United States Department of Labor
Employees' Compensation Appeals Board

L.K., Appellant	)	
and	)	**Docket No. 14-526**
	)	**Issued: July 7, 2014**
U.S. POSTAL SERVICE, POST OFFICE, Homewood, IL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Acting Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 3, 2014 appellant, through her attorney, filed a timely appeal from an October 16, 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 this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate wage-loss compensation effective July 3, 2010; and (2) whether appellant established any employment-related disability after July 3, 2010.

FACTUAL HISTORY

Appellant filed two traumatic injury claims in 1989. On November 7, 1989 appellant, then a 29-year-old carrier, injured her back when she stumbled while walking up steps. On

[1] 5 U.S.C. § 8101 *et seq.*

December 19, 1989 she alleged a back injury while delivering parcels. The two claims were administratively combined. OWCP accepted a lumbosacral strain and a herniated L4-5 disc with subsequent urinary incontinence. On February 3, 1992 appellant underwent an L4-5 discectomy surgery. She returned to a limited-duty position on November 30, 1992.

On November 5, 1998 appellant filed a notice of recurrence of disability commencing October 23, 1998. According to an August 5, 2009 statement of accepted facts (SOAF), she began work in June 1999 full time as a modified distribution clerk and the position was permanent effective June 3, 2000.[2]

In a report dated May 1, 2000, Dr. Konstantin Slavin, a Board-certified neurosurgeon, advised that appellant was scheduled for surgery for a spinal cord stimulator. The record contains a job offer dated October 26, 2000 from the employing establishment for a full-time modified distribution clerk position. The offer stated that it was a rehabilitation assignment based on a report dated October 16, 2000 from Dr. Slavin and the job offer would be reviewed in three months.

Appellant worked limited duty with intermittent disability and filed a notice of recurrence of disability commencing December 11, 2003. OWCP accepted the recurrence of disability and she began receiving compensation for wage loss.

In a memorandum dated April 2, 2009, an employing establishment Office of the Inspector General (OIG) agent indicated that Dr. Slavin was interviewed as part of an investigation into appellant's claim for compensation. The memorandum reported that Dr. Slavin stated that she could perform office work full time, but he could not determine a lifting restriction. It was also noted that appellant told him that there was no limited-duty work available at the employing establishment.

By report dated April 13, 2009, Dr. Slavin provided results on examination. He stated that the spinal cord stimulator device had been replaced in October 2008. Dr. Slavin noted that appellant's work was not able to accommodate her limitations and she remained off work. Appellant underwent a functional capacity evaluation (FCE) on May 26, 2009. In a report dated June 15, 2009, Dr. Magdalena Anitescu, a Board-certified anesthesiologist, provided results on examination and diagnosed lumbar radiculitis and sacroiliitis.

OWCP referred appellant for a second opinion examination to Dr. Avi Bernstein, a Board-certified orthopedic surgeon. In a report dated September 17, 2009, Dr. Bernstein provided a history and stated that she had a benign physical examination with good neurological function. Appellant's subjective complaints were consistent with lumbar arachnoiditis and she felt that she could work 12 hours a week. Dr. Bernstein stated that she could work in a sedentary position with the ability to change position and no lifting over 10 pounds. After a trial period, appellant could attempt to increase her work abilities.

[2] There does not appear to be any specific evidence in the record transmitted to the Board as to an offer of a permanent position effective June 3, 2000.

OWCP found a conflict in the medical opinion and Dr. Mukund Komanduri, a Board-certified orthopedic surgeon, was selected as the referee physician. In a report dated March 8, 2010, Dr. Komanduri provided a history of injury, review of medical records and listed results on examination. He opined that there was evidence of "probable symptom magnification and fabrication of symptoms. [Appellant] has given an invalid response on her [FCE] that is unmistakably invalid." Dr. Komanduri stated that appellant told him that she could only flex forward to 40 degrees, but the OIG video surveillance confirmed that she was able to do much more and "it is impossible to determine what is real and what is not real with regards to [appellant's] subjective complaints, as I am not able to identify functional deficits that are anatomic." He stated that there were no positive findings on diagnostic studies, except for some degenerative disc disease and he was not confident that she had any diagnosed condition. Dr. Komanduri noted that appellant had been diagnosed with arachnoiditis, which most likely was real and probably caused some pain, but she clearly was magnifying her symptoms. He stated that the original diagnosis of arachnoiditis may be related to her disc surgery that occurred in 1992, but "[c]urrently, I do not believe [that appellant] is being treated for any condition that is related to the 1989 injury." Dr. Komanduri concluded that "all of [appellant's] accepted conditions have returned to the preinjury state."

In a supplemental report dated April 30, 2010, Dr. Komanduri stated that the "issue of arachnoiditis is a tricky one. It is a postsurgical complication and it can cause disabling pain and limitations. I do not believe [that] this is the case for [appellant], however, given the surveillance video and other inconsistent findings as noted. Although I doubt that the scarring that has occurred is gone, I do not believe that explains [her] inconsistent behavior. I am unable to determine [appellant's] level of 'disability' as she is in many ways malingering and fabricating her symptoms. Regardless, this does not render her disabled and unable to work." He found that appellant could perform the modified distribution clerk position. In response to whether the arachnoiditis was preexisting, Dr. Komanduri stated, "I am not stating that the arachnoiditis is preexisting. I believe that it is clearly a postsurgical complication related to [appellant's] 1992 disc surgery. I am stating that at this point I cannot trust [her] physical examination findings as there is evidence of symptom magnification. It is simply not possible to determine whether [appellant] truly has any significant current injury. Unfortunately, when an individual is malingering, it is not feasible to distinguish between what symptoms are real and what symptoms are not." In response to whether appellant's disability had ceased, Dr. Komanduri stated, "[Appellant] was allowed a modified position from an accepted injury and following surgery. I did not examine her in 1992 and I think that I would hesitate to go so far as to say she needs no restrictions. [Appellant] had a microdiscectomy at L4-5 and implantation of a spinal cord stimulator. Regardless of symptom magnification, I do not think [that] she should be punished to the degree that all prior assignments of disability should be eliminated. As noted above, my opinion has not changed regarding [appellant's] ability to work and I believe [that] she is able to perform the full-time modified distribution clerk position as previously noted."

By letter dated May 21, 2010, OWCP advised appellant that it proposed to terminate compensation for wage loss based on the weight of the medical evidence. It noted that she had been provided a permanent job offer as a modified clerk and Dr. Komanduri opined that she could perform the limited-duty position.

On June 21, 2010 appellant submitted a June 9, 2010 note from Dr. Fakher Habib, a Board-certified internist, who treated her for multiple problems, including back and leg pain. Dr. Habib indicated that she could work with limitations on pulling, pushing and lifting.

By decision dated June 30, 2010, OWCP terminated wage-loss compensation effective July 3, 2010. It found that the weight of the evidence was represented by Dr. Komanduri.

On October 15, 2010 appellant requested reconsideration of her claim. She submitted an October 8, 2010 report from Dr. Sergey Neckrysh, a Board-certified neurosurgeon, who indicated that a computerized tomography myelogram showed degenerative changes in the spine. Dr. Neckrysh indicated that surgical options were discussed. The case was referred to an OWCP medical adviser for an opinion regarding surgery. In a report dated January 3, 2011, the medical adviser opined that appellant's degenerative disc disease was not related to the employment injuries and he did not recommend authorization for surgery.

By decision dated January 13, 2011, OWCP reviewed the case on its merits and denied modification.

Appellant again requested reconsideration of her claim. She submitted a January 10, 2011 report from Dr. Anitescu providing results on examination. Dr. Anitescu indicated that appellant was scheduled for an epidural steroid injection. In a report dated March 31, 2011, she diagnosed failed back surgery syndrome and lumbosacral radiculitis.

By decision dated June 2, 2011, OWCP reviewed the merits of the claim and denied modification.

On February 6, 2012 appellant again requested reconsideration. She submitted a January 31, 2012 report from Dr. Jonathan Watson, a Board-certified emergency medicine specialist, who provided results on examination and indicated that she should continue light duty. Dr. Watson stated that he agreed with the recommendation that appellant would likely need an L4-S1 decompression and fusion surgery.

OWCP referred the case to an OWCP medical adviser for an opinion with respect to proposed surgery. In a report dated May 13, 2012, the medical adviser opined that appellant was a candidate for surgical intervention. The medical adviser stated that the adjacent level deterioration was a direct result of treatment for the work-related injury and recommended authorization of the surgical procedure.[3]

By decision dated July 9, 2012, OWCP reviewed the merits of the claim and denied modification. It did not discuss the medical adviser's report.

On July 15, 2013 OWCP received a reconsideration request. The record indicated that appellant underwent lumbar surgery on October 10, 2012. Appellant submitted a June 24, 2013

[3] On appeal, counsel for appellant contends that the October 10, 2012 surgery should be authorized. As there is no final decision by OWCP denying the request for surgery, it is not an issue presently before the Board in this appeal. *See* 20 C.F.R. § 501.2.

report from Dr. Slavin stating that the October 2012 surgery was uneventful, but she had reported bilateral leg pain and there was a question as to whether the spinal cord stimulation device could be replaced.

By decision dated October 16, 2013, OWCP reviewed the case on its merits and denied modification. It found that the evidence was insufficient to warrant modification of the prior decisions.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.[4] The weight of medical evidence is determined by its reliability, its probative value and its convincing quality. The factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.[5]

ANALYSIS -- ISSUE 1

There are several issues that require clarification before the Board addresses the termination issue. The application for reconsideration, received on July 15, 2013 was untimely with respect to the July 9, 2012 OWCP decision.[6] Since OWCP treated the application as timely, the Board will review the merits of the claim.

In this regard there are two findings made by OWCP, which the Board finds are not supported by the record: (1) that a conflict under 5 U.S.C. § 8123(a)[7] existed and the selection of Dr. Komanduri was as a referee physician; and (2) that appellant was offered a "permanent" light-duty position and therefore the medical issue was whether appellant could perform the light-duty job. As to a conflict with the second opinion physician, Dr. Bernstein, OWCP never identified the attending physicians that offered a conflicting opinion. He found that appellant could work with restrictions, such as a 10-pound lifting restriction. It is not clear whether Dr. Bernstein felt that she could work full time, as he noted her belief that she could only work part time. An attending physician, Dr. Slavin, did not offer a conflicting opinion. He appeared to concur that appellant could work with some restrictions, but never clearly indicated the nature and extent of those restrictions. There were no probative medical reports from attending

[4] *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

[5] *Gary R. Sieber*, 46 ECAB 215 (1994).

[6] An application for reconsideration must be received by OWCP within one year of the date of OWCP's decision. 20 C.F.R. § 10.607(a).

[7] 5 U.S.C. § 8123(a) provides that if there is a disagreement between and attending physician and an OWCP physician, a third physician shall be selected to make an examination.

physicians establishing a conflict with Dr. Bernstein. The Board finds that the selection of Dr. Komanduri was as a second opinion physician. Even though the reports of Dr. Komanduri are not entitled to the special weight afforded to the opinion of referee specialist resolving a conflict of medical opinion,[8] his reports can still be considered for their own intrinsic value and can still constitute the weight of the medical evidence.[9]

As to appellant's light-duty job, it is not clear from the record what evidence OWCP relied on to make a determination that appellant had a permanent job offer that would be available at any time. A SOAF asserts that the job was permanent as of June 2000, but this is not supported by the evidence of record. The October 26, 2000 letter from the employing establishment provided a job offer that gave no indication it was permanent in nature it was a rehabilitation assignment that would be reviewed three months later. If the job was reviewed and made permanent or if the employing establishment specifically indicated that, the modified job was available at the time of the termination, OWCP did not cite to any specific evidence in this regard.[10] Appellant had not worked since 2003. OWCP could have requested that the employing establishment make a suitable job offer and if she did not accept the offer, then a suitable work termination could have been pursued under 5 U.S.C. § 8106(c).

Based on the evidence therefore the medical issue as to disability was whether appellant continued to have an employment-related disability for the carrier position she was performing when injured in 1989.[11] Dr. Komanduri was the only physician to provide detailed medical reports based on an accurate background. He provided a complete history and results on examination. Dr. Komanduri's March 8, 2010 report referred to an original diagnosis of arachnoiditis but finds that appellant was not currently being treated for an employment-related condition and she had returned to a preinjury state. He noted that the diagnostic studies showed only degenerative disc disease and this condition is not an accepted employment-related condition. The April 30, 2010 report notes some hesitation in stating that appellant had no work restrictions, but Dr. Komanduri did not find any specific employment-related disability. Moreover, any ambiguity as to disability was clearly attributable to his findings that appellant had magnified her symptoms, making a precise determination impossible.

The Board accordingly finds that the opinion of Dr. Komanduri represents the weight of the medical evidence and is sufficient to meet OWCP's burden of proof. There were no reports from attending physicians as of June 30, 2010 that provided a complete background and a probative opinion that appellant continued to have an employment-related disability. OWCP

[8] It is well established that when a case is referred to a referee specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight. *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[9] *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[10] The Board notes that the record contains a June 9, 2010 letter from the employing establishment (submitted to the record on February 6, 2012) stating that appellant had requested a "restoration to employment" and she would be notified of the results. It is not clear what the employing establishment subsequently determined.

[11] The term "disability" as used under FECA means the incapacity, because of injury in employment, to earn the wages which the employee was receiving at the time of injury. *Donald Johnson*, 44 ECAB 540, 548 (1993); 20 C.F.R. § 10.5(f).

properly terminated wage-loss compensation effective July 3, 2010. Appellant may submit new evidence or argument with a written application 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.

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 appellant. In order to prevail, she must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability which continued after termination of compensation benefits.[12]

ANALYSIS -- ISSUE 2

Having properly terminated wage-loss compensation effective, the burden shifted to appellant to establish employment-related disability after July 3, 2010. The Board notes that her attending physicians, which included Drs. Slavin, Anitescu, Watson and Neckrysh, did not provide medical reports which addressed the causal relationship between a diagnosed condition and the employment injury. Nor did the physicians discuss specific work restrictions or disability for work based on an employment injury. The medical evidence of record is insufficient to establish that appellant was disabled due to residuals of her accepted conditions.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate wage-loss compensation effective July 3, 2010. With respect to disability after that date, appellant did not meet her burden of proof.

[12] *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 16, 2013 is affirmed.

Issued: July 7, 2014
Washington, DC

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

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

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