

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

M.R., Appellant

and

**DEPARTMENT OF THE ARMY,
Fort Monmouth, NJ, Employer**

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**Docket No. 14-1405
Issued: December 22, 2014**

Appearances:
Thomas R. Uliase, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 5, 2014 appellant, through his attorney, filed a timely appeal from a March 24, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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 this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation and medical benefits effective August 10, 2013.

FACTUAL HISTORY

On December 30, 2010 appellant, then a 37-year-old supply technician, filed a traumatic injury claim alleging that on December 29, 2010 he bruised his right shoulder when he slipped on steps. OWCP accepted the claim for a right iliofemoral hip sprain, right rotator cuff

¹ 5 U.S.C. § 8101 *et seq.*

syndrome with allied disorders, a sprain of the right shoulder, right upper arm and right rotator cuff, a sprain of the sacrum, and thoracic or lumbosacral neuritis, or radiculitis. Appellant stopped work on December 29, 2010.

On February 18, 2011 appellant underwent surgery on his right shoulder. On February 23, 2011 he returned to limited duty but stopped work again on March 22, 2011. Appellant resumed modified work on July 5, 2011 but filed a recurrence of disability on September 15, 2011 when his work location closed and the employing establishment could not provide him with work within his limitations. OWCP paid compensation for total disability effective December 19, 2011. On April 18, 2012 appellant underwent an authorized decompression laminectomy at L4, L5 and S1.

On July 10, 2012 Dr. Bruce R. Rosenblum, a Board-certified neurosurgeon, found a negative straight leg test with no motor deficit. In a work restriction evaluation dated July 10, 2012, he diagnosed status post lumbar discectomy and found appellant could perform sedentary full-time employment.

In a report dated August 9, 2012, Dr. Rosenblum related that appellant's condition had improved and referred him for a functional capacity evaluation.

On September 18, 2012 Dr. Rosenblum noted that a functional capacity evaluation demonstrated that appellant could perform very heavy work. On examination he found some mild back pain, a negative straight leg raise, and no motor deficit. Dr. Rosenblum released appellant to return to heavy work as a supervisory police officer with no restrictions.

By letter dated October 1, 2012, OWCP advised Dr. Rosenblum that at the time of his injury appellant worked as a supply technician rather than a supervisory police officer. It requested that Dr. Rosenblum review the position description for a supply technician and complete a work restriction evaluation. On December 5, 2012 OWCP asked him to address whether appellant's accepted conditions had resolved.

In a report dated December 11, 2012, Dr. Rosenblum related that appellant "has had persistent lower back pain to his legs which is exacerbated after working through Super Storm Sandy. [Appellant] as well did not return to work." On examination he found no motor deficits and a negative straight leg raise. Dr. Rosenblum diagnosed residual radiculitis.

On December 18, 2012 Dr. Rosenblum discussed appellant's complaints of low back pain radiating into the lower extremities. He advised that appellant should not work pending a magnetic resonance imaging (MRI) scan study. On January 15, 2013 Dr. Rosenblum related that an MRI scan study showed "residual spondylosis in the facet joints at L4-5. However, there is also exuberant epidural fibrosis." He recommended steroid injections.

On February 15, 2013 OWCP referred appellant to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated March 1, 2013, Dr. Askin discussed appellant's history of injury and reviewed the medical reports of record. He noted that appellant complained of right shoulder pain, right arm and shoulder weakness, and pain in his lower back radiating into the legs. Dr. Askin questioned the need for the shoulder and back surgery given the findings on MRI scan studies. He noted that the January 11, 2011 MRI

scan of appellant's right shoulder showed tendinosis and osteoarthritis consistent with his age and without findings of a traumatic injury. On examination Dr. Askin found no frozen right shoulder or crepitus. With regard to the lower back he found a negative right straight leg raise and back pain on the left straight leg raise and normal manual muscle testing of the lower extremities. Dr. Askin stated, "Sensation is preserved in both lower extremities in the sense that there is no anesthesia, but he did report diminished sensation on the dorsolateral aspect of the left foot." He found that the accepted conditions had resolved and related that appellant's "overarching problem is the fact that he is significantly heavier than ideal for his frame." Dr. Askin opined that appellant could work as a supply technician with no limitations and required no further medical treatment. He related:

"Firstly, I do not dispute that there had been discomfort associated with having fallen. However, what has been done has been to identify imperfections that would have been present independent of the reported slip and fall and to have provided 'treatments' for such imperfections, even though there was no expectation that such actually addressed anything that was caused by, worsened by, aggravated by, or precipitated by anything that resulted from the event on the date of occurrence."

In a work restriction evaluation dated March 1, 2013, Dr. Askin released appellant to return to work with no restrictions.

On June 18, 2013 OWCP notified appellant that it proposed to terminate his compensation and authorization for medical benefits as he had no further employment-related disability or need for treatment.

On June 18, 2013 Dr. Rosenblum recommended electrodiagnostic testing of the lower extremities.

In a June 26, 2013 response to the proposed notice of termination, appellant's attorney related that he did not injure his back after Super Storm Sandy but instead was unable to clean up following the storm because of his back. He further contended that Dr. Askin did not support his opinion with rationale and did not address whether appellant had residuals from the authorized surgeries.

By decision dated August 1, 2013, OWCP terminated appellant's compensation and authorization for medical treatment effective August 1, 2013. It found that Dr. Askin's opinion represented the weight of the evidence and established that he had no further residuals of his December 29, 2010 work injury.

On August 8, 2013 appellant, through his attorney, requested an oral hearing before an OWCP hearing representative.

In a statement dated July 2, 2013, received by OWCP on August 20, 2013, Dr. Rosenblum related, "[Appellant] is still suffering the residua of his work injury and requires treatment of lumbar sacral radiculopathy."

In a report dated August 20, 2013, Dr. Rosenblum indicated that appellant's electromyogram revealed radiculopathy at L5 and S1 bilaterally. He stated, "[Appellant] clarifies today what he told me at the time of his Dec[ember] 2012 office visit. After Super [S]torm Sandy he was simply cleaning some of the debris around his house when he experienced worsening of his prior symptomatology secondary to his work-related injury. [Appellant] ultimately was unable to carry out the task of cleaning these areas of destruction and actually had to hire someone to do it." On November 25, 2013 Dr. Rosenblum implanted a spinal cord stimulator.

In a report dated December 10, 2013, Dr. Rosenblum discussed appellant's continued symptoms of left lower extremity pain following implantation of the dorsal column stimulator. On December 23, 2013 he performed a revision of the pulse stimulator and evacuation of a postoperative wound with debridement of skin and subcutaneous tissue.

Dr. Rosenblum later related that appellant had improved post revision of the dorsal column stimulator. He found that appellant should remain off work pending reevaluation.

On January 14, 2014 Dr. Rosenblum related:

"[Appellant] currently still suffers from the residuals of his work injury as outlined in my report previously. This is true because though [he] did improve after his initial lumbar decompression, he continued to have residua of his post[-]traumatic lumbar radiculopathy which ultimately worsened and failed to respond to conservative management requiring the implantation of a dorsal column stimulator for the alleviation of permanent residua of post[-]traumatic lumbar radiculopathy causally related to his work injury as outlined in my reports."

At the hearing, held on January 16, 2014, appellant related that he was initially hired by the employing establishment as a police officer. He transferred to a supply technician position in October 2010 when the base began closing because he was qualified to drive a forklift. Appellant indicated that he only sat for one hour a day and spent the rest of the time moving things between buildings. He described his injury on December 29, 2010. Appellant related that he underwent surgery to his low back on April 18, 2012. He initially improved but then his nerve pain returned.

After Super Storm Sandy appellant tried to clear branches from his deck but was in too much pain to complete the task. He asserted that Dr. Askin's evaluation lasted only 10 minutes. Appellant's attorney maintained that his date-of-injury job was more physical than described in the position description and that consequently Dr. Askin's report was not based on an accurate factual background. He also contended that the statement of accepted facts did not indicate that OWCP authorized appellant's back surgery and that Dr. Askin did not address the effect of scar formation seen on MRI scan study. Appellant related that the employing establishment and OWCP nurse told him that he could get a desk job as a police officer if he was cleared to return with no restrictions. He took extra doses of pain medication to take the functional capacity evaluation and then had to stay in bed for a week. Appellant asked Dr. Rosenblum to clear him

for work as a police officer. The employing establishment later told him that he could not be hired in law enforcement because of his back surgery.

On January 27, 2014 Dr. Rosenblum stated, “[Appellant] did not have a clear intervening injury during Super Storm Sandy and due to his residua from his original work injury is unable to return to his physically demanding job.”

By decision dated March 24, 2014, the hearing representative affirmed the August 1, 2013 decision.

On appeal, appellant’s attorney argues that Dr. Rosenblum’s opinion supports that he had continued residuals of his accepted employment injury. He also argues that the statement of accepted facts provided to Dr. Askin indicated that the supply technician job was sedentary and did not indicate that the back surgery on April 18, 2012 and right shoulder surgery on February 18, 2011 were authorized. Counsel also contends that Dr. Askin indicated that the shoulder surgery was for a degenerative rather than a traumatic condition and that back surgery was not warranted.

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 Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁴ 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.⁵

ANALYSIS

OWCP accepted that appellant sustained a right iliofemoral hip sprain, right rotator cuff syndrome with allied disorders, a sprain of the right shoulder, right upper arm and right rotator cuff, a sprain of the scrum, and thoracic or lumbosacral neuritis, or radiculitis. Appellant sustained intermittent periods of disability. OWCP paid him compensation for total disability beginning December 2011 after the employing establishment could not provide work within his restrictions.

² *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁴ *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

⁵ *Id.*

On April 18, 2012 appellant underwent a laminectomy at L4, L5 and S1. Following his surgery on July 10, 2012 Dr. Rosenblum released appellant to resume sedentary employment. On August 9, 2012 he related that appellant had improved and requested a functional capacity evaluation. In a report dated September 18, 2012, Dr. Rosenblum related that a functional capacity evaluation demonstrated that appellant could perform very heavy work and found that he could work as a supervisory police officer without restrictions.

On February 15, 2013 OWCP referred appellant to Dr. Askin for a second opinion examination. The Board finds that OWCP met its burden of proof to terminate his compensation through the opinion of Dr. Askin, who determined that he had no further disability or need for medical treatment causally related to his accepted employment injury. In his March 1, 2013 report, Dr. Askin reviewed the history of injury and the medical evidence. On examination he found no evidence of a frozen right shoulder or crepitus, a negative right straight leg raise test, and back pain on the left straight leg raise test. Dr. Askin found normal sensation except for decreased sensation of the dorsolateral area of the left foot. He questioned the need for the back and shoulder surgeries given the findings on diagnostic studies and noted that some of the treatment was directed toward treating conditions that were unrelated to appellant's December 29, 2010 fall. Dr. Askin concluded that appellant had no residuals of the accepted conditions and that he could return to work as a supply technician without limitations. He attributed his current symptoms to his excess weight. Dr. Askin provided a thorough review of the factual and medical background and accurately summarized the relevant medical evidence. Moreover, he provided detailed findings on examination and reached conclusions regarding appellant's condition which comported with his findings.⁶

The remaining evidence of record submitted prior to OWCP's termination of compensation is insufficient to show that appellant had further disability due to his employment injury. In a report dated December 11, 2012, Dr. Rosenblum found that appellant's back and leg pain increased after he worked during Super Storm Sandy. On examination he found no motor deficits and a negative straight leg raise. Dr. Rosenblum diagnosed residual radiculitis. As he attributed the increased back and leg pain to a possible injury sustained working during a storm, his opinion is of little probative value.

On December 18, 2012 Dr. Rosenblum advised that appellant should not work pending an MRI scan study. On January 15, 2013 he found that a lumbar MRI scan study showed residual spondylosis at L4-5 and exuberant epidural fibrosis. Dr. Rosenblum did not, however, address the cause of appellant's condition and thus his opinion is of diminished probative value.⁷

On August 20, 2013 Dr. Rosenblum interpreted an electrodiagnostic study as showing bilateral L5 and S1 radiculopathy. He related that appellant had been cleaning debris after Super Storm Sandy when his symptoms increased due to his employment injury. In a report dated January 14, 2014, Dr. Rosenblum noted that appellant had initially improved after his lumbar

⁶ See Pamela K. Guesford, *supra* note 4.

⁷ *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

decompression surgery but that his condition subsequently worsened. He found that appellant had continued residuals of his lumbar radiculopathy and required the implantation of a dorsal column stimulator. On January 27, 2014 Dr. Rosenblum opined that appellant did not have an intervening injury during Super Storm Sandy and was unable to perform his physically demanding job due to residuals of his work injury. He did not, however, provide any rationale for his opinion that residuals of the December 29, 2010 work incident and resulting surgery caused his condition to worsen. Dr. Rosenblum further did not explain the effects of the intervening injury cleaning up after Super Storm Sandy or how appellant was now disabled from a physically demanding job. Such rationale is particularly necessary given that he previously indicated that a functional capacity evaluation found that appellant could perform heavy work and released him to return to employment as a supervisory police officer. OWCP asked that Dr. Rosenblum address whether appellant could work as a supply technician and complete a work restriction evaluation; however, the physician did not provide the requested information. The Board thus finds that the weight of the evidence establishes that appellant had no residuals of his employment injury effective August 10, 2013, the date OWCP terminated his compensation.

On appeal, appellant's attorney contends that Dr. Rosenblum's opinion supports that he had continued residuals of his accepted employment injury. As discussed, however, Dr. Rosenblum's opinion is insufficiently rationalized to establish that he had further disability or need for medical treatment due to his accepted work injury.

Counsel further maintains that the statement of accepted facts provided to Dr. Askin did not indicate that the back surgery on April 18, 2012 and right shoulder surgery on February 18, 2011 were authorized by OWCP. He also contends that Dr. Askin found that the shoulder surgery was for a degenerative and not a traumatic condition and was thus inconsistent with the statement of accepted facts. Dr. Askin, however, discussed the surgeries and questioned why they were performed given the diagnostic studies. He noted that the MRI scan of appellant's shoulder showed tendinosis and osteoarthritis consistent with age. Dr. Askin opined that appellant received treatment for his work injury that had resulted from unrelated imperfections. He did not, however, find that the accepted conditions did not occur and thus his opinion is not inconsistent with the statement of accepted facts.

Counsel further argues that the position of supply clerk was wrongly identified as sedentary. The position description provided by the employing establishment, however, indicates that was a primarily sedentary position with no "special physical demands." Appellant has not established that the position was not as described in the position description.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation benefits for lost wages and authorization for medical treatment effective August 10, 2013 on the grounds that

he had no further disability or need for medical treatment due to his December 29, 2010 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the March 24, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 22, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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