

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

T.M., Appellant)	
)	
and)	Docket No. 14-1634
)	Issued: August 11, 2015
U.S. POSTAL SERVICE, POST OFFICE,)	
Philadelphia, PA, Employer)	
)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On July 21, 2014 appellant, through counsel, filed a timely appeal from a May 9, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 met its burden of proof to terminate appellant's compensation benefits on October 9, 2013.

On appeal counsel maintains that the opinion of the attending physician Dr. Charles M. Bolno, an osteopath, is sufficient to establish residual disability and that the opinion of an OWCP referral physician Dr. Zohar Stark, a Board-certified orthopedic surgeon, was inconsistent with the statement of accepted facts and was therefore insufficient to carry the weight of the medical evidence. He asserts that the termination of benefits should be reversed or, in the alternative, the case should be referred to a referee physician.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On May 28, 2011 appellant, then a 33-year-old mail processing clerk expediter, filed a traumatic injury claim alleging that she injured her back and shoulder on May 27, 2011 while pulling large, heavy mail containers. She stopped work on May 27, 2011. In a brief emergency department report dated May 28, 2011, Dr. Brian Clohessy, an osteopath, diagnosed shoulder pain.

Appellant subsequently came under the care of Dr. Bolno, an osteopath who practices family medicine and orthopedic surgery. On May 31, 2011 Dr. Bolno advised that the May 27, 2011 injury caused acute traumatic cervical and lumbar radiculopathy, acute traumatic arthritis of both shoulders, and acute traumatic cervical and lumbar spine sprain and strain. He advised that appellant was totally disabled. A June 27, 2011 magnetic resonance imaging (MRI) scan study of the left shoulder demonstrated degenerative changes and was suspicious for tear within the superior labrum. An MRI scan study of the lumbar spine that day demonstrated a small disc herniation at T12-L1 and a moderate herniation at L5-S1 with degenerative changes seen. A June 28, 2011 MRI scan study of the cervical spine revealed no evidence of disc herniation or spinal stenosis. A June 29, 2011 MRI scan study of the right shoulder was unremarkable.

Following an initial denial on July 14, 2011, on September 29, 2011 an OWCP hearing representative reversed the July 14, 2011 decision, and appellant's claim was accepted for displacement of intervertebral discs without myelopathy at T12-L1 and L5-S1 and cervical and lumbar radiculopathy. She received compensation and was placed on the periodic compensation rolls.

In October 2011 OWCP referred appellant to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for a second opinion evaluation. He provided a work capacity evaluation dated December 1, 2011 and a report dated December 2, 2011.

Dr. Bolno continued to submit reports in which he reiterated his diagnoses and indicated that a July 28, 2011 electrodiagnostic study of the lower extremities demonstrated acute L5-S1 radiculopathy.

OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Bolno and Dr. Draper regarding appellant's physical restrictions and work abilities, and referred her to Dr. William H. Simon, a Board-certified orthopedic surgeon, for an impartial evaluation. Dr. Simon provided a June 4, 2012 report and advised that appellant could perform sedentary duty.

In a July 2, 2012 letter, OWCP proposed to terminate appellant's compensation and medical benefits on the grounds that the medical evidence, as characterized by Dr. Simon's report, established that she no longer had residuals or disability due to the May 27, 2011

employment injury. Appellant, through counsel, disagreed with the proposed termination. Dr. Simon provided an additional report on July 14, 2012.²

In a July 6, 2012 report, Dr. Marc C. Cohen, a chiropractor, noted review of emergency records dated May 27, 2011 and MRI scan studies of the left and right shoulder and left foot and ankle. He diagnosed cervical sprain/strain; rule out cervical disc herniation; rule out cervical radiculopathy; lumbar-sacral myofasciitis/sprain/strain; small left paracentral disc herniation at T1-2-L1; moderate size broad-based central disc herniation at L5-S1; bilateral shoulder sprain/strain; superior labral tear of the left shoulder; and tendinopathy of the left shoulder due to the May 2011 employment injury. A whole body bone scan on July 24, 2012 showed increased activity in the knees and shoulders, similar to an examination of November 11, 2011.

By decision August 21, 2012, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Simon and finalized the termination of wage-loss and medical compensation benefits, effective August 25, 2012. Appellant, through counsel, timely requested a hearing.

In an October 10, 2012 decision, an OWCP hearing representative set aside the August 21, 2012 termination decision and remanded the case for further development. She found the wording of a question furnished by OWCP to Dr. Draper was inappropriate and thus his opinion should be excluded. As such, it was premature to find a conflict in medical evidence. Upon remand OWCP was to refer appellant for a new second opinion evaluation and reinstate wage-loss compensation.

In October 2012 OWCP referred appellant to Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon, for a second opinion evaluation.³

In a December 6, 2012 letter, OWCP proposed to terminate appellant's wage-loss and medical benefits as the medical evidence, as characterized by Dr. Didizian's report, established that she no longer had residuals or disability due to the May 27, 2011 employment injury. Appellant, through counsel, disagreed with the proposed termination and submitted a December 21, 2012 report in which Dr. Bolno reviewed appellant's diagnostic studies and medical care. Dr. Bolno reported that, shortly after she returned to light duty in July 2012, she sustained additional work-related injuries, and continued to have severe cervical and lumbar pain that radiated into the shoulders and down both legs. He described physical examination findings of severe neck spasm and neurosensory impairment over the L4 to S1 and C4 to C6 nerve roots and restricted range of motion of the cervical and lumbar spine.

By decision dated March 27, 2013, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Didizian and finalized the termination of wage-loss and medical

² Appellant returned to work on July 12 or 13, 2012. On July 13, 2012 she filed a traumatic injury claim alleging that a driver crashed into her, injuring her back and hand. Appellant stopped work that day. OWCP adjudicated the claim under file number xxxxxx981 and accepted lumbar sprain. Appellant returned to modified duty in September 2012.

³ Dr. Didizian provided a November 26, 2012 report which, as discussed *infra*, has been excluded from the record.

compensation benefits, effective August 25, 2012. Appellant, through counsel, timely requested a hearing.

In a June 24, 2013 decision, an OWCP hearing representative set aside the March 27, 2013 decision and remanded the case to OWCP. She found that Dr. Didizian had been provided a copy of Dr. Draper's report when that report should have been excluded. As such, Dr. Didizian's report should also be excluded. OWCP was instructed to refer appellant for a new second-opinion evaluation.

In July 2013 OWCP referred appellant, along with a statement of accepted facts and a set of questions, to Dr. Stark, a Board-certified orthopedic surgeon, for a second opinion evaluation.⁴ A July 17, 2013 MRI scan study of the left shoulder demonstrated findings suggestive of supraspinatus tendinopathy without focal tear and acromioclavicular joint hypertrophy with mild impingement.

In a July 23, 2013 report, Dr. Stark described appellant's report of the employment injury and her complaints of radiating low back pain, left shoulder pain, and left foot pain.⁵ He noted his review of the medical record, including diagnostic studies and appellant's complaint of radiating low back pain, tingling and numbness in both lower extremities, and left shoulder pain that started two months previously. Physical examination demonstrated that appellant was able to walk with a normal gait. There was no tenderness on examination of the cervical spine and no spasm with normal motion. There was tenderness on palpation over the spinous processes of the midthoracic and lumbosacral vertebrae and over the paraspinal and paralumbar musculature with no spasm. Appellant complained of pain on motion. Sitting root test was negative, and straight leg raising was negative at 80 degrees bilaterally. There was no sensory or motor deficit to the upper or lower extremities, and deep tendon reflexes to the extremities were present and equal bilaterally. Examination of her left shoulder revealed local tenderness on palpation with diminished range of motion. Impingement and apprehension tests were negative.

Dr. Stark opined based on the history given by appellant and his review of the medical records, it was his opinion that none of the accepted diagnoses were related to the May 27, 2011 work incident. He further opined that the demonstrated degenerative disc disease found on MRI scan study of her lumbar spine was not caused by the May 2011 preexisting condition. Dr. Stark noted that he found no evidence of cervical or lumbar radiculopathy on his physical examination. He further opined that the May 27, 2011 incident caused a lumbar strain and left shoulder sprain from which appellant had recovered, and that the shoulder pain she had developed two months prior to his examination had no connection to the May 27, 2011 injury. Dr. Stark concluded that she had no remaining residuals of the May 27, 2011 injury and was not totally or partially disabled at the time of his examination secondary to the May 27, 2011 incident. In an attached

⁴ The statement of accepted facts indicated that appellant was under the care of Dr. Bolno and described diagnostic studies. The statement also indicated that she had a second employment injury that occurred on July 13, 2013 that had been accepted for lumbar sprain. The questions provided Dr. Stark were: "Which conditions were sustained as a result of the May 27, 2011 work injury? Does the claimant continue with residuals of these sustained conditions? Is the claimant totally or partially disabled due to these sustained conditions, and if partially disabled, does the claimant require restrictions to return to work?" Dr. Stark was asked to fully address the questions on a work capacity evaluation (OWCP Form 5c) and attach the form to his report.

⁵ Dr. Stark did not indicate that he reviewed the reports of Drs. Draper, Simon, and Didizian.

work capacity evaluation, he advised that appellant had reached maximum medical improvement and could perform her usual job duties without restriction.

In an August 8, 2013 letter, OWCP proposed to terminate appellant's compensation and medical benefits on the grounds that the medical evidence, as characterized by Dr. Stark's report, established that she no longer had residuals or disability due to the May 27, 2011 employment injury. Counsel disagreed with the proposed termination and submitted a September 12, 2013 report in which Dr. Bolno reiterated his medical findings and conclusions. Dr. Bolno found on physical examination that appellant still had restricted cervical spine range of motion and severe pain with flexion and extension of the lumbar spine. He advised that appellant had never fully recovered from the May 27, 2011 employment and was unable to perform full duty.

By decision October 9, 2013, OWCP found that the weight of the medical evidence rested with the opinion of Dr. Stark and finalized the termination of wage-loss and medical compensation benefits. Appellant, through counsel, timely requested a hearing. Counsel noted that appellant was working full-time light duty. He asserted that because Dr. Stark opined that the accepted conditions were not caused by the May 27, 2011 employment injury, his opinion was insufficient to carry the weight of the medical evidence. Counsel asserted that, at the least, a conflict in medical evidence had been established between Dr. Stark and Dr. Bolno regarding whether appellant continued to have residuals of the accepted conditions.

In a May 9, 2014 decision, an OWCP hearing representative found that the weight of the medical evidence rested with the opinion of Dr. Stark who performed a thorough examination and reviewed the complete medical record. She affirmed the October 9, 2013 decision.

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.⁶ 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.⁷

ANALYSIS

OWCP accepted that on May 27, 2011 appellant sustained employment-related displacement of intervertebral discs without myelopathy at T12-L1 and L5-S1 and cervical and lumbar radiculopathy. Appellant returned to work briefly in July 2012 and since September 2012 has been working modified duty.⁸

In July 2013 OWCP referred her to Dr. Stark for a second opinion evaluation. In a July 23, 2013 report, Dr. Stark described appellant's report of the employment injury, her complaints of radiating low back pain, and left shoulder pain, his review of the medical record,

⁶ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁷ *Id.*

⁸ *Supra* note 3.

and physical examination findings.⁹ He indicated that none of the accepted diagnoses were related to the May 27, 2011 incident at work. Dr. Stark further opined that the demonstrated degenerative disc disease found on MRI scan study of her lumbar spine was not caused by the May 2011 injury and was a preexisting condition. He noted that he found no evidence of cervical or lumbar radiculopathy on his physical examination. Dr. Stark further opined that the May 27, 2011 incident caused a lumbar strain and left shoulder sprain from which she had recovered, and that the shoulder pain she had developed two months prior to his examination had no connection to the May 27, 2011 injury. He concluded that appellant had no remaining residuals of the May 27, 2011 injury and was not totally or partially disabled at the time of his examination secondary to the May 27, 2011 incident. In an attached work capacity evaluation, Dr. Stark advised that appellant had reached maximum medical improvement and could perform her usual job duties without restriction.

As noted, Dr. Stark opined that none of the accepted conditions were caused by the May 27, 2011 employment injury and that she only sustained a lumbar strain and left shoulder sprain that day, from which she had recovered. However, acceptance of displacement of intervertebral discs without myelopathy at T12-L1 and L5-S1 and cervical and lumbar radiculopathy has not been rescinded. The Board finds that Dr. Stark's report does not comport with the statement of accepted facts and does not comport with adequate rationale the determination that her residuals have ceased.¹⁰ Dr. Stark's opinion is insufficient to establish that appellant's disability had ceased. Dr. Bolno, appellant's attending physician, has been consistent in his opinion that she continues to have residuals of the May 27, 2011 employment injury. OWCP did not meet its burden of proof to terminate appellant's compensation and medical benefits for the May 27, 2011 employment injury.¹¹

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation and medical benefits on October 9, 2013.

⁹ Dr. Stark did not indicate that he reviewed the reports of Drs. Draper, Simon, and Didizian.

¹⁰ See *John L. Hofmann*, Docket No. 04-1802 (issued November 22, 2004).

¹¹ *J.W.*, Docket No. 14-250 (issued May 28, 2014).

ORDER

IT IS HEREBY ORDERED THAT the May 9, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 11, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board