representative found that appellant no longer had any residuals or total disability due to her June 17, 2002 employment injury based on Dr. Freeman's December 18, 2006 medical report.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[2] Having determined that an employee has a disability causally related to his federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[3] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[4]

[2] *T.F.*, 58 ECAB ___ (Docket No. 06-1186, issued October 19, 2006); *George A. Rodriguez*, 57 ECAB 224 (2005).

[3] *J.M.*, 58 ECAB ___ (Docket No. 06-661, issued April 25, 2007); *Elaine Sneed*, 56 ECAB 373 (2005).

[4] *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Furman G. Peake*, 41 ECAB 361 (1990).

The Office procedure manual provides as follows:

> "When the [Office] medical adviser, second opinion specialist or referee physician renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate or does not use the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[5]

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained cervical radiculopathy due to a June 17, 2002 employment injury. Appellant stopped work on June 18, 2002 and was placed on the periodic rolls for temporary total disability by letter dated August 29, 2002. On February 6, 2003 she was offered the modified position of mail handler technician working four hours per day, which appellant accepted. Appellant accepted a modified job offer as a mail handler technician and returned to work for four hours per day on February 7, 2003. She stopped work on February 10, 2003 and returned to her modified part-time work on April 22, 2003. On July 23, 2003 the Office issued a loss of wage-earning capacity decision which found that her modified job represented her wage-earning capacity.

On November 1, 2006 the Office referred appellant for another second opinion evaluation with Dr. Freeman. Based on his December 18, 2006 report, the Office terminated appellant's compensation. The Board finds, however, that Dr. Freeman's opinion is of diminished probative value and thus, not sufficient to constitute the weight of the medical evidence.

The Office, in its referral of appellant to Dr. Freeman, requested that he provide an opinion regarding whether appellant had any objective findings of cervical or right upper extremity condition, whether she was able to work more than four hours per day and whether she continued to have any residuals of her accepted June 17, 2002 employment injury. In the accompanying statement of accepted facts, the Office advised Dr. Freeman that it had accepted that appellant sustained the condition of cervical radiculopathy/neuritis due to her June 17, 2002 employment injury. To assure that the report of a medical specialist is based upon a proper factual background, the Office provides information to the physician through the preparation of a statement of accepted facts.[6] As noted under legal precedent, the Office procedure manual provides that any medical opinion must accept as correct the statement of accepted facts and offer an opinion clearly within that statement. An opinion which fails to do this is unresponsive and irrelevant.

In a report dated December 18, 2006, Dr. Freeman opined that appellant had symptom magnification. He found no indication that appellant had sustained anything more "than perhaps a very limited soft tissue event" based upon the "biomechanics and pathophysiologic analysis of the asserted injury event mechanism." Dr. Freeman found appellant's low back examination to

[5] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

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

be "similarly unremarkable regarding clinical radiculopathy." He, therefore, did not find that appellant had no further residuals of her accepted cervical radiculopathy, but instead determined that she had only experienced a soft tissue injury such as a sprain/strain due to the June 17, 2002 employment injury. To the extent that Dr. Freeman's opinion is outside the framework of the statement of accepted facts, it is insufficient to meet the Office's burden of proof to establish that appellant has no further employment-related residuals of her accepted condition.[7]

The Office did not indicate that it was attempting to rescind acceptance of appellant's claim based on Dr. Freeman's report. However, it did not inform appellant that it was contemplating rescission or actually rescinding acceptance of her accepted cervical radiculopathy in its termination decision. As the Board has held, 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.[8] It may not 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.

Accordingly, the Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits effective January 23, 2007 as the weight of the medical evidence was insufficient to establish that she had no further employment-related disability as of that date.[9]

[7] *See M.W.*, 57 ECAB 710 (2006); *Douglas M. McQuaid*, 52 ECAB 382 (2001) (medical reports must be based on a complete and accurate factual and medical background and medical opinions based on an incomplete or inaccurate history are of little probative value).

[8] *John M. Pittman*, 7 ECAB 514 (1955); *see also Avalon C. Bailey*, 56 ECAB 223 (2004) (Office procedures note that the reasoning behind the Office's evaluation should be clear enough for the reader to understand the precise defect of the claim and the kind of evidence which would overcome it).

[9] In view of the Board's reversal of the Office's termination decision, the issue of whether appellant had residuals on and after January 23, 2007 is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 18, 2007 is reversed.

Issued: August 8, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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