

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

C.N., Appellant)

and)

**U.S. POSTAL SERVICE, WEST PALM BEACH)
PROCESSING & DISTRIBUTION CENTER,)
West Palm Beach, FL, Employer)**

**Docket No. 11-1824
Issued: June 18, 2012**

Appearances:
C.B. Weiser, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 26, 2011¹ appellant, through her attorney, filed a timely appeal from a February 2, 2011 decision of the Office of Workers' Compensation Programs (OWCP) affirming the prior termination of her wage-loss and medical compensation benefits. Pursuant to the Federal Employees' Compensation Act² (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 compensation effective July 15, 2010 on the grounds that an accepted aggravation of preexisting lumbar conditions had ceased without residuals.

¹ Appellant's request for appeal was postmarked on July 26, 2011 within 180 days of OWCP's February 2, 2011 decision.

² 5 U.S.C. § 8101 *et seq.*

On appeal, counsel asserts that OWCP's February 2, 2011 decision should be reversed based on the record.

FACTUAL HISTORY

OWCP accepted that on July 2, 2008 appellant, then a 47-year-old supervisor, sustained a temporary aggravation of a herniated L4-5 disc with scoliosis and degenerative disease while lifting trays of mail.³ She received compensation on the daily rolls from July 24, 2008 to June 17, 2009 and ongoing medical benefits.

Appellant submitted medical reports regarding an April 2008 nonoccupational lumbar injury. In a May 1, 2008 report, Dr. Robert Green, an attending Board-certified thoracic and general surgeon, noted a one-month history of lumbar and right leg pain. A May 2, 2008 magnetic resonance imaging scan showed a small right-sided disc herniation at L4-5 with spinal stenosis, rotoscoliosis and facet disease. Dr. Wayne S. Weidenbaum, an attending Board-certified anesthesiologist, administered an epidural steroid injection on May 15, 2008. In May and June 2008 reports, Dr. Green noted that appellant had excellent symptomatic relief from the epidural injection but presented on June 10, 2008 with severe lumbar and right leg pain. Dr. Weidenbaum administered additional epidural injections on June 16 and 26, 2008. He found her disabled for work for an indefinite period.

In a December 1, 2008 report, Dr. Bruce M. Fishbane, a physician performing a fitness-for-duty examination for the employing establishment, found appellant disabled from her date-of-injury job and noted work restrictions.

In a January 23, 2009 report, Dr. Weidenbaum stated that appellant was doing well until a June 8, 2008 workplace incident when she lifted "106 trays each weighing 20 pounds and developed severe pain in the low back radiating to the right buttock and hip." He found her disabled for work through November 10, 2009.

On June 3, 2009 OWCP referred appellant the medical record and a statement of accepted facts to Dr. Richard Kleiman, a Board-certified orthopedic surgeon, for a second opinion regarding the duration of any disability for work related to the accepted injuries. Dr. Kleiman submitted a June 17, 2009 report opining that the June 8, 2008 incident caused a temporary aggravation of preexisting lumbar conditions. He noted that appellant could no longer work as a supervisor as she could not perform heavy lifting and required narcotic pain medication.⁴

³ OWCP initially denied the claim by August 27, 2008, finding that appellant did not establish that the claimed June 8, 2008 incident was factual. Following a January 14, 2009 telephonic hearing, an OWCP hearing representative vacated the August 27, 2008 decision and remanded the case to OWCP for appointment of a second opinion physician.

⁴ The employer submitted July 23, 2008 and January 13, 2009 letters asserting that appellant's lumbar condition was due solely to nonoccupational injuries sustained in a May 3, 1998 automobile accident and a March 2008 lifting incident at her home. Appellant submitted a March 9, 2009 statement asserting that she fully recovered from the accident by August 26, 1998.

OWCP found a conflict of medical opinion between Dr. Fishbane, for appellant, and Dr. Kleiman, for OWCP, regarding the duration of the accepted aggravation. To resolve the conflict, it selected Dr. Robert Elkins, a Board-certified orthopedic surgeon, to serve as impartial medical examiner. In a September 30, 2009 report, Dr. Elkins opined that the accepted aggravation ceased no later than June 17, 2009.

By notice dated October 21, 2009, OWCP advised appellant that it proposed to terminate her compensation on the grounds that the accepted injuries had ceased without residuals. Counsel responded by November 17, 2009 letter asserting that there was no conflict of opinion as Dr. Fishbane was a fitness-for-duty examiner, not an attending physician. OWCP then directed appointment of a new impartial medical examiner, clarifying that the conflict was between Dr. Green and Dr. Kleiman.

On March 2, 2010 OWCP selected Dr. Emmanuel Scarlatos, a Board-certified orthopedic surgeon, as impartial medical examiner and provided him a statement of accepted facts and a copy of the medical record. The record contains a Form ME023 appointment schedule notification without information regarding the selection process.⁵

In an April 13, 2010 report, Dr. Scarlatos opined that the June 8, 2008 work incident temporarily aggravated preexisting lumbar scoliosis with a bulging L4-5 disc. He stated that the aggravation ceased no later than June 17, 2009.

By notice dated May 10, 2010, OWCP advised appellant that it proposed to terminate her compensation benefits on the grounds that the accepted injury had ceased without residuals, based on Dr. Scarlatos' report as the weight of the medical evidence. In a July 12, 2010 letter, counsel contested the proposed termination on the grounds that Dr. Scarlatos mischaracterized her medical history. By decision dated July 16, 2010, OWCP terminated appellant's wage-loss and medical compensation benefits effective July 15, 2010.

In an August 9, 2010 letter, appellant requested an oral hearing, held November 4, 2010. Counsel contended that Dr. Scarlatos' opinion was fundamentally flawed as it relied on Dr. Elkins' incorrect history. Following the hearing, counsel submitted an August 17, 2010 report from Dr. Weidenbaum finding that appellant remained disabled for work.

By decision dated February 2, 2011, an OWCP hearing representative affirmed OWCP's July 16, 2010 decision terminating appellant's compensation benefits. The hearing representative found that any confusion regarding the fitness-for-duty physician's status was harmless error that did not diminish the probative value of Dr. Scarlatos' opinion as impartial medical examiner.

⁵ In a March 5, 2010 report, counsel requested that Dr. Elkins' report be excluded from the record as it characterized Dr. Fishbane as an attending physician whereas he was a physician performing a fitness-for-duty examination for the employing establishment. In a March 16, 2010 letter, OWCP responded that Dr. Elkins' error was insufficient to exclude his report.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁶ Having determined that, an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁷ OWCP's procedures require notification prior to terminating benefits.⁸ A notice of proposed termination should inform appellant of all conditions under consideration for termination and allow her an opportunity to respond prior to termination of her compensation benefits.⁹

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹⁰ To terminate authorization for medical treatment, OWCP must establish that the claimant no longer has residuals of an employment-related condition which require further medical treatment.¹¹ After it meets this burden of proof, the burden shifts to the claimant to establish a medical condition causally related to his or her accepted injuries.¹² In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.¹³ For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.¹⁴

ANALYSIS

OWCP accepted that appellant sustained a temporary aggravation of a preexisting herniated lumbar disc and lumbar scoliosis. Appellant received wage-loss compensation through June 17, 2009 and ongoing medical benefits. To determine the duration of the accepted aggravation, OWCP obtained a second opinion from Dr. Kleiman, a Board-certified orthopedic surgeon, who found that the accepted aggravation had ceased as of June 17, 2009, whereas

⁶ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁷ *Id.*

⁸ *P.C.*, Docket No. 10-611 (issued December 6, 2010); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6b (March 1997).

⁹ *S.B.*, Docket No. 10-2226 (issued September 13, 2011); *see Winton A. Miller*, 52 ECAB 405 (2001), citing to Federal (FECA) Procedure Manual, *supra* note 8 at Chapter 2.1400.6.

¹⁰ *Roger G. Payne*, 55 ECAB 535 (2004); *Furman G. Peake*, 41 ECAB 361 (1990).

¹¹ *Pamela K. Guesford*, 53 ECAB 726 (2002).

¹² *Manuel Gill*, 52 ECAB 282 (2001); *Talmadge Miller*, 47 ECAB 673 (1996).

¹³ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

¹⁴ *Alice J. Tysinger*, 51 ECAB 638 (2000).

Dr. Weidenbaum, an attending Board-certified anesthesiologist, and Dr. Green, an attending Board-certified surgeon, opined that appellant remained disabled for work.

OWCP found a conflict of medical opinion between Dr. Fishbane, a fitness-for-duty physician, and Dr. Kleiman, and selected Dr. Elkins, a Board-certified orthopedic surgeon, as impartial medical examiner. Counsel asserted that Dr. Elkins' report was tainted by OWCP's misstatement that Dr. Fishbane created the conflict of opinion. OWCP acknowledged this error and selected Dr. Scarlatos, a Board-certified orthopedic surgeon, as the new impartial medical examiner in the case. The record contains a Form ME023 appointment schedule notification dated March 2, 2010. However, this form does not contain any information regarding the process OWCP used to select Dr. Scarlatos. Additionally, there are no print screens of record documenting the selection process.

OWCP has an obligation to verify that it selected Dr. Scarlatos in a fair and unbiased manner. It maintains records for this purpose.¹⁵ However, the current record does not include any documents demonstrating that OWCP selected Dr. Scarlatos as the impartial medical examiner by use of the "PDS" system. The Board cannot ascertain whether Dr. Scarlatos was selected according to OWCP's procedures requiring selection of impartial medical specialists on a strict rotating basis.¹⁶ OWCP developed these procedures to provide adequate safeguards against any possible appearance that the selected physician's opinion was biased or prejudiced.

The Board finds that OWCP has not adequately explained how the rotational system selected Dr. Scarlatos. The Board has placed great importance on the appearance as well as the fact of impartiality. The selected physician may carry the special weight accorded an impartial medical specialist only if OWCP's selection procedures were scrupulously followed. OWCP has not met its affirmative obligation to establish that it properly followed its selection procedures.

Therefore, OWCP did not meet its burden of proof in terminating appellant's medical and wage-loss compensation benefits, as there was an outstanding conflict of medical opinion at the time of the July 16, 2010 termination decision.

On appeal, counsel asserts that OWCP's February 2, 2011 decision should be reversed based on the record. As stated, OWCP did not meet its burden of proof in terminating appellant's wage-loss and medical compensation benefits as there is insufficient evidence that OWCP followed proper procedures in selecting Dr. Scarlatos as the impartial medical examiner.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation. The case is returned to OWCP for payment of all wage-loss compensation and medical benefits due and owing after July 15, 2010.

¹⁵ *M.A.*, Docket No. 07-1344 (issued February 19, 2008).

¹⁶ *Raymond J. Brown*, 52 ECAB 192 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 2, 2011 is reversed.

Issued: June 18, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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