

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

G.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Columbus, OH, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 12-1571
Issued: January 25, 2013**

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
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 16, 2012 appellant filed a timely appeal from the June 26, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her compensation. 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 met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective January 27, 2012 on the grounds that she had no residuals of her February 17, 2009 work injury after that date.

FACTUAL HISTORY

OWCP accepted that on February 17, 2009 appellant, then a 42-year-old distribution clerk, sustained an acute lumbosacral strain and aggravation of bulging discs at L4-5 and L5-S1

¹ 5 U.S.C. §§ 8101-8193.

due to carrying and setting a box down on the floor at work.² She stopped work on February 17, 2009 and received compensation for total disability.

Appellant received treatment for her back condition from Dr. Charles J. Kistler, an attending osteopath and Board-certified family practitioner. In an April 19, 2010 report, Dr. Kistler diagnosed acute lumbar sprain/strain and aggravation of fibromyalgia at L5 and indicated that her February 17, 2009 injury caused total disability from February 17 to August 11, 2010. In an August 12, 2010 report, he stated that appellant's February 17, 2009 injury caused her to be totally disabled from February 17, 2009 to December 11, 2010.

OWCP referred appellant to Dr. David K. Halley, a Board-certified orthopedic surgeon, for an examination and opinion regarding whether she had continuing residuals of her February 17, 2009 work injury.

In a September 3, 2010 report, Dr. Halley provided a history of appellant's injury and findings on examination. He indicated that straight leg testing was normal and that she did not exhibit any spasms in her back. Sensory testing in appellant's legs elicited normal responses. Dr. Halley found that the accepted conditions of acute lumbosacral strain and aggravation of bulging discs at L4-5 and L5-S1 had resolved. He indicated that appellant was medically capable of returning to her date-of-injury job without restrictions.

A copy of Dr. Halley's report was forwarded to Dr. Kistler for review and comment. On October 13, 2010 Dr. Kistler provided an opinion that appellant remained totally disabled from work. He discussed diagnostic testing of record showing bulging lumbar discs and stated that, although the lumbar strain did not keep her from working, the aggravated bulging discs at L4-5 and L5-S1 required continuation of physical therapy and further diagnostic evaluation. Dr. Kistler posited that maximum medical improvement had not been reached.

Due to a conflict in the medical opinion evidence between Dr. Kistler and Dr. Halley regarding work-related residuals, OWCP referred appellant to Dr. Ralph G. Rohner, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether she had residuals of her February 17, 2009 work injury.³

In a March 8, 2011 report, Dr. Rohner described appellant's medical history, including the treatment of her February 17, 2009 injury and reported his findings on physical examination. He indicated that on examination she had a blunted affect and avoided direct eye contact. Dr. Rohner reported that there was no shift in appellant's position and that her gait was slow and deliberate but not antalgic. He indicated that her spine was straight and that her pelvis was level. Appellant had normal ankle reflexes and normal findings on sensory examination of her legs. Dr. Rohner summarized the reports of attending physicians and noted that she reported complaints of back pain with essentially every visit and was prescribed medication. Although attending physicians referred to lumbar fibromyalgia and lumbosacral strain, he was unable to

² While setting the box down on the floor, appellant felt something pull in her back and dropped the box.

³ Dr. Rohner was provided with surveillance tapes, obtained by the employing establishment, which showed appellant engaging in activities such as shopping.

find any true physical examination findings. Dr. Rohner summarized the surveillance videos which he indicated showed appellant shopping while carrying bags that were not of great size.⁴ He indicated that, based on a review of her complete case file and the physical examination findings, she had degenerative lumbar joint disease and degenerative lumbar disc disease which were preexisting conditions. Dr. Rohner indicated that the preexisting nature of these conditions was supported by the diagnostic testing of record. He opined that there were no objective findings of the accepted conditions of acute lumbosacral strain and an aggravation of bulging discs at L4-5 and L5-S1 and posited that appellant's continuing problems were due to her preexisting conditions. Concerning appellant's ability to work, Dr. Rohner stated that she was deconditioned because she had not worked for two years and posited that it would be improper to send her back to work without therapy and a reconditioning program. He indicated that therapy and reconditioning were needed due to appellant's preexisting conditions rather than her accepted work injuries.

On March 23, 2011 OWCP requested an addendum report from Dr. Rohner specifying the frequency and duration of the physical therapy and reconditioning programs he recommended. On March 25, 2011 Dr. Rohner indicated that appellant be referred to a facility providing these programs and noted that, when the evaluation was completed, the facility would need to provide such details. After completing the programs, a final evaluation would be needed to address the permanency of any restrictions.

By letter dated April 11, 2011, OWCP informed appellant that she was being referred for vocational rehabilitation services to assist in providing the recommended therapy and reconditioning services.

On September 20, 2011 OWCP forwarded copies of all documentation received since March 25, 2011 for Dr. Rohner to review. It requested an addendum report which addressed if and when appellant could return to work and the necessity of continuing the therapy and reconditioning programs. Dr. Rohner responded that he would have to reexamine appellant before providing a response and the reexamination took place on October 17, 2011.

In an October 17, 2011 report, Dr. Rohner indicated that appellant had undergone two separate programs of therapy. He noted that during the present examination she was more alert and faced the examiner more directly compared to the previous examination. Dr. Rohner noted that, upon review of the new evidence provided and based on the physical examination findings compared to appellant's previous examination, there appeared to be little change in her condition. He noted that, during the course of her therapy, she increased her range of motion to an almost normal level only to revert back to the level found during each of his examinations. Dr. Rohner recommended that appellant continue with physical therapy through the end of the year and progressively increase its difficulty. He stated that a functional capacity evaluation was definitely needed to establish what she could achieve. Dr. Rohner again opined that appellant's inability to work was due to deconditioning and preexisting conditions rather than the accepted work injuries.

⁴ According to Dr. Rohner, the videos did not show any antalgic gait, facial evidence of pain or hesitancy in movements. They showed appellant entering and exiting motor vehicles without any apparent difficulty and raising and lowering the tailgate of her vehicle without any apparent difficulty.

In a November 7, 2011 report, Dr. Kistler updated his assessment of appellant's condition since beginning the physical therapy program. He diagnosed lumbosacral strain and aggravation of bulging discs at L4-5 and L5-S1, conditions which he felt were extremely symptomatic. Dr. Kistler summarized appellant's progression through physical therapy, but posited that she was not ready for a functional capacity evaluation yet because she was not at maximum medical improvement. He expressed disagreement with Dr. Rohner's opinion regarding the cause and seriousness of appellant's medical condition. Dr. Kistler indicated that appellant could not engage in any type of progressive return to work without first completing the therapy and work conditioning programs.

In a December 16, 2011 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she ceased to have residuals of her February 17, 2009 work injury. It indicated that it based this proposed action on the opinion of Dr. Rohner, the impartial medical specialist. OWCP provided appellant 30 days to submit evidence and argument challenging the proposed termination.

In response to the proposed termination, OWCP received a letter from appellant disagreeing with its proposed action. Appellant also submitted treatment notes from Dr. Kistler, dated between December 2011 and January 2012.

In a January 23, 2012 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective January 28, 2012 on the grounds that she had no residuals of her February 17, 2009 work injury after that date.

Appellant disagreed with the decision and requested an oral hearing before an OWCP hearing representative. At the hearing held on April 11, 2012, she was represented by counsel and Dr. Kistler testified on her behalf. Dr. Kistler indicated that appellant's herniated discs were directly and proximately related to the February 17, 2009 injury she sustained at work and posited that the condition had not resolved. He stated that, no matter how successfully her therapy proceeded, she was never going to be able to return to the full range of her job duties. Appellant testified that she continued to suffer from the effects of the accepted work injury.

Subsequent to the hearing, OWCP received statements from appellant dated January 10 and May 23, 2012 and medical reports from Dr. Kistler dated from February 2011 to January 2012.

In a June 26, 2012 decision, OWCP's hearing representative affirmed OWCP's January 23, 2012 termination decision. She found that the weight of the medical opinion evidence regarding appellant's lack of work-related residuals continued to rest with the opinion of Dr. Rohner.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁵ OWCP may not terminate compensation

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

without establishing that the disability ceased or that it was no longer related to the employment.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Section 8123(a) of FECA provides in pertinent part: "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."⁸ In situations where 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 weight.⁹

OWCP frequently provides videotape investigative evidence created or supplied by the employing establishment.

Under certain circumstances, videotape evidence may be of value to a physician offering an opinion regarding a claimant's medical condition. It may reflect on the patient's reliability as a historian or on the actual ranges of motion, lifting or other physical activities the claimant may perform. However, a videotape may be incorrect or misleading to a physician if there are errors, such as the identity of individual recorded on the videotape or whether certain activities were facilitated by the use of medication. OWCP has the responsibility to make the claimant aware that it is providing videotape evidence to a medical expert. If the claimant requests a copy of the videotape, one should be made available and the employee given a reasonable opportunity to offer any comment or explanation regarding the accuracy of the recording.¹⁰

ANALYSIS

OWCP properly determined that there was a conflict in the medical opinion between Dr. Kistler, an attending osteopath and Board-certified family practitioner and Dr. Halley, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether appellant continued to have residuals of the February 17, 2009 employment injury. In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Rohner, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.¹¹

⁶ *Id.*

⁷ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ 5 U.S.C. § 8123(a).

⁹ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁰ *J.M.* 58 ECAB 478 (2007), *F.S.* Docket No. 11-863 (issued September 26, 2012).

¹¹ *See supra* note 8 and accompanying text. In several reports dated in mid 2010, Dr. Kistler stated that appellant's February 17, 2009 work injury caused her to be totally disabled beginning February 17, 2009 and continuing. In contrast, Dr. Halley indicated on September 3, 2010 that appellant had no residuals of the February 17, 2009 work injury.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Rohner, the impartial specialist, selected to resolve the conflict in the medical opinion.¹² The March 8, 25 and October 17, 2011 reports of Dr. Rohner establish that appellant had no disability due to her February 17, 2009 work injury after January 27, 2012.

In his reports, Dr. Rohner provided a detailed description of appellant's medical history and reported his findings on physical examination. He indicated that her spine was straight and that her pelvis was level. Appellant had normal ankle reflexes and normal findings on sensory examination of her legs. Although attending physicians referred to lumbar fibromyalgia and lumbosacral strain, Dr. Rohner was unable to find any true physical examination findings. He indicated that, based on a review of appellant's complete case file and the physical examination findings, she had degenerative lumbar joint disease and degenerative lumbar disc disease which were preexisting conditions. Dr. Rohner indicated that the preexisting nature of these conditions were supported by the diagnostic testing of record. He opined that there were no objective findings of the accepted conditions of acute lumbosacral strain and an aggravation of bulging discs at L4-5 and L5-S1 and posited that appellant's continuing problems were due to her preexisting conditions.

The Board has carefully reviewed the opinion of Dr. Rohner and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Rohner provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹³ He provided medical rationale for his opinion by explaining that he could find no objective evidence on examination of appellant's February 17, 2009 work injuries. Moreover, Dr. Rohner explained that her continuing problems were related to her preexisting conditions, including degenerative lumbar joint disease and degenerative lumbar disc disease. Appellant's need for physical therapy and reconditioning were due to these nonwork conditions. The Board notes that Dr. Rohner reviewed surveillance videos of appellant's activities outside of work, but there is no evidence that he mischaracterized the content of the videos or was unduly influenced by the videos in rendering his opinion. Appellant has not raised an objection to Dr. Rohner's report based on the doctor's exposure to the video evidence. She has not sought any particular relief in this appeal based on him having viewed the video. The record is silent on whether appellant knew of the existence of the video evidence.

Appellant submitted a number of reports, including a November 7, 2011 report and numerous treatment notes, in which Dr. Kistler indicated that she continued to have disabling residuals of her February 17, 2009 work injuries. Dr. Kistler provided a similar opinion at the April 11, 2012 hearing before an OWCP hearing representative. However, as Dr. Kistler was on one side of the conflict, his additional evidence is essentially duplicative of his prior stated opinion and is insufficient to give rise to a new conflict.¹⁴

¹² See *supra* note 9 and accompanying text.

¹³ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹⁴ See *Richard O'Brien*, 53 ECAB 234 (2001).

For these reasons, OWCP properly terminated appellant's compensation effective January 27, 2012. 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 effective January 27, 2012 on the grounds that she had no residuals of her February 17, 2009 work injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the June 26, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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