

**United States Department of Labor
Employees' Compensation Appeals Board**

C.W., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS BENEFITS ADMINISTRATION,)
St. Petersburg, FL, Employer)

Docket No. 13-1248
Issued: December 6, 2013

Appearances:

William Hackney, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 30, 2013 appellant, through his attorney, filed a timely appeal from the November 30, 2012 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.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation effective November 30, 2012 on the grounds that he had no disability due to his work injuries after that date.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on January 11, 2001 appellant, then a 53-year-old loan specialist, sustained sUBLUXATIONS of his C4, C5 and C6 discs due to tripping over a mail bucket at work. Under a separate file number, he claimed that he sustained injury on January 31, 2005 when he twisted to reach for some files and soon thereafter collapsed in his chair while attempting to stand. OWCP accepted that appellant sustained an aggravation of spinal stenosis in the cervical region, neck sprain/strain and lumbar sprain. For appropriate case management, it combined the two case files. Appellant stopped work on January 31, 2005 and has not returned to work.

On April 18, 2011 Dr. Thomas Tolli, an attending Board-certified orthopedic surgeon, performed an anterior discectomy and anterior interbody fusion at C4-5, C5-6 and C6-7 and partial vertebrectomy at C4, C5, C6 and C7 with metal prosthetic implants. The procedures were authorized by OWCP.

The findings of an October 4, 2011 magnetic resonance imaging (MRI) scan of appellant's cervical spine showed anterior interbody fusion from C4 through C7, mild spondylosis bilaterally at C3-4 due to disc bulging and mild spondylosis at C6-7 related to posterolateral spurring. A February 7, 2012 MRI scan showed the anterior interbody fusion from C4 through C7 with good alignment, degenerative disc disease and uncovertebral hypertrophy resulting in mild spinal stenosis. It also showed moderate bilateral, neural foraminal narrowing at C3-4 without significant change and stable mild degenerative anterolisthesis of C7 on T1 with mild spinal stenosis and moderate bilateral neural foraminal narrowing. None of the findings were deemed to be acute.

In order to obtain additional information about his work-related condition and ability to work, OWCP referred appellant to Dr. Jonathan Black, a Board-certified orthopedic surgeon. In a May 14, 2012 report, Dr. Black determined that appellant's accepted work conditions had resolved. He found that appellant was capable of performing sedentary work which was required by his regular work as a loan specialist. Dr. Black indicated that appellant's continuing medical problems were associated with the underlying degenerative disc disease and spinal stenosis.

In a June 18, 2012 report, Dr. Samy F. Bishai, an attending Board-certified orthopedic surgeon, diagnosed cervical disc syndrome, chronic cervical strain, lumbosacral strain, herniated lumbar discs at L4-5 and L5-S1 with disc bulging and spinal stenosis of the lumbar spine. He advised that appellant continued to have residuals of his work injuries, including pain, weakness and numbness in his hands. Appellant was totally and permanently disabled from doing any type of work, even sedentary. On July 16, 2012 Dr. Bishai stated that appellant was having problems with back pain which radiated down his left leg and indicated that he had residual problems from his April 18, 2011 surgery.

OWCP determined that there was a conflict in the medical opinion evidence between Dr. Black and Dr. Bishai regarding appellant's employment-related residuals and work capacity. It referred appellant to Dr. Charles A. Finn, a Board-certified orthopedic surgeon, for an impartial medical examination. The record does not contain any copy of the statement of accepted facts provided to Dr. Finn.

In a September 21, 2012 report, Dr. Finn stated that appellant was involved in an injury on January 31, 2005 when he was working as a loan specialist and fell into some file cabinets.² Appellant reported that since that time he experienced neck and back pain. He had cervical fusion surgery on April 18, 2011 which provided some relief of his symptoms, but still experienced numbness in both of his arms (left greater than right) and back pain.³ On examination, appellant had a limited range of motion of his cervical spine, 50 percent normal in all planes. He had tenderness in his cervical spine and lumbar spine with bilateral sciatic notch tenderness. No motor, sensory or reflex deficits were found in the upper and lower extremities in all major muscles and the tested dermatomes showed no evidence of muscle wasting. Dr. Finn found some generalized weakness in the upper and lower extremities, but posited that it was secondary to effort. He noted that very minimal range of motion of appellant's hips caused back pain with pain on range of motion of his shoulder related to his neck. Dr. Finn discussed a number of medical records and stated:

“After review of all of the medical records provided and examination of the patient my opinions in regards to this on the job injury of January 31, 2005 are as follows: I believe we are dealing with a resolved cervical and lumbar sprain/strain. I believe this is all preexisting pathology which is documented and verified on the MRI scans with disc osteophyte complexes and preexisting spondylolisthesis. The most that this reported injury represents is that of a resolved cervical and lumbar sprain/strain. I do not feel that the knees have anything to do in regards to the injury of January 31, 2005. [Appellant] is capable of full time, full-duty work. He needs no assistance with activities of daily living and an end result has been achieved.

“[Appellant's] current complaints are unrelated to the injury of January 31, 2005, they are due to preexisting condition. He is capable of full time, full-duty work as it relates to the reported injury of January 31, 2005. In saying these statements, I do believe that due to the preexisting pathology [appellant] [was] disabled from doing anything more than a sedentary position and this sedentary position will be permanent as he is 65 years old, has multilevel spondylosis and spondylolisthesis. However, it is not related to this injury, it is due to preexisting pathology.”

In an October 12, 2012 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation on the grounds that he had no disability due to his work injuries after that date.⁴ It indicated that the weight of the medical evidence regarding work-related disability rested with the well-rationalized opinion of Dr. Finn, the impartial medical specialist. OWCP provided appellant with 30 days from the date of the letter to submit additional evidence and argument challenging the proposed termination action.

² Dr. Finn stated that the January 31, 2005 injury “related to his cervical and lumbar spine.”

³ Appellant also reported bilateral knee problems.

⁴ OWCP advised appellant that he would continue to receive medical benefits related to his accepted work conditions.

Appellant submitted additional reports, dated in September and October 2012, in which Dr. Bishai discussed his medical problems.

In a November 30, 2012 decision, OWCP terminated appellant's wage-loss compensation effective November 30, 2012 on the grounds that he had no disability due to his work injuries after that date.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁵ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Section 8123(a) of FECA provides in pertinent part: "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."⁸ In situations where there exist 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, must be given special weight.⁹ To be well rationalized, an opinion must contain adequate explanation of its findings and be based on a complete and accurate factual and medical history.¹⁰

ANALYSIS

OWCP accepted that on January 11, 2001 appellant sustained subluxations of his C4, C5 and C6 discs due to tripping over a mail bucket at work. It accepted that on January 31, 2005 he sustained aggravation of spinal stenosis in the cervical region, neck sprain/strain and lumbar sprain when he twisted to reach for some files and soon thereafter collapsed in his chair while attempting to stand. On April 18, 2011 appellant underwent OWCP-authorized anterior discectomy and anterior interbody fusion at C4-5, C5-6 and C6-7 and partial vertebrectomy at C4, C5, C6 and C7 with metal prosthetic implants. In a November 30, 2012 decision, OWCP terminated his wage-loss compensation effective November 30, 2012 based on a September 21, 2012 report of Dr. Finn, a Board-certified orthopedic surgeon serving as an impartial medical specialist.

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁶ *Id.*

⁷ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ 5 U.S.C. § 8123(a).

⁹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁰ *Donna Faye Cardwell*, 41 ECAB 730, 741-42 (1990).

The Board notes that OWCP properly determined that there was a conflict in the medical opinion between Dr. Bishai, appellant's attending Board-certified orthopedic surgeon, and Dr. Black, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether appellant continued to have residuals of the accepted work injuries.¹¹ In order to resolve the conflict, OWCP referred appellant, pursuant to section 8123(a) of FECA, to Dr. Finn.¹²

In his September 21, 2012 report, Dr. Finn stated that appellant was involved in an injury on January 31, 2005 when he was working as a loan specialist and fell into some file cabinets.¹³ He described the findings of his physical examination, noting that appellant had limited range of motion of his cervical spine (50 percent normal in all planes), that he had tenderness in his cervical spine and lumbar spine with bilateral sciatic notch tenderness and that very minimal range of motion of his hips caused back pain. Dr. Finn stated that he believed with regards to the January 31, 2005 work injury that "we are dealing with a resolved cervical and lumbar sprain/strain. I believe this is all preexisting pathology which is documented and verified on the MRI scans with disc osteophyte complexes and preexisting spondylolisthesis." Dr. Finn asserted that "the most that this reported injury represents is that of a resolved cervical and lumbar sprain/strain" and indicated that appellant was capable of full-time, full-duty work as it related to the January 31, 2005 injury. He indicated that appellant's nonwork-related conditions, including multilevel spondylosis and spondylolisthesis, limited him to sedentary work.

The Board finds that the September 21, 2012 report of Dr. Finn is not sufficiently well rationalized to represent the weight of the medical evidence with respect to appellant's work-related disability on or after November 30, 2012, the effective date of the termination of his wage-loss compensation.¹⁴ Dr. Finn did not provide a detailed medical opinion explaining how appellant's work-related disability had ceased. The probative value of his opinion on causal relationship is greatly reduced because he did not provide a complete and accurate factual and medical history.¹⁵ Dr. Finn only mentioned appellant's January 31, 2005 work injury briefly and made no mention of the accepted January 11, 2001 work injury. In addition, he did not acknowledge that OWCP had accepted appellant's sustained subluxations of his C4, C5 and C6

¹¹ In a May 14, 2012 report, Dr. Black determined that appellant's accepted work conditions had resolved and found that he was capable of performing sedentary work such as was required by his regular work as a loan specialist. He stated that appellant's continuing medical problems were associated with his underlying degenerative disc disease and spinal stenosis. In contrast, Dr. Bishai indicated in a June 18, 2012 report that appellant continued to have residuals of his work injuries, including pain, weakness and numbness in his hands and opined that he was totally and permanently disabled from doing any type of work, even sedentary work.

¹² See *supra* note 8.

¹³ Dr. Finn stated that the January 31, 2005 work injury "related to his cervical and lumbar spine." His description of the January 31, 2005 work injury differs from the reported mechanism of injury. Appellant had reported that he injured himself on January 31, 2005 when he twisted to reach for some files and soon thereafter collapsed in his chair while attempting to stand.

¹⁴ See *supra* note 9.

¹⁵ See *supra* note 10.

discs or the accepted aggravation of spinal stenosis in the cervical region.¹⁶ Given that he did not address these accepted conditions, Dr. Finn did not provide sufficient medical opinion that these conditions had resolved. Moreover, Dr. Bishai noted that appellant suffered continuing disabling residuals from his April 18, 2011 cervical disc fusion surgery which was approved as related to the January 11, 2001 work injury. However, Dr. Finn did not provide an opinion on this matter or otherwise provide an adequate explanation of why appellant ceased to have disabling residuals of his accepted work injuries.

OWCP relied on the opinion of Dr. Finn to terminate appellant's wage-loss and medical benefits effective November 30, 2012. It failed to meet its burden of proof in terminating appellant's benefits.¹⁷

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation effective November 30, 2012 on the grounds that he had no disability due to his work injuries after that date.

¹⁶ The Board notes that the record does not contain any recent statement of accepted facts that might have been provided to Dr. Finn.

¹⁷ See *Gail D. Painton*, 41 ECAB 492, 498 (1990); *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922-23 (1989).

ORDER

IT IS HEREBY ORDERED THAT the November 30, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 6, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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