

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

C.N., Appellant)

and)

U.S. POSTAL SERVICE, CHEF MENTEUR)
STATION, New Orleans, LA, Employer)

**Docket No. 11-1546
Issued: January 25, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 7, 2011¹ appellant filed a timely appeal of a December 15, 2010 Office of Workers' Compensation Programs' (OWCP) merit decision terminating compensation benefits. Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c)(1) and 501.3, the Board has jurisdiction to consider the merits of the case.

¹ Under the Board's *Rules of Procedure*, the 180-day time period for determining jurisdiction is computed beginning on the day following the date of OWCP's decision. See 20 C.F.R. § 501.3(f)(2). As OWCP's merit decision was issued on December 15, 2010, the 180-day computation begins December 16, 2010. One hundred and eighty days from December 16, 2010 was June 13, 2011. Since using June 17, 2011, the date the appeal was received by the Clerk of the Board, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is June 7, 2011, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

² 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits and medical benefits effective November 28, 2005; and (2) whether appellant met her burden of proof to establish entitlement to continuing benefits on or after November 28, 2005.

FACTUAL HISTORY

On December 5, 2000 appellant, then a 34-year-old carrier, filed a traumatic injury claim alleging that she experienced mid and upper back pain following performance of her regular duties on November 29, 2000. OWCP accepted her claim for latissimus dorsi strain and lumbar strain on May 24, 2001.

On September 21, 2001 appellant underwent a magnetic resonance imaging (MRI) scan which demonstrated protrusion of the L4-5 disc and L5-S1. On May 9, 2002 Dr. J. Lee Moss, an orthopedic surgeon, noted that she had back pain, but no complaints of numbness in her lower extremities with normal reflexes in the upper and lower extremities. He completed a report on February 11, 2003 and stated that appellant was under his treatment for a lumbar strain sustained in a motor vehicle accident on October 12, 2001. Dr. Moss first treated her on April 12, 2002 and that she was involved in a second motor vehicle accident on July 29, 2002 and reinjured her back. He stated that appellant's diagnosis was lumbar strain and lumbar disc degeneration. Dr. Moss opined that her current condition was due to her accepted employment injuries, her preexisting degenerative changes and her motor vehicle accidents. In a report dated October 24, 2003, he amended his diagnoses to lumbar strain and lumbar disc syndrome.

In a decision dated April 2, 2004, OWCP found that appellant's actual earnings as a part-time letter carrier fairly and reasonably represented her wage-earning capacity. Dr. Moss continued to support her partial disability for work. On May 11, 2004 appellant requested that OWCP expand her claim to include the diagnosed condition of lumbar disc syndrome.

OWCP referred appellant for a second opinion evaluation on July 22, 2004. In a report dated October 28, 2004, Dr. Christopher E. Cenac, a Board-certified orthopedic surgeon, examined her and stated that he found no objective orthopedic, mechanical dysfunction or neurological deficits related to her November 29, 2000 employment injury. He diagnosed thoracic and lumbar strains and aggravation of preexisting degenerative conditions. Dr. Cenac opined that appellant had no evidence of residuals and attributed her current conditions to her nonemployment-related motor vehicle accidents and her weight. He concluded that she could return to full duty. Appellant underwent a functional capacity evaluation which demonstrated submaximal effort.

Appellant's attending physician, Dr. George F. Chimento, a Board-certified orthopedic surgeon, examined appellant on April 11, 2005. He noted her history of injury on November 29, 2000. Appellant reported low back pain which radiated down the posterior aspect of her right leg. Dr. Chimento diagnosed lumbar disc disease with possible radiculopathy and recommended diagnostic testing. Appellant underwent an electromyogram on April 20, 2005 which demonstrated chronic lumbosacral radiculopathy affecting the right L5 root bilaterally.

On May 25, 2005 Dr. Patrick H. Waring, a Board-certified anesthesiologist, examined her and diagnosed lumbar disc displacement and lumbar radiculitis. Appellant underwent a lumbar MRI scan on June 27, 2005 which demonstrated herniated discs at L4-5 and L5-S1.

OWCP found a conflict of medical opinion evidence and referred appellant to Dr. John J. DeBender, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. DeBender submitted a report dated July 7, 2005 and reviewed appellant's history of injury and medical history. He diagnosed strain of the latissimus dorsi resolved, degenerative disc disease L4-5 and L5-S1 and chronic right L5 radiculopathy. Dr. DeBender opined that appellant's condition was not the result of her accepted employment injury, but instead the result of her two automobile accidents. Until appellant injured her lumbar spine in those accidents, she had no complaints of symptoms extending into her legs and her neurological examination was negative. Dr. DeBender opined that she had no work-related residuals and that her current disability was not due to her accepted condition which had resolved.

In a letter dated July 26, 2005, OWCP proposed to terminate appellant's compensation and medical benefits based on Dr. DeBender's report. It allowed her 30 days for a response.

By decision dated November 28, 2005, OWCP terminated appellant's compensation benefits based on Dr. DeBender's report. Appellant requested an oral hearing on November 30, 2005.

Appellant submitted a report dated August 28, 2006 from Dr. Charles K. Speller, an orthopedic surgeon, who reviewed her history of injury and diagnosed herniated disc at L4-5 and L5-S1 with lumbar radiculopathy. Dr. Speller stated that she could return to light duty due to residual pain in the low back and opined that she was partially disabled. Appellant testified at the oral hearing on August 29, 2006 contending that Dr. DeBender did not address the accepted conditions in his report. She reported her automobile accidents in October 2001 and July 2002.

By decision dated November 13, 2006, OWCP's hearing representative affirmed the November 28, 2005 decision finding that Dr. DeBender's report was entitled to the special weight of the medical evidence.

Appellant requested reconsideration on November 13, 2007. She stated that OWCP should have accepted additional conditions as arising from her accepted employment injury. Appellant also argued that Dr. DeBender's report was inaccurate as her herniated discs preexisted her automobile accidents. By decision dated August 6, 2008, OWCP reviewed the merits of her claim and declined to modify the termination decision.

Appellant requested reconsideration on August 6, 2009 and submitted evidence regarding her cervical condition. She reiterated disagreement with Dr. DeBender's report and conclusions. By decision dated October 30, 2009, OWCP reviewed the merits of appellant's claim and denied modification of the termination decision.

Appellant requested reconsideration on October 30, 2010 and argued that Dr. DeBender's report was speculative. By decision dated December 15, 2010, OWCP reviewed the merits of her claim and denied modification of the termination decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ 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 related to the employment.⁴ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which required further medical treatment.⁶

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.⁷ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁸

In situations where there are 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 on a proper factual background, must be given special weight.⁹

ANALYSIS -- ISSUE 1

Appellant filed a claim for traumatic injury on November 29, 2000 which OWCP accepted for latissimus dorsi strain and lumbar strain. After her employment injury, she sustained additional back strains in two nonemployment-related motor vehicle accidents in October 2001 and July 2002. Appellant's attending physician, Dr. Moss, noted a diagnosis of lumbar disc syndrome without explanation. Appellant sought treatment from Dr. Chimento to whom she first reported low back pain which radiated down her right leg. Dr. Chimento diagnosed lumbar disc disease with possible radiculopathy. Dr. Waring, diagnosed lumbar disc displacement and lumbar radiculitis after examining appellant and reviewing diagnostic studies.

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *Id.*

⁵ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁶ *Id.*

⁷ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

⁸ *R.C.*, 58 ECAB 238 (2006).

⁹ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

Appellant underwent a lumbar MRI scan on June 27, 2005 which demonstrated herniated discs at L4-5 and L5-S1.

OWCP referred appellant for a second opinion evaluation with Dr. Cenac who diagnosed thoracic and lumbar strains and aggravation of preexisting degenerative conditions attributing appellant's current conditions to her motor vehicle accidents and her weight. Dr. Cenac concluded that appellant could return to full duty. The Board finds that OWCP properly determined that there was a conflict of medical opinion evidence between appellant's physicians, Dr. Moss, Dr. Chimento, Dr. Waring and Dr. Cenac, the second opinion physician, warranting resolution by an impartial medical specialist pursuant to 5 U.S.C. § 8123(a).

Dr. DeBender conducted an impartial medical examination on July 7, 2005 reviewing appellant's history of injury and medical history. He diagnosed strain of the latissimus dorsi resolved, degenerative disc disease L4-5 and L5-S1 and chronic right L5 radiculopathy. Dr. DeBender's extensive review of the medical records led him to opine that appellant's condition was not the result of her accepted employment injury, but instead the result of her two automobile accidents. He noted that appellant did not report symptoms of radiculopathy until after those accidents and her neurological examination prior to those accidents was negative. Dr. DeBender concluded that she had no work-related residuals as her accepted conditions had resolved with no disability.

The Board finds that Dr. DeBender's report was entitled to the special weight of the medical evidence. Dr. DeBender provided a detailed report reviewing the medical records and noting the progression of appellant's radicular symptoms after her automobile accidents. He explained why he determined that appellant's current condition was not due to her employment. Dr. DeBender attributed her condition to her preexisting degenerative disc disease and her subsequent back strains. As his report is based on a proper factual history, provided findings and included medical reasoning, supporting his conclusions, the Board finds that OWCP met its burden of proof to terminate appellant's compensation and medical benefits.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that she had disability causally related to her accepted employment injury.¹⁰ To establish a causal relationship between the condition, as well as any disability claimed, and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its

¹⁰ *George Servetas*, 43 ECAB 424, 430 (1992).

probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹¹

ANALYSIS -- ISSUE 2

Following OWCP's termination of her compensation and medical benefits, appellant has submitted limited medical evidence. She submitted evidence regarding her cervical condition which was not the basis of this claim and not relevant to the issue of whether she continues to experience residuals and disability as a result of her accepted latissimus dorsi strain and lumbar strain. This evidence is not sufficient to meet appellant's burden of proof and establish entitlement to continuing medical or compensation benefits.

Appellant has also argued that Dr. DeBender's report was not entitled to the weight of the medical evidence as it was not factually accurate and was speculative. As noted above, the Board finds that his report was detailed and well rationalized. The Board finds that appellant has not submitted the necessary medical opinion evidence to establish that her accepted employment-related conditions continue to require medical treatment or to cause disability for work.

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 compensation benefits and that she has failed to meet her burden of proof in establishing any continuing disability or medical residuals on or after November 28, 2005.

¹¹ *James Mack*, 43 ECAB 321 (1991).

ORDER

IT IS HEREBY ORDERED THAT the December 15, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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