United States Department of Labor
Employees' Compensation Appeals Board

R.N., Appellant	)	
and	)	**Docket No. 12-1578**
	)	**Issued: June 17, 2013**
TENNESSE VALLEY AUTHORITY,	)	
Soddy Daisy, TN, Employer	)	

Appearances:
Debra Hauser, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 17, 2012 appellant, through his attorney, filed a timely appeal from the June 29, 2012 merit 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 properly terminated appellant's compensation and medical benefits effective August 2, 2011.

FACTUAL HISTORY

On February 23, 2006 appellant, then a 41-year-old nuclear plant maintenance supervisor, filed a traumatic injury claim for a July 20, 2005 low back injury that occurred when a chair seat dropped as he attempted to sit, causing him to flip backwards and hit a table. He stopped work

[1] 5 U.S.C. § 8101 *et seq.*

on January 9, 2006 and returned intermittently.[2] OWCP accepted the claim for sprain/strain of the lumbar region.

Appellant received treatment from Dr. Ronald C. Brooksbank, a family practitioner. In an April 6, 2006 treatment note, Dr. Brooksbank noted appellant's previous L4-5 anterior lumbar interbody fusion, which was performed by another surgeon. He stated that appellant did well after that surgery until July 2005 when a chair in which he was sitting collapsed causing him to fall backwards and reinjure his back. Dr. Brooksbank indicated that appellant saw another physician and had a magnetic resonance imaging (MRI) scan which was negative. However, he advised that he continued to have back pain and was unable to work because of the pain. Dr. Brooksbank advised that appellant complained of pain in the lower back around L4-5 and the left buttock and down the back of the left leg. He complained of some pain in the posterior thigh area but this was not as severe as the back pain. Dr. Brooksbank denied any numbness, tingling or pins and needles sensation. He indicated that the pain was a sciatic-type pain going down the back of the left leg down to the foot. Dr. Brooksbank advised that he referred appellant to a specialist to determine the source of the left leg radiculopathy. He advised that it "may be due to a nerve root stretch" and "perhaps a neurologist could discover what the problem is and how to best correct the problem." On examination, appellant walked in a stooped position, limped and had trouble getting in and out of a chair due to back pain. He had tenderness on palpation at L4-5 and difficulty touching all of the toes with both hands because of back pain. Appellant had definite evidence of pedal edema bilaterally, greater on the left, of questionable etiology. Regarding disability, Dr. Brooksbank opined that it would depend upon the neurologist's findings and the treatment recommendations. He opined that appellant was unable to work at this time.

Appellant stopped work again on April 13, 2006. He attempted a return to part-time limited duty on February 12, 2007 but was unable to work. Appellant did not return to work. He received disability compensation.

In an October 13, 2009 report, Dr. Brooksbank explained that appellant's discomfort was most prominent in the lumbar spine. He advised that it radiated to the buttocks and left anterior and posterior thigh. Appellant related the pain as constant, moderate in intensity and throbbing. Dr. Brooksbank indicated that this was a chronic problem, with essentially constant pain, which began about three years earlier. He explained that "the event which precipitated this pain was a fall." Dr. Brooksbank continued to treat appellant.

OWCP continued to develop the claim, and on July 13, 2010, referred appellant to Dr. Raju Vanapalli, a Board-certified orthopedic surgeon, for a second opinion.[3] In an

[2] The record reflects that appellant had a preexisting low back condition that resulted in an L4-5 anterior lumbar interbody fusion with a posterior sextant pedicle screw fixation, performed in January 2005.

[3] OWCP's development of the claim included referring appellant to a specialist and a January 7, 2009 decision terminating his benefits finding that the opinion of a referral physician established that he had no continuing residuals of his work injury. However, on March 5, 2010, it vacated the decision finding that it did not meet its burden of proof. Thereafter, OWCP referred appellant to Dr. Larry Parker, a Board-certified orthopedic surgeon. However, Dr. Parker was unable to sufficiently clarify his opinion that appellant's work-related condition had resolved, leading to appellant's referral to Dr. Vanapalli.

August 19, 2010 report, Dr. Vanapalli noted appellant's history of injury and treatment. On examination, all movements of the spine were resisted to less than 35 to 50 percent of normal with complaints of pain. Bilateral paraspinal scars at L4-5 were well healed and not tender. The lumbar area was hypersensitive to touch and that there was no tenderness of paraspinal muscles as much as the complaint of pain to touch. There was left leg pain along the buttock to the front of the thigh and to the whole ankle and foot with sensation in all dermatomes. Motor power was normal. The left foot was slightly plantar flexed but he had active dorsiflexion of the ankle and great toe was graded 5/5 intermittently. Knee and ankle reflexes were 2+ bilaterally. Appellant reported incontinence if he did not take medications but there were no records for this. Dr. Vanapalli diagnosed lumbar strain, resolved; chronic low back pain, multifactorial; left lower extremity dysesthesia and status post L4-5 anterior interbody fusion that was unrelated to the injury. There was "no objective evidence to show that these diagnoses were caused by or aggravated by a [onetime] fall backwards at work on July 20, 2005."

Dr. Vanapalli noted that "[e]very diagnosis and every consultant appears, according to the symptoms, to have no different objective findings except osteoarthritis of the spine and the surgical findings." He indicated that appellant's "preexisting condition was aggravated by the aggravating practice of his employment and the resultant aggravation was temporary." Dr. Vanapalli advised that the diagnosis of lumbar strain was appropriate and there were objective findings on x-ray that the fusion of the L4-5 healed well, and the pedicle screws were in place. He opined that, therefore, the injury did not cause any deeper damage than muscle strain which should have healed in three to six months. Dr. Vanapalli explained that a lumbar MRI scan after the injury, revealed no disc herniation, no spinal stenosis and no nerve impingement.[4] Based on this, he opined that the condition was more "subjective than objective." Dr. Vanapalli could not find an orthopedic basis for urinary incontinence and he noted that there were no urology records. He advised that appellant reached maximum medical improvement and could work with restrictions. Regarding treatment, Dr. Vanapalli explained that recommended treatment of appellant's condition was difficult because "we could not establish what the condition is except putting together some symptoms with our objective findings." He recommended a psychological evaluation and depending upon the report, work hardening followed by a functional capacity evaluation (FCE) to determine the level at which he could function.

Dr. Brooksbank continued to treat appellant and submitted reports dating from July 7 to November 4, 2010. He diagnosed low back pain, leg pain, insomnia and pedal edema.

On June 3, 2011 OWCP proposed to terminate appellant's compensation benefits based on the report of Dr. Vanapalli, which established that the residuals of the work injury of July 20, 2005 had ceased. Appellant was given 30 days to submit additional evidence or argument.

In a June 21, 2011 statement, appellant submitted additional evidence and asserted that the 30-day time limit was not realistic for obtaining further medical evidence. He asserted that he continued to have residuals of his injury and could not work.

[4] The actual copy of the MRI scan was dated November 20, 2006.

Additional medical evidence included reports from Dr. Brooksbank from May 16 to July 1, 2011. Dr. Brooksbank, in a May 16, 2011 attending physicians report, diagnosed "chronic low back pain of questionable etiology." He indicated that appellant had pain radiating to the left buttock and hip and pain in the back and lumbar region. Dr. Brooksbank stated that appellant was unable to return to work and the date was "indefinite." In a May 16, 2011 treatment note, he noted findings and also advised that appellant was depressed. Spinal maneuvers included pain with: twisting, getting on/off the examination table and touching alternate hand to alternate toes. Appellant was tender to palpation of lumbar paravertebral muscles. Dr. Brooksbank explained that appellant's pain started more than five years prior, his problem was chronic and he was in constant pain. He opined that the event which "precipitated the pain was a fall." Dr. Brooksbank noted that the condition was aggravated by lifting, bending over and twisting and worsened with back flexion, back extension and twisting movements. In reports dated June 6, 2011, he explained that appellant had chronic back pain due to the July 20, 2005 injury. Appellant had sciatica which radiated to the left buttocks and down the left leg to his fourth and fifth toe of the left leg. He also had bilateral lymphedema, urinary incontinence, sexual dysfunction and depression. Dr. Brooksbank explained that the accepted injury was still medically present and had not resolved. He opined that the aggravation was "not related to any preexisting condition." Dr. Brooksbank indicated that appellant was disabled for all work.

In a June 7, 2011 report, Dr. Brooksbank noted diagnoses that included depression due to his chronic back pain, urinary incontinence and "chronic low back pain of questionable etiology." He stated that appellant made a "full recovery from his L4-5 interbody lumbar fusion and had returned to work on April 12, 2005, without any restrictions." Dr. Brooksbank also advised that appellant had no preexisting conditions before his July 20, 2005 fall. He opined that there was no clear-cut treatment plan or resolution of his condition. Dr. Brooksbank advised that appellant was not a surgical candidate, and that pain clinic interventions were unsuccessful although appellant was stable with medical management. In a June 9, 2011 report, he stated that appellant "returned to work on April 12, 2005, with [no] restrictions. [Dr. Brooksbank] performed his job with no pain or difficulty again free from pain, until his fall [three] months later on July 20, 2005." He indicated "[l]et us not quibble but put the pain where the pain was due and that was his fall on July 20, 2005."

In a June 30, 2011 report, Dr. Brooksbank explained that appellant injured his back resulting in disc herniation on January 11, 2005, underwent surgery, returned to work in March 2005 and was released from medical care in April 2005. Appellant worked from April until July 20, 2005 when the work injury occurred. Dr. Brooksbank noted that appellant could not return to work because of the chronic back pain. He agreed with Dr. Vanapalli that the MRI scan did not show any disc herniation or nerve root impingement. However, Dr. Brooksbank explained that "this in itself does not mean that the patient is not suffering from chronic back pain. This we see many times in private practice when nothing surgically can be done for the patient by an orthopedic surgeon, so the patient is referred to a 'pain clinic' specialist for further medical management of … continued pain. Such was the exact case with [appellant]." Dr. Brooksbank advised that appellant walked with a cane in a stooped position and antalgic gait and had chronic back pain with left leg radiculopathy. He noted that there was no test available to determine whether a patient was suffering from pain. Dr. Brooksbank explained that his findings of appellant in the way he walked, sat and his actions strongly suggested pain. He noted that an x-ray or a laboratory test did not give a true story of a patient's condition.

Dr. Brooksbank advised that he treated appellant before and after the July 20, 2005 injury and his health had deteriorated. He continued to treat appellant and submit reports.

In an August 2, 2011 decision, OWCP terminated appellant's compensation benefits effective that date.

In a letter dated June 4, 2012, counsel requested reconsideration and submitted new medical evidence. She argued that the medical evidence supported that appellant continued to be disabled from his accepted injury. Counsel also argued that OWCP's doctor shopped until it received an opinion supporting the termination of benefits.

In a May 31, 2012 report, Dr. Brooksbank noted treating appellant since 2002 and stated that he was in his "usual state of excellent health until he fell from a gully chair that collapsed under him at work" on July 20, 2005. He noted that appellant had low back pain diagnosed as lumbosacral strain in 2004 that was treated with medication and physical therapy which did not relieve his symptoms. Appellant had a small central herniated nucleus pulposus at L4-5 level and underwent an L4-5 anterior lumbar interbody fusion with a posterior sextant pedicle screw fixation in January 2005. He had an uneventful recovery, returned to work and did well until the July 2005 injury when he fell from a chair. Dr. Brooksbank indicated that appellant subsequently continued to have chronic back pain that prevented him from working. Appellant had complaints of the pain at L4-5 radiating into the left buttock and down the back of the leg to his foot. He had extreme difficulty getting in and out of the chair and walked with a cane in a stooped position. Dr. Brooksbank noted other findings similar to those in prior reports, including incontinence after the July 20, 2005 injury. He opined that appellant's work-related lumbar strain had not ceased. Appellant also took pain medications and antidepressants that he did not take before the work injury. Dr. Brooksbank opined that "[t]herefore based on my objective findings (knowing [appellant's] medical condition prior to his accident in 2005) it is my medical opinion and with reasonable medical certainly that [appellant's] current condition of the lumbar strain with neuroproxia left leg, urinary incontinence, was caused by his original workplace injury that occurred on July 20, 2005." He provided other reports in which he repeated his diagnoses and opinions.

By decision dated June 29, 2012, OWCP denied modification of the prior decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[5] Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[6] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[7] To terminate authorization for medical treatment,

[5] *Curtis Hall*, 45 ECAB 316 (1994).

[6] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[7] *Furman* G. *Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[8]

ANALYSIS

OWCP found that appellant's accepted conditions of sprain/strain of the lumbar region resolved by August 2, 2011 and terminated his medical and compensation benefits on that date.

In making this determination, OWCP accorded the weight of the evidence to the opinion of the second opinion physician, Dr. Vanapalli, who opined that the residuals of the work injury of July 20, 2005 had ceased. However, Dr. Brooksbank, the treating physician, opined that appellant continued to have residuals of his July 20, 2005 employment injury. Both physicians provided rationalized support for their respective opinions. 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."[9] Accordingly, there is an unresolved conflict in the medical evidence. Because OWCP bears the burden of proof to terminate benefits, the Board will reverse OWCP's decision affirming the termination of benefits.

On appeal, counsel argued that the report of the second opinion physician was not sufficient to carry the weight of the evidence. As explained, there is an unresolved conflict. OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation and authorization for medical treatment effective August 2, 2011.

[8] *Calvin* S. *Mays,* 39 ECAB 993 (1988).

[9] 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan*, 45 ECAB 207, 210 (1993).

ORDER

IT IS HEREBY ORDERED THAT the June 29, 2012 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 17, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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