

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

J.M., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Auburn, CA, Employer**

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**Docket No. 13-27
Issued: April 11, 2013**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 3, 2012 appellant filed a timely appeal from a September 25, 2012 decision of the Office of Workers' Compensation Programs (OWCP) which terminated his 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 the case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate of appellant's wage-loss compensation and medical benefits effective September 21, 2012.

FACTUAL HISTORY

On June 12, 2000 appellant, then a 51-year-old letter carrier, filed a traumatic injury claim alleging an aggravation of degenerative disc disease that day while pushing a hamper of

¹ 5 U.S.C. §§ 8101-8193.

parcels. OWCP accepted his claim for lumbar strain and aggravation of lumbar degenerative disc disease. Appellant returned to full-time limited duty and stopped in October 2005.

From September 20, 2000 to January 9, 2006 for low back pain, appellant came under the treatment of Dr. Randall W. Armstrong, a Board-certified orthopedic surgeon, who noted a history of chronic back pain beginning in 1983 with work-related back injuries 1991, 1997, 1998 and 2000. Dr. Armstrong diagnosed probable symptomatic facet arthropathy at L3-4, symptomatic degenerative disc disease at L3-4, rule out longstanding facet fracture on the right, possible lower lumbar pars defect and three-level disc desiccation at L3-4, L4-5 and L5-S1. He treated appellant conservatively with bilateral nerve blocks. On September 12, 2005 appellant presented with severe back pain and reported that he was unable to perform his job. In a duty status report dated September 12, 2005, Dr. Armstrong noted that appellant was totally disabled. On January 9, 2006 he released appellant to limited-duty work for two hours a day. A magnetic resonance imaging (MRI) scan of the lumbar spine dated August 4, 2000 revealed moderate disc bulging at L3-4 with spondylolisthesis and mild degenerative changes at T11-12 and L4-5 and L5-S1. An April 20, 2005 MRI scan of the lumbar spine revealed L3-4 advanced degenerative disc disease with canal stenosis and neural foraminal narrowing and asymmetric degenerative disc changes at L4-5. A computerized tomography of the lumbar spine dated September 10, 2001 revealed degeneration of L3-4 disc protrusion, L3-4 central spinal stenosis, degeneration of L4-5 disc with disc protrusion and degeneration of L5-S1 disc with disc protrusion. On September 14, 2005 appellant had a lumbar myelogram that revealed moderate-to-severe degenerative disc disease at L3-4 and spinal stenosis at L3-4.

On January 11, 2006 appellant was offered a light-duty position as a carrier for two hours a day. On January 12, 2006 he accepted the position and returned to work. On May 5, 2006 Dr. Armstrong increased appellant's work hours to four a day and continued his physical restrictions.²

On March 26, 2009 OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion.³ In an April 27, 2009 report, Dr. Swartz noted that physical examination revealed normal range of motion of the lumbar spine, equal reflexes in the lower extremities, intact sensation and negative straight leg raises. He noted extensive multilevel degenerative changes, spondylolisthesis at L3-4, foraminal stenosis, spinal stenosis, degeneration at L4-5 with a small left paracentral disc protrusion, degeneration at L5-S1, disc protrusion and degeneration at L3-4 and chronic central spinal stenosis. Dr. Swartz noted that the degenerative pathology antedated the 2000 work injury. He found that the 2000 work injury caused an increase in pain, but appellant was already having pain in the lower extremities and there was no evidence to support material changes resulting from the 2000 work injury. Dr. Swartz opined

² In a report of investigation of workers' compensation fraud, the U.S. Postal Service, Office of the Inspector General noted that appellant was investigated from June 8 to July 14, 2006 for possible malingering and exceeding his physical limitations. The investigation findings revealed that appellant may be malingering. Upon completion of his two-hour day, he moved with normal gait and without discomfort, driving 30 minutes to a second opinion appointment.

³ Dr. Swartz previously saw appellant in 2007 for a right knee condition that was developed in a separate claim File No. xxxxxx876. The termination of benefits presently before the Board pertains only to appellant's accepted low back conditions.

that appellant had substantial age-related low back degenerative changes. He opined that appellant sustained a temporary aggravation of his degenerative disease that had ceased by the time of his examination. Dr. Swartz recommended Celebrex but advised that appellant would not need surgery or physical therapy. He stated that it was unlikely that appellant had residuals of his 2000 injury nine years later. Dr. Swartz found extensive age-related changes to the low back and lumbar spine. In a work capacity evaluation, he noted that appellant could return to work full time with restrictions.

In a May 28, 2009 letter, OWCP requested that Dr. Armstrong review the report of Dr. Swartz and provide a response. In a June 10, 2009 report, Dr. Armstrong reviewed Dr. Swartz's report and noted that for the most part he agreed with the findings therein. He noted that appellant could work eight hours a day with modest restrictions.

On June 30, 2009 OWCP offered appellant a full-time light-duty modified assignment as a city carrier subject to the restrictions set forth by Dr. Swartz and Dr. Armstrong. Appellant accepted the position.

On September 4, 2009 OWCP issued a notice of proposed termination of wage-loss benefits based on Dr. Swartz's report.

Appellant submitted a September 2, 2009 report from Dr. Armstrong, who noted that he returned to work and worked for one hour before having back pain while casing mail. Dr. Armstrong advised that appellant's job position needed to be clarified as to specific tasks to be performed. He released appellant to his express mail job for four hours a day. In a September 3, 2009 report, Dr. Armstrong noted that appellant reported being let go because the employing establishment was unable to accommodate his physical restrictions. Appellant was released to modified duty for four hours a day.

By decision dated October 16, 2009, OWCP terminated appellant's wage-loss benefits, effective October 25, 2009, based on Dr. Swartz's report.

In a December 21, 2009 letter to OWCP, appellant acknowledged that his benefits were terminated on October 25, 2009 but he continued to receive wage-loss compensation from OWCP. He sought clarification of his entitlement to compensation benefits.

In a letter dated January 20, 2010, OWCP advised appellant that his wage-loss benefits were terminated October 16, 2009. After the decision issued, the employing establishment withdrew the job offer at eight hours a day and noted that it could not accommodate his work restrictions of four hours a day. As it could not accommodate his work restrictions, OWCP determined that appellant was entitled to wage-loss compensation.⁴

⁴ On January 20, 2010 OWCP referred appellant for vocational rehabilitation. In a vocational rehabilitation closure report dated September 20, 2011, the counselor noted that two goal positions were selected, receptionist and accounting clerk. Appellant received 90 days of job placement services but did not obtain employment and vocational rehabilitation ended on September 21, 2011.

Appellant submitted a report from Dr. Armstrong dated October 26, 2010 which noted that appellant was involved in a motor vehicle accident on October 25, 2010 when his car was struck from behind and pushed 60 feet. He had back and leg pain since that time. Dr. Armstrong noted that x-rays did not reveal a fracture but the accident aggravated his back pathology. In a November 21, 2011 report, he noted that appellant recently had a right knee replaced and had not worked in two years. Dr. Armstrong diagnosed thoracic or lumbosacral neuritis or radiculitis, radicular syndrome and lumbosacral spondylosis.

OWCP referred appellant to Dr. Swartz for a second opinion. In an December 8, 2011 report, Dr. Swartz noted that examination revealed normal range of motion of the lumbar spine, reflexes were absent in the lower extremities, sensation was intact, motor function was normal with negative straight leg raises bilaterally. He noted extensive multilevel degenerative changes, spondylolisthesis at L3-4, foraminal stenosis, spinal stenosis, degeneration at L4-5 with a small left paracentral disc protrusion, degeneration at L5-S1, disc protrusion and degeneration at L3-4 disc with disc protrusion and chronic central spinal stenosis. Dr. Swartz stated that the 2000 work injury caused an increase in pain but there was no evidence to support that there were material changes due to the 2000 work injury. Appellant was also involved in a motor vehicle accident on October 25, 2010 which caused increased back and leg symptoms. Dr. Swartz opined that appellant had substantial age-related degenerative changes in his low back that were not related to the 2000 work injury. Appellant's low back strain had resolved and there was no evidence of material change or structural changes in the lumbar spine based on the 2000 work injury.⁵ In a work capacity evaluation dated December 17, 2011, Dr. Swartz noted that appellant was able to work full time with restrictions.

On August 16, 2012 OWCP issued a notice of proposed termination of compensation and medical benefits for the accepted low back conditions based on Dr. Swartz's report.

Appellant submitted a September 11, 2012 statement and disagreed with the proposed termination of benefits. He contended that he had residuals of the aggravation of degenerative disc disease and was unable to lift heavy objects without pain. With regard to the positions of accounting clerk and receptionist, appellant found it hard to find a job, the pay in the positions was lower than in his prior employment and he could not type quickly.

By decision dated September 25, 2012, OWCP terminated appellant's wage-loss and medical benefits effective September 21, 2012. It found that Dr. Swartz's report represented the weight of medical opinion and established that appellant had no continuing residuals of his accepted lumbar injuries.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁶ After it has determined that an employee has disability causally

⁵ Dr. Swartz also opined that appellant's employment did permanently aggravate his bilateral knee condition. The knee condition is not before the Board on the present appeal. *See supra* note 3.

⁶ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

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.⁷ 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.⁸

ANALYSIS

OWCP accepted appellant's claim for work-related lumbosacral strain and an aggravation of lumbosacral degenerative disc disease from the June 12, 2000 work injury. It referred him to Dr. Swartz for a second opinion evaluation.

In a December 8, 2011 report, Dr. Swartz provided an extensive review of appellant's accepted conditions, medical history and reported examination findings. There were no clinical findings of any residuals or disability causally related to the accepted low back injury of June 12, 2000. Dr. Swartz noted a normal range of motion of the lumbar spine, reflexes were equal in the lower extremities and symmetrical, sensation was intact and motor function was normal. He diagnosed extensive multilevel degenerative changes, spondylolisthesis at L3-4, foraminal stenosis, spinal stenosis, degeneration at L4-5 with a small left paracentral disc protrusion, degeneration at L5-S1, disc protrusion and degeneration at L3-4 disc with disc protrusion and chronic central spinal stenosis. Dr. Swartz found that appellant had substantial age-related degenerative changes in his low back but there was no evidence of structural or material change to the lumbar spine due to the 2000 work injury. He opined that appellant's accepted injury represented a temporary aggravation that had resolved. Dr. Swartz explained that appellant's current symptoms were due to age-related degenerative changes. He opined that appellant had no work-related residuals and required no further treatment. In a work capacity evaluation dated December 17, 2011, Dr. Swartz noted that appellant was able to work full time with restrictions.

The Board finds that Dr. Swartz's report represents the weight of the medical evidence. OWCP properly relied on his opinion to terminate appellant's compensation benefits on September 21, 2011. Dr. Swartz's opinion is based on proper factual and medical history as he reviewed a statement of accepted facts and appellant's prior medical treatment and test results. He provided comprehensive findings on examination in support of his opinion that the accepted work-related conditions had resolved and that appellant's continuing symptoms were due to a degenerative condition that was no longer aggravated by the accepted injury. Dr. Swartz reported no basis on which to find that appellant had any continuing residuals of his accepted lumbosacral strain and aggravation of lumbosacral degenerative disc disease. There is no

⁷ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁸ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

contemporaneous medical evidence of equal weight supporting appellant's claim for continuing residuals of the accepted lumbar conditions.⁹

Appellant disagreed with the termination of benefits, noting that he continued to have residuals of the aggravation of degenerative disc disease. With regards to the vocational rehabilitation positions of accounting clerk and receptionist it was hard to find a job, the pay was lower and he could not type quickly. As noted, the issue of whether appellant has continuing low back conditions causally related to his 2000 work injury is a medical issue which must be addressed by a physician. Appellant did not submit additional medical evidence.

On appeal, appellant asserted that he requested a change of physician which was improperly denied and the most recent report from Dr. Armstrong supports continuing residuals of his work injury. In a November 21, 2011 report, Dr. Armstrong noted appellant's complaints of low back pain and diagnosed thoracic or lumbosacral neuritis or radiculitis, radicular syndrome and lumbosacral spondylosis. The Board notes that he provided diagnoses for conditions not accepted as related to the 2000 work injury. Dr. Armstrong noted that appellant had not worked in two years. He did not address how the nonaccepted back conditions were related to the 2000 work injury.¹⁰

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 has met its burden of proof to terminate benefits.

⁹ As noted, *supra* notes 3 and 5, this decision pertains only to appellant's accepted lumbar conditions due to the June 12, 2000 work injury.

¹⁰ See *G.A.*, Docket No. 09-2153 (issued June 10, 2010) (for conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 25, 2012 is affirmed.

Issued: April 11, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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