United States Department of Labor
Employees' Compensation Appeals Board

S.H., Appellant	)	
and	)	**Docket No. 12-1666**
	)	**Issued: March 18, 2013**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION HOSPITAL, Minneapolis, MN, Employer	)	

Appearances:
Stuart H. Deming, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 31, 2012 appellant, through counsel, filed a timely appeal of the July 2, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the termination of her compensation benefits. 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 the case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective February 22, 2011.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On March 13, 1963 appellant, then a 21-year-old licensed practical nurse, sustained a low back injury while assisting a patient into bed. OWCP accepted her claim for chronic lumbosacral strain. Initially, appellant did not lose time from work, but sought physical therapy and used a lumbar belt at work. On April 15, 1964 she resigned; she subsequently gave birth on May 24, 1964. Appellant sought reinstatement in late 1964 but was deemed by the employing establishment to be not physically qualified to continue performing her duties. Compensation for temporary total disability was paid for the period August 19, 1964 through November 24, 1965. Appellant was placed in a vocational rehabilitation program and found able to perform general clerical office employment.

In a decision issued on September 16, 1968, OWCP reduced appellant's compensation finding that she had the capacity to perform the position of general office clerk. It found that she had an 84 percent wage-earning capacity effective November 25, 1965.

The record reflects that appellant received compensation benefits for partial disability for over 40 years. She worked at intermittent jobs during her period of partial disability and became an instructional aid in the mid-1980s, a position she still performs.

In a January 6, 2006 report, Dr. Harry W. Burdick, a Board-certified orthopedic surgeon, noted that he treated appellant from 1995 to 1996 but had not seen her since. He noted that she could not work as a licensed practical nurse because of a back injury. Dr. Burdick stated that the degenerative disc disease in appellant's lumbosacral spine had progressed very little, but she showed a significant increase in the calcification of her abdominal aorta. He found the likelihood of her needing any surgical procedure for her back very slim. Appellant was safe to continue in the same employment, but should avoid the job of licensed practical nurse, which involved bending, lifting and twisting.

A November 24, 2006 statement of accepted facts noted appellant's employment history, the duties of the position of registered nurse, the accepted injury and her medical treatment. It advised that the claim was accepted for chronic lumbar strain, that she was placed on total disability on August 19, 1964 and that a loss of wage-earning capacity determination was made based on general clerical office employment. The statement of accepted facts noted that appellant had a nonwork-related diagnosis of lumbosacral degeneration.

On December 19, 2006 OWCP referred appellant to Dr. Perry W. Greene, Jr., a Board-certified orthopedic surgeon, for a second opinion. In a January 23, 2007 report, Dr. Greene found that she had spondylolisthesis, which was first diagnosed in 1967. As a result, she had intermittent muscular problems based on the instability of her spine. Appellant originally had a muscular problem when she was injured in 1963 and, probably, since she was a teenager. Dr. Greene noted that her symptoms were precipitated by the work injury in March 1963. He found that appellant did not have a chronic lumbar strain, but rather an underlying anatomic defect in her spine, which predisposed her to muscular problems. As a result, appellant was not capable of lifting activities. Dr. Greene noted that she seemed to be comfortable doing sedentary activities. He indicated that appellant would benefit from a flexibility program with some core strengthening.

On August 2, 2007 OWCP proposed to terminate appellant's compensation as she did not have any further residuals of the chronic lumbar strain from the work injury of March 13, 1963. In an August 14, 2007 report, Dr. Burdick noted that she had spondylolisthesis and, probably, had this condition at the time of her 1963 employment injury. The pain of which appellant complained was probably the result of the injury from 1963 superimposed on the congenital defect. Dr. Burdick noted that this did not go away and frequently required surgery for relief. He noted that appellant was able to tolerate pain without surgery.

A conflict in medical opinion was found between Dr. Burdick and Dr. Greene with regard to whether appellant had residuals of her work-related injury of March 13, 1963.

On December 18, 2007 OWCP referred appellant to Dr. Constantine Nicholas, a Board-certified orthopedic surgeon, selected as the impartial referee.

In a July 18, 2008 report, Dr. Nicholas found that there were no residuals from the work-related injury of 1963. He noted that the injury was of a temporary nature and had long since resolved. Dr. Nicholas stated that appellant had a pars defect at the L5-S1 level, which had not progressed. He placed restrictions on her work activity and would eliminate the date-of-injury job, but noted that she was capable of any activity that did not require repetitive lifting. In an October 18, 2008 addendum, Dr. Nicholas responded to OWCP's questions. He stated that the lumbosacral strain by degeneration was a temporary condition, which resolved with four to six weeks. Dr. Nicholas noted that there was no medical evidence that appellant's congenital condition was in any way affected by the accepted lumbosacral strain. He noted that the condition of spondylosis was the same in 1963, 1966 and 2006, as noted by x-rays. Dr. Nicholas stated that childbirth would pose a greater strain to appellant's back condition than an isolated lumbosacral strain.

In a March 2009 report, Dr. Burdick indicated that appellant's chronic low back pain was slowly getting worse. He stated that a computerized tomography (CT) scan of February 25, 2009 showed: (1) L5 chronic spondylolysis, grade 1 spondylolisthesis L5 on S1; (2) mild-to-moderate right foramen stenosis L5-S1, mild on left, no impingement seen; and (3) multilevel mild degenerative changes elsewhere.

On March 3, 2009 OWCP noted that Dr. Nicolas was a partner of a physician who examined appellant years prior. Although both physicians had not been partners for several years, the fact was enough to invalidate the impartial medical examination by Dr. Nicholas. Accordingly, there remained an unresolved medical conflict between Dr. Greene and Dr. Burdick.

On April 16, 2009 OWCP referred appellant to Dr. Emmanuel N. Obianwu, a Board-certified orthopedic surgeon, for an impartial medical examination. It asked him to determine whether she still had a diagnosis of chronic lumbar strain causally related to the work injury of March 13, 1963; whether residuals of the chronic strain of the lumbosacral area remained causally related to the accepted injury; whether the injury, caused an aggravation of the preexisting congenital spondylolisthesis/spondylolysis at L5-S1; and if an aggravation of congenital defect was still present. In a report dated April 24, 2009, Dr. Obianwu diagnosed (1) bilateral spondylolysis, L5, with grade 1 spondylolysis, L5 on S1; (2) mild to moderate, right

foramen stenosis, L5-S1, mild on the left; and (3) multilevel, mild degenerative disc disease, L4-5, L3-4 and L2-L3. He indicated that he agreed with Drs. Green and Burdick that appellant did not have chronic lumbar strain. Dr. Obianwu also agreed that such a diagnosis, though not present, would not be related to the work injury of March 13, 1963. He indicated that no residuals remain of the chronic strain of the lumbosacral area. Dr. Obianwu stated that there was no tightness of the muscle of the lumbar spine and no atrophy of the paraspinous muscles. He noted that there was no finding which would suggest chronic inflammation of the soft tissues of appellant's lumbar spine. Dr. Obianwu opined that she has developmental spondylolysis, with grade 1 spondylolysis, L5-S1. He noted that this is a developmental condition that usually develops in the preadolescent years and that by the time appellant commenced work at the employing establishment, this condition would be well established. Dr. Obianwu noted, however, that the plain x-ray findings are quite subtle as seen in the January 2006 x-ray. He indicated that it did not appear that in the early phases of appellant's illness there was any talk of aggravation of preexisting, developmental condition in her lumbar spine. Regardless, Dr. Obianwu noted that, the work of transferring a patient from a chair would not aggravate this developmental condition, it would simply cause an exacerbation of the symptoms of the underlying condition and that there would be no worsening of the development condition by appellant's activities. He concluded that, no aggravation of the preexisting condition occurred, it was merely an exacerbation of the symptoms, which have now returned to normal. Dr. Obianwu did believe that the residuals of aggravation of the congenital defect at L5-S1 persisted. He noted that all the changes seen on appellant's CT scan are easily attributable to the aging process. Dr. Obianwu indicated that this is a lumbosacral degeneration and that this nonwork-related diagnosis is what is responsible for all of the symptoms that appellant manifests at this time. He opined that the degeneration of the disc is clearly age related. Dr. Obianwu also noted that, because of the nonwork-related diagnosis of lumbosacral degeneration, it would be prudent that, in a work environment, appellant should not engage in activities that call for lifting above 30 pounds or repetitive bending of the trunk. He reiterated that these restrictions are not predicated by any work-related activity but are the result of the nonwork-related diagnosis of lumbosacral degeneration and the developmental diagnosis of bilateral spondylolysis and grade 1 spondylolisthesis, L5-S1. In a June 3, 2009 update, Dr. Obianwu opined that he did not believe that residuals of aggravation of the congenital defect at L5-S1 persisted; that there were no residuals of aggravation of the congenital defect at L5-S1 persisting at this time; that appellant does not have any diagnosis that was caused or precipitated by her work injury; and that her current complaints are due solely to nonwork-related factors.

On July 8, 2009 OWCP issued a proposed modification of loss of wage-earning capacity, wherein it proposed modifying the previously established loss of wage-earning capacity with a termination of appellant's medical benefits and compensation for wage loss for this claim.

By letter dated August 5, 2009, appellant's counsel contended that termination was not proper as appellant had a permanent disability for 40 years and that OWCP had determined that she reached maximum medical improvement from her employment-related injury in 1968.

On August 10, 2009 OWCP terminated appellant's medical and wage-loss benefits effective that date.

In an order dated July 23, 2010, the Board reversed the August 10, 2009 decision, as it found that OWCP did not review arguments presented by appellant's counsel that were received on the date of the decision. The Board noted that it was imperative that OWCP review all evidence and argument made prior to the issuance of the final decision.[2]

On February 22, 2011 OWCP again terminated appellant's medical and wage-loss benefits effective the date of the decision.

On February 20, 2012 appellant, through counsel, requested reconsideration. Among the arguments set forth by counsel was that the statement of accepted facts was deficient in that it made no reference to OWCP's finding that she had no history of prior back disability, did not reference that OWCP found that she had reached maximum medical improvement and suffered a 15 percent permanent disability due to her employment injury, that it made no reference to OWCP's finding that her claim had been accepted for the aggravation of a preexisting spondylolisthesis and that the statement of accepted facts failed to accurately report that the employing establishment declined to rehire her because of her back condition. Counsel also contended that OWCP failed to provide proper notice that it was attempting to rescind acceptance of an accepted employment-related condition. Counsel contended that the impartial medical examiner's report was premised on an incomplete and inaccurate recitation of the facts and was also premised on leading questions. Finally, counsel contends that the employing establishment never offered appellant a suitable position.

By decision dated July 2, 2012, OWCP found that the evidence and argument submitted was insufficient to modify the February 22, 2011 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[3] OWCP's burden of proof in terminating compensate includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.[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] Where a case is

[2] Docket No. 09-2280 (issued July 23, 2010).

[3] *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[4] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[5] *M.D.*, Docket No. 11-1737 (issued April 3, 2012); *Calvin S. Mays*, 39 ECAB 993 (1988).

[6] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[7]

ANALYSIS

OWCP accepted that on March 15, 1963 appellant sustained a chronic lumbosacral strain in the performance of her federal duties as a licensed practical nurse. Appellant was paid compensation and medical benefits for a period of over 40 years.

OWCP found a conflict in medical opinion between appellant's treating physician, Dr. Burdick, and a second opinion physician, Dr. Greene, with regard to whether she had any residuals of the 1963 injury. Dr. Burdick opined that her pain as of August 14, 2007 was probably the result of the 1963 injury superimposed on her congenital defect. Dr. Greene opined that appellant's symptoms were precipitated by the work injury of March 1963. He did not believe that she had a chronic lumbar strain, but rather an underlying anatomic defect in her spine, which predisposed her to muscular problems. In order to resolve the conflict between these physicians, OWCP initially referred appellant to Dr. Nicholas for an impartial medical examination; but because he was once a partner in practice with a physician who previously examined appellant, OWCP properly determined that a new impartial medical examination was required.[8]

OWCP referred appellant to Dr. Obianwu to resolve the conflict in medical opinion. Dr. Obianwu found that no residuals remained from the accepted chronic lumbosacral strain. He stated that the act of transferring a patient from a chair would not aggravate appellant's underlying spondylolysis condition but would simply cause an exacerbation of symptoms. Appellant's condition had since returned to normal. Dr. Obianwu noted that, although she had physical restrictions, they were not related to her accepted lumbosacral strain but the result of her underlying lumbosacral degeneration and the bilateral spondylolysis and grade 1 spondylolisthesis at L5-S1. Based on the opinion of Dr. Obianwu, the impartial medical examiner, OWCP terminated appellant's wage-loss compensation and medical benefits. He supported that there were no continuing residuals from her accepted lumbosacral strain injury. Dr. Obianwu's reports represent the special weight of the medical evidence.

With regard to the statement of accepted facts, the Board notes that it is the means by which factual findings are separated from medical findings and opinions. Clear factual findings are aimed at preventing physicians from making erroneous factual assumptions about the case, which undermined their medical conclusions.[9] The criteria for preparation of the Statement of Accepted Facts are set forth in section 2.809.1 of OWCP's procedures in the Federal (FECA) Procedure Manual. The Board finds that the statement of accepted facts of record set forth the

[7] *V.G.*, 49 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

[8] *See e.g., Raymond E. Heathcock,* 32 ECAB 2004 (1981) (Board remanded the case because the selected impartial medical examiner was an associate of a physician who had previously examined appellant).

[9] *P.P.*, Docket No. 12-970 (issued November 6, 2012).

accepted injury, duties of appellant's former position and work history. The Board notes that Dr. Obianwu had her record for review and was aware of the factors set forth by her. The report of Dr. Obianwu reveals a thorough knowledge of the medical and factual components of this case. Although appellant correctly notes that, the statement of accepted facts did not include a notation with regard to acceptance for aggravation of spondylolisthesis/spondylolysis, this was corrected when OWCP sent him a follow-up letter on May 9, 2009 asking for clarification with regard to the issue of remaining residuals of aggravation of preexisting congenital sponylolisthesis/spondylolysis at L5-S1. The Board has defined a leading question as one which suggest or implies an answer to the question posed.[10] The questions asked of the impartial specialist were open-ended and did not suggest an answer. They are of the type of medical inquery to be answered by a physician in describing a claimant's condition.[11] The contention that the termination was not proper because the employing establishment did not offer appellant a suitable position is without merit. Benefits were terminated due to the fact that she no longer had residuals of the employment injury.

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 properly terminated appellant's wage-loss compensation and medical benefits effective February 22, 2011.

[10] *Carl D. Johnson*, 46 ECAB 804 (1995).

[11] *J.C.*, Docket No. 12-199 (issued June 8, 2012).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 2, 2012 is affirmed.

Issued: March 18, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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