United States Department of Labor
Employees' Compensation Appeals Board

D.F., Appellant	)	
and	)	**Docket No. 13-551**
	)	**Issued: July 12, 2013**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Boise, ID, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 9, 2013 appellant, through his attorney, filed a timely appeal from the November 27, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) and on January 10, 2013 he filed a timely appeal from the December 4, 2012 merit decision of 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.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 16, 2012 on the grounds that he had no residuals of his May 27, 2010 work injury after that date; and (2) whether appellant met his burden of proof to establish that he had total disability on or after January 15, 2012 due to his May 27, 2010 work injury.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on May 27, 2010 appellant, then a 54-year-old transportation security officer, sustained a neck sprain due cutting a padlock off of luggage with a bolt cutter. He stopped work on May 27, 2010. Appellant's claim was later expanded to include acceptance of temporary aggravation of cervical spondylosis.[2]

In a June 24, 2010 report, Dr. William Vetter, an attending Board-certified family practitioner, stated that appellant had some minor pain to his back, especially with heavy lifting, but was doing relatively well otherwise. He indicated that appellant was then released to work with a 30-pound lifting restriction for another week and stated that on July 2, 2010 he would return to full unrestricted duties.

On October 5, 2010 Dr. Beth Rogers, an attending Board-certified physical medicine and rehabilitation specialist, diagnosed cervical strain with borderline cervical stenosis and stated that appellant had restrictions of no lifting above the shoulder, no standing greater than 30 minutes and no lifting over 20 pounds.

Electrodiagnostic testing of appellant's upper extremities performed by Dr. Rogers on June 8, 2011 showed evidence of moderated right and mild-to-moderate left carpal tunnel syndrome. There was no evidence of generalized peripheral neuropathy or acute right C5-T1 cervical radiculopathy.

On August 11, 2011 Dr. Rogers increased appellant's work restrictions and recommended consultation for carpal tunnel syndrome, which she felt was aggravated by the work injury.

In an October 20, 2011 report, Dr. Christopher Goring, a Board-certified orthopedic surgeon serving as an OWCP referral physician, opined that the work-related cervical strain and temporary aggravation of cervical spondylosis had resolved. He found that appellant had developed myofascial pain syndrome as a result of the preexisting spondylosis and stenosis and recommended work restrictions for these nonwork conditions, including no lifting, pushing or pulling.

Appellant then received treatment for his neck condition from Dr. Robert H. Friedman, a Board-certified physical medicine and rehabilitation physician. On October 27, 2011 Dr. Friedman diagnosed cervical arthritis, cervicalgia and myofascial pain, which he felt were causally related to the May 27, 2010 work injury. He provided restrictions of no lifting greater than 20 pounds, no reaching above the shoulders and working for one hour and then sitting for a break every 30 minutes with no work.

In a November 22, 2011 report, Dr. Friedman diagnosed neck pain, myofascial pain, cervical osteoarthritis, carpal tunnel syndrome and right ulnar nerve pathology. He did not provide a medical opinion on the cause of the diagnosed conditions. The findings of

[2] Appellant received medical benefits for treatment of his work injuries. The employing establishment accommodated his work limitations in a limited-duty position.

electromyogram (EMG) testing from November 1, 2011 did not show any cervical radiculopathy.

In a December 12, 2011 letter, OWCP advised appellant that it proposed to terminate his medical benefits because he ceased to have residuals of his May 27, 2010 work injuries. It indicated that its proposed action was based on the October 20, 2011 report of Dr. Goring. OWCP advised appellant that he had 30 days from the date of the letter to submit evidence and argument challenging the proposed termination action. In a January 17, 2012 letter, it expanded the time for him to submit additional evidence and argument until February 13, 2012.

In a January 5, 2012 note, Dr. Friedman indicated that appellant reported that his employer was accommodating his permanent restrictions.

On January 26, 2012 appellant filed a Form CA-7 claiming wage-loss compensation for total disability beginning January 15, 2012, noting that the employing establishment could not accommodate his increased work restrictions.

By letter dated January 27, 2012, OWCP requested that appellant submit additional evidence in support of his claim for recurrence of total disability beginning January 15, 2012.

Appellant submitted a January 18, 2012 report in which Dr. Friedman indicated that appellant's preexisting cervical arthritis, cervicalgia and myofascial pain were directly related to the May 27, 2010 work injury and were permanent in nature. Dr. Friedman noted that appellant was nonsymptomatic prior to May 27, 2010. He stated that appellant's work restrictions, including no pushing, pulling, lifting, bending or stooping were medically necessary due to his cervical degenerative arthritis and cervicalgia.

In a January 26, 2012 letter, an employing establishment official stated that appellant was unable to perform the duties of a transportation security officer and had been on leave-without-pay status since January 15, 2012.

In a February 3, 2012 report, Dr. Friedman diagnosed neck pain, cervical osteoarthritis and hypertension. In a February 3, 2012 letter, he opined that appellant's increasing neck symptoms were a result of his neck strain from May 27, 2010 and indicated that appellant required restrictions due to neck pain, including no engaging in neck flexion or extension.

OWCP determined that there was a conflict in the medical opinion evidence regarding whether appellant continued to have residuals of his May 27, 2010 work injury, which required medical treatment and referred appellant to Dr. Joseph Verska, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion on the matter.

In a March 14, 2012 report, Dr. Verska detailed appellant's factual and medical history and noted that appellant currently complained of neck pain with radiation across the top of his shoulders up into the back of his head. He reported the findings of his March 14, 2012 examination of appellant, noting that his neck showed good flexion, extension, rotation and lateral bending and that the extremes of motion gave him neck pain and referred pain into his trapezial areas. Palpation of appellant's cervical spine showed minimal tenderness up and down from the base of his skull to his upper thoracic spine. Dr. Verska indicated that appellant had 5/5

strength in his finger extensors, wrist flexor, biceps and triceps and that sensation was grossly intact in the C5, C6, C7 and C8 dermatomes. Tinel's sign was mildly positive in both elbows, but negative in both wrists. Dr. Verska diagnosed obesity, deconditioning, mild central canal stenosis, cervical spondylolysis, mild-to-moderate carpal tunnel syndrome bilaterally, cubital tunnel syndrome on the right based on present examination, myofascial pain syndrome, headaches and history of T4 fracture. He indicated that appellant's myofascial pain syndrome was related to his preexisting conditions and noted that his carpal and cubital tunnel syndrome conditions also were not work related and did not necessitate surgical intervention. Dr. Verska concluded that appellant did not have any residuals of his May 27, 2010 work injury, noting that the accepted work-related conditions would have resolved within eight weeks of May 27, 2010. He stated:

> "[Appellant] has preexisting disc degeneration and cervical stenosis and I believe some of the symptoms that he is experiencing in his neck and referred pain into the shoulders are ongoing. The cervical strain should have resolved by now and the temporary aggravation of his preexisting problems also should have resolved, but the patient continues to complain of symptoms, partly related to his myofascial pain syndrome, partly related to underlying disc degeneration and facet arthritis. I believe that [appellant] has received adequate treatment for his cervical strain and aggravation of his preexisting cervical spondylolysis…. [Appellant's] residual symptoms are from deconditioning, age and the natural history of preexisting problems.
>
> "There was definitely an aggravation of preexisting cervical spondylolysis and cervical stenosis. The mechanism which brought on the complaint was using a bolt cutter. This was a one-time episode to put a strain on the muscles in the neck. This aggravation should be temporary and I believe [that appellant's] ongoing symptoms are related to deconditioning and ongoing cervical spondylolysis. [Appellant] has undergone a series of investigative studies that document cervical stenosis, but he does not need surgery for that and he has no evidence of cervical radiculopathy and therefore does not need surgery. If he does not need surgery, then his condition is soft tissue or facet or aggravation of preexisting arthritis and those conditions typically resolved over the course of six to eight weeks. Therefore, the temporary aggravation is resolved eight weeks after the event."

In a May 16, 2012 decision, OWCP terminated appellant's medical benefits effective May 16, 2012 on the grounds that he ceased to have residuals of his May 27, 2010 work injury after that date. It based its termination decision on the opinion of Dr. Verska.

In another decision dated May 16, 2012, OWCP denied appellant's claim that he sustained a recurrence of total disability on or after January 15, 2012 due to his May 27, 2010 work injury. It found that the medical reports of Dr. Friedman did not adequately explain how work-related residuals prevented him from performing any work.

Appellant requested a telephone hearing with an OWCP hearing representative regarding the denial of his claim for a recurrence of total disability. During the September 11, 2012

hearing, he argued that the March 14, 2012 report of Dr. Verska actually showed that he continued to have residuals of his May 27, 2010 work injury.

Appellant requested a telephone hearing with an OWCP hearing representative regarding the termination of his compensation. During the September 18, 2012 hearing, he denied having any neck complaints before his May 27, 2010 injury and noted that treatment had not relieved his pain complaints. Appellant testified that his work injuries had not resolved and asserted that the employing establishment had been unable to accommodate his work restrictions.

Appellant submitted chart notes of Dr. Friedman dated June 1 and 29, 2012. In the June 1, 2012 note, Dr. Friedman reported his findings on examination and diagnosed neck pain, cervical osteoarthritis and hypertension. In the June 29, 2012 note, he diagnosed neck pain, cervical osteoarthritis, myofascial pain, an unspecified ulnar nerve injury, unspecified carpal tunnel syndrome and hypertension.

In a November 27, 2012 decision, an OWCP hearing representative affirmed OWCP's May 16, 2012 decision denying appellant's claim for a recurrence of total disability beginning January 15, 2012.

In a December 4, 2012 decision, an OWCP hearing representative affirmed OWCP's May 16, 2012 decision terminating appellant's wage-loss compensation and medical benefits.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[3] OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

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."[6] 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.[7]

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

[4] *Id.*

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

[6] 5 U.S.C. 8123(a).

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

ANALYSIS -- ISSUE 1

OWCP accepted that on May 27, 2010 appellant sustained a neck sprain and temporary aggravation of cervical spondylosis and paid medical benefits for treatment related to the injury. The Board notes that OWCP properly determined that there was a conflict in the medical opinion between Dr. Friedman, an attending Board-certified orthopedic surgeon, and Dr. Goring, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether appellant continued to have residuals of the May 27, 2010 employment injury which required medical treatment. In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Verska, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.[8] In a May 16, 2012 decision, it terminated appellant's medical benefits effective May 16, 2012 based on the March 14, 2012 report of Dr. Verska.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Verska, the impartial medical specialist selected to resolve the conflict in the medical opinion.[9] The March 14, 2012 report of Dr. Verska establishes that appellant had no residuals of his May 27, 2010 work injury, which required medical treatment after May 16, 2012.

In his March 14, 2012 report, Dr. Verska detailed appellant's factual and medical history and described the May 27, 2010 work injury. He reported the findings of his March 14, 2012 examination of appellant, noting that his neck showed good flexion, extension, rotation and lateral bending and that the extremes of motion gave him neck pain and referred pain into his trapezial area. Dr. Verska indicated that appellant had 5/5 strength in his finger extensors, wrist flexor, biceps and triceps and that sensation was grossly intact in the C5, C6, C7 and C8 dermatomes. He diagnosed obesity, deconditioning, mild central canal stenosis, cervical spondylolysis, mild-to-moderate carpal tunnel syndrome bilaterally, cubital tunnel syndrome on the right based on present examination, myofascial pain syndrome, headaches and history of T4 fracture. Dr. Verska indicated that appellant's myofascial pain syndrome was related to his preexisting conditions and noted that his carpal and cubital tunnel syndrome conditions also were not work related and did not necessitate surgical intervention. He concluded that appellant did not have any residuals of his May 27, 2010 work injury, noting that the accepted work-related conditions would have resolved within eight weeks of May 27, 2010.

The Board has carefully reviewed the opinion of Dr. Verska and notes that it has reliable, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Verska provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[10] He provided medical rationale for his opinion by explaining that appellant's continuing problems and need for medical treatment were due to nonwork conditions, including his preexisting cervical spondylosis.

[8] *See supra* note 6 and accompanying text.

[9] *See supra* note 7 and accompanying text.

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

LEGAL PRECEDENT -- ISSUE 2

An employee seeking benefits under FECA has the burden of establishing the essential elements of his claim including the fact that the individual is an "employee of the United States" within the meaning of FECA, that the claim was timely filed within the applicable time limitation period of FECA, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.[11] The medical evidence required to establish a causal relationship between a claimed period of disability and an employment injury is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the compensable employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12]

ANALYSIS -- ISSUE 2

On January 26, 2012 appellant filed a Form CA-7 claiming wage-loss compensation for total disability beginning January 15, 2012, asserting that the employing establishment could not accommodate his increased work restrictions. The Board finds that he did not meet his burden of proof to submit medical evidence showing that his work stoppage on and after January 15, 2012 was due to his May 27, 2010 work injury. Therefore, OWCP properly denied appellant's claim for total disability compensation beginning January 15, 2012.

Appellant submitted a January 18, 2012 report in which Dr. Friedman indicated that his preexisting cervical arthritis, cervicalgia and myofascial pain were directly related to the May 27, 2010 work injury and were permanent in nature. Dr. Friedman noted that appellant was nonsymptomatic prior to May 27, 2010. He stated that appellant's work restrictions, including no pushing, pulling, lifting, bending or stooping were medically necessary due to his cervical degenerative arthritis and cervicalgia. In a February 3, 2012 report, Dr. Friedman diagnosed neck pain, cervical osteoarthritis and hypertension. In a February 3, 2012 letter, he opined that appellant's increasing neck symptoms were a result of his neck strain from May 27, 2010 and indicated that he required restrictions due to neck pain, including no engaging in neck flexion or extension.

The submission of these reports does not establish that appellant's claim for total disability beginning January 15, 2012 because Dr. Friedman did not provide sufficient medical rationale in support of his opinion on causal relationship. Dr. Friedman indicated that a number of medical conditions which have not been accepted as employment related, such as cervical arthritis, cervicalgia and myofascial pain, were directly related to the May 27, 2010 work injury. However, he did not explain the basis for this opinion nor did Dr. Friedman adequately explain

[11] *J.F.*, Docket No. 09-1061 (issued November 17, 2009).

[12] *See E.J.*, Docket No. 09-1481 (issued February 19, 2010).

how appellant's medical condition on and after January 15, 2012 rendered him totally disabled from all work. Appellant submitted other reports of Dr. Freidman, but none of these reports contained a rationalized medical opinion that appellant had work-related total disability on and after January 15, 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 medical benefits effective May 16, 2012. The Board further finds that appellant did not meet his burden of proof to establish that he had total disability on or after January 15, 2012 due to his May 27, 2010 work injury.

ORDER

IT IS HEREBY ORDERED THAT the December 4 and November 27, 2012 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: July 12, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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