United States Department of Labor
Employees' Compensation Appeals Board

S.S., Appellant	)	
	)	**Docket No. 13-1183**
and	)	**Issued: February 4, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Des Moines, IA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On April 17, 2013 appellant filed a timely appeal from October 19 and November 5, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective November 5, 2012 on the grounds that she had no residuals of her June 15, 2000 work injury after that date; and (2) whether it properly denied appellant's request for authorization of back surgery.

[1] 5 U.S.C. §§ 8101-8193.

[2] The Board notes that, after its November 5, 2012 decision, OWCP issued a May 16, 2013 decision, affirming the November 5, 2012 decision. However, as appellant had filed her appeal with the Board on April 17, 2013, the May 16, 2013 decision is null and void as it pertained to the same issue over which the Board has jurisdiction. *See Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

FACTUAL HISTORY

OWCP accepted that on June 15, 2000 appellant, then 32-year-old automation clerk, sustained left-sided sciatica due to bending over to place a heavy mail tray into a machine and then standing up. Her sciatica condition was treated with lumbar epidural injections, physical therapy and chiropractic treatment. Appellant began working in a limited-duty position and received compensation for medical treatment and for intermittent periods of disability on the daily compensation rolls.

The record does not contain any evidence that appellant received medical treatment after May 2005 until she presented at the emergency room at Mercy Medical Center on January 28, 2010 with complaints of back and left leg pain starting the prior day after shoveling snow that entailed lifting, turning and bending.[3] Appellant was diagnosed with an acute exacerbation of chronic low back pain with left radiculopathy, onset beginning on January 27, 2010. She also received treatment for back and left leg symptoms at the emergency room on several occasions, including March 24 and June 11, 2010.

On April 14, 2010 Dr. Chad Abernathey, an attending Board-certified neurosurgeon, stated that appellant presented that day with a chronic history of low back pain. Appellant's neurologic function was intact and a magnetic resonance imaging (MRI) scan of her lumbosacral spine demonstrated mild degenerative changes consistent with her age but with no neural compromise. Dr. Abernathey stated that, based on the paucity of clinical and radiographic findings, he recommended continued conservative management of appellant's condition. In May and June 2010, Dr. Michael D. Jackson, an attending physiatrist, diagnosed appellant with left piriformis syndrome and mild left S1 dysfunction.

In a report dated April 4, 2011, Dr. David Segal, an attending Board-certified neurosurgeon, stated that appellant reported experiencing pain in her left lower back which radiated down into her left leg as far as the knee. He diagnosed disc herniations at L4-5 and L5-S1 and lumbar radiculopathy at L4-5 and L5-S1 on the left. Dr. Segal recommended that appellant undergo microlumbar discectomy surgery at L4-L5 and L5-S1. A request for authorization of this surgery was submitted to OWCP.

In a July 7, 2011 report, Dr. Peter Wirtz, a Board-certified orthopedic surgeon serving as an OWCP referral physician, reviewed appellant's medical history, including the June 15, 2000 work injury and its subsequent treatment. He stated that on physical examination that there was subjective sensitivity in appellant's left L5-S1 nerve distribution and sciatic notch and decreased feeling over her left heel as well as the fifth toe to touch. Dr. Wirtz diagnosed multilevel degenerative disc disease and noted that his review of the medical evidence revealed that appellant's symptoms became more consistent following the January 2010 history of snow shoveling.[4] Appellant's subjective complaints of back pain and left leg pain resulted in multiple managements of her medical condition. Dr. Wirtz noted that the current MRI scan showed "an L4-5 disc herniation left to the L4 nerve root" and that the current examination did not correlate

[3] The record does contain physical therapy reports from this period.

[4] Dr. Wirtz listed the snow shoveling as occurring on January 28, 2010 rather than January 27, 2010.

to sciatic irritation on the left or neurologic involvement on the left to indicate that the L4 nerve root was in a condition that would require surgery. He stated:

> "Following the June 15, 2000 injury there [were] off and on symptoms without any specific medical management. Following the January 28, 2010 incident there has been a continuation of symptoms requiring multiple evaluations making that condition more symptom producing than the 2000 work injury. Based on the subjective symptoms and the current physical examination, there is no sciatic restriction nor neurologic to indicate a direct need for surgical intervention at the L4-5 left herniation involving the L4 nerve root. This degeneration in the lumbar spine is one of a natural progressive condition and has changed based on the April 2010 MRI [scan] and the April 2011 MRI [scan] indicating this degenerative process. Appropriate treatment for the current condition would be restrictions within her physical capabilities, anti-inflammatory medications and an occasional analgesic medication."

In an August 30, 2011 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits on the grounds that she ceased to have residuals of her work injury based on the July 7, 2011 report of Dr. Wirtz. Appellant was provided 30 days from the date of the letter to present evidence and argument challenging the proposed termination action.

Appellant submitted a September 15, 2011 report from Dr. Segal who opined that she continued to have residuals of the June 15, 2000 work injury which caused left-sided sciatica. Dr. Segal stated that disc herniations at L4, L5 and S1 had been evident since appellant's original injury on June 15, 2000. He noted that the original injury was traumatic rather than degenerative and indicated that he had described disc herniations that had gotten worse over the years. Dr. Segal stated:

> "However, the initial injury was a disc herniation causing left radicular symptoms -- known as left sciatica -- and that has continued through the years with exacerbations, particularly [January 28, 2010] of the same incident. Therefore, this is in my opinion clearly the same problem which started [June 15, 2000], not a different problem. The degenerative problem is the same problem."

OWCP found a conflict in medical opinion arose between Dr. Wirtz and Dr. Segal regarding whether appellant continued to have residuals of her June 15, 2000 work injury and whether surgery at the L4-5 level constituted appropriate treatment as necessitated by the accepted work condition. It referred her to Dr. Stephen F. Weiss, a Board-certified orthopedic surgeon, for an impartial examination.

In a March 6, 2012 report, Dr. Weiss discussed appellant's medical history, including her June 15, 2000 work injury and the January 2010 snow shoveling incident. He provided a detailed summary of the medical reports of record and provided his physical examination findings. On examination, appellant exhibited paravertebral spasms in her lumbar region, left greater than the right. Dr. Weiss reported the results of range of motion in appellant's back and the findings of a neurological examination. He noted that the presence of pain on simulated

trunk rotation and superficial palpation and the inconsistent response to straight leg raise were positive Waddell signs consistent with symptom magnification. Dr. Weiss indicated that appellant's diagnosis was lumbar degenerative disc disease, temporary aggravation of lumbar degenerative disc disease secondary to the June 2000 work incident and symptom magnification. In response to a question regarding whether appellant's present condition remained causally related to the June 15, 2000 work injury or whether it was related to the natural progression of a degenerative process, Dr. Weiss stated:

> "[Appellant] has had low back complaints since the mid 1990's. She did suffer a work injury in 2000, but MRI [scan] following this injury did not reveal any permanent aggravation of her underlying degenerative disc condition. It is true that there has been a slight progression of her degenerative disc disease since 2000, but this slow progression, in my opinion, is probably the result of a normal progression of her underlying degenerative disc condition that has bothered [her] since the mid 1990's. Further support for this opinion is found in the fact that she did not have any true radicular symptoms in 2000 … and there was an almost a five- to six-year gap in treatment, which likewise is not consistent with having sustained a permanent aggravation of the underlying degenerative disc disease."[5]

In a March 29, 2012 decision, OWCP denied appellant's request for authorization of low back surgery for an L4-5 microdiscectomy. It based its denial on the opinion of Dr. Weiss, the impartial specialist, who indicated that the surgery was not necessitated by the June 15, 2000 work injury. On August 9, 2012 appellant requested reconsideration.

In a September 10, 2012 letter, OWCP advised appellant that it proposed to terminate her wage-loss and medical benefits on the grounds that she ceased to have residuals of her work injury based on the March 6, 2012 report of Dr. Weiss, the impartial medical specialist. Appellant was provided 30 days from the date of the letter to present evidence and argument challenging the proposed termination action.

Appellant submitted the findings of diagnostic testing of her low back from March 2012 and an April 5, 2012 medical report describing the treatment of her back and leg conditions.

In an October 19, 2012 decision, OWCP affirmed its March 29, 2012 decision denying appellant's request for authorization of back surgery.

In a November 5, 2012 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective November 5, 2012 on the grounds that she had no residuals of her work injuries after that date. It based its termination on the March 6, 2012 report of Dr. Weiss.

[5] Dr. Weiss also indicated that he could agree with Dr. Segal that the L4-5 microdiscectomy surgery might be a realistic option since the MRI scan testing revealed a possible nerve root compression and appellant's complaints over the past few years had been consistent in terms of sensory complaints, extensor hallucis longus weakness, intermittent depressed left-sided reflexes and positive straight leg raising. He indicated that he would have to agree cautiously due to appellant's symptom magnification. Dr. Weiss stated that this surgery would not be necessitated by the June 15, 2000 work injury.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[6] OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[7] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

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."[9] 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.[10]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained left-sided sciatica on June 15, 2000. It terminated her wage-loss compensation and medical benefits effective November 5, 2012 based on the March 6, 2012 report of Dr. Weiss, a Board-certified orthopedic surgeon serving as an impartial medical specialist.

OWCP properly determined that there was a conflict in the medical opinion between Dr. Wirtz, a Board-certified orthopedic surgeon serving an OWCP referral physician, and Dr. Segal, an attending Board-certified neurosurgeon, regarding whether appellant continued to have residuals of her June 15, 2000 work injury.[11] In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Weiss for an impartial medical examination and an opinion on the matter.[12]

The Board finds that the well-rationalized opinion of Dr. Weiss constitutes the weight of the medical evidence regarding appellant's work-related residuals.[13]

---

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

[7] *Id.*

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

[9] 5 U.S.C. § 8123(a).

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

[11] In a July 7, 2011 report, Dr. Wirtz indicated that appellant's medical problems were due to her preexisting degenerative condition, rather than the June 15, 2000 work injury. In contrast, Dr. Segal indicated in a September 15, 2011 report that appellant's medical problems were primarily due to the June 15, 2000 work injury.

[12] *See supra* note 9.

[13] *See supra* note 10.

In his March 6, 2012 report, Dr. Weiss expressed his belief that appellant did suffer a work injury in 2000, but noted that MRI scan testing following this injury did not reveal any permanent aggravation of her underlying degenerative disc condition. He indicated that there had been a slight progression of appellant's degenerative disc disease since 2000, but attributed that slow progression to the normal progression of her underlying degenerative disc condition. Dr. Weiss stated that appellant's left-sided sciatica had resolved as evidenced by the results of diagnostic testing and the extended periods that she went without medical treatment. He indicated that the reported sensitivity in appellant's sciatic notch was only subjective in nature. Dr. Weiss also pointed out appellant's symptom magnification on examination, noting that the presence of pain on simulated trunk rotation and superficial palpation and the inconsistent response to straight leg raise were positive Waddell signs consistent with symptom magnification.

The Board has carefully reviewed the opinion of Dr. Weiss and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding whether appellant had continuing work-related residuals. Dr. Weiss provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[14] He indicated that appellant's diagnostic testing, examination results and the course of her medical treatment showed that her work-related sciatica had resolved. Dr. Weiss provided further medical rationale for his opinion by explaining that appellant's continuing back and leg symptoms could be explained by the nonwork-related progression of her degenerative back condition.

For these reasons, OWCP met its burden of proof to justify its termination of appellant's wage-loss compensation and medical benefits effective November 5, 2012.

LEGAL PRECEDENT -- ISSUE 2

Section 8103(a) of FECA states in pertinent part: "The United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation."[15]

The Board has found that OWCP has great discretion in determining whether a particular type of treatment is likely to cure or give relief.[16] The only limitation on OWCP's authority is that of reasonableness.[17] Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and

[14] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[15] 5 U.S.C. § 8103.

[16] *Vicky C. Randall*, 51 ECAB 357 (2000).

[17] *Lecil E. Stevens*, 49 ECAB 673, 675 (1998).

probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[18]

In order to be entitled to reimbursement of medical expenses, it must be shown that the expenditures were incurred for treatment of the effects of an employment-related injury or condition.[19] Proof of causal relationship in a case such as this must include supporting rationalized medical evidence.[20]

ANALYSIS -- ISSUE 2

Appellant requested authorization for microlumbar discectomy surgery at L4-L5 and L5-S1, but OWCP denied this request based on the opinion of Dr. Weiss, the impartial medical specialist. OWCP properly determined that there was a conflict in the medical opinion between Dr. Wirtz and Dr. Segal regarding whether the requested back surgery was necessitated by residuals of appellant's June 15, 2000 work injury.[21] In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Weiss for an impartial medical examination and an opinion on the matter.

The Board finds that the March 6, 2012 opinion of Dr. Weiss constitutes the weight of the medical evidence regarding whether the requested microlumbar discectomy surgery at L4-L5 and L5-S1 would be necessitated by residuals of appellant's June 15, 2000 work injury. For the reasons explained above, Dr. Weiss provided a well-rationalized opinion that appellant ceased to have residuals of her June 15, 2000 work injury. He explicitly indicated that the cessation of these residuals meant that the requested surgery was not necessitated by the June 15, 2000 injury. Dr. Weiss indicated that L4-5 microdiscectomy surgery might be a realistic option, but clearly stated that this surgery would be necessitated by the natural progression of appellant's nonwork-related degenerative condition and would not be necessitated by her June 15, 2000 work injury. Therefore, OWCP properly denied appellant's request for authorization of back surgery.

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.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective November 5, 2012 on the grounds that she had no

[18] *Rosa Lee Jones*, 36 ECAB 679 (1985).

[19] *Bertha L. Arnold*, 38 ECAB 282, 284 (1986).

[20] *Zane H. Cassell*, 32 ECAB 1537, 1540-41 (1981); *John E. Benton*, 15 ECAB 48, 49 (1963).

[21] In a July 7, 2011 report, Dr. Wirtz provided an opinion that appellant did not require back surgery. In contrast, Dr. Segal indicated in an April 11, 2011 report that appellant's needed back surgery due to the June 15, 2000 work injury.

residuals of her June 15, 2000 work injury after that date. The Board further finds that OWCP properly denied appellant's request for authorization of surgery.

ORDER

IT IS HEREBY ORDERED THAT the November 5 and October 19, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: February 4, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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