United States Department of Labor
Employees' Compensation Appeals Board

G.S., Appellant	)	
and	)	**Docket No. 07-1307**
	)	**Issued: November 2, 2007**
DEPARTMENT OF THE INTERIOR, NATIONAL PARK SERVICE, LAKE MEAD RECREATION AREA, Boulder City, NV, Employer	)	

Appearances:
Gordon Reiselt, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 16, 2007 appellant filed a timely appeal from the merit decisions of the Office of Workers' Compensation Programs dated June 14 and October 3, 2006 and March 20, 2007 terminating his compensation and medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation and medical benefits effective June 14, 2006; and (2) whether appellant has established that he has any continuing employment-related disability after June 14, 2006.

FACTUAL HISTORY

On December 9, 2002 appellant sustained injury to his back while grading a rough road in the course of his federal employment. By letter dated January 15, 2003, the Office accepted

his claim for back strain. The Office later accepted appellant's claim for displaced intervertebrae disc. Appropriate compensation and medical benefits were paid.

On October 29, 2003 Dr. Hugh L. Bassewitz, appellant's treating orthopedic surgeon, released him to return to work as of October 29, 2003 with restrictions. Appellant was able to lift and push up to five pounds but could not climb, kneel or bend at the waist. He also received medical treatment from Dr. Michael Fishell, a physician Board-certified in pain management. Dr. Fishell commenced treating appellant on March 5, 2003 at the request of Dr. Bassewitz. In a report dated November 10, 2004, he conducted a physical examination and assessed appellant with "lumbar discogenic disruption with myelopathy." In a report dated October 19, 2005, Dr. Fishell indicated that appellant rated his pain from a 3 to a 6 on a 0 to 10 pain scale. Appellant took medication to treat his pain. As of his report on January 18, 2006, appellant reported to Dr. Fishell pain of 2 on a 0 to 10 pain scale.

By letter dated March 10, 2006, the Office referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion examination. Appellant had previously been seen by Dr. Swartz. In a March 28, 2006 medical report, Dr. Swartz noted that he last examined appellant on January 30, 2004. He opined:

> "[Appellant] has a disc bulge at L4-5, in addition to mild bulging at L2-3 and L3-4 without evidence of sciatic radiculopathy. He does have evidence of preexisting nonindustrial sciatic neuropathy from an old sciatic nerve laceration. This does not appear to be nerve root, however, and does not appear to be industrial.
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> "The diagnosed condition with respect to low back pain, and his left lower extremity numbness and burning, would have appeared to be medically connected to the work injury by aggravation and it appears that he has reached maximum medical improvement and does not appear to have a permanent aggravation. His current problem is preexisting."

Dr. Swartz noted that appellant's diagnosis would be multiple level disc disease and left lower extremity chronic sciatic neuritis, which were all preexisting conditions. He indicated that the diagnosed condition was medically connected to the work injury by aggravating a preexisting degenerative disease, a back strain and was temporary until June 9, 2003. Dr. Swartz opined that appellant could not perform his former job but was capable of working in a lighter capacity. He listed his prognosis as guarded, but noted that there is no further treatment to provide for the industrial claim but only for his nonindustrial low back and left lower extremity condition. Dr. Swartz disagreed with the need for Lortab or Flexeril, stating that a nonsteroidal anti-inflammatory would be considered reasonable.

In response to a clarification request by the Office, on May 10, 2006 Dr. Swartz reviewed Dr. Fishell's reports and found no basis for any change in his opinion. He noted that appellant's current disability was multifactorial and included the preexisting shortening and atrophy of his left lower extremity, chronic left sciatic neuropathy involving the left lower extremity and preexisting condition of multilevel degenerative disc disease. Dr. Swartz noted that the

combination of these preexisting problems caused his inability to perform his job, not the injuries with regard to his current claim.

On May 15, 2006 the Office issued a notice of proposed termination of medical and compensation benefits.

In a May 25, 2006 report, Dr. Fishell reviewed Dr. Swartz' opinion. He disagreed that appellant's preexisting conditions were the cause of his disability, stating that Dr. Swartz' conclusion that appellant's not participating in the work environment due to preexisting causes is "almost ludicrous" noting that appellant "was performing his duties prior to the December 9, 2002 employment injury, and the preexisting conditions were in existence at that time."

In a June 9, 2006 report, Dr. Swartz addressed the report of Dr. Fishell, stating that he overlooked the fact that there was mild disc bulging in the lumbar spine at two levels, that there was sciatic neuropathy, not radiculopathy, which had been with appellant most of his life. He again noted that appellant had a short atrophied left leg, which caused an imbalance of the back, pelvic and hip musculature, placing increased pain upon his low back with chronic sciatic neuropathy. Dr. Swartz stated that the report of Dr. Fishell did not change his opinion that appellant's "current problems are preexisting and the injury he sustained on December 9, 2002 has come and gone." Dr. Fishell noted that any further treatment would be considered nonindustrial and between appellant and Dr. Fishell.

By decision dated June 14, 2006, the Office terminated appellant's compensation benefits effective June 14, 2006 based on the opinion of Dr. Swartz.

On July 13, 2006 appellant requested reconsideration.

By letter dated August 28, 2006, Dr. Swartz stated that he "did not find that [appellant] continues to suffer objective residuals of the accepted displaced lumbar intervertebral disc per the accepted claim." He noted that appellant's continuing issues were due to numerous preexisting factors. Dr. Swartz noted that appellant had sciatic nerve pathology prior to the December 2002 claim and there was no evidence of anything different now. He noted that appellant did strain his back in December 2002 and that this took several months to subside, but "he did not have normal sciatic nerve or normal left lower extremity prior to the injury of December 2002." Dr. Swartz noted that this aggravation would have subsided by June 2003.

By decision dated October 3, 2006, the Office denied modification of its June 14, 2006 decision.

By letter dated November 10, 2006, appellant's attorney referred appellant to Dr. Barry R. Maron, a Board-certified orthopedic surgeon, for a medical opinion. In an opinion dated December 12, 2006, Dr. Maron discussed his physical examination and review of appellant's medical history and treatment. He stated that he disagreed with the conclusions of Dr. Swartz. Dr. Maron gave his diagnosis as displaced lumbar disc and unspecified back strain/sprain. He also noted a herniated nucleus pulposus and acute to chronic strain/sprain pattern which was the direct result from the two index injuries of August 21 and December 9, 2002. Dr. Maron opined that appellant was totally disabled by virtue of his age, education and experience.

By letter dated December 15, 2006, appellant requested reconsideration and submitted Dr. Maron's report.

By decision dated March 20, 2007, the Office denied modification of its October 3, 2006 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[1] The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.[2] The Office's burden of proof includes the necessity of furnishing medical opinion evidence based on a proper factual and medical background.[3] 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.[4]

Section 8123(a) 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 an examination.[5]

ANALYSIS -- ISSUE 1

In the present case, the Office accepted appellant's claim for back strain and displaced intervertebrae disc. Dr. Fishell, appellant's treating physician, indicated that appellant was still disabled and experiencing residuals from the accepted injury. Dr. Swartz, the second opinion physician, indicated that appellant had no residuals from the accepted condition. Rather, he attributed appellant's current condition to his preexisting medical conditions. Both Dr. Fishell and Dr. Swartz are Board-certified in their respective fields. Both physicians examined appellant, reviewed multiple medical records, and provided well-rationalized medical opinions. Both discussed appellant's prior history and his work injuries. Their opinions are in conflict as to whether appellant's accepted injury has resolved.

There is a disagreement between appellant's treating physician and the second opinion physician with regard to whether appellant has any continuing residuals or disability resulting from the accepted injury. The conflict of opinion arose prior to the termination of appellant's benefits in the June 14, 2006 decision. Because the Office relied on the opinion of Dr. Swartz to terminate appellant's compensation, it failed to meet its burden of proof.

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

[2] *Id.*

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

[4] *Id.*

[5] 5 U.S.C. § 8123(a); *Regina T. Pellecchia*, 43 ECAB 155 (2001).

CONCLUSION

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation and medical benefits.[6]

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 20, 2007 and October 3 and June 14, 2006 are reversed.

Issued: November 2, 2007
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

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

[6] In light of the disposition of this issue, the remaining issue is moot.