

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

M.R., Appellant

and

**DEPARTMENT OF JUSTICE, BUREAU OF
PRISONS, Fort Dix, NJ, Employer**

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**Docket No. 12-1290
Issued: December 21, 2012**

Appearances:

*Jason S. Lomax, Esq., 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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 21, 2012 appellant, through his attorney, filed a timely appeal from a November 30, 2011 decision of an Office of Workers' Compensation Programs' (OWCP) hearing representative. 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 properly terminated appellant's wage-loss and medical benefits effective May 8, 2011 on the grounds that his accepted condition had resolved.

On appeal, appellant's counsel contends that OWCP committed error in evaluating the opinion of the impartial medical examiner.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 27, 2009 appellant, then a 28-year-old correctional officer, filed a traumatic injury claim alleging injury to his low back and right shoulder when he lost his balance on the stairs and fell backwards. On July 14, 2009 OWCP accepted his claim for lumbago. It paid wage-loss compensation and medical benefits. On January 21, 2010 appellant underwent a microdiscectomy on the left at L5-S1.

Appellant had a previous claim of traumatic injury on March 19, 2007. He was standing in a line when ice and snow fell off the roof of a building and struck him in the left side of his head, back and abdomen (OWCP File No. xxxxxx180). Appellant was diagnosed with a lumbar strain and left rib contusion. He returned to full-time limited-duty work after a few days and resumed regular full-time duty after two weeks. OWCP administratively accepted the claim without a formal adjudication.

In a June 11, 2010 attending physician's report, Dr. Joseph Lombardi, a Board-certified orthopedic surgeon, reviewed a July 8, 2009 magnetic resonance imaging (MRI) scan of the lumbar spine. He diagnosed a left-sided lumbar disc herniation at L5-S1, sciatica, status post microdiscectomy at L5-S1 on January 21, 2010 and right-sided thoracic disc herniation at T11-12 and left sided at T12-L1. Dr. Lombardi opined that the conditions were caused or aggravated by appellant's employment injury and he was totally disabled.

On July 28, 2010 OWCP referred appellant to Dr. Aldo D. Iulo, a Board-certified orthopedic surgeon, for a second opinion. In an August 11, 2010 report, Dr. Iulo reviewed the statement of accepted facts and medical history. Appellant sustained a herniated disc. Dr. Iulo noted that the prognosis was good as well over 90 percent of patients would be expected to recover and that appellant would expect a full recovery. He noted that appellant's complaints were subjective and he did not find any objective signs of residual permanency. Dr. Iulo opined that appellant should be able to return to his full-time employment without restrictions within a reasonable degree of medical certainty. He explained that the fall precipitated a latent preexisting condition which most likely began when appellant was in the military service.

On September 16, 2010 Dr. Lombardi noted that appellant was out of work for six weeks due to left-sided foraminal herniated nucleus pulposus of the lumbar spine at L5-S1 and left sciatica. In subsequent reports, he reiterated that appellant was totally disabled.

OWCP found a conflict in medical opinion between Dr. Lombardi and Dr. Iulo with regard to appellant's residuals and extent of disability due to the work injury. On October 25, 2010 it referred appellant to Dr. Ian Fries, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a December 6, 2010 report, Dr. Fries noted that appellant's claim had been accepted for lumbago. He found that appellant did not have objective residuals of his fall. Dr. Fries stated that appellant likely sustained back contusions based upon the mechanism of the injury, but any contusion should have healed. On examination there were no objective findings and appellant had healed sufficiently to resume full-time full-duty work. Appellant had preexisting conditions not related to the fall of chronic depression, suicidal ideation, probable prescription drug

dependence, probable alcoholism, chronic low back and left leg symptoms. Dr. Fries stated that appellant was unable to resume full-duty work as a corrections officer due to the concurrent preexisting conditions. Despite appellant's claims to the contrary, his preexisting conditions had not been aggravated, precipitated or accelerated by the employment injury.

By letter dated December 22, 2010, OWCP updated appellant's accepted conditions to include: lumbago; L5-S1 disc herniation; T11-12 and T12-L1 disc herniations and lumbar radiculopathy.

By letter dated December 22, 2010, OWCP asked for Dr. Fries to provide a supplemental opinion as to whether his opinion had changed based on the newly accepted conditions. In a January 6, 2011 report, Dr. Fries noted that it had ruled that a person cannot meet disablement requirements based on a spinal condition, *e.g.*, a herniated disc, but must have objective evidence of radiculopathy in an extremity due to the spinal pathology. He reiterated that appellant's symptoms and clinical findings are entirely subjective and that recent electrodiagnostic studies were normal and provided no objective support that appellant had lower extremity radiculopathy. Dr. Fries concluded that appellant did not have any disabling residuals from his fall. He concluded that appellant did not have disability due to his May 27, 2009 employment injury based on the objective findings.

On February 8, 2011 OWCP issued a notice of proposed termination of appellant's compensation benefits finding that the special weight of the medical evidence was represented by the Dr. Fries who found appellant's medical conditions had ceased and there was no disability due to the employment injury.

Dr. Lombardi continued to submit reports stating that appellant was totally disabled to the accepted employment injury.

On March 16, 2011 OWCP asked Dr. Fries to address whether the fact that appellant had a prior employment injury to his back would change his conclusions. In an April 12, 2011 response, Dr. Fries opined that appellant had fully recovered from his prior injury of March 19, 2007 and had no residuals. He further opined that this accident had no bearing on appellant's subsequent May 27, 2009 injuries or change his prior opinion.

By decision dated May 3, 2011, OWCP terminated appellant's compensation and medical benefits effective May 8, 2011.

On May 31, 2011 appellant requested an oral hearing before an OWCP hearing representative. At the hearing, appellant's representative argued that Dr. Fries was biased and did not submit a rational medical opinion. He contended that Dr. Fries erroneously applied the criteria for a schedule award to determine the issue of disability and disregarded the accepted conditions.

By decision dated November 30, 2011, OWCP's hearing representative affirmed the termination of benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.² 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.³ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.⁴

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.⁵ When 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.⁶

ANALYSIS

OWCP accepted appellant's claim for lumbago causally related to a May 27, 2009 employment injury. It subsequently accepted an L5-S1 disc herniation, T11-12 and T12-L1 disc herniations and lumbar radiculopathy. OWCP accepted the additional conditions after the report of Dr. Iulo, and the first report of the impartial medical examiner, Dr. Fries.

At the time OWCP referred appellant to Dr. Fries, it asked him to resolve the conflict between appellant's treating physician, Dr. Lombardi, and the second opinion physician, Dr. Iulo, with regards to the need for further medical treatment and continuing disability due to the work injury. As Dr. Lombardi opined that appellant was totally disabled due to the accepted injury and Dr. Iulo believed that appellant could return to his regular employment, OWCP properly found a conflict with regard to whether appellant's disability had ceased.

The Board finds that the opinion of Dr. Fries is not sufficient to resolve the conflict in the medical evidence with regard to whether appellant has any disability residuals of his accepted condition. In concluding that appellant had no disabling residuals from the employment incident, Dr. Fries stated that OWCP has ruled that a person cannot meet disablement requirements based solely on a spinal condition, but must have objective evidence of radiculopathy in an extremity due to spinal pathology. He did not. In evaluating a claim for a schedule award, FECA does not allow an impairment rating for the back or spine, but awards

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

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

⁴ *M.D.*, Docket No. 11-1737 (issued April 3, 2012); *Calvin S. Mays*, 39 ECAB 993 (1988).

⁵ 5 U.S.C. § 8123(a).

⁶ *J.M.*, Docket No. 12-589 (issued September 14, 2012).

may be allowed for impairment to an extremity that originates in the spine.⁷ When considering the issue of disability, Dr. Fries misunderstood that appellant could not be disabled solely due to a back injury. His opinion does not constitute a fully-rationalized opinion on causal relation.

The Board finds that the report of the impartial medical examiner, Dr. Fries, is not sufficient to resolve the conflict of medical evidence. As there is an unresolved conflict of medical evidence, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation and medical benefits effective May 8, 2011.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation and medical benefits effective May 8, 2011 on the grounds that his accepted condition had resolved.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 30, 2011 is reversed.

Issued: December 21, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

⁷ FECA and the implementing regulations do not provide for the payment of a schedule award for the permanent loss of use of the back or the body as a whole. *See Jay K. Tomokiyo*, 51 ECAB 361 (2000). However, a claimant may be entitled to a schedule award for permanent impairment to an upper or lower extremity even though the cause of the impairment originated in the neck, shoulders or spine. *Thomas J. Englehart*, 50 ECAB 319 (1999).