

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

A.P., Appellant

and

**DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
Richmond, VA, Employer**

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**Docket No. 11-2126
Issued: April 25, 2012**

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
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 21, 2011 appellant filed a timely appeal from a March 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the termination of his compensation benefits. 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.²

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss and medical compensation benefits effective August 29, 2010 on the grounds that his accepted lumbar conditions ceased without residuals.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the March 28, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal, appellant contends that OWCP erred in its analysis of: (1) a December 3, 2009 magnetic resonance imaging (MRI) scan report by Dr. Noel I. Perin, a Board-certified neurosurgeon; (2) reports by Dr. Joseph Spano, a chiropractor; (3) reports by Impartial Medical Examiner Dr. Richard D. Semble, a Board-certified orthopedic surgeon; and (4) an August 2007 medical report showing no spinal injury prior to the date of injury.

FACTUAL HISTORY

On July 15, 2008 appellant, then a 29-year-old revenue agent, fell and sustained injuries to his lower back, hip and leg while in the performance of duty. OWCP accepted the claim for sprain of lumbosacral joint (ligament). It paid wage-loss compensation for total disability. Appellant worked intermittently³ and was placed on the periodic rolls in April 2009.⁴

An October 14, 2008 MRI scan of the lumbar spine revealed no central canal or foraminal stenosis.

In a March 27, 2009 report, Dr. Thomas Booker, a Board-certified physical medicine and rehabilitation physician, diagnosed back pain and muscle spasm. He opined that appellant's back pain was likely muscular or ligamentous.

In a May 5, 2009 nerve conduction study report, Dr. Kaiyu Ma, a Board-certified neurologist, opined that appellant had a mild abnormal electrodiagnostic study which revealed the evidence of spontaneous activity in the left mid-lumbar paraspinal muscles. Dr. Ma stated that the spontaneous activity could be due to the acute left mid-lumbar radiculopathies.

OWCP referred appellant for a second opinion evaluation to determine the nature and extent of his employment-related condition. In a May 29, 2009 report, Dr. Harvey L. Seigel, a Board-certified orthopedic surgeon, conducted a physical examination and reviewed a statement of accepted facts, history of the injury and the medical evidence of record. There was subjective tenderness along the entire left paralumbar musculature, extending down into the left buttock. There were no areas of muscle spasm in the midline or in the paraspinal musculature of the entire lumbosacral spine. Dr. Seigel found no evidence of muscle weakness in any of the lower extremity major muscle groups and opined that appellant had no objective findings of the accepted condition of sprain of lumbosacral joint (ligament). He opined that appellant had reached maximum medical improvement and that no further medical treatment was necessary. Dr. Seigel opined that the accepted condition had totally resolved and appellant was able to perform the physical requirements of the full duties of his federal employment as revenue agent.

Appellant submitted a July 2, 2009 functional capacity evaluation report by Kirstin Banse, a physical therapist, for Dr. Booker. She opined that appellant fell into the category for sedentary work.

³ On October 8, 2008 appellant accepted a full-time limited-duty job offer from the employing establishment as an internal revenue agent.

⁴ On October 15, 2008 appellant filed a claim for a recurrence, which OWCP accepted by decision dated November 13, 2008.

OWCP referred appellant to Dr. Semble to resolve a conflict in the medical opinion between Drs. Booker and Seigel on the issues of: (1) whether a causal relationship existed between his condition and the accepted employment injury; and (2) whether appellant continued to have any disability or residuals as a result of the accepted employment injury. In a July 28, 2009 report, Dr. Semble reviewed a statement of accepted facts, the medical evidence of record and performed a physical examination. He stated that diagnostic testing had not revealed any evidence of structural abnormality or lumbar herniated disc. Despite this, appellant complained of subjective lumbar radiculitis extending to the left lower extremity and the inability to drive for more than 15 minutes. The objective examination was virtually normal with just a slight loss of range of motion. No palpable spasm was demonstrated but various areas of sensitivity remained subjectively. Dr. Semble advised that appellant had not yet reached maximum medical improvement but did not appear to have any ongoing disability. He concluded that appellant could return to his normal duties full time either from home or if he could be transported to the facility and his laptop be carried in a wheelie type of device, then he could return to his full duties at other facilities as well.

In an October 7, 2009 report, Dr. Booker provided a brief medical history and opined that appellant's pain was most likely mild myofascial pain. He reported that there was no evidence of permanent injury to appellant's spine or lower back and recommended that he return to work while sitting for intervals no longer than 30 minutes without a break.

On October 8, 2009 the employing establishment offered appellant a limited-duty job as a tax compliance officer. The position required conducting taxpayer examinations in an office setting and would not require driving or transporting a laptop computer or cases to/from work.

In a letter dated November 3, 2009, appellant refused the job offer and requested 15 days to submit evidence to establish why the position offered did not comply with his medical restrictions.

By letter dated November 6, 2009, OWCP notified appellant that it found the modified tax compliance officer position to be suitable to his work capabilities in accordance with his medical restrictions. It provided 30 days for him to either accept the position or provide an explanation of the reasons for refusing it.

Appellant submitted a November 4, 2009 report by Dr. Spano, who diagnosed lumbosacral neuritis/radiculitis, muscle spasm and lumbar region subluxation. Dr. Spano marked a checkbox noticing that the July 15, 2008 incident was the cause of appellant's conditions. Appellant also submitted progress notes dated October 13 to November 13, 2009 by Dr. Spano.

By decision dated November 19, 2009, OWCP accepted appellant's claim for lumbar muscle spasm and lumbar subluxation (segmental dysfunction).

A December 3, 2009 MRI scan of the lumbar spine revealed scoliosis, convex to the left, with straightening of the normal lumbar lordosis and degenerative facet joint changes at L4-5 and L5-S1 and was otherwise unremarkable.

In a December 6, 2009 letter, appellant refused the employing establishment's limited-duty job offer.

By letter dated December 10, 2009, OWCP found that the reasons appellant provided for refusing the suitable job offer were not valid. It granted 15 days for him to accept the position and noted that if he failed to accept the offered position his entitlement to compensation would be terminated.

Appellant submitted a November 21, 2009 x-ray of his spine, which showed normal lumbar lordosis, no acute fracture or malalignment and disc space narrowing, facet joint hypertrophy and possible neural foraminal narrowing at the L5-S1 level. He also submitted progress notes dated December 4, 2009 to February 9, 2010 by Dr. Spano. A March 4, 2010 report of Dr. Semble indicated that appellant was unable to drive except for short distances and unable to lift more than 20 pounds.

By decision dated March 23, 2010, OWCP terminated appellant's entitlement to monetary compensation benefits based on his refusal of suitable work, pursuant to 5 U.S.C. § 8106(c).

On March 31, 2010 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative. He submitted an April 2, 2010 report by Dr. Booker, who diagnosed low back pain and ordered massage therapy.

Following a preliminary determination, by decision dated June 7, 2010, an OWCP hearing representative reversed the March 23, 2010 decision with retroactive reinstatement of wage-loss benefits. The hearing representative found that the conflict between Drs. Booker and Siegel remained unresolved as Dr. Semble did not provide sufficient medical rationale to support that appellant had continuing employment-related residuals. The hearing representative directed OWCP to refer the case back to Dr. Semble for clarification.

On remand, OWCP referred appellant to Dr. Semble. In his July 13, 2010 report, Dr. Semble reexamined appellant, reviewed his medical history and concluded that he had no disability. He reported that objective diagnostic testing did not reveal any structural abnormality that would necessitate further treatment or that would explain his ongoing subjective complaints. Dr. Semble opined that appellant was capable of working full duties as a revenue agent without any restrictions on driving, noting that there were no objective findings to support the subjective complaints regarding his driving limitations. He concluded that appellant did not require further medical treatment.

By letter dated July 23, 2010, OWCP notified appellant that it proposed to terminate his compensation benefits based on the weight of the medical evidence, as represented by Dr. Semble. It allotted 30 days for appellant to submit additional evidence or argument in disagreement with the proposed action.

In a letter dated August 23, 2010, appellant's attorney disagreed with OWCP's proposal to terminate his compensation benefits. He contended that Dr. Semble's report ignored the December 3, 2009 MRI scan of the lumbar spine showing scoliosis and degenerative facet joint changes at L4-5 and L5-S1. He also contended that the findings by Dr. Spano refuted the lack of

an objective basis for the pain appellant reported and support the limitations on driving and standing to 30-minute intervals. Appellant submitted progress reports dated August 17 to 31, 2010 by Dr. Spano.

By decision dated August 24, 2010, OWCP terminated appellant's wage-loss and medical benefits effective August 29, 2010. It found that the weight of the evidence was represented by Dr. Semble.

On August 27, 2010 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative.⁵ He submitted a September 13, 2010 report by Dr. Perin, who indicated a small left paracentral disc at L5-S1, which did not seem to be touching the nerve root and recommended a good closed repeat MRI scan as the open MRI scan of the lumbar spine was a poor study. Appellant also submitted progress notes dated October 13, 2009 to February 4, 2011 by Dr. Spano and a February 1, 2011 report by Dr. Spano explaining that, although he did not use the term "subluxation" in his reports, if his findings were present then subluxation would be present as well. He indicated that documentation of subluxation was noted during every office visit and could be found with his documentation. Dr. Spano opined that an axial compression injury of the lower lumbar spine such as falling directly on the gluteal musculature, sacrum and lumbar spine as appellant did on the date of injury was consistent with his findings and provided causal relationship between the employment incident and his injuries.

On February 7, 2011 an oral hearing was held before an OWCP hearing representative who heard appellant's testimony and allotted 30 days for the submission of additional evidence.

Appellant submitted a March 1, 2011 report by Dr. Booker, who indicated that appellant was currently under his care for back and left leg pain and a March 4, 2011 report by Dr. Spano, who indicated that the L5-S1 intravertebral disc height was compromised and if the disc is compromised the vertebrae above it will be lower on the vertical axis than normal and that this was the location of subluxation. He also submitted progress notes dated February 9 to March 22, 2011 by Dr. Spano.

By decision dated March 28, 2011, an OWCP hearing representative affirmed the August 24, 2010 termination decision, finding that Dr. Semble represented the weight of the medical evidence.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁶ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer

⁵ On October 30, 2010 appellant, through his attorney, requested subpoenas for witnesses at the hearing. By decision dated January 14, 2011, OWCP denied the request.

⁶ See *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

related to the employment.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁹ 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.¹⁰

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.¹¹ 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.¹²

ANALYSIS

OWCP accepted appellant's claim for sprain of the lumbosacral joint (ligament), lumbar muscle spasm and lumbar subluxation (segmental dysfunction). It terminated his compensation benefits effective August 29, 2010 on the grounds that the accepted employment-related condition had resolved without residuals based on the opinion of the impartial medical examiner, Dr. Semble.

OWCP referred appellant to Dr. Semble to resolve the conflict in the medical opinion evidence between Drs. Booker and Siegel. Dr. Booker, appellant's treating physician, opined that appellant continued to suffer from residuals from his accepted employment injury. Dr. Siegel, an OWCP referral physician, disagreed with Dr. Booker and opined that appellant no longer had any residuals or disability due to the accepted employment injury, concluding that appellant's sprain of lumbosacral joint (ligament) had resolved. As there was a conflict of medical opinion evidence between appellant's physician and OWCP's referral physician on the issues of medical residuals and disability, the Board finds that OWCP properly referred appellant to Dr. Semble to resolve the conflict in the medical opinion evidence, pursuant to 5 U.S.C. § 8123(a).

The Board finds that OWCP met its burden of proof to terminate appellant's medical and wage-loss compensation benefits based on the July 28, 2009 and July 13, 2010 reports of

⁷ See *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁸ See *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁹ See *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁰ See *James F. Weikel*, 54 ECAB 660 (2003).

¹¹ 5 U.S.C. § 8123(a). See *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹² See *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

Dr. Semble, the impartial medical examiner, who reviewed appellant's medical history, examined him and found no objective evidence of ongoing residuals or disability due to the accepted sprain of lumbosacral joint (ligament), lumbar muscle spasm and lumbar subluxation (segmental dysfunction). Dr. Semble reviewed the statement of accepted facts and the medical record. He found no objective evidence of symptoms related to the accepted conditions. Dr. Semble found no evidence of other conditions or residuals related to appellant's employment. He explained that diagnostic testing had not revealed any objective evidence of structural abnormality or lumbar herniated disc and that the objective examination was virtually normal with just a slight loss of range of motion. No palpable spasm was demonstrated but various areas of sensitivity remained subjectively. Upon reexamination on July 13, 2010, Dr. Semble concluded that appellant was capable of working full duties as a revenue agent without any driving restrictions, again explaining that there was no objective evidence to support the subjective complaints.

The Board finds that Dr. Semble's reports represent the special weight of the medical evidence at the time OWCP terminated benefits and that OWCP properly relied on his reports in terminating appellant's benefits. The Board finds that he had full knowledge of the relevant facts and evaluated the course of appellant's condition. Dr. Semble is a specialist in the appropriate field. His opinion is based on proper factual and medical history and his report contained a detailed summary of this history. Dr. Semble addressed the medical records to make his own examination findings to reach a reasoned conclusion regarding appellant's condition.¹³ At the time benefits were terminated, he found no basis on which to attribute any residuals or continued disability to appellant's accepted conditions. Dr. Semble's opinion as set forth in his July 28, 2009 and July 13, 2010 reports is found to be probative evidence and reliable. The Board finds that his opinion constitutes the special weight of the medical evidence and is sufficient to justify OWCP's termination of benefits for the accepted conditions.

In assessing the probative value of chiropractic evidence, the initial question is whether the chiropractor is considered a physician under 5 U.S.C. § 8101(2). A chiropractor is not considered a physician under FECA unless it is established that there is a spinal subluxation as demonstrated by x-ray to exist.¹⁴ OWCP's implementing regulations define subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae, which must be demonstrable on any x-ray film to an individual trained in the reading of x-rays.¹⁵ The Board has held that a chiropractor is a physician as defined under FECA to the extent that the reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.¹⁶ Although Dr. Spano diagnosed lumbar region subluxation on November 4, 2009, his reports are of no probative

¹³ See *Michael S. Mina*, 57 ECAB 379 (2006) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

¹⁴ See *Mary A. Ceglia*, 55 ECAB 626 (2004).

¹⁵ 20 C.F.R. § 10.5(bb).

¹⁶ *Id.* at § 10.311(a). Cf., *D.S.*, Docket No. 09-860 (issued November 2, 2009).

value. There is no indication in his reports that he diagnosed a subluxation as demonstrated by x-ray to exist. The record contains an x-ray dated November 21, 2009, but as Dr. Spano's November 4, 2009 diagnosis predates the November 21, 2009 x-ray, it could not have been used as a basis for his diagnosis. Thus, the Board finds that OWCP properly terminated appellant's compensation benefits effective August 29, 2010 relating to the accepted lumbar conditions.

The September 13, 2010 report by Dr. Perin and the March 1, 2011 report by Dr. Booker contain no opinion as to whether appellant continues to have residuals from the accepted lumbar conditions. Thus, these reports are insufficient to show that the termination was improper. Moreover, as Dr. Booker was on one side of the conflict which Dr. Semble resolved, the additional report is insufficient to overcome the weight accorded Dr. Semble's report as the impartial medical examiner or to create a new conflict.¹⁷ Accordingly, the Board finds that Dr. Semble's opinion continues to constitute the special weight of medical opinion and supports OWCP's August 24, 2010 decision terminating appellant's compensation for wage-loss and medical benefits.

On appeal, appellant contends that OWCP erred in its analysis of the medical evidence of record. For the reasons stated above, Dr. Semble's reports represent the special weight of the medical evidence and establish that appellant did not suffer from residuals due to his accepted conditions. Dr. Semble found no basis on which to attribute any other condition to appellant's employment. Thus, the Board finds that appellant's argument is not substantiated.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss and medical compensation benefits effective August 29, 2010 on the grounds that his accepted lumbar conditions had ceased without residuals.

¹⁷ *Dorothy Sidwell*, 41 ECAB 857 (1990).

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 25, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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