United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	
DEPARTMENT OF HOMELAND SECURITY, U.S. COAST GUARD, OFFICE OF PERSONNEL & TRAINING, Washington, DC, Employer	)	**Docket No. 11-1288** **Issued: April 13, 2012**

Appearances:
Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 2, 2011 appellant, through her attorney, filed a timely appeal from a February 24, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 and medical benefits effective August 29, 2010.

On appeal, her attorney asserts that the opinion of the referee physician is not well rationalized.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On March 20, 1991 appellant, then a 58-year-old secretary, filed a traumatic injury claim alleging that she injured her back, right arm, right leg and right rib cage when she tripped and fell at work on March 19, 1991. She returned to work on April 8, 1991. On June 10, 1991 OWCP accepted that appellant sustained a right arm sprain and lumbosacral strain. Appellant stopped work on October 1, 1991 and did not return. On November 11, 1991 OWCP accepted aggravation of herniated nucleus pulposus at L4-5. Appellant was placed on the periodic compensation rolls. Nonwork-related conditions include cervical stenosis and fibromyalgia.

Appellant moved to Florida in 2004. In March 2008 she was referred to Dr. Richard Steinfeld, a Board-certified orthopedic surgeon, for a second-opinion evaluation. By report dated July 11, 2008, Dr. Steinfeld noted appellant's history of long-standing low back pain beginning with the March 1991 work injury, a past medical history that included fibromyalgia and multiple myeloma and her current complaints of radiating back pain and numbness of both legs and difficulty in some activities of daily living. He noted a slight shuffling gait. Lower extremity examination demonstrated 5/5 strength and intact sensation. Straight-leg raising was positive bilaterally and appellant was tender to palpation in the midline of the lower back. Dr. Steinfeld reviewed a 1976 cervical magnetic resonance imaging (MRI) scan that demonstrated cervical spondylosis from C3-4 to C6-7 with evidence of central stenosis at C3-4 and C5-6, and a May 1992 lumbar computerized tomography (CT) scan that demonstrated a disc protrusion at L4-5 with displacement of the L4 nerve root and degenerative change at L4-5 and L5-S1. He diagnosed chronic low back pain and probable spinal stenosis. In answer to specific OWCP questions, Dr. Steinfeld advised that the accepted conditions of right arm sprain, lumbar strain and aggravation of lumbar disc appeared to have resolved and that there did not appear to be any other work-related residuals that would support continued disability from work, stating that appellant's symptoms were more consistent with a long-term degenerative process such as spinal stenosis, as supported by her subjective complaints and his objective examination findings. He indicated that her continued disability was due to the nonwork-related condition and that, based on the accepted conditions, she could return to her date-of-injury job as a secretary without restrictions.

A July 16, 2008 MRI scan study of the lumbar spine demonstrated moderate multilevel spondylitic changes most involved at L3-4 where there was a moderate central canal stenosis. In reports dated August 29 and December 15, 2008, Dr. Abe Hardoon, a Board-certified internist, advised that he had been appellant's treating physician since she moved to Florida. He reported that her daily back pain interfered with her daily routine and ability to sleep. Dr. Hardoon found that appellant's condition would not improve and disagreed with Dr. Steinfeld's assessment that she could return to work.

OWCP found that a conflict in medical opinion arose between Dr. Hardoon and Dr. Steinfeld as to whether appellant had residuals of her accepted conditions. On March 27,

2009 it referred her to Dr. Kirk Maes, Board-certified in orthopedic surgery, for an impartial evaluation, scheduled for April 17, 2009.[2]

On March 23, 2009 Dr. Hardoon provided examination findings. In a March 28, 2009 report, Dr. Devin Datta, a Board-certified orthopedist, noted appellant's complaints of chronic back and right buttock and left leg pain that had slowly worsened through the years. She reported appellant's significant past medical history, provided physical examination findings and indicated that appellant ambulated with a steady gait. Dr. Datta diagnosed degenerative disc disease of the lumbar spine, severe L4-5 and L5-S1; lumbar stenosis, greatest at L3-4 and L4-5; back and bilateral leg pain, right greater than left; and possible S1 joint pain. She referred appellant to Dr. Joseph M. Brooks, Board-certified in internal and pain medicine, for epidural injections. On March 15, 2009 Dr. Brooks noted his review of appellant's history and provided examination findings. He reviewed the June 16, 2008 MRI scan and diagnosed chronic low back and bilateral lower extremity pain; degenerative disc disease of the lumbar spine, multilevel, more so at L4-5 and L5-S1; lumbar spinal stenosis, multilevel; right buttock pain consistent with sacroiliitis; neck and right arm pain; and history of work-related injury. Dr. Brooks performed lumbar injections on September 23 and 30, and October 14 and 28, 2009. On December 15, 2009 Dr. Hardoon noted that appellant was undergoing arthrocentesis for her right shoulder due to numbness, tingling and discoloration of her right hand and fingers. He reiterated that she was totally disabled. In a January 25, 2010 report, Dr. Brooks provided physical findings, reiterated his diagnoses and advised that he was referring appellant for chiropractic treatment. He continued to submit reports.

On January 19, 2010 OWCP ascertained that appellant's appointment with Dr. Maes had been cancelled.[3] On March 5, 2010 it referred her to Dr. Robert B. McShane, a Board-certified orthopedic surgeon, for an impartial evaluation.

In an April 5, 2010 report, Dr. McShane noted the history of injury and his review of the statement of accepted facts and medical record. He described appellant's complaint of constant, severe pain, made worse by exercise, movement, walking and standing and reported that she did not use a cane, walker or wheelchair and moved about the examination room easily. On low back examination, appellant was tender to very light touch and deep palpation and had pain with flexion, extension and lateral rotation. Straight-leg raise and sitting root tests were negative. Appellant reported decreased sensation in the superficial and deep peroneal distribution of the right foot and normal sensation in the posterior tibial distribution. Sensation was normal in the left foot. Lower extremity strength was normal and no atrophy was present. Appellant reported patchy diminished sensation in both hands in a nonanatomic distribution. Right shoulder range of motion was full and there was no hand atrophy present. Dr. McShane advised that the accepted conditions of right arm sprain, lumbar sprain and aggravation of displacement of the lumbar disc at L4-5 had resolved and that there were no work-related residuals to support

[2] In an April 17, 2009 letter to President Barack Obama, appellant's husband reported that she had seen a "back physician" the previous day for an appointment scheduled by OWCP. In a January 20, 2010 telephone memorandum, however, an OWCP claims examiner advised that she had been informed by Dr. Maes' office that an appointment scheduled with him had been cancelled and they had no record that appellant was seen.

[3] *Id*.

disability from work. He stated that appellant's current symptoms were much more consistent with those of an ongoing severe degenerative arthritis of L4-5 and L5-S1, as shown on CT scans and MRI scan studies which showed spinal stenosis and also noted that her laboratory results supported that she had an inflammatory process. Dr. McShane stated that she could return to her date-of-injury position as a secretary based on the accepted conditions and had reached maximum medical improvement. He indicated that appellant had other medical conditions that were not related to work that supported disability including the degenerative arthritis, spinal stenosis and history of fibromyalgia which would prevent her from working in her usual job. Dr. McShane advised that she could work eight hours a day with permanent physical restrictions of two hours sitting, walking, standing, reaching, reaching above shoulder, twisting, driving, pushing, pulling, lifting and squatting; and one hour bending, stooping, kneeling and climbing; and a 20-pound weight restriction.

An April 8, 2010 cervical spine MRI scan study showed multilevel disc space narrowing and degenerative changes with moderate spinal stenosis at C3-4, C5-6 and C6-7. Dr. Brooks continued to submit reports and performed cervical epidural injections on May 5 and 17, 2010. On June 2, 2010 he diagnosed cervicalgia with upper extremity pain and degenerative disc disease of the cervical spine with spinal stenosis.

On July 21, 2010 OWCP proposed to terminate appellant's compensation benefits on the grounds that the medical evidence, as characterized by Dr. McShane's opinion, established that her employment-related conditions had resolved. Appellant disagreed with the proposed termination, and submitted medical evidence previously of record and a July 14, 2010 procedure note from Dr. Brooks for a cervical epidural injection. In a July 27, 2010 report, Dr. Brooks reviewed Dr. McShane's report and stated that he disagreed that she could return to her normal employment because she had moderate spinal stenosis at multiple levels and pain that radiated into her arms that caused cervicogenic headaches, had difficulty with sitting, standing, moving and working with her arms and degenerative disc disease of the lumbar spine with spinal stenosis that caused chronic back pain radiating into the lower extremities. He opined that all of appellant's problems were directly related to the 1991 work injury and she had cumulative degeneration occurring after this injury.

In a July 29, 2010 report, Dr. Datta noted appellant's chief complaint of neck and bilateral upper extremity numbness and tingling and low back pain. She noted that appellant walked with a steady gait, had good strength in both arms, very limited neck motion with increased pain and low back pain. Dr. Datta noted her review of MRI scan studies of the cervical spine and diagnosed multilevel degenerative disc disease of the cervical spine, debilitating neck and bilateral arm pain, moderate cervical stenosis, low back and occasional leg pain and degenerative disc disease and stenosis of the lumbar spine. She opined that at some point cervical spine surgery should be considered and stated, "I find it rather ridiculous that [appellant] was put back to work after 19 years, at age 73. I have put her back off work. [Appellant] has been disabled for 19 years. I do not see any reason to change her work status." X-rays of the cervical spine on July 29, 2010 demonstrated moderate degenerative disc disease at C4-5, C5-6 and C6-7 with mild disc disease at C2-3 and C3-4.

By decision dated August 25, 2010, OWCP found that the weight of the medical evidence rested with Dr. McShane and terminated appellant's wage-loss and medical benefits effective August 29, 2010.

On September 2, 2010 appellant requested a hearing, and submitted an August 18, 2010 report in which Dr. Hardoon advised that he treated appellant for several medical conditions including back pain which was constant at times and interrupted her daily routine and her ability to sleep at night. Dr. Hardoon advised that pain management with epidural injections had not given much relief to her right upper extremity and advised that appellant was disabled from any work.

In an October 8, 2010 report, Dr. Kenneth Henschel, a Board-certified neurologist, advised that appellant was seen for evaluation for chronic pain syndrome and lumbar spine disease. He noted her report of the trip and fall injury in 1991, her medical history and complaints of chronic aches and pains in her arms, back, hips, legs, neck and shoulders, diaphoresis, numbness, nervousness, headaches, forgetfulness, dizziness, problems with bowel movements, ankle edema, irregular heartbeat, hay fever, easy bruising, jerking movements, leg cramps, tingling, lightheadedness and fatigue. Dr. Henschel provided findings, noting normal motor and sensory examinations in the upper and lower extremities and advised that appellant had significant difficulty getting up onto the examination table due to pain and was unable to lie with her lower extremities straight and had difficulty walking. He stated that a lumbar spine MRI scan study two weeks previously showed severe L4-5 spinal stenosis and mild-to-moderate stenosis at L3-4 and L5-S1 with advanced facet arthropathy bilaterally at those levels. Dr. Henschel diagnosed long-standing lumbar degenerative disease with a significant degree of spinal stenosis at L4-5; a significant degree of functional deficits at L4-5; functional limitations due to chronic pain syndrome; and depression and anxiety. He advised that appellant's physician's limitations would present a significant problem for functioning in the workplace.

At the hearing, held telephonically on January 4, 2010, appellant asserted that all her medical conditions were due to the 1991 employment injury. She described her current condition, stated that she had problems dealing with OWCP through the years and asserted that her compensation should not have been terminated. By decision dated February 24, 2011, an OWCP hearing representative found that the weight of the medical evidence rested with the opinion of Dr. McShane and affirmed the August 25, 2010 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.[4] 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.[5]

[4] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[5] *Id.*

Under FECA, the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury. Disability is thus not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to a federal employment injury, but who nevertheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used in FECA.[6] Whether a particular injury causes an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.[7]

Section 8123(a) of FECA provides that, 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.[8] When the case is referred to an impartial medical specialist for the purpose of resolving 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 did not meet its burden of proof to terminate appellant's compensation benefits effective August 29, 2010. The accepted conditions in this case are right arm sprain, lumbosacral strain and aggravation of herniated disc at L4-5. OWCP properly determined that a conflict in medical evidence had been created between the opinions of appellant's treating physician, Dr. Hardoon, and Dr. Steinfeld, an OWCP referral physician, regarding whether appellant had residuals of the accepted conditions. It referred appellant to Dr. McShane, Board-certified in orthopedic surgery, for an impartial evaluation.

The Board, however, finds that the opinion of Dr. McShane is not well rationalized or insufficient to represent the weight of the medical evidence. OWCP provided the physician with a list of questions and asked that he provide objective support and medical rationale for his conclusions. In his April 5, 2010 report, Dr. McShane's response to questions presented by OWCP was quite brief. He repeated the question posed by OWCP and provided a conclusory answer without any detailed explanation of the basis for his conclusion. There was no accompanying narrative explanation for Dr. McShane's stated conclusions. He did not refer to results on examination, the medical or factual history, the nature of the accepted conditions, or provide sufficient medical rationale to support his opinion that the residuals of appellant's accepted conditions had resolved. Because Dr. McShane did not fully explain the basis for his opinion, his April 5, 2010 report is of limited probative value. There is an unresolved conflict in the medical opinion evidence regarding whether appellant continues to have residuals of her

[6] *See* 20 C.F.R. § 10.5(f); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

[7] *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[8] 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

[9] *Manuel Gill*, 52 ECAB 282 (2001).

employment injuries. Therefore, OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective August 29, 2010.[10]

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the February 24, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 13, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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

[10] *Elaine Sneed*, 56 ECAB 373 (2005).