

FACTUAL HISTORY

On July 29, 2009 appellant, then a 56-year-old mail handler, injured his head and neck while driving a forklift in the performance of duty. OWCP accepted his claim for scalp contusion and neck sprain by decision dated September 23, 2009.

In a report dated February 2, 2010, appellant's attending physician, Dr. Richard J. Berger, an osteopath, described the employment injury, noting that a truck pulled away while appellant was still loading it with a forklift. This caused the forklift to fall off of the truck and appellant struck his head on the top of the forklift. Appellant continued to have persistent neck pain and a magnetic resonance imaging (MRI) scan confirmed a herniated cervical disc with spinal stenosis aggravated by trauma. Dr. Berger diagnosed cervical radiculopathy. He opined that appellant was totally disabled until March 1, 2010. Appellant underwent epidural steroid injections, but did not return to work.

On October 21, 2010 OWCP referred appellant for a second opinion evaluation by Dr. Robert Allen Smith, a Board-certified orthopedic surgeon. Appellant underwent a second MRI scan on November 10, 2010 which demonstrated multilevel degenerative disc and joint disease with multilevel central and foraminal stenosis. In a report dated November 19, 2010, Dr. Smith described appellant's employment injury and his accepted conditions. He examined appellant's neck and found no spasm, atrophy, trigger points or deformity. Dr. Smith stated that appellant's neurological examination was normal with no deficit or sign of radiculopathy and he diagnosed degenerative disc disease of the neck. He opined that appellant's accepted condition had resolved and that he had no residuals due to these conditions. Dr. Smith found that appellant could return to regular work. He further stated that there was no evidence that appellant's cervical degenerative disease was caused, aggravated, accelerated or precipitated by his July 29, 2009 employment injury.

Dr. Leonard A. Bruno, a Board-certified neurologist, examined appellant on December 14, 2010. He diagnosed cervical degenerative joint disease with left foraminal stenosis and left-sided C6 radiculitis. Dr. Bruno described appellant's employment injury and performed a physical examination. On January 6, 2011 he attributed appellant's C5-6 disc herniation to his July 29, 2009 employment injury as well as exacerbation and aggravation of underlying cervical spondylosis. Dr. Bruno found that appellant had limited range of motion in the cervical spine due to pain and stiffness. He recommended a two-level anterior cervical discectomy and fusion.

OWCP found a conflict of medical opinion between Dr. Smith and Dr. Berger as to the degree of appellant's disability, the need for referral to a neurosurgeon and the necessity of further treatment. It referred appellant, a statement of accepted facts and a list of questions to Dr. E. Michael Okin, a Board-certified orthopedic surgeon, on February 2, 2011.

In a report dated February 22, 2011, Dr. Okin reviewed appellant's history of injury. Appellant reported constant aching in his neck radiating down to his left upper extremity. Dr. Okin stated that, during the course of the interview process, appellant demonstrated reasonably good fluidity of motion in his neck and was able to flex such that his chin almost touched his chest, but that there was significant discordance on formal examination. He stated

that appellant had limited flexion and extension with a jerky motion and some symptom magnification as well as no fluidity of the motion of his neck. Dr. Okin reviewed appellant's cervical MRI scan and found significant disc degenerative disease of the cervical spine with multilevel cord impingement at C4-5 and C6-7. He diagnosed significant disc degenerative disease of the cervical spine with multilevel foraminal stenosis and central spinal stenosis, as well as symptom magnification with regards to the cervical spine examination. Dr. Okin did not find any objective evidence to substantiate appellant's subjective complaints. He stated that appellant had preexisting arthritic changes in the cervical spine. Dr. Okin advised that appellant could return to his date-of-injury position with limitations due to his underlying cervical disc disease. He requested a formal job description of appellant's mail handler position.

In a report dated February 28, 2011, Dr. Bruno stated that appellant's C5-6 disc herniation was a result of his July 29, 2009 work injury. He also found left upper extremity radiculopathy and again recommended surgery.

In a letter dated December 22, 2011, OWCP proposed to terminate appellant's compensation and medical benefits as he had no continuing disability or medical residuals based on Dr. Okin's report.

Counsel responded on January 22, 2012 that appellant's preexisting depressive disorder was aggravated by the work injury. He submitted a January 19, 2012 report from Dr. Harry A. Doyle, a Board-certified psychiatrist, who diagnosed major depressive disorder and pain disorder with psychological factors. Dr. Doyle stated that the pain disorder was due to appellant's July 29, 2009 work injury and associated physical limitations. He stated that appellant was experiencing serious emotional and cognitive symptoms resulting in total disability. Dr. Doyle described appellant's work injury as appellant was driving a forklift off a truck at the loading dock when the truck pulled away and the forklift hit the loading dock causing him to hit his head violently on the forklift cage. Appellant experienced immediate severe neck and head pain. He experienced increasingly severe headaches and consulted Dr. Berger on July 30, 2009. Dr. Doyle also noted appellant's family history and his preoccupation with his pain symptoms and functional disabilities. He noted that Dr. Okin had referred to symptom magnification, but opined that appellant's symptoms were the result of pain disorder and major depressive disorder. Dr. Doyle stated:

"It is my opinion that [appellant] developed a pain disorder following the work injury due to accident-related stressors including chronic pain, which was unresponsive to conservative treatment, and persistent physical impairments and limitations due to pain. [Appellant] became increasingly depressed by the lack of improvement in his chronic pain condition and hopeless about recovering his former level of physical functioning and subsequently experienced a recurrence of a major depressive disorder. Therefore, it is my opinion that the Pain Disorder and major depressive disorder are related to the work injury on July 29, 2009."

He opined that appellant was totally disabled due to his work-related emotional conditions.

By decision dated March 30, 2012, OWCP terminated appellant's compensation and medical benefits effective April 8, 2012. It found Dr. Doyle's report was not based on a proper

factual background and failed to address the lack of objective findings or significant symptom magnification noted by Dr. Okin. OWCP found that Dr. Doyle did not address whether appellant continued to have residuals of the accepted soft tissue injuries from the July 29, 2009 work injury. It determined that Dr. Okin's report represented the weight of the medical opinion evidence establishing that appellant had no ongoing medical residuals or disability due to his accepted employment injury.

Counsel requested a telephone hearing before an OWCP hearing representative on April 1, 2012. He submitted a report dated April 26, 2012 from Dr. Berger. Dr. Berger noted appellant's history of injury and stated that appellant had no neck pain prior to his employment injury. He opined that appellant had sustained an aggravation of herniated disc and acute radiculopathy as a result of the employment injury. Counsel appeared at the oral hearing on July 17, 2012. He argued that Dr. Okin's report was not sufficiently detailed or well reasoned to terminate appellant's compensation and medical benefits.

Following the oral hearing, Dr. Bruno submitted a report dated August 13, 2012 and diagnosed herniated disc at C5-6. He recommended cervical fusion.

By decision dated September 28, 2012, the hearing representative affirmed the March 30, 2012 termination decision finding that Dr. Doyle's report was not based on a proper factual background and that Dr. Okin's report was entitled to the weight of the medical evidence and established that appellant had no employment-related disability or residuals.

LEGAL PRECEDENT -- ISSUE 1

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

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; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁷

In situations where there are 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 on a proper factual background, must be given special weight.⁸

ANALYSIS -- ISSUE 1

Appellant injured his head and neck when a truck pulled away from the dock while he was loading the truck with a forklift. OWCP accepted that appellant sustained a head laceration and neck sprain as a result of jumping clear of the falling forklift and striking his head on the roof of the forklift. Appellant did not return to work. Drs. Berger and Bruno opined that he had sustained a permanent aggravation of his underlying cervical disease requiring surgery. OWCP referred appellant to a second opinion physician, Dr. Smith, who found that appellant's injury-related conditions had resolved without permanent aggravation of his underlying cervical condition. Due to this conflict of medical opinion evidence, it referred appellant to Dr. Okin for an impartial medical examination to resolve the issues of disability and medical residuals due to appellant's accepted employment injury.

In a February 22, 2011 report, Dr. Okin provided physical findings noting that appellant demonstrated reasonably good fluidity of motion in his neck and was able to flex such that his chin almost touched his chest, but that there was significant discordance on formal examination. He found some symptom magnification as well as no fluidity of the motion of his neck. Dr. Okin reviewed appellant's MRI scan of the cervical spine and found significant disc degenerative disease of the cervical spine with multilevel cord impingement at C4-5 and C6-7. He diagnosed significant disc degenerative disease of the cervical spine with multilevel foraminal stenosis and central spinal stenosis, as well as symptom magnification with regards to the cervical spine examination. Dr. Okin opined that there was no objective evidence to substantiate appellant's subjective complaints. He stated that appellant had preexisting arthritic changes in the cervical spine. Dr. Okin concluded that appellant could return to his date-of-injury position with limitations due to his cervical disc disease. He found that appellant's accepted employment-related injuries had resolved and noted that appellant exhibited symptom magnification.

The Board finds that Dr. Okin's report is entitled to the special weight of the medical evidence and establishes that appellant's accepted injuries resolved with no disability and no medical residuals. Dr. Okin's report was based on a proper factual history and included detailed findings on examination as well as reasoning in support of his opinion that appellant's accepted conditions of head laceration and neck sprain had resolved. Based on this report, OWCP met its burden of proof to terminate appellant's compensation benefits.

⁷ R.C., 58 ECAB 238 (2006).

⁸ Nathan L. Harrell, 41 ECAB 401, 407 (1990).

Following Dr. Okin's report and the proposed notice of termination, appellant submitted a report from Dr. Doyle, a Board-certified psychiatrist, who attributed appellant's symptom magnification as identified by Dr. Okin, to a pain disorder caused by his accepted employment injuries. Dr. Doyle provided a detailed report noting appellant's history of injury and explaining why he believed that appellant had developed an emotional condition as a consequence of his accepted employment injury. As OWCP had not accepted this condition as a result of appellant's employment injury,⁹ this report does not address appellant's accepted condition and is not sufficient to create a conflict with Dr. Okin's report regarding appellant's physiological conditions.

Appellant also submitted a report dated February 28, 2011 from Dr. Bruno attributing appellant's C5-6 disc herniation and left upper extremity radiculopathy to his July 29, 2009 work injury. In an April 26, 2012 report, Dr. Berger described appellant's history of injury and stated that appellant had no neck pain prior to his employment injury. He opined that appellant had sustained an aggravation of herniated disc and acute radiculopathy as a result of the employment injury. These reports do not contain the necessary physical findings and medical reasoning to meet or overcome the weight of Dr. Okin as the impartial medical examiner. Neither physician provided an explanation of how appellant's accepted employment injury resulted in the additional conditions. Furthermore, as Drs. Berger and Bruno were on one side of the conflict that Dr. Okin resolved, the additional reports from these physicians is insufficient to overcome the weight accorded Dr. Okin's report as the impartial medical specialist or to create a new conflict with it.¹⁰

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective April 8, 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.

LEGAL PRECEDENT -- ISSUE 2

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct. As is noted by Larson in his treatise on workers' compensation, once the work-connected character of any injury has been established, the subsequent progression of that condition remains compensable so long as the worsening is not shown to have been produced by an independent nonindustrial cause and so long as it is clear that the real operative factor is the

⁹ *JaJa K. Asaramo*, 55 ECAB 104 (2004).

¹⁰ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances.¹¹

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Rationalized medical evidence is evidence which relates a work incident or factors of employment to a claimant's condition, with stated reasons of a physician. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.¹²

ANALYSIS -- ISSUE 2

In response to OWCP's proposed termination of compensation, counsel alleged that appellant had developed a consequential emotional condition, aggravation of his preexisting depressive disorder. In support of this claim for a consequential injury, appellant submitted a detailed report with rationale from Dr. Doyle diagnosing major depressive disorder and pain disorder with psychological factors and clearly opining that appellant's current psychological conditions were due to his accepted employment injury. OWCP did not address the claimed consequential injury in either the March 30, 2012 initial termination decision or the September 28, 2012 decision of the hearing representative. The Board finds that this aspect of appellant's claim requires additional development of the medical evidence. On remand, OWCP should refer appellant and a statement of accepted facts to a second opinion physician to determine whether appellant's underlying emotional condition was aggravated by his accepted employment injury. After this and such other development as OWCP deems necessary, OWCP should issue an appropriate decision on this issue.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation and medical benefits. The Board further finds that OWCP failed to address appellant's claim for a consequential emotional condition.

¹¹ *Clement Jay After Buffalo*, 45 ECAB 707, 715 (1994)

¹² *Charles W. Downey*, 54 ECAB 421 (2003).

ORDER

IT IS HEREBY ORDERED THAT the September 28, 2012 decision of the Office of Workers' Compensation Programs is affirmed and remanded for additional development of the consequential injury.

Issued: July 9, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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