United States Department of Labor
Employees' Compensation Appeals Board

T.S., Appellant	)	
and	)	**Docket No. 10-2332**
	)	**Issued: July 6, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Forest Park, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 20, 2010 appellant filed a timely appeal from an August 9, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 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 OWCP met its burden of proof to terminate compensation for wage-loss and medical benefits effective June 11, 2009; and (2) whether appellant has established a permanent impairment entitling him to a schedule award under 5 U.S.C. § 8107.

FACTUAL HISTORY

On January 31, 2008 appellant, then a 46-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that he sustained a neck and head injury on January 22, 2008 when

[1] 5 U.S.C. § 8101 *et seq.*

the "floor gave out."[2] OWCP accepted the claim for headache and neck sprain. Appellant stopped working and began receiving wage-loss compensation as of March 8, 2008.

The attending physician, Dr. Charles Chen, provided treatment notes indicating that appellant was totally disabled. In a note dated August 7, 2008, he indicated that appellant could work limited duty. By note dated August 28, 2008, Dr. Chen again indicated that appellant was unable to work. OWCP prepared a statement of accepted facts (SOAF) and referred appellant to Dr. David Trotter, an orthopedic surgeon, for a second opinion examination. In a report dated January 25, 2009, Dr. Trotter provided a history and results on examination. He stated that appellant had likely sustained a cervical sprain/strain, possible head contusion and lumbar sprain/strain with possible sacrococcygeal fracture, superimposed on preexisting degenerative abnormalities of the cervical and lumbar spine. Dr. Trotter opined that appellant's current condition appeared to be related to the preexisting degenerative condition or unreported intervening injuries. He stated that there did not appear to be any objective evidence of ongoing cervical or lumbar radiculopathy, or evidence of an unhealed fracture or sequelae of a head injury. Dr. Trotter concluded that appellant appeared to be fully recovered from the January 22, 2008 employment injury.

According to OWCP, a conflict in the medical evidence existed and appellant was referred to Dr. Jaroslaw Dzwinyk, a Board-certified orthopedic surgeon selected as a referee physician. In a report dated March 5, 2009, Dr. Dzwinyk provided a history and results on examination. He noted that appellant continued to experience headaches; he diagnosed resolved cervical and lumbar strains, superimposed on mild preexisting degenerative changes. Dr. Dzwinyk further stated:

> "Symptoms related to the work incident of January 22, 2008 should have resolved within six months or in July of 2008, at which time maximal medical improvement would have been achieved. The examinee's symptoms are markedly out of proportion to the objective findings which are minimal and with presence of factitious findings (*e.g.*, Waddell's sign) which has no organic basis.
>
> "Therefore, no further treatment is recommended as the injury sustained on January 22, 2008 is felt to have resolved. In the opinion of this examiner, the claimant may return to his regular duties without restrictions. The claimant's headaches are beyond scope of the expertise of this examiner and, as such, could be further addressed."

In a letter dated May 5, 2009, OWCP advised that it proposed to terminate compensation for wage loss and medical benefits based on the medical evidence of record. It indicated that appellant should submit evidence or argument within 30 days. On May 22, 2009 OWCP received an April 21, 2009 report from Dr. Herbert Engelhard, a neurosurgeon, who provided results on examination and diagnosed cervical disc herniation, cervical and low back pain. Dr. Engelhard indicated that surgery might be an option for the herniated disc. On June 5, 2009

[2] The factual evidence indicated that appellant was operating a forklift and his head struck the top of the forklift when the rear wheel went through the floor.

the Office received an undated letter from appellant, stating that he did not want to get injured and had cooperated with OWCP regarding his injury.

In a decision dated June 11, 2009, OWCP terminated compensation for wage loss and medical benefits. It found the weight of the medical evidence rested with Dr. Dzwinyk.

On January 12, 2010 appellant filed a claim for compensation (Form CA-7) indicating that he was claiming a schedule award. By letter dated February 12, 2010, OWCP advised him to submit medical evidence with respect to permanent impairment. Appellant submitted a report dated June 4, 2009 from Dr. Daniel Hier, a neurologist, who provided results on examination. By decision dated March 15, 2010, OWCP found that appellant was not entitled to a schedule award.

Appellant requested reconsideration of the June 11, 2009 termination decision on May 14, 2010. He submitted a May 4, 2010 report from a Dr. Jacob Salomon, who stated that, while it could not be proven that appellant suffered cervical and lumbar disc disease on the job, the job duties aggravated the cervical and lumbar condition. In a report dated June 7, 2010, Dr. Salomon provided a history of a January 22, 2008 injury and again opined that appellant aggravated his cervical and lumbar disc disease. He stated: "we are requesting that [appellant's] previous three cases of lumbar dis[c] disease" be combined with the current OWCP claim file.

In a report dated June 24, 2009, Dr. Salomon stated that appellant had a recurrence on May 26, 2010. He stated that the recurrence definitely occurred at work and was job related. On July 8, 2010 appellant filed a recurrence of disability commencing May 26, 2010.

By decision dated August 9, 2010, OWCP reviewed the case on its merits and denied modification of the June 11, 2009 termination decision. It found the evidence submitted was not sufficient to warrant modification.[3]

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[4] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. 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.[5]

[3] OWCP stated, without citation to authority, that Dr. Salomon was not the physician of record and had not been accepted as a change of physicians, therefore his reports were of no probative value.

[4] *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

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

It is well established that, when a case is referred to a referee physician for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[6]

ANALYSIS -- ISSUE 1

With respect to the issue of whether appellant remained disabled due to the accepted injury, OWCP found that a conflict existed pursuant to 5 U.S.C. § 8123(a).[7] Attending physician, Dr. Chen, indicated that appellant remained disabled, while second opinion physician, Dr. Trotter, opined that appellant could return to his date-of-injury position. The referee physician, Dr. Dzwinyk, provided a March 5, 2009 report with an opinion that appellant did not have an employment-related disability. He provided a history and results on examination, noted the lack of objective findings, and offered an unequivocal opinion that appellant could return to his work duties without restriction. As noted above, a well-rationalized opinion from a referee physician is entitled to special weight, and the Board finds that Dr. Dzwinyk was entitled to special weight in this case.

On reconsideration, appellant submitted reports from Dr. Salomon. The August 19, 2010 decision appeared to find that the reports were of no probative value because appellant had not received authorization to change physicians. There is no provision under FECA, its regulations or Board precedent that renders an attending physician's report of no probative value solely because OWCP has not formally authorized treatment. The reports from Dr. Salomon are not sufficient to outweigh the referee physician because they do not provide a rationalized medical opinion on the issue presented. Dr. Salomon did not provide a complete medical history, and he refers to prior lumbar injuries without further explanation. In his May 4, 2010 report, he referred to "job duties" as aggravating appellant's condition, without providing explanation or discussing the January 22, 2008 injury. Dr. Salomon referred to the January 22, 2008 injury in his June 7, 2010 report, but he does not provide a complete medical history, does not explain the nature and extent of any employment-related aggravation, or describe any period of employment-related disability on or after June 11, 2009. In addition, his June 24, 2010 report discussed a May 26, 2010 recurrence of disability, which is not at issue on this appeal.

The Board accordingly finds that, with respect to compensation for wage loss, the Office met its burden of proof to terminate compensation as of June 11, 2009. The weight of the probative evidence was represented by Dr. Dzwinyk, the referee physician.

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[6] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[7] FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). The implementing regulations state 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. 20 C.F.R. § 10.321 (1999).

The June 11, 2009 decision also terminated medical benefits. The Board notes that an accepted condition in this case is headaches. Dr. Dzwinyk noted that appellant reported symptoms of continuing headaches, and he indicated that the headaches were beyond the scope of his expertise. He did not specifically state that headache residuals were not employment related. It is the Office's burden of proof to terminate medical benefits for an accepted condition. The Board finds the Office did not meet its burden of proof with respect to termination of medical benefits related to the accepted condition of headaches.

LEGAL PRECEDENT -- ISSUE 2

The schedule award provision of FECA[8] and its implementing regulations[9] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants.[10] The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[11] For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.[12] The medical evidence necessary to support a schedule award includes a physician's report that provides a detailed description of the impairment.[13]

ANALYSIS -- ISSUE 2

Appellant submitted a CA-7 form indicating that he was claiming a schedule award. The only medical evidence submitted was a report from Dr. Hier, who provided brief descriptions of examination findings, such as "normal" for "sensory" and "motor." There is no detailed description of an employment-related permanent impairment to a scheduled member of the body that could provide the basis for a permanent impairment evaluation under the A.M.A., *Guides.* In the absence of any probative evidence regarding a permanent impairment, the Office properly determined that appellant was not entitled to a schedule award under 5 U.S.C. § 8107.

[8] 5 U.S.C. § 8107.

[9] 20 C.F.R. § 10.404 (1999).

[10] *See Ronald R. Kraynak*, 53 ECAB 130 (2001); *August M. Buffa*, 12 ECAB 324 (1961).

[11] *Supra* note 9.

[12] FECA Bulletin No. 09-03 (issued March 15, 2009).

[13] *See James E. Jenkins*, 39 ECAB 860 (1988); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(c) (August 2002).

The Board notes that appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.[14]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate compensation for wage loss as of June 11, 2009. The Office did not meet its burden to terminate medical benefits for the accepted condition of headaches. The Board further finds that appellant did not establish entitlement to a schedule award under 5 U.S.C. § 8107.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 9, 2010 is affirmed with respect to termination of wage-loss compensation, and reversed with respect to termination of medical benefits for headaches. The March 15, 2010 decision is affirmed.

Issued: July 6, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

[14] *See Linda T. Brown*, 51 ECAB 115 (1999).