

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on January 4, 2011 appellant, then a 51-year-old mail handler and tow motor driver sustained an aggravation of preexisting cervical and lumbar radiculopathy when he slipped and fell on a wet floor.² Appellant stopped work at the time of injury and did not return.³ He received wage-loss compensation on the daily compensation rolls beginning February 6, 2011 and on the periodic rolls beginning August 28, 2011.

Dr. Kenneth E. McCulloch, an attending Board-certified orthopedic surgeon, diagnosed back, right hand and right shoulder injuries. He submitted reports from January 6 to September 28, 2011 holding appellant off work. Dr. Ali Guy, an attending Board-certified physiatrist, held appellant off work through March 2012 due to herniated cervical discs from C2 to C7, disc bulges from L3 to L5, bilateral L4-S1 radiculopathy, left ulnar sensory neuropathy, diabetic peripheral neuropathy, right shoulder impingement and myofascial pain syndrome.⁴

On March 10, 2013 OWCP obtained a second opinion from Dr. Michael Carciente, a Board-certified neurologist, who reviewed the medical record and a statement of accepted facts. On examination, Dr. Carciente found no atrophy in the extremities, absent ankle reflexes bilaterally, motor strength at 5/5 throughout both arms and legs, blunted sensation in both lower extremities in a stocking distribution, no tenderness or spasms throughout the paraspinals and bilaterally negative straight leg raising tests. He opined that appellant had no objective signs of radiculitis or lumbar radiculopathy. Dr. Carciente opined that appellant's objective findings were due to diabetic neuropathy, without influence from the January 4, 2011 injuries. He opined that appellant had no disability related to the accepted injuries.

By notice dated April 16, 2013, OWCP advised appellant that it proposed to terminate his wage loss and medical compensation benefits because the accepted injuries had ceased without residuals. It based the proposal on Dr. Carciente's opinion as the weight of the medical evidence.

In response, appellant submitted reports from a physician's assistant that were not signed or reviewed by a physician.

² Appellant noted that he had a history of a 1990 back injury sustained while in the armed forces. He received disability payments from the Department of Veterans Affairs for this injury.

³ On July 28, 2011 OWCP obtained a second opinion from Dr. Richard Gilbert, a Board-certified orthopedic surgeon, who found appellant totally disabled for work due to the accepted injuries.

⁴ March 16, 2011 magnetic resonance imaging (MRI) scans showed disc herniations from C3 to C7, with cord compression, disc bulges at L3-4 and L4-5 with facet hypertrophy and a Grade I spondylolisthesis. A July 17, 2011 MRI scan showed supraspinatus and subscapularis tendinopathy in the right shoulder with bony hypertrophy of the acromioclavicular joint. September 16, 2011 electromyography (EMG) and nerve conduction velocity (NCV) studies showed bilateral carpal tunnel syndrome, right worse than left and left ulnar sensory neuropathy. Appellant related a history of diabetes mellitus with diabetic neuropathy and a left carpal tunnel release February 17, 2012 lumbar x-rays showed osteoarthritic facet spurs and endplate spurs, osteoarthritic changes throughout the lumbar spine from L2 to L5.

By decision dated May 23, 2013, OWCP terminated appellant's wage-loss and medical benefits effective that day. It found that Dr. Carciente's opinion was the weight of the medical evidence. OWCP noted that physician's assistants did not qualify as physicians under FECA and that their opinions were of no probative medical value.

In an October 4, 2013 letter, counsel requested reconsideration. He contended that the medical record established that appellant had active residuals of the accepted injuries. Counsel also asserted that a new report from Dr. Gabriel L. Dassa, an attending Board-certified orthopedic surgeon, was sufficient to shift the weight of the evidence in appellant's favor.

In the August 19, 2013 report, Dr. Dassa provided a history of injury and treatment. On examination, he found limited cervical and lumbar motion, lumbar paraspinal spasm, mild swelling of the right shoulder, tenderness to palpation of the right subacromial and subdeltoid bursae and a positive impingement sign in the right shoulder. Dr. Dassa diagnosed disc herniations from C2 to C7 with disc extrusion, worsened by the January 4, 2011 injury, lumbar disc bulges from L2 to S1 with radiculopathy and a right shoulder sprain/strain with impingement and a partial rotator cuff tear. He opined that all findings were "directly caused by the accident." Dr. Dassa explained that appellant's symptoms were genuine as he had positive straight leg raising and Spurling's tests, which someone without medical knowledge could not subvert. He found that appellant remained totally disabled for work.

Counsel also submitted additional notes from a physician's assistant, not signed or reviewed by a physician.

By decision dated January 6, 2014, OWCP denied modification of the May 23, 2013 decision on the grounds that the additional medical evidence was insufficient to establish that appellant continued to have residuals of the accepted injuries on or after May 23, 2013. It found that Dr. Dassa's report did not explain how and why the accepted injuries continued to disable appellant for work on and after May 23, 2013. OWCP further found that the additional reports from the physician's assistant were of no probative medical value.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ Having determined that an employee has a disability causally related to his or her federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁶

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. 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

⁵ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁶ *Id.*

compensation benefits.⁷ 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.⁸ The fact that a condition's etiology is unknown or obscure neither relieves appellant of the burden of establishing a causal relationship by the weight of the medical evidence, nor shifts the burden of proof of OWCP to disprove an employment relationship.⁹

ANALYSIS

OWCP accepted that appellant sustained an aggravation of preexisting cervical and lumbar radiculopathy. Dr. McCulloch, an attending Board-certified orthopedic surgeon, and Dr. Guy, an attending Board-certified physiatrist, held appellant off work through March 2012 due to herniated cervical and lumbar discs with radiculopathy. Dr. Carciente, a Board-certified neurologist and second opinion physician, opined on March 10, 2013 that the accepted injuries had ceased and that appellant's symptoms were due to diabetic neuropathy. On May 23, 2013 OWCP terminated appellant's wage-loss and medical compensation benefits based on Dr. Carciente's opinion that the accepted injuries ceased without residuals or work limitations. Dr. Carciente based his opinion on a statement of accepted facts, the complete medical record and a thorough clinical examination. The burden shifted to appellant to demonstrate that he continued to be disabled for work on and after May 23, 2013 due to the accepted injuries.¹⁰

In support of his request for reconsideration, appellant submitted the report of Dr. Dassa, an attending Board-certified orthopedic surgeon, who diagnosed multiple cervical and lumbar disc herniations. Dr. Dassa explained that appellant's radicular symptoms were genuine because, as a layperson, appellant did not have the medical knowledge to falsify his physiologic responses. However, appellant's veracity is not at issue. Dr. Dassa did not explain how or why the accepted January 4, 2011 traumatic injuries continued to cause appellant's symptoms or disable him from work on and after May 23, 2013. As he did not provide medical reasoning supporting causal relationship, his opinion is insufficient to shift the weight of the medical evidence in appellant's favor or create a conflict with Dr. Carciente's opinion.

On reconsideration, counsel also provided additional notes from a physician's assistant. However, these documents are of no probative medical value as a physician's assistant is not considered a physician under FECA.¹¹ Therefore, OWCP's January 6, 2014 decision finding that appellant did not establish that he continued to have residuals of the accepted injuries on and after May 23, 2013 is appropriate under the law and facts of the case.

On appeal, counsel contends that OWCP should rely on the opinion of Dr. Dassa. He argues that Dr. Carciente's report is inaccurate and predicated on an inadequate physical

⁷ See *Virginia Davis-Banks*, 44 ECAB 389 (1993); see also *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

⁸ *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁹ *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

¹⁰ *Virginia Davis-Banks*, *supra* note 7.

¹¹ 5 U.S.C. § 8101(2); *Richard E. Simpson*, 57 ECAB 668 (2006) *Vickey C. Randall*, 51 ECAB 357 (2000).

examination. As stated, OWCP properly denied modification as Dr. Dassa's opinion was insufficient to shift the weight of the medical evidence in appellant's favor or to require further development by OWCP.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that appellant did not establish continuing work-related disability on and after May 23, 2013.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 6, 2014 is affirmed.

Issued: June 23, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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