

FACTUAL HISTORY

OWCP accepted that on February 1, 1991 appellant, then a 53-year-old quality assurance representative, sustained cervical strain, lumbar sprain, a temporary aggravation of preexisting spondylolisthesis at L4 and a temporary aggravation of lumbar degenerative disc disease in a motor vehicle accident. He stopped work on February 1, 1991 and did not return. OWCP paid appellant compensation for total disability beginning June 9, 1991.

On May 12, 2009 Dr. Blake Thompson, an attending Board-certified physiatrist, discussed appellant's history of a motor vehicle accident and diagnosed chronic pain syndrome and degenerative disc disease of the cervical and lumbar spine. On August 17, 2009 he provided an additional diagnosis of a neurogenic bladder. Dr. Thompson found that appellant's disability status was "permanent and stationary."

By letter dated November 27, 2009, OWCP referred appellant to Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon, for a second opinion examination. On December 14, 2009 Dr. Sabourin reviewed appellant's history of injury and the medical reports of record. He diagnosed multilevel degenerative disc disease of the lumbar spine and L4-5 degenerative disc disease with grade 1 spondylolisthesis at L5-S1. Dr. Sabourin noted that appellant had experienced a serious motor vehicle accident in the military prior to his work injury which caused neck and back problems. He found that the conditions resulting from appellant's February 1, 1991 work injury had resolved. Dr. Sabourin stated:

"I do feel that the claimant had a temporary aggravation of his lumbar spine problem, and I feel that it essentially had ceased by 1996 when he was evaluated by his doctors at that time. I feel that there has been no material changes which have occurred from [the February 1, 1991] accident and the changes that have occurred have been due to the natural progression of the underlying degenerative disc disease originating with his congenital spinal stenosis and the accident in the 1970s."

On December 22, 2009 OWCP advised appellant of its proposed termination of his compensation and medical benefits. It found that Dr. Sabourin's opinion represented the weight of the evidence and supported that he had no further residuals of his accepted employment injury.

In a report dated December 23, 2009, received by OWCP on January 14, 2010, Dr. Thompson provided diagnoses that included chronic pain syndrome, cervical and lumbar degenerative disc disease, neurogenic bladder, congenital spinal stenosis, grade 1 spondylolisthesis at L4-5 and cervical spondylosis especially at C3 through C6. He opined that appellant's condition was permanent and that appellant required additional medical treatment.

OWCP determined that a conflict existed between Dr. Thompson and Dr. Sabourin regarding whether appellant had further residuals of his February 1, 1991 work injury. It referred him to Dr. John Serocki, a Board-certified orthopedic surgeon, for an impartial medical examination. On May 13, 2010 Dr. Serocki discussed appellant's history of injury and complaints of back pain radiating down both legs, neck pain radiating into the trapezius and

urinary incontinence. He diagnosed status post cervical and lumbar sprains, chronic axial neck and low back pain with degenerative disc disease and lumbar spondylolisthesis and lumbar radiculitis. Dr. Serocki discussed appellant's history of an injury to his back in the 1970s. He listed findings on examination of diminished tendon reflex in the low back and a positive straight-leg test. Dr. Serocki disagreed with Dr. Sabourin's opinion that appellant's condition had not materially changed after his February 1, 1991 work injury. He stated:

"First, Dr. Sabourin indicated that he did not find any material change in [appellant's] condition as a result of the industrial incident of February 1, 1991. However, the medical records suggest that there are at least three significant material changes that did occur as a result of this accident. The first is [appellant's] work capacity. Prior to this accident, [he] was working in his usual and customary job without restrictions. Following the accident, [appellant] was unable to return to his usual and customary job because of his symptoms and was ultimately found to [be] permanently partially disabled. The second material change is the development of chronic axial neck and back pain. There are no records indicating that [appellant] [was] being treated for neck and back pain prior to the incident of February 1, 1991, nor is there any evidence that he missed time from work because of these conditions. Following this accident, there are multiple medical documents indicating the presence of neck and back pain that required additional medical treatment and lost time from work. The third material change is the development of lumbar radiculopathy. This condition has been documented by multiple medical examiners following [appellant's] injury. There is no medical documentation indicating that [he] carried these diagnos[es] prior to the industrial injury of February 1, 1991. It should be noted that these symptoms were of such magnitude that surgery was recommended by several physicians as a means of resolving them after conservative treatment had failed."

Dr. Serocki also disagreed with Dr. Sabourin's finding that appellant's sprains had resolved as of 1996 as it was "inconsistent with the submitted medical evidence." He stated, "In summary, I believe that the medical evidence suggests that [appellant] continues to experience neck and back pain, as well as lumbar radiculitis, as a result of the industrially-related motor vehicle accident of February 1, 1991." Dr. Serocki opined that appellant could perform sedentary employment. He listed as objective factors supporting that appellant had continued employment-related disability "loss of motion in the neck and back, tenderness over the neck and low back, and a positive straight[-]leg raising test on the right." Dr. Serocki attributed all the diagnosed conditions to appellant's work injury and found that he required "supportive care as is currently being provided by Dr. Thompson."

On June 18, 2010 OWCP requested that Dr. Serocki clarify his conclusions. It stated:

"Although you have outlined three 'significant material changes' including a change in disability status and work capacity, increased neck and back pain and the development of radiculopathy, these are *not* considered material changes in the claimant's industrial medical condition based on objective findings and diagnostic testing results. Furthermore, the absence of medical treatment and or disability prior to the February 1, 1991 injury does not establish that all medical

complaints related to the cervical and lumbar spine after the date of injury are related to the industrial incident.” (Emphasis in the original.)

OWCP advised Dr. Serocki of the definition of aggravation and asked that he provide his opinion regarding whether appellant sustained a permanent aggravation. It noted that he found that appellant had continued pain in his neck and back and lumbar radiculitis due to his February 1, 1991 motor vehicle accident. OWCP stated:

“It is not clear to [OWCP] how the diagnosis of cervical sprain, lumbar sprain and lumbar radiculopathy are still actively causing objective findings in light of [appellant’s] ongoing multilevel lumbar and cervical degenerative disc disease which was documented at the time of injury[.] Please explain with medical rationale why you attribute the claimant’s current cervical and lumbar conditions to the industrial injury rather than the natural progression of his degenerative condition.”

On August 31, 2010 Dr. Serocki related:

“In your letter of June 18, 2010, you indicated that [OWCP] did not consider change in work capacity, symptoms of neck pain, or radiculopathy as ‘material changes.’ If these conditions are not considered to be material changes, then under the definition of terms utilized by [OWCP], there would be no permanent aggravation in [appellant’s] underlying condition. In order to document changes per these definitions, one would have to have a preinjury MRI [magnetic resonance imaging] scan, an EMG/NCV [electromyogram/nerve condition] study performed before and after the injury, or a postinjury study showing changes consistent with acute trauma. These tests do not exist; therefore, under the definitions adopted by [OWCP], it would not be possible to document an industrial aggravation of his underlying condition.”

Dr. Serocki asserted that he did not mean to attribute all of appellant’s complaints to his employment injury as a “significant portion” of his neck and back problems were due to preexisting degenerative conditions. He stated, “However, using the definitions noted above, it is not possible to document a permanent aggravation of his preexisting condition arising as a result of his industrial injury.”

By letter dated September 22, 2010, OWCP requested that Dr. Serocki address whether appellant had continued residuals of his February 1, 1991 employment injury and whether his temporary aggravation had ceased. On October 8, 2010 Dr. Serocki asked that OWCP provide its definition of residuals. In an October 12, 2010 response, OWCP advised that it did not have an exact definition of “residuals.” It requested that Dr. Serocki explain whether appellant’s current condition was related to his February 1, 1991 work injury. On October 13, 2010 Dr. Serocki noted that medical records both past and present showed that appellant had “continued complaints of pain” but did not demonstrate objective findings directly resulting from the work injury. He stated that, based on OWCP’s definition of aggravation, appellant’s temporary aggravation ceased in 1996 when a physician found that he had reached maximum medical improvement.

By decision dated October 21, 2010, OWCP terminated appellant's compensation and authorization for medical treatment effective October 24, 2010. It based the termination on Dr. Serocki's opinion that his temporary aggravation of lumbar degenerative disc disease ceased by January 10, 1996.

On appeal appellant argues that Dr. Serocki disagreed with Dr. Sebourin's opinion. He maintains that his condition changed after the February 1, 1991 work incident.

LEGAL PRECEDENT -- ISSUES 1 & 2

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² Its burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.³ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.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

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.⁶ 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.⁷ 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.⁸

² *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁴ *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

⁵ *Id.*

⁶ 5 U.S.C. § 8123(a).

⁷ 20 C.F.R. § 10.321.

⁸ *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

ANALYSIS -- ISSUES 1 & 2

OWCP accepted that appellant sustained a sprain of the cervical and lumbar spine and a temporary aggravation of preexisting L4 spondylolisthesis and degenerative disc disease due to a February 1, 1991 motor vehicle accident. It paid him compensation for total disability beginning June 9, 1991. OWCP determined that a conflict arose between Dr. Thompson, his attending physician, and Dr. Sabourin, who provided a second opinion examination, regarding the extent of appellant's employment-related condition and disability. It referred him to Dr. Serocki, a Board-certified orthopedic surgeon, for an impartial medical examination. On May 13, 2010 Dr. Serocki diagnosed status post cervical and lumbar sprains, chronic axial neck and low back pain with degenerative disc disease, lumbar spondylolisthesis and lumbar radiculitis. He attributed the diagnosed conditions to the accepted work injury. Dr. Serocki disagreed with Dr. Sabourin's opinion that appellant had not experienced a material change in his condition subsequent to his employment injury. He explained that after the February 1, 1991 motor vehicle accident appellant was unable to perform his date-of-injury position, required medical treatment and developed lumbar radiculopathy. Dr. Serocki also found that his back and neck sprains had not resolved based on his review of the medical evidence. He opined that appellant continued to experience pain in his neck and low back and lumbar radiculitis due to his work injury. Dr. Serocki determined that he could perform sedentary employment.

Dr. Serocki's opinion was detailed, based on a thorough review of the medical evidence and findings on examination and supported by medical rationale. OWCP, however, determined that it required clarification. When it secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, it has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report.⁹ OWCP's request for clarification, however, must be presented in a neutral manner and observe the distinction between inappropriate adjudicatory questions and appropriate medical questions.¹⁰ On June 18, 2010 it advised Dr. Serocki that alterations in work status, increased pain and radiculopathy did not constitute material changes in appellant's condition. However, the issue of whether appellant's condition changed subsequent to the work injury is a medical determination for a physician. Additionally, the issue is not whether he has established a material change in his condition but rather whether OWCP has met its burden of proof to show that he no longer has any disability or need for further medical treatment due to his accepted employment injury. Dr. Serocki addressed the relevant issue and found that he had continuing disability and the need for medical treatment as a result of his February 1, 1991 motor vehicle accident.

OWCP further informed Dr. Serocki that the absence of medical treatment prior to appellant's work injury did not show that all his conditions were work related. Contrary to its implication, however, Dr. Serocki did not rely solely on the fact that he required medical treatment after his February 1991 motor vehicle accident in determining that he had continuing employment-related residuals. He discussed the history of injury, provided subjective and

⁹ See *L.R. (E.R.)*, 58 ECAB 369 (2007); *Phillip H. Conte*, 56 ECAB 213 (2004).

¹⁰ See *Carlton L. Owens*, 36 ECAB 608 (1985).

objective findings of disability and considered the medical evidence of record in reaching his conclusions.

In a supplemental report dated August 31, 2010, Dr. Serocki found that under OWCP's definition of material change, it would not be possible to show a permanent aggravation without detailed diagnostic studies before and after the injury. In a report dated October 8, 2010, he found that, under OWCP's definition of aggravation, appellant's condition resolved in 1996. These reports, however, were predicated on the information provided by OWCP in its June 18, 2010 letter. As the June 18, 2010 letter failed to observe the distinction between adjudicatory and medical questions, the supplemental reports from Dr. Serocki are insufficient to meet OWCP's burden of proof. Consequently, OWCP improperly terminated appellant's compensation and authorization for medical treatment.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation effective October 21, 2010 on the grounds that he had no further employment-related disability and condition.

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 22, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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