

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

Y.G., Appellant)
)
and) **Docket No. 11-1691**
) **Issued: February 13, 2012**
U.S. POSTAL SERVICE, NEW YORK)
PERFORMANCE CLUSTER, NEW YORK, NY,)
Employer)
)

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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 15, 2011 appellant filed a timely appeal from the March 14, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her 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.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective March 14, 2011 on the grounds that she had no residuals of her August 28, 2008 employment injury after that date.

¹ 20 C.F.R. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on August 28, 2008 appellant, then a 59-year-old sales and service distribution associate, sustained a back sprain of her lumbar region, bilateral knee sprains and bilateral wrist sprains due to falling to her knees at work after a large box fell on her.

Appellant was initially seen by Dr. Jean Chen, a physical medicine and rehabilitation physician, who diagnosed her with lumbar sprain, bilateral knee sprains and acute bilateral wrist sprains with tenosynovitis. The findings of an August 29, 2008 radiograph of her lumbosacral spine revealed mild degenerative changes of her lumbar spine with degenerative disc disease at L3-4 and L4-5 levels. Magnetic resonance imaging (MRI) scan testing of her right knee, obtained on November 4, 2008, showed a large tear of the body of the medial meniscus inferiorly, fibrillation of the anterior margin and the inferior articular surface of the posterior horn, partial proximal anterior cruciate ligament tear and erosions involving the posterior aspect of the medial femoral condyle and the tibial aspect of the proximal tibiofibular joint. November 18, 2008 MRI scan testing of appellant's left knee revealed a vertical tear of the posterior horn of the medial meniscus, posteromedial meniscocapsular separation, erosion at the posterior aspect of the nonweight bearing surface of the medial femoral condyle, medial collateral ligament tear and lateral patellar tilt.

On December 4, 2008 appellant was examined by Dr. Kenneth McCulloch, an attending Board-certified orthopedic surgeon, who diagnosed bilateral meniscus tears. She underwent arthroscopic left knee surgery on February 20, 2009 which was authorized by OWCP.

On April 28, 2009 Dr. Adam Carter, an attending Board-certified physical medicine and rehabilitation physician, diagnosed appellant with internal derangement of both knees, status post left medial repair and sprain of her lumbar spine. Appellant was examined again by him on May 26, 2009 when he diagnosed her with sprain/strain of the cervical spine, sprain/strain of the lumbar spine and exacerbation of underlying lumbar pathology. Dr. Carter opined that work-related conditions contributed to her disability.

On July 1, 2009 OWCP sent appellant for a second opinion medical examination with Dr. Michael Katz, a Board-certified orthopedic surgeon, who reviewed the medical evidence of record and performed a physical examination. Dr. Katz examined her lumbosacral spine, wrist and knees and opined that her lumbosacral sprain and bilateral wrist and knee conditions had resolved.

On August 4, 2009 Dr. Carter diagnosed appellant with sprain/strain cervical spine, sprain/strain lumbar spine, exacerbation of underlying degenerative disc disease and internal derangement and contusion of both knees.²

In order to resolve the conflict between Dr. Carter and the second opinion physician, Dr. Katz, appellant was referred for an impartial medical examination with Dr. David J. Fleiss, a

² Appellant was examined on October 30, 2009 by Dr. Marc Levinson, a Board-certified orthopedic surgeon, who diagnosed cervical spinal pain syndrome, lumbar spinal pain syndrome, internal derangement bilateral knees and right carpal tunnel syndrome.

Board-certified orthopedic surgeon. In a February 25, 2010 report, Dr. Fleiss detailed his performance of a physical examination and opined that her accepted conditions had resolved. He indicated that the only residual appellant had been bilateral anterior knee pain. Dr. Fleiss stated that she only had continuing complaints from degenerative conditions. He found that appellant could return to full-time work at the employing establishment with restrictions.

OWCP determined that Dr. Fleiss' report needed clarification regarding the cause of the need for work restrictions and sent him a March 5, 2010 letter requesting such clarification. It did not receive a response to its request.³

In order to resolve the continuing conflict in the medical opinion evidence regarding appellant's work-related residuals, OWCP referred appellant to Dr. Robert Israel, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on this matter. In his September 27, 2010 report, Dr. Israel discussed appellant's medical history, including her August 28, 2008 work injury and reported his examination findings. He examined her cervical spine, lumbar spine, shoulders, elbows, wrists, hands, hips, knees and right leg. Dr. Israel found that appellant had full range of motion in her back and extremities (including her lumbar spine, wrists and knees) and no motor or sensory deficits in the examined muscle groups. He diagnosed her with a resolved sprain of the cervical spine, resolved sprain of the thoracic spine, resolved sprain of the lumbar spine, resolved sprain of both shoulders, resolved sprain of both elbows, resolved sprain of both wrists, resolved sprain of both hands, resolved sprain of both hips, resolved sprain of the right knee, resolved sprain of the right leg and status post arthroscopic surgery of the left knee. Dr. Israel opined that, based on his examination from an orthopedic point of view, appellant had no disability as a result of the August 28, 2008 accident. He indicated that no treatment was medically necessary at this time. He concluded that she required no orthopedic treatment, physical therapy, household help, durable medical equipment, transportation or diagnostic testing. Dr. Israel stated that appellant was capable of work activities and activities of daily living without restrictions.

In a February 7, 2011 letter, OWCP advised appellant that it proposed to terminate appellant's wage-loss compensation and medical benefits on the grounds that she had no residuals of her August 28, 2008 employment injury after that date. It determined that the weight of the medical evidence regarding her work-related residuals rested with the well-rationalized report of Dr. Israel, the impartial medical specialist.

Appellant asserted that she continued to have residuals of her August 28, 2008 employment injury. She submitted a January 11, 2011 report in which Dr. Levinson diagnosed cervical spinal pain syndrome, lumbar spinal pain syndrome, bilateral carpal tunnel syndrome, bilateral internal derangement of the knees and bilateral shoulder impingement. In a February 22, 2011 report, Dr. Levinson stated:

“[Appellant] is the patient who has been under my care for an injury sustained in a work[-]related accident on [August 28, 2008]. She had injuries to her cervical spine, lumbar spine, bilateral knees, bilateral shoulders and bilateral carpal tunnel

³ On July 27, 2010 appellant started receiving treatment from Dr. Nelson Botwinick, Board-certified orthopedic surgeon, who diagnosed mild carpal tunnel syndrome and arthritis.

syndrome. [Appellant] states [that] she is still awaiting surgery for the right knee. These injuries have disabled and prevented her from returning to her previous employment.”

In a March 14, 2011 decision, OWCP terminated appellant’s wage-loss compensation and medical benefits effective March 14, 2011 on the grounds that she had no residuals of her August 28, 2008 employment injury after that date. It based its termination on the opinion of Dr. Israel noting that the opinion of Dr. Levinson was of limited probative value regarding appellant’s work-related residuals.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁴ OWCP 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 includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

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.”⁷ In situations where there exist opposing medical reports of virtually equal weight and rationale and 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 upon a proper factual background, must be given special weight.⁸

ANALYSIS

OWCP accepted that on August 28, 2008 appellant sustained a back sprain of her lumbar region, bilateral knee sprains and bilateral wrist sprains due to falling to her knees at work after a large box fell on her. It paid wage-loss compensation and medical benefits but terminated this compensation effective March 14, 2011 based on a September 27, 2010 opinion of Dr. Israel, a Board-certified orthopedic surgeon who served as an impartial medical specialist.

OWCP properly determined that there was a conflict in the medical opinion between Dr. Carter, an attending Board-certified physical medicine and rehabilitation physician, and Dr. Katz, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether appellant continued to have residuals of her August 28, 2008 employment

⁴ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁵ *Id.*

⁶ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ 5 U.S.C. § 8123(a).

⁸ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

injury.⁹ In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Israel for an impartial medical examination and an opinion on the matter.¹⁰

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Israel, the impartial medical specialist selected to resolve the conflict in the medical opinion.¹¹ The report of Dr. Israel establishes that appellant had no disability due to her August 28, 2008 employment injury after March 14, 2011.

In his September 27, 2010 report, Dr. Israel discussed appellant's medical history, including her August 28, 2008 work injury and reported his examination findings. He examined her cervical spine, lumbar spine, shoulders, elbows, wrists, hands, hips, knees and right leg. Dr. Israel determined that appellant had no disability or need for medical care as a result of the August 28, 2008 accident. He indicated that no treatment was medically necessary at this time. Dr. Israel stated that appellant was capable of work activities and activities of daily living without restrictions.

The Board has carefully reviewed the opinion of Dr. Israel and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Israel provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹² He provided sufficient medical rationale for his opinion by explaining that his evaluation of appellant, including the findings of a comprehensive physical examination, showed that her work-related injuries had resolved. Dr. Israel found that she had full range of motion in her back and extremities (including her lumbar spine, wrists and knees) and no motor or sensory deficits in the examined muscle groups. In a February 22, 2011 report, Dr. Levinson, an attending Board-certified orthopedic surgeon, suggested that the condition of appellant's cervical spine, lumbar spine, bilateral knees, bilateral shoulders and bilateral median nerves were work related. His report is of limited probative value because he did not present any findings or medical rationale in support of this opinion.

On appeal, appellant argued that Dr. Israel did not examine her, but his September 27, 2010 report shows that he performed an extensive physical examination. She indicated that she

⁹ In reports dated between April and August 2009, Dr. Carter found that appellant continued to have residuals of her August 28, 2008 work injury. In contrast, Dr. Katz determined in a July 1, 2009 report that appellant had no such residuals.

¹⁰ See *supra* note 7 and accompanying text. OWCP initially referred appellant for an impartial medical examination with Dr. Fleiss, a Board-certified orthopedic surgeon. After Dr. Fleiss did not respond to OWCP's request for clarification of his February 25, 2010 report, it properly referred her to Dr. Israel.

¹¹ See *supra* note 8 and accompanying text.

¹² See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

was waiting for approval for right knee surgery, but there is no medical evidence showing that such surgery is necessitated by a work-related condition.¹³

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 wage-loss compensation and medical benefits effective March 14, 2011 on the grounds that she no longer had residuals of her August 28, 2008 employment injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 13, 2012
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

¹³ Appellant also discussed travel expenses that she felt should be reimbursed, but this matter is not the subject of the present appeal. She submitted additional evidence after OWCP's March 14, 2011 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).