United States Department of Labor
Employees' Compensation Appeals Board

C.C., Appellant	)	
and	)	**Docket No. 13-680**
	)	**Issued: July 2, 2013**
U.S. POSTAL SERVICE, CONCORD STATION, Knoxville, TN, Employer	)	

Appearances:
Ronald L. Coile, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 25, 2013 appellant, through her representative, filed a timely appeal from a July 30, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP).[1] Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's compensation benefits effective December 18, 2011; and (2) whether it properly terminated her authorization for medical benefits.

[1] Under the Board's *Rules of Procedure*, if using the date the appeal was received by the Clerk of the Board would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 25, 2013, which renders the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 18, 2003 appellant, then a 46-year-old rural mail carrier, filed a traumatic injury claim alleging that on April 30, 2003 she sustained low back pain, bilateral upper leg pain and bilateral lower leg numbness in the performance of duty. OWCP accepted the claim for an aggravation of spondylolisthesis. Appellant experienced intermittent periods of total disability.

On July 30, 2009 the employing establishment withdrew appellant's limited-duty employment due to safety concerns resulting from her use of opiates. OWCP paid compensation for total disability.

In a work restriction evaluation dated January 18, 2010, Dr. Frank McNiel, an attending physician specializing in family medicine, found that appellant was unable to work.

On June 28, 2010 OWCP referred appellant to Dr. Sidney Wallace, a Board-certified orthopedic surgeon, for a second opinion examination.[3] In a report dated August 11, 2010, Dr. Wallace diagnosed spondylolisthesis aggravated by the accepted work injury, lumbar sprain, an abdominal wall hernia and an umbilical hernia. He found that appellant's spondylolisthesis had "returned to the point it was prior to the aggravation." In a supplemental report dated September 30, 2010, Dr. Wallace advised that the aggravation of her spondylolisthesis had ceased.

In a report dated March 15, 2011, Dr. McNiel opined that appellant remained partially disabled due to her April 2003 employment injury. He advised that the work-related aggravation of her preexisting condition continued and described imaging findings of facet joint osteoarthritis and anterior listhesis at L5-S1 with pars defect. Dr. McNiel noted that appellant was working with restrictions when the employing establishment removed her from employment due to her prescribed pain medications.

On May 10, 2011 OWCP determined that a conflict existed between Dr. McNiel and Dr. Wallace regarding whether appellant's employment-related aggravation of spondylolisthesis had ceased. It referred her to Dr. William L. Johnson, a Board-certified orthopedic surgeon, for an impartial medical examination.[4]

In a report dated June 10, 2011, Dr. Johnson reviewed appellant's history of injury and medical reports. On examination he measured symmetrical reflexes, no atrophy and normal strength and range of motion of the lower extremities. Dr. Johnson found tenderness to palpation of the lumbar spine with a negative straight leg raise and positive pedal pulses. He indicated that diagnostic studies revealed grade 1 spondylolisthesis and pars defects. Dr. Johnson diagnosed L5-S1 spondylolisthesis, lumbar sprain, an abdominal wall hernia, an umbilical hernia and

[3] On January 19, 2010 appellant's attorney requested that OWCP expand acceptance of the claim to include emotional problems.

[4] On June 1, 2011 Dr. McNiel questioned the need for appellant to see Dr. Johnson and asserted that orthopedic surgeons did not often agree with pain management physicians.

degenerative spondylolisthesis at L4-5. He noted that OWCP had also accepted lumbar sprain and an abdominal wall hernia which had resolved.[5] Dr. Johnson concluded:

> "I do feel the aggravation of the spondylolisthesis has resolved. [Appellant] had a preexisting spondylolisthesis which became symptomatic with her lifting injury, and she has had symptoms slowly progressive since that time; however, as defined by [OWCP], the temporary aggravation is considered ceased when the patient returns to a baseline of pathology which is due only to the underlying progressive disorder. [Appellant] has obviously worsened over time, but I feel this is likely due to the underlying disorder of a spondylolisthesis compounded by the development of an additional spondylolisthesis at the next proximal level which was not present previously. This is also compounded by contributing factors such as her obesity, deconditioning, narcotic dependence and perhaps even psoriatic arthritis. This is likely the natural course of this progressive disorder, and would have occurred in the absence of the index injury."

Dr. Johnson concluded that appellant's temporary aggravation had resolved and that her physical limitations were due to "her preexisting spondylolisthesis and natural progression over time including development of an additional area of spondylolisthesis more proximally." He found that she could perform sedentary employment.

On July 20, 2011 OWCP advised appellant of its proposed termination of her compensation and authorization for medical benefits.

On August 29, 2011 appellant's representative maintained that the majority of the physicians in her area would not accept patients who worked for the employing establishment. He asserted that OWCP disregarded the opinions of her attending physicians. The representative contended that OWCP did not advise Dr. Wallace or Dr. Johnson of appellant's prior right shoulder and lumbar injury, assigned file number xxxxxx835. He argued that she did not have preexisting spondylolisthesis but instead her condition resulted from a 2002 work injury.

By decision dated November 22, 2011, OWCP terminated appellant's compensation effective December 18, 2011. It found that Dr. Johnson's opinion represented the weight of the evidence and established that she had no further employment-related condition or disability. OWCP noted that it had accepted lumbar sprain due to a February 4, 2002 employment injury. It further found that a magnetic resonance imaging (MRI) scan study performed on October 30, 2002 showed spondylolisthesis at L5-S1 that predated her April 30, 2003 work injury.

On December 10, 2011 appellant, through her representative, requested an oral hearing before an OWCP hearing representative. At the telephone hearing, held on April 19, 2012, appellant's representative argued that the statement of accepted facts failed to include her 2002 work injury. He asserted that her preexisting condition was work related. The hearing representative noted that OWCP had not accepted spondylolisthesis in the prior 2002 claim but

[5] OWCP accepted only an aggravation of spondyloliesthesis due to appellant's work injury. In the statement of accepted facts it listed lumbar sprain, an abdominal wall hernia and an umbilical hernia as other conditions.

instead lumbar strain and a right shoulder strain. Appellant's representative advised that she had filed an emotional condition claim.[6]

In a decision dated July 30, 2012, OWCP's hearing representative affirmed the November 22, 2011 decision. She found that Dr. Johnson's report constituted the weight of the evidence and established that appellant had no disability or need for medical treatment due to her April 30, 2003 work injury.

On appeal appellant's representative argues that her condition began when she sustained a prior injury to her back under file number xxxxxx835. He also notes that she was in a motor vehicle accident in 1997 on the way home from work but she did not file a claim because her supervisor informed her that because she was not driving the car she used on her route it was not work related.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[7] It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[8] 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.[9]

Section 8123(a) 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.[10] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. 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.[11] 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 and based upon a proper factual background, must be given special weight.[12]

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[6] In an undated report received by OWCP on August 3, 2011, Dr. Glenn R. Peterson, a Board-certified psychiatrist, diagnosed major depression, generalized anxiety and chronic pain. He attributed the conditions to "injuries at work, causing chronic pain and worsened by emotional abuse from supervisors at work."

[7] *Elaine Sneed*, 56 ECAB 373 (2005).

[8] *Fred Reese*, 56 ECAB 568 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[9] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[10] 5 U.S.C. § 8123(a).

[11] 20 C.F.R. § 10.321.

[12] *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained an aggravation of spondylolisthesis due to an April 30, 2003 employment injury. Appellant worked limited-duty employment until July 2009, when the employing establishment withdrew her modified work due to safety concerns from her opiate use. OWCP paid her compensation for total disability.

OWCP determined that a conflict arose between Dr. Wallace, an OWCP referral physician, and Dr. McNiel, appellant's attending physician, regarding whether she had any continuing employment-related aggravation of her preexisting spondylolisthesis. It referred her to Dr. Johnson for an impartial medical examination.

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 and based upon a proper factual background, must be given special weight.[13] The Board finds that the opinion of Dr. Johnson, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Johnson accurately summarized the relevant medical evidence, provided detailed findings on examination and reached conclusions about appellant's condition which comported with his findings.[14] In a report dated June 10, 2011, he reviewed the medical evidence of record, including the results of diagnostic studies. On examination, Dr. Johnson found a negative straight leg raise, tenderness of the lumbar spine and positive pedal pulses. He diagnosed grade 1 spondylolisthesis and pars defect by diagnostic study. Dr. Johnson opined that appellant's work-related aggravation of spondylolisthesis had ceased. He explained that, while her condition had worsened, it was due to the natural progression of the preexisting spondylolisthesis rather than the work-related temporary aggravation. Dr. Johnson further attributed appellant's physical limitations to preexisting spondylolisthesis and its natural progression rather than her employment injury. As his report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an impartial medical examiner.[15] OWCP thus met its burden of proof to terminate appellant's compensation benefits for the accepted conditions of an aggravation of spondylolisthesis.

LEGAL PRECEDENT -- ISSUE 2

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[16] 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.[17]

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[13] *J.M.*, 58 ECAB 478 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[14] *Manuel Gill*, 52 ECAB 282 (2001).

[15] *See J.M., supra* note 13; *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[16] *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

[17] *Id*.

ANALYSIS -- ISSUE 2

OWCP met its burden of proof to terminate authorization for medical benefits through the opinion of Dr. Johnson, the impartial medical examiner, who found that appellant had no residuals of her accepted condition. Dr. Johnson explained that the temporary aggravation of her spondylolisthesis had ceased and that her current condition resulted from a natural progression of the condition rather than the employment-related aggravation. As his opinion is detailed and well rationalized, it is entitled to the special weight accorded an impartial medical examiner and establishes that appellant has no further residuals of her accepted employment injury.

On appeal appellant's representative argues that her condition began in February 2002. He further asserts that she was in a motor vehicle accident in 1997 on the way home from work but her supervisor told her that she could not file a claim. The issue, however, is whether appellant has any further disability or need for medical treatment as a result of her April 30, 2003 employment injury. As discussed, Dr. Johnson's opinion is rationalized and based on a proper history and thus represents the special weight of the evidence.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation and authorization for medical benefits effective December 18, 2011 on the grounds that she had no further disability causally related to her April 30, 2003 employment injury

ORDER

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

Issued: July 2, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board