United States Department of Labor
Employees' Compensation Appeals Board

J.P., Appellant	)	
	)	
and	)	**Docket No. 11-2141**
	)	**Issued: June 12, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Raleigh, NC, Employer	)	

Appearances:
Daniel F. Read, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2011 appellant, through his attorney, filed a timely appeal from a June 15, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to justify termination of appellant's compensation and medical benefits for his accepted injury effective April 20, 2011; and (2) whether appellant established that he had any continuing disability or residuals relating to his accepted conditions after April 20, 2011.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On June 29, 2010 appellant, then a 45-year-old motor vehicle operator, injured his low back and left shoulder when lifting a gate and pushing a postal container up a ramp. OWCP accepted the claim for lumbar sprain and left shoulder sprain. Appellant stopped work on June 29, 2010 and did not return to regular full-time work.

Appellant was treated by Dr. Thomas A. Dimmig, a Board-certified orthopedic surgeon, on July 23, 2010, for left shoulder and low back pain after pushing a cart at work. He noted appellant's history was significant for a back and shoulder injury while in the military and that appellant took narcotic pain medication. Dr. Dimmig diagnosed acute and chronic left shoulder pain and acute chronic lumbar pain and recommended physical therapy. In a September 14, 2010 report, he noted that appellant returned to light duty with restrictions on August 24, 2010. On October 21, 2010 Dr. Dimmig noted that appellant was at maximum medical improvement and could return to work without restrictions. He advised that appellant had no permanent impairment from his work injuries. A magnetic resonance imaging (MRI) scan revealed mild disc bulge at L3-4, L4-5 and L5-S1, mild multilevel degenerative disc disease and small renal cysts.[2]

On October 25, 2010 OWCP referred appellant to Dr. William A. Somers, a Board-certified orthopedic surgeon, to determine if the accepted conditions had resolved and whether any of his other conditions were caused by the work injury. In a November 12, 2010 report, Dr. Somers indicated that he reviewed the records provided and examined appellant. He asserted that the accepted lumbar sprain and left shoulder sprain were not the correct diagnoses. Dr. Somers believed the proper diagnoses to be cervical disc disease with left radiculopathy aggravated by the June 29, 2010 injury, lumbar disc disease with right and left radiculopathy aggravated by the June 29, 2010 injury, tendinosis of the left rotator cuff and symptomatic mesoacromion left shoulder likely caused by the June 29, 2010 injury. He noted no tenderness at the sacroiliac joints or sciatic nerve region, limited range of motion of the back, normal motor examination from the hips to the toes and tenderness in the C5-6 region. For the left shoulder, motor examination was normal except for the left triceps and supinator, left shoulder range of motion was limited and there was tenderness of the acromion with positive impingement signs. Dr. Somers noted that appellant had nonwork-related conditions in the cervical and lumbar spine as well as mesoacromion in the left shoulder that were aggravated by the June 29, 2010 work injury and which were not adequately treated and had not resolved. He opined that appellant's lumbar and left shoulder and neck conditions were related to the June 29, 2010 work injury. Dr. Somers opined that appellant could not return to work as a motor vehicle operator because in North Carolina it was illegal to drive while on the opiate medications appellant was taking. He further noted that appellant was restricted from all work because he could not drive to and from work. In a work capacity evaluation, Dr. Somers opined that appellant was temporarily totally disabled from all work because of his opiate medications.

[2] Appellant requested his claim be expanded to include lumber degenerative disc disease, left shoulder degenerative joint disease and lumbar radiculopathy. In a September 22, 2010 decision, OWCP denied his request. Appellant filed several claims for compensation for the period September 11, 2010 to April 23, 2011. In multiple decisions between November 9, 2010 and June 8, 2011, OWCP denied the claims.

On November 23, 2010 OWCP requested that Dr. Somers clarify his opinion noting that his previous report was not based on the statement of accepted facts and advised that the statement of accepted facts was the only factual framework for his opinion. It further advised that appellant's treating physician Dr. Dimmig diagnosed lumbar sprain and left shoulder sprain and opined on October 21, 2010 that appellant could return to work without restrictions. OWCP requested Dr. Somers examine this report and provide an opinion as to whether appellant's condition resolved.

In a report dated December 1, 2010, Dr. Somers reviewed Dr. Dimmig's October 21, 2010 report and opined that Dr. Dimmig failed to provide a history or findings on physical examination in support of his change in restrictions. He further noted that appellant's work-related conditions had not resolved and he believed appellant's condition of mesacromion and aggravation of cervical disc disease should be accepted. Dr. Somers noted that he did not believe appellant should go back to work full time without restrictions as it was illegal to drive an automobile on opiate medications.

OWCP found that a conflict of medical opinion existed between Dr. Somers, who indicated that appellant sustained residuals of his work-related injuries and was totally disabled, and Dr. Dimmig, who determined that appellant's accepted conditions had resolved and he could return to work without restrictions.

To resolve the conflict OWCP, on February 9, 2011, referred appellant to a referee physician, Dr. Robert W. Elkins, a Board-certified orthopedic surgeon. In a March 2, 2011 report, Dr. Elkins noted reviewing the record, including the history of appellant's work injury, and examining appellant. Examination revealed moderate tenderness in the upper and mid aspect of the sacroiliac joints, L1-2 and L3-5 to the slightest tapping, limited lumbar range of motion, normal range of motion of the hip, knees and ankles. Strength testing for the hips were normal bilaterally but limited on the left side with regards to quads, ankles and toes due to under-effort. Dr. Elkins diagnosed chronic pain syndrome, moderate symptom magnification and pain accentuation, unexplained marked decreased range of motion in his back, no evidence of radiculopathy, chronic low back pain with preexisting injury, chronic left shoulder pain with decreased range of motion in both shoulders with a questionable validity to the range of motion, possible impingement of the left shoulder and cervical pain with degenerative arthritic changes. He opined that appellant's lumbar sprain and left shoulder sprain has resolved. Dr. Elkins noted moderate symptom magnification and pain accentuation, an inconsistent examination, very high self-pain evaluation, nonphysiologic findings and preexisting degenerative changes in all areas. He advised that appellant did not provide a concerted effort throughout the examination and indicated that appellant had a bizarre gait and under effort in a lot of muscle testing. Dr. Elkins advised that appellant had preexisting problems with the lumbar and left shoulder condition with an exacerbation of pain secondary to his injury but no aggravation and no production of permanent objective changes. He opined that appellant did not have any residuals of the accepted work-related injuries of June 29, 2010 that would prevent him from returning to his date-of-injury position as a motor vehicle operator without restrictions.

On March 18, 2011 OWCP proposed to terminate all benefits finding that Dr. Elkin's March 2, 2011 report established no continuing residuals of his work-related condition.

On April 12, 2011 appellant's attorney opposed the proposed termination and asserted that appellant could not return to work because he was taking narcotic medications and could not operate a commercial motor vehicle while taking opiates. Appellant submitted a March 23, 2011 commercial driver fitness determination report from Dr. James Partridge, a Board-certified internist, who noted that appellant was not able to work due to shoulder, neck and low back injuries requiring narcotic medication for pain relief. In a March 28, 2011 report, Dr. David Halpern, a family practitioner, noted treating appellant for back, neck and shoulder pain from a June 2010 injury. He diagnosed chronic low back pain, migraine headaches, chronic fatigue, sleep apnea, post-traumatic stress disorder, alcohol abuse, depression and injury of June 29, 2010 which caused marked worsening of the lumbar disc disease and cervical disc disease with left arm radiculopathy. Dr. Halpern noted that as a result of appellant's pain and chronic narcotic use he could not safely drive or work.

In a decision dated April 20, 2011, OWCP terminated appellant's medical and compensation benefits effective the same day finding that the medical evidence established that he had no continuing residuals of his accepted conditions.

On April 27, 2011 appellant requested reconsideration. He submitted reports from Veterans Affairs Medical Center dated April 13, 2011 where he was treated for left lumbar strain with chronic back pain, left shoulder strain, status post left finger dislocation and right ankle strain. Appellant reported initially injuring his back in the military and reinjuring it on June 29, 2010 while at work. Also submitted were physician assistant notes from July 21, 2010 to February 17, 2011, who treated appellant for major depression, post-traumatic stress disorder, panic disorder and chronic pain secondary to a work injury.

In a June 15, 2011 decision, OWCP denied modification of the April 20, 2011 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying 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] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.[5]

[3] *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

[4] *Mary A. Lowe*, 52 ECAB 223 (2001).

[5] *Id.; Leonard M. Burger*, 51 ECAB 369 (2000).

ANALYSIS -- ISSUE 1

OWCP found a medical conflict between appellant's attending physician, Dr. Dimmig, a Board-certified orthopedic surgeon, who determined that appellant's lumbar sprain and left shoulder sprain had resolved and that he could return to work full time without restrictions, and Dr. Somers, an OWCP referral physician, who indicated that appellant still had residuals of lumbar sprain and left shoulder sprain and was totally disabled and could not return to his preinjury position. Consequently, OWCP referred appellant to Dr. Elkins to resolve the conflict of opinion with respect to appellant's work-related lumbar sprain and left shoulder sprain. The Board finds that, under the circumstances of this case, the opinion of Dr. Elkins was not an impartial medical specialist because there was no conflict of medical opinion at the time of OWCP's referral to Dr. Elkins. The reports of Dr. Dimmig, a treating physician, and Dr. Somers, both Board-certified orthopedic surgeons, were not sufficient to create such a conflict. Dr. Somers, in forming his opinion, made his own legal findings which are beyond the scope of his medical expertise as a second opinion physician and therefore his opinion is of diminished probative value insufficient to create a conflict of opinion. In his November 12, 2010 report, he disputed the conditions accepted by OWCP and opined that appellant could not return to his position as a motor vehicle operator because in the state of North Carolina it was illegal to drive while on opiate medications which appellant was taking.[6] On November 23, 2010 OWCP requested clarification from Dr. Somers explaining that his previous report was not based on the statement of accepted facts and advised that the statement of accepted facts was the only factual framework for his opinion. In a supplemental report dated December 1, 2010, Dr. Somers stood by his prior report. Therefore the Board finds that his opinion is of diminished probative value and cannot be the basis of a conflict with regards to appellant's orthopedic condition.

Even though the report of Dr. Elkins is thus not entitled to the special weight afforded to the opinion of an impartial medical specialist resolving a conflict of medical opinion, his report can still be considered for its own intrinsic value[7] and can still constitute the weight of the medical evidence.[8] Dr. Elkins reviewed appellant's history, reported findings and opined that appellant's lumbar sprain and left shoulder sprain has resolved with moderate symptom magnification and pain accentuation, he noted the examination was inconsistent with nonphysiologic findings and preexisting degenerative changes in all areas. He diagnosed chronic pain syndrome, moderate symptom magnification, no evidence of radiculopathy, chronic low back pain, chronic left shoulder pain and cervical pain with degenerative arthritic changes. Dr. Elkins noted that appellant did not provide a concerted effort throughout the examination and under effort in muscle testing. He advised that appellant had preexisting problems with the

[6] *See Jeannine E. Swanson*, 45 ECAB 325 (1994); *Barbara Bush*, 38 ECAB 710 (1987) (a medical expert should only determine the medical question certified to him; determination of the legal standards in regards to such medical questions is outside the scope of his or her expertise).

[7] *See Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[8] *See Leanne E. Maynard*, 43 ECAB 482 (1992) (the Board found that a physician's "opinion is probative even though he was not an impartial medical examiner" and that the opinion of this physician and another physician were sufficient to establish causal relation); *Rosa Whitfield Swain*, 38 ECAB 368 (1987) (the Board found that a physician was improperly designated as an impartial medical specialist, but that his opinion nonetheless constituted the weight of the medical evidence).

lumbar and left shoulder condition with an exacerbation of pain secondary to his injury which resolved without permanent objective changes. Dr. Elkins opined that appellant did not have any residuals of the accepted work-related injuries of June 29, 2010 that would prevent him from returning to his job as a motor vehicle operator without restrictions. He found no basis on which to attribute any continuing condition to appellant's employment.

Thereafter, appellant submitted a March 23, 2011 report from Dr. Partridge, who noted appellant was not able to work due to shoulder, neck and low back injuries requiring narcotic medication for pain relief. Similarly, Dr. Halpern, in a March 28, 2011 report, diagnosed chronic low back pain, migraine headaches, chronic fatigue, sleep apnea, post-traumatic stress disorder, alcohol abuse, depression and injury of June 29, 2010 which caused marked worsening of the lumbar disc disease and cervical disc disease with left arm radiculopathy. He noted that as a result of appellant's pain and chronic narcotic use he could not safely drive or work. However, neither physician specifically addressed how any continuing condition nor disability were causally related to the accepted work injury. Additionally, OWCP never accepted that appellant developed cervical disc disease with left arm radiculopathy as a result of his June 29, 2010 work injury and there is no medical evidence to support such a conclusion. The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.[9]

The Board finds that Dr. Elkins had full knowledge of the relevant facts and evaluated the course of appellant's condition. At the time benefits were terminated Dr. Elkins clearly opined that appellant had absolutely no work-related reason for disability. His opinion as set forth in his report of March 2, 2011 is found to be probative evidence and reliable. The Board finds that Dr. Elkins's opinion constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of benefits for the accepted condition of lumbar sprain and left shoulder sprain has ceased.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to him to establish that he had continuing disability causally related to his accepted employment injury.[10] To establish causal relationship between the claimed disability and the employment injury, appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship.[11]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that he has any continuing residuals of his work-related lumbar sprain and left shoulder sprain on or after April 20, 2011.

[9] *See Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

[10] *See Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

[11] *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

After the termination of benefits on April 20, 2011, appellant submitted reports from Veterans Affairs Medical Center dated April 13, 2011 where he was treated for left lumbar strain with chronic back pain, left shoulder strain, status post left finger dislocation and right ankle strain. He reported initially injuring his back in the military and reinjuring it on June 29, 2011 while at work. However, as noted above, this report does not address how any continuing condition or medical restrictions and disability were causally related to the accepted work conditions. Also submitted were physician assistant notes from July 21, 2010 to February 17, 2011, who treated appellant for major depression, post-traumatic stress disorder, panic disorder and chronic pain secondary to a work injury. However, the Board has held that treatment notes signed by a physician's assistant are not considered medical evidence as this provider is not a physician under FECA.[12]

None of the reports submitted by appellant after the termination of benefits included a rationalized opinion regarding the causal relationship between his current condition and his accepted work-related conditions. Consequently, appellant did not establish that he had any employment-related condition or disability after April 20, 2011.

On appeal, counsel asserts that appellant continued to have residuals of his work-related injury, specifically pain, which required him to take prescription narcotics and made it impossible for him to return to his position as a commercial driver. Appellant asserts that Dr. Dimmig and Dr. Somers both advised that appellant was on medication for his work injury and therefore supported that appellant had continuing residuals of his work injury. However, the Board notes that Dr. Dimmig determined that appellant's lumbar sprain and left shoulder sprain had resolved and that he could return to work full time without restrictions. Dr. Dimmig did not indicate that narcotic medication was needed for appellant's accepted conditions.[13] As explained, Dr. Somers opinion is of limited probative value.[14]

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.

[12] *See David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician's assistants, nurses and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a ''physician'' as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

[13] The record indicates that appellant's use of narcotic medication preexisted his work injury.

[14] Counsel cites to *R.H.*, 58 ECAB 654 (2007), where the Board affirmed OWCP's reduction of compensation due to the claimant's failure to cooperate with vocational rehabilitation. The claimant asserted that he could not meet with his rehabilitation counselor because he was unable to drive due to use of narcotic pain medication. The Board in *R.H.*, noted that the medical evidence did not establish that he could not meet with the counselor or that he could not use alternative forms of transportation. Counsel asserts that the medical evidence supports that appellant cannot operate a commercial vehicle which is an essential part of his job. However, the Board notes that appellant's benefits were terminated and that OWCP did not accept that conditions necessitating narcotic medication were employment related. As explained, the medical evidence does not support that appellant has any ongoing condition or disability causally related to his employment.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate benefits effective on April 20, 2011 and that appellant failed to establish that he had any continuing residuals or disability attributable to his accepted conditions after April 20, 2011.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 15, 2011 is affirmed.

Issued: June 12, 2012
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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