United States Department of Labor
Employees' Compensation Appeals Board

C.J., Appellant	)	
and	)	**Docket No. 09-1490**
	)	**Issued: November 23, 2009**
TENNESSEE VALLEY AUTHORITY, SEQUOYAH NUCLEAR PLANT, Daisy, TN, 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 May 26, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 13, 2009 merit decision terminating his compensation and medical benefits and modifying its determination of his wage-earning capacity. 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 met its burden of proof to terminate appellant's compensation and medical benefits and to modify its determination of his wage-earning capacity.

FACTUAL HISTORY

The Office accepted that on February 24, 1977 appellant, then a 35-year-old electrician, sustained an aggravation of degenerative disc disease while moving light fixtures. Appellant stopped work for various periods and received compensation for periods of partial and total disability.

Appellant received treatment for his back condition from Dr. George Seiters, a Board-certified orthopedic surgeon. On May 15, 1980 Dr. Seiters stated that appellant continued to experience symptoms from the accepted lumbar disc disease. On examination, appellant showed acute back and bilateral leg pain, worse on the right than the left. He had great difficulty moving from one position to another. On the right side, appellant flexed only 10 degrees and extended 5 degrees, with complaints of pain. Lateral bending and rotation were severely limited with pain. Straight leg raising in the sitting and recumbent positions was positive at 45 degrees and was exacerbated by dorsiflexion of the ankle. Straight leg raising on the left was positive at 60 degrees. The sensory examination revealed a light deficit over the medial border of the right foot. His reflexes were 2+ and symmetrical. Palpation of the back revealed maximum tenderness at the L5-S1 level with 2+ spasms. Dr. Seiters opined that appellant was able to work an eight-hour day, provided that he worked in a sedentary position. Appellant was precluded from lifting more than 10 pounds; from any bending, climbing or twisting; from walking or standing more than four hours per day; and from lifting, squatting or kneeling more than two hours per day.

The record contains a job description for an electrical accessories assembler, which was categorized as a sedentary position. On December 16, 1980 the Office medical adviser opined that the position of electrical accessories assembler was within appellant's restrictions and that he should reasonably be expected to perform its duties.

In a formal loss of wage-earning capacity (LWEC) decision dated January 27, 1981, the Office adjusted appellant's compensation based on its determination that he had the ability to earn the wages of an electrical accessories assembler at a weekly pay rate of $377.60.

In response to the Office's request for updated medical evidence, appellant submitted reports from Dr. McKinley S. Lundy, a Board-certified internist. In an April 18, 2006 report, Dr. Lundy provided a history of injury and treatment. He noted that appellant had not had any treatment for low back pain by any physician since he last saw Dr. Seiters in 1998. Dr. Lundy diagnosed low back pain which, he opined within a reasonable degree of medical certainty, was unrelated to the accepted 1977 injury. He stated that, although appellant complained of severe lower back pain, there were no objective findings indicating that he was unable to work. On November 29, 2007 Dr. Lundy reiterated his opinion that appellant's complaints of low back pain were not related to the 1977 injury.

On November 14, 2008 Dr. Lundy provided examination findings. Appellant had a normal gait with good smooth ambulation without guarding. He was able to squat and arise without difficulty, but complained of bilateral hip pain. Trendelenburg's test was negative bilaterally. Manual motor testing of the lower extremities was 5/5 bilaterally with flexion and extension of the hips, knees, ankles and great toes, and with inversion and eversion of the ankles. There was very good muscle tone and bulk of lower extremities. In the supine posture with leg muscles relaxed, maximum circumference of the right lower leg was 41.4 centimeter (cm), with maximum circumference of the left lower leg measuring 40.6 cm and 10 cm proximal to the superior border of the patella; circumference of the right thigh measured 49.2 cm, with circumference of the left thigh measuring 48.4 cm, demonstrating no thigh or lower leg atrophy. Examination of the spine revealed that appellant was able to bend forward from the standing posture, flexing his back with fingers extending to 15 inches above the level of the floor.

Extension and side bending were unremarkable. Achilles and patella reflexes were 2+ bilaterally. Sensibility to light touch was intact bilaterally on the dorsum, plantar, medial and lateral surface of each foot. Seated straight leg raising test was negative bilaterally. On palpation of the lumbar and thoracic spine, Dr. Lundy found no tenderness or spasm of paravertebral muscles, midline tenderness or step-offs. Neither axial compression nor trunk rotation produced a complaint of low back pain. Appellant was able to heel walk without difficulty and was able to rise up on toes with hands against the wall. Upper trapezius muscles were well developed bilaterally. He got onto and off of the examination table with ease and without guarding.

In the November 14, 2008 report, Dr. Lundy opined that appellant's complaints of low back pain were unrelated to the 1977 injury and that there were no objective findings which precluded appellant's return to work. He recommended no work restrictions, noting that appellant had symmetrical reflexes and no motor or sensory deficit in the lower extremities. The hip and leg pain level reportedly improved with activity, self-prescribed white willow bark tea and heat treatment. Dr. Lundy noted that there was no medical evidence that willow bark tea, which appellant had been using to treat his back pain, aids in the treatment of osteoarthritis.

On March 11, 2009 the Office advised appellant that it proposed to terminate his medical and compensation benefits because the medical evidence established that he no longer had any residuals from his accepted 1977 work injury. Appellant was given 30 days to provide additional evidence or argument supporting his continued disability or continuing residuals.

On April 6, 2009 the Office issued a notice of proposed modification of the January 27, 1981 LWEC determination based on his ability to return to work without restrictions, as described in the March 11, 2009 notice.

Appellant submitted a report of a March 20, 2009 magnetic resonance imaging (MRI) scan of the lumbar spine and two reports from Dr. Howard Brock, a Board-certified family practitioner. In an undated report, received on March 27, 2009, Dr. Brock disagreed with Dr. Lundy's conclusion that appellant was able to return to gainful employment. He opined that this 68-year-old man was incapable of physically functioning with adult daily living activities without assistance. In a letter dated May 9, 2009, Dr. Brock reiterated his disagreement with Dr. Lundy's report. Referencing the March 20, 2009 MRI scan report, he stated that appellant had at least two herniated discs that precluded him from performing any type of work that demands lifting, bending or twisting. Noting appellant's claim that Dr. Lundy had not performed the testing and procedures reported, Dr. Brock recommended that appellant be examined by an orthopedic surgeon.[1]

In a May 13, 2009 decision, the Office terminated appellant's compensation and medical benefits and modified its determination of his wage-earning capacity effective that date.

[1] Dr. Brock's letter was dated May 9, 2009; however, as it was received by the Office on April 16, 2009, it is not possible to determine the correct date of the letter.

LEGAL PRECEDENT

Under the Federal Employees' Compensation Act,[2] once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[3] It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4] The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was in fact erroneous.[6] The burden of proof is on the party attempting to show the award should be modified.[7]

When an LWEC has been issued and the medical evidence establishes that the employment-related residuals of the injury have ceased, a proposed decision to both modify the LWEC and terminate benefits should be issued because (a) the claimant's condition has changed (and that is one of the reasons to modify an LWEC) and (b) the medical evidence on file now supports no ongoing residuals related to the work injury. The two issues are linked and both must be addressed in a situation like this.[8]

ANALYSIS

The Office accepted that on February 24, 1977 appellant sustained an aggravation of degenerative disc disease. On January 27, 1981 it issued a wage-earning capacity decision based on its determination that he had the ability to earn the wages of an electrical accessories assembler at a weekly pay rate of $377.60. The Board finds that the Office failed to meet its burden of proof to terminate appellant's compensation and medical benefits and to modify its determination of his wage-earning capacity effective May 13, 2009.

The Office's January 27, 1981 LWEC decision was based on Dr. Seiters' opinion that although appellant continued to experience symptoms from the accepted lumbar disc disease, including acute back and bilateral leg pain, he was able to work an eight-hour day in a sedentary position. Appellant was restricted from lifting more than 10 pounds; from any bending, climbing

[2] 5 U.S.C. §§ 8101-8193.

[3] *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[4] *Id.*

[5] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[6] *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

[7] *Jack E. Rohrabaugh*, 38 ECAB 186, 190 (1986).

[8] FECA Bulletin No.09-05, Part IA(5) (issued August 18, 2009).

or twisting; from walking or standing more than four hours per day; and from lifting, squatting or kneeling more than two hours per day.

In its May 13, 2009 decision, the Office found that the weight of the medical evidence was encompassed in Dr. Lundy's November 14, 2008 report, which established that appellant no longer had residuals from his accepted condition and that his condition had improved such that he could return to work without restrictions. The Board finds, however, that Dr. Lundy's report is of limited probative value and is insufficient to meet the Office's burden of proof. Dr. Lundy stated that, although appellant complained of severe lower back pain, there were no objective findings to indicate that he was unable to work. However, he did not address the results of recent x-rays or MRI scans, which would have reflected the status of appellant's accepted degenerative disc disease. Dr. Lundy opined that appellant was not disabled and that his complaints of pain were unrelated to the accepted 1977 injury. However, he did not explain the basis for his opinion, or why appellant's preexisting degenerative disc condition could not be responsible for the alleged pain. The Board has held that a medical opinion that is not fortified by rationale is of diminished probative value.[9] The Board notes that Dr. Lundy did not have the benefit of reviewing the March 20, 2009 MRI scan report, which revealed the existence of two herniated discs.

Dr. Brock disagreed with Dr. Lundy's conclusion that appellant was able to return to gainful employment. He opined that this 68-year-old man was incapable of physically functioning with adult daily living activities without assistance. Referencing a March 20, 2009 MRI scan report, he stated that appellant had at least two herniated discs that precluded him from performing any type of work that demands lifting, bending or twisting. Dr. Brock's reports are of limited probative value, in that they do not contain examination findings and are insufficiently rationalized. However, together with the March 20, 2009 MRI scan report, they provide evidence of a continuing degenerative back condition.

The Board finds that Office failed to satisfy its burden of proof. The medical evidence of record is not sufficiently rationalized to establish that appellant no longer has residuals from his accepted injury, or that the January 27, 1981 LWEC determination should be modified. Dr. Lundy's reports did not establish by the weight of the evidence that appellant's entitlement to benefits had ceased or that his wage-earning capacity had improved. The Office failed to follow its own procedures to either seek clarification from Dr. Lundy, or to obtain a second opinion evaluation.[10] Further development of the medical evidence was called for, particularly in light of Dr. Brock's findings of continuing residuals.

CONCLUSION

As the Office did not establish that appellant no longer had residuals from his accepted condition or that there was a material change in the nature and extent of the employment-related

[9] *Cecilia M. Corley*, 56 ECAB 662 (2005).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.8(a) (October 2005). *See also id*. at Chapter 2.810.9 (October 2005).

condition, it improperly terminated compensation and medical benefits and improperly modified the January 27, 1981 LWEC determination.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' May 13, 2009 decision is reversed.

Issued: November 23, 2009
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