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U.S. DEPARTMENT OF LABOR

JAN 14 2016

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

Date of Injury:
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 11/12/2015. As a result of such hearing, it has been determined that the decision issued by the district office should be vacated and the case **remanded** to the district office for further action as explained in the enclosed copy of the Hearing Representative's Decision.

Since the enclosed order provides for the reinstatement of compensation for wage loss, you must forward a completed CA7 to the District Office cited below, through your employing agency.

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,



Karen S. Hunt
Hearing Representative

PAUL H FELSER, ESQ
P. O. BOX 10267
SAVANNAH, GA 31412

If you have a disability (a substantially limiting physical or mental impairment), please contact our office/claims examiner for information about the kinds of help available, such as communication assistance (alternate formats or sign language interpretation), accommodations and modifications.

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
employed by the case file number
The hearing was held on November 12, 2015.*

The issue is whether the Office met its burden of proof to terminate wage-loss compensation and medical benefits.

The _____ employed the claimant, _____ as a _____
_____ in _____. The claimant sustained a back
injury in the performance of duty on _____ while lifting a metal storage cabinet.
He timely filed a claim that was eventually accepted by the Office for lumbar
radiculopathy and lumbar spondylosis. The claim was subsequently allowed for
permanent aggravation of lumbar degenerative disc disease at L4-5. The claimant
stopped work in _____.

The medical evidence indicated pre-existing lumbar degenerative disc disease. The
Office development letters did not request that the claimant provide information and
medical records related to any back injuries prior to _____. An _____
report by attending orthopaedic specialist _____ stated he did not have any
information on any prior treatment of the claimant's back or any prior injuries to his
lumbar spine. The claim was accepted on reconsideration despite a lack of medical
rationale supporting a causal relationship between the diagnosed conditions and the
_____, work incident. In an April 12, 2007, hearing on the claim, the claimant
testified he had prior low back problems related to a work injury 24 to 25 years prior, but
he had no problems in the three to four years prior to the _____ work incident.

A September 29, 2008, second opinion report by _____ M.D., was based on
a statement of accepted facts (SOAF) which did not note any prior back injuries or pre-
existing conditions. Dr. _____ stated the claimant denied any previous problems with
his back except for occasional muscle spasms. Dr. _____ noted over-exaggeration of
physical findings following non-anatomic guidelines. Dr. _____ opined the claimant had
continuing residuals of the work injury noting he was "psychologically wrapped up" in his
back pain without explaining the medical connection between the work incident and the
diagnosed lumbar radiculopathy and spondylosis. He noted the claimant's overlying
complaints masked any objective findings that might be present. Dr. _____ indicated the
claimant was totally disabled due to the medication he took and due to his psychological
condition. The Office did not request additional clarification or explanation from Dr. _____.

The claimant was again referred for a second opinion examination by M.D., a Board-certified orthopaedic surgeon, on [redacted]. A revised SOAF did not note any prior back injuries or pre-existing conditions and Dr. [redacted] did not make note of any prior back injuries. Dr. [redacted] opined that the claimant continued to have disabling residuals of the work injury and indicated that although he had existing lumbar disc disease and degenerative arthritis at the time of the injury the exacerbation had become permanent in nature. Although Dr. [redacted] did not provide a medical explanation of how the work incident caused such permanent aggravation, the Office subsequently expanded its acceptance of the claim to include the diagnosis of permanent aggravation of lumbar degenerative disc disease at L4-5.

The claimant began to treat with [redacted] M.D., a pain management specialist, in 2012. Dr. [redacted] reports do not give a history of any back injuries or treatment prior to the 2006 work incident. Dr. [redacted] gave a history that the claimant stated he was hurt at work in 2006 on base, but did not describe the mechanism of injury. Dr. [redacted] additionally diagnosed cervical spinal stenosis, degeneration of cervical intervertebral disc, and intervertebral cervical disc disorder with myelopathy. Dr. [redacted] has continued to treat the claimant and to provide updated reports that do not reflect a history of the mechanism of the work incident, provide minimal physical examination findings, and which do not provide a medical explanation of the connection between the claimant's current conditions and the [redacted] work incident.

The claimant was referred for a second opinion examination to determine the extent of remaining injury-related disability and was examined by Board-certified orthopaedic surgeon, [redacted] on [redacted]. Dr. [redacted] gave a history of the [redacted] work incident and noted that the claimant stated he had no previous history of any injury to his back of a job-related or non-job-related nature. The claimant denied any prior work injuries other than a right wrist injury about 30 years prior for which he elected not to have any type of surgical intervention. Dr. [redacted] noted the claimant's course of treatment for the work injury and the claimant's current complaints. Dr. [redacted] provided physical examination and x-ray findings and diagnosed significant degenerative disc disease at L4-5 and to a lesser extent at L5-S1. Dr. [redacted] then stated he did not dictate the remainder in front of the claimant as he wanted to investigate the claim further in lieu of the claimant's answers to his questions. Dr. [redacted] noted the claimant categorically denied any previous history of injury to his back other than he may have sustained a strain to the back, but nothing major. Dr. [redacted] stated he did not confront the claimant with the fact that he previously saw the claimant in his office. Dr. [redacted] then noted he had initially evaluated the claimant for an independent medical examination on [redacted] and treated him until [redacted]. During that time Dr. [redacted] had extensive review of previous treatments of the claimant and the fact was revealed that in final settlement under the State Board of Workers Compensation, under Judge [redacted] Dr. [redacted] noted there were several interesting factors in reference to Claim [redacted] case of [redacted] accident date [redacted] dated [redacted] under the State Board of Workers Compensation, Georgia. He noted that in that particular section #3, Judge [redacted] found that the claimant had a bad back for twelve to fourteen years prior to the [redacted].

injury, and found the claimant had suffered injuries to his lower back following the employment of no fewer than five previous employers. The judge further found the claimant sought to conceal the full extent of his history from the employer and from his treating physician and from counsel by either failing to tell them of his history or deliberately denying it. Judge [redacted] found the claimant was not a credible witness. Dr. [redacted]

stated his interest was piqued by the small wire fragment over the right iliac crest identified in the claimant's x-rays. He noted he had not destroyed any x-rays since he had been in practice since [redacted] and he was able to pull up x-rays taken of the claimant's lumbar spine on [redacted]. The lumbar spine films clearly showed that in [redacted]

the claimant had degenerative disc disease of a significant nature at the L4-5 level. Dr. [redacted] opined that the claimant had pre-existing disease process and that the claimant had been less than honest in his response to questions of previous examiners and his treating physicians. He noted that with the inconsistencies in the claimant's physical examination and the fact that the claimant had a prior problem with his back, it was his opinion that the claimant probably sustained a lumbar strain with the [redacted]

work injury. The claimant had significant pre-existing injury to the lower back and based on the diagnostic tests and previous films from [redacted] that the claimant had credible evidence of pre-existing disease which he had utilized in curtailing his work activities with previous employers. Dr. [redacted] opined the accepted conditions had resolved or returned to baseline, noting an EMG shortly after the work incident already showed significant injury to the S1 nerve root and that the fact such injury appeared in only two months spoke to the fact it was a pre-existing condition. Dr. [redacted] noted subjective complaints greatly outweighed objective findings. Dr. [redacted] further opined there was an issue of drug dependence based on the claimant's use of strong narcotics and the claimant was attempting to manipulate the system because he had refused back surgeries because it could not enable him the further use of narcotics. Dr. [redacted] felt the injury-related limitations would have resolved within twelve months of the initial injury and noted he had never seen a more clear-cut case of manipulative behavior in the use of pre-existing disease processes for material gain. Dr. [redacted] did not provide a copy of the [redacted] compensation decision by [redacted] or reports of the [redacted] lumbar x-rays referenced and on which his opinion was based in part.

The Office requested a supplemental report from Dr. [redacted] regarding whether the work incident caused a material worsening of the claimant's pre-existing lumbar spine condition and if he believed there was a temporary aggravation of symptoms, to explain why he believed the condition had returned to baseline.

Dr. [redacted] responded on [redacted]. He stated he agreed to a temporary aggravation that would not have prolonged beyond three months, maximum. Dr. [redacted] explained that his conclusion was based on the degree of the injury as described from the initial lifting episode as well as the inconsistencies in the claimant's clinical examination indicating a trend toward symptom magnification. He noted that the claimant had engaged in symptomatic treatment prior to the injury and he continued to complain of pain and discomfort and he would certainly expect him to complain of extended pain and discomfort after the [redacted] work injury. Dr. [redacted] also thought the fact that the claimant attempted to mislead him and the previous examiners as to the [redacted]

existence of prior injuries was also of clinical and factual significance. The Office did not request that Dr. _____ provide a copy of the decision or 1993 lumbar x-ray report.

By letter dated _____ the Office advised the claimant that it proposed to terminate his wage-loss compensation and medical benefits for the reason that the weight of the medical evidence, represented by the opinion of Dr. _____ established that his injury-related conditions and disability had ceased. The Office afforded the claimant 30 days to provide evidence and/or argument to the contrary.

The Office received an April 3, 2015, report by _____ an orthopaedic specialist from whom the claimant sought additional examination and opinion. Dr. _____ noted he reviewed information including notes from the Nexus Pain Center of _____ radiology reports, an _____ MRI, second opinion evaluations from two physicians in _____ and, office notes from _____ by Dr. _____ Dr. _____ related a history of the _____ work incident. He also noted that the claimant injured his low back on another on-the-job injury "about 30 years ago" and that he stayed in bed for about three weeks then his symptoms improved. Since then the claimant had off and on episodes of back strains and sprains "but he has continued to work." Dr. _____ noted the claimant's course of treatment and current complaints. He provided physical examination and x-ray findings and diagnosed severe degenerative disc disease at L4-5 with neuropathy of the S1 nerve root on the left and chronic low back pain syndrome. Dr. _____ noted apparent x-rays prior to the injury that showed degenerative disc disease and noted that the most recent MRI findings. Dr. _____ did not doubt that the claimant had an exacerbation of his symptoms after the _____ injury but thought the symptoms from the injury would have resolved within a few months. He felt that the subjective symptoms were much greater than either the physical findings or radiographs or MRI. Dr. _____ noted he could not medically correlate the claimant's symptoms with either the physical or MRI findings. He indicated the claimant was not employable due to his current state of symptoms and narcotic use and opined that the claimant's current condition was not medically secondary to the _____ injury. Dr. _____ recommended no other therapy or treatment other than possibly a detoxification trial.

By decision dated April 14, 2015, the Office made the proposed termination of benefits final effective that date.

The claimant disagreed with the Office decision and by letter dated April 22, 2015, his then attorney, Alan Shapiro, requested a telephone hearing.

The Office subsequently received a notice of representation by attorney Paul Felser, who requested an oral hearing.

The Office continued to receive documentation of continuing treatment that did not provide a complete and accurate history or explanation of the medical connection

between the claimant's current conditions and the _____ work incident. Dr. _____ stated only that the claimant was unable to do a job because of his back injury.

The claimant submitted a _____ letter requesting reconsideration of the Office decision, arguing that Dr. _____ opinion should be afforded the weight of the evidence. The claimant perceived that Dr. _____ statements that he had refused any surgeries or procedures were lies and that Dr. _____ had not provided a complete or adequate examination. The claimant acknowledged that Dr. _____ had treated him in _____ when he broke his right wrist on another job and that he had a "conflict of interest" with him then because he refused to let him do surgery on his wrist. The claimant submitted additional medical progress and drug test reports as well as copies of reports already of record.

By letter dated August 13, 2015, the district office advised the claimant that it would not reconsider his claim as a hearing had been requested previously.

The claimant submitted an August 21, 2015, letter to the Employees' Compensation Appeals Board (ECAB) requesting reconsideration and reiterating his arguments of July 21, 2015.

By letter dated September 16, 2015, the district office advised the claimant regarding his appeal rights and that as his case was current under the jurisdiction of the Branch of Hearings & Review that no action on the request for reconsideration unless he withdrew the hearing request.

By letter dated November 11, 2015, Mr. Felser advised that the claimant would be representing himself at the telephone hearing scheduled for November 12, 2015.

The telephonic hearing was held on November 12, 2015. The hearing transcript is of record.

The claimant explained the reasons he disagreed with the Office decision. He noted Dr. _____ treated him for a broken wrist in _____. Dr. _____ wanted to do surgery but the claimant did not want to have surgery and they had a conflict about that. The claimant testified that he knew he had already had a conflict with Dr. _____ at the time he was referred to Dr. _____ by the Office. I explained the Office did not have knowledge that he was previously treated by Dr. _____ at the time of the referral. The claimant indicated Dr. _____ spent fifteen minutes with him. He asked the claimant a few questions but did not check him out like other doctors had. The claimant asserted Dr. _____ was untruthful in his report and never really evaluated him. I questioned the claimant regarding items noted by Dr. _____. He indicated Dr. _____ did not ask him to toe or heel walk and that he could not do it. The claimant admitted Dr. _____ checked his reflexes, had him lie on the table and did a leg lift, and tried to bend his legs. The claimant felt Dr. _____ did not perform sufficient testing and the examination was inadequate. The claimant thought other doctors to whom he had been referred by the Office had done a thorough examination and Dr. _____ did not do half of what they

did. He also denied that he refused surgery or anything else. Dr. _____ recommended that he not have implant surgery. I noted Dr. _____ cited a prior relationship with the claimant for a state workers' compensation case. The claimant testified he did not have a copy of the decision on the state workers' compensation hearing. The claimant agreed that in final settlement under a case called State Board of Workers' Compensation with Judge Gordon Zesse that the judge found he had a bad back for twelve to fourteen years prior to the 1993 injury and that he had suffered injuries to his lower back with no less than five prior employers. The claimant noted his treating physician told the Office that he would never be able to do any work.

The employing establishment did not provide comments.

I have reviewed the evidence and testimony of record and find that the case is not in posture for a determination as the evidence requires further development.

The Office may terminate or suspend compensation benefits only under certain specified circumstances: when a claimant refuses an offer of suitable employment; when the Office establishes that the disability for which compensation has been paid has ceased or is no longer causally related to the employment injury; when a claimant refuses to assign or prosecute an action in his own name as required by the Secretary under section 8131(b) of the Act; and under section 8123 of the Act when a claimant fails to undergo or obstructs a scheduled medical examination.¹

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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.²

To discharge its burden of proof, it is not sufficient for the Office to simply produce a physician's opinion negating causal relationship. As with the case where the burden of proof is upon a claimant, the Office must support its position on causal relationship with a physician's opinion which is based upon a proper factual and medical background and which is supported by medical rationale explaining why there no longer is, or never was, a causal relationship.³

The Office accepted the instant claim for lumbar radiculopathy, lumbar spondylosis, and permanent aggravation of lumbar degenerative disc disease at L4-5. The medical evidence did not contain a physician's explanation of the medical connection between those conditions and the _____ lifting incident at work, particularly given that the evidence showed pre-existing lumbar degenerative disc disease. The Office also failed to request information and documentation from the claimant regarding any back injuries or conditions prior to the _____ work incident. The initial treating physician, Dr.

¹ William C. Austin, 39 ECAB ____ (1988).

² Adina D. Blanco, 39 ECAB ____ (1988).

³ Frank J. Mela, 41 ECAB 115, 125 (1989).

noted he had no information on any prior treatment of the claimant's back or any prior injuries to his lumbar spine. In a hearing on the claim, the claimant testified he had prior low back problems related to a work injury years prior, but he had no problems in the three to four years prior to the work incident.

The Office did not request further information regarding the prior back injuries or conditions. The Office referred the claimant for a second opinion examination by Dr.

but the SOAF did not note any prior back injuries or pre-existing conditions. Dr. Owen stated the claimant denied any previous problems with his back except for occasional muscle spasms and he noted over-exaggeration of physical findings following non-anatomic guidelines. The claimant was later referred for a second opinion examination by Dr. who did not note any prior back injuries and failed to provide a medical explanation of how the work incident caused permanent aggravation of the lumbar degenerative disc disease at L4-5.

The claimant began to treat with Dr. whose reports did not give a history of any back injuries or treatment prior to the work incident and did not specifically describe the mechanism of the work incident. Dr. reports do not provide complete physical examination findings or rationale to support a causal relationship between the claimant's current conditions and the work incident. The claimant was referred for another second opinion examination and was examined by Dr.

Office procedures do not prohibit a second opinion referral to Dr. and the claimant's prior relationship with Dr. was more than 20 years prior. The fact that the claimant did not agree with Dr. recommendation for right wrist surgery at that time does not establish that any serious or protracted disagreement or argument existed between them then or at the time of the second opinion examination. The claimant raised no objection to the referral to Dr. prior to the examination. The claimant did not allege that Dr. was in any way biased, and argued only that Dr.

performed an inadequate physical examination and did not have him perform toe/heel walking as stated. Dr. noted the claimant denied any prior history of injury to his back of a job-related or non-job-related nature other than he may have sustained a strain to the back, but nothing major. Dr. then noted findings in prior treatment of the claimant from to and review of records of previous treatment. Dr. specifically noted a compensation case involving the claimant where the claimant was found to have had a bad back for twelve to fourteen years prior to the injury; to have suffered injuries to his lower back following the employment of no fewer than five previous employers; and, to have sought to conceal the full extent of his history from the employer, his treating physician, and counsel by either failing to tell them of his history or deliberately denying it. Dr. reviewed x-rays taken of the claimant's lumbar spine on in his possession. Dr. opined that the claimant's injury-related conditions had resolved or returned to baseline. The claimant did not argue that Dr. provided any false information regarding the findings in the noted compensation case, and agreed during his hearing testimony that such findings were made by Judge Zesse. Dr. opinions were based in part on the x-rays and medical evidence from and on the

compensation decision which are not part of the instant case record and his opinion is therefore of insufficient probative value to constitute the weight of the evidence.

On remand, the Office should request that Dr. _____ provide supplemental information including the medical treatment records and documentation regarding the prior injuries for which he treated the claimant, including the decision of Judge Zesse⁴, on which his opinions of December 9, 2014, and January 13, 2015, were in part based. The Office should simultaneously request that the claimant provide details of and medical records associated with any and all back injuries, conditions, and treatment prior to _____

Following receipt and review of this information, this Office should undertake any necessary further development or issue an appropriate decision regarding the claimant's entitlement to ongoing medical benefits and wage-loss compensation. As the Office did not meet its burden of proof to terminate compensation at the time its decision was issued it is required to reinstate such benefits.

Accordingly, the decision of the district office dated April 14, 2015, is set aside and the case record is returned to the district office for actions consistent with this decision.

DATED: JAN 14 2016

WASHINGTON, D.C.



KAREN S. HUNT
Hearing Representative
For
Director, Office of Workers'
Compensation Programs

⁴ I contacted Judge Zesse's office and the State of Georgia Board of Workers' Compensation to request a copy of the April 22, 1994, decision. I was advised that such records were destroyed after ten years.