United States Department of Labor
Employees' Compensation Appeals Board

A.R., Appellant	)	
and	)	**Docket No. 09-1566**
	)	**Issued: June 2, 2010**
U.S. POSTAL SERVICE, POST OFFICE, Fort Lewis, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
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 June 4, 2009 appellant, through his attorney, filed a timely appeal from the July 23, 2008 and February 24, 2009 merit decisions of the Office of Workers' Compensation Programs that terminated his compensation benefits. 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 benefits effective August 2, 2008.

On appeal, appellant's counsel contends that the Office failed to meet its burden of proof as the impartial medical examiner was not properly selected from the Physicians' Directory System (PDS) and his opinion was insufficiently rationalized.

FACTUAL HISTORY

On August 1, 2002 appellant, then a 54-year-old rural carrier, sustained injury to his back while lifting and carrying bags of mail. The Office accepted his claim for displacement of a

lumbar disc and spinal stenosis of the lumbar and thoracic spine.[1] Appellant was placed on light duty and received compensation for periods of intermittent disability. He was ultimately returned to a four-hour-a-day work schedule under physical restrictions.

In an October 23, 2003 decision, the Office reduced appellant's wage-loss compensation based on his actual earnings as a modified letter carrier effective October 5, 2003.

Appellant came under the treatment of Dr. Shariar Sotudeh, a Board-certified orthopedic surgeon, who submitted work capacity evaluations on an intermittent basis restricting appellant to four hours of work a day subject to specified work restrictions. On February 5, 2004 Dr. Sotudeh noted that appellant was being treated conservatively with a back brace and listed work limitations.[2] In a May 15, 2006 note, he noted that he had treated appellant since December 2, 2002 and recommended obtaining a new MRI scan.

The employing establishment referred appellant for a fitness-for-duty examination. On July 12, 2006 Dr. Wayne J. Altman, a Board-certified orthopedic surgeon, reviewed the history of injury and appellant's medical treatment. Appellant complained of intermittent low back pain that would radiate down his left leg. Dr. Altman set forth findings on examination, noting that straight leg raising was without evidence of radiculopathy and that appellant was within essentially normal limits. He advised that appellant could return to duty as a full-time letter carrier.

In a February 1, 2007 duty status report, Dr. Sotudeh diagnosed lumbosacral spine syndrome and continued work restrictions on lifting 20 pounds for four hours a day; sitting, standing and reaching above his shoulders for two hours a day; and walking for one hour a day. He prohibited appellant from climbing, kneeling and pushing/pulling.

On April 11, 2007 additional diagnostic studies were obtained. Multiple views of the lumbosacral spine revealed disc space narrowing and facet hypertrophy at L5-S1. The vertebral bodies and pedicles were intact. There was no evidence of compression fracture or spondylolisthesis. The pelvis revealed no evidence of fracture, dislocation or other bony abnormality.

The Office referred appellant to Dr. Robert Israel, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated April 17, 2007, Dr. Israel reviewed the history of injury and the medical evidence of record. On examination, the lordotic curve was normal with no spasm or tenderness of the paraspinal muscles on palpation. Sitting Laseque's testing was negative to 80 degrees and straight leg raising was bilaterally negative to 75 degrees in the seated and supine positions. Dr. Israel found no sensory deficit and advised that muscle strength of both lower extremities was full and equal. He found no evidence of atrophy. Dr. Israel

---

[1] An August 7, 2002 magnetic resonance imaging (MRI) scan showed disc bulging and right foraminal stenosis at L5-S1, a bulging disc with facet hypertrophy at L4-5 and a mild disc bulge at L3-4.

[2] On November 14, 2004 appellant underwent diagnostic testing degenerative changes in the thoracic spine with moderate spondylosis and arthritis in the shoulders and ankles.

diagnosed a resolved sprain of the lumbar spine and advised that appellant had no residual disability. He recommended appellant's return to full duty as a letter carrier without restrictions.

In an April 20, 2007 note, Dr. Sotudeh advised that appellant continued to complain of low back pain radiating to the lower extremities, which was worse with prolonged standing, sitting, walking or going up and down stairs. He continued appellant's work restrictions.

The Office found that a conflict in medical opinion arose between Dr. Sotudeh and Dr. Israel on the nature and extent of any disabling residuals and appellant's capacity for work. In a December 7, 2007 letter, it referred appellant to Dr. Michael J. Katz, a Board-certified orthopedic surgeon, for an impartial medical examination.

In December 19, 2007 report, Dr. Katz reported findings on examination of appellant's lumbar spine, noting no paravertebral muscle spasm and a full range of motion. Straight leg raising was reported as normal and sensory examination was reported as full with reflexes found to be symmetrical bilaterally. Babinski's and Patrick's tests were negative. Dr. Katz reviewed the statement of accepted facts, noting that the claim was accepted for displacement of the lumbar vertebral area, spinal stenosis and thoracic spine pain. He reviewed the reports of the physicians of record and diagnostic test results. Dr. Katz diagnosed a resolved lumbar strain. He advised that the employment injury caused an aggravation of underlying degenerative disc disease and spinal stenosis that had since resolved. Dr. Katz stated that appellant did not have any current disabling condition and found that he could return to work full time as there were no objective findings relative to the 2002 employment injury. He noted that appellant did not require any work limitations as his condition had resolved without disability and he was capable of performing his usual job.

In a May 15, 2008 duty status report, Dr. Sotudeh listed restrictions, noting that appellant could only lift 15 pounds, sit for three hours, stand for one hour and perform fine manipulation for two hours. He prohibited walking, climbing, kneeling, bending, stooping, twisting and operating machinery.

In a May 21, 2008 letter, the Office notified appellant that it proposed to terminate his compensation benefits. Appellant was advised to submit additional evidence within 30 days if he disagreed with the proposed action.

In a June 2, 2008 report, Dr. Mark Armstrong, a Board-certified radiologist, obtained an MRI scan of the lumbar spine. He noted decreased disc height at L4-5, mild spurring of the endplates diffusely, no compression fractures and no spondylolisthesis. Dr. Armstrong characterized the spinal canal as unremarkable. Axial imaging revealed a broad lobular herniation at L4-5 that impinged on the thecal sac and left neural foramen. There was a broad bulge found at L5-S1 causing canal and foraminal stenosis.

In a June 18, 2008 letter to the employing establishment, Dr. Sotudeh noted that appellant complained of pain radiating down the left leg. On examination, he listed restrictions in flexion and extension of the lumbosacral spine. Dr. Sotudeh advised that straight leg raising was positive on the left and within normal limits on the right. In light of the recent MRI scan, he advised that appellant was being referred to a neurologist and for pain management.

In a June 19, 2008 note to the employing establishment, Dr. Afshan Khan, a Board-certified neurologist, stated that appellant was seen on June 11, 2008 for complaint of persistent low back pain with numbness. He noted that appellant's lumbar MRI scan was abnormal with lobular herniation to the left at L4-5 and disc bulge at L5-S1. Dr. Khan advised that appellant was to work four hours a day and not lift more than 15 pounds.

In a July 23, 2008 decision, the Office terminated appellant's compensation benefits effective August 2, 2008. It found that the weight of medical opinion was represented by Dr. Katz, the impartial medical specialist. The new medical evidence submitted by appellant diagnosed a disc herniation at L4-5, which had not been accepted as employment related. It found that neither Dr. Sotudeh nor Dr. Kahn provided adequate medical opinion addressing how the accepted injury caused or contributed to this condition.

On July 31, 2008 appellant requested an oral hearing which was held on December 18, 2008. He discussed his 2002 employment injury and medical treatment, contending that his examination by Dr. Katz had been cursory. Counsel contended that the opinion of Dr. Katz was not sufficient to support the termination of benefits. In a January 12, 2009 letter, counsel argued that the record did not establish that Dr. Katz was properly selected from the PDS.

In a February 24, 2009 decision, the hearing representative affirmed the termination of appellant's compensation benefits; however, the case was remanded for the Office to refer the June 2, 2008 MRI scan study to Dr. Katz for review and comment.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[4] The Office's burden of proof includes the necessity of furnishing medical opinion evidence based on a proper factual and medical background.[5]

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: 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 make an examination.[6] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.[7]

---

[3] *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

[4] *Id.*

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

[6] 5 U.S.C. § 8123(a).

[7] *Williams C. Bush*, 40 ECAB 1064, 1075 (1989).

It is well established that Office procedures provide that an impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists, including those certified by the American Medical Association and American Osteopathic Association.[8] The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, the Office has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.[9] These procedures contemplate selection on a strict rotating basis in order to negate any appearance that preferential treatment exists between a physician and the Office.[10] Moreover, the reasons for the selection made must be documented in the case record.[11]

ANALYSIS

The Office accepted appellant's claim for displacement of a lumbar disc and spinal stenosis of the lumbar and thoracic spine. Due to a conflict between appellant's physician, Dr. Sotudeh, who found that appellant had continuing disability and residuals due to his accepted conditions, and the second opinion physician, Dr. Israel, who advised that appellant had no remaining disability or residuals, the Office referred appellant to Dr. Katz, as the impartial medical specialist to resolve a conflict in medical opinion. In a medical opinion dated December 19, 2007, Dr. Katz found that appellant's lumbosacral strain had resolved, noted that there were no objective findings to establish any ongoing problems relative to appellant's 2002 employment injury and stated that appellant had no work limitations.

On appeal, counsel contends that the Office did not properly select Dr. Katz as the impartial medical specialist. Under its procedures, the Office claims examiner is to assure that the impartial medical specialist is selected in conformance with the PDS from those Board-certified specialists who are qualified and available to conduct the examination. The procedure manual provides that the case file is to be supplemented with documentation of those instances in which a physician was contacted and declined the referral or examination is not otherwise feasible.[12] The district Office is to document in the case record how the rotational procedures were followed.

The evidence of record does not provide adequate documentation pertaining to the selection of Dr. Katz as the impartial medical specialist. A referee medical referral form of record is dated November 2, 2007 to which the claims examiner noted contact with an individual identified as "Patti" on November 8, 2007 to schedule an examination for December 19, 2007.

---

[8] *See LaDonna M. Andrews*, 55 ECAB 301 (2004).

[9] *See Raymond J. Brown*, 52 ECAB 192 (2001).

[10] *Id.* *See also Miguel A. Muniz*, 54 ECAB 217 (2002).

[11] *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003). A claimant may ask to participate in the selection of the impartial medical specialist under certain conditions; however, no request was made in this case.

[12] *Id.* at Chapter 3.500.4(b)(7).

The evidence does not reflect whether Dr. Katz was the first physician so contacted on that date, that he was next on any list maintained by the Office or provide any reference to the rotational procedures for selecting the impartial medical specialist. There appears to have been some computer difficulty as a memorandum of file stated that an appointment was made but the Office's computer system prevented "the bronzing of the ME023." Internal e-mails dated November 8 and 9, 2007 document difficulties with the computer system and generally advise that documents to be imaged be placed in internal trays for processing. This evidence, however, is not adequate to establish that Dr. Katz was properly selected in compliance with the rotational system using the PDS. For this reason, the Board finds that Dr. Katz was not properly selected as the impartial medical specialist. The Office's decision terminating appellant's compensation benefits must be reversed due to an unresolved conflict in medical opinion.

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits as of August 2, 2008.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2009 and July 23, 2008 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: June 2, 2010
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