

OWCP accepted the claim on July 6, 2010 for contusion of left hand, sprain of left hand, left shoulder and upper arm sprain acromioclavicular, contusion of right hip and thigh, right knee and leg sprain, neck sprain and lumbar sprain. Appellant stopped work on November 16, 2009 and received wage-loss compensation. On November 29, 2009 he was terminated from his temporary position.

Appellant began receiving treatment on December 2, 2010 with Dr. Gerald Dworkin, Board-certified in physical medicine and rehabilitation, who diagnosed status post traumatic low back pain with right sciatica from disc herniation at L5-S1, neck pain with right arm radiation and right shoulder and left hand pain. On December 16, 2010 nerve conduction studies revealed right L5-S1 lumbosacral radiculopathy and right C5-6 cervical radiculopathy with no evidence of right upper or lower plexopathy, peripheral polyneuropathy or myopathy. A December 20, 2010 cervical magnetic resonance imaging (MRI) scan revealed generalized disc degeneration with cervical spondylosis. A lumbar MRI scan revealed multidegenerative changes with narrowing bulging and disc herniation at L5-S1 and L4-5.

On January 10, 2011 appellant was referred to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Smith noted that the only accepted conditions with regard to the November 16, 2009 injury were soft tissue sprains, strains and contusions. Based on physical examination, he opined that the accepted conditions had resolved without any discernible residuals. Dr. Smith further stated that the MRI scan findings of degenerative disease of the cervical and lumbar spines were unrelated to appellant's work injury but were age related, revealing nothing of a post-traumatic nature, which would have caused or aggravated his preexisting conditions. He concluded that appellant had reached maximum medical improvement, could return to regular duty and did not require further treatment.

In a January 20, 2011 report, Dr. Dworkin reviewed Dr. Smith's January 10, 2011 report and disagreed with his findings. He reported that the December 20, 2010 MRI scan showed degenerative disease with disc herniations at L4-5 and L5-S1. Dr. Dworkin opined that appellant's disc herniation was secondary to the traumatic incident, which occurred at work in November 2009 and that he remained disabled.

On March 24, 2011 OWCP referred appellant, to Dr. Andrew J. Gelman, a Board-certified orthopedic surgeon, for an impartial referee medical examination to resolve the conflict in opinion between Dr. Dworkin and Dr. Smith. Dr. Gelman reviewed appellant's medical history and provided findings on physical examination. He opined that appellant's sprains, strains and contusions, including his cervical and lumbar strain, had resolved. Dr. Gelman attributed appellant's ongoing symptomology to age-related physiologic degenerative disease. He noted that appellant had periods of remission or exacerbation with respect to his degenerative disease and that the degenerative process was incidental to the contusion and/or sprain/strain injuries of November 16, 2009. Dr. Gelman concluded that appellant had no specific restrictions or limitations pertaining to the musculoskeletal system and any future treatment addressing his degenerative disease was not related to the accepted diagnoses regarding the November 16, 2009 injury.

On April 6, 2011 OWCP notified appellant of a proposal to terminate his compensation benefits.

By decision dated May 10, 2011, OWCP terminated appellant's compensation benefits effective May 10, 2011 on the grounds that the weight of the medical evidence rested with Dr. Gelman, who found that appellant did not have residuals of his work-related injury.

On May 17, 2011 appellant, through counsel, requested an oral hearing before the Branch of Hearings and Review.

By decision dated July 28, 2011, the Branch of Hearings and Review set aside OWCP's May 10, 2011 decision. OWCP failed to provide a copy of the pretermination notice and decision to appellant's attorney. It was directed to reinstate benefits and reissue the proposed termination of benefits.

Appellant submitted a May 24, 2011 report from Dr. Bruce H. Grossinger, a Board-certified neurologist, who stated that appellant sustained injuries from a fall on November 16, 2009. Dr. Grossinger diagnosed traumatic disc injuries with right lumbosacral radiculopathy and right cervical radiculopathy, relating to C5-6, L4-5 and L5-S1 pathology due to the November 16, 2009 accident. He concluded that appellant remained disabled.

In a July 14, 2011 progress note, Dr. Dworkin reported that appellant returned for follow-up regarding his work-related back injury which had significantly improved. He found that appellant could return to work full duty.

On August 3, 2011 OWCP notified counsel and appellant of its proposal to terminate his compensation benefits based on Dr. Gelman's opinion that he did not have residuals or disability related to his accepted medical conditions. It provided him 30 days to submit additional information.

In a September 15, 2011 medical report, Dr. Dworkin noted that a December 16, 2009 nerve conduction study revealed right L5-S1 lumbosacral radiculopathy. The December 20, 2010 MRI scan revealed disc herniations at L4-5 and L5-S1. Dr. Dworkin diagnosed traumatic low back pain with right sciatica from the disc herniations. He disagreed with Dr. Gelman's report that the December 20, 2010 MRI scan indicated multi-level features of disc and facet degeneration. Dr. Dworkin stated that appellant suffered a traumatic disc herniation at L5-S1 with narrowing of the left, greater than right, lateral recess. He further noted significant discogenic bulging and flattening of the anterior aspect of the thecal sac at L4-5. Dr. Dworkin advised that the diagnoses were traumatic in nature and stemmed from the November 2009 injury and corroborated by the positive electromyography (EMG) findings of radiculopathy in the same distribution at L5-S1.

On November 29, 2011 OWCP provided Dr. Gelman with a copy of Dr. Dworkin's September 15, 2011 medical report, the December 20, 2010 MRI scan and the December 16, 2010 nerve conduction study. It requested a supplemental report regarding appellant's residuals and disability.

In a December 5, 2011 report, Dr. Gelman reported that he was aware of the electrodiagnostic studies and MRI scan imaging studies of the lumbar and cervical spine when he wrote his initial report. In response to Dr. Dworkin's report, he stated that the course of treatment addressed a degenerative spinal condition and that lumbar strain type injuries did not

cause radiculopathy. He further noted that the MRI scan findings were of a degenerative nature and not consistent with a lumbar strain and/or contusion. Dr. Gelman stated that the minor trauma appellant sustained had no independent association with the progression to serious low back injury. His opinion had not changed since his March 24, 2011 report. Dr. Gelman further noted that Dr. Dworkin had released appellant to full duty on July 14, 2011.

By decision dated December 14, 2011, OWCP terminated appellant's compensation benefits effective that day. It found that the weight of the medical evidence rested with Dr. Gelman, who found that appellant did not have to experience residuals of his work-related conditions or disability.

On December 21, 2011 appellant, through counsel, requested an oral hearing before the Branch of Hearings and Review. At the March 20, 2012 hearing, he testified that he was discharged from the VA and was actively seeking employment as he had sufficiently recovered and was able to work. Appellant's counsel argued that he was discharged to return to work as of November 15, 2011 and sought wage loss for compensation through that date. Appellant stated that Dr. Dworkin mistakenly released him to full duty as of July 14, 2011 but that he was not released from treatment until November 15, 2011. He did not disagree with OWCP's finding that he no longer needed medical treatment as of December 14, 2011, but contended that he was entitled to wage-loss compensation past May 1, 2011. Counsel stated that he would submit a medical report from Dr. Grossinger in support of appellant's claim. The record was held open for 30 days.

In a September 6, 2011 report, Dr. Grossinger reported that appellant sustained serious traumatic injuries on November 16, 2009 including right cervical radiculopathy at C5-6 and L4-5 and L5-S1 radiculopathy. He stated that appellant required ongoing treatment and was expected to return to work in approximately 60 days. Dr. Grossinger noted that appellant's right C5-6 radiculopathy was verified by objective EMG and nerve conduction studies, which were ignored in Dr. Gelman's report. He reiterated that appellant had right cervical radiculopathy, right lumbosacral radiculopathy and focal neurological deficits including weakness of the right shoulder girdle and biceps and weakness of the right leg and foot. Thus, Dr. Grossinger concluded that appellant required ongoing medical care for his injuries.

By decision dated May 17, 2012, OWCP affirmed the December 14, 2011 decision terminating compensation. It noted that the findings of Dr. Gelman were sufficiently well rationalized and based on a proper medical background. Thus, the weight of the medical evidence rests with his opinion that the November 16, 2009 injury had resolved with no further disability or need for medical treatment. It further noted that appellant's physician Dr. Dworkin released appellant to full duty as of July 14, 2011. The hearing representative further instructed OWCP to provide appellant wage-loss compensation for the period April 29 through July 14, 2011.²

Appellant filed a claim for compensation (Form CA-7) for leave without pay from July 15, 2011 onward.

² By letter dated June 27, 2012, OWCP informed appellant that he was being provided with compensation as directed by the May 17, 2012 OWCP decision.

By decision dated June 27, 2012, OWCP denied appellant's disability compensation for the period July 15 to November 30, 2011.

On July 3, 2012 appellant, through counsel, appealed OWCP's June 27, 2012 decision and requested an oral hearing before the Branch of Hearings and Review.

At the October 9, 2012 hearing, appellant testified that he had continued treatment by Dr. Dworkin through November 14, 2011. The record was held open for 30 days.

In a November 27, 2012 medical report, Dr. Dworkin reported that he was treating appellant for traumatic low back pain with right sciatica from traumatic disc herniation at L4-5 and L5-S1. He noted that appellant was placed out of work until his most recent visit of July 14, 2011. Based on subsequent visits and following his history, Dr. Dworkin opined that appellant could not return to his prior employment through the end of April 2012.

By decision dated January 7, 2013, OWCP affirmed the June 27, 2012 decision finding that appellant did not establish ongoing disability after July 14, 2011.

LEGAL PRECEDENT

Under FECA,³ the term disability is defined as incapacity, because of employment injury, to earn the wages that the employee was receiving at the time of injury.⁴ Disability is not synonymous with a physical impairment which may or may not result in an incapacity to earn the wages. An employee who has a physical impairment causally related to a federal employment injury but who nonetheless has the capacity to earn wages he or she was receiving at the time of injury has no disability as that term is used in FECA.⁵

Whether a particular injury causes an employee to be disabled and the duration of that disability are medical issues which must be proved by a preponderance of the reliable, probative and substantial medical evidence.⁶ Findings on examination are generally needed to support a physician's opinion that an employee is disabled for work. When a physician's statements consist only of a repetition of the employee's complaints that excessive pain caused an inability to work, without making an objective finding of disability, the physician has not presented a medical opinion on the issue of disability or a basis for payment of compensation.⁷

Section 8123(a) 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.⁸ In situations where there are opposing

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Prince E. Wallace*, 52 ECAB 357 (2001).

⁵ *Cheryl L. Decavitch*, 50 ECAB 397 (1999); *Maxine J. Sanders*, 46 ECAB 835 (1995).

⁶ See *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001); *Edward H. Horton*, 41 ECAB 301, 303 (1989).

⁷ *G.T.*, 59 ECAB 447 (2008); see *Huie Lee Goal*, 1 ECAB 180, 182 (1948).

⁸ 5 U.S.C. § 8123(a).

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.⁹

ANALYSIS

OWCP accepted that appellant sustained a contusion of left hand, sprain of left hand, left shoulder and upper arm sprain acromioclavicular, contusion of right hip and thigh, right knee and leg sprain, neck sprain and lumbar sprain due to the November 16, 2009 employment incident. Appellant has the burden of proving by the weight of the substantial, reliable and probative evidence a causal relationship between his claimed disability from July 15 to November 30, 2011 and the accepted November 16, 2009 injuries.¹⁰ The reports of his physicians do not provide a rationalized medical opinion finding him disabled for work for the claimed period due to his accepted injuries. Therefore, the medical evidence submitted is insufficient to meet appellant's burden of proof.¹¹

OWCP determined that a conflict existed between Dr. Dworkin, appellant's treating physician, and Dr. Smith, a second opinion referral physician, regarding the nature and extent of appellant's employment-related condition and disability. It referred him to Dr. Gelman for an impartial medical evaluation to resolve the conflict. In a March 24, 2011 report, Dr. Gelman opined that appellant's sprains, strains and contusions, including his cervical and lumbar strain, had resolved. He attributed appellant's symptomology to his age-related physiologic degenerative disease. Dr. Gelman concluded that appellant had no specific restrictions or limitations pertaining to the musculoskeletal system and any future treatment addressing degenerative disease would not be related to the accepted diagnoses regarding the November 16, 2009 incident.

In a July 14, 2011 progress note, Dr. Dworkin reported that appellant returned for a follow-up regarding his work-related back injury which had significantly improved. He stated that appellant could return to work full duty. In a September 15, 2011 medical report, Dr. Dworkin noted that a December 16, 2009 nerve conduction study revealed right L5-S1 lumbosacral radiculopathy and the December 20, 2010 MRI scan revealed disc herniation at L4-5 and L5-S1. He diagnosed traumatic low back pain with right sciatica from disc herniation at L4-5 and L5-S1 as seen on the MRI scan. Dr. Dworkin reiterated that he disagreed with Dr. Gelman's report because the December 20, 2010 MRI scan indicated multilevel features of disc and facet degeneration. He opined that these diagnoses were traumatic in nature and stemmed from the November 2009 incident and were corroborated by the positive EMG findings of radiculopathy in the same distribution at L5-S1.

⁹*Nathan L. Harrell*, 41 ECAB 402 (1990).

¹⁰*See Amelia S. Jefferson*, 57 ECAB 183 (2005).

¹¹*Alfredo Rodriguez*, 47 ECAB 437 (1996).

In a December 5, 2011 report, Dr. Gelman responded to Dr. Dworkin's September 15, 2011 report and stated that he was previously aware of the electrodiagnostic data and MRI scan imaging studies of the lumbar and cervical spine when he made his initial findings. He stated that the course of treatment addressed a degenerative spinal condition and that lumbar strain-type injuries did not cause a radiculopathy. Dr. Gelman further noted that the MRI scan findings were of a degenerative nature and not consistent with a lumbar strain and/or contusion. He stated that minor trauma had no independent association with progression to serious low back injuries and his opinion had not changed since his March 24, 2011 report. Dr. Gelman further noted that interestingly, Dr. Dworkin released appellant to full duty on July 14, 2011.

In a November 27, 2012 medical report, Dr. Dworkin reported that he was treating appellant for traumatic low back pain with right sciatica from traumatic disc herniation at L4-5 and L5-S1. He noted that appellant was placed out of work until his most recent visit of July 15, 2011. Based on subsequent visits and following his history, Dr. Dworkin opined that appellant could not return to his prior employment through the end of April 2012.

The Board finds that, the opinion of Dr. Gelman is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that disabling residuals of appellant's work-related conditions have ceased. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.¹²

The Board finds that Dr. Gelman's opinion is based on a proper factual and medical history and he thoroughly reviewed the factual and medical history by accurately summarizing the relevant medical evidence.¹³ Dr. Gelman provided medical rationale for his opinion by explaining that appellant's sprains, strains and contusions, including his cervical and lumbar strain, had resolved and that his symptomology was a result of his age-related physiologic degenerative disease. He further provided detailed rationale that appellant was not disabled as a result of the accepted November 16, 2009 injuries and any current problems were related to his nonindustrial degenerative disease, noting that lumbar strain-type injuries did not cause a radiculopathy. Dr. Gelman further noted that the MRI scan findings were of a degenerative nature and not consistent with a lumbar strain and/or contusion and that appellant's musculoskeletal conditions stemming from the November 16, 2009 incident had long since resolved. He provided support for his argument and addressed prior MRI scan and nerve conduction studies, noting that appellant had a preexisting ongoing medical degenerative process which was unaltered by the November 16, 2009 injury. Thus, appellant had no physical limitations as a result of the November 16, 2009 incident. Dr. Gelman's opinion is entitled to special weight as the impartial medical examiner and establishes that appellant is not entitled to disability compensation from July 15 to November 30, 2011.

The Board finds that Dr. Dworkin's medical reports are insufficient to establish disability for the period July 15 to November 30, 2011. Dr. Dworkin did not relate appellant's continued

¹²*Solomon Polen*, 51 ECAB 341 (2000). See 5 U.S.C. § 8123(a).

¹³See *Melvina Jackson*, 38 ECAB 443 (1987).

disability to the accepted November 16, 2009 injuries of contusion of left hand, sprain of left hand, left shoulder and upper arm sprain acromioclavicular, contusion of right hip and thigh, right knee and leg sprain, neck sprain and lumbar sprain. Rather, he opined that appellant remained disabled as a result of traumatic low back pain with right sciatica from disc herniations at L4-5 and L5-S1. Dr. Dworkin disagreed with Dr. Gelman's opinion that appellant's disability was a result of an underlying degenerative condition, stating that the disc herniation was traumatic and stemmed from the November 2009 incident. Although he generally supported that appellant's continued symptoms were a result of a disc herniation related to the work injury, Dr. Dworkin's opinion on causal relationship was conclusory without adequate explanation as to how the conditions caused disability or remained symptomatic.¹⁴ Dr. Dworkin failed to provide any argument or opinion that appellant remained disabled as a result of the accepted November 16, 2009 injuries.¹⁵ Thus, his reports are insufficient to overcome the opinion of Dr. Gelman or to create a new medical conflict.¹⁶

The Board further notes that Dr. Dworkin did not establish that appellant was disabled after July 14, 2011 as a result of the November 16, 2009 injuries. Dr. Dworkin's July 14, 2011 progress note stated that appellant returned for a follow-up regarding his work-related back injury which had significantly improved and that he was released to work full duty. Thus, his July 14, 2011 report establishes that appellant was no longer disabled and was not entitled to disability compensation. Dr. Dworkin submitted a subsequent report dated November 27, 2012 where he noted that he was treating appellant for traumatic low back pain with right sciatica from traumatic disc herniation at L4-5 and L5-S1. His November 27, 2012 report did not provide adequate rationale as to why appellant remained disabled and did not explain why his opinion changed since his July 14, 2011 report. The record also failed to contain any reports documenting treatment from Dr. Dworkin from July 15 to November 30, 2011. Dr. Dworkin's report did not provide any opinion that appellant was totally disabled from July 15 to November 30, 2011 as a result of his accepted November 16, 2009 injuries and failed to explain how any residuals of this injury caused appellant disability.¹⁷ Without any explanation or rationale for the conclusion reached, Dr. Dworkin's reports are insufficient to establish that any additional conditions are causally related to his original November 16, 2009 injury.¹⁸ Therefore, the medical evidence of record does not establish that appellant's claimed disability during this timeframe was related to his November 16, 2009 employment injury.¹⁹

In a September 6, 2011 medical report, Dr. Grossinger reported that appellant sustained serious traumatic injuries on November 16, 2009 including right cervical radiculopathy at C5-6

¹⁴See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹⁵*J.H.*, Docket No. 12-1848 (issued May 15, 2013).

¹⁶See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).

¹⁷*S.P.*, Docket No. 09-1010 (issued March 2, 2010).

¹⁸*Deborah L. Beatty*, 54 ECAB 334 (2003).

¹⁹*Supra* note 11.

and L4-5 and L5-S1 radiculopathy. He argued that appellant required ongoing treatment and was expected to return to work in 60 days. Dr. Grossinger noted that appellant's right C5-6 radiculopathy was verified by objective EMG and nerve conduction studies, which were ignored in Dr. Gelman's report. He reiterated that appellant suffered from right cervical radiculopathy, right lumbosacral radiculopathy and focal neurological deficits including weakness of the right shoulder girdle and biceps and weakness of the right leg and foot. Thus, Dr. Grossinger concluded that appellant required ongoing medical care for his injuries.

Dr. Grossinger's report is insufficient to establish that appellant was disabled from July 15 to November 30, 2011 due to the November 16, 2009 employment incident. He failed to discuss appellant's medical history and how his degenerative back condition related to his disability. Dr. Grossinger did not describe or explain appellant's medical condition. He did not specifically address appellant's capacity for work or the reasons why he was unable to continue his duties. Although Dr. Grossinger reported that appellant remained disabled for 60 days, this limitation was based on diagnoses that were not accepted by OWCP as part of this claim. Thus, his opinion on the cause of appellant's injury was not rationalized and failed to establish that appellant was disabled during this period as a result of his November 16, 2009 employment injury.²⁰

The Board notes that the remaining medical evidence of record is also insufficient to establish disability for the period July 15 to November 30, 2011 as the reports failed to provide an opinion that appellant was disabled as a result of the accepted November 16, 2009 injuries. The reports of Dr. Dworkin and Dr. Grossinger did not establish that appellant's claim should have also been accepted for additional injuries. Dr. Gelman's opinion is entitled to special weight as the impartial medical examiner and establishes that appellant's November 16, 2009 injuries had resolved. Because appellant has not submitted any reasoned medical opinion evidence to show that she was disabled for the period July 15 to November 30, 2011 as a result of the November 16, 2009 injury, the Board finds that OWCP properly denied his claim for disability compensation.

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board's merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that appellant failed to establish that he was disabled due to his November 16, 2009 injury for the period July 15 to November 30, 2011.

²⁰S.T., Docket No. 11-1316 (issued January 25, 2012).

ORDER

IT IS HEREBY ORDERED THAT the January 7, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 29, 2013
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

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

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