

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

G.F., Appellant)

and)

DEPARTMENT OF HOMELAND SECURITY,)
TRANSPORTATION SECURITY)
ADMINISTRATION, Sanford, FL, Employer)

**Docket No. 10-2309
Issued: August 5, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 15, 2010 appellant filed a timely appeal from an August 27, 2010 decision of the Office of Workers' Compensation Programs (OWCP) terminating her wage-loss and medical benefits. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 August 29, 2010 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 25, 2004 appellant, then a 54-year-old transportation screener, filed a traumatic injury claim alleging that on March 15, 2004 she injured her lower back due to lifting a heavy piece of luggage. OWCP accepted the claim for L4-5 herniated disc permanent aggravation of lumbar degenerative disc disease and lumbago. Appellant stopped work on March 24, 2004 and was placed on the periodic rolls in receipt of temporary total disability.² She returned to work as a legal secretary in the private sector working 40 hours a week on November 28, 2005. On February 2, 2006 OWCP issued a loss of wage-earning capacity decision reducing appellant's wage-loss compensation. It found that her actual wages as a legal secretary/receptionist represented her wage-earning capacity. Accordingly, appellant began receiving compensation for partial disability.

On May 11, 2010 Dr. Mark S. Storey, a treating Board-certified internist, advised that appellant continued to be totally disabled due to her herniated lumbar disc. He stated this finding had been documented by a July 21, 2004 magnetic resonance imaging (MRI) scan.

On May 6, 2010 OWCP referred appellant to Dr. David B. Lotman, a Board-certified orthopedic surgeon, for a second opinion evaluation for a current assessment of her back condition. By report dated June 18, 2010, Dr. Lotman noted appellant's complaint of mid thoracolumbar back pain radiating into the pelvis and both legs. He provided findings on physical examination and addressed the accepted conditions. Physical findings included diffuse midline tenderness on gentle palpitation; mild-to-moderate tenderness in the left sciatic notch and sacroiliac joint; and trace mild tenderness right sciatic notch and sacroiliac joint. In answer to specific OWCP questions, Dr. Lotman advised that appellant sustained an aggravation of her preexisting degenerative disc disease, but such aggravation was not permanent. He related that her degenerative disc disease was chronic and preexisted the 2004 accepted employment injury. Dr. Lotman attributed appellant's symptoms to her chronic degenerative disc disease with probable bilateral facet joint arthritis. Next, he advised that she has no residuals from her accepted March 2004 employment injury and that any disability was a result of her nonwork related chronic degenerative disc disease and facet arthropathy. In a July 2, 2010 clarification, Dr. Lotman circled "yes" to the question of whether he was referring to accepted conditions of aggravated degenerative disc disease and lumbago when he concluded that appellant no longer had any residuals from her March 2004 employment injury. He also circled "yes" to the question of whether the permanent restrictions he found were due to her underlying condition of degenerative disc disease and not the accepted employment conditions of lumbago and aggravated degenerative disc disease.

On July 21, 2010 OWCP issued a notice proposing to terminate appellant's compensation benefits on the grounds that she no longer had any residuals or disability due to her accepted aggravated degenerative disc disease and lumbago. It found the weight of the medical evidence rested with Dr. Lotman's opinion.

² Appellant returned briefly to work on July 9, 2005. She worked 1½ days before stopping on July 10, 2005.

In a letter dated July 29, 2010, appellant disagreed with the proposal to terminate her compensation benefits and contended that Dr. Lotman failed to conduct a thorough examination.

By decision dated August 27, 2010, OWCP terminated appellant's compensation effective August 29, 2010. It found the evidence of record established that appellant no longer had any disability or residuals due to her accepted lumbago and aggravated degenerative disc disease.³

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁴ After it has determined that an employee has disability causally related to her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁸

The Board has held that once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁹ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.¹⁰ In certain situations, if the medical evidence is sufficient to meet

³ The Board notes that, following the August 27 decision, OWCP received additional evidence. See 20 C.F.R. §§ 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003); *M.B.*, Docket No. 09-176 (issued September 23, 2009). The Board precluded from reviewing new evidence on appeal as its reviews is limited to the evidence before OWCP at the time of the final decision. See 20 C.F.R. § 501.2(c)(1).

⁴ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁶ See *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁷ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

⁹ *Stanley B. Plotkin*, 51 ECAB 700 (2000); *Tamra McCauley*, 51 ECAB 375 (2000).

¹⁰ *Stanley B. Plotkin, id.*

OWCP's burden of proof to terminate benefits, this evidence may negate a loss of wage-earning capacity such that a separate evaluation of the prior determination is unnecessary.¹¹ OWCP's burden to demonstrate no further disability is effectively the same, irrespective of whether there is an existing loss of earning capacity determination.¹²

ANALYSIS

OWCP accepted appellant's claim for L4-5 herniated disc, lumbago and permanent aggravation of lumbar degenerative disc disease and paid appropriate compensation and medical benefits. By decision dated August 27, 2010, it terminated her compensation benefits effective August 29, 2010 finding that the weight of the medical opinion evidence rested with Dr. Lotman, OWCP referral physician. The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

OWCP referred appellant for a second opinion evaluation with Dr. Lotman for a current assessment of her accepted employment-related conditions. In his June 18, 2010 report, Dr. Lotman concluded that her accepted lumbago and aggravated degenerative disc disease had resolved. He opined that appellant had no residuals and no physical limitations from her accepted conditions. Dr. Lotman noted that there was no permanent aggravation of the degenerative disc disease and lumbago as the conditions predated the March 15, 2004 employment injury. However, OWCP accepted a permanent aggravation. The opinion of Dr. Lotman departed from the statement of accepted facts and history accepted by OWCP. This renders his opinion of reduced probative value. Dr. Lotman attributed appellant's current disability to nonwork-related degenerative disc disease but, OWCP accepted a permanent aggravation. The medical evidence indicated that appellant has residuals and her employment-disability has not resolved. The Board finds that Dr. Lotman's opinion is insufficient to meet OWCP's burden of proof.

CONCLUSION

The Board finds that OWCP has not met its burden of proof in terminating appellant's wage-loss and medical benefits effective August 29, 2010.

¹¹ *A.P.*, Docket No. 08-1822 (issued August 5, 2009). There may exist a situation where a separate analysis would be necessary, based on preexisting conditions or other medical conditions, but that situation does not present itself in this case. Should those particular facts arise, this decision does not preclude a further consideration of the matter. *Id.*

¹² *Id.*

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 27, 2010 is reversed.

Issued: August 5, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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