

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

J.N., Appellant)	
)	
and)	Docket No. 11-672
)	Issued: January 13, 2012
DEPARTMENT OF HOMELAND SECURITY,)	
TRANSPORTATION SECURITY)	
ADMINISTRATION, Las Vegas, NV, Employer)	

Appearances:
Daniel M. Goodkin, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 21, 2010 appellant, through his representative, filed a timely appeal from the December 23, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 exercised its discretion in denying authorization for surgery; and (2) whether OWCP properly terminated appellant's compensation benefits effective August 30, 2009.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 15, 2005 appellant, a 45-year-old federal air marshal, sustained an injury in the performance of duty when he slipped and fell down stairs. OWCP accepted his claim for lumbar sprain/strain, lumbar disc compromise and disc herniation at L4-5 and L5-S1 with degenerative disc changes. Appellant received compensation for total disability on the periodic rolls.

Dr. G. Michael Elkanich, the attending Board-certified orthopedic surgeon, found that appellant was not capable of performing his usual job but could return to light duty. He reviewed DVDs showing appellant coaching a little league baseball team, but he remained of the opinion that appellant had an internal disc disruption at L4-5 and L5-S1 and was a candidate for anterior and posterior lumbar reconstructive surgery based on complaints of symptomatology and severe pain at those levels.

Dr. Gary J. La Tourette, a Board-certified orthopedic surgeon and OWCP referral physician, opined that appellant's total disability ceased by May 9, 2008, the date he was observed meeting the physical demands of his coaching duties. Based on this observed functional capacity, he found that anterior and posterior lumbar fusion surgery was not currently warranted. Dr. La Tourette was sure that appellant continued to suffer residual pain from the accepted injury, and he noted that physical impairments precluded appellant from performing a number of physical activities required of a federal air marshal.² Later, however, he agreed with the recommendation of a functional capacity evaluation that appellant be returned to his preaccident job position, given his inconsistent effort and invalid test results, unless there was any medical evidence to the contrary.

OWCP found a conflict on the issues of surgery and disability for the date-of-injury position. It referred appellant, together with the case record and a statement of accepted facts, to Dr. Anthony B. Serfustini, a Board-certified orthopedic surgeon, for an impartial medical evaluation. Dr. Serfustini reviewed appellant's history of injury and medical records. He noted appellant's current symptomatology and findings on physical examination. Dr. Serfustini offered the accident-related diagnoses of acute lumbosacral sprain/strain, contusion and transitory aggravation to degenerative disc disease L4-5 and L5-S1. Nonaccident diagnoses included degenerative disc and facet disease L4-5 and L5-S1, pain behavior and symptom magnification.

Dr. Serfustini noted that soft-tissue injuries resolved approximately four months postinjury. He added that the physical therapy program was quite successful, achieving a 90

² On a Practical Exercise Performance Requirements form, Dr. La Tourette indicated that appellant could not employ the following defensive tactics: use rapid and coordinated body movements to control an adversary or defend against physical attack; have joint structures that are completely flexible and free from any abnormalities; participate fully, both offensively and defensively, in all course requirements (*i.e.*, throws, being thrown, takedowns, and restraint applications); strike repeatedly a hand-held bag using feet, knees, hands and elbows for 20 seconds. Dr. La Tourette also indicated that appellant could participate in the following aircraft tactical training: move swiftly from a seated position to a position of cover and then strategically maneuver inside commercial single and wide-body aircraft; control an adversary physically using takedowns and restraint techniques within the confines of single and wide-body aircraft; and have joint structure that are completely free from any abnormalities.

percent improvement rate, which allowed appellant to move to a home exercise program. Further, no less than five orthopedic consultations failed to reveal any significant neurological deficit or finding. Dr. Serfustini was of the opinion that appellant's activities of daily living, as well as his capacity to perform the activities attendant to coaching little league baseball, clearly indicated a level that would be compatible with work activities. Dr. Serfustini concluded that appellant should be capable of performing his regular duties as a federal air marshal and was not a candidate for any type of pain management or surgical intervention for the lumbosacral spine. There was no objective evidence of residuals of the December 15, 2005 injury. The scientific basis of this, Dr. Serfustini explained, was that appellant had no neurological deficits, no muscle atrophy or fasciculations. Appellant was described as well muscled in spite of his stating that he did not currently work out in a gym. Further, surveillance videos demonstrated normal physical activities, including climbing an 8-foot chain link fence and standing for 2.5 hours at a time.

OWCP terminated appellant's compensation benefits effective August 30, 2009. It found that the weight of the medical evidence, represented by the opinion of the impartial medical specialist, Dr. Serfustini, established that appellant had no objective findings to support continuing residual of the accepted injury and was capable of performing his full work duties. Further, this evidence established that surgical intervention was not warranted.

An OWCP hearing representative affirmed finding that OWCP met its burden when it terminated compensation and medical benefits on the grounds that appellant no longer had residuals of his accepted work injury. The hearing representative found that the weight of the medical evidence rested with Dr. Serfustini, whose opinion as an impartial medical specialist was entitled to special weight. The hearing representative noted that although Dr. Elkanich continued to support continuing injury-related conditions and the need for surgical intervention, he did not provide adequate reasoning as to why Dr. Serfustini's opinions were incorrect.

Appellant requested reconsideration and submitted a new functional capacity evaluation. He argued that Dr. Serfustini did not base his opinion on a complete and accurate factual and medical history, as he questioned the acceptance of appellant's displaced intervertebral disc and did not review appellant's job description. Also, he argued that Dr. La Tourette's rationale for work restrictions was incomplete.

In a decision dated December 23, 2010, OWCP reviewed the merits of appellant's case and denied modification of its prior decision. It found that the body of the medical evidence substantiated that the work injury was an aggravation of the underlying degenerative condition rather than an occurrence by direct cause. OWCP found that the weight of the medical opinion evidence rested with Dr. Serfustini and noted that appellant submitted no medical report from a qualified physician interpreting the new functional capacity evaluation.

On appeal, appellant argues that OWCP did not meet its burden of proof to justify the termination of his compensation benefits. He makes substantially the same arguments raised in his request for reconsideration: Dr. Serfustini did not base his opinion on a complete and accurate factual and medical history; his opinion on residuals was not entitled to special weight, as there was no conflict on the issue of continuing residuals; he did not review the job description; Dr. La Tourette did not explain how an invalid functional capacity evaluation

established that appellant could perform the full range of his air marshal duties; and the functional capacity evaluation used by Dr. La Tourette and Dr. Serfustini was invalid.

LEGAL PRECEDENT -- ISSUE 1

FECA furnishes to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.³ OWCP must therefore exercise discretion in determining whether the particular service, appliance or supply is likely to affect the purposes specified in FECA.⁴ The only limitation on OWCP's authority is that of reasonableness.⁵

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.⁶ When 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.⁷

ANALYSIS -- ISSUE 1

A conflict in medical opinion arose on the need for surgery. Dr. Elkanich, the attending orthopedic surgeon, found that appellant suffered from an internal disc disruption at L4-5 and L5-S1 and was a candidate for anterior and posterior lumbar reconstructive surgery based on complaints of symptomatology and severe pain at those levels. Dr. La Tourette, the second-opinion orthopedic surgeon disagreed. Having observed appellant's activities as a little league baseball coach, he found that appellant had a functional capacity that would not warrant the proposed surgery currently. Also, appellant did not use frequent narcotic medications and only occasionally used anti-inflammatory medication. OWCP properly referred appellant to Dr. Serfustini, a Board-certified orthopedic surgeon, to resolve the conflict.

OWCP provided Dr. Serfustini with appellant's case record and a statement of accepted facts so he could base his opinion on a proper factual and medical history. Dr. Serfustini concluded that appellant was not a candidate for any type of surgical intervention for the lumbosacral spine. He noted that no less than five orthopedic consultations failed to reveal any significant neurological deficit or finding. Dr. Serfustini also noted appellant's activities of daily

³ 5 U.S.C. § 8103(a).

⁴ See *Marjorie S. Geer*, 39 ECAB 1099 (1988) (OWCP has broad discretionary authority in the administration of the Act and must exercise that discretion to achieve the objectives of section 8103).

⁵ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁶ 5 U.S.C. § 8123(a).

⁷ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

living and his demonstrated activities coaching little league baseball. His opinion on the need for surgery appears sound and rational and is entitled to special weight in resolving the conflict. Dr. Elkanich's continuing opinion on the need for surgery only reinforced the conflict that OWCP selected Dr. Serfustini to resolve; it did not create a conflict with the impartial medical specialist. As the weight of the evidence supported that appellant was not currently a candidate for surgical intervention, the Board finds that OWCP properly exercised its broad discretion under FECA to deny authorization for the proposed surgery and affirms the December 23, 2010 decision.

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.

Appellant argues that Dr. Serfustini did not follow the statement of accepted facts, which accepted a displaced disc. To be accurate, the statement of accepted facts stated that OWCP expanded its acceptance of appellant's claim to include lumbar disc compromise and disc herniation at L4-5 and L5-S1 with degenerative changes. Dr. Serfustini based his opinion on the number of orthopedic consultations that had failed, notwithstanding the accepted medical conditions, to reveal any significant neurological deficit or findings, and on appellant's capacity to perform activities of daily living and activities related to coaching little league baseball.

LEGAL PRECEDENT -- ISSUE 2

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁸ Once OWCP accepts a claim, it has the burden of proof to justify terminating or modifying compensation benefits.⁹ After it has determined that an employee has disability causally related to federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.¹⁰

ANALYSIS -- ISSUE 2

OWCP asked Dr. Serfustini to resolve a conflict on the issue of disability for work but the Board finds no true conflict on that issue between Dr. Elkanich and Dr. La Tourette. Dr. Elkanich found that appellant was not capable of performing his usual job. Initially, Dr. La Tourette agreed. He found that physical impairments precluded appellant from performing a number of specific physical activities required of a federal air marshal. But, in a supplemental report, he decided to support the recommendation of a functional capacity evaluation that appellant be returned to his preaccident job because of inconsistent effort. This change of opinion raised two problems. The functional capacity evaluation recommended

⁸ 5 U.S.C. § 8102(a).

⁹ *Harold S. McGough*, 36 ECAB 332 (1984).

¹⁰ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

appellant's return to duty "unless there is any medical evidence to the contrary." Dr. La Tourette provided that evidence on the Practical Exercise Performance Requirements Form when he found that appellant could not employ certain defensive tactics or perform in certain aircraft tactical training maneuvers required of the preinjury job. Also, Dr. La Tourette did not explain how appellant's inconsistent effort on the latest functional capacity evaluation meant that appellant could now meet all the practical exercise performance requirements. His supplemental report made no mention of those requirements.

Because Dr. La Tourette did not provide sufficient rationale for his change of opinion on the issue of disability for work, the Board finds that his opinion was of diminished probative value and was insufficient to create a true conflict warranting referral to an impartial medical specialist.¹¹

This meant that, when OWCP referred appellant to Dr. Serfustini for an opinion on disability, Dr. Serfustini did not serve in the capacity of an impartial medical specialist. He was, for purposes of that issue, another second-opinion referral physician. Dr. Serfustini found that appellant's activities of daily living, as well as his capacity to perform the activities attendant to coaching little league baseball, clearly indicated a level that would be compatible with work activities. Although this generally supported OWCP's termination of disability compensation, Dr. Serfustini did not address the practical exercise performance requirements of appellant's federal air marshal position. The requirements were a matter of record, and Dr. La Tourette had indicated that appellant could not perform a number of the specific physical requirements. Instead of vaguely referring to work activities, Dr. Serfustini should have addressed the requirements directly. When he did not, he left some doubt whether he based his opinion on a proper factual background. The Board therefore finds that his opinion on the issue of disability for work is of diminished probative value and does not carry the weight of the medical opinion evidence.¹²

For this reason, the Board finds that OWCP did not meet its burden of proof to justify the termination of appellant's disability compensation. The Board will reverse OWCP's December 23, 2010 decision on the issue of disability for work and will remand the case for a proper reinstatement of compensation benefits.

On the issue of entitlement to medical benefits, the Board finds no conflict between Dr. Elkanich and Dr. La Tourette. Both reported that appellant suffered painful residuals of the accepted employment injury. So once again, when OWCP asked Dr. Serfustini for an opinion on residuals, he was not serving in the capacity of an impartial medical specialist but of a second-opinion referral physician. Dr. Serfustini found no objective evidence of residuals: no neurological deficits, no muscle atrophy or fasciculations, appellant was well muscled and had demonstrated normal physical activities. Notwithstanding OWCP's acceptance of lumbar disc compromise, Dr. Serfustini offered sound rationale for his conclusion. The Board finds that his opinion created a conflict with Dr. Elkanich, who continued to support injury-related residuals.

¹¹ *Ceferino L. Gonzales*, 32 ECAB 1591 (1981); *George Randolph Taylor*, 6 ECAB 968 (1954).

¹² See generally *Melvina Jackson*, 38 ECAB 443, 450 (1987) (addressing factors that bear on the probative value of medical opinions).

But as the conflict remains unresolved, the weight of the medical opinion evidence does not justify the termination of appellant's medical benefits. The Board finds that OWCP has not met its burden of proof on this issue. The Board will reverse OWCP's December 23, 2010 decision on the issue of medical benefits and will remand the case for proper reinstatement of benefits for the accepted medical conditions.

CONCLUSION

The Board finds that OWCP properly exercised its discretion in denying authorization for surgery. The Board also finds that OWCP improperly terminated appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2010 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part. The case record is returned to OWCP for further action consistent with this opinion.

Issued: January 13, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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