

FACTUAL HISTORY

On June 12, 2009 appellant, then a 49-year-old automation clerk, filed a traumatic injury claim alleging that, on June 12, 2009, while loading over 180 trays, she suffered a slipped disc in her lower back.

Appellant commenced treatment with Dr. Craig H. Lichtblau, a Board-certified physiatrist, on September 1, 2009. Dr. Lichtblau diagnosed lumbar myofascial pain syndrome; L2-3 and L3-4 protruding discs; L4-5 bulging disc and L4-5 bulging disc. He opined that the diagnoses were secondary to injuries sustained from a work accident on June 12, 2009. Dr. Lichtblau also diagnosed acute functional decline secondary to chronic pain, secondary to the previously noted diagnoses. In a March 16, 2010 report, he described appellant's work duties on June 12, 2009 which he noted required her to lift heavy trays of mail. At that time, appellant developed low back pain. Dr. Lichtblau discussed appellant's treatment with a chiropractor and discussed appellant's magnetic resonance imaging (MRI) scan. When he first saw appellant, he believed that her pain was caused by the work incident of June 12, 2009. Dr. Lichtblau noted that appellant had no past medical history for any episodes of acute or chronic back pain prior to this incident and that the MRI scans did reveal protruding discs at her L2-3 and L3-4 spinal levels and a bulging disc at her L4-5 spinal level. He concluded that appellant's diagnoses of L2-3 and L3-4 protruding discs and L4-5 bulging disc were made symptomatic secondary to the injury she sustained in the work-related accident. With regard to the myofascial pain syndrome, Dr. Lichtblau opined that, although he was unable to determine if there is a direct relationship between this pathology and appellant's work-related accident, he was able to state that this condition could have been made symptomatic as she was asymptomatic prior to the work-related accident. He indicated that disc protrusions and bulging discs can remain asymptomatic throughout a person's life. Dr. Lichtblau noted that appellant, who has reached maximum medical improvement, is going to suffer from the acute intermittent exacerbations of chronic pain and discomfort.

On April 14, 2010 OWCP referred appellant to Dr. David B. Lotman, a Board-certified orthopedic surgeon, for a second opinion examination. In a May 7, 2010 report, Dr. Lotman opined that appellant had preexisting lumbar spondylosis and that the incident of June 12, 2008 caused an aggravation of that preexisting condition. He found that the aggravation had resolved based on his evaluation, but did note that lumbar spondylosis is a permanent condition and that appellant will be inclined to aggravation with some routine activities. Dr. Lotman noted that appellant's MRI scan findings are a result of age and wear and tear, and that there was no evidence of disc herniation or spinal stenosis. He did not believe that appellant had myofascial pain syndrome.

On May 18, 2010 OWCP accepted appellant's claim for aggravation lumbosacral spondylosis without myelopathy (resolved).

By decision dated June 30, 2010, OWCP denied appellant's claim for compensation commencing November 20, 2009.

On July 7, 2010 appellant requested an oral hearing before an OWCP hearing representative. At the hearing held on October 27, 2010, she stated that, after she was injured,

she returned to the manual section because there was not a lot of heavy lifting and she basically sorted letters. Appellant was able to do this position but on November 20, 2009 she was told to clock out and go home because they no longer had any work for her. She testified that her low back goes out on her regularly.

By decision dated January 25, 2011, the hearing representative modified the previous decision to reflect that the claim was accepted for aggravation of lumbosacral spondylosis, resolved as of May 7, 2010. The hearing representative affirmed the finding that appellant was not entitled to wage-loss compensation benefits as of May 7, 2010, the date the aggravation due to the work injury resolved. On February 1, 2011 OWCP issued a check for compensation for the period November 20, 2009 through May 6, 2010.

By letter dated May 6, 2011, appellant requested reconsideration.

By decision dated June 24, 2011, OWCP reviewed appellant's arguments but denied modification of the January 25, 2011 decision.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Once OWCP accepts a claim it has the burden of justifying modification or termination of compensation. After it has determined that an employee has disability causally related to his employment, it may not terminate compensation without establishing that the disability has ceased or is no longer related to the employment injury.³ The fact that OWCP accepted an employee's claim for a specified period of disability does not shift the burden of proof to the employee. The burden is on OWCP to demonstrate an absence of employment-related disability or residuals in the period subsequent to the date of termination or modification.⁴

Section 8123(a) 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 evaluation.⁵

ANALYSIS

OWCP accepted appellant's claim for aggravation of lumbosacral spondylosis, resolved as of May 7, 2010. The Board notes that OWCP placed the burden of proof on appellant to establish that any resulting injury after May 7, 2010 was causally related to the accepted condition. However, OWCP's acceptance of a claim for a specified period does not shift the

² 5 U.S.C. § 8102(a).

³ *D.M.*, Docket No. 10-857 (issued January 3, 2011); *Edwin Lester*, 34 ECAB 1807 (1983).

⁴ *J.D.*, Docket No. 11-131 (issued December 21, 2011). See also *Elsie L. Price*, 54 ECAB 734, 739 (2003); *Raymond M. Shulden*, 31 ECAB 297 (1979).

⁵ 5 U.S.C. § 8123(a).

burden of proof to the claimant. It is its burden to establish that appellant did not have residuals from the accepted injury.⁶

The Board finds that OWCP did not meet its burden. Dr. Lichtblau, appellant's treating physiatrist, opined that the L2-3, L3-4 protruding discs and L4-5 bulging discs were made symptomatic due to appellant's work injury. He based this conclusion on multiple physical examinations of appellant, her MRI scan and the fact that she was not symptomatic prior to the work accident. Dr. Lichtblau also discussed appellant's work duties, which he noted required her to lift heavy trays of mail, as well as appellant's treatment with a chiropractor. He also noted that appellant had myofascial pain syndrome which was made symptomatic as a result of the work incident. Dr. Lotman, the second opinion examiner, opined that appellant had preexisting lumbar spondylosis and that the employment injury of June 12, 2009 caused an aggravation of that preexisting condition. However, he found that the aggravation had resolved. Dr. Lotman stated that appellant's findings on her MRI scan are the result of age and wear and tear, and that there was no evidence of disc herniation or spinal stenosis. He did not believe appellant had myofascial pain syndrome.

OWCP gave greater weight to the opinion of Dr. Lotman, noting that his opinion was based on an accurate factual and medical background and his review of the medical records and physical examination. However, Dr. Lichtblau's opinion was based on multiple physical examinations, review of appellant's job duties and the MRI scan result. Dr. Lotman found that the aggravation had resolved, a conclusion not reached by Dr. Lichtblau. Accordingly, there was an unresolved conflict in the medical opinion evidence between Dr. Lichtblau, appellant's treating physician, and Dr. Lotman, the second opinion physician. Because of this unresolved conflict, OWCP did not meet its burden of proof to terminate appellant's compensation as of May 7, 2010. The June 24, 2011 decision is reversed.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to establish that the employment-related aggravation of appellant's lumbosacral spondylosis resolved as of May 7, 2011.

⁶ *J.D.*, *supra* note 4.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 24, 2011 is reversed.

Issued: May 16, 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