United States Department of Labor
Employees' Compensation Appeals Board

R.F., Appellant	)	
	)	**Docket No. 14-1304**
and	)	**Issued: November 25, 2014**
DEPARTMENT OF THE NAVY, PUBLIC WORKS CENTER, San Diego, CA, Employer	)	

Appearances:
Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 21, 2014 appellant, through her attorney, filed a timely appeal from the May 2, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her compensation benefits. 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.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective May 5, 2012 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries; and (2) whether she had any continuing employment-related residuals or disability after May 5, 2012.

On appeal, counsel contends that the reports of an attending physician are sufficiently rationalized to establish that appellant has continuing residuals and disability due to her employment-related injuries. Alternatively, he contends that there is a conflict in medical

[1] 5 U.S.C. § 8101 *et seq.*

opinion between the attending physician and an OWCP referral physician regarding whether appellant has any continuing employment-related residuals and disability.

FACTUAL HISTORY

OWCP accepted that on May 2, 1978 appellant, then a 41-year-old warehouse employee, sustained a back sprain and exacerbation of preexisting congenital lumbar spondylosis without myelopathy when she picked up a box of paper at work. She stopped work on May 3, 1978 and returned to work on August 1, 1978. Appellant again stopped work on February 5, 1979 and has not returned to work. She underwent authorized lumbosacral fusion on July 24, 1979.[2]

By letter dated February 6, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Jonathan D. Black, a Board-certified orthopedic surgeon, for a second opinion to determine whether she had any continuing employment-related residuals or total disability. In a February 27, 2012 medical report, Dr. Black reviewed a history of the May 2, 1978 employment injuries and appellant's employment. He also reviewed the statement of accepted facts and medical record. Under a review of his systems, Dr. Black stated that appellant denied any of the following relevant conditions: joint swelling, muscle or bone pain in other extremities, or loss of coordination. On examination of the lumbar spine, he found no step-off or bruising. Lumber alignment was normal. Sagital and coronal balance was neutral. There was a well-healed midline scar. Dr. Black reported generalized tenderness to palpation along the course of the lumbosacral spine. There was also decreased range of motion in flexion and extension of the lumbar spine with pain on these maneuvers; motor strength was five out of five in the bilateral lower extremities; deep tendon reflexes were equal and symmetric in the bilateral lower extremities with no evidence of hyperreflexia, Babinski and clonus; gait and station were normal; appellant ambulated unassisted; and straight leg raise and crossed straight leg raise test were negative. On neurological examination, Dr. Black reported good coordination and no weakness or sensory deficit and deep tendon reflexes were intact. He reviewed medical reports including: a January 16, 1985 lumbar x-ray which revealed a solid arthrodesis at L5, L6 and S1 and a 6-bone lumbar spine; a January 17, 1985 lumbar computerized tomography (CT) scan report revealed a solid arthrodesis with no evidence of disc herniation; an April 7, 1987 lumbar x-ray revealed a solid arthrodesis; lumbar CT scans dated April 7, 1987 and August 17, 1989 revealed no evidence of disc herniation or stenosis (the latter CT scan also showed unilateral spondylosis at left L5); and a June 12, 1997 lumbar magnetic resonance imaging (MRI) scan demonstrated postoperative changes and spondylolisthesis at the lumbosacral junction with no evidence of stenosis (the appearance was stable compared to a prior study).

Dr. Black advised that the work-related lumbar strain had resolved. He noted that it was determined ultimately that appellant had an exacerbation of preexisting spondylolisthesis which was treated with arthrodesis. All studies suggested that this fusion had healed and no studies suggested pseudarthrosis. Dr. Black stated that there were no objective findings of current

[2] On January 5, 1982 appellant was involved in a nonwork-related motor vehicle accident. She was hospitalized from January 5 to 18, 1982 and diagnosed as having recurrent lumbar disc syndrome. In January 1993 appellant sustained a back injury while getting into her car. She was unable to walk for six days. On February 19, 1983 appellant's legs gave out as she got up from a seated position and fell to the ground. She was unable to walk for several days. In December 1984 appellant reinjured her back in a second nonwork-related motor vehicle accident.

disability due to the work-related exacerbation of preexisting spondylolisthesis. He further stated that, on examination, appellant was completely neurologically intact. Although she described weakness in her left leg, she could get up and down from the examination table without difficulty and walk without assistive devices. Dr. Black advised that there were no objective findings to support ongoing disabling residuals from the work-related condition nor did appellant need further treatment for the employment-related conditions. He opined that she had disability based on a nonwork-related right total knee arthroplasty that developed a methicillin resistant staphylococcus aureus (MRSA) infection, advanced age, deconditioning, and endometrial cancer. Dr. Black opined that appellant had no physical restrictions due to her work-related injury. He advised that she could handle 10 pounds occasionally and she was capable of performing sedentary duties. Dr. Black concluded that appellant's back sprain had resolved and her spondylolisthesis had been successfully surgically treated.

On March 12, 2012 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Black's medical opinions. Appellant was advised that she had 30 days to submit additional evidence in response to the proposed termination.

In a March 29, 2012 letter, appellant contended that a cadre of OWCP physicians and her own physician concurred that she was permanently disabled and unable to work. She did not understand how Dr. Black found that her 1978 surgical fusion was successful when he took no x-rays or performed other diagnostic tests to form an educated opinion. Appellant asserted that prior MRI scans and x-rays showed that the fusion was not successful.

In a referral form dated March 27, 2012, Dr. J. Mandume Kerina, an attending Board-certified orthopedic surgeon, diagnosed stenosis. In an accompanying narrative report, he noted that appellant presented with lower back pain. Dr. Kerina provided normal findings on physical examination and assessed lumbar and lumbosacral disc degeneration and low back pain.

In an April 17, 2012 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective May 5, 2012. It found that the medical evidence submitted was insufficient to outweigh the weight accorded to Dr. Black's opinion.

On April 21, 2012 appellant requested a review of the written record by an OWCP hearing representative.

In an April 18, 2012 lumbar CT scan report, Dr. Mahrad Paymani, a Board-certified radiologist, found two-millimeter anterolisthesis at L5-S1 with an associated mild right pars interarticularis defect. He also found moderate spinal canal narrowing at L3-L4 secondary to mild symmetrical disc protrusion along with degenerative hypertrophic changes of the posterior elements. There was mild associated bilateral neural foraminal narrowing. There was no severe spinal canal narrowing. Degenerative changes of the articular facets were present.

By letter dated May 15, 2012, appellant requested an oral hearing before an OWCP hearing representative rather than a review of the written record.

In a December 26, 2012 report, Dr. Kerina reported that appellant's April 18, 2012 CT scan with 3-D reconstruction showed a pars interarticularis defect on the right side of the L4 and

L5 facet with grade 1 spondylolisthesis of L4 on L5. She also had significant facet arthropathy of the L4 and L5 facet. The pars interarticularis defect led to the instability pattern that was seen and facet arthropathy. There was evidence of significant arthrosis of the right L4-L5 facet secondary in part to the pars interarticularis defect and instability. The left facet was also degenerative although there was no left-sided pars defect noted. The instability pattern affected the facet on the left side. Dr. Kerina advised that these findings entirely explained appellant's low back pain. He further advised that these findings, in their entirety, were secondary to her original injury. Dr. Kerina concluded that appellant's instability pattern and CT scan findings were consistent with nonhealing of any attempted past fusion.

In an April 16, 2013 report, Dr. Kerina reviewed Dr. Black's February 27, 2012 report. He disagreed with Dr. Black's opinion that appellant's back sprain had resolved, that her spondylosis had been successfully treated surgically and that her current disability from work was due to nonwork-related medical issues. Dr. Kerina advised that her current disability remained related to her May 2, 1978 work injury. He related that, although appellant underwent surgical intervention for her spondylosis, recent diagnostic tests revealed findings consistent with nonhealing of an attempted fusion. Dr. Kerina stated that the April 18, 2012 CT scan findings were secondary to her May 2, 1978 employment injury and were objective evidence supporting her subjective complaints and continuing disability. He opined that appellant continued to be disabled because of her accepted work condition of exacerbation of preexisting congenital lumbar spondylosis without myelopathy.

In a January 9, 2014 report, Dr. Kerina noted that appellant's low back pain had worsened and that she had not returned to work. He also noted her medical, family and social background. Dr. Kerina assessed ongoing low back pain.

In a June 12, 2013 decision, an OWCP hearing representative affirmed the April 17, 2012 decision. He found that the evidence submitted by appellant was insufficient to outweigh the weight accorded to Dr. Black's opinion.

By letter dated April 2, 2014, appellant, through her attorney, requested reconsideration.

In a March 31, 2014 report, Dr. Kerina stated that he did not just consider the radiologists' reports. He looked at the actual scans and tests to determine objective findings. Dr. Kerina noted that all of the objective tests performed on appellant showed objective problems consistent with her accepted condition of exacerbation of preexisting congenital spondylosis without myelopathy. He further referenced his April 16, 2013 report and findings. Dr. Kerina stated that he was aware of appellant's intervening injuries and stated that they were relatively minor in nature and did not require ongoing, significant medical care. He noted that appellant indicated that she had continuous pain complaints since her May 1978 employment injury. Dr. Kerina stated that her medical work-up and imaging studies were consistent with the alleged symptomatology. He reiterated his opinion that appellant was disabled due to her accepted May 1978 injury. Dr. Kerina added comments that his opinion was sufficient to refer appellant to a referee physician.

In a May 2, 2014 decision, OWCP denied modification of its termination decision. It found that Dr. Kerina's May 31, 2014 report was not sufficiently rationalized to outweigh the weight accorded to Dr. Black's report or to create a conflict in the medical opinion evidence.

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.[3] Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[4] After it has determined that an employee has disability causally related to federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[5] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[6]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[7] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[8]

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]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a back sprain and exacerbation of preexisting congenital lumbar spondylosis without myelopathy while in the performance of duty. It, therefore, has the burden of proof to justify the termination of compensation for temporary total disability.

OWCP found that the opinion of Dr. Black, an OWCP referral physician, represented the weight of the medical evidence. On February 27, 2012 Dr. Black reported an essentially normal examination with the exception of generalized tenderness to palpation along the course of the lumbosacral spine and decreased range of motion in flexion and extension of the lumbar spine with pain on these maneuvers. He stated that his review of prior diagnostic test results suggested

[3] 5 U.S.C. § 8102(a).

[4] *Harold S. McGough*, 36 ECAB 332 (1984).

[5] *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[6] *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[7] *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[8] *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

[9] 5 U.S.C. § 8123(a).

that appellant's fusion had healed and there was no pseudarthrosis. Dr. Black advised that there were no objective findings to support ongoing disabling residuals from the accepted May 2, 1978 work-related injuries. He found that her employment-related back sprain had resolved and her spondylolisthesis had been successfully surgically treated. Dr. Black attributed appellant's current disability to nonwork-related right total knee arthroplasty that developed an MRSA infection, advanced age, deconditioning, and endometrial cancer. He concluded that she could perform sedentary work duties.

The Board, however, finds that Dr. Kerina's opinions are of equal weight to the opinion of Dr. Black. Dr. Kerina was the attending physician. In reports dated April 16, 2013 and March 31, 2014, he took issue with Dr. Black's findings. On April 16, 2013 and March 31, 2014 Dr. Kerina found that appellant's current disability remained related to her accepted May 2, 1978 work-related exacerbation of preexisting congenital lumbar spondylosis without myelopathy. He explained that, although she underwent surgical intervention for her spondylosis, recent diagnostic tests revealed findings consistent with nonhealing of an attempted fusion. Dr. Kerina stated that the April 18, 2012 CT scan findings were secondary to appellant's May 2, 1978 employment injury and were objective evidence supporting her subjective complaints and continuing disability. His December 26, 2012 letter set forth the April 18, 2012 lumbar CT scan findings. Dr. Kerina advised that these findings explained appellant's current low back pain, and they were related to the accepted employment injury. He concluded that the CT scan findings were consistent with nonhealing of her previous fusion.

Pursuant to 5 U.S.C. § 8123(a), there is a disagreement between the physician making the examination for the United States and the physician of the employee on the issue of whether appellant had any continuing residuals and disability causally related to the May 2, 1978 employment injuries. OWCP should have referred appellant to an impartial medical specialist.[10] Without a resolution of the conflict, the Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits. The Board will reverse OWCP's May 2, 2014 decision.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof.[11]

[10] *M.D.*, Docket No. 11-928 (issued December 1, 2011).

[11] In light of the Board's disposition on the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 25, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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