United States Department of Labor
Employees' Compensation Appeals Board

J.G., Appellant	)	
and	)	**Docket No. 08-2155**
	)	**Issued: July 28, 2009**
DEPARTMENT OF THE ARMY, CALIFORNIA NATIONAL GUARD, Fresno, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2008 appellant timely appealed the July 16, 2008 merit decision of the Office of Workers' Compensation Programs, which denied modification of a March 28, 2008 decision terminating wage-loss compensation and medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's wage-loss compensation and medical benefits effective March 31, 2008.

FACTUAL HISTORY

Appellant, a 60-year-old former automotive worker, has an accepted claim for low back strain and disc herniation at L4-5, which arose on August 20, 1992.[1] He stopped work the day of

[1] Appellant injured his back while working on a motor vehicle.

his injury and voluntarily resigned from his position effective October 5, 1992.[2] On April 7, 1995 appellant underwent an Office-approved L5-S1 microdiscectomy. Following surgery the Office paid him wage-loss compensation for temporary total disability. Effective March 3, 1996, it reduced him compensation based on his ability to earn weekly wages of $200.00 in the selected position of apartment house manager or hotel/motel clerk.[3]

In September 1997 appellant advised the Office that he had recently begun working as a rental agent for a private-sector equipment rental company. He continued to work as an equipment rental agent/manager for approximately seven years. In October 2004 appellant informed the Office that he had been working as a truck driver since August 2004, with average monthly earnings of $1,200.00. Periodic financial disclosure statements (Form EN1032) indicated that, as recently as September 8, 2007, appellant continued to work as a long-haul trucker.

Dr. James A. Critchlow, a family practitioner, saw appellant every three to four months regarding his low back condition. Appellant's treatment records cover a three-and-a-half-year period dating back to January 2005.[4] Dr. Critchlow routinely prescribed pain medication (Darvocet-N) and a muscle relaxant (Soma) for appellant's chronic low back pain. Appellant essentially returned to him whenever he needed his prescriptions refilled. In calendar year 2005, Dr. Critchlow saw appellant on four occasions. His January 4, 2005 treatment notes indicated that appellant had been on Darvocet-N and Soma for seven to eight years. Dr. Critchlow also noted that appellant had returned a little early for his refills because "his job [kept] him out of town" and this was a convenient time for him. He appears not to have examined appellant at that time, but to have simply refilled his prescription. Dr. Critchlow saw appellant again on May 10, 2005. He noted that appellant had chronic low back pain following a 1995 L4-5 discectomy and had been on Darvocet-N and Soma for the past 10 years.[5] Dr. Critchlow again refilled appellant's prescriptions. However, other than checking appellant's blood pressure, he appears not to have conducted a physical examination.

In his August 11, 2005 treatment notes, Dr. Critchlow indicated that appellant had returned for a refill of his prescriptions. He reported that appellant had an initial back injury on August 20, 1992, which was treated conservatively. Dr. Critchlow also noted that appellant

[2] Appellant's resignation was unrelated to his August 20, 1992 employment injury. In fact, his decision to resign predated his employment injury. Although appellant originally planned to resign effective August 22, 1992, the effective date of the resignation was postponed until after appellant exhausted his entitlement to continuation of pay. Beginning October 5, 1992, the Office paid appellant wage-loss compensation for temporary total disability.

[3] A similar loss of wage-earning capacity (LWEC) determination had been in effect since December 11, 1994. However, the previous LWEC determination was suspended following appellant's April 1995 surgery.

[4] It is not entirely clear from the record when appellant began treating with Dr. Critchlow. The earliest record of his treatment is dated January 4, 2005. However, the treatment notes for that particular date suggest that it was not the first time Dr. Critchlow had seen appellant.

[5] Dr. Critchlow was mistaken as to which lumbar vertebra had been operated on in 1995. The April 7, 1995 microdiscectomy was at the L5-S1 level, not L4-5 as reported by him.

"underwent a dis[c]ectomy in 1994" and "[had] been permanently disabled since."[6] He stated that appellant had been on a lot of pain medications over the years and that he had weaned himself down to his current medications, Soma and Darvocet-N, which Dr. Critchlow renewed for another three-month period. When Dr. Critchlow next saw appellant on December 2, 2005, he noted that appellant had chronic low back pain. He reported that appellant was injured on August 20, 1992 and in "1994 he had an L4-5 dis[c]ectomy," which gave him no relief. Dr. Critchlow further stated that appellant "[had] been permanently disabled now for 11 or 12 years." He again renewed appellant's prescriptions, apparently without benefit of a physical examination.

In 2006 Dr. Critchlow saw appellant on three occasions. His May 1, 2006 treatment notes indicated that appellant had chronic low back pain. Dr. Critchlow again reported that appellant had an L4-5 discectomy. Appellant reportedly told him that he had been "totally disabled since 1992." Dr. Critchlow did not report any specific findings on physical examination. He renewed appellant's prescriptions for another three-month period. Dr. Critchlow next saw appellant on September 11, 2006. He completed an "employee's work status report," indicating that appellant was "permanently disabled." The form report noted an August 20, 1992 date of injury, but did not include a diagnosis or identify any specific physical limitations. Dr. Critchlow noted that appellant was on Darvocet-N and Soma, and that those prescriptions were being refilled for a three-month period. His accompanying treatment notes indicated that appellant was "permanently disabled from back pain requiring ***two*** surgeries for about 12 to 14 years." (Emphasis added.)

In his December 6, 2006 treatment notes, Dr. Critchlow reported that appellant had a herniated disc at L4-5 back in 1992 while he was in California where he was in the National Guard. He further noted that appellant was eventually operated on, but this resulted in no improvement. Dr. Critchlow also reported that appellant "was totally disabled in 1994 by the ... Department of Labor." Appellant reportedly told Dr. Critchlow that the Federal Government did not settle workers' compensation cases, and just continued paying him disability and taking care of his medications and office visits. Despite having last seen appellant on September 11, 2006, Dr. Critchlow reported that it had been almost seven months since appellant's last visit. The December 6, 2006 treatment notes indicated that appellant's previously authorized three-month supply of medications lasted approximately seven months. Dr. Critchlow surmised that appellant was "not having to take [his medication] all the time." He again renewed appellant's prescriptions for Darvocet-N and Soma.

Dr. Critchlow's May 8, 2007 treatment notes indicated that appellant had "been disabled since 1992 and 1994 from back ***injuries*** sustained at work." (Emphasis added.) He also noted that appellant had undergone a laminectomy and had been on Darvocet-N and Soma now for about 12 to 14 years. Dr. Critchlow stated that he last saw appellant on December 6, 2006, at which time he gave him a three-month supply of medications. This latest refill lasted appellant five months. Dr. Critchlow noted that he reportedly played around with his medications and tried not to take them at times. Appellant advised him that he was having more problems at

[6] Dr. Critchlow was apparently unaware that appellant had been regularly employed since August 1997. He also seems to have forgotten that appellant informed him that he was employed during the January 4, 2005 Office visit.

night because he could not get comfortable and sleep. Dr. Critchlow refilled appellant's prescriptions for another three-month period.

Dr. Carl W. Huff, a Board-certified orthopedic surgeon and Office referral physician, examined appellant on August 14, 2007. He reviewed appellant's employment history, noting, among other things, that appellant was currently employed as a long-haul trucker. Dr. Huff also reviewed various medical records, including the April 7, 1995 operative report, postsurgical follow-up treatment records and several lumbar imaging studies taken within a five-month period following surgery. He also obtained recent x-rays of the lumbar spine and pelvis, and he administered a bilateral lower extremity electromyography (EMG) and nerve conduction study.

The x-rays and nerve conduction study were essentially normal. The EMG showed chronic bilateral L5 radiculopathy, but no indication of an active process. After reviewing appellant's history, medical records, objective studies and conducting a physical and neurological examination, Dr. Huff's final impression was "postop[erative] status partial left lumbar laminectomy/microdis[c]ectomy at L5-S1" and "chronic low back pain." He indicated that there were no residuals of the accepted condition of L4-5 disc herniation. Dr. Huff further indicated that appellant did not have any current work restrictions as a result of his previously accepted condition. He explained that postoperative lumbar imaging scans in 1995 showed no residual nerve root compression or herniation of the disc. However, while appellant's recent EMG revealed L5 radiculopathy bilaterally, Dr. Huff stated that this was the result of the original old nerve injury that warranted surgery in 1995, and there was no current indication of a continuing active process. He further noted that approximately eight months following surgery, appellant's surgeon, Dr. John T. Bonner, had not imposed any limitations on work activity.

Dr. Huff indicated that the expected outcome following a simple microdiscectomy was that appellant would return to his preinjury level of work activity. He explained that appellant's employment history corroborated the fact that he should not have work restrictions. Dr. Huff commented that appellant had worked continuously from 1997 through the present time and that his current job was as a long-haul truck driver. According to him, appellant did not indicate any difficulty with this job or a need to be off work for treatment due to back symptoms. As such, Dr. Huff concluded that appellant required no further medical treatment.

Dr. Critchlow renewed appellant's prescription again on September 20, 2007. At that time, he reported that appellant had been "disabled since 1992 from a back injury sustained at work." Dr. Critchlow also noted that appellant had undergone a laminectomy, but continued to experience pain. He reiterated that appellant had been on medication for about 12 to 14 years.

On February 25, 2008 the Office advised appellant that it proposed to terminate all benefits based on Dr. Huff's August 14, 2007 report. It afforded appellant 30 days to submit additional evidence or argument in response to the proposed termination.

The Office received March 4, 2008 treatment notes from Dr. Critchlow who indicated that appellant had been permanently disabled since 1994. He also reported that appellant had been on Darvocet-N and Soma for years. Dr. Critchlow noted that appellant was recently evaluated at the request of the Department of Labor. He commented that x-rays had already

been obtained, but that a lumbar magnetic resonance imaging (MRI) scan was also requested. Dr. Critchlow indicated that he would schedule appellant for an MRI scan.

In a decision dated March 28, 2008, the Office terminated appellant's wage-loss compensation and medical benefits effective March 31, 2008.

On April 14, 2008 appellant requested reconsideration. He submitted the results of an April 3, 2008 lumbar MRI scan. The Office also received Dr. Critchlow's April 14, 2008 treatment notes, which discussed appellant's latest MRI scan results. According to Dr. Critchlow, the recent scan "did not show that much."

By decision dated July 16, 2008, the Office denied modification of the March 28, 2008 decision terminating benefits.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[7] 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.[8] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[9] 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.[10]

ANALYSIS

Appellant's treating physician, Dr. Critchlow, regularly dispensed pain medication and muscle relaxants, apparently without benefit of objective studies, imaging studies or physical examination findings. Moreover, Dr. Critchlow's treatment notes are fraught with inconsistencies and inaccurate information. He has consistently misstated the details of appellant's April 7, 1995 surgery and has mistakenly referenced multiple back injuries and multiple surgeries. Dr. Critchlow has also exhibited difficulty in keeping track of specific dates when he saw appellant. But the most glaring deficiency in his treatment records is the omission of appellant's recent employment history. With the exception of his January 4, 2005 treatment notes which included a vague reference to him having a job, Dr. Critchlow makes no mention of appellant's work as an equipment rental agent/manager and long-haul trucker. Despite appellant's regular employment history of more than a decade's duration, Dr. Critchlow has consistently described him as permanently disabled. The treatment notes do not provide a clear basis for Dr. Critchlow's opinion on disability. Furthermore, appellant has not provided any

[7] *Curtis Hall*, 45 ECAB 316 (1994).

[8] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[9] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

[10] *Calvin S. Mays*, 39 ECAB 993 (1988).

explanation in support of an ongoing nexus between appellant's August 20, 1992 employment injury and his subjective complaints of chronic low back pain. Accordingly, Dr. Critchlow's treatment records are of limited probative value in determining the extent of any employment-related residuals.

The Board finds that the Office properly relied on Dr. Huff's August 14, 2007 report as a basis for terminating appellant's wage-loss compensation and medical benefits.[11] Dr. Huff found that appellant no longer had residuals of his accepted condition of L4-5 disc herniation. He also indicated that appellant did not require any work restrictions or further medical treatment. Dr. Huff based his opinion on a thorough review of appellant's history and medical records, as well as his own physical examination and recently obtained x-rays and objective studies. The paucity of objective evidence in conjunction with appellant's postsurgical employment history supports Dr. Huff's conclusion that appellant no longer has residuals of his August 20, 1992 employment-related back injury.

CONCLUSION

The Office properly terminated appellant's wage-loss compensation and medical benefits effective March 31, 2008.

ORDER

IT IS HEREBY ORDERED THAT the July 16, 2008 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 28, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

[11] A wage-earning capacity determination remains in effect until it is properly modified. *See Katherine T. Kreger*, 55 ECAB 633 (2004). The medical evidence in this case shows a material change in the nature and extent of the employment-related condition, warranting a modification of the wage-earning capacity determination.