

FACTUAL HISTORY

On September 15, 2004 appellant, then a 41-year-old mail handler, filed a traumatic injury claim alleging that she injured her lower back and right hand that date when she fell while trying to unload cages from a truck. OWCP assigned File No. xxxxxx781 and accepted her claim for lumbar and neck sprains and a contusion of the right hand. On May 23, 2006 appellant's attending physician stated that appellant's neck pain had resolved with physical therapy and that she had minimal occasional lower back pain. He released appellant to return to full duties with no restrictions. Magnetic resonance imaging (MRI) scans demonstrated disc desiccation at L5-S1 and disc protrusion at C5-6 and C6-7.

On May 30, 2008 appellant filed a traumatic injury claim alleging that she sustained a low back strain and sprain on May 22, 2008 while opening a mail container. OWCP assigned File No. xxxxxx670, which became the master file for both claims. It accepted a sprain of the lumbosacral joint and ligament on July 22, 2008. Appellant underwent a magnetic resonance imaging (MRI) scan on August 15, 2008 which demonstrated L4-5 degenerative disc disease with left lateral protrusion and bulge as well as L5-S1 retrolisthesis and degenerative disc disease.

Appellant accepted a light-duty position on February 5, 2008 working eight hours a day with restrictions. She underwent an epidural steroid injection on April 28, 2009. Appellant underwent a second MRI scan on June 1, 2009 which demonstrated degenerative disc disease with retrolisthesis at L3-4 and L5-S1 with L4-5 moderate left neural foraminal narrowing and canal stenosis.

Appellant filed a recurrence of disability claim on September 10, 2009 alleging that on that date she was sent home as there was no work available and no accommodations possible at the employing establishment. She returned to work on February 15, 2010 and OWCP stopped her compensation benefits.

Appellant filed a second recurrence of disability claim on August 13, 2010 noting that the employing establishment removed her light-duty position on that date and sent her home. She received a letter dated August 13, 2010 from the employing establishment stating that under the National Reassessment Process (NRP), there were no available necessary tasks within her medical restrictions. OWCP authorized compensation benefits entering her on the periodic rolls.

Dr. Joel Weddington, an orthopedic surgeon, completed reports on July 12, August 4 and 25, 2010 diagnosing chronic low back pain and lumbar degenerative disc disease. He stated that appellant could work with restrictions. Appellant underwent an MRI scan on August 13, 2010 which demonstrated a disc bulge at L4-5 with neural foraminal stenosis as well as a diffuse disc bulge at L5-S1.

In a letter dated September 13, 2010, OWCP requested that Dr. Weddington provide appellant's physical limitations resulting from her work-related conditions. Dr. Weddington responded on September 22, 2010 and diagnosed multilevel degenerative disc disease and lumbar sprain/strain based on her MRI scan. He completed a work capacity evaluation and indicated that appellant could perform light-duty work for eight hours a day. In a note dated

November 10, 2010, Dr. Weddington diagnosed multilevel degenerative disc disease and chronic low back pain. On January 5, 2011 Dr. Michael E. Hebrard, a physician Board-certified in physical medicine, examined appellant and diagnosed lumbar spondylosis with chronic lumbar discogenic pain and lumbar spondylolisthesis.

OWCP referred appellant for a second opinion evaluation. Dr. J. Hearst Welborn, Jr., a Board-certified orthopedic surgeon, examined appellant on January 19, 2011 and found that she had recovered from her work-related lumbar strain. He stated that appellant's current condition was lumbar degenerative disc disease. Dr. Welborn stated that appellant's continued low back pain was due to lumbosacral radiculopathy, degenerative disc disease and lumbar disc protrusion which were not causally related to her employment injury. He stated that appellant had no limitations due to her work-related disability, but was restricted to sedentary work due to her preexisting lumbar degenerative disc disease. Dr. Welborn completed a work capacity evaluation and concluded that appellant could work eight hours a day with restrictions.

On January 31, 2011 OWCP determined that there was a conflict of medical opinion evidence between Dr. Hebrard and Dr. Welborn regarding the relationship between her current back condition and disability and her accepted employment injury. It prepared a statement of accepted facts and questions to be addressed by the referee physician. The statement included OWCP definitions on aggravation, acceleration and precipitation to be used by the referee in forming a narrative response to the questions asked.

On February 8, 2011 Dr. Hebrard noted that appellant experienced increased symptoms in October 2010 and diagnosed lumbar strain, chronic, intermittent sciatica and lumbosacral sprain.

In a report dated February 28, 2011, Dr. J.C. Pickett, a Board-certified orthopedic surgeon, performed an impartial medical examination. He noted appellant's history of injury and reviewed the statement of accepted facts. Dr. Pickett listed findings on physical examination including hypoactive reflexes at the patellar level and no evidence of atrophy in the lower extremities. He found tenderness in the low back, positive Goldthwaite testing and painful straight leg raising at 80 degrees on both sides. Dr. Pickett found limited range of motion in appellant's back. He reviewed appellant's MRI scans and noted the protrusion of the nucleus pulposus at L4-5. Dr. Pickett stated, "It is suggested that the attending physician be asked to review their notes to determine whether the two falls could have any effect on the appearance now of lumbosacral disc disease, principally at the L4-5 on the left side." He concluded, "Absent any alteration or change in the diagnosis or feelings regarding this, this patient has no residual or disability secondary to the two falls of 2004 and 2008 and therefore is not a qualified injured worker." Dr. Pickett completed a work capacity evaluation and stated that appellant could not perform her usual job due to pain.

In a note dated March 7, 2011, Dr. William R. Campbell, an osteopath, stated that appellant's recent increased symptoms were due to the May 22, 2008 employment injury. He stated that appellant would continue to experience periods of increased symptoms which would require medical care.

OWCP proposed to terminate appellant's compensation benefits by letter dated May 17, 2011. It found that Dr. Pickett's report established that appellant's accepted condition had ceased with no residuals or disability.

By decision dated July 1, 2011, OWCP terminated appellant's medical and wage-loss benefits effective July 3, 2011.

On August 18, 2011 Dr. Hebrard addressed appellant's history of injury and reviewed the medical evidence in the record. He provided detailed findings on physical examination including limited range of motion of the spine, involuntary guarding in the lumbar paraspinal muscles, normal sensory examination and loss of muscle strength in the ankle dorsiflexion. Dr. Hebrard diagnosed lumbar strain and lumbar radiculitis on the left. He stated, "It is the opinion of the undersigned with reasonable medical certainty that [appellant's] ongoing condition secondary to the May 22, 2008 injury ... arose out of as well as in the course of her employment and further that the diagnosis was inadequate. I also opine that her condition was aggravated by her assignment to a work duty that required prolonged standing, twisting and bending at the waist." Dr. Hebrard stated that appellant's accepted employment injury strained her lumbar muscles and that her continued work activities of prolonged standing, twisting and bending irritated the intervertebral discs, aggravating her condition. He concluded:

"It is true that a large portion of the population experience degenerative changes to the lumbar spine and have abnormal findings who have no history of back or leg problems, but in conjunction with the clinical evaluations and the history of injury, it is medically reasonable to conclude that if not for the industrially-related injury of May 22, 2008, she would not be experiencing her current symptoms and that this condition not only arose out of and during the course of her employment but also has ongoing residuals. It is also my opinion that the diagnosis of lumbosacral strain/sprain is not an accurate description of her ongoing symptomatology."

Appellant requested reconsideration on August 18, 2011. Dr. Hebrard completed notes dated September 29 and October 27, 2011 and diagnosed lumbosacral sprain, lumbar radiculitis and lumbar herniated disc. He opined that appellant's current conditions were employment related. Dr. Hebrard stated, "Based on the fact that twisting, turning, bending, reaching, lifting and pushing activities have created an environment where there is a significant amount of ongoing micro trauma to the anterior and posterior columns of the spine which would be the intervertebral discs and facet joints. It is medically reasonable to draw the conclusion to causal relationship between what she does industrially and based on her current conditions [these] do coincide with one another as a causal relationship between what she does for employment and her current condition at this time."

By decision dated December 7, 2011, OWCP denied modification of the July 1, 2011 decision finding that Dr. Hebrard was part of the initial conflict resolved by Dr. Pickett.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.² After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁵

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.⁶ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁷

In situations where there are opposing medical reports of virtually equal weight and rationale, and 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.⁸

ANALYSIS -- ISSUE 1

Appellant sustained two back injuries, one on September 15, 2004 and the other on May 22, 2008, both of which were accepted for lumbar strain or sprain. She underwent diagnostic testing that revealed degenerative disease of the lumbar spine. Appellant's attending physicians, Drs. Weddington and Hebrard, opined that her continuing condition was due to her accepted employment injury. OWCP referred appellant to a second opinion physician, Dr. Welborn, who found that appellant had no residuals of her accepted lumbar condition and noted that her current condition and disability were due to degenerative joint disease that had no relationship to her employment. Due to this conflict of medical opinion evidence, OWCP

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ *Id.*

⁶ 5 U.S.C. §§ 8101-8193, 8123; *B.C.*, 58 ECAB 111 (2006); *M.S.*, 58 ECAB 328 (2007).

⁷ *R.C.*, 58 ECAB 238 (2006).

⁸ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

referred appellant, a statement of accepted facts and a list of questions to Dr. Pickett, for an impartial medical examination.

The Board finds that Dr. Pickett's report is not sufficient to resolve the conflict of medical opinion evidence. Dr. Pickett reviewed the statement of accepted facts, the medical records and provided findings on physical examination. When addressing the issue of whether appellant's current condition was related to her federal employment, Dr. Pickett suggested that OWCP request clarification from her attending physicians. He was asked to address whether appellant had residuals of her accepted injuries or whether any conditions were related to preexisting conditions. Dr. Pickett was provided with OWCP's definitions as to aggravation, acceleration and precipitation and requested to submit a narrative response to the questions on causal relation. He recommended that the attending physicians be asked to review their notes to determine whether the two falls could have any effect on appellant's lumbosacral disc disease at the L4-5 on the left. Dr. Pickett did not clearly address this central aspect of the case, but instead suggested that OWCP undertake further development. His report is not sufficient to resolve the conflict of medical evidence. As there is an unresolved conflict of medical evidence, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation and medical benefits effective July 3, 2011.⁹

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation and medical benefits effective July 3, 2011.

⁹ Due to the Board's determination on the termination issue, it is not necessary to discuss whether appellant has established continuing disability on or after July 3, 2011.

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 18, 2012
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