

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

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S.J., Appellant)	
)	
and)	Docket No. 13-1753
)	Issued: January 6, 2014
DEPARTMENT OF ENERGY, BONNEVILLE)	
POWER ADMINISTRATION, Portland, OR,)	
Employer)	

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECSIION AND ORDER

Before:

PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On July 18, 2013 appellant, through counsel, filed a timely appeal from an April 12, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP), affirming the termination of her wage-loss and medical compensation 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 this claim.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss and medical benefits effective November 20, 2012 on the grounds that the accepted aggravation of a herniated lumbar disc ceased without residuals.

On appeal, counsel asserts that OWCP did not meet its burden of proof to terminate appellant's compensation as the report of the impartial medical examiner was speculative

¹ 5 U.S.C. § 8101 *et seq.*

regarding the date the accepted condition resolved. He also contends procedural errors by OWCP in terminating appellant's compensation and engaged in "doctor shopping."

FACTUAL HISTORY

This case was previously before the Board. By decision issued July 29, 2003,² the Board affirmed OWCP's May 29, 2002 finding that appellant did not establish that she was disabled for work for intermittent periods between March 1, 1996 and January 1998, causally related to an accepted aggravation of an L5-S1 herniated disc sustained on or before January 26, 1998. Appellant attributed her condition to prolonged sitting at work from 1981 to 1998. She stopped work on January 23, 1998 and did not return. Appellant received compensation for total disability on the daily and periodic rolls. The facts of the case as set forth in the Board's prior decision are incorporated by reference.

Dr. Timothy J. Gray, an attending osteopathic physician Board-certified in family practice, submitted reports dated September 6, 2002 to March 22, 2011 finding appellant totally disabled due to the accepted aggravated of an L5-S1 herniated disc, lumbar degenerative disc disease and right-sided sciatica. He noted that she required opioid pain medications for pain control "but then she can't think clearly." Appellant remained off work.

On April 9, 2011 OWCP obtained a second opinion from Dr. Aleksandar Curcin, a Board-certified orthopedic surgeon, who found that the accepted conditions had resolved. Dr. Curcin submitted a June 16, 2011 supplemental report³ stating that the accepted condition should have resolved within one year. He asserted that he "reviewed the records thoroughly enough" to support his conclusions.

By notice dated July 25, 2011, OWCP advised appellant that it proposed to terminate her wage-loss and medical benefits based on Dr. Curcin's opinion. In an August 11, 2011 letter, counsel objected to the proposed termination, asserting a conflict of opinion between Dr. Gray and Dr. Curcin requiring resolution by an impartial medical examiner.

On November 1, 2011 OWCP obtained a second opinion from Dr. Scott H. Kitchel, a Board-certified orthopedic surgeon, who reviewed the medical record and statement of accepted facts. On examination, Dr. Kitchel noted mild tenderness over the right sacroiliac joint and limited lumbar motion. He diagnosed an "[a]dministratively accepted aggravation of preexisting herniated disc at L5-S1, resolved," preexisting lumbar degenerative disc disease, nonoccupational low back pain, and status post L5-S1 microdiscectomy "unrelated to the industrial claim." Dr. Kitchel advised that appellant could perform full-time sedentary work.

By decision dated November 30, 2011, OWCP terminated appellant's compensation benefits effective that day, based on Dr. Kitchel's opinion as the weight of the medical evidence.

² Docket No. 03-1285 (issued July 29, 2003).

³ OWCP asked Dr. Curcin for a supplemental report as the statement of accepted facts on which he based his April 9, 2011 report misstated appellant's years of federal employment as 1996 to 1998 whereas she worked at the employing establishment from 1981 to 1998.

In a December 16, 2011 letter, counsel requested a telephonic hearing. He asserted that OWCP did not meet its burden of proof to terminate appellant's compensation as she was not provided a proper pretermination notice. Counsel submitted a January 5, 2012 report from Dr. Gray asserting that appellant's condition remained work related. A comparison of a 1999 lumbar MRI scan and October 2011 lumbar x-rays showed no worsening of degenerative changes.

By decision dated and finalized May 11, 2012, an OWCP hearing representative vacated the November 30, 2012 decision and reinstated appellant's benefits. The hearing representative directed OWCP to obtain a supplemental report from Dr. Kitchel.

In a June 7, 2012 report, Dr. Gray opined that prolonged sitting at work caused a lumbar disc herniation and permanent damage throughout the lumbar spine, requiring an L5-S1 microdiscectomy in April 1985. He permanently limited appellant to working one hour a day light duty.

Dr. Kitchel submitted a June 28, 2012 supplemental report, finding that the accepted aggravation of an L5-S1 herniated disc ceased no later than January 1999, based on the medical record and clinical examination.

OWCP found a conflict of medical opinion between Dr. Kitchel, for OWCP, and Dr. Gray, for the appellant. To resolve the conflict, it selected Dr. Walter Smith, a Board-certified orthopedic surgeon, as the impartial medical examiner. In a September 3, 2012 report, Dr. Smith reviewed the medical record and statement of accepted facts. On examination, he found limited lumbar motion, bilateral tenderness of the sacroiliac joints and inconsistent muscle strength testing. Dr. Smith diagnosed lumbar degenerative disc disease, status post L5-S1 laminectomy, and "[c]hronic post-laminectomy mechanical low back pain." He opined that appellant's gradually increasing symptoms in the years after she stopped work were due to age-related progression of degenerative disc disease and her postsurgical status. This course was the opposite of that of the accepted aggravation, which would have improved after she was no longer performing prolonged sitting at work. Dr. Smith found that the aggravation should have resolved no more than one year following the last exposure to aggravating factors. As appellant stopped work in January 1998, the aggravation should have resolved by January 1999. Dr. Smith found appellant able to perform light duty for four hours a day.

By notice dated October 4, 2012, OWCP advised appellant of its proposal to terminate her wage-loss and medical compensation benefits as the accepted lumbar condition had ceased without residuals, Dr. Smith's reports represented the weight of the medical evidence. In response, counsel submitted an October 25, 2012 statement asserting that Dr. Smith's report was too speculative to have probative value. He provided appellant's statement asserting that Dr. Smith's physical examination was unnecessarily aggressive.

By decision dated November 20, 2012, OWCP terminated appellant's wage-loss and medical benefits effective that day. It found that the accepted aggravation of a herniated L5-S1 disc had ceased without residuals, based on Dr. Smith's opinion as the weight of the medical evidence.

In a February 5, 2013 letter, counsel requested a review of the written record,⁴ conducted on November 20, 2013. He submitted November 28, 2012 and January 23, 2013 statements asserting that Dr. Smith's opinion was insufficient to establish that the accepted condition had ceased as he did not specify a date of recovery or the medical evidence on which he based his conclusion.

By decision dated and finalized April 12, 2013, an OWCP hearing representative affirmed OWCP's November 20, 2012 decision. The hearing representative found that Dr. Smith's report was sufficiently rationalized to resolve the conflict between Dr. Gray and Dr. Kitchel. She noted that Dr. Smith's opinion was based on the statement of accepted facts and the complete medical record.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁵ 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.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁷ 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.⁸

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 (known as a referee physician or impartial medical specialist) who shall make an examination.⁹

ANALYSIS

OWCP accepted that appellant sustained an aggravation of a preexisting L5-S1 herniated disc on or before January 23, 1998. Dr. Gray, an attending osteopathic physician Board-certified in family medicine, found appellant totally disabled for work through March 22, 2011. Dr. Curcin, a Board-certified orthopedic surgeon and a second opinion physician, opined on April 9 and June 16, 2011 that the accepted aggravation had ceased no later than January 1999.

⁴ Appellant initially requested an oral hearing, scheduled for February 25, 2013. Counsel then requested that OWCP conduct a review of the written record in lieu of an oral hearing.

⁵ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁶ *Id.*

⁷ *Roger G. Payne*, 55 ECAB 535 (2004).

⁸ *Pamela K. Guesford*, 53 ECAB 726 (2002).

⁹ 5 U.S.C. § 8123.

As Dr. Curcin did not adequately clarify his opinion, OWCP selected Dr. Kitchel, a Board-certified orthopedic surgeon, as second opinion examiner. Dr. Kitchel provided November 1, 2011 and June 28, 2012 reports found that, based on the medical record and a clinical examination, the accepted aggravation ceased no later than one year after appellant stopped work in January 1998.

OWCP then found a conflict between Dr. Gray and Dr. Kitchel, and selected Dr. Smith, a Board-certified orthopedic surgeon, to resolve it. Dr. Smith provided a September 3, 2012 report finding that appellant's symptoms were due to age-related progression of degenerative disc disease and her postsurgical status. He explained that the accepted aggravation would have resolved no more than one year after appellant was last exposed to aggravating factors in January 1998.

Based on Dr. Smith's opinion, OWCP issued a preliminary notice of termination on October 4, 2012. Counsel then submitted statements asserting Dr. Smith's report was vague and his examination overly aggressive. OWCP terminated appellant's wage-loss and medical benefits effective November 20, 2012.

The Board finds that Dr. Smith's opinion was sufficient to establish that the accepted aggravation of a herniated L5-S1 disc had ceased without residuals as of November 20, 2012. His report was based on the complete medical record and a statement of accepted facts. Dr. Smith also performed a thorough clinical examination. He then presented detailed rationale explaining how and why the medical evidence, clinical course and findings on examination all demonstrated that appellant's ongoing lumbar condition was due to a nonoccupational degenerative process and that the accepted aggravation had ceased. The Board finds that Dr. Smith's report is sufficiently rationalized to represent the weight of the medical evidence in this case.¹⁰ Therefore, OWCP's April 12, 2013 decision terminating appellant's wage-loss and medical compensation benefits as of November 20, 2012 was proper under the law and facts of this case.

On appeal, counsel asserts that OWCP did not meet its burden of proof to terminate appellant's compensation as Dr. Smith's report was too speculative to establish the date the accepted condition resolved. However, the Board finds that Dr. Smith's report was sufficiently rationalized to establish that the accepted condition ceased without residuals within one year after exposure to the aggravating factors. Counsel also alleges that OWCP committed numerous procedural errors in terminating appellant's compensation. As set forth above, OWCP improperly terminated appellant's compensation by November 30, 2011 decision. However, this decision was vacated on May 11, 2012. The November 20, 2012 termination decision was based on the opinion of an impartial medical examination after proper development of the evidence. Counsel also contends that OWCP engaged in "doctor shopping" by obtaining a second opinion from Dr. Kitchel after obtaining one from Dr. Curcin. However, OWCP properly determined that a new second opinion report was needed as Dr. Curcin's report was flawed.

¹⁰ *Deborah L. Beatty*, 54 ECAB 340 (2003).

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 and medical compensation benefits effective November 20, 2012 on the grounds that an accepted aggravation of a herniated L5-S1 disc had ceased without residuals.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated April 12, 2013 is affirmed.

Issued: January 6, 2014
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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