

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

J.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brighton, MA, Employer**

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**Docket No. 12-1198
Issued: October 19, 2012**

Appearances:

*Debra A. Joyce, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 3, 2012 appellant, through his attorney, filed a timely appeal of a November 10, 2011 Office of Workers' Compensation Programs' (OWCP) merit decision terminating his benefits. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's medical and wage-loss compensation benefits effective November 20, 2011.

FACTUAL HISTORY

On September 5, 2001 appellant, then a 40-year-old letter carrier filed a traumatic injury claim alleging that he injured his low back lifting a box in the performance of duty. OWCP accepted his claim for low back strain on September 11, 2001. Appellant alleged that he

¹ 5 U.S.C. § 8101 *et seq.*

sustained a recurrence of disability on February 11, 2002 due to this injury. In a report dated September 16, 2002, Dr. George B. McManama, Jr., a Board-certified orthopedic surgeon, performed a fitness-for-duty examination and noted that appellant initially hurt his back in 1985 while lifting weights. He stated that appellant received chronic treatment for back problems since then. Dr. McManama opined that any permanent restrictions would be based on appellant's chronic condition and not based on an employment injury. On February 13, 2003 OWCP accepted the February 11, 2002 recurrence.

Appellant filed a traumatic injury claim on July 25, 2002 alleging that on the same day he injured his lower back when steps on which he was walking on collapsed. OWCP accepted his claim for low back strain and displacement of lumbar intervertebral disc on September 12, 2002. Appellant underwent a magnetic resonance imaging (MRI) scan on October 8, 2002 which demonstrated advanced L5-S1 degenerative disc disease with left L5 foraminal stenosis. OWCP entered him on the periodic rolls on March 17, 2003.

In a report dated February 10, 2010, appellant's attending physician, Dr. Gregory B. Park, a physician Board-certified in physical medicine and rehabilitation, noted appellant's history of injury and diagnosed intervertebral disc degeneration lumbar and lumbago. He completed a work restriction evaluation on March 26, 2010 and indicated that appellant was partially disabled, but not cleared for work. Appellant underwent a functional capacity evaluation on March 12, 2010 which demonstrated that appellant performed below the sedentary physical demand level.

On February 11, 2011 Dr. Park reported that appellant was experiencing increased symptoms after bending. He again diagnosed lumbago and intervertebral disc degeneration in the lumbar spine. Dr. Park stated, "I suspect that the patient has a flare-up of his lower back pain related to the degenerative disc at L5-S1." Appellant reported that his symptoms had spontaneously improved on March 11, 2011.

OWCP referred appellant for a second opinion evaluation with Dr. Steven A. Silver, a Board-certified orthopedic surgeon, on April 26, 2011. In a report dated May 12, 2011, Dr. Silver noted appellant's history of injury and diagnosed degenerative disc disease with lumbar degenerative facet arthritis. He stated, "Based on my review of the claimant's records as well as the history of the claimant, it is my opinion that the claimant had a temporary aggravation of degenerative disc disease of the lumbar spine." Dr. Silver opined that appellant's temporary aggravation should not have lasted more than one year and that appellant had no residuals of the July 25, 2002 work injury. He stated, "At the present time there is no clinical evidence of [appellant] having an acute injury that caused a permanent impairment with respect to his lumbar spine, either on a clinical or on a radiological basis." Dr. Silver concluded that appellant could return to work in a sedentary capacity only due to significant limitations due to his preexisting degenerative disc disease. He found that appellant had reach maximum medical improvement and that his treatment was symptomatic only.

On July 13, 2011 OWCP provided Dr. Park with Dr. Silver's report and requested that he provide comments. By report, in a letter dated September 1, 2011, it proposed to terminate appellant's compensation and medical benefits based on Dr. Silver. Dr. Park reviewed

Dr. Silver's report on September 13 and 14, 2011 and agreed that appellant could return to work in a limited sedentary capacity only. He stated,

"I disagree that the patient had a temporary aggravation of degenerative disc disease of the lumbar spine. The patient's current symptoms relative to his premorbid symptoms speak for themselves with regards to this 'temporary' nature. The patient made it known that he did have lower back pain symptoms prior to his fall, however, symptoms did not limit his work as a postal worker. While there is certainly a good likelihood that the patient's degenerative disc disease predated his fall, the extent of his symptoms did not predate his fall."

By decision dated November 10, 2011, OWCP terminated appellant's compensation and wage-loss benefits effective November 20, 2011 on the grounds that Dr. Silver's report carried the weight of the medical evidence and established that appellant was no longer totally disabled and that his current medical condition was not due to his accepted employment injury.

LEGAL PRECEDENT

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.² 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.³ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁴ 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.⁵

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.⁶ 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.⁷

² *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

³ *Id.*

⁴ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁵ *Id.*

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

⁷ *R.C.*, 58 ECAB 238 (2006).

ANALYSIS

OWCP accepted appellant's claim for displacement of lumbar disc and low back strain on September 12, 2002. Appellant did not return to work. He submitted medical reports from his attending physician, Dr. Parks, supporting continued disability for work and the need for medical treatment. OWCP referred appellant for a second opinion evaluation with Dr. Silver, who found that appellant's current condition and disability was not due to his accepted employment injuries, but to his preexisting degenerative disc disease. Dr. Parks reviewed this report and disagreed with Dr. Silver's findings opining that appellant had sustained a permanent aggravation of his underlying condition based on his continuing symptoms and disability. Drs. Parks and Silver are both Board-certified physicians. Each physician offered reasoning for the contradictory opinions offered. Dr. Parks noted that appellant had worked as a letter carrier until his accepted July 25, 2002 employment injury and that following this injury his symptoms increased such that he was no longer able to work. Dr. Silver opined that appellant sustained only a temporary aggravation of his underlying condition which should have resolved within one year of the date of injury. The reports of each physician are of equal weight and reach opposite conclusions on the central issues of this case, whether appellant's current condition and his disability for work is due to his accepted employment injury. Due to the disagreement between appellant's physician and OWCP's second opinion physician, the Board finds that there is a conflict of medical opinion evidence. As there is an unresolved conflict of medical opinion evidence,⁸ the Board finds that OWCP has not met its burden of proof to terminate appellant's compensation and medical benefits effective November 20, 2011 and that the November 10, 2011 decision of the OWCP must be reversed.

CONCLUSION

The Board finds that there is an unresolved conflict of medical evidence such that OWCP has failed to meet its burden of proof to terminate appellant's compensation and medical benefits.

⁸ *O.H.*, Docket No. 12-609 (issued July 18, 2002).

ORDER

IT IS HEREBY ORDERED THAT the November 10, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 19, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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