United States Department of Labor
Employees' Compensation Appeals Board

C.K., Appellant	)	
and	)	**Docket No. 11-2094**
	)	**Issued: July 2, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Kingston, PA, Employer	)	

Appearances:
John G. Swatkoski, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2011 appellant, through her attorney, filed a timely appeal from an April 27, 2011 merit decision 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 the case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective December 20, 2009.

FACTUAL HISTORY

On August 27, 2003 appellant, then a 51-year-old letter carrier, injured her back in the performance of duty. A September 2, 2003 electromyogram (EMG) obtained by Dr. Leroy J. Pelicci, a Board-certified neurologist, revealed bilateral L4, L5 and S1 nerve root involvement and spasms from T10 through T12. A September 15, 2003 magnetic resonance imaging (MRI)

[1] 5 U.S.C. § 8101 *et seq.*

scan report from Dr. Juan D. Gaia, a Board-certified diagnostic radiologist, indicated that appellant sustained L2-3, L3-4, L4-5 and L5-S1 disc herniations. By decision dated November 5, 2003, OWCP accepted her traumatic injury claim for acute exacerbation of lumbar strain.[2] After appellant was discharged to restricted duty, she sustained recurrence of disability on September 13, 2004.[3] She did not return to work and received disability compensation accordingly.[4]

An August 14, 2006 MRI scan report from Dr. Michael Yuz, a Board-certified diagnostic radiologist, diagnosed L2-3, L3-4, L4-5 and L5-S1 disc protrusions, L4-5 disc extrusion and canal stenosis and hypertrophic facet disease while a November 10, 2006 EMG conducted by Dr. John A. Kline, Jr., a Board-certified physiatrist, showed electrodiagnostic evidence of left S1 radiculopathy.

Progress notes for the period May 21, 2007 to August 12, 2008 from Dr. Toni Jo H. Parmelee, an osteopath and Board-certified family practitioner, diagnosed lumbar intervertebral disc degeneration, lumbago sciatica due to disc displacement and radiculopathy. She related that appellant had limited lumbar range of motion (ROM), decreased lordotic curve, paraspinal muscle spasms and tenderness, sacroiliac joint tenderness, right extensor hallucis longus weakness and positive bilateral straight leg raise maneuver on multiple examinations.[5]

In an April 17, 2007 report, Dr. William R. Prebola, Jr., a Board-certified physiatrist, examined appellant and observed limited lumbar ROM, paraspinal spasms, left lumbar trigger point, sacroiliac tenderness, slightly-antalgic left gait and positive Gaenslen's and Lasegue's maneuvers. He also noted Dr. Kline's November 10, 2006 EMG findings. Dr. Prebola diagnosed lower back pain and left-sided lumbar radiculopathy. In a follow-up report dated September 4, 2007, he added a diagnosis of disc herniation and opined that appellant "remains on total disability status."[6]

OWCP referred appellant to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion examination. In an October 27, 2008 report, Dr. Draper disagreed with Dr. Gaia's interpretation of the September 15, 2003 MRI scan, stating that the scan actually exhibited normal L2-3, L3-4 and L5-S1 discs and a bulging L4-5 disc. He also remarked that the August 14, 2006 MRI scan demonstrated bulging L2-3, L3-4 and L5-S1 discs and L4-5 disc

[2] In addition, OWCP accepted three prior claims for lumbar and lumbosacral sprains arising on November 26, 1994; October 8, 1996; and August 11, 1998. *See* it File Nos. xxxxxx944, xxxxxx628 and xxxxxx966. OWCP subsequently combined these claims with the present one.

[3] The foregoing information was incorporated into the September 11, 2008 statement of accepted facts.

[4] OWCP originally terminated appellant's wage-loss compensation and medical benefits on September 14, 2006. OWCP's hearing representative later reversed the decision on June 7, 2007. Appellant was referred for vocational rehabilitation services in early 2009. Following issuance of OWCP's November 4, 2009 notice of proposed termination of wage-loss compensation and medical benefits, *infra*, the vocational rehabilitation counselor closed services effective November 11, 2009.

[5] The case record contains additional progress notes from Dr. Parmelee for the period September 23, 2008 to November 18, 2010, which essentially reiterated content found in earlier notes.

[6] Dr. Prebola presented objective findings akin to those contained in his preceding report.

herniation. On examination, Dr. Draper observed limited lumbar ROM and positive Waddell's signs. He diagnosed resolved lumbar strain and preexisting degenerative disc disease at L2-3, L3-4, L4-5 and L5-S1. Dr. Draper opined that appellant's symptoms resulted from her disc protrusions and explained:

> "I believe that the worsening of the disc protrusion[s] is not associated with the [August 27, 2003] accident as it occurred between the two dates of the MRI [scan] studies, indicating progression of the degenerative lumbar disc disease. This progression is not causally related to the accepted lumbar strain."

He concluded that appellant was totally disabled for the two-month period following the August 27, 2003 traumatic incident, but was thereafter capable of performing modified work on a full-time schedule. Dr. Draper restricted pushing, pulling and lifting to items weighing less than 20 pounds.

OWCP asked Dr. Prebola in a November 12, 2008 letter to submit a detailed response to Dr. Draper's October 27, 2008 report. In a November 17, 2008 letter, Dr. Prebola commented, "I have read Dr. Draper's [second opinion] report and I disagree with his findings...." OWCP determined that a conflict in medical opinion existed between Drs. Prebola and Draper regarding the extent of work-related residuals and whether appellant remained disabled as a result of her accepted condition and referred the case to Dr. Barry I. Berger, a Board-certified orthopedic surgeon, for a referee examination.

In a January 12, 2009 report, Dr. Berger reviewed the September 11, 2008 statement of accepted facts and the medical file. On examination, he observed limited lumbar ROM and diminished left L5 sensation that was "subjective" in the absence of lower extremity atrophy. Dr. Berger pointed out that the diagnostic records, notably the September 15, 2003 and August 14, 2006 MRI scans, documented L4-5 central disc protrusion and canal stenosis, multilevel degenerative disc disease and hypertrophic facet disease, but did not definitively establish L4-5 disc herniation. He opined that, while appellant was temporarily disabled for up to six months due to her work-related lumbar strain on August 27, 2003, she was thereafter able to return to full-time employment with permanent restrictions, which included limiting walking and standing to two hours each, bending, stooping, squatting and kneeling to less than an hour each and lifting less than 20 pounds on occasion. Dr. Berger specified that her symptoms were not residuals of the accepted condition, but instead resulted from an underlying degenerative condition.

OWCP received additional medical evidence. In a November 21, 2008 report, Dr. Prebola reiterated that he disagreed with Dr. Draper's October 27, 2008 second opinion report and opined that appellant was totally disabled. On examination, he observed limited lumbar ROM, paraspinal spasms, left lower extremity numbness, antalgic left gait and a positive Lasegue's maneuver. Dr. Prebola diagnosed work-related lumbar disc herniation and myofascial spasm. He added in a March 20, 2009 report that appellant sustained lumbago.[7]

A December 10, 2008 EMG conducted by Dr. Christopher Castro, an osteopath Board-certified in physical medicine and rehabilitation, showed electrodiagnostic evidence of left L5

[7] Dr. Prebola presented objective findings akin to those contained in his preceding report.

and right S1 radiculopathy while Dr. Parmelee's March 13, 2009 report stated that the medication Cymbalta was medically necessary to treat appellant's herniated lumbar disc and radiculopathy.

In June 29 and August 4, 2009 letters to Dr. Berger, OWCP requested a supplemental opinion. It noted appellant's previous claims, provided medical records regarding those claims[8] and asked if his review of those records caused any change in his previous opinion. OWCP also sent a June 29, 2009 letter to Dr. Draper providing the same information and asking the same question.

In an August 14, 2009 report, Dr. Berger noted reviewing the additional records and advised that appellant's restrictions were due to a nonwork-related degenerative condition and that she did not have any particular residuals of her work-related conditions. He advised that the additional records did not change his opinion.

In a September 9, 2009 report, Dr. Draper noted reviewing the additional material provided by OWCP, including Dr. Berger's January 12, 2009 report. He advised that the additional information confirmed his original opinion and that his conclusions were consistent with those of Dr. Berger.

On November 4, 2009 OWCP issued a notice of proposed termination of wage-loss compensation and medical benefits. It advised that both Dr. Draper and Dr. Berger found that the review of additional medical records confirmed their original conclusion.

Counsel argued in a December 4, 2009 letter that Dr. Berger's January 12, 2009 report was suspect and that appellant experienced ongoing back pain that rendered her permanently and totally disabled.[9]

By decision dated December 10, 2009, OWCP terminated appellant's medical and wage-loss benefits effective December 20, 2009, finding that the weight of the medical evidence established that her accepted employment condition resolved.

In a March 11, 2010 report, Dr. Prebola examined appellant and observed limited lumbar ROM, paraspinal spasms, diminished sensory function in the left lower extremity, antalgic left gait and a positive Lasegue's maneuver. He diagnosed lumbar disc herniation, myofascial pain and radiculopathy and restricted lifting to items weighting less than 10 pounds and driving to less than one hour.

Counsel requested a telephonic hearing, which was held on February 23, 2011. Appellant testified that she did not have a back condition prior to working for the employing establishment. She remained symptomatic and on pain medication since she was taken off duty in 2004.

Following the hearing, OWCP received additional evidence. In a February 17, 2011 work capacity evaluation form, Dr. Parmelee checked the "no" box indicating that appellant was

[8] *See supra* note 2.

[9] Appellant also submitted an October 20, 2009 report from Dr. Prebola, which essentially reiterated content found in the November 21, 2008 and March 20, 2009 reports.

unable to return to her previous federal employment in any capacity. She permanently proscribed lifting, squatting, kneeling and climbing and limited other activities of daily living. Dr. Prebola noted in a March 10, 2011 report that the August 14, 2006 MRI scan exhibited L4-5 and L5-S1 disc herniations.[10] In a March 21, 2011 letter, counsel reargued that Dr. Berger's January 12, 2009 report was based on "surmise, speculation and unwarranted presumption."

On April 27, 2011 OWCP's hearing representative affirmed the December 10, 2009 decision.

LEGAL PRECEDENT

Once OWCP has accepted a claim, it has the burden of justifying termination or modification of compensation benefits,[11] which includes furnishing rationalized medical opinion evidence based on a proper factual and medical background.[12] Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability ceased or was no longer related to the employment.[13] The right to medical benefits for an accepted condition, on the other hand, is not limited to the period of entitlement to disability compensation. To terminate authorization for medical treatment, OWCP must establish that an employee no longer has residuals of an employment-related condition, which would require further medical treatment.[14]

If there is a conflict in medical opinion between the employee's physician and the physician making the examination for the United States, OWCP shall appoint a third physician, known as a referee physician or impartial medical specialist, to make what is called a referee examination.[15] Where OWCP has referred appellant to a referee physician to resolve a conflict, the referee's opinion, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16]

ANALYSIS

OWCP accepted that appellant sustained work-related exacerbation of lumbar strain on August 27, 2003 as well as recurrence of disability on September 13, 2004, after which she did not return to her federal employment. Dr. Prebola, her attending physician, opined in April 17 and September 4, 2007 reports that she was totally disabled. On the other hand, Dr. Draper, OWCP's second opinion examiner, concluded in an October 27, 2008 report that, while appellant

[10] Dr. Prebola presented objective findings, diagnoses and work restrictions similar to those contained in earlier reports.

[11] *I.J.*, 59 ECAB 408 (2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

[12] *D.C.*, Docket No. 09-1070 (issued November 12, 2009); *Larry Warner*, 43 ECAB 1027 (1992).

[13] *I.J.*, *supra* note 11.

[14] *L.G.*, Docket No. 09-1692 (issued August 11, 2010); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[15] *See* 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321.

[16] *L.W.*, 59 ECAB 471 (2007); *James P. Roberts*, 31 ECAB 1010 (1980).

was totally disabled for a two-month period due to her accepted condition, her present symptoms were nonindustrial as they stemmed from preexisting degenerative lumbar disc disease. OWCP determined that a conflict in medical opinion existed and appointed Dr. Berger as an impartial medical specialist.

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits. In a January 12, 2009 report, following a physical examination and a review of the September 11, 2008 statement of accepted facts and the medical file, Dr. Berger opined that appellant was temporarily disabled for up to six months due to her accepted lumbar condition, but was nonetheless capable of full-time employment with permanent restrictions after this period. He also explained that her present symptoms resulted from preexisting degenerative disc disease rather than her accepted condition. As noted, the report of an impartial medical specialist will be accorded special weight upon review by the Board provided that the report obtained from such specialist is sufficiently rationalized and based upon a proper factual background.[17] Here, Dr. Berger suggested that appellant's exacerbated lumbar strain resolved after six months elapsed from the August 27, 2003 employment incident, which would be February or March 2004. He then ruled out that any ensuing symptoms were work related and attributed them to preexisting degenerative disc disease. However, Dr. Berger failed to take into account appellant's September 13, 2004 recurrence of disability, which was accepted by OWCP. Medical opinions based on an incomplete or inaccurate factual history are of diminished probative value.[18] This inconsistency in Dr. Berger's opinion was not specifically clarified in his August 14, 2009 supplemental report. Accordingly, the Board finds that his opinion was insufficient to meet OWCP's burden of proof to terminate benefits.

Furthermore, the Board finds that it was improper to seek additional opinion from Dr. Draper, the second opinion physician who created the conflict with Dr. Prebola, after Dr. Berger was selected to resolve the conflict and had provided an opinion. OWCP's procedures contemplate that, once a referee specialist submits an opinion, if the opinion is insufficient, OWCP must seek clarification from the impartial specialist.[19] It is the impartial specialist who must resolve the medical conflict.[20] OWCP did not explain why it was necessary to seek a supplemental opinion from a second opinion physician who created the conflict which necessitated appellant's referral to Dr. Berger under 5 U.S.C. § 8123(a). This gives the

[17] *See James T. Johnson*, 39 ECAB 1252, 1256 (1988) ("[t]he Board reviews the medical evidence to determine whether the medical report was based on incomplete information and looks at such factors as the opportunity for and thoroughness of examination performed by the physician; the accuracy and completeness of the physician's knowledge of the facts and medical history; the care of analysis manifested; and the medical rationale expressed by the physician on the medical issues addressed to him by [OWCP]").

[18] *P.B.*, Docket No. 10-1127 (issued March 28, 2011).

[19] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11(e) (September 2010). *See also V.G.*, 59 ECAB 635 (2008).

[20] *See Thomas J. Fragale*, 55 ECAB 619 (2004). *See also Charles H. Miller*, Docket No. 93-2000 (issued March 22, 1995) (in a situation where there exists a medical conflict, if the weight of the medical evidence lies anywhere, it must be with the opinion of the specialist chosen to resolve the outstanding conflict).

appearance that OWCP sought opinion outside of the impartial specialist's report upon which to resolve the conflict.[21]

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits effective December 20, 2009.

ORDER

IT IS HEREBY ORDERED THAT the April 27, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 2, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

[21] *Cf. Frederick Justiniano*, 45 ECAB 491 (1994) (OWCP not allowed to rely on a referral physician's report, without further explanation, when there was a conflict for which an impartial specialist had been selected).