

FACTUAL HISTORY

On July 25, 1991 OWCP accepted that appellant, then a 42-year-old cemetery caretaker, sustained a lumbar strain on February 20, 1991 when lifting headstones.² Appellant was placed on the periodic compensation rolls and the accepted condition was expanded to include herniated disc at L4-5 and postlaminectomy syndrome.

Appellant returned to work as an information receptionist on May 1, 1995. By decision dated October 24, 1995, OWCP found that his actual earnings as an information receptionist fairly and reasonably represented his wage-earning capacity and reduced his compensation accordingly. Appellant was terminated in December 1995. On September 23, 1996 OWCP denied appellant's request for merit review of the October 24, 1995 decision.³ Appellant continued to receive compensation, based on his wage-earning capacity and medical treatment for his accepted conditions.⁴

In a November 29, 2010 report, Dr. John Dahill, an attending orthopedic surgeon, noted a history that appellant injured his back when working in 1991. He described appellant's complaint of back pain and left leg numbness. Examination of the back demonstrated no lumbar/sacral tenderness, spasticity or bony/soft tissue abnormality. Appellant could bend forward to the mid-lower leg level. Patrick, Gaenslen and pelvic tilt tests were negative. Motor and sensory examinations were normal. A pelvis x-ray was normal. Lumbar spine x-ray demonstrated facet arthropathy of the bilateral L4-5 and L5-S1 facets and grade 1 spondylolisthesis of L4-5. Dr. Dahill diagnosed lumbago, lumbar radiculopathy and lumbar spondylolisthesis.

On April 28, 2011 OWCP referred appellant to Dr. Randy J. Pollet, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a May 17, 2011 report, Dr. Pollet reviewed the statement of accepted facts and medical record, and noted appellant's complaint of pain, swelling, weakness, stiffness and inflammation of the low back that was dull, constant, moderate-to-severe and made worse with activity. He noted that appellant was 100 percent disabled due to a military service-connected post-traumatic stress disorder and had chronic renal failure. Dr. Pollet reported that appellant ambulated with some difficulty. Range of motion was slightly painful but adequate and straight leg raising and hamstring spasm tests were negative in the sitting position. Mild low back tenderness was noted. A lumbar spine x-ray demonstrated age-related degenerative joint and disc changes, age-related degenerative spondylolisthesis at L4-5 and age-related spinal stenosis. Dr. Pollet diagnosed resolved lumbar sprain/strain of February 20, 1991, age-related degenerative joint disease and disc disease with L4-5 age-related degenerative spondylolisthesis and spinal stenosis with spinal instability. In answer to specific OWCP questions, he found that there was no objective evidence to support that appellant was disabled as a result of the lumbar strain of February 20, 1991 and there were no objective

² Appellant was dismissed from the employing establishment for cause on July 3, 1991.

³ In a July 15, 1996 decision, OWCP denied appellant's request for a hearing on the grounds that it was not timely filed.

⁴ On November 27, 2007 Dr. Alfonso Chavez, a nephrologist, advised that appellant was under his care for end-stage renal disease and required dialysis three times weekly.

evidence to support that he was presently disabled as a result of an intervertebral disc disorder with myelopathy or from post-laminectomy syndrome as a result of the February 20, 1991 work injury. Dr. Pollet found no objective residuals from the February 20, 1991 work injury that would render appellant totally disabled from all work, and that there were no significant residuals of the injury. He advised that appellant could return to full duty as related to the February 20, 1991 employment injury.

In a letter dated December 9, 2011, OWCP proposed to terminate appellant's monetary compensation on the grounds that the medical evidence, as characterized by Dr. Pollet's report, established that he no longer had residuals or disability due to the February 20, 1991 employment injury. Appellant did not respond.

By decision dated January 23, 2012, OWCP finalized the termination of wage-loss compensation, effective that day.

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.⁵ 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.⁶

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits on January 23, 2012. The accepted conditions in this case are a lumbar strain, a herniated disc at L4-5 and postlaminectomy syndrome.⁷

Appellant received compensation based on a loss of wage-earning capacity determination in 1994. The Board has established that once the wage-earning capacity of an injured employee is determined, a modification of such determination is not warranted unless there is a material change in the nature and extent of the injury-related condition, the employee has been retrained or otherwise vocationally rehabilitated or the original determination was, in fact, erroneous.⁸ The burden of proof is on the party attempting to show a modification of the wage-earning capacity determination.⁹ In certain situations, however, if the medical evidence is sufficient to meet OWCP's burden of proof to terminate benefits, the same evidence may also negate a loss of wage-earning capacity such that a separate evaluation of the existing wage-earning capacity

⁵ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁶ *Id.*

⁷ As noted by Dr. Pollet, appellant has not had back surgery.

⁸ *Stanley B. Plotkin*, 51 ECAB 700 (2000).

⁹ *Id.*

determination is unnecessary.¹⁰ OWCP's burden to demonstrate no further disability is effectively the same, irrespective of whether there is an existing determination in place finding loss of earning capacity. Case law may suggest that a threshold evaluation of the wage-earning capacity needs to be performed before there is a termination of benefits. The burden, however, is often substantially the same, the evidence is the same and the process of terminating benefits need only be done once.¹¹ While a claimant may still have unrelated medical conditions or impairments, as in this case, the medical evidence must establish that the employment-related disability and medical conditions no longer exist.

The medical evidence most contemporaneous with the January 23, 2012 termination includes Dr. Dahill's November 29, 2010 report.¹² Dr. Dahill stated that appellant's back pain began in 1991 when he was lifting stones at work and had continued since that time. Examination findings included no lumbar/sacral tenderness, spasticity or bony/soft tissue abnormality. Dr. Dahill advised that appellant could bend forward to the mid-lower leg level, and that Patrick's, Gaenslen's and pelvic tilt tests were negative, and motor and sensory examinations were normal. He diagnosed lumbago, lumbar radiculopathy and lumbar spondylolisthesis, none of which are accepted conditions. Dr. Dahill did not discuss the accepted conditions or appellant's ability to work.

Dr. Pollet, an OWCP referral physician, provided a May 17, 2011 report, which noted his review of the statement of accepted facts and medical record and appellant's complaint of constant dull, moderate-to-severe pain, weakness and stiffness of the low back that was made worse with activity. He indicated that appellant ambulated with some difficulty and physical examination demonstrated slightly painful but adequate range of motion with mild low back tenderness. Straight leg raising and hamstring spasm tests were negative in the sitting position. Dr. Pollet reviewed x-ray findings and diagnosed resolved lumbar sprain/strain that occurred on February 20, 1991, age-related degenerative joint disease and disc disease with L4-5 age-related degenerative spondylolisthesis and spinal stenosis with spinal instability. He responded to OWCP questions, advising that there was no objective evidence to support that appellant was disabled as a result of the lumbar strain, an intervertebral disc disorder with myelopathy, or of postlaminectomy syndrome as a result of the February 20, 1991 employment injury. Dr. Pollet indicated that there were no significant residuals of the injury and advised that appellant could return to full duty as related to the February 20, 1991 work injury.

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. 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

¹⁰ *A.P.*, Docket No. 08-1822 (issued August 5, 2009). There may exist a situation where a separate analysis would be necessary, based on preexisting conditions or other medical conditions, but that situation does not present itself in this case. Should those particular facts arise, this decision does not preclude a further consideration of the matter.

¹¹ *Id.*

¹² The Board has held that contemporaneous evidence is entitled to greater probative value than later evidence. *S.S.*, 59 ECAB 315 (2008).

the physician's opinion are facts, which determine the weight to be given to each individual report.¹³ The Board finds that OWCP properly determined that the weight of the medical opinion evidence rested with the opinion of Dr. Pollet who provided a comprehensive report in which he outlined examination findings and provided a rationalized explanation for his opinion that appellant's accepted lumbar conditions had resolved. OWCP therefore met its burden of proof to terminate appellant's compensation benefits on January 23, 2012.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's monetary compensation on January 23, 2012.

ORDER

IT IS HEREBY ORDERED THAT the January 23, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 6, 2012
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

¹³ *Michael S. Mina*, 57 ECAB 379 (2006).