

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

K.B., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL AIR
DEPOT, San Diego, CA, Employer**

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**Docket No. 10-2324
Issued: September 14, 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
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 16, 2010 appellant filed a timely appeal from a May 4, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating appellant's compensation 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 compensation for wage-loss and medical benefits effective May 9, 2010.

FACTUAL HISTORY

On July 29, 2008 appellant then a 50-year-old aircraft sheet metal worker, filed a traumatic injury claim alleging that, on July 23, 2008, while he was cleaning up the hangar, he

¹ 5 U.S.C. § 8101 *et seq.*

was required to bend, stoop, kneel, crouch, crawl under equipment and stand for one and one-half hours, and that these work activities aggravated preexisting conditions and injured his back. On September 15, 2008 OWCP accepted appellant's claim for lumbar strain (exclusively) and sprain of the back, lumbar region (exclusively).

In an August 5, 2008 report, Dr. Paula West, appellant's Board-certified family practitioner, indicated that she was treating appellant for his low back strain. She noted that he was to remain off work until August 12, 2008. Dr. West noted that appellant could return to modified work on August 13, 2006.

In an October 8, 2008 report, Dr. Paul A. Jain, a Board-certified internist, indicated that appellant had been his patient since September 2007, that he had multiple medical problems including moderate-to-severe low back pain, left ankle pain and bilateral knee pain all of which Dr. Jain strongly believed had been exacerbated by his current work duties. He noted that he had previously written a work-duty limitation letter stating that appellant should be on light duty but that this was ignored and appellant was forced to work outside his restrictions, and that this exacerbated his symptoms. Dr. Jain noted that appellant had chronic daily pain which limits his range of motion and ability for performing normal activities of daily living and his normal work duties.

By letter dated October 29, 2008, the employing establishment denied that appellant was made to work outside of his restrictions.

By letter dated October 15, 2008, OWCP informed appellant that it was going to expand the acceptance of his claim to include strain of the thoracic (midback) spine. However, it declined to accept nonindustrial injuries to his knees and left ankle.

On December 10, 2008 OWCP sent appellant for a second opinion to Dr. Thomas J. Sabourin, a Board-certified orthopedic surgeon. In an opinion dated July 23, 2008, Dr. Sabourin listed his impressions as: (1) mild degenerative disc disease L5-S1; (2) thoracic degenerative arthritis, most noted at the level of T10-T11; (3) mild to minimal medial joint chondromalacia and early degenerative joint disease of the medial compartments of the knees bilaterally; (4) osteochondroma, left distal femur; (5) status post left ankle sprain with residual calcification and ossification of the tendon insertions into the medial and lateral malleolous; (6) diabetes mellitus; and (7) moderate rigidity on examination of both legs, etiology undetermined. He noted that the only diagnosis that could be medically connected to appellant's employment would be a temporary aggravation of his thoracic and lumbar degenerative disease. Dr. Sabourin did not believe that appellant's knee problems or his left ankle problem were related to his industrial injury. He noted that, while appellant did have an aggravation of his preexisting back condition, his type of injury was relatively mild. Dr. Sabourin stated that appellant had no related factors of disability for the thoracic and lumbar spine. He noted that appellant had preexisting multiple issues with his spine and that most of these were relatively minor findings. Dr. Sabourin believed that appellant's objective findings for his thoracic and lumbar spine were related to his previous injury and wear and tear over the years. He recommended a magnetic resonance imaging (MRI) scan on appellant's lumbar spine. Dr. Sabourin believed that appellant's partial disability from the relatively minor strain/sprain to his spine would cease by February 2009.

In a December 22, 2008 and February 19, 2009 opinion, Dr. Jain indicated that he was continuing to treat appellant, that appellant had chronic daily pain which limits his range of motion and ability to perform normal activities of daily living and his normal work activities.

By decision dated January 23, 2009, OWCP denied expansion of appellant's claim to include bilateral knee and left ankle conditions.

Appellant had an initial spinal orthopedic consultation with Dr. Ramin Raiszadeh, a Board-certified orthopedic surgeon, on January 30, 2009. In his report, Dr. Raiszadeh diagnosed: (1) chronic intractable left buttock pain, industrially aggravated; (2) chronic midback pain, most likely muscular strain; (3) left buttock pain, most likely secondary to S1 nerve root irritation; industrially aggravated; (4) neurologically grossly intact, however unable to fully assess because of significant pain; and (5) severe tension signs and paresthesias noted in left buttock. He placed appellant on temporary total disability. Dr. Raiszadeh noted that clinically, appellant's greatest component of pain and disability continues to be his left buttock. He noted a significant disc extrusion at L5-S1, which is most likely responsible for his left buttock pain. Dr. Raiszadeh discussed treatment options, including operative intervention, nonoperative care and medical therapy. He continued to submit reports indicating that he believed that appellant remained temporarily totally disabled due to his accepted work injury.

In order to resolve the conflict between appellant's treating physicians and the second opinion physician as to whether appellant should have surgery authorized, whether there was a link between the diagnosed conditions and the accepted employment injury, whether appellant continued to suffer residuals of the accepted lumbar strain/sprain and whether his injuries to his knees and ankles were secondary to the July 23, 2008 employment injury. OWCP referred appellant to Dr. Gregory Schwab, a Board-certified orthopedic surgeon, for an impartial medical examination. In a December 2, 2009 report, Dr. Schwab reviewed appellant's medical record and work history and the results of his physical examination. He stated that, while appellant may well have had an occupationally-related straining injury from which he has long since recovered, at the present time there were no positive objective findings on clinical examination to corroborate his subjective complaints. Dr. Schwab further concluded that appellant was absolutely not a candidate for spine surgery. He did not believe appellant's conditions in his knees and ankles were caused by the work exposure. Dr. Schwab noted that appellant may have duty restrictions on the basis of his preexisting occupational degenerative conditions in his knees and ankles, the occupational exposure has in no way affected the need for those restrictions. He did not find any objective evidence to suggest that appellant required any duty restrictions from the standpoint of his lumbar spine. Dr. Schwab opined that appellant had fully recovered from the occupational straining injury to his lumbar spine, and no further medical care was required with respect to his lumbar spine.

On March 15, 2010 OWCP proposed terminating appellant's compensation and medical benefits based on the opinion of Dr. Schwab and gave appellant 30 days to submit further evidence. In this notice of proposed termination, it noted that in order to receive benefits under FECA, a claimant must establish that his disabling conditions are the result of work injury or factors of his federal employment. OWCP also noted that an increase in pain is not objective evidence of disability and that disability attributed the work injury could not be supported by subjective complaints of pain in the absence of objective evidence. It found that Dr. Schwab's

report established that the medical conditions of thoracic and lumbar strains had ceased or were no longer employment related, as there were no objective findings in the thoracic and lumbar spines that could be established as being causally related to the July 23, 2008 work injury. Appellant did not respond within the 30-day time allotted.

By decision dated May 4, 2010, OWCP terminated appellant's medical and wage-loss compensation benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.² After it has determined that an employee has disability causally related to his federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.³ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. 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.⁵

Section 8123(a) of FECA provides in pertinent part: If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.⁶ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁷

ANALYSIS

OWCP accepted appellant's claim for lumbar strain and sprain of the back. Appellant received treatment for these conditions from Drs. West, Jain and Raiszadeh. These physicians

² *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

³ *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988). See *I.R.*, Docket No. 09-1229 (issued February 24, 2010).

⁴ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

⁵ *Kathryn E. Demarsh*, *supra* note 4; *James F. Weikel*, 54 ECAB 660 (2003); *B.K.*, Docket No. 08-2002 (issued June 16, 2009).

⁶ 5 U.S.C. § 8123(a); see also *R.H.*, 59 ECAB 720 (2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁷ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

believed that appellant continued to suffer from the employment injury of July 23, 2008. OWCP referred appellant to Dr. Sabourin for a second opinion. Dr. Sabourin believed that appellant's objective findings for his thoracic and lumbar spine were related to his previous injury and wear and tear over the years. In his December 10, 2008 report, he opined that appellant's relatively minor strain/sprain to his spine would cease by February 2009. In order to resolve the conflict between appellant's treating physicians and the second opinion physician, OWCP properly referred appellant to Dr. Schwab for an impartial medical examination pursuant to 5 U.S.C. § 8123(a). Dr. Schwab opined that, while appellant may have had an occupationally-related straining injury, he had recovered from that injury and that at the present time there were no positive objective findings on clinical examination to corroborate appellant's complaints. He indicated that there were no findings on clinical examination that corresponded to the diagnostic MRI scan findings. Dr. Schwab opined that appellant had sustained a straining injury superimposed upon his long-standing degenerative disc disease, and that the work incident did not result in any permanent injury or result in permanent impairment. He opined that appellant's knee and ankle conditions were not employment related and suggested that any work restrictions he may have were attributable to his preexisting degenerative conditions in these areas. Moreover, there were no restrictions due to his lumbar spine. Based on Dr. Schwab's opinion, on March 15, 2010 OWCP proposed terminating appellant's compensation and medical benefits, and in a decision dated May 4, 2010, terminated all benefits effective May 9, 2010.

The Board finds that OWCP properly terminated appellant's compensation and medical benefits based on the well-rationalized opinion of the impartial medical examiner, Dr. Schwab who conducted a physical examination and reviewed appellant's medical and work history. Dr. Schwab opined that appellant had fully recovered from the occupational straining injury to his lumbar spine and that no further medical care was required with respect to his lumbar spine. The Board finds that Dr. Schwab's opinion constitutes the special weight of the medical evidence and is sufficient to justify OWCP's termination of benefits.⁸

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation for wage-loss and medical benefits effective May 9, 2010.

⁸ See *V.G.*, *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2010 is affirmed.

Issued: September 14, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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