

**United States Department of Labor
Employees' Compensation Appeals Board**

N.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Plainfield, IL, Employer**

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**Docket No. 14-918
Issued: August 18, 2014**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 11, 2014 appellant, through her attorney, filed a timely appeal from a February 20, 2014 decision of the Office of Workers' Compensation Programs (OWCP) and its hearing representative that affirmed the termination of her wage-loss compensation and medical benefits. Pursuant to the Federal Employees' Compensation Act¹ (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 met its burden of proof to terminate appellant's compensation benefits on July 17, 2013 on the grounds that the accepted condition had resolved with no residuals.

On appeal, appellant's attorney asserts that the claim should be accepted for a psychiatric condition, based on the report of the impartial physician.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On April 17, 2009 appellant, then a 45-year-old clerk, sustained injury to her lower back while spreading flats of magazines. She did not stop work. On May 7, 2009 OWCP accepted the claim for a lumbar strain. It subsequently accepted displacement of a lumbar disc without myelopathy at L3-4. Appellant stopped work on August 19, 2009 and underwent surgery for a lumbar hemilaminectomy and discectomy at L3-4. She returned to part-time modified duty on November 16, 2009.

A December 10, 2009 magnetic resonance imaging (MRI) scan study of the lumbar spine demonstrated postoperative changes at L3-4. A March 19, 2010 lumbar discogram and postdiscogram computerized tomography (CT) study of the lumbar spine demonstrated disc degeneration and protrusion at L2-3, disc degeneration with superimposed postoperative changes at L3-4, disc bulging and degeneration at L4-5 and normal disc morphology at L5-S1. The study indicated that it was difficult to identify a single primary pain generator since appellant reported pain at all levels, including at the normal L4-5 level.

On October 21, 2010 appellant filed a recurrence of disability claim. She stopped work that day because the employing establishment had no work within her limitations. Appellant was paid wage-loss compensation and placed on the periodic rolls.

In a November 18, 2010 report, Dr. Prempreet Singh Bajaj, Board-certified in physical and pain medicine, reported that appellant had permanent restrictions and could work limited duty for four hours daily. In progress notes dated December 9, 2010 and February 10, 2011, he noted complaints of low back pain. Dr. Bajaj noted that physical examination demonstrated bilateral lower extremity strength of 5/5 and negative straight leg raising test. He diagnosed lumbar radiculitis, chronic low back pain and status post discectomy.

OWCP referred appellant to Dr. Allan M. Brecher, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a March 18, 2011 report, Dr. Brecher reported that physical examination demonstrated 4/5 lower extremity strength and a positive straight leg raise bilaterally with tenderness along the surgical scar. He diagnosed postlaminectomy syndrome and advised that appellant's ongoing back pain was caused by the employment injury. Dr. Brecher found that she was capable of performing six hours of sedentary work daily with a 10-pound restriction on pushing, pulling and lifting and that she not climb. He recommended a functional capacity evaluation and electrodiagnostic studies.

OWCP determined that a conflict in medical opinion arose between Dr. Bajaj and Dr. Brecher regarding appellant's residuals and capacity for employment. It referred appellant, together with a statement of accepted facts and the medical record, to Dr. Steven E. Mather, a Board-certified orthopedic surgeon, for an impartial evaluation. Dr. Mather was asked to address her restrictions and work capabilities.

In an August 1, 2012 report, Dr. Mather reviewed the history of injury, the medical record and appellant's complaint of disabling lower back pain. Physical examination demonstrated significant pain complaints with range of motion. Lower back sensation and gait were normal. Seated straight leg raising was negative. Lower extremity strength was 5/5 and

sensation was normal bilaterally. No atrophy was present. Dr. Mather diagnosed status post left L3-4 discectomy/hemilaminectomy at L3-4, back pain and functional overlay/psychogenic pain syndrome. He advised that, based on the history, the mechanism of injury, the admission by appellant of a preexisting condition, the April 17, 2009 employment injury was unlikely to cause a disc herniation at L3-4 but noted that it had been accepted. Dr. Mather stated that the surgical procedure, preoperative physical therapy and up to six weeks of postoperative physical therapy was appropriate for this condition. He reported that, after careful review of the available medical records, appellant's complaints of back pain were not supported by objective physical findings or imaging tests. Dr. Mather commented that back surgery relieved back and leg pain in the vast majority of patients and those who did poorly generally had secondary gain due to psychosocial factors and litigation. He indicated that appellant had many findings of nonorganic pain behavior or Waddell findings and that her functional capacity evaluation on November 19, 2009 demonstrated several inconsistencies, including that she could lift 15 to 19 pounds, yet on November 20, 2009 she reported that she could not even lift her 7-pound cat. Dr. Mather advised that there were no objective findings on examination by any provider postoperatively and stated that he did not believe she needed additional physical therapy or injections.

In a supplementary report dated August 3, 2012, Dr. Mather advised that appellant was able to work eight hours a day and could lift, bend, twist, push and pull 10 pounds while at work. He found no physical limitations on examination or imaging studies resulting from employment activity and advised that the lifting restriction was not based on objective findings.

On December 11, 2012 Dr. Bajaj reported that appellant's back pain had been constant since the April 17, 2009 employment injury. He stated that her lumbar range of motion was severely limited and that she had multilevel degenerative changes on x-ray and CT studies. Dr. Bajaj advised that appellant could work four hours of sedentary duty daily with permanent restrictions of no twisting, bending, stooping, pushing, pulling, lifting, squatting, kneeling or climbing. Appellant could walk, stand and reach for one hour. On January 3, 2013 Dr. Bajaj reported that she had fallen on stairs at home several months previously which caused an acute flare up of pain.

By report dated April 12, 2013, Dr. Mather advised that the accepted conditions of lumbar strain and lumbar disc herniation had resolved with no residuals. Appellant had no lifting restrictions and could lift parcels up to 70 pounds. Dr. Mather reiterated that her lumbar disc condition had been appropriately treated with surgery.

On June 4, 2013 OWCP found that the weight of the medical evidence rested with the opinion of Dr. Mather, the impartial referee. It proposed to terminate appellant's wage-loss compensation and medical benefits on the grounds that she had no residuals or work limitations due to the accepted lumbar conditions.

Appellant disagreed with the proposed termination, stating that she had not recovered from chronic low back and leg pain.

In a June 19, 2013 progress note, Dr. Bajaj noted appellant's complaint of continued back pain and increased bilateral leg pain. He advised that straight leg raising was positive bilaterally and diagnosed chronic back pain, lumbar facet arthropathy, lumbar radiculitis and failed back

surgical syndrome. Dr. Bajaj reiterated appellant's work restrictions and his opinion that her condition was related to the April 17, 2009 employment injury.

By decision dated July 17, 2013, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective that day. It found that she had no residuals of the accepted condition. OWCP noted that the weight of the medical evidence rested with the opinion of Dr. Mather who performed an impartial evaluation.

Appellant, through her attorney, timely requested a hearing. She submitted a progress report dated December 4, 2013 in which Dr. Bajaj reiterated his findings and conclusions. At the hearing held on December 18, 2013 appellant testified that she continued to have disabling low back and leg pain. Her attorney asserted that OWCP should develop the psychological component of the claim.

After the hearing, appellant submitted a January 10, 2014 report from Timothy R. Tumlin, Ph.D., a licensed clinical psychologist, who noted her report that her radiating back pain began with a work injury in 2009 that resulted in a herniated disc and degenerative disc disease. Dr. Tumlin stated that she described her pain treatment history and reported that the constant pain decreased her activities of daily living. He performed pain inventory testing and provided recommendations for coping with pain.

By decision dated February 20, 2014, an OWCP hearing representative found the weight of the medical evidence rested with the opinion of Dr. Mather and affirmed the July 17, 2013 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.² OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.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 that require further medical treatment.⁴

Section 8123(a) of FECA 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.⁵ The implementing regulations

² *Jaja K. Asaramo*, 55 ECAB 200 (2004).

³ *Id.*

⁴ *T.P.*, 58 ECAB 524 (2007).

⁵ 5 U.S.C. § 8123(a); *see Y.A.*, 59 ECAB 701 (2008).

states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or OWCP's medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination, and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁶ When there exist opposing 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 upon a proper factual background, must be given special weight.⁷

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's compensation and medical benefits on July 17, 2013. OWCP determined a conflict in medical evidence between Dr. Bajaj, an attending physiatrist, and Dr. Brecher, an OWCP referral physician, regarding appellant's work abilities. It properly referred appellant to Dr. Mather for an impartial evaluation.

In a comprehensive report dated August 1, 2012, Dr. Mather noted the history of injury, his review of the medical record and appellant's complaint of disabling lower back pain. He provided physical examination findings. Dr. Mather reported that appellant's complaints of back pain were not supported by objective physical findings or imaging tests, noting that there were no objective findings on examination by any provider postoperatively. He indicated that he did not believe appellant needed additional physical therapy or injections.

In supplementary reports dated August 3, 2012 and April 12, 2013, Dr. Mather advised that the accepted conditions of lumbar strain and lumbar disc herniation had resolved with no residuals and that appellant could work eight hours a day. He found no physical limitations at examination or imaging resulting from employment activity and advised that she had no lifting restrictions based on objective findings. As Dr. Mather provided a well-rationalized opinion that appellant could work eight hours a day with no restrictions, his opinion is therefore entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence regarding whether appellant had any employment-related disability.⁸

The additional medical evidence appellant submitted is insufficient to overcome the weight accorded Dr. Mather as an impartial medical specialist on this issue. Dr. Bajaj, who furnished a December 4, 2013 report in which he reiterated his findings and conclusions, had been on one side of the conflict in medical evidence regarding appellant's work capabilities. Reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded the opinion of the impartial physician or to create a new conflict.⁹ In his January 10, 2004 report, Dr. Tumlin provided no

⁶ 20 C.F.R. § 10.321.

⁷ V.G., 59 ECAB 635 (2008).

⁸ See *Sharyn D. Bannick*, 54 ECAB 537 (2003).

⁹ *Supra* note 2.

opinion regarding appellant's work ability. The Board has long held that a medical report that does not address appellant's degree of disability due to his accepted employment injury is of diminished probative value and insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.¹⁰

The Board therefore concludes that Dr. Mather's opinion that appellant had no restrictions and could work eight hours a day at regular duty is entitled to the special weight accorded an impartial medical examiner.¹¹ The additional medical evidence submitted is insufficient to overcome the weight accorded him as an impartial medical specialist regarding appellant's disability. OWCP therefore met its burden of proof to terminate appellant's compensation.

Dr. Bajaj was consistent in his opinion that appellant had chronic back pain, lumbar radiculitis and degenerative disc disease, but the Board notes that none of these conditions was accepted as caused by the April 17, 2009 employment injury. On April 12, 2013 Dr. Mather specifically advised that the accepted conditions of lumbar strain and lumbar disc herniation had resolved with no residuals.

Appellant also asserted that she sustained a consequential emotional condition due to back pain. In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.¹² A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, the claimant must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship.¹³

Dr. Mather noted that appellant had many findings of nonorganic pain behavior and psychosocial issues. He did not relate these findings to the April 17, 2009 employment injury or the accepted conditions. In his January 10, 2014 report, Dr. Tumlin did not provide a firm diagnosis of any psychological condition, noting only that a pain inventory test was performed. The Board has long held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁴ Appellant therefore did not meet her burden of proof to establish that she sustained a consequential emotional condition.

¹⁰ *Id.*

¹¹ *See supra* note 9.

¹² Larson, *The Law of Workers' Compensation* § 1300; *see Charles W. Downey*, 54 ECAB 421 (2003).

¹³ *J.J.*, Docket No. 09-27 (issued February 10, 2009).

¹⁴ *Willie M. Miller*, 53 ECAB 697 (2002).

The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion.¹⁵ The Board finds that the weight of the medical evidence regarding whether appellant continued to have residuals of the accepted conditions on or after July 17, 2013 rests with the opinion evaluation of Dr. Mather who provided reports dated August 1 and 3, 2012 and April 12, 2013. The Board finds that OWCP met its burden of proof in finding that the April 17, 2009 employment injury had resolved on July 17, 2013.

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 met its burden of proof to terminate appellant's wage-loss compensation and medical benefits on July 17, 2013 on the grounds that the accepted conditions had resolved with no residuals.

ORDER

IT IS HEREBY ORDERED THAT the February 20, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 18, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹⁵ *C.B.*, Docket No. 08-1583 (issued December 9, 2008).