

On appeal, appellant asserts that OWCP did not meet its burden of proof to terminate his compensation benefits. He contends that OWCP relied on inadequate legal reasoning or Board precedent and refused to accept additional spinal injuries. Appellant also contends that there was no conflict between his physicians and a second opinion physician. He asserts that chiropractors should be accorded equal weight under FECA in all circumstances.

FACTUAL HISTORY

OWCP accepted that on August 11, 2008 appellant, then a 45-year-old letter carrier, sustained thoracic and rhomboid back sprains while pulling down mail from his route case. He stopped work on September 10, 2008 and claimed a recurrence of disability commencing that day. In an August 18, 2008 report, Dr. Philip J. Cilio, an attending chiropractor, diagnosed thoracic spinal subluxations by x-ray. On September 23, 2008 he opined that the subluxations were attributable to an August 11, 2008 occupational injury while pulling down mail. Dr. Cilio held appellant off work in reports through November 2, 2009.

On January 14, 2009 OWCP accepted the claimed recurrence of disability. It paid appellant compensation for wage loss commencing October 25, 2008.

In an April 8, 2009 letter, OWCP advised appellant of the need to obtain additional expert medical opinion regarding the nature and extent of the accepted injuries. It referred him to Dr. P. Leo Varriale, a Board-certified orthopedic surgeon, to obtain a second opinion report. OWCP also advised appellant of his right to have a physician of his choosing present at the examination. In an April 20, 2009 report, Dr. Varriale reviewed the medical record and statement of accepted facts. On examination, he noted spasms throughout the paraspinal muscles of the back and neck. Dr. Varriale opined that appellant had not yet reached maximum medical improvement. Appellant could not return to his date-of-injury job, but could perform part-time limited-duty work.

OWCP found a conflict of medical opinion between Dr. Cilio and Dr. Varriale regarding the nature and extent of the accepted injuries. To resolve the conflict, it selected Dr. Leon Sultan, a Board-certified orthopedic surgeon.

In a January 20, 2010 letter, OWCP advised appellant that there was a conflict in medical opinion between Dr. Cilio and Dr. Varriale regarding the diagnosis of his back conditions and whether he had continuing disability related to the accepted injuries. It referred to section 8123(a) of FECA² that authorized the appointment of an impartial medical specialist.

Dr. Sultan submitted a February 2, 2010 report reviewing the medical record and a statement of accepted facts. On examination, he found normal ranges of cervical, thoracic and lumbar motion, no paraspinal spasm, dull biceps and triceps reflexes bilaterally, a normal sensory examination in both arms and normal grip strength bilaterally. Dr. Sultan diagnosed resolved cervical and lumbar strains superimposed on underlying degenerative disc disease. He opined that the accepted thoracic and rhomboid back strains had resolved completely, as there

² 5 U.S.C. § 8213(a).

were no orthopedic or neurologic findings. He released appellant to return to his date-of-injury position without restrictions.

By notice dated April 12, 2010, OWCP proposed to terminate appellant's medical and wage-loss benefits, based on Dr. Sultan's report indicating that the accepted thoracic and rhomboid sprains had ceased without residuals. It afforded appellant 30 days to submit additional evidence.

Appellant responded by May 4, 2010 letter. He objected to the notice of proposed termination and asserted that he continued to have disabling residuals of the accepted injuries. Appellant alleged that Dr. Sultan's examination was flawed and suspect. He submitted an April 30, 2010 report from Dr. Cilio, noting that he had treated appellant beginning on August 18, 2008 for the August 11, 2008 injury. Dr. Cilio diagnosed thoracic subluxations by April 26 and 29, 2010 x-rays, a lumbar sprain and thoracic, lumbar and sacral neuritis.

By decision dated May 18, 2010, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day on the grounds that the accepted injury had ceased without residuals, based on Dr. Sultan's opinion. It found that he failed to provide sufficient medical evidence refuting Dr. Sultan's opinion.

On February 26, 2011 appellant requested reconsideration. He asserted that OWCP erroneously terminated his benefits and that the claim should be accepted for additional thoracic and lumbar conditions.

In chart notes from August 18, 2008 to May 30, 2010, Dr. Cilio and his associate Dr. John G. Rupolo, a chiropractor, diagnosed C4, T1-6 and L2-3 subluxations by x-ray, with disc rotations and thoracic listing to the right. Dr. Ahmed Elfiky, an attending neurologist, administered a lumbar epidural injection in March 2011 to ameliorate symptoms of an L5-S1 disc herniation with nerve root impingement and radiculopathy. He also diagnosed a herniated C5-6 disc with radiculitis. Dr. Charmaine Johnson, an attending osteopathic physician, submitted June 7, 2010 and January 25, 2011 reports diagnosing herniated discs due to a January 20, 2004 occupational slip and fall and the August 11, 2008 injury. In an undated report, Dr. Noah Rosen, an attending Board-certified neurologist, noted examining appellant on December 9, 2010. He noted a history of a 2004 occupational injury and the August 2008 injury. Dr. Rosen diagnosed cervicalgia and chronic headaches.

In a December 3, 2010 report, Dr. Anang Modi, an attending osteopath, diagnosed herniated cervical and lumbar discs producing chronic neck and back pain with radicular symptoms into the right arm.

By decision dated May 27, 2011, OWCP denied modification of the May 18, 2010 decision. It found that the evidence did not support that appellant remained disabled for work on and after May 18, 2010 due to the accepted injuries. OWCP further found that he failed to establish any procedural, legal or factual errors by OWCP.

In a May 19, 2012 letter, appellant again requested reconsideration. He submitted an extensive statement asserting that OWCP misrepresented the facts of his case such that he could no longer obtain a proper appeal. Appellant asserted that OWCP failed to accept a lumbar sprain

and thoracic-lumbosacral neuritis as diagnosed by Dr. Rupolo; that OWCP improperly sought a second opinion examination from Dr. Varriale; created a false conflict of medical opinion; improperly obtained an impartial medical evaluation and did not properly notify him of the reasons for the second opinion and impartial examinations. He alleged that OWCP denied him due process in terminating his compensation, improperly terminated his compensation benefits and continuously ignored his requests for assistance in addressing the deficiencies in his claim.

By decision dated August 20, 2012, OWCP found that the additional evidence was insufficient to warrant modification of its decision. It found that appellant did not establish that the lumbar sprain or thoracic-lumbosacral neuritis should be accepted as Dr. Rupolo provided an incomplete and inaccurate medical history. The April 8, 2008 second opinion referral letter properly set forth the reasons for the referral and appellant's right to have a physician of his choosing present. OWCP further found that the conflict of opinion between appellant's chiropractor and Dr. Varriale was clear from the record, necessitating the selection of an impartial medical examiner. It noted that the referral letter to Dr. Sultan set forth the reasons for the referral. OWCP advised that appellant was provided appropriate notice prior to the termination of his compensation.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ 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.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁶

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.⁷ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.⁸ In situations where there are opposing medical reports of virtually equal weight and

³ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁴ *Id.*

⁵ *Roger G. Payne*, 55 ECAB 535 (2004).

⁶ *Pamela K. Guesford*, 53 ECAB 726 (2002).

⁷ *Supra* note 2; *Robert W. Blaine*, 42 ECAB 474 (1991).

⁸ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

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 -- ISSUE 1

OWCP accepted that appellant sustained thoracic and rhomboid sprains on August 11, 2008 while pulling down mail from his case. It also accepted a recurrence of disability commencing September 10, 2008 and paid wage-loss compensation. Dr. Cilio, an attending chiropractor, diagnosed spinal subluxations by x-ray and held appellant off work in reports from November 9, 2009. On April 20, 2009 OWCP obtained a second opinion report from Dr. Varriale, a Board-certified orthopedic surgeon, who opined that the accepted thoracic and rhomboid strains had ceased and that appellant could resume part-time, light-duty work. It found a conflict of medical opinion and selected Dr. Sultan, a Board-certified orthopedic surgeon, to serve as the medical referee. Dr. Sultan submitted a detailed February 2, 2010 report reviewing the medical record and statement of accepted facts. He noted no objective findings of the accepted strains and opined that appellant could resume his date-of-injury job without any work restrictions.

By notice dated April 12, 2010 and finalized May 18, 2010, OWCP terminated appellant's medical and wage-loss benefits effective May 18, 2010 on the grounds that the accepted thoracic and rhomboid strains had ceased without residuals. It accorded Dr. Sultan the weight of the medical evidence. The Board finds that the termination was proper under the law and facts of the case.

Dr. Sultan performed a thorough clinical examination noting detailed objective findings negating the presence of the accepted thoracic and rhomboid strains. He explained why the absence of paraspinal spasm and neurologic abnormalities established that the accepted injuries had ceased without residuals. Dr. Sultan also reviewed the entire medical record and a statement of accepted facts. The Board finds that Dr. Sultan's opinion is of sufficient weight to resolve the conflict of medical opinion between Dr. Cilio, for appellant, and Dr. Varriale, for the government.¹⁰ The Board further finds that Dr. Sultan's opinion is of sufficient probative quality to meet OWCP's burden of proof in terminating appellant's wage-loss and medical compensation benefits.¹¹

On appeal, appellant asserts that OWCP did not meet its burden of proof in terminating his benefits. He contends that OWCP relied on inadequate legal reasoning or Board precedent. Appellant also contends that there was no conflict between Dr. Cilio and Dr. Varriale as neither Dr. Varriale or Dr. Sultan obtained x-rays or administered appropriate testing. As stated above, OWCP met its burden of proof in terminating appellant's wage-loss and medical compensation benefits. Also, there was a clear conflict of medical opinion between Dr. Cilio, who found

⁹ *Anna M. Delaney*, 53 ECAB 384 (2002).

¹⁰ *Id.*

¹¹ *Supra* note 6.

appellant totally disabled for work due to ongoing spinal conditions and Dr. Varriale, who found that appellant could perform part-time limited duty as the accepted conditions had resolved.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.¹² For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.¹³

ANALYSIS -- ISSUE 2

Following OWCP's termination of appellant's compensation benefits, appellant requested reconsideration on February 26, 2011 and May 19, 2012, asserting a continuing disability for work on and after May 18, 2010 related to the accepted injuries.

Appellant submitted chart notes dated from August 18 to May 30, 2010 from Dr. Cilio and Dr. Rupolo, attending chiropractors, diagnosing spinal subluxations by x-ray. Dr. Elfiky, an attending neurologist, administered a lumbar epidural steroid injection in March 2011 but did not address causal relationship. Dr. Johnson, an attending osteopathic physician, diagnosed herniated lumbar discs on June 7, 2010 and January 25, 2011 attributable in part to the August 11, 2008 injuries. Dr. Rosen, an attending Board-certified neurologist, diagnosed cervicalgia and chronic headaches in a December 9, 2010 examination. Dr. Modi, an attending osteopath, opined on December 3, 2010 that appellant had chronic neck and back pain from herniated discs. The physicians did not provide sufficient medical rationale explaining how or why the accepted thoracic and rhomboid strains continued to totally disable appellant for work on or after May 18, 2010. Their opinions are insufficient to meet appellant's burden of proof.¹⁴ The Board notes that OWCP did not accept the diagnoses of cervicalgia, chronic headaches and disc herniations as work related.

LEGAL PRECEDENT -- ISSUE 3

Where an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he and she bears the burden of proof to establish that the condition is causally related to the employment injury.¹⁵ A claimant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which compensation is sought is causally related to a specific employment incident or to specific

¹² See *Virginia Davis-Banks*, 44 ECAB 389 (1993); see also *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

¹³ *Alice J. Tysinger*, 51 ECAB 638 (2000).

¹⁴ *Virginia Davis-Banks*, *supra* note 12.

¹⁵ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

conditions of employment.¹⁶ Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹⁷ 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 implicated employment factors.¹⁸ The opinion of the physician must be based on a complete factual and medical background of the claimant,¹⁹ must be one of reasonable medical certainty²⁰ explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.²¹

ANALYSIS -- ISSUE 3

OWCP accepted that appellant sustained thoracic and rhomboid strains. Pursuant to his May 19, 2012 request for reconsideration, he asserted that OWCP should have expanded the claim to include a lumbar sprain and thoracic-lumbosacral neuritis as diagnosed by Dr. Cilio, who diagnosed these conditions in an April 30, 2010 report. However, Dr. Cilio did not provide medical rationale explaining how and why these conditions were sequelae of the accepted injuries or were otherwise causally related to work factors. Therefore, his opinion is insufficient to meet appellant's burden of proof.²²

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 May 18, 2010. The Board also finds that appellant has not established a continuing work-related disability on and after May 18, 2010 causally related to accepted thoracic and rhomboid strains. The Board further finds that he has not established that he sustained thoracic neuritis or other spinal conditions causally related to accepted thoracic and rhomboid strains.

¹⁶ See *Katherine J. Friday*, 47 ECAB 591 (1996).

¹⁷ *John W. Montoya*, 54 ECAB 306 (2003).

¹⁸ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹⁹ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

²⁰ *Supra* note 17.

²¹ *Judy C. Rogers*, 54 ECAB 693 (2003).

²² *Supra* note 18.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 20, 2012 is affirmed.

Issued: September 18, 2013
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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