United States Department of Labor
Employees' Compensation Appeals Board

A.C., Appellant	)	
and	)	**Docket No. 07-2423**
	)	**Issued: May 15, 2008**
U.S. POSTAL SERVICE, POST OFFICE, Boise, ID, 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 25, 2007 appellant filed a timely appeal from a March 9, 2007 merit decision of the Office of Workers' Compensation Programs terminating authorization for medical benefits.[1] 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 authorization for medical benefits effective March 14, 2006 on the grounds that he had no residuals of his August 22, 1999 employment injury.

[1] In its March 9, 2007 decision, the Office indicated that it was denying appellant's request for reconsideration of the merits of his claim. As the Office considered the merits of the arguments he raised on reconsideration, however, it constitutes a merit review of the claim. *See Delphyne L. Glover*, 51 ECAB 146, 147 (1999).

FACTUAL HISTORY

This case has previously been before the Board. On June 5, 2001 the Board set aside November 1, 1999 and February 16, 2000 decisions, finding that the medical evidence was sufficient to require further development to determine whether appellant sustained an injury on August 22, 1999 in the performance of duty.[2] The Board found that the Office should determine whether he sustained a back injury or aggravation of a preexisting back condition due to grabbing a tray of mail that slipped out of his hands on August 22, 1999.

On remand, the Office referred appellant to Dr. Joseph Verska, a Board-certified orthopedic surgeon. The Office requested that the physician address whether the August 22, 1999 employment incident caused a low back injury or aggravated a preexisting low back condition. On July 17, 2001 Dr. Verska opined that the August 22, 1999 low back incident "was sufficient to cause the injury that required surgical intervention, namely the disc herniations at L4-5 and L5-S1."[3] He noted that a May 1998 magnetic resonance imaging (MRI) study showed "no significant disc herniations" but a September 1999 MRI scan study showed an increased disc herniation at L4-5 and disc bulge at L5-S1. Dr. Verska found that appellant did not sustain an aggravation of a preexisting low back condition. On August 28, 2001 the Office accepted that appellant sustained herniated discs at L4-5 and L5-S1 causally related to the August 22, 1999 employment incident and also accepted the November 15, 1999 discectomy as resulting from the employment injury.

Appellant resumed limited-duty employment on September 4, 2002 but stopped work on September 9, 2002. On appeal for the second time, the Board reversed a December 24, 2003 decision finding that appellant abandoned suitable work on September 9, 2002 and that he did not establish a recurrence of total disability beginning September 9, 2002.[4] The Board instructed the Office to pay compensation from September 9, 2002 until April 9, 2003, when appellant returned to limited-duty employment.

Appellant stopped work again and filed a recurrence of disability claim on July 26, 2003. By decision dated November 7, 2003, the Office found that the evidence was insufficient to show that he sustained a recurrence of disability. In a progress report dated November 8, 2003, Dr. Richard Radnovich, an attending osteopath, noted that appellant had a history of "several work[-]related injuries and several exacerbations." He asserted that "small motions on his job (that do not require heavy lifting or extreme bending) do require very frequent, repetitive small motions. Although any one of these motions [is] not significant enough to cause a problem the accumulative risk is very high that one will tear some ligamentous fibers in an already damaged area." Dr. Radnovich found that appellant's current job was "inadvisable because it is causing reinjury to this weakened area."

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[2] Docket No. 00-2072 (issued June 5, 2001). On August 25, 1999 appellant, then a 46-year-old mail processor, filed a claim alleging that on August 22, 1999 he sustained severe radiating low back pain when he grabbed a slipping tray of mail. In November 1999 he underwent a discectomy at L4-5 and L5-S1.

[3] Appellant underwent a discectomy at L4-5 and L5-S1 in November 1999.

[4] Docket No. 04-1283 (issued February 17, 2005).

On June 8, 2005 the Office noted that appellant had alleged that he sustained a recurrence of disability on September 2, 2003. The Office referred him to Dr. Leslie Bornfleth, a Board-certified orthopedic surgeon, for a second opinion examination. On June 29, 2005 Dr. Bornfleth diagnosed degenerative disc disease at L3-4, L4-5 and L5-S1 preexisting the August 22, 1999 work injury, a herniated disc at L4-5 due to the employment injury and status post laminectomy at L5. He discussed appellant's current complaints of episodic back and buttock pain. Dr. Bornfleth opined that the objective evidence did not show a recurrent disc herniation at L4-5. He attributed appellant's current symptoms to a degenerative condition and found that his limited-duty position was within his restrictions. Dr. Bornfleth opined that lumbar tears seen on a discogram in December 6, 2004 were consistent with degenerative disc disease. In a supplemental report dated September 6, 2005, he concurred with appellant's prior work restrictions and found that they were necessary due to both his work injury and the degenerative disc disease. Dr. Bornfleth found it was not possible to state whether his degenerative disc disease was aggravated by his employment injury.

The Office determined that a conflict existed between Dr. Radnovich and Dr. Bornfleth. The Office referred appellant to Dr. David Schenkar, a Board-certified orthopedic surgeon, for an impartial medical examination. In the statement of accepted facts, the Office noted that appellant previously sustained herniated discs at L3-4, L4-5 and L5-S1 in June 1991 while working in nonfederal employment. The Office identified the accepted condition as an aggravation of herniated discs at L4-5 and L5-S1.

In a report dated January 13, 2006, Dr. Schenkar found that appellant had no work restrictions due to the aggravation of his herniated discs at L4-5 and L5-S1 as the 1999 disc bulges "were properly treated and he recovered from that with only a loss of right ankle reflex but no leg weakness and pain." He attributed appellant's back pain to preexisting degenerative spondylosis. Dr. Schenkar found that appellant's aggravation had ceased and that he had "recovered from the radiculopathy of the herniated discs of 1999 after the surgery." He opined that the 1999 employment injury temporarily aggravated his degenerative disc disease (DDD) but that his current restrictions were "due to his nonspecific low back pain due to generalized spinal wear present before the 1999 disc herniation." Dr. Schenkar disagreed with Dr. Radnovich's finding that appellant sustained exacerbations due to repetitive tissue tearing while performing his light-duty employment. He opined that he did not sustain recurrences of disability on July 26 and September 2, 1993 such that he could no longer perform his modified-duty employment.

On February 9, 2006 the Office notified appellant of its proposed termination of compensation and medical benefits on the grounds that the medical evidence did not show that he had any residuals of his August 22, 1999 employment injury. The Office further proposed that it deny that he sustained a recurrence of disability beginning September 2, 2003. By decision dated March 14, 2006, the Office finalized its termination of medical benefits effective that date.[5]

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[5] The Office indicated that it was terminating wage-loss compensation and medical benefits; however, it does not appear that appellant was in receipt of compensation.

In a letter dated March 10, 2006, received by the Office on March 17, 2006, appellant asserted that the notice of proposed termination of compensation inaccurately indicated that his claim was accepted for an aggravation of herniated discs at L4-5 and L5-S1. He also argued that Dr. Schenkar's license had been suspended in Washington. On January 22, 2007 appellant requested reconsideration. He argued that the statement of accepted facts was inaccurate as his claim was accepted for herniated discs rather than an aggravation of herniated discs.

By decision dated March 9, 2007, the Office denied appellant's request for reconsideration on the grounds that the evidence was insufficient to warrant review of the prior decision. The Office, however, weighed the merits of his argument regarding Dr. Schenkar and his contention that the statement of accepted facts was in error. The Office found that it used the word "aggravation" because of his history of prior herniated discs and concluded that the "wording does not change the fact that this Office accepts any residuals related to the August 22, 1999 incident, or November 15, 1999 surgery, and that the current medical evidence establishes the claimant no longer has residuals or disability that is due to his work injury."

LEGAL PRECEDENT

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[6] To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[7]

Section 8123(a) 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.[8] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9] In situations where there exist opposing medical reports of virtually equal weight 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.[10]

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[6] *Pamela K. Guesford*, 53 ECAB 727 (2002).

[7] *Id*.

[8] 5 U.S.C. § 8123(a).

[9] 20 C.F.R. § 10.321.

[10] *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

The Office procedure manual provides as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF [statement of accepted facts] which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[11]

ANALYSIS

The Office accepted that appellant sustained herniated discs at L4-5 and L5-S1 due to an August 22, 1999 employment injury. He underwent a discectomy at L4-5 and L5-S1 in November 1999. Appellant returned to limited-duty employment on September 4, 2002. He sustained a recurrence of disability from September 9, 2002 until April 9, 2003. On July 26, 2003 appellant again stopped work. The Office determined that a conflict existed between Dr. Radnovich and Dr. Bornfleth regarding the nature and extent of his employment-related condition and disability. The Office referred appellant to Dr. Schenkar for resolution of the conflict. Based on Dr. Schenkar's opinion, the Office, in its March 14, 2006 decision, indicated that it was terminating appellant's compensation and entitlement to medical treatment. As the Office was not paying him compensation, however, it improperly characterized the issue as termination of wage-loss compensation. The issue is whether appellant has residuals of his employment injury entitling him to further medical treatment.[12]

Where there exists a conflict in medical opinion 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, is entitled to special weight.[13] The Board finds, however, that Dr. Schenkar's opinion is of diminished probative value and thus does not represent the special weight of the medical evidence. The Office provided Dr. Schenkar with a statement of accepted facts which indicated that it had accepted that appellant sustained an aggravation of herniated discs at L4-5 and L5-S1 due to his August 22, 1999 employment injury. The Office, however, accepted the claim for herniated discs at L4-5 and L5-S1. 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.[14] As noted, when a physician renders a medical opinion based on an incomplete or inaccurate statemet of accepted facts, the probative value of the opinion is seriously diminished or negated altogether.[15] Dr. Schenkar found that appellant had no further

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

[12] In its notice of proposed termination of compensation and medical benefits, the Office also proposed finding that appellant did not establish a recurrence of disability beginning September 2003. The Office, however, did not address this further in its March 14, 2006 decision.

[13] *Glen E. Shriner*, 53 ECAB 165 (2001).

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

[15] *See supra* note 11.

work restrictions or residuals due to an aggravation of his herniated discs at L4-5 and L5-S1. His opinion, however, is based on a statement of accepted facts that does not accurately reflect the conditions the Office accepted as employment related. Consequently, Dr. Schenkar's opinion is of diminished probative value and insufficient to resolve the conflict in medical opinion.

CONCLUSION

The Board finds that the Office improperly terminated authorization for medical benefits effective March 14, 2006 on the grounds that he had no residuals of his August 22, 1999 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 9, 2007 is reversed.

Issued: May 15, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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