United States Department of Labor
Employees' Compensation Appeals Board

W.I., Appellant	)	
and	)	**Docket No. 09-2373**
	)	**Issued: September 22, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Laurel, MS, Employer	)	

Appearances:
Greg Dixon, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 28, 2009 appellant, through his representative, filed a timely appeal of a September 29, 2008 merit decision of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's medical and wage-loss compensation benefits effective September 30, 2008.

On appeal, appellant's representative contends that the report of the impartial medical specialist was not sufficient to support the termination of appellant's compensation benefits.

FACTUAL HISTORY

This case has previously been before the Board. On October 1, 1980 appellant twisted his foot and ankle in the performance of duty. The Office accepted his claim for a right ankle sprain on January 9, 1981 and expanded his claim to include arthritis of the metatarsal cuneiform joint of the right foot on July 25, 1986. The medical evidence establishes that appellant had a

preexisting condition of Charcot-Marie-Tooth disease, a severe peripheral neuropathy. The Office entered him on the periodic rolls on November 8, 1984. It proposed to terminate appellant's compensation benefits by letter dated June 16, 1992.

By decision dated December 1, 1992, the Office finalized the termination effective December 13, 1992. Appellant appealed this decision to the Board. In a decision dated September 20, 1996,[1] the Board reversed the termination. The facts and the circumstances of the case as set out in the Board's prior decision are incorporated by reference.

The Office entered appellant on the periodic rolls on January 24, 1997. Appellant's attending physician, Dr. Steven D. Nowicki, a Board-certified orthopedic surgeon, supported appellant's disability for work and diagnosed Charcot-Marie-Tooth disease, as well as osteoarthritis of the right knee. He stated that appellant's accepted injury-related conditions were still medically present and totally disabling. On November 14, 2006 Dr. Nowicki recommended a powered wheelchair and found progressing weakness in appellant's feet and hands.

The Office referred appellant, a statement of accepted facts and list of questions to Dr. Byron Thomas Jeffcoat, a Board-certified orthopedic surgeon, for a second opinion evaluation on April 16, 2007. The statement of accepted facts noted that appellant's claim was accepted for right ankle sprain.[2] Dr. Jeffcoat completed a report on April 30, 2007 and provided findings on examination. He found that appellant's Charcot-Marie-Tooth disease was the reason for his falls. Dr. Jeffcoat diagnosed Charcot-Marie-Tooth disease, severe degenerative arthritis of the right knee, moderate arthritic changes of the metatarsal joints of the right foot, congestive heart failure and small vessel disease with peripheral vascular disease of both lower legs and diabetes mellitus. He opined that appellant's work-related injuries had resolved and attributed his prolonged disability to Charcot-Marie-Tooth disease which typically worsened with age.[3] Dr. Jeffcoat stated that appellant was not capable of returning to gainful employment due to his age and diagnosis of Charcot-Marie-Tooth disease.

The Office proposed to terminate appellant's compensation on November 27, 2007 based on Dr. Jeffcoat's report. Appellant submitted additional records from Dr. Nowicki diagnosing chronic severe worsening Charcot-Marie-Tooth disease of the hands and feet, insulin-dependent diabetes, arterial insufficiency to his legs, gallbladder disease and hypertension. He submitted several reports from Dr. Cleve E. Johnson, a Board-certified orthopedic surgeon, who stated that

[1] Docket No. 94-2114 (issued September 20, 1996).

[2] There are two statements of accepted facts in the record. An undated statement of accepted facts entered into the record on April 10, 2007, stated that appellant's 1980 employment injury was accepted for right ankle sprain as well as permanent aggravation of Charcot-Marie-Tooth Disease of the right foot. A statement of accepted facts dated April 10, 2007 lists appellant's accepted conditions as right ankle sprain only and states that he has a preexisting condition of Charcot-Marie-Tooth Disease effecting his right foot and ankle. There is no other indication in the record that the Office accepted a permanent aggravation of Charot-Marie-Tooth disease as resulting from appellant's 1980 employment injury.

[3] There is no indication in this report that Dr. Jeffcoat received the statement of accepted facts listing as an accepted condition permanent aggravation of Charot-Marie-Tooth disease. He indicates that this condition was continuing unlike the accepted work-related condition of right ankle sprain.

work-related injuries of repeated sprains had aggravated his preexisting condition of Charcot-Marie-Tooth disease.

The Office found that there was a conflict of medical opinion evidence between Drs. Johnson and Nowicki and Dr. Jeffcoat regarding the causal relationship of appellant's current condition to his accepted employment injuries. It referred appellant and a list of questions to Dr. William L. Park, IV, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated February 29, 2008, Dr. Park stated that he had evaluated appellant "as well as his available medical records." He listed his findings on physical examination and diagnosed Charot-Marie-Tooth or hereditary motor sensory neuropathy, arthritic right knee and right foot tarsometararsal arthritis and history of ankle sprain on October 1, 1980. Dr. Park noted that appellant's ankle sprain had resolved and that the ankle sprain was a result of his neuropathy rather than an aggravating factor of that disease. He stated that appellant was not disabled due to his accepted employment injury, but instead due to his chronic progressive neuromuscular disease.

The Office proposed to terminate appellant's wage-loss compensation and medical benefits in a letter dated March 7, 2008. It allowed him 30 days to respond.

By decision dated September 29, 2008, the Office terminated appellant's medical and wage-loss compensation benefits effective September 30, 2008.

LEGAL PRECEDENT

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] After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[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]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of the Act which 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 and resolve the conflict of medical evidence.[8] This is called a referee

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

[5] *Id.*

[6] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[7] *Id.*

[8] 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

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 were there are 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 on a proper factual background, must be given special weight.[10]

The Office's procedures provide that a statement of accepted facts must contain the date of injury, claimant's age, the job held on the date of injury, the employer, the mechanism of injury and the claimed or accepted conditions.[11] It may also include additional elements, including appellant's prior medical history, depending on the nature of the condition claimed and the issues to be resolved.[12] The purpose of the statement of accepted facts is to allow a physician to form an impression of the individual and evidence to be evaluated. The statement of accepted facts should state the conditions claimed and accepted by the Office, so the physician can assess whether the diagnoses given in the medical evidence to be reviewed, as well as his own diagnoses, are consistent with the conditions for which the claim was filed and accepted.[13]

ANALYSIS

The Office accepted appellant's claim for sprain right ankle and arthritis of metatarsal cuneiform joint of the right foot. Appellant's attending physicians, Drs. Nowicki and Johnson, Board-certified orthopedic surgeons, supported his disability for work due to his accepted conditions. The second opinion physician, Dr. Jeffcoat, a Board-certified orthopedic surgeon, found that appellant's disability due to his accepted right ankle sprain had ceased. Due to this conflict of medical opinion evidence the Office properly referred appellant to Dr. Park, a Board-certified orthopedic surgeon, to resolve the issue of appellant's continuing disability for work.

In a February 29, 2008 report, Dr. Park stated that he evaluated appellant "as well as his available medical records." He listed his findings on physical examination and diagnosed Charot-Marie-Tooth or hereditary motor sensory neuropathy, arthritic right knee and right foot tarsometararsal arthritis and history of ankle sprain on October 1, 1980. Dr. Park opined that appellant's ankle sprain had resolved and that the ankle sprain was a result of his neuropathy rather than an aggravating factor of that disease. He stated that appellant was not disabled due to his accepted employment injury, but instead due to his chronic progressive neuromuscular disease. Dr. Park did not address any disability or medical residuals as a result of the additional accepted condition of arthritis of metatarsal cuneiform joint of the right foot.

[9] *R.C.*, 58 ECAB 238 (2006).

[10] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

[11] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.12 (June 1995).

[12] *Id.* at Chapter 2.809.13. *Darletha Coleman*, 55 ECAB 143 (2003).

[13] *Gwendolyn Merriweather*, 50 ECAB 411 (1999).

The Board finds that the report of Dr. Park is not entitled to the special weight of the medical opinion evidence because it was based on an inaccurate statement of accepted facts. The Board notes that it is unclear whether Dr. Park relied on the Office's April 10, 2007 statement of accepted facts, which failed to include arthritis of metatarsal cuneiform joint of the right foot as an accepted condition.[14] There is no indication upon what he relied to provide the factual basis for his report. The record does not contain a statement of accepted facts associated with the materials referred to Dr. Parks and he did not specifically state that he reviewed the statement of accepted facts. The statement of accepted facts included in the record and dated April 10, 2007 does not include all of appellant's accepted conditions. As noted, the condition of arthritis of metatarsal cuneiform joint of the right foot is not listed as an accepted condition. It is well established that medical opinions based on an incomplete or inaccurate history are of diminished probative value.[15] Dr. Parks made no findings regarding appellant's continuing disability or medical residuals due to this condition. His opinion is, therefore, not based on a proper factual history. For this reason, the Office improperly relied on the opinion of Dr. Parks to establish that appellant had no remaining disability or residuals from the accepted injuries. It failed to meet its burden of proof to terminate appellant's compensation and medical benefits.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

[14] There is no evidence supporting that the Office accepted permanent aggravation of Charcot-Marie-Tooth disease as a result of appellant's 1980 employment injury other than an undated statement of accepted facts received into the record on April 10, 2007. The Board finds that the record does not establish that this condition was actually accepted by the Office.

[15] *Douglas M. McQuaid*, 52 ECAB 382 (2001); *T.G.*, Docket No. 07-2231 (issued June 2, 2008).

ORDER

IT IS HEREBY ORDERED THAT the September 29, 2008 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 22, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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