

On appeal appellant contends that the medical evidence submitted by his treating physician supports that he is unable to work because of his employment-related injury.

FACTUAL HISTORY

On October 20, 2008 appellant, then a 31-year-old temporary border patrol agent, filed a traumatic injury claim alleging that he injured his back while doing dumb bell squats during physical training period. He returned to light-duty work after the injury and missed periodic time for appointments. On January 14, 2009 OWCP accepted appellant's claim for a lumbar sprain. It later accepted displacement of a lumbar intervertebral disc without myelopathy. Appellant was initially treated with conservative care. On November 20, 2009 OWCP approved low back disc surgery. On January 6, 2010 appellant underwent a lumbar laminotomy and discectomy at L4, right. OWCP paid wage-loss compensation for total disability.

On April 14, 2010 the employing establishment terminated appellant's employment, noting that he was a temporary employee and had not been medically released to return to full duty. It further noted that he failed to complete the Academy Training Program.

In a June 10, 2010 report, Dr. Gregory Misenhimer, an attending Board-certified orthopedic surgeon, stated that appellant continued to experience pain and discomfort in his back without significant pain and discomfort in his lower extremity. He opined that appellant would benefit from a work hardening/work conditioning program.

In a June 15, 2010 report, Dr. Terry Klein, a Board-certified family practitioner, stated that appellant had a disc herniation at L4-L5 and L5-S1 status post surgery. He asked appellant to increase his exercise on his own. Dr. Klein noted that appellant's work status was "no work per Dr. Misenhimer."

On June 28, 2010 OWCP referred appellant to Dr. Randy Pollet, a Board-certified orthopedic surgeon, for a second opinion. In a July 12, 2010 report, Dr. Pollet diagnosed appellant with resolving lumbar sprains and strain/herniated nucleus pulposus post surgery. He opined that the surgery was successful, but that there continued to be symptoms of unresolved disc disease in the low back secondary to the work-related injury of the lumbar sprain and the displaced lumbar intervertebral disc without myelopathy. Dr. Pollet noted limitations of low back motion, spasm, rigidity and weakness in both lower extremities along with a normal neurological examination. He opined that appellant could return to full-time work beginning at a sedentary or light-duty position and opined that appellant should attempt to return to gainful employment on August 1, 2010. Dr. Pollet noted that appellant should initially be placed at a sedentary or light-duty position.

In an August 2, 2010 report, Dr. Misenhimer noted that appellant had not been able to undergo a work hardening program as no such program was available to him and that it would be "absolutely counterproductive" for him to travel between Las Cruces and El Paso for such a program. He believed a work hardening program in Las Cruces would definitely be beneficial for appellant and would allow him to be able to return to work sooner than his current situation. In a September 2, 2010 report, Dr. Misenhimer stated that he disagreed with Dr. Pollet's opinion that appellant could return to full and active duty over the course of 12 weeks after a return to

work. He found that he had far too much lower back pain as a result of his injury, the delay in appropriate treatment and the inflammatory reaction as a result of the surgical procedure. Dr. Misenhimer noted that appellant still had fairly significant pain and discomfort in his back indicating an ongoing inflammatory process in the intervertebral disc space at eight months postop. He noted that, if he underwent appropriate work hardening/work conditioning, that some of the pain and discomfort may be alleviated, but opined that he may eventually require another surgical intervention to remove the intervertebral disc that has become extremely painful and replace it with an artificial disc at the L4 level or a fusion of L4 to L5. Dr. Misenhimer noted that, for a man of appellant's age and activity level, the artificial disc replacement would be the ideal form of treatment, and that he did not believe that a fusion would be in appellant's best interest. In a September 16, 2010 report, he stated that the effects of the work injury have not ceased at this time, and that appellant's prognosis was good to recover from his current situation to be able to return to some form of gainful employment. Dr. Misenhimer noted that the effects of appellant's employment-related injury have not ceased, and that they do limit his activities by preventing him from engaging in normal activities including bending, lifting, and twisting, which causes an increased pain and discomfort in his back which prevents the employee from returning to his previous job.

By letter dated October 1, 2010, OWCP referred appellant to Dr. Thomas Grace, a Board-certified orthopedic surgeon, to resolve the conflict between Drs. Misenhimer and Pollet with regard to appellant's work capabilities. In an October 11, 2010 report, Dr. Grace listed his impressions as lumbar radiculitis secondary to herniated disc L4-5; and status post surgery with an improvement of symptoms. He noted that appellant has improved, but continued to have problems. Dr. Grace noted that appellant will probably reach a point of maximum medical improvement approximately January 6, 2011. He stated that he would lean toward the opinion of Dr. Misenhimer to allow appellant more time and rehabilitation to transpire over the next three months.

In an October 5, 2010 report, Dr. Klein found that appellant could do work duty with lifting limits of 15 pounds, and that he would be able to return to a full-duty position in six weeks. On February 15, 2011 he found appellant stable.

In a November 15, 2010 note, Dr. Misenhimer indicated that he believed appellant could return to full and active duty with the employing establishment as of December 1, 2010. In a February 14, 2011 report, he stated that, although appellant had been released to full and active duty at work, there was no position available for him at the employing establishment. Dr. Misenhimer stated that he would like appellant to continue with the current level of activity.

In a February 15, 2011 report, Dr. Klein stated that appellant was stable and that his employment was full duty.

On May 16, 2011 Dr. Misenhimer evaluated appellant and noted that he continued to have residuals of problems with his low back and exiting nerve roots around the disc herniation that was removed and suggested further testing. He noted that appellant stated that he was "essentially no better than he was prior to the surgical procedure." In a July 6, 2011 report, Dr. Misenhimer indicated that he would like to keep appellant off work for the next six weeks.

On July 28, 2011 OWCP proposed terminating appellant's wage-loss compensation as the injury-related disability had ended. It noted Dr. Misenhimer's February 14, 2011 report in support of the recommended termination.

In an August 17, 2011 report, Dr. Misenhimer noted that appellant continued to complain of significant pain and discomfort in his back. He opined that appellant was not able to return to work until he could establish the source of his pain. Dr. Misenhimer therefore concluded that termination of appellant's benefits was inappropriate and that appellant was unable to work at any occupation for the time being. He further opined that, with appropriate identification and treatment of his problem, appellant would be able to return to some form of gainful employment, although not with the employing establishment.

In a decision dated September 8, 2011, OWCP terminated appellant's wage-loss compensation benefits effective the date of the decision. It did not terminate his medical benefits.

In a September 28, 2011 report, Dr. Misenhimer indicated that appellant's physical condition had changed since his last functional capacity evaluation in October 2010. He opined that, at this time, appellant was not able to return to any form of gainful employment secondary to the continued pain and discomfort in his back. In response to the September 8, 2011 decision, Dr. Misenhimer indicated that he never stated that appellant could return to full and active duty with the employing establishment; rather the statements were made in the hopes that, with certain treatments, appellant could return to full and active duty. However, he opined that appellant was not able to return to full and active duty at this time. Dr. Misenhimer opined that appellant was not able to lift 80 pounds and that he was unable to perform at a heavy physical demand level due to pain and discomfort in his back, which is related to the L3, L4 and L5 intervertebral discs. He noted that his request for a discogram had been denied. In subsequent reports dated November 9 and December 20, 2011, Dr. Misenheimer continued to request approval for a discogram.

On October 4, 2011 appellant requested a telephonic hearing before an OWCP hearing representative.

In a November 14, 2011 report, Dr. Klein stated that he believed that appellant should seek employment in a position that does not require repetitive bending, stooping and squatting with lifting limits of 10 pounds.

At the hearing held on February 8, 2012, appellant testified with regard to his medical care. He noted that, after the accident, he was placed on light duty and missed work for physical therapy and doctor's appointments. Appellant noted that he last worked for the employing establishment on April 19, 2010 and that he was then fired because he had not met benchmarks for becoming an agent due to his injury. He noted that he had not worked since that time.

By decision dated April 6, 2012, OWCP's hearing representative affirmed the September 8, 2011 decision terminating appellant's wage-loss compensation benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.² 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.³

ANALYSIS

OWCP accepted appellant's claim for sprain of the lumbar region of his back and displacement of lumbar intervertebral disc without myelopathy. It paid intermittent compensation benefits for total disability subsequent to his surgery on January 6, 2010. OWCP terminated appellant's compensation benefits effective September 8, 2011. The Board finds that OWCP did not meet its burden of proof when it terminated his compensation benefits.

The Board notes that a conflict initially arose between Dr. Misenhimer, appellant's treating surgeon, and the second opinion surgeon, Dr. Pollet, with regard to appellant's ability to return to work. In order to resolve the conflict, OWCP referred appellant to Dr. Grace for an impartial medical examination. In an October 11, 2010 report, Dr. Grace stated that he would lean toward the opinion of Dr. Misenhimer and allow appellant more time and rehabilitation. Accordingly, OWCP continued to pay wage-loss compensation.

Appellant continued to receive treatment from Dr. Misenhimer and Dr. Klein. Dr. Misenhimer, at various times, expressed optimism with regard to appellant's ability to eventually return to work. However, he continued to note disabling effects from the accepted injury until his report of November 15, 2010, when he noted that appellant could return to full and active-duty work. In a February 14, 2011 report, Dr. Misenhimer stated that, although appellant had been released to full and active duty at work, there was no position available for him at the employing establishment and he would like to see appellant continue with the current level of activity. He started to change his conclusion in his May 16, 2011 report wherein he noted that appellant continued to have residuals of problems with his low back and suggested further tests. When OWCP, on July 28, 2011, proposed to terminate appellant's compensation benefits, it noted that on February 14, 2011 Dr. Misenhimer indicated that appellant was capable of performing his usual job. However, he responded to the proposed termination in an August 17, 2011 report wherein he indicated that appellant was not able to return to work until the source of his pain could be determined. Dr. Misenhimer opined that termination of appellant's benefits was inappropriate and that he was unable to work at any occupation for the time being. Nevertheless, OWCP still terminated appellant's compensation on September 8, 2011. The Board finds that this was improper.

OWCP had the burden of proof to terminate compensation; it should not terminate compensation without establishing either that the disability had ceased or was no longer related

² *Curtis Hall*, 45 ECAB 316 (1994).

³ *S.M.*, Docket No. 12-1414 (issued February 25, 2013).

to the employment.⁴ Dr. Misenhimer, at the time of termination of benefits, indicated that appellant was unable to work. Subsequent to the termination of benefits but prior to the decision by the hearing representative, he continued to opine that appellant could not return to work. Dr. Misenhimer noted that he never indicated that appellant could return to full and active duty at the employing establishment, rather he had indicated his belief that appellant could, after certain treatments, return to some employment. He noted that appellant could not do heavy physical labor. Accordingly, Dr. Misenhimer was of the strong belief that appellant's employment-related disability had not ceased. OWCP's hearing representative indicated that Dr. Misenhimer did not provide adequate rationale for his belief that appellant was unable to return to work. However, it is the burden of OWCP to prove that appellant's disability had ceased in order to terminate compensation benefits, not the burden of appellant to prove that he could not work.⁵ The Board notes that the hearing representative cited to the case of *Charlene V. Mialeedstrom*⁶ and contended that the physician in that case changed his mind about disability but that the Board found that this change in opinion was not supported by rationalized evidence. However, in *Mialeedstrom*, the Board relied in large part on the opinion of a different physician who specifically indicated that appellant had no further residuals and was no longer disabled due to her work injury. No physician in the present case made such a statement. Appellant's other treating physician, Dr. Klein, is a Board-certified family practitioner whereas Dr. Misenhimer was appellant's treating Board-certified orthopedic surgeon. Dr. Klein continually deferred to Dr. Misenhimer's opinions with regard to appellant's work capabilities. Therefore, his opinion is not sufficient to establish no continuing disability.

The evidence of record is not sufficient to establish that appellant's disability had ceased in this case. Accordingly, the Board finds that OWCP did not meet its burden of proof.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective September 8, 2011.

⁴ A.S., Docket No. 12-1509 (issued March 5, 2013).

⁵ *Id.*

⁶ Docket No. 02-1847 (issued June 13, 2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 6, 2012 is reversed.

Issued: June 26, 2013
Washington, DC

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

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

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