United States Department of Labor
Employees' Compensation Appeals Board

N.F., Appellant	)	
and	)	**Docket No. 11-337**
	)	**Issued: September 26, 2011**
U.S. POSTAL SERVICE, POST OFFICE, Merrifield, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
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 November 23, 2010 appellant, through counsel, filed a timely appeal of an October 21, 2010 decision of the Office of Workers' Compensation Programs (OWCP) terminating her compensation for wage-loss and medical benefits effective April 13, 2010. 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 April 13, 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 May 26, 2004 appellant, then a 54-year-old rural letter carrier, filed a traumatic injury claim alleging that she sustained injuries to her left leg and hip when she stepped into a hole in the performance of duty. OWCP accepted the claim for left hip strain, aggravation of thoracic and lumbosacral neuritis or radiculopathy, aggravation of displacement of lumbar intervertebral disc without myelopathy and aggravation of postlaminectomy syndrome, lumbar region.[2] Appellant underwent low back surgery on September 22, 2005. She returned to part-time employment until December 2005, when she stopped working altogether.

In a report dated March 13, 2009, Dr. Srinivason R. Parthasarathy, an attending Board-certified physiatrist, provided a history of injury and treatment and stated that appellant had chronic lumbosacral and lower extremity pain due to a May 26, 2004 work-related injury to her spine. He noted that she underwent a laminectomy, successfully completed work conditioning and resumed modified work until December 2005 when she experienced an exacerbation of her condition due to medication intolerance.

Examination of the thoracic and lumbar spine revealed a normal kyphosis; no significant scoliosis or list; a normal lumbar lordosis; normal S1 joint motion bilaterally; and normal lumbosacral alignment. Appellant had trunk weakness and experienced pain on all aspects of range of motion testing. Lumbar flexion was to 60 degrees; extension was to 15 degrees. Lateral flexion was to 15 degrees bilaterally. Left straight leg raise produced radicular pain. Laseague's maneuver did not produce any radicular symptoms. The lower thoracic and lumbosacral spine was diffusely tender to palpation and appellant was tender over the coccyx. The left hip was tender to palpation over the gluteal muscles, trochanter. Left hip range of motion testing revealed flexion to 90 degrees; abduction to 45 degrees; internal rotation to 20 degrees; extension to 10 degrees; adduction to 20 degrees; and external rotation to 45 degrees, with no significant pain. Left lower extremity sensation was intact to light touch except over the left lateral thigh, left medial knee, left medial leg, left posterior calf, left lateral calf, left anterior leg, left medial ankle, left lateral ankle, left dorsal foot, left dorsal first web space.

An October 15, 2007 magnetic resonance imaging (MRI) scan of lumbar spine demonstrated mild-to-moderate neural foraminal narrowing at L4/5 and L5/S1. The left posterior tibial motor conduction demonstrated reduced amplitude and slightly increased latency. The left perineal motor conduction demonstrated a delayed distal latency and significantly reduced amplitude. The left common peroneal F-wave latency was significantly prolonged. Needle electromyography demonstrated small amplitude acute denervation potentials along with increased amplitude, increased duration polyphasic motor units potentials with overall

[2] The Board notes that File No. xxxxxx219 was accepted for left hip strain. Appellant's January 19, 2006 traumatic injury claim was accepted for aggravation of thoracic or lumbosacral neuritis or radiculitis; aggravation of displacement of lumbar intervertebral disc without myelopathy; aggravation of postlaminectomy syndrome, lumbar region. (File No. xxxxxx787) The files were consolidated, with File No. xxxxxx219 serving as the master file.

diminished numbers of motor units. Dr. Parthasarathy diagnosed lumbar postlaminectomy syndrome, lumbar radiculopathy and sacroiliitis and opined that appellant was unable to work.[3]

OWCP referred appellant to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination to clarify her work capability and to determine whether her accepted injuries had resolved. In a report dated June 15, 2009, Dr. Smith reviewed the medical and factual history and provided examination findings.

Examination of the spine revealed satisfactory active range of motion, with forward flexion to 50 degrees, extension to 20 degrees and side bending to 20 degrees bilaterally. There was no spasm or rigidity present during these maneuvers. The neurologic examination revealed no focal atrophy with both calves measuring 34 centimeters in diameter and no clinically significant weakness. Sensation was reduced in the lateral calf area. All reflexes were normal and symmetrical. Distracted straight leg raising test did not provoke any radicular finding. A comparison of preoperative and postoperative MRI scan studies showed satisfactory decompression of the spine with no recurrent or residual disc protrusion.

Dr. Smith opined that the accepted conditions of hip sprain and displacement of the L4-5 disc (which was surgically removed) had resolved. He opined, however, that appellant continued to experience residuals of the thoracic or lumbosacral neuritis and radiculitis and postlaminectomy syndrome. Dr. Smith stated that she was not totally disabled and could return to work in the medium category based on the 2005 functional capacity evaluation (FCE). In an accompanying work capacity evaluation, he indicated that appellant could return to work eight hours a day, provided that she be restricted from walking or standing more than four hours per shift and from pushing, pulling or lifting more than 50 pounds.

OWCP found a conflict in medical opinion between Dr. Parthasarathy and Dr. Smith on the issue of appellant's ability to work. On October 2, 2009 it referred her, together with a statement of accepted facts, a list of questions and the medical record to Dr. Dhruv B. Pateder, a Board-certified orthopedic surgeon, to resolve the conflict in medical opinion.

In an October 30, 2009 report, Dr. Pateder reviewed appellant's medical history and statement of accepted facts. On examination, range of motion of the lumbar spine was limited due to subjective pain. Objectively, Dr. Pateder did not sense any spasm or mechanical block. Appellant did have pain with light touch over the lumbar spine and in the lateral aspect of her hips. Forward flexion was to 5 degrees; extension to 15 degrees; left lateral flexion to 15 degrees; right lateral flexion to 15 degrees. Dr. Pateder stated that he was unable to test sensation "as the exam[ination] was variable." Reflexes in the upper and lower extremities, straight leg raise and contralateral straight leg raise "could not be elicited secondary to pain." Dr. Pateder stated:

> "Based on all the evidence and examining [appellant], I do not see any kind of objective problem now which could be attributed to her injury in May 2004. I think that while she might be having pain, it certainly cannot be attributed

[3] The record contains numerous follow-up reports from Dr. Parthasarathy reiterating his opinion that appellant continued to experience disabling residuals of the accepted injury.

> directly to that injury. In fact, I do not think it can be attributed to the injury at all. [Appellant] has received [a] more than appropriate amount of treatment for that type of injury and in my opinion, she has been grossly over-treated at State of Art Rehab[ilitation]. I think that there are no objective findings to validate her subjective complaints, which could be attributed to the injury."

Dr. Pateder opined that the pain appellant was experiencing, as well as the disability, was related to her underlying condition, including depression, arthritis and malingering, rather than the 2004 injury. He further opined that her total disability ceased three months after her discectomy and that she did not have any residuals of the accepted injury. Dr. Pateder diagnosed "back pain and hip pain of unknown origin" and opined that appellant was able to return to work without any restrictions as it related to the accepted injury.

By letter dated January 12, 2010, OWCP asked Dr. Pateder to clarify his October 30, 2009 report by providing a medical reason as to why his medical opinion differed from that of the second opinion evaluator, who opined that appellant return to work with restrictions. Dr. Pateder was also asked to comment on the November 2005 FCE indicating that appellant was able to return to medium work level.

In a January 18, 2010 follow-up report, Dr. Parthasarathy opined that appellant could return to work in a sedentary capacity. He recommended that she return to work on a trial basis eight hours a day with restrictions including sitting, standing and walking no more than three hours a day; lifting and carrying no more than 10 pounds, three hours a day; pulling and pushing no more than 10 pounds, two hours a day; bending and stooping rarely; and no climbing or kneeling. Dr. Parthasarathy also recommended that appellant use an ergonomic chair.

In a supplemental report dated January 27, 2010, Dr. Pateder stated:

> "Upon further review of the case, I personally think that [appellant] should be able to work without any restrictions whatsoever. I think that my opinion differs from the second opinion in that I think that she can do more than what the other opinion thinks. I think that [appellant] has been malingering this entire time, as I do not see any objective evidence of an acute injury. While she does have some chronic degenerative changes, these are problems that are seen in all patients and are not related to her work injury in any way whatsoever. As far as the FCE goes, I think that [appellant] can certainly return to work at least under those conditions, if not under complete return to work without any restrictions whatsoever."

The record contains a January 26, 2010 job offer for a modified rural carrier position. The position required appellant to drive and transport equipment to various sites up to two hours a day and to type and take photos up to five hours a day. Physical requirements included intermittent lifting, walking and bending.

In a letter dated February 17, 2010, Dr. Parthasarathy responded to the employing establishment's January 26, 2010 job offer. He indicated that appellant was able to perform sedentary work, but not the duties required for the offered position. Because of her lumbar radiculopathy and severe pain, she had limited ability to stand, bend, walk, lift and twist and

would be unable to perform the duties of the offered position, which would require her to lift unspecified amounts, sit and drive for repetitive and extended periods and get in and out of a car frequently.

On March 2, 2010 OWCP proposed to terminate appellant's medical and compensation benefits on the grounds that the medical evidence established that she had no disability or residuals due to her accepted injury. It found that the weight of medical evidence was represented by the report of the impartial medical examiner, Dr. Pateder.

By decision dated April 12, 2010, OWCP finalized its termination of appellant's medical and compensation benefits effective April 13, 2010. On April 26, 2010 appellant, through her representative, requested a telephonic hearing.

At an August 3, 2010 hearing, counsel contended that OWCP improperly terminated appellant's benefits. He argued that there was no real conflict between the second opinion physician and the treating physician as to whether she could return to work or whether she had continuing residuals.

By decision dated October 21, 2010, an OWCP's hearing representative affirmed the April 12, 2010 termination decision, finding that the weight of the medical evidence was represented by Dr. Pateder.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation.[4] After it has been determined that an employee has disability causally related to her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was 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 to compensation for disability.[7] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.[8]

In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

[4] *A.W.*, 59 ECAB 593 (2008).

[5] *J.M.*, 58 ECAB 478 (2007).

[6] *See Del K. Rykert*, 40 ECAB 284 (1988).

[7] *T.P.*, 58 ECAB 524 (2007).

[8] *I.J.*, 59 ECAB 408 (2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[9]

ANALYSIS

The Board finds that OWCP improperly terminated appellant's compensation and medical benefits effective April 13, 2010. Therefore, the October 21, 2010 decision must be reversed.

OWCP referred appellant to Dr. Pateder to resolve the conflict in medical opinion between her treating physician, who opined that she was totally disabled and its second opinion physician, who opined that she could return to work with restrictions related to her accepted conditions. The Board finds that OWCP properly determined that a conflict existed regarding her capacity to work; it further finds, however, that Dr. Pateder's referee reports are insufficient to resolve the conflict.

In his October 30, 2009 report, Dr. Pateder provided minimal examination findings, noting that he was unable to test sensation "as the exam[ination] was variable" and that reflexes in the upper and lower extremities, straight leg raise and contralateral straight leg raise "could not be elicited secondary to pain." He failed to explain why he believed that appellant was able to return to work without restrictions or why he disagreed with Dr. Smith's opinion regarding her work capability, nor did Dr. Pateder explain why appellant's multiple work-related conditions had improved to the extent that they no longer caused her to sustain wage loss. The fact that he was unable to provide relevant examination findings further diminishes the probative value of his report.

Dr. Pateder's brief supplemental report dated January 27, 2010 failed to clarify why his medical opinion differed from that of Dr. Smith or to comment on the November 2005 FCE indicating that appellant was able to return to medium work level. He essentially reiterated his belief that she had been malingering "this entire time" and was able to return to work without restrictions. Dr. Pateder did not render his opinion to a reasonable degree of medical certainty; nor did he explain the basis for his conclusion. For all of these reasons, his. Pateder's reports are of limited probative value and are insufficient to resolve the conflict in medical opinion.[10] Accordingly, OWCP did not meet its burden or proof to terminate appellant's wage-loss compensation effective April 13, 2010.

[9] *Gloria J. Godfrey*, 52 ECAB 486 (2001). FECA provides that, if there is a 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 the examination. 5 U.S.C. § 8123(a). The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and it will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case. 20 C.F.R. § 10.321 (1999).

[10] The Board notes that appellant's treating physician eventually opined that appellant was able to return to a sedentary position. There still remains an unresolved conflict as to her physical abilities and restrictions to be encompassed in any proposed position.

The Board also finds that OWCP did not meet its burden of proof to terminate appellant's medical benefits. The medical evidence of record does not establish that she no longer has residuals of her accepted condition.[11]

The Board notes that both appellant's treating physician and the second opinion physician believed that appellant had continuing residuals related to her accepted injury. The conflict in medical opinion arose regarding the issue of her ability to work. As there was no conflict regarding whether appellant had remaining residuals of the accepted injury, Dr. Pateder did not serve as an impartial medical examiner on this issue. Rather, Dr. Pateder's report constitutes another second opinion evaluation.[12]

Reports from both Dr. Parthasarathy and Dr. Smith provide probative evidence that appellant continues to experience residuals of her accepted injury. Dr. Parthasarathy provided detailed examination findings, which revealed decreased range of motion pain, sensory impairment related to appellant's accepted conditions. Dr. Smith opined that the accepted conditions of hip sprain and displacement of the L4-5 disc (which had been surgically removed) had resolved. He opined, however, that appellant continued to experience residuals of the thoracic or lumbosacral neuritis and radiculitis and postlaminectomy syndrome, which required work restrictions.

Dr. Pateder's reports are insufficiently rationalized to meet the OWCP's burden of proof that appellant no longer had residuals of the accepted conditions.

Dr. Pateder opined without any explanation that appellant's total disability ceased three months after her discectomy and that she did not have any residuals of the accepted injury. He expressed his belief that any pain she was experiencing could not be due to the accepted injury. Instead, Dr. Pateder attributed appellant's complaints to malingering and other underlying, nonwork-related conditions. As discussed above, he failed to provide rationale for his opinion. Such an explanation is particularly important in light of the examination findings and opinion of the treating physician and OWCP referral physician that appellant continues to experience residuals of the 2004 injury. As Dr. Pateder served as a second opinion examiner on the issue of continuing residuals, his report is not entitled to the special weight accorded to an impartial medical examiner. The Board finds his report to be of limited probative value and insufficient to meet the OWCP's burden to terminate appellant's medical benefits.[13]

The Board finds that OWCP improperly terminated appellant's compensation and medical benefits effective April 13, 2010. Accordingly, the October 21, 2010 decision is reversed.

[11] *See supra* note 6 and accompanying text.

[12] The Board notes that Dr. Smith opined that the accepted conditions of hip sprain and displacement of the L4-5 disc had resolved. Although this opinion could be construed as conflicting with the treating physician's opinion, OWCP did not determine that a conflict existed on this issue and did not task Dr. Pateder to resolve that conflict.

[13] To the extent that there existed a conflict as to whether the accepted conditions of hip sprain and displacement of the L4-5 disc had resolved, Dr. Pateder's reports are insufficient to resolve the conflict.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss and medical benefits, effective April 13, 2010, on the grounds that she had no residuals or disability related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the October 21, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 26, 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