United States Department of Labor
Employees' Compensation Appeals Board

S.D., Appellant	)	
and	)	**Docket No. 13-889**
	)	**Issued: August 1, 2013**
DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, Philadelphia, PA, Employer	)	

Appearances:
Jason S. Lomax, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 5, 2013 appellant, through her attorney, filed a timely appeal from a December 7, 2012 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 this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits effective July 30, 2011 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on June 4, 2009 appellant, then a 48-year-old tax examiner, tripped over a desk in the performance of duty and sustained injuries to her back, knees and ankle. It accepted her claim for lumbosacral sprain, left ankle sprain and contusion of both legs. Appellant stopped work on June 4, 2009. OWCP paid wage-loss compensation. Appellant was placed on the periodic rolls and treated by Dr. Gary Oxenberg, an internist.

In a July 20, 2009 report, Dr. Robert E. Liebenberg, a Board-certified orthopedic surgeon, noted that appellant sustained an injury at work and had been out of work since early June 2009. Appellant related that her back pain bothered her the most, but it had improved over the past six to seven weeks. Upon examination, Dr. Liebenberg observed normal gait and normal posture. He stated that appellant would not or could not move her back in any direction without complaining of pain. Straight leg raise testing was negative and her neurological examination revealed intact sensation, symmetrical reflexes and normal strength. Dr. Liebenberg reported that x-rays revealed some degree of degenerative disc disease. He opined that appellant's back pain may be related to her degenerative disc disease and noted that she had signs of symptom magnification. Dr. Liebenberg explained that she could have sprained her back superimposed on her degenerative condition.

On November 26, 2010 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second-opinion examination to determine the extent of her continuing employment-related residuals and disability. In a December 29, 2010 report, Dr. Smith related her complaints of axial low back pain that was aggravated with walking and standing and residual left ankle pain. He reviewed the statement of accepted facts and noted that appellant's claim had been accepted for soft tissue sprains of the lumbosacral spine and left ankle and contusion of the left lower leg. Dr. Smith provided an accurate history of the June 4, 2009 employment injury and reviewed her records. Appellant's medical records indicated that she had been diagnosed with degenerative disease of the spine by Dr. Liebenberg in July 2009. Dr. Smith stated that she was not currently receiving any active treatment but was recently admitted to the hospital from December 5 to 8, 2010 for asthma and back pain.

Upon examination, Dr. Smith observed no findings of any spasm, atrophy, trigger points or deformity. Active thoracolumbar range of motion was satisfactory without spasm or rigidity but she had complaints of discomfort with extension of spine. Examination of appellant's left ankle revealed no evidence of any swelling or deformity and satisfactory range of motion and strength. Dr. Smith found that she had fully recovered from her accepted conditions of lumbosacral sprain, left ankle sprain and contusions of the lower extremities and no longer had residuals related to these conditions. Appellant's current complaint of low back pain was reasonably related to her nonindustrial-related degenerative disease, which was not caused or aggravated by the June 4, 2009 employment incident. Dr. Smith concluded that appellant's conditions related to the June 4, 2009 employment incident had resolved and that she could return to regular duty.

In a December 22, 2010 report, Dr. Liebenberg noted appellant's complaints of chronic low back pain and some pain in her left ankle and foot. He related that he examined her in

July 2009 and found some degree of degenerative disc disease. Dr. Liebenberg reported that physical therapy had not improved appellant's condition. He stated that her physical examination did not reveal objective abnormalities and referred her to pain management.

In a December 22, 2010 diagnostic report, a Dr. Scott Haber noted appellant's complaints of low back pain. He observed normal lumbar vertebrae and no significant intervertebral disc space narrowing. Dr. Haber reported mild osteophyte formation at the anterior endplates of the lumbar spine extending from L2 to L4. He also found sclerosis and narrowing at the facets of L5-S1 consistent with mild facet osteoarthritis. Dr. Haber diagnosed degenerative changes of the lumbar spine.

In a January 5, 2011 magnetic resonance imaging (MRI) scan report, Dr. Ryan Lee, a Board-certified diagnostic radiologist, noted appellant's complaints of low back pain radiating down the left. He stated that alignment was anatomic. Dr. Ryan Lee noted preservation of vertebral body heights in the lumbosacral spine and preservation of intervertebral disc heights in the lumbosacral spine. He observed mild bilateral facet hypertrophy with mild right-sided foraminal narrowing at L5-S1. Dr. Ryan Lee diagnosed mild degenerative changes of the lower lumbar spine with mild foraminal stenosis at L4-5 and L5-S1, greater on the left and probable cyst in the right kidney.

In a January 24, 2011 office note, Dr. Liebenberg reviewed the MRI scan and noted the presence of degenerative disc disease and possible foraminal irritation at L4-5 and L5-S1. Dr. Liebenberg stated that appellant was not a candidate for surgery and recommended pain management.

In a February 14, 2011 report, Dr. Deepak Mehrotra, a Board-certified anesthesiologist who specializes in pain management, related appellant's complaints of severe pain in the lower back and neck radiating into her lower extremities that she attributed to a June 4, 2009 fall at work. A June 17, 2009 MRI scan revealed mild osteophyte formation at the endplates of the lumbar spine extending from L2 to L4 and sclerosis and narrowing of the facets of L5-S1, consistent with mild facet osteoarthritis. Upon examination, Dr. Mehrotra observed tenderness in the cervical and lumbar spinous processes and right side facet column tenderness in the lumbar spine. He noted limited thoracolumbar flexion and extension and limited and painful cervical range of motion. Straight leg raise texting was negative. Dr. Mehrotra diagnosed lumbar spondylosis, cervical spondylosis, lumbar facet arthropathy and lumbar radiculitis. He opined that appellant's pain was multifactorial and originated from radiculitis, cervical/lumbar spine and lumbar facet arthropathy.

In April 14, 2011 hospital records, Dr. Mehrotra noted that appellant was treated for lumbosacral spondylosis without myelopathy, essential hypertension, asthma and panic disorder. He administered steroid injections.

OWCP found a conflict in medical opinion between Dr. Smith, the second-opinion examiner, and Drs. Oxenberg and Liebenberg, appellant's treating physicians, as to whether she had any continuing residuals or disability due to her accepted employment injuries. On April 14, 2011 it referred her, together with a statement of accepted facts and the medical record, to Dr. Bong S. Lee, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a May 5, 2011 report, Dr. Bong Lee reviewed an accurate history of appellant's June 4, 2009 employment injury and subsequent medical treatment. He noted her current complaints of constant pain in the low back that increased with movement and that her left ankle did not feel smooth. Upon examination, Dr. Lee observed normal curvature of the lumbosacral spine. He noted that forward bending was performed cautiously and with a complaint of pain. Hyperextension was poorly performed and lateral bending to each side showed no segmental restriction of motion. Dr. Lee stated that both lower extremities were symmetrical in the supine position with no gross deformity. He observed minimal tenderness on palpation of the spinous process and the paravertebral muscles, but no tenderness of the sciatic notch or root of the sciatic nerve. Straight leg raise testing was negative. Dr. Lee reported that neurological examination of the lower extremities revealed no sensory deficit or motor weakness and no pathological reflexes. Deep tendon reflexes of the knees and ankles were present and symmetric bilaterally. Dr. Lee reviewed appellant's records and noted that a June 17, 2009 x-ray showed mild degenerative changes of the lumbar spine with mild sclerosis of the facet joints with facet osteoarthritis and minimum osteophytes. An MRI scan of the lumbar spine also revealed mild degenerative changes of the lower lumbar spine with mild foraminal stenosis at L4-5 and L5-S1, greater on the left. Dr. Lee diagnosed resolved sprains of the low back and left ankle and contusions of the lower extremities and degenerative discogenic disease of the lumbosacral spine. He opined that appellant's accepted June 4, 2009 injuries had resolved and that she was recovered with no disability. Dr. Lee stated that her present symptoms were most likely associated with degenerative disc disease of the lumbar spine, which was not caused by the June 4, 2009 incident, but was part of the normal aging process. He concluded that her present diagnostic studies and current treatment were not the result of the June 4, 2009 incident, but due to the underlying degenerative disc disease of the lumbar spine.

On May 5, 2011 OWCP issued a notice of proposed termination of appellant's compensation and medical benefits based on Dr. Lee's May 5, 2011 medical report. Appellant was advised that she had 30 days to submit additional relevant evidence or argument if she disagreed with the proposed action.

In an undated report and admission records, Dr. Mehrotra noted a diagnosis of lumbar radiculitis and lumbar spondylosis and administered steroid injections.

By decision dated July 14, 2011, OWCP terminated appellant's compensation benefits effective July 30, 2011. It found that Dr. Lee's May 5, 2011 report represented the weight of the medical evidence and established that her accepted conditions had ceased. Appellant no longer had any residuals or disability causally related to her accepted employment injuries.

In a July 5, 2012 letter, appellant, through counsel, submitted a request for reconsideration. He stated that a June 28, 2012 report by Dr. Mehrotra created a conflict in medical opinion with Dr. Lee's opinion. In the June 28, 2012 report, Dr. Mehrotra related appellant's complaints of low back and neck pain and accurately described the June 4, 2009 employment injury. He stated that her pain became progressively worse since her fall and eventually led to paresthesis of the lower extremities, left more than right. Dr. Mehrotra reviewed her history and noted that an MRI scan of the lumbar spine revealed mild osteophyte formation at the anterior endplates of the lumbar spine extending from L2 to L4. He reported that there was sclerosis and narrowing of the facets of the L5-S1 consistent with facet

osteoarthritis. Dr. Mehrotra administered various steroid and facet joint injections and lumbar radiofrequency neurotomy of the facet joint nerve.

Upon examination, Dr. Mehrotra observed normal toe and heel walking and negative sensory examination. He noted tenderness in the cervical and lumbar spinous processes and in the lumbar facet column present on the right side. Straight leg raise testing was negative. Hoffman and Spurling's tests were also negative. Dr. Mehrotra reported that range of motion of the cervical spine was painful and somewhat limited in rotation bilaterally. He diagnosed lumbar and cervical radiculitis, lumbar discogenic pain because of internal disc disruption and lumbar facet arthropathy. Dr. Mehrotra disagreed with Dr. Lee's opinion. He stated within a reasonable degree of medical certainty that the June 4, 2009 incident caused appellant to have discogenic pain due to disc injury from her fall at work. Although appellant had chronic degenerative disc disease, the June 4, 2009 incident was responsible for her pain because she did not have pain prior to the incident. He stated that appellant's June 4, 2009 employment injury was responsible for her severe back pain because of severe aggravation of a prior degenerative condition leading to radiculitis in the lower extremities and internal disc disruption. Dr. Mehrotra stated that appellant would be very limited in her functions because she was unable to sit or stand for prolonged periods of time.

By decision dated December 7, 2012, OWCP denied modification of the July 14, 2012 decision terminating appellant's compensation benefits.

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 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

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

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

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

shall make an examination.[7] 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.[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]

ANALYSIS

OWCP accepted that on June 4, 2009 appellant sustained lumbosacral sprain, left ankle sprain and contusion of the bilateral legs in the performance of duty. Appellant stopped work and was placed on the periodic rolls. In a decision dated July 14, 2011, OWCP terminated her compensation benefits based on the May 5, 2011 report of the impartial medical examiner, Dr. Lee. The Board finds that it properly terminated appellant's compensation benefits effective July 30, 2011 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

OWCP found that a conflict in medical opinion between appellant's physicians, Drs. Oxenberg and Liebenberg, who determined that she had residuals from her work-related injuries and Dr. Smith, the second-opinion examiner, who found that her work-related injuries had resolved. It referred her to Dr. Lee to resolve the conflict. In his May 5, 2011 report, Dr. Lee provided an accurate history of injury and reviewed appellant's medical records. He noted that a June 17, 2009 x-ray demonstrated mild degenerative changes of the lumbar spine with facet osteoarthritis and minimum osteophytes and an MRI scan report demonstrated degenerative changes of the lower lumbar spine with mild foraminal stenosis at L4-5 and L5-S1. Upon examination, Dr. Lee observed minimal tenderness on palpation of the spinous process and the paravertebral muscles, but no tenderness of the sciatic notch or root of the sciatic nerve. Straight leg raise testing was negative. Dr. Lee reported that neurological examination of the lower extremities revealed no sensory deficit or motor weakness and no pathological reflexes. Deep tendon reflexes of the knees and ankles were present and symmetric bilaterally. Dr. Lee opined that appellant's June 4, 2009 employment injuries had resolved and that she had fully recovered with no disability. He explained that her present symptoms were most likely associated with degenerative disc disease of the lumbar spine and not the June 4, 2009 employment incident.

The Board finds that Dr. Lee's May 5, 2011 report is sufficiently detailed and well reasoned to constitute the weight of the medical opinion evidence. When there exist 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

[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).

weight.[10] Dr. Lee reviewed appellant's history and accurately described the June 4, 2009 employment injury. He conducted an examination and found that the physical findings did not establish that she continued to suffer residuals or disability from her work-related injuries. Dr. Lee determined that appellant's present symptoms were a result of her degenerative disc disease and the normal aging process. The Board finds that his opinion represents the special weight of medical opinion evidence. Accordingly, Dr. Lee's opinion constitutes the special weight of evidence and is sufficient to justify OWCP's termination of wage-loss compensation benefits for the accepted conditions.

The Board further finds that the medical evidence submitted after Dr. Lee's independent medical evaluation report is insufficient to overcome the weight of his report or to create a conflict in medical evidence. The June 28, 2012 report of Dr. Mehrotra stated that her current neck and back pain was causally related to the June 4, 2009 employment injury because it caused a severe aggravation of a prior degenerative condition. Dr. Mehrotra explained that, although she suffered from a degenerative lumbar disc disease, the June 4, 2009 employment incident was the cause of her pain because she did not have pain prior to the incident. The Board has noted, however, that an opinion that a condition is causally related because the employee was asymptomatic before the injury is insufficient, without sufficient rationale, to establish causal relationship.[11] Dr. Mehrotra's opinion is insufficient to overcome the special weight accorded to Dr. Lee's report as the impartial medical examiner or to create a new conflict.

On appeal, appellant's counsel contends that OWCP's decision was based on flawed findings of fact and conclusions of law. The Board finds that the weight of medical opinion as represented by Dr. Lee supports OWCP's decision to terminate appellant's wage-loss and compensation benefits. The medical evidence from Dr. Mehrotra is not sufficient to establish continuing residuals or disability related to her accepted work-related injuries.

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 met its burden of proof to terminate appellant's compensation and wage-loss benefits effective July 30, 2011.

[10] *Id.*

[11] *T.M.*, Docket No. 08-975 (issued February 6, 2009); *Michael S. Mina*, 57 ECAB 379 (2006).

ORDER

IT IS HEREBY ORDERED THAT the December 7, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 1, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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