

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

J.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 11-1252
Issued: April 16, 2012**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 27, 2011 appellant, through his attorney, timely appealed the April 4, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the termination of his wage-loss compensation. 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.

ISSUES

The issues are: (1) whether OWCP properly declined authorization for spinal manipulation under anesthesia; and (2) whether it properly terminated appellant's wage-loss compensation effective September 26, 2009 on the basis that he was no longer disabled from performing his date-of-injury position.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

Appellant, a 43-year-old former letter carrier, injured his lower back in the performance of duty on March 18, 2006.² He has an accepted claim for left hip strain, acute sciatic neuritis and herniated disc (L5-S1). OWCP authorized a November 1, 2007 lumbar laminectomy, discectomy and fusion at L5-S1.³ Appellant was incapacitated following surgery and received wage-loss compensation beginning October 27, 2007 and was placed on the periodic compensation rolls.

In November 2008, appellant's neurosurgeon and his chiropractor agreed that his ongoing lumbar condition required further treatment, which included transforaminal injections and spinal manipulation under general anesthesia. OWCP authorized the transforaminal injections, but referred the request for spinal manipulation to its medical adviser. In a January 23, 2009 report, the medical adviser indicated that spinal manipulation was beyond his area of expertise, and he could not offer an opinion on whether the proposed treatment was appropriate. He recommended that appellant be referred to a chiropractor with experience in performing the recommended procedure. The medical adviser also noted that appellant would likely benefit from epidural steroid injections.

In February 2009, OWCP referred appellant to Dr. Manhal A. Ghanma, a Board-certified orthopedic surgeon, to determine if the proposed spinal manipulation was medically necessary and causally related to the March 18, 2006 accepted employment injury.

In a report dated March 9, 2009, Dr. Ghanma advised that spinal manipulation was not medically necessary. He explained that there was insufficient objective medical evidence to support that such treatment was appropriate considering that the disc herniation at L5-S1 had been removed and there was no evidence of any recurrent disc herniation based on the most recent lumbar magnetic resonance imaging (MRI) scan dated October 22, 2008.⁴ Dr. Ghanma did not recommend any alternative treatment, and stated that appellant could return to his regular job, with a 35-pound lifting restriction.

Appellant's chiropractor, Dr. Bennett, reviewed Dr. Ghanma's report and expressed his disagreement. On April 10, 2009 he noted that Dr. Ghanma was not certified in spinal manipulation. Dr. Bennett explained that spinal manipulation was clinically indicated often times postsurgery due to fibrotic scar tissue and adhesions that develop around the nerve roots in spite of the disc being removed. He also indicated that such treatment would help to improve spinal mobility and reduce radicular-type complaints that appellant presently experienced.

² Effective September 4, 2007, the employing establishment dismissed appellant for improper conduct.

³ Dr. Peter M. Fragatos, a Board-certified neurosurgeon, performed the November 1, 2007 surgery. OWCP recognized him as appellant's treating physician. Dr. Brian L. Bennett, a chiropractor, also treated appellant, and he often worked in conjunction with Dr. Fragatos concerning appellant's postsurgery rehabilitation.

⁴ Dr. Joseph P. Spirnak, a Board-certified radiologist, indicated that appellant's October 22, 2008 lumbar MRI scan revealed "L5-S1 findings more suggestive of scar formation rather than disc herniation...." Appellant's neurosurgeon reviewed the same MRI scan and continued to diagnose lumbar herniated disc.

Dr. Bennett disagreed with Dr. Ghanma's opinion regarding appellant's ability to resume his regular letter carrier duties.

OWCP found a conflict in medical opinion between Dr. Bennett and Dr. Ghanma regarding the need for spinal manipulation, as well as the extent of any injury-related physical limitations or restrictions.

In a report dated May 11, 2009, Dr. Ralph J. Kovach, a Board-certified orthopedic surgeon and impartial medical examiner, stated that spinal manipulation was not medically necessary. In addition to performing a physical examination and reviewing the medical records, he viewed two postsurgery MRI scans provided by appellant, which did not show evidence of spinal surgery having been performed. Appellant had informed Dr. Kovach that the November 1, 2007 lumbar fusion involved insertion of screws and other hardware, but this was not evident on the MRI scans. Dr. Kovach further noted that the MRI scans did not reveal any significant abnormality and there was no evidence of herniated discs. In finding that spinal manipulation was not medically necessary, he explained that the apophyseal joints appeared reasonable on the MRI scan and there was no evidence of scar tissue that would be mobilized by any manipulation. Dr. Kovach also indicated that no alternative medical treatment was necessary, including transforaminal injection therapy. As to the need for ongoing medical treatment, he stated that active manual therapy was no longer required, but appellant should be allowed to continue treatment with his surgeon as necessary. Dr. Kovach found that appellant was capable of performing his usual job without work restrictions. He noted that appellant had residual diminished sensation over the lateral left foot and leg, but this did not impair him from performing his regular duties.

Dr. Bennett reviewed Dr. Kovach's report and disagreed with his findings. He contended that Dr. Kovach was not certified or familiar with the recommended procedure. Dr. Bennett continued to treat appellant on a regular basis and documented ongoing lumbar and lower extremity complaints. In a report dated July 27, 2009, appellant's neurosurgeon, Dr. Fragatos, indicated that appellant was totally disabled and would benefit greatly by acupuncture and therapy for at least three months.

By decision dated September 23, 2009, OWCP terminated appellant's wage-loss compensation effective September 26, 2009.⁵ Based on Dr. Kovach's May 11, 2009 report, it found that he was capable of performing his date-of-injury position as a letter carrier without restrictions or limitations. The September 23, 2009 decision did not terminate medical benefits.

Appellant requested a hearing, which was held on January 7, 2010. Dr. Bennett submitted a January 12, 2010 report reiterating his disagreement with Dr. Kovach regarding the necessity of spinal manipulation. He also disagreed with Dr. Kovach regarding appellant's ability to perform his regular letter carrier duties. Dr. Bennett noted that appellant primarily delivered mail on foot and his job required frequent bending, lifting, rotating, carrying and sitting for prolonged periods. He believed appellant's ongoing lumbar condition precluded such activities. Dr. Bennett addressed Dr. Kovach's apparent confusion regarding appellant's

⁵ OWCP issued a notice of proposed termination of compensation on August 19, 2009. The notice also advised appellant that OWCP would not authorize spinal manipulation as it was not "medically supported."

November 1, 2007 surgery and the absence of hardware on the latest lumbar MRI scan. He explained that appellant had undergone a TruFUSE® procedure, which involved the insertion of bone dowels (allograft). This was a different procedure than interbody fusion and did not involve metal instrumentation that would otherwise appear on postsurgery imaging studies.

In a decision dated March 26, 2010, OWCP's hearing representative found that while OWCP met its burden of proof to terminate appellant's compensation, Dr. Bennett's clarification regarding appellant's November 1, 2007 surgery warranted further consideration. The hearing representative set aside the September 23, 2009 decision and instructed OWCP to return the case to Dr. Kovach for a supplemental report on whether the nature of surgery appellant received altered his opinion regarding appellant's ability to perform his date-of-injury job. The hearing representative also directed OWCP to issue a final decision regarding the requested authorization for spinal manipulation.

In a supplemental report dated April 27, 2010, Dr. Kovach reviewed Dr. Bennett's January 12, 2010 report explaining the type of spinal fusion surgery appellant received. He commented that while it was a different type of fusion, it was a fusion nonetheless, and the results were stated to have been solid. Dr. Kovach stated that the additional information regarding appellant's fusion did not change his earlier opinion regarding appellant's ability to perform his job as a letter carrier. He further noted that the procedure itself would not preclude appellant from resuming his letter carrier duties and because the fusion was solid, appellant was able to return to his usual job.

By decision dated July 23, 2010, OWCP found that the residuals from appellant's employment injury did not preclude him from performing his date-of-injury job. Thus, appellant's compensation benefits remained terminated. OWCP also denied authorization for the spinal manipulation treatment.

Appellant's attorney requested another hearing, which was held on January 18, 2011. In a September 1, 2010 report, Dr. Bennett again reiterated his disagreement with Dr. Kovach regarding appellant's ability to resume his date-of-injury job.

On April 4, 2011 the Branch of Hearings and Review issued a decision affirming OWCP's July 23, 2010 decision.

LEGAL PRECEDENT -- ISSUE 1

An injured employee is entitled to receive all medical services, appliances or supplies which a qualified physician prescribes or recommends and which OWCP considers necessary to treat the work-related injury.⁶ OWCP has broad discretion in reviewing requests for medical services under 5 U.S.C. § 8103(a), with the only limitation on its authority being that of reasonableness.⁷ Abuse of discretion is generally shown through proof of manifest error, clearly

⁶ 5 U.S.C. § 8103(a); 20 C.F.R. § 10.310(a) (2011).

⁷ *Joseph E. Hofmann*, 57 ECAB 456, 460 (2006).

unreasonable exercise of judgment or administrative actions which are contrary to both logic and probable deductions from established facts.⁸

While OWCP is obligated to pay for treatment of employment-related conditions, appellant has the burden of establishing that the medical expenditure was incurred for treatment of the effects of an employment-related injury or condition.⁹ Proof of causal relationship must include rationalized medical evidence.¹⁰ In addition to demonstrating causal relationship, the injured employee must show that the requested services, appliances or supplies are medically warranted.¹¹

ANALYSIS -- ISSUE 1

Dr. Bennett recommended that appellant undergo spinal manipulation under general anesthesia. Dr. Ghanma, a Board-certified orthopedic surgeon and OWCP referral physician, found that the recommend procedure was not medically necessary because appellant's L5-S1 disc herniation had been removed and there was no evidence of recurrent disc herniation based on the most recent lumbar MRI scan. OWCP determined that a conflict in medical opinion existed, and therefore, properly referred the case to an impartial medical examiner.¹²

Dr. Kovach did not find that spinal manipulation was medically necessary for treatment of appellant's accepted condition. He physically examined appellant, reviewed medical records provided by OWCP, and he viewed appellant's postsurgery MRI scans. Dr. Kovach noted that the MRI scans did not reveal any significant abnormality and there was no evidence of herniated discs. He further commented that the apophyseal joints appeared reasonable on the MRI scan and there was no evidence of scar tissue that would be mobilized by any manipulation. Based upon these findings, Dr. Kovach concluded that spinal manipulation was not medically necessary.

Where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³ Dr. Kovach, the impartial medical examiner, provided a well-rationalized report based on a proper factual and medical history. He accurately summarized the relevant medical evidence, and relied on the latest statement of accepted facts, which included a description of appellant's duties as a letter

⁸ *Id.*; *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

⁹ *Debra S. King*, 44 ECAB 203, 209 (1992).

¹⁰ *Joseph E. Hofmann*, *supra* note 7.

¹¹ *Id.* at 460-61.

¹² FECA provides that if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination. 5 U.S.C. § 8123(a); see 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994). For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale." *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹³ *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

carrier. Dr. Kovach also provided detailed examination findings and medical rationale supporting his opinion. As such, his opinion as the impartial medical examiner was entitled to determinative weight.¹⁴

Dr. Bennett, appellant's chiropractor, disagreed with Dr. Kovach regarding the need for spinal manipulation. He believed there was evidence of scar tissue and that such treatment was medically necessary. Dr. Bennett also believed that Dr. Kovach was unfamiliar with spinal manipulation unqualified to render an opinion on its necessity and efficacy. Unlike Dr. Bennett, Dr. Kovach relied on his own interpretation of appellant's postsurgery MRI scans and Dr. Kovach did not see evidence of scar tissue.

Subsequent reports from a physician who was on one side of a medical conflict that had already been resolved would generally be insufficient to overcome the weight accorded the impartial medical examiner's report and/or insufficient to create a new medical conflict.¹⁵ The Board finds that Dr. Bennett's disagreement with Dr. Kovach is insufficient to create a new conflict or to overcome the special weight properly accorded Dr. Kovach as the impartial medical examiner. Accordingly, OWCP properly denied authorization for spinal manipulation under anesthesia.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹⁶ Having determined that an employee has a disability causally related to his federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.¹⁷ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.¹⁸

ANALYSIS -- ISSUE 2

As previously noted, OWCP declared a conflict in medical opinion between appellant's physicians and Dr. Ghanma, an OWCP referral physician. The conflict included both the need for certain medical treatment, as well as the extent of any injury-related physical limitations/restrictions. Dr. Ghanma believed appellant could return to his regular job with a 35-pound lifting restriction, but Dr. Bennett disagreed.

Dr. Kovach found that appellant was capable of performing his usual job without restriction. Apart from appellant's subjective complaints of pain, he noted that appellant had

¹⁴ *Id.*

¹⁵ *I.J.*, 59 ECAB 408, 414 (2008).

¹⁶ *Curtis Hall*, 45 ECAB 316 (1994).

¹⁷ *Jason C. Armstrong*, 40 ECAB 907 (1989).

¹⁸ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

residual diminished sensation over the lateral left foot and leg. However, the impartial medical examiner did not believe that the injury-related residuals affecting appellant's left lower extremity precluded him from performing his regular duties. Based on the impartial medical examiner's opinion, OWCP terminated wage-loss compensation, but did not disturb appellant's entitlement to medical benefits.

Much like his opinion regarding the need for spinal manipulation, Dr. Kovach's opinion regarding appellant's ability to resume his date-of-injury position is well rationalized and entitled to the deference generally accorded an impartial medical examiner.¹⁹ Although there was some initial confusion about appellant's November 1, 2007 lumbar fusion, he noted in his supplemental report that appellant's fusion was solid and he was able to resume his usual duties as a letter carrier.

While both Dr. Bennett and Dr. Fragatos submitted subsequent reports finding that appellant remained disabled, these subsequent reports are insufficient to overcome the weight properly accorded Dr. Kovach's opinion.²⁰ These additional reports are also insufficient to create a new conflict in medical opinion.²¹ Accordingly, the Board finds that OWCP properly terminated wage-loss compensation based on the weight of the evidence, as represented by the impartial medical examiner's May 11, 2009 and April 27, 2010 reports.

CONCLUSION

OWCP properly denied appellant's request for authorization of spinal manipulation under anesthesia. The Board also finds that it properly terminated wage-loss compensation effective September 26, 2009.

¹⁹ Gary R. Sieber, *supra* note 13.

²⁰ *I.J.*, *supra* note 15.

²¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the April 4, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 16, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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