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J.H., Appellant)	
)	
and)	Docket No. 10-2145
)	Issued: July 13, 2011
DEPARTMENT OF HOUSING & URBAN)	
DEVELOPMENT, St. Louis, MO, Employer)	
)	

Case Submitted on the Record

Before:
 RICHARD J. DASCHBACH, Chief Judge
 MICHAEL E. GROOM, Alternate Judge
 JAMES A. HAYNES, Alternate Judge

On August 25, 2010 appellant filed a timely appeal from a May 4, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss benefits effective October 25, 2009.

On appeal, appellant's attorney asserts that the weight of the medical evidence establishes that she is totally disabled and that her benefits were improperly terminated because she did not have a pretermination hearing.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On October 3, 1979 appellant, then a 28-year-old clerk typist, sustained an employment-related injury when her chair fell backwards. The claim was accepted for lumbar and thoracic strains, subluxations of L1, L2 and L3 and an L4-5 disc herniation. Dr. Harlan C. Hunter, an osteopath, performed a laminectomy at L4-5 on June 16, 1980 and a fusion procedure from L4 to S1 on October 29, 1980. Appellant was separated from employment effective July 24, 1981.² She received appropriate continuation of pay and wage-loss compensation.

In 1983, appellant entered a pain management program. On June 16, 1983 Dr. Hunter advised that she could return to limited duty on a part-time basis but the employing establishment had no available positions. By decision dated December 15, 1983, OWCP reduced appellant's compensation, based on her ability to earn wages as a clerk typist. Appellant returned to private employment as a clerk typist with the State of Missouri on February 1, 1984 and continued this employment until September 20, 1989.³ She filed claims for compensation beginning September 21, 1989 and was placed on the compensation rolls.

On May 9, 1990, Dr. David B. Robson, a Board-certified orthopedic surgeon, performed a posterior spinal fusion at L4-5 and lumbar laminectomy and decompression from L3 to L5. He submitted reports that described appellant's condition and follow-up treatment. Dr. Robson found that she was totally disabled.⁴

² By decision dated September 30, 1981, the Merit Systems Protection Board affirmed the employing establishment's action.

³ At the time appellant stopped private employment, she was a clerical supervisor.

⁴ In an October 15, 2002 report, Dr. Daniel G. Sohn, OWCP's referral physician and a Board-certified physiatrist, advised that appellant could work eight hours of limited-duty daily. An October 24, 2002 functional capacity evaluation showed submaximal effort. OWCP found a medical conflict between Drs. Robson and Sohn, and referred appellant to Dr. Suseela Samudrala, a Board-certified physiatrist, for an impartial evaluation. In a December 11, 2002 report, Dr. Samudrala advised that appellant's physical findings did not correlate with her subjective complaints and opined that appellant could work modified duty in an office setting. Electromyogram (EMG) and nerve conduction studies of the lower extremities on December 19, 2002 were normal. In February 2003, OWCP referred appellant for vocational rehabilitation. Appellant asserted that she was unable to tolerate vocational rehabilitation or return to work and on April 1, 2003 OWCP proposed to suspend her monetary compensation for failure to cooperate in rehabilitation efforts. She disagreed and submitted an April 10, 2003 report from Dr. Robson advising that she was unable to work. On May 14, 2003 OWCP reduced appellant's monetary compensation to zero for failure to participate in vocational rehabilitation. On May 5, 2004 OWCP's hearing representative remanded the case and reinstated wage-loss compensation. After obtaining additional reports from Dr. Samudrala, on August 3, 2004 OWCP reduced appellant's monetary compensation to zero because she refused to participate in vocational rehabilitation. Appellant requested a hearing on August 16, 2004 and OWCP denied this on October 5, 2004, finding that the request was not timely filed. By order dated February 14, 2006, the Board remanded the case finding that she timely requested a hearing. Docket No. 05-1070 (issued February 14, 2006). Appellant submitted reports from Dr. Robson dated October 13, 2004 to July 7, 2006 in which he advised that she was totally disabled. On August 7, 2006 a hearing representative set aside the August 3, 2004 decision and remanded the case to OWCP for retroactive reinstatement of appellant's wage-loss compensation. OWCP found that a conflict in medical evidence was created between Dr. Robson and Dr. Jack C. Tippet, OWCP's referral physician Board-certified orthopedic surgery, regarding whether proposed surgery should be authorized and in reports dated June 8 and August 28, 2007, Dr. Peter Mirkin, a Board-certified orthopedist, advised that surgical intervention was appropriate. The surgery was authorized.

On October 23, 2007 Dr. Robson and Dr. David Kennedy, a Board-certified neurosurgeon, performed removal of instrumentation and exploration of a fusion mass at L4-5; bilateral L2-3 and L3-4 laminectomy, facetectomy and foraminotomy; and pedical screw fixation and fusion, L2-5. In reports dated November 15, 2007 to May 15, 2008, Dr. Robson described appellant's postoperative care and advised that she could not work. By report dated August 14, 2008, he stated that x-rays looked excellent and that she was doing "relatively well" with some paralumbar symptoms around the sacroiliac area bilaterally and no radicular symptoms. Appellant moved gingerly with no pain on internal or external hip rotation. Neurologic examination was intact. Dr. Robson advised that she stay off work and return to see him in six months. In a September 18, 2008 work capacity evaluation, he advised that appellant was permanently unable to work in any capacity.

On October 6, 2008 OWCP referred appellant to Dr. Donald H. Brancato, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 31, 2008 report, Dr. Brancato reviewed the medical record and the history of injury. He noted negative EMG findings and performed a physical examination. Dr. Brancato opined that appellant's complaints were subjective, without consistent, objective validation. He found that she could return to eight hours of full-time modified duty.

In reports dated November 12, 2008 to March 10, 2009, Dr. Robson diagnosed bilateral sacroiliac joint arthritis and delayed union at the L3-4 level, based on computerized tomography (CT) scan findings and reiterated that appellant was totally disabled.

OWCP found that a conflict in medical opinion arose between Dr. Robson and Dr. Brancato regarding appellant's disability status and work capabilities. On March 5, 2009 it referred her to Dr. Morris M. Soriano, a Board-certified neurosurgeon, for an impartial evaluation. In an April 16, 2009 report, Dr. Soriano noted the history of injury, his review of the medical record, including a position description for a clerk-typist and appellant's complaints of constant low back pain that radiated into the thoracic spine. Appellant also had intermittent aching in the thoracic spine and left buttock and occasional stabbing pains in the right and left leg with prolonged sitting. Dr. Soriano noted her report that she was capable of driving, going to the grocery store with her sister, cooking, going up steps, dressing herself and that she remained independent at home. On physical examination, there was no point tenderness or spasm, 5/5 strength in the lower extremities and no calf atrophy. Lumbar range of motion was diminished and appellant could remove her shoes and socks and replace them without difficulty. Appellant got on and off the examination table under her own power and Dr. Soriano advised that four Waddell's signs were positive.

Dr. Soriano diagnosed status post multiple lumbar spinal procedures. He advised that appellant's condition was consistent with subjective complaints of pain, which had no correlation to radiological or physical examination findings, maintaining that there was significant functional overlay, symptom exaggeration and functional illness. Dr. Soriano noted that she was attempting to portray herself in a condition of ill-being whereas none existed organically. He found that appellant was capable of performing the full-time sedentary job that she was performing at the time of her injury and also capable of at least light duty, with a permanent restriction of lifting limited to 25 pounds occasionally and between 5 and 15 pounds frequently. Dr. Soriano opined that her generalized medical condition was unrelated to the work injury, but

was instead likely due to her obesity, sedentary lifestyle and significant deconditioning. He recommended no treatment plan and advised that appellant could return to full-time sedentary, if not light-duty work immediately. On June 30, 2009 Dr. Soriano advised that he had reviewed the position description for her date-of-injury job as a clerk-typist. Based on appellant's physical examination, she could perform the described duties.

On August 27, 2009 OWCP proposed to terminate appellant's wage-loss compensation on the grounds that the medical evidence, as characterized by Dr. Soriano's opinion, established that she was no longer disabled from the date-of-injury position.

Appellant disputed the opinions of Dr. Brancato and Dr. Soriano, asserting that the opinion of Dr. Robson should carry more weight. In a September 10, 2009 report, Dr. Robson noted her increased complaints involving a cramping-type sensation in her low back and bilateral leg region. He stated that appellant's gait was normal, without evidence of assistive devices, limp or abnormalities and that she was able to stand on heels and toes. Peripheral pulses were symmetrical and there was no paravertebral muscle spasm and no pain over the sacroiliac joints, greater trochanters or on internal or external hip rotation. Straight leg raise examination was positive at 75 degrees bilaterally. Motor, sensory and deep tendon reflex testing in both lower extremities remained intact and there was no evidence of spasticity. Babinski testing was normal. Lumbar range of motion was diminished. Dr. Robson advised that x-ray studies demonstrated a healing fusion from L2 to L4. He recommended a CT scan and noted that she could not work.

By decision dated September 28, 2009, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Soriano, who provided an impartial evaluation. It terminated appellant's wage-loss benefits effective October 25, 2009.

Appellant requested a hearing. In an April 19, 2009 report, Dr. Dwight Woiteshek, a Board-certified orthopedist, advised that he examined her on April 16, 2009. He reviewed the records of Dr. Robson from 2007 to 2009 and numerous x-ray and CT scan reports. Dr. Woiteshek described the history of injury, appellant's medical and surgical history and her complaint of constant pain in her lower and upper back, shoulders and neck. He noted her report that she had a hard time with activities of daily living and required the constant help of her sister to do household chores. Physical examination demonstrated pain and tenderness in the lumbar, thoracic and cervical spine with muscle spasm and guarding and decreased range of motion. There was pain and tenderness on bilateral hip examination with diminished range of motion. Dr. Woiteshek diagnosed failed back syndrome, spinal canal stenosis, possible nonunion of fusion at L3-4 and moderate osteoarthritis of both sacroiliac joints, all related to the 1979 employment injury. He found that appellant had reached maximum medical improvement and was totally disabled, due to her ongoing discomfort, weakness and stiffness in the lumbar spine. Dr. Woiteshek advised that she should avoid all bending, twisting, lifting, pushing, pulling, carrying, climbing and other similar tasks. Appellant should not handle more than five pounds on an occasional basis; should not handle weight overhead or away from her body and should not carry over long distances or uneven terrain; should avoid remaining in a fixed position for more than 20 to 30 minutes, including both sitting and standing; should change positions frequently and rest in a recumbent fashion when needed; and should pursue proper stretching, strengthening and range of motion exercises in addition to nonimpact aerobic conditioning such as walking,

biking or swimming to tolerance daily. Dr. Woiteshek directed her to follow up with her personal physician for future medical care.

A September 25, 2009 CT scan of the lumbar spine demonstrated postoperative changes, a left-sided protrusion with osteophytic spurring at T11-12 and probable mild stenosis above the level of the fusion. In a report dated September 29, 2009, Dr. Robson noted appellant's complaint of low back bilateral leg, right anterolateral thigh and left buttock pain. He stated that her gait was normal without evidence of assistive devices, limp or abnormalities and that she was able to stand on toes and heels. There was no paravertebral muscle spasm and no pain over the sacroiliac joints or greater trochanters and no pain on internal or external rotation. Straight leg raise examination was positive at 75 degrees bilaterally and neurologic examination, including motor, sensory and deep tendon reflexes in both upper and lower extremities, remained intact. There was no evidence of spasticity and Babinski was normal. Lumbar spine range of motion was diminished. Dr. Robson reviewed the September 25, 2009 CT scan study, noting some stenosis at the top of appellant's fusion. He advised that she was unable to work. On February 1, 2010 Dr. Robson noted that appellant had been his patient since 1989, described her surgical history and advised that she could possibly require further surgery. He concluded that she was completely disabled and unable to work in any capacity.

At the February 25, 2010 hearing, appellant described her condition and treatment and noted her dissatisfaction with Dr. Soriano's examination. Her attorney argued that the medical evidence established entitlement to wage-loss compensation. In a March 3, 2010 report, Dr. Robson listed findings on examination and reiterated that appellant was permanently disabled from work.

By decision dated May 4, 2010, OWCP's hearing representative found that the weight of the medical evidence rested with the opinion of Dr. Soriano and affirmed the September 28, 2009 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ OWCP'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

Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the

⁵ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁶ *Id.*

time of injury, has no disability as that term is used in FECA.⁷ Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁸

Section 8123(a) of FECA provides that, 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 shall make an examination.⁹ When the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁰

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation effective October 25, 2009. The accepted conditions in this case are lumbar and thoracic strains, subluxations of L1, L2 and L3 and an L4-5 disc herniation. OWCP properly determined that a conflict in medical opinions arose between appellant's treating physician, Dr. Robson, and Dr. Brancato, an OWCP referral physician, regarding her disability and capacity for work. It referred her to Dr. Soriano, Board-certified in neurosurgery, for an impartial evaluation. In an April 16, 2009 report, Dr. Soriano reviewed the history of injury, medical records and the position description for a clerk-typist. He noted appellant's report that she was capable of driving, going to the grocery store, cooking, climbing steps and dressing herself and that she remained independent at home. Dr. Soriano provided examination findings and advised that her condition was consistent with subjective complaints of pain, which had no correlation with radiological or physical examination findings. He noted that there was a significant functional overlay, symptom exaggeration and functional illness. Dr. Soriano found that appellant's generalized medical condition was unrelated to the work injury and was instead likely due to her obesity, sedentary lifestyle and significant deconditioning. He stated that she attempted to portray herself as being ill and opined that she was capable of performing the date-of-injury position on a full-time basis. On June 30, 2009 Dr. Soriano advised that he had reviewed the position description for appellant's date-of-injury job as a clerk-typist and that she could perform the described duties.

The Board finds that, as Dr. Soriano provided a comprehensive, well-rationalized opinion in which he clearly advised that he had reviewed the date-of-injury position description and that appellant could return to sedentary work as a clerk-typist or even light-duty work, his opinion is

⁷ See 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

⁸ *Fereidoon Kharabi*, 52 ECAB 291 (2001).

⁹ 5 U.S.C. § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁰ *Manuel Gill*, 52 ECAB 282 (2001).

entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence in regard to whether her wage-loss compensation could be terminated.¹¹

The Board further finds that the medical evidence appellant subsequently submitted is insufficient to overcome the weight accorded Dr. Soriano as an impartial medical specialist. In reports dated September 10, 2009 to March 3, 2010, Dr. Robson reiterated his findings and conclusion that she continued to be totally disabled. The Board has held that reports from a physician, such as Dr. Robson, who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.¹²

In an April 19, 2009 report, Dr. Woiteshek described the employment injury and noted his review of selected medical records, appellant's complaint of constant pain and her report that she had difficulty with activities of daily living. While he advised that she was totally disabled, he provided no knowledge of her sedentary job duties and did not explain why her medical condition rendered her totally disabled. Moreover, Dr. Woiteshek advised that she should pursue such activities as biking or swimming to tolerance daily, but the restrictions he provided did not preclude sedentary work. A medical opinion not fortified by rationale is of diminished probative value.¹³ The Board therefore finds that Dr. Woiteshek's report of insufficient probative value to overcome the weight accorded Dr. Soriano.

Dr. Soriano provided a comprehensive, well-rationalized opinion in which he clearly advised that appellant could return to work at the date-of-injury position. His opinion is entitled to the special weight accorded an impartial medical examiner.¹⁴ The opinions of Dr. Robson and Dr. Woiteshek are insufficient to overcome the weight accorded Dr. Soriano as an impartial medical specialist regarding whether appellant was totally disabled from work. OWCP therefore properly terminated her wage-loss compensation.¹⁵

Regarding appellant's argument on appeal that her benefits were improperly terminated because she did not have a pretermination hearing, in a termination case, she must have notice and an opportunity to be heard, not a pretermination hearing.¹⁶ Appellant received a pretermination notice by letter dated August 27, 2009. Furthermore, a February 25, 2010 hearing was held on the merit issue in this case.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹¹ See *Sharyn D. Bannick*, 54 ECAB 537 (2003).

¹² *I.J.*, 59 ECAB 408 (2008).

¹³ *Cecelia M. Corley*, 56 ECAB 662 (2005).

¹⁴ See *Sharyn D. Bannick*, *supra* note 11.

¹⁵ *Manuel Gill*, *supra* note 10.

¹⁶ *M.L.*, 57 ECAB 746 (2006).

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation on the grounds that she was no longer disabled from her date-of-injury position.

ORDER

IT IS HEREBY ORDERED THAT the May 4, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 13, 2011
Washington, DC

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

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

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