

File Number:
HR12-D-H

RECEIVED MAY 03 2011

U.S. DEPARTMENT OF LABOR

OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 50
LONDON, KY 40742-8300
Phone: (202) 693-0045

APR 26 2011

Date of Injurv:
Employee:

Dear Mr. _____ :

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on 02/07/2011. Based upon that hearing, it has been determined that the decision of the District Office should be reversed as outlined in the attached decision.

Your case file has been returned to the Jacksonville District Office. You may contact that office by writing to our Central Mail Room at the following address:

US DEPARTMENT OF LABOR
OFFICE OF WORKERS' COMP PROGRAMS
PO BOX 8300 DISTRICT 6 JAC
LONDON, KY 40742-8300

Sincerely,



Carol E. Adams
Hearing Representative

PAUL H FELSER
FELSER LAW FIRM, P.C.
POST OFFICE BOX 10267
SAVANNAH, GA 31412

U.S. DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et. seq. of
claimant; Employed by the _____; Case number _____ -A
hearing was held on February 7, 2011.

The issue for determination is whether the Office has met its burden of proof to terminate compensation and medical benefits.

The claimant was employed as a _____ for the _____. He filed a traumatic claim for date of injury of _____. His case was accepted for lumbar strain.

The claimant stopped working on the date of injury and has not returned to work. He was paid compensation by automatic payments every twenty-eight days.

On March 28, 2008 x-rays of the lumbar spine were performed, which revealed that the claimant had moderate degenerative disc disease (DDD) at her L5-S1 and moderate osteoarthritic facet change of the lower three levels.

A MRI was performed on April 4, 2008 that showed the claimant had L2-3 and L3-4 disc bulges, containing annular tears, which impinged upon the thecal sac and degenerative disease.

EMG/NCS tests were performed on July 30, 2008. The tests were interpreted by Dr. _____. Dr. _____ found, on review of the EMG, that there was no evidence of radiculopathy. The doctor found some decrease insertions in some muscles, which were not specific. He also found decreased recruitments in some muscles, which were due to low back pain. The doctor found that the nerve conduction study was within normal limits.

A CT scan was performed on August 25, 2008. Dr. _____ reviewed the scan and found mild diffuse bulge with a small right paramedian disc protrusion at the L3-L4; mild diffuse bulge with a small left paramedian disc protrusion at L4-L5 and mild diffuse bulge moderate endplate osteophyte spurring and facet arthropathy at the L5-S1, causing bilateral foraminal stenosing.

An MRI was done on May 15, 2009 and was read by Dr. _____. The doctor found multilevel degenerative changes most significant at the L5-S1 level with spinal canal more significantly affected at the L3-L4 and minimal focal central disc protrusion at L4-L5, which the doctor noted had improved.

The claimant was treated by Dr. _____ for lower back muscle spasms and ongoing sciatica since the injury. Dr. _____ consistently found that the claimant was not able to work.

Dr. _____ referred the claimant to Dr. _____, neurologist, for additional evaluation.

Dr. Robinson, in his report dated June 18, 2009, determined that the claimant's pre-existing condition had been aggravated by the work injury and that the claimant's condition had not returned to its pre-injury state. The doctor determined that the claimant's condition was work-related and was disabling at that time. He also ordered additional testing.

The claimant was seen again by Dr. _____ on July 13, 2009. The doctor recommended that the claimant have posterior decompression at the L4-5 and L5-S1 levels to the right side.

The Office referred the claimant for a second opinion evaluation. The claimant was examined by Dr. _____ on July 8, 2009. The doctor diagnosed the claimant with aggravation of the DDD at the L5-S1 and non work-related Sjogren's syndrome. In response to the Office's question as to whether the claimant had work-related back strain, the doctor stated that the claimant still had some spasms and loss of motion. He also noted that the acute symptoms of the lumbar sprain had resolved but that the claimant still had some chronic loss of motion and spasm. He noted that the claimant also had multiple disc bulging and DDD at the L5-S1, which was asymptomatic for 5 to 6 years prior to the work injury. In response to the question as to whether there was any objective findings that the current condition was a result of the work factors of the March 18, 2008 injury, the doctor stated,

The claimant states that he had a five- to six-year period where he had no pain after he had pulled his muscles five or six years ago. His examination revealed some loss of motion, but no focal neurological signs. The most recent CT myelogram showed lumbar disc bulges and degenerative disc disease at L5-S1. The claimant's condition became symptomatic with an injury at work. It is more likely than not that he had some pre-existing degenerative changes in the spine, especially at L5-S1. The injury could have resulted in some disc bulges. He still has limited range of motion of his back and some spasm.

Further, Dr. _____ also found that the claimant had work-related restrictions from the March 18, 2008 work incident and completed a work restriction form. The doctor indicated that the restrictions were temporary but stated that it was unlikely that the claimant would resume regular duties. The doctor did not recommend surgery for the disc disease, since the claimant did not have significant radiculopathy.

The Office determined there was a conflict in medical as to whether the claimant had the ability to work. Therefore, a referee examination was scheduled with Dr. _____ to resolve the conflict in medical opinion.

In a report dated March 11, 2010, Dr. _____ found that the claimant's work-related condition had resolved and that his remaining symptoms were due to DDD. The doctor believed the DDD

was due to the natural aging process. He determined that the claimant's work restrictions were due to the claimant's chronic pain with DDD and Sjogren's syndrome and not the result of the work injury.

The Office determined that the weight of medical evidence was held by the referee opinion. On May 21, 2010, the Office issued a proposed termination of compensation and medical benefits.

By letter dated June 14, 2010, attorney Paul Felser responded to the Office's proposed termination notice. The attorney provided the following arguments:

- That Dr. _____, the second opinion physician, supported that the claimant had continuing work-related residuals – but the Office failed to ask whether the conditions were aggravated, exacerbated or accelerated by the work injury.
- That Dr. _____, in his report dated June 18, 2009, found that the injury-related condition still existed and was disabling at that time and had not resolved and the claimant had sustained an aggravation of a pre-existing condition that had not returned to its pre-injury status.
- That the claimant had established *prima facie* evidence for expansion of the claim to include aggravation but the Office neither asked the medical consultants, if the work injury had caused an aggravation of the pre-existing condition(s), nor asked Dr. _____ for further clarification of his opinion regarding aggravation.
- That both Dr. _____ and Dr. _____ found the claimant disabled from working and was in need of surgery to resume gainful employment.
- That, given Dr. _____ report, the Office should have undertaken further development of the issue of aggravation of the pre-existing conditions with him.
- That Dr. _____, the referee physician, did not adequately resolve the conflict in medical opinion in that he did not provide adequate discussion of the claimant's baseline state and how the claimant's condition had resolved and had returned to it.
- That the Office confused the claimant's case with another case in that the Office stated in its decision that a Dr. _____ medical opinion represented the weight of medical evidence; however, the claimant was never treated or examined by Dr. _____. The attorney argued that this was clear error because it appeared the Office based its decision on a report that did not exist in the case and in order to provide due process a new decision would need to be issued, based on the evidence of the claimant's case alone.

In addition to the attorney's arguments, after the proposed notice was issued, several medical reports were received.

The Office reviewed the new medical evidence but determined that the weight of medical evidence was still held by the referee examiner. Therefore, by decision dated September 24,

2010, the proposed action was made final and all compensation and medical benefits ceased. The Office did not address the attorney's arguments in the decision.

The claimant disagreed with the decision and requested a hearing before an OWCP representative.

A hearing was held on February 7, 2011. The claimant was represented by attorney Paul Felser.

~~A copy of the hearing transcript was sent to the employer for comment. No comments were submitted.~~

After review of the evidence, I find the decision of the Office must be reversed.

Dr. _____, the second opinion physician, found that the claimant's pre-existing condition had been aggravated. He noted that the claimant still had objective findings of the work injury that prevented him from performing the full duties of the position. Dr. _____ also speculated that the bulging discs could have occurred as the result of the accident. Since Dr. _____ opinion was not well rationalized, regarding the aggravation of the DDD of the lumbar spine, the Office should have asked the doctor to provide reasoning for his opinion. Also, the doctor should have been advised to provide an opinion, within reasonable medical certainty, as to whether the bulging discs were or were not caused by the work incident. The Board has often disapproved of the Office shopping for medical opinions. While most of the cases involved an impartial medical specialist, resolving a conflict of medical opinion, the Board has also applied the prohibition against shopping for a favorable medical opinion to the securing of a second opinion. The Board has stated that when the Office selects a physician for an opinion on causal relationship, it has an obligation to secure, if necessary, clarification of the physician's report and to have a proper evaluation made.¹ The referee opinion was pre-mature in that the Office should have resolved the issue as to whether the bulging lumbar spine discs and the DDD of the L5-S1 were caused, aggravated or accelerated by the work incident. On this issue there was no conflict in medical opinion in that the second opinion clearly implied that the conditions were work-related.

On remand the Office should write to Dr. _____ and asked him to provide a clear reasoned opinion as to whether the claimant's DDD at the L5-S1 was aggravated or accelerated by the work incident. Also, the doctor should be asked to provide a clear reasoned opinion as to whether the lumbar bulging discs were directly caused, aggravated or accelerated by the work incident. If the doctor provides an adequate report to establish that the above mentioned conditions are work-related, the conditions should be accepted. If Dr. _____ fails to respond or does not adequately respond, a new second opinion evaluation should be obtained to resolve the issue. If the doctor needs to examine the claimant again, it should be authorized.

I also find that the Office asked the referee physician the same questions it asked the second opinion physician. The Office should have resolved the issues on causal relationship of the other conditions by clarifying it with the second opinion physician before going to another doctor for an opinion. Also, as stated above, the Office should have scheduled another second opinion to

¹ Steven P. Anderson, 51 ECAB 525 (2000)

answer the questions, if the first second opinion failed to do so. As an aside, it should be noted that the referee opinion was not well reasoned and was of little value to resolve the issue of casual relationship of the pre-existing conditions. The only issue that was in conflict for the referee to decide was whether the claimant's work-related conditions prevented the claimant from working. This was the only opinion that could be given special weight of a referee opinion. However, I find that the referee doctor could not provide an informed opinion on all the facts of the case, until the Office resolved the issue as to whether the other conditions of DDD of the L5-S1 and the bulging discs were work-related. Therefore, the referee's opinion had very little value.

The Board has long held that proceedings under the Act are not adversarial in nature nor is the Office a disinterested arbitrator. The Office has the obligation to see that justice is done.² Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ The test of "disability" under the Federal Employees' Compensation Act is whether employment related impairment prevents the employee from engaging in the kind of work he or she was doing when injured.⁵ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶ To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which require further medical treatment.⁷

² *Rebel L. Cantrell*, 44 ECAB 660 (1993).

³ *Jorge E. Sotomayor*, 52 ECAB 105 (2000)

⁴ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁵ *David H. Goss*, 32 ECAB 1868 (1981).

⁶ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁷ See note 4, *Mary A. Lowe*

After review of the evidence, I find that the Office has failed to meet its burden to terminate compensation and medical benefits. In accordance with the above findings, the decision of the Office dated September 24, 2010 is **reversed, and compensation and medical benefits are reinstated to the date of termination.** Since it appears the claimant applied for retirement benefits, the Office should ensure the claimant is not receiving OPM benefits before paying compensation. The case is also **remanded** for additional development as stated above.

Date: ~~APR 26 2011~~

Washington, D.C.



Carol Adams
Hearing Representative
for
Director, Office of Workers'
Compensation Programs