United States Department of Labor
Employees' Compensation Appeals Board

D.R., Appellant	)	
and	)	**Docket No. 12-1697**
	)	**Issued: January 29, 2013**
U.S. POSTAL SERVICE, POST OFFICE, Lapeer, MI, Employer	)	

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
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 31, 2012 appellant, through her attorney, filed a timely appeal from February 24 and July 17, 2012 merit decisions 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 February 24, 2012 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

On appeal, appellant's counsel contends that OWCP's decision was contrary to fact and law.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on March 22, 2008 appellant, then a 41-year-old rural mail carrier, sustained a lower back injury when she lifted trays of mail while loading her vehicle. Appellant stopped work and returned to limited duty. Her claim was accepted for thoracic and lumbar strains. Appellant stopped work on September 22, 2009 and received disability compensation.

On June 22, 2011 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second-opinion examination to determine the extent of her continuing employment-related residuals and disability. In a July 11, 2011 report, Dr. Obianwu noted appellant's complaints of low back pain and muscle spasms in the mid-thoracic area that radiated to the front and down the right lower extremity. He reviewed the statement of accepted facts and her medical records and provided an accurate history of injury. Upon examination, Dr. Obianwu observed minimal tenderness down the midline from the top of the thoracic spine to the tailbone and mild discomfort with deep palpation. He did not find any sensory changes in the lower extremities or tightness of the muscles of the cervical, lumbar or thoracic spine. Extension of appellant's thoracolumbar spine was 15 degrees. Lateral bending to the right was 10 degrees and to the left was 15 degrees. Appellant had full range of motion in the neck. Deep tendon reflexes were equal bilaterally and straight leg raising test was negative bilaterally.

Dr. Obianwu reviewed appellant's diagnostic reports and noted that they revealed mild degenerative changes in the spine and minimal central disc bulge at T10-11. He diagnosed chronic mid and lower back pain, mild bulging disc, resolved soft tissue injuries of the thoracic and lumbar spine and resolved thoracic and lumbar strains. Regarding appellant's accepted injuries for thoracic and lumbar strains, Dr. Obianwu stated that his examination findings did not support that she suffered from active residuals of either strain.[2] He determined that the diagnostic reports revealed degenerative changes of the thoracic spine and bulging discs, but explained that they were not caused by a specific accident or incident. Dr. Obianwu opined that the March 22, 2008 work injury did not cause or contribute to appellant's degenerative changes and concluded that she did not have any active residuals of the March 22, 2008 employment injury. He reported that she was able to return to work and found no indication for continued treatment.

In reports dated July 22 to November 1, 2011, Dr. Robert Bouvier, an internist, noted appellant's complaints of cervical and mid thoracic pain for several years and decreased range of motion. Upon examination, he observed trigger points along the low back and tenderness in the mid thoracic spine. Dr. Bouvier diagnosed radiculopathy, herniated disc and mild-to-moderate degenerative changes. He explained that the degenerative changes worsened after the March 22, 2008 work-related injury and that the disc herniation and thoracic radiculopathy occurred after the March 22, 2008 employment incident. Dr. Bouvier reported that the previous impartial medical examiner, physicians and physical therapists agreed with his assessment. He reviewed Dr. Obianwu's report and disagreed with his findings. Dr. Bouvier noted that Dr. Obianwu

[2] Dr. Obianwu noted that appellant did not have tightness of the muscles in her lumbar or thoracic spine, any asymmetry of the lumbar or thoracic spine and no swelling.

contradicted himself because he denied the existence of appellant's musculoskeletal problems but also stated that they were degenerative in nature.

OWCP determined that there was a conflict in medical opinion between Dr. Obianwu and Dr. Bouvier as to whether appellant had any continuing residuals or disability due to her accepted employment injuries. On October 20, 2011 it referred appellant, together with a statement of accepted facts and the medical record, to Dr. Zachary Endress, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an October 31, 2011 report, Dr. Endress provided an accurate history of injury and noted appellant's complaints of pain about the T10-11 area, numbness and pain from the lower back area down to the foot and some numbness in her hand and right forearm. He reviewed her history and found that a June 29, 2009 magnetic resonance imaging (MRI) scan report demonstrated diffuse disc osteophyte complex but no disc herniation or spinal canal stenosis. An MRI scan of the thoracic spine revealed minor disc bulging and a small left foraminal herniated disc.

Upon examination, Dr. Endress observed full range of motion in the cervical spine including lateral rotation, lateral flexion, forward flexion and extension. He found that appellant's thoracic spine appeared normal with no list or paraspinous muscle spasm on inspection or palpation. Dr. Endress also reported that there was no deformity such as gibbus formation or scoliosis in the thoracolumbar spine. Straight leg raising and Patrick's test were negative bilaterally. Dr. Endress opined that appellant had fully recovered from her injury and found that there were no objective physical findings to explain her continuing complaints of pain. He reported that she could return to her normal work activities without restriction.

In a November 5, 2011 work capacity evaluation, Dr. Endress found that appellant was able to work 8 hours a day with two 15 minute breaks.

On November 28, 2011 OWCP issued a notice of proposed termination of appellant's disability compensation and medical benefits based on Dr. Endress' October 31, 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 reports dated December 2, 6 and 20, 2011, Dr. Bouvier noted appellant's complaints of mid thoracic and cervical pain for years with mid back pain being the worse. He reported decreased range of motion, radicular leg pain down the right leg and stabbing back and mid-thoracic pain. Dr. Bouvier stated that appellant's low cervical and upper thoracic conditions were getting worse as time went by. He conducted an examination and diagnosed chronic pain syndrome, herniated disc spine, osteophyte complex, mild-to-moderate degenerative changes of the lumbar spine and radiculopathy. Dr. Bouvier opined that appellant's musculoskeletal issues would not improve to the point where she could work. He stated that she was at maximum potential and may benefit from work hardening. Dr. Bouvier disagreed with Dr. Endress's findings and with OWCP for finding that their physicians were right in their assessment.

In a December 29, 2011 MRI scan report, Dr. William C. Melton, a Board-certified diagnostic radiologist, observed mild loss in disc height and mild right neuroforaminal narrowing

at the C5-6 and normal vertebral body height in appellant's lumbar spine. He also found right paracentral C5-6 extruded, right C6-7 paracentral disc protrusion without cord effacement and neuroforaminal narrowing. Regarding her thoracic spine, Dr. Melton observed minor disc bulging at the T3-4 and T10-11. He diagnosed tiny left T7-8 foraminal disc protrusion without exiting nerve root impingement, minor disc bulging and facet degenerative changes.

In a February 8, 2012 report, Dr. Henry Hagenstein, a neurologist, provided an accurate history of injury and noted appellant's complaints of constant back pain, with the most severe pain in the mid-thoracic region. He related that she initially thought she had a lumbar sprain but further diagnostic studies revealed a herniated disc. Dr. Hagenstein reviewed appellant's medical records and conducted an examination. Her musculoskeletal examination was positive for back pain, limb pain and myalgias. Range of motion of the neck in flexion, extension, rotation and lateral flexion was normal for her age. Dr. Hagenstein diagnosed lumbar disc herniation, chronic low back pain, neck pain, right arm pain and disc herniation.

In a February 13, 2012 electromyography (EMG) examination, Dr. Hagenstein stated that the study was considered normal. He reported that the disc herniation did not result in an overt axonal injury to the cervical nerve root and there was no evidence for a peripheral nerve entrapment such as a carpal or cubital tunnel syndrome.

In a decision dated February 24, 2012, OWCP finalized the termination of appellant's compensation benefits effective February 24, 2012. It found that Dr. Endress's October 31, 2011 report represented the weight of the medical evidence in establishing that her accepted conditions had ceased and that she no longer had any residuals or disability causally related to her accepted employment injuries.

On February 27, 2012 appellant, through counsel, requested a telephone hearing, which was held on May 15, 2012. Counsel contended that OWCP was being absolutely dismissive of appellant's physician who reported that she was still symptomatic from the March 22, 2008 work-related injury. Appellant testified that she had not worked for anyone other than the employing establishment and that she did not suffer any traumatic injury other than the March 22, 2008 employment injury. She related that she continued to suffer from back pain that came from the mid back to the front and radiated down the right side of her leg, arms and lower back.

In a February 22, 2012 EMG report, Dr. Hagenstein observed that several muscles on the right side that had L4-5 as a common nerve root revealed positive sharp waves and fibrillation potentials although recruitment and interference appeared normal. A nerve conduction study revealed normal motor and sensory nerves. Dr. Hagenstein stated that the study was considered abnormal and noted findings compatible with mid L4-5 radiculopathy. He also resubmitted his February 8, 2012 report.

In February 21 and 28, 2012 reports, Dr. Bouvier noted appellant's complaints of mid thoracic and cervical pain that was unchanged for years and worsening low cervical and upper thoracic pain. He observed decreased range of motion in the same areas, radicular leg pain down the right leg and stabbing back and mid-thoracic pain. Dr. Bouvier repeated his diagnoses of chronic pain syndrome, radiculopathy of LS spine and thoracic spine, herniated disc and mild-to-

moderate degenerative changes. He stated that OWCP's lawyer stated that appellant could go back to work, but he disagreed because it would make her conditions worse.

Appellant also resubmitted several diagnostic reports.

By decision dated July 17, 2012, OWCP's hearing representative affirmed the February 24, 2012 termination decision finding that the medical evidence established that appellant's accepted conditions had ceased and that she no longer had any residuals or disability causally related to her accepted employment injuries.

LEGAL PRECEDENT

Pursuant to FECA, once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.[3] OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[4] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[6] 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.[7]

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 shall make an examination.[8] 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.[9] 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

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

[4] *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

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

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

[7] *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

[8] 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).

[9] 20 C.F.R. § 10.321.

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[10]

ANALYSIS

OWCP accepted that on March 22, 2008 appellant sustained thoracic and lumbar strains in the performance of duty. She was on and off work but has not returned since September 22, 2009. Appellant received disability compensation. In a decision dated February 24, 2012, OWCP terminated her compensation benefits based on the report of the impartial medical examiner, Dr. Endress. The Board finds that it properly terminated appellant's compensation benefits effective February 24, 2012 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

OWCP had found that a conflict in medical opinion existed between appellant's attending physician, Dr. Bouvier, who determined that appellant continued to suffer residuals from her work-related injuries, and Dr. Obianwu, an OWCP referral physician, who found that appellant was no longer disabled due to her work-related injuries. It referred appellant to Dr. Endress to resolve the conflict. In his October 31, 2011 report, Dr. Endress provided an accurate history of injury and reviewed appellant's medical records. He noted that a June 29, 2009 MRI scan report demonstrated diffuse disc osteophyte complex but no disc herniation or spinal canal stenosis. Upon examination, Dr. Endress observed full range of motion in the cervical spine including lateral rotation, lateral flexion, forward flexion and extension. He found that appellant's thoracic spine appeared normal with no list or paraspinous muscle spasm on inspection or palpation. Dr. Endress also reported that there was no deformity such as gibbus formation or scoliosis in the thoracolumbar spine. Straight leg raising and Patrick's test were negative bilaterally. Dr. Endress opined that appellant had fully recovered from her injury and found that there were no objective physical findings to explain her continuing complaints of pain. He concluded that she could return to her normal work activities without restriction.

The Board finds that Dr. Endress' October 31, 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 weight.[11] Dr. Endress reviewed appellant's history and accurately described the March 22, 2008 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. The Board finds that Dr. Endress' opinion represents the special weight of medical opinion evidence. Accordingly, Dr. Endress' opinion constitutes the special weight of evidence and is sufficient to justify OWCP's termination of wage-loss and compensation benefits for the accepted conditions.

[10] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[11] *Supra* note 10.

The Board further finds that the medical evidence submitted after Dr. Endress' independent medical evaluation report was insufficient to overcome the weight of this report or to create another conflict in medical evidence. Appellant submitted various reports by Dr. Bouvier stating that she continued to suffer symptoms from her March 22, 2008 work-related injuries and was unable to work. Because Dr. Bouvier was on one side of the conflict which Dr. Endress' resolved the additional reports are insufficient to overcome the weight accorded Dr. Endress' report as the impartial medical examiner or to create a new conflict.[12]

Appellant also submitted reports by Dr. Hagenstein, who reviewed her history and noted that diagnostic studies revealed a herniated disc. Upon examination, Dr. Hagenstein observed that her musculoskeletal was positive for back pain, limb pain and myalgias. He diagnosed lumbar disc herniation, chronic low back pain, neck pain, right arm pain and disc herniation. The Board finds, however, that Dr. Hagenstein's report is of limited probative value as he offers no opinion on the cause of appellant's lumbar disc herniation nor does he relate her disc herniation or other back conditions to the March 22, 2008 work-related injury.[13] Similarly, the diagnostic reports of Dr. Melton are also of limited probative value as he provides no opinion on whether appellant's back conditions are causally related to her March 22, 2008 injuries. Thus, these reports are insufficient to overcome the special weight afforded to Dr. Endress's impartial medical examination report. The Board finds that Dr. Endress's opinion continues to constitute the special weight of medical opinion and supports OWCP's decision to terminate appellant's wage-loss and compensation benefits. There is no other medical evidence contemporaneous with the termination of appellant's benefits which supports that she has any 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 medical benefits effective February 24, 2012.

[12] *Dorothy Sidwell*, 41 ECAB 857 (1990).

[13] *R.E.*, Docket No. 10-679 (issued November 16, 2010); *K.W.*, 59 ECAB 271 (2007).

ORDER

IT IS HEREBY ORDERED THAT the July 17 and February 24, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 29, 2013
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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