United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 13-2098**
	)	**Issued: August 19, 2014**
DEPARTMENT OF HOMELAND SECURITY, U.S. CUSTOMS & BORDER PATROL, Kingsville, TX, Employer	)	

Appearances:
Toby Rubenstein, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On July 24, 2013 appellant, through his representative, filed a timely appeal from a July 10, 2013 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 the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to justify termination of appellant's compensation benefits for his accepted injury effective January 15, 2012; and (2) whether appellant established that he had any continuing disability or residuals of his accepted conditions after January 15, 2012.

[1] 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On September 19, 2008 appellant, then a 39-year-old border patrol trainee, injured his neck after participating in training calisthenics on September 17, 2008 while in the performance of duty. OWCP accepted his claim for neck sprain. Appellant did not stop work but returned to a limited-duty position. He was terminated by the employing establishment on March 9, 2010 due to an inability to perform his assigned duties. Thereafter, OWCP placed appellant on the periodic compensation rolls.

Medical evidence was developed in the case. Appellant submitted a September 19, 2008 magnetic resonance imaging (MRI) scan of the cervical spine which showed disc desiccation and protrusions at C3-4, C4-5, C6-7 and C7-T1. An electromyogram dated December 17, 2008 revealed mild median neuropathy at the wrists. Appellant came under the treatment of Dr. Sergio M. Solorzano, a Board-certified family practitioner, on February 2, 2011 for chronic neck and left arm pain associated with weakness and numbness which he noted began in September 2008 while training as a border patrol agent. Dr. Solorzano noted that appellant's condition was refractory to conventional therapy and he was not a candidate for surgery. He opined that given the chronicity and extent of his symptoms appellant would not be able to return to duties of a border patrol agent any time soon or ever. Dr. Solorzano noted permanent restrictions of no heavy lifting over 20 pounds, no prolonged pushing/pulling or reaching.

On March 11, 2011 OWCP referred appellant to Dr. Sofia M. Weigel, a Board-certified orthopedist, for a second opinion. In an April 25, 2011 report, Dr. Weigel noted appellant's history and findings on examination. Motor examination was normal. There was mild atrophy on the left elbow and mild pain of the paraspinal muscles but no spasm in the cervical muscle region. Dr. Weigel diagnosed cervical sprain associated with myofascial pain in the paracervical muscles. She noted that appellant had preexisting cervical injury and the work injury of September 7, 2008 resulted in a temporary exacerbation of his preexisting condition that resolved by October 2008. Dr. Weigel opined that work activities from September 17, 2008 did not materially worsen the preexisting condition and diagnostic studies did not show a worsening of his condition. She noted no physical objective residuals from the September 17, 2008 work injury. Dr. Weigel returned appellant to work full duty without restrictions in relation to the September 17, 2008 work injury. In a May 16, 2011 addendum, she noted reviewing a May 16, 2011 functional capacity evaluation which noted that appellant provided guarded and inconsistent effort and performance such that the testing was not considered valid. Dr. Weigel reiterated that appellant could return to work without restrictions. In a May 16, 2011 work capacity evaluation, she also indicated that appellant could return to work full duty.

Appellant submitted a July 9, 2011 report from Dr. Solorzano, who disagreed with Dr. Weigel's opinion. Dr. Solorzano noted that appellant continued to have pain, numbness in a radicular fashion which was not explained by anatomical pathology or correlated with medical tests. He opined that appellant had residuals of his work-related injury which were disabling and that he was not malingering. Dr. Solorzano recommended ruling out brachial plexus and opined that appellant could not resume work full time, eight hours per day.

OWCP found that a conflict of medical opinion existed between Dr. Solorzano, who indicated that appellant sustained disabling residuals of his work-related injuries, and

Dr. Weigel, who determined that appellant's accepted conditions had resolved and he could return to work without restrictions related to his accepted injuries.

To resolve the conflict OWCP, on September 16, 2011, referred appellant to Dr. John R. Anderson, a Board-certified orthopedist, for a referee report. In a September 23, 2011 report, Dr. Anderson noted the history of appellant's work injury while lifting weights and also reviewed the medical record. He advised that appellant claimed to be unable to return to his regular duties and that he last worked on February 26, 2010. Examination revealed normal gait. While appellant reported tenderness about the scapula, elbow, hand, wrist and forearm, it was not specific and there were no trigger points. Appellant had normal range of motion. There was no crepitation or subluxation in the arms. Tinel's sign was positive on the left. Reflexes were symmetrical. Muscle strength was 4/5 on the left but Dr. Anderson suggested that this was due to decreased effort and noted that appellant had no gross weakness. Appellant had stocking glove hypoesthesia. Dr. Anderson stated that a cervical sprain would have explained some of his finding initially but would not explain his present findings. He stated that no absolute diagnosis could be made other than that appellant might have some carpal tunnel syndrome causing aching pain into his arm. Dr. Anderson recommended that this be addressed by appellant's treating physician. He opined that the accepted neck sprain would have resolved within two to three months and appellant could return to work eight hours per day as a border patrol agent. Dr. Anderson noted that appellant's pain was subjective and he found no physical findings which would substantiate the claim. He noted the degenerative disc disease in the neck was mild to moderate and probably asymptomatic. Dr. Anderson noted that appellant's degenerative disc disease had not resolved and there was no reason to believe the degenerative disc disease was caused by the work injury. He opined that the injury that occurred on September 17, 2008 should have resolved at this point in time.

On October 27, 2011 OWCP issued a notice of proposed termination of compensation and medical benefits based on Dr. Anderson's report.

In letters dated November 10 and December 1, 2011, appellant disagreed with the proposed termination. He asserted that the opinion of Dr. Anderson was speculative and should not be the basis of a termination of benefits. Appellant submitted reports from Dr. Jairo Puentes, a physiatrist, dated November 1 and 29, 2011, who noted a history of the September 17, 2008 injury and indicated that appellant was a professional boxer for 14 years prior to being a border patrol agent. Dr. Puentes noted normal range of motion of the cervical, thoracic and lumbar region with decreased sensation in the C8-T1 distribution. He diagnosed cervical pain, myofascitis cervical spine, muscle ligamentous strain of the cervical spine and probable thoracic outlet syndrome. Dr. Puentes noted that appellant did not have a cervical problem but appeared to have thoracic outlet syndrome. In a duty status report dated November 1 to 29, 2011, he returned appellant to work full time with no overhead reaching. Appellant submitted Texas Workers' Compensation Work Status Reports and physical activities status report dated October 26 to December 19, 2011, from Dr. James Rose, a Board-certified internist, who noted a September 17, 2011 date of injury and diagnosed cervical radiculopathy. Dr. Rose advised that appellant could work with restrictions on lifting.

In a January 3, 2012 decision, OWCP terminated appellant's wage-loss and medical benefits effective January 15, 2012, based on Dr. Anderson's report.

On February 22, 2012 appellant requested a review of the written record. He asserted that Dr. Anderson's report was insufficient to carry the weight of the evidence. Appellant noted that, as a former boxer, he was only knocked down three times over 24 years and had no significant injury except in the capacity of border patrol agent. He submitted Texas Workers' Compensation Work Status Reports and a physical activities status report dated December 12, 2011 to May 2, 2012 from Dr. Rose who noted a date of injury of September 17, 2011 and diagnosed cervical radiculopathy. Dr. Rose noted that appellant could work with a lifting restriction. A January 12, 2012 report from Dr. Solorzano noted that he was not sure of the cause of the cervical radiculopathy and asserted that appellant had a possible brachial plexus injury to the arm. He opined that appellant's cervical radiculopathy was unequivocally a result of him getting injured while performing border patrol agent duties. Dr. Solorzano opined that appellant had disabling moderate to severe pain and he was not malingering. In a January 19, 2012 report, Dr. Will E. Moorehead, a Board-certified orthopedist, treated appellant for neck and left shoulder pain. Appellant reported an onset of symptoms on September 17, 2008 when he worked as a border patrol agent and was performing training exercise and experienced pain in the neck and left arm. Dr. Moorehead noted that appellant apparently sustained an injury to his neck and left shoulder while performing repetitive activities as a border patrol agent. He noted signs of left thoracic outlet syndrome. An MRI scan of the cervical spine dated February 17, 2012 revealed mild disc bulges at C3-4, C4-5, C6-7 with no significant spinal canal stenosis.

In a decision dated June 12, 2012, an OWCP hearing representative affirmed the January 3, 2012 OWCP decision.

On January 14, 2013 appellant requested reconsideration. Appellant submitted Texas Workers' Compensation Work Status Reports and a physical activities status report dated July 31, 2012 to March 26, 2013 from Dr. Rose who noted a date of injury of September 17, 2008 and diagnosed cervical radiculopathy. Dr. Rose noted that appellant could return to work with a lifting restriction. He submitted an April 10, 2009 cervical spine MRI scan report that showed multilevel central disc bulge and no spinal canal stenosis. An October 13, 2010 cervical spine MRI scan revealed encroachment of the right C3-4, C4-5 neural foramen with no nerve root impingement. A May 16, 2012 report from Dr. Narcisco Gonzalez, a Board-certified anesthesiologist, noted treating appellant for back and neck pain that began after a 2008 injury. He noted an essentially normal physical examination with tenderness in the facets at T1-T4. Dr. Gonzalez performed a diagnostic brachial plexus block and diagnosed left-sided thoracic outlet syndrome. In a July 3, 2012 report, Dr. Ali Azizzadeh, a Board-certified general surgeon, treated appellant for left arm neurological symptoms. He noted findings of left upper extremity motor weakness and numbness along the fourth and fifth digit. Dr. Azizzadeh diagnosed chronic left upper extremity pain and numbness.

Appellant also provided a September 19, 2012 report from Dr. John W. Ellis, a Board-certified family practitioner, who noted that appellant had complaints of neck pain that radiated down his back and left leg. Dr. Ellis noted the history of the September 17, 2008 injury and also appellant's history in boxing. He noted findings of tightness and tenderness of the cervical muscles, tightness of the thoracic and lumbar paraspinal muscles, decreased sensation to light touch on the left side of the neck, along the S1 nerve and L5 nerve in the left leg with no evidence of malingering. Dr. Ellis diagnosed neck strain, deranged discs in the neck, strain of the left shoulder girdle, left thoracic outlet syndrome, left brachial plexus impingement, deranged

discs at L5-S1 and S1 spinal nerve impingement, lumbosacral plexus and sciatic nerve impingement and left shoulder traumatic arthritis. He opined, based on examination and review of the records, that the injuries and disabilities set forth in the diagnoses arose out of and in the course of appellant's employment and that the employment factors and work duties contributed to and aggravated his injuries and disabilities. Dr. Ellis noted that the September 17, 2008 injury caused enough hypertrophy of muscles and ligaments in the left shoulder girdle area that it caused subclinical brachial plexus impingement. He advised that appellant required additional medical benefits including blocks and injections. Dr. Ellis noted that appellant reached maximum medical improvement on September 19, 2012 and was temporarily totally disabled as a result of this injury.

In a decision dated July 10, 2013, OWCP denied modification of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[2] After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.[4]

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for neck sprain. Appellant did not stop work but returned to a limited-duty position and was terminated on March 9, 2010 due to an inability to perform his job.

OWCP found that a conflict of medical opinion existed between Dr. Solorzano, who indicated that appellant had disabling residuals of his work injury, and Dr. Weigel, who determined that appellant's accepted conditions had resolved and he could return to work without restrictions related to his accepted injuries. Consequently appellant was referred to Dr. Anderson to resolve the conflict of opinion.

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.[5]

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[2] *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

[3] *Mary A. Lowe*, 52 ECAB 223 (2001).

[4] *Id.; Leonard M. Burger*, 51 ECAB 369 (2000).

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

In a September 23, 2011 report, Dr. Anderson reviewed appellant's history, reported findings and noted that appellant exhibited no objective complaints or findings due to the accepted conditions. He opined that the physical examination was essentially normal. Dr. Anderson advised that appellant's neck sprain would have resolved within two to three months. He noted appellant's pain was subjective and he found no physical findings which would substantiate continuing residuals of the work injury. Dr. Anderson noted appellant's degenerative disc disease in the neck was mild to moderate and probably asymptomatic. While he advised that appellant's degenerative disc disease has not resolved, he found no basis on which to attribute this to the work injury. Dr. Anderson concluded that the accepted neck sprain had resolved.

The Board finds that the opinion of Dr. Anderson is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that residuals of appellant's work-related conditions have ceased. Dr. Anderson had full knowledge of the relevant facts and evaluated the course of appellant's condition. He clearly opined that appellant had no work-related residuals or reason for disability. Dr. Anderson's opinion as set forth in his report of September 23, 2011 is probative evidence and reliable. The Board finds that his opinion constitutes the weight of the medical evidence and is sufficient to justify OWCP's termination of wage-loss and medical benefits for the accepted conditions.

After Dr. Anderson's examination appellant submitted reports from Dr. Puentes dated November 1 and 29, 2011, who noted a history of the September 17, 2008 injury and diagnosed cervical pain, myofascitis cervical spine, muscle ligamentous strain of the cervical spine and probable thoracic outlet syndrome. Dr. Puentes noted that appellant did not have a cervical problem and opined that appellant appeared to have thoracic outlet syndrome. In a duty status report dated November 1 to 29, 2011, he returned appellant to work full time with no reaching over the head. However, Dr. Puentes did not specifically explain how any accepted conditions remained symptomatic and caused continuing disability. Rather, he noted that appellant did not have a cervical problem but had symptoms consistent with thoracic outlet syndrome. Additionally, the Board also notes that OWCP did not accept thoracic outlet syndrome as being work related.[6]

Also submitted were form reports and physical activities status report dated October 26 to December 19, 2011, from Dr. Rose who noted a date of injury of September 17, 2011 and diagnosed cervical radiculopathy and advised that appellant could return to work with restrictions on lifting. However, Dr. Rose's opinions are of limited probative value as he did not provide any medical reasoning to explain why any diagnosed condition was due to the September 17, 2008 work injury. Thus, his reports are of limited probative value.

Consequently, the weight of the medical evidence supports OWCP's termination of appellant's compensation and medical benefits.

[6] *See Jaja K. Asaramo*, 55 ECAB 200 (2004) (for conditions not accepted or approved by OWCP, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury).

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that he had continuing disability causally related to his accepted employment injury.[7] To establish causal relationship between the claimed disability and the employment injury, appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship.[8]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that he has any continuing residuals of his work-related neck sprain, on or after January 15, 2012.

After the termination of benefits, appellant submitted form reports and status reports dated December 12, 2011 to March 26, 2013 from Dr. Rose who diagnosed cervical radiculopathy. He noted that appellant could return to work within restrictions. In a January 12, 2012 report, Dr. Solorzano opined that appellant's cervical radiculopathy was unequivocally a result of him getting injured while performing the duties of border patrol agent. He opined that appellant sustained moderate to severe pain that was disabling and he was not malingering. A May 16, 2012 report from Dr. Gonzalez diagnosed left-sided thoracic outlet syndrome and he performed a diagnostic brachial plexus block. A July 3, 2012 report from Dr. Azizzadeh diagnosed chronic left upper extremity pain and numbness. He noted that the clinical presentation was not consistent with compression at the thoracic outlet. These reports do not clearly indicate that appellant had any continuing condition that was causally related to the September 17, 2008 work injury; rather, they attributed appellant's pain to cervical radiculopathy, thoracic outlet syndrome and brachial plexus, conditions not accepted by OWCP as work related.[9] Thus, these reports do not establish continuing disability due to the accepted work-related condition and are not sufficient to meet appellant's burden of proof.

A January 19, 2012 report from Dr. Moorehead noted that appellant reported neck and shoulder symptoms on September 17, 2008 when training for the employing establishment. He noted that appellant sustained an injury to his neck and left shoulder while performing repetitive activities as a border patrol agent. However, Dr. Moorehead did not provide a rationalized opinion explaining how any continuing condition was causally related to the September 17, 2008 neck sprain.[10]

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[7] *See Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

[8] *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

[9] *See Alice J. Tysinger*, 51 ECAB 638 (2000) (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, not OWCP's burden to disprove such relationship).

[10] *Franklin D. Haislah*, 52 ECAB 457 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value; *Jimmie H. Duckett*, 52 ECAB 332 (2001).

Dr. Ellis' September 19, 2012 report noted appellant's history and diagnosed neck strain, deranged neck discs, left shoulder strain, left thoracic outlet syndrome, left brachial plexus impingement, cervical spinal cord impingement, deranged discs in the back at L5-S1 and S1, lumbosacral plexus and sciatic nerve impingement and traumatic arthritis of the left shoulder. He opined that the diagnosed injuries, impairments and disabilities arose out of and in the course of appellant's employment and work factors and duties contributed to and aggravated appellant's injuries and disabilities. Dr. Ellis noted that the September 17, 2008 injury caused enough hypertrophy of muscles in the left shoulder girdle area that caused subclinical brachial plexus impingement. He found that appellant was totally disabled due to his injury. The Board finds that Dr. Ellis' report did not provide sufficient rationale explaining how any continuing conditions were causally related to the accepted September 17, 2008 neck sprain. Rather, Dr. Ellis attributed appellant's pain to deranged discs in the neck, left thoracic outlet syndrome, left brachial plexus impingement, deranged discs in the back at L5-S1 and S1 spinal nerve impingement and traumatic arthritis of the left shoulder, all conditions not accepted by OWCP as work related[11] and he did not provide medical reasoning clearly explaining how these conditions resulted from the accepted neck sprain. The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.[12] Therefore, the report from Dr. Ellis is insufficient to overcome that of Dr. Anderson or to create a new medical conflict.

Other medical reports submitted, such as diagnostic studies, are insufficient to establish a continuing work-related condition as they failed to provide an opinion as to whether appellant had continuing residuals due to his work-related injury. Consequently, appellant has not established that he had any employment-related condition or disability after January 15, 2012.

On appeal, appellant's representative asserts that OWCP improperly terminated compensation benefits as appellant continued to have residuals of his work injury. Appellant also contends that his claim should have been expanded to include thoracic outlet syndrome and that OWCP should have further developed the matter. As explained, the evidence submitted by appellant after the termination of benefits is insufficiently rationalized with regard to how the accepted neck sprain remained symptomatic or other conditions were related to the accepted cervical sprain. The need for rationale is particularly important where the evidence indicates that appellant had a preexisting degenerative spine condition.

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 has met its burden of proof to terminate compensation benefits and that, thereafter, appellant did not establish that he had any continuing residuals of his accepted condition.

[11] *See supra* note 9.

[12] *See Jimmie H. Duckett, supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 10, 2013 is affirmed.

Issued: August 19, 2014
Washington, DC

Patricia Howard Fitzgerald, Acting Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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