

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

D.C., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
Gainesville, FL, Employer)

Docket No. 11-1770
Issued: March 2, 2012

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 12, 2011 appellant, through her attorney, filed a timely appeal from a May 4, 2011 merit decision of the Office of Workers' Compensation Programs' (OWCP) hearing representative which affirmed the termination of her compensation benefits. 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 properly terminated appellant's wage-loss compensation benefits effective May 9, 2010 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

On appeal, appellant's counsel contends that OWCP's decision was contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on June 5, 1989 appellant, then a 48-year-old nursing assistant, sustained a left hip and leg injury as a result of lifting a patient into an ambulance. It accepted her claim for lumbar strain and aggravation of degenerative disc disease. Appellant stopped work on the date of injury and returned to light duty on October 27, 1989. She stopped work again on February 12, 1990 and filed a claim for recurrence of disability. Appellant was placed on the periodic rolls for disability compensation.

In letters dated May 1 and 14, 2009, OWCP requested that appellant submit update medical evidence regarding her accepted medical conditions to establish that her entitlement to continuing compensation payments.

In a May 6, 2009 report, Dr. Edward J. Sambey, an orthopedic surgeon, related that appellant had a work-related back injury in the late 1980s and was disabled from work since 1989. Appellant complained of intermittent and episodic back pain and informed him that there was no change in her status. Upon examination, Dr. Sambey reported normal findings on her cranial nerve and peripheral neurovascular examination. Appellant's coordination, balance and hip were intact and her reflexes, distal motor and sensory examinations were also within normal limits. Dr. Sambey observed that her posterior tibialis and dorsalis pedis purposes were plus 2, but her Faber's test was negative. He further noted some posterior tightness with straight leg raising maneuver on the left, but otherwise appellant's straight leg raise test was negative. Appellant described pain in her bilateral flanks, crests, buttocks and left groin. Range of motion was 60 degrees flexion, 20 degrees extension and 30 degrees lateral bending. Dr. Sambey diagnosed chronic lumbar pain with degenerative spondylitic changes. He stated that he did not have any previous paperwork for comparison, but it was his understanding that appellant had been disabled for a chronic back condition as a result of a work injury for over 20 years and he found no reason to think that her status had changed.

On June 18, 2009 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. David Lotman, a Board-certified orthopedic surgeon, for a second opinion examination to determine the extent of her continuing employment-related residuals and disability. The statement of accepted facts noted that her June 22, 1989 traumatic injury claim had been accepted for lumbar strain and aggravation of degenerative disc disease. In a September 29, 2009 report, Dr. Lotman noted appellant's complaints of midline low back pain when she stood or walked too much. He reviewed the statement of facts and her medical records and provided an accurate history of injury. Upon examination, Dr. Lotman observed normal lumbar lordosis and slight midline discomfort to palpation at the lumbosacral junction and the left sacroiliac joint. Appellant's right and left lateral tilt reached 25 degrees with left paraspinous pain, forward flexion was to the mid tibia and extension was some 25 degrees. Both flexion and extension were limited by midline discomfort at the lumbosacral junction. Appellant's Trendelenburg and straight leg raise tests were negative bilaterally. Dr. Lotman noted that during the testing pressure was applied to the left sacroiliac joint with no complaints. He observed normal and symmetric strength and sensation with no clonus.

Dr. Lotman reviewed appellant's diagnostic reports and noted that his objective findings were restricted to the abnormalities on her diagnostic studies. He diagnosed mechanical

instability lumbosacral spine with disc osteophyte complexes L3-4 and L5. Regarding appellant's accepted injury for lumbar sprain, Dr. Lotman found no objective findings to support the diagnosis of a lumbar sprain and no physical findings consistent with a permanent aggravation of degenerative disc disease. He determined however that she still had residuals of her accepted June 5, 1989 work injury and stated that the previous disc herniation at L4 had evolved into a disc osteophyte complex. Based on the radiographic studies, Dr. Lotman concluded that appellant developed disc osteophyte complexes above and below the L4 level. He opined that she was capable of working in a sedentary position for eight hours a day with restrictions.

In a September 29, 2009 work capacity evaluation form, Dr. Lotman restricted appellant to no reaching above the shoulder, twisting, bending, stooping, squatting, climbing or kneeling and no pushing, pulling or lifting less than 25 pounds.

OWCP determined that there was a conflict in medical opinion between Dr. Sambey and Dr. Lotman as to whether appellant had any continuing residuals or disability due to her accepted employment injuries. On January 15, 2010 it referred her, together with a statement of accepted facts and the medical record, to Dr. Brian E. Haycook, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a March 17, 2010 report, Dr. Haycook examined appellant that day and found no objective findings to support a diagnosis of lumbar strain. He opined that her complaints were purely subjective. Dr. Haycook reported that because appellant's conditions had been ongoing for the past 21 years he believed that her lumbar strain and aggravation of degenerative disc disease had long resolved and that her current symptoms resulted from her underlying arthritis. He stated that he found no evidence of any residuals of her 1989 work injury and reported that she had reached maximum medical improvement. Dr. Haycook also stated that appellant was capable of doing at least medium work, light duty or sedentary work and recommended that she undergo a functional capacity evaluation examination to identify her specific work restrictions.

On April 1, 2010 OWCP issued a notice of proposed termination of appellant's disability compensation and medical benefits based on Dr. Haycook's March 17, 2010 medical report. Appellant was advised that she had 30 days to submit additional relevant evidence or argument if she disagreed with the proposed action. No additional evidence was received.

In a decision dated May 7, 2010, OWCP finalized appellant's termination for medical and wage-loss compensation benefits effective May 9, 2010. It found that Dr. Haycook's March 17, 2010 report represented the weight of the medical evidence in establishing that her accepted conditions had ceased and that she no longer had any residuals or disability causally related to her accepted employment injuries.

On May 12, 2010 appellant, through counsel, requested a telephone hearing.

In a June 2, 2010 magnetic resonance imaging (MRI) scan report, Dr. Frans Van Dijk, a Board-certified diagnostic radiologist, observed mild disc bulging, mild desiccation and mild ligamentum hypertrophy, but no spinal stenosis. He also noted mild degenerative marrow edematous changes at the anterior of L3-4 and minimal change anteriorly to the right at L4-5.

Dr. Van Dijk diagnosed moderate left parasagittal disc herniation of T12-L1, central mild disc herniation of L1-2, disc bulging and multilevel neural foraminal narrowing.

By decision dated July 30, 2010, an OWCP hearing representative set aside the May 7, 2010 decision finding that Dr. Haycook's opinion was insufficient to constitute the weight of the evidence. The case was remanded to request a supplemental report with fully-reasoned opinion as to whether appellant sustained disc osteophyte complexes above and below the L4 level causally related to the June 5, 1989 employment injury and whether her accepted conditions of lumbar strain and permanent aggravation of degenerative disc disease had resolved. Appellant's wage-loss compensation and medical benefits were reinstated beginning May 9, 2010.

On August 4, 2010 OWCP received reports from Dr. Raul B. Zelaya, a Board-certified orthopedic surgeon. On a May 27, 2010 Dr. Zelaya noted appellant's complaints of low back pain. He provided an accurate history of injury that in 1989 she injured her back when lifting a patient at work. Upon examination, Dr. Zelaya observed mild pain upon compression of the right and left sciatic notch. Appellant's straight leg raise test was positive in the sitting and recumbent position and deep tendon reflexes of both lower extremities were 1+ equal and bilateral. X-rays of her lumbar spine revealed a straightening of the lumbar lordosis with muscle spasticity. Dr. Zelaya diagnosed discogenic disease with compressive radiculopathy. He recommended an MRI scan of the lumbar spine and advised appellant to avoid pushing, pulling or lifting anything heavier than 5 to 10 pounds and any bending, walking or going up and down stairs in a repetitive fashion.

In a June 10, 2010 report, Dr. Zelaya stated that appellant returned to the office after obtaining an MRI scan of the lumbar spine. The MRI scan revealed significant discogenic disease affecting all levels of the lumbar spine and sacrum from T12/L1 to L5/S1 with multiple herniated discs of the bulging type, the worse being at the levels of L3/L4 and L4/L5. Dr. Zelaya also noted facet syndrome associated with degenerative joint disease and multiple neural foraminal stenosis.

In letters dated August 6 and September 16, 2010, OWCP requested that Dr. Haycook provide a supplemental report which included his reasoned opinion as to whether appellant had disc osteophyte complexes above and below the L4 level causally related to the June 5, 1989 employment injury, whether the permanent aggravation of the degenerative disc disease had resolved and when it resolved and whether she had any injury-related residuals or disability related to injury-related osteophyte complexes. On September 17, 2010 Dr. Haycook responded "no" to the question as to whether she had disc osteophyte complexes above and below the L4 level, causally related to the June 5, 1989 employment injury. He also stated that he did not find that appellant's aggravation of degenerative disc disease was permanent because typically these aggravations resolved in 6 to 22 months.

In a memorandum to the district medical director, dated September 30, 2010, the claims examiner (CE) advised that three attempts had been made to contact the referee physician to obtain a clarification of his report. The CE cited correspondence dated August 6 and September 2 and 16, 2010 and noted that Dr. Haycook's responses had still not provided rationale for his opinion that appellant's disc osteophyte complexes were not related to her employment injury, that her aggravation of disc disease had resolved in 6 to 22 months and also

had not provided a rationalized opinion regarding injury-related residual. The district medical director stated that he had telephoned Dr. Haycock's office twice "regarding report dated September 17, 2010" following which he received a call from Dr. Haycock on October 1, 2010. He related: "I explained [to] him that he needs to answer all three questions raised by CE on September 16, 2010 with his reasoned medical opinion/medical rationale and complete OWCP-5c form with any limitations. I told [Dr. Haycock] to submit the medical report with any additional charge on HICFA-1500 form."

In an October 15, 2010 supplemental report, Dr. Haycock stated that the finding of the disc osteophyte complex above and below the L4 level was not causally related to the June 5, 1989 employment injury. He explained that the radiographic findings were not the result of an acute injury such as lifting or twisting but were indicative of a chronic degenerative process that developed overtime. Dr. Haycock noted that appellant sustained a lumbar strain as a result of the June 5, 1989 employment injury, but stated that this injury should not be considered a permanent aggravation of the underlying degenerative disc disease. He explained that lumbar strains were typically treated with conservative modalities within a four- to six-month time period and accordingly this type of injury would not result in permanent changes or injuries that would require 21 years of treatment. Dr. Haycock further opined that appellant did not sustain any permanent injuries or disability relating to her 1989 work injury and that the findings seen in the radiographic studies were of a chronic degenerative nature, not directly related to her 1989 injury. He also reported that she should be able to perform any type of work with the only restriction being her pain symptoms.

In a decision dated November 4, 2010, OWCP terminated appellant's entitlement to medical and wage-loss benefits effective November 21, 2010 as the medical evidence demonstrated that she no longer suffered residuals from her accepted employment injury. It found that Dr. Haycock's March 17 and October 15, 2010 reports represented the weight of the medical evidence to establish that her accepted conditions had resolved.

On November 10, 2010 appellant, through counsel, requested a telephone hearing. She submitted various medical reports dated from July 16, 1990 to July 9, 1992 regarding her 1989 work-related injury.

On March 16, 2011 a telephone hearing was held.

In a decision dated May 4, 2011, an OWCP hearing representative affirmed the November 4, 2010 decision terminating appellant's entitlement to compensation benefits effective November 21, 2010. The hearing representative found that Dr. Haycock's reports represented the weight of the medical evidence of record in establishing that she no longer had any residuals of her employment-related injury.

LEGAL PRECEDENT

According to FECA, once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.² OWCP may not

² *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.³ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁶

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.⁷ This is called a referee examination and OWCP will select a physician who is qualified in the inappropriate specialty and who has no prior connection with the case.⁸ When there exists 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.⁹

In a situation where OWCP secures an opinion from an impartial medical examiner for purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.¹⁰

ANALYSIS

OWCP accepted that appellant sustained a lumbar strain and aggravation of degenerative disc disease due to a June 5, 1989 employment incident when she lifted a patient into an

³ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

⁶ *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *A.P.*, *id.*

⁷ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

⁸ 20 C.F.R. § 10.321.

⁹ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁰ *See Phillip H. Conte*, 56 ECAB 213 (2004); *Guiseppa Aversa*, 55 ECAB 164 (2003).

ambulance.¹¹ Appellant stopped work and was placed on the periodic rolls. In a decision dated May 7, 2010, OWCP terminated her wage-loss compensation and medical benefits based on the report of the impartial medical specialist, Dr. Haycook, dated March 17, 2010. By decision dated July 30, 2010, an OWCP hearing representative set aside the May 7, 2010 decision finding that Dr. Haycook's medical opinion did not constitute the weight of the evidence regarding appellant's continuing disability. The case was remanded for OWCP to request that Dr. Haycook provide a supplemental report as to whether her accepted conditions had resolved. On May 4, 2011 OWCP terminated appellant's wage-loss compensation and medical benefits based on the opinion of Dr. Haycook.

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

Following Dr. Haycook's initial March 17, 2010 report, an OWCP hearing representative found that Dr. Haycook's opinion was insufficient to constitute the weight of the evidence regarding her continuing work-related disability. The case was remanded for OWCP to request that Dr. Haycook provide a supplemental report with a fully-reasoned opinion as to whether she sustained disc osteophyte complexes above and below the L4 level causally related to the June 5, 1989 employment injury and whether her accepted conditions of lumbar strain and aggravation of degenerative disc disease had resolved. OWCP thereafter made three attempts by correspondence dated August 6 and September 2 and 16, 2010 to obtain clarification of his reports. On September 17, 2010 it received handwritten notes from Dr. Haycook which responded "no" to the question as to whether appellant had disc osteophyte complexes above and below the L4 level, causally related to the June 5, 1989 employment injury and which noted that her aggravation of degenerative disc disease was not permanent because typically these aggravations resolved in 6 to 22 months.

The Board has explained that, if the impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a statement of accepted facts to a second impartial specialist for the purpose of obtaining his rationalized medical opinion on the issue.¹² OWCP had made three attempts to receive clarification from Dr. Haycook. In response it received the vague and unrationalized handwritten notes of September 17, 2010 pursuant to the request for a supplemental report. OWCP should have selected a second impartial medical specialist and referred appellant for another examination. Rather, it, through the district medical adviser, chose to call Dr. Haycook's office and speak directly with him to elicit a rationalized report regarding the issues central to the decision to terminate benefits. The Board has explained in *Carlton L. Owens*, that oral communications or conversations between OWCP or one of its medical advisers or consultants and the impartial medical specialist on disputed issues should not

¹¹ The Board notes that the hybrid record in this case contains a FECA Nonfatal Summary which reports that appellant's accepted conditions were lumbar strain and aggravation of degenerative disc disease. These were the accepted conditions identified in the statement of accepted facts dated June 18, 2009. The hearing representative on July 30, 2010 however identified the accepted conditions as lumbar strain and permanent aggravation of degenerative disc disease.

¹² *Raymond A. Fondots*, 53 ECAB 637 (2002); see also *Harold Travis*, 30 ECAB 1071 (1979).

occur, as it undermines the appearance of impartiality. Such communication, the Board held, must be in writing. As the Board explained, under 5 U.S.C. § 8123(a) medical opinion evidence obtained from an impartial medical specialist should be based on a completely independent evaluation and judgment and untrammelled by potential opinions expressed in oral communications between OWCP and the impartial specialist.¹³

For these reasons the Board finds that Dr. Haycock's medical opinion does not constitute the special weight of the medical evidence. OWCP did not meet its burden of proof to terminate appellant's compensation.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation effective November 21, 2010 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

ORDER

IT IS HEREBY ORDERED THAT that the May 4, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 2, 2012
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

¹³ *David W. Pickett*, 54 ECAB 272 (2002); *see also Carlton L. Owens*, 36 ECAB 608 (1986).