United States Department of Labor
Employees' Compensation Appeals Board

V.Y., Appellant	)	
and	)	**Docket No. 14-828**
	)	**Issued: November 18, 2014**
DEPARTMENT OF THE NAVY, NAVY FACILITIES ENGINEERING COMMAND -- STATIONS, San Diego, CA, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 25, 2014 appellant, through his representative, filed a timely appeal from the January 10, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) which affirmed the termination of appellant's compensation benefits effective June 2, 2013. 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.

ISSUE

The issue on appeal is whether OWCP properly terminated appellant's wage-loss compensation effective June 2, 2013.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On April 19, 1995 appellant, then a 42-year-old pipefitter, was injured in a motor vehicle accident in the performance of duty. He stopped work on April 22, 1995. OWCP accepted the claim for a lumbar sprain and a consequential adjustment disorder, which resolved effective June 4, 1997. Appellant returned to light-duty work on June 19, 1995 and stopped work on January 16, 1996 because the employing establishment could not accommodate his work limitations. He underwent vocational rehabilitation but did not obtain employment.[2] On May 2, 2002 OWCP found that appellant was no longer totally disabled and reduced his compensation based upon his abilities to perform the duties of the constructed position of an information clerk. On June 11, 2003 it granted a schedule award for three percent permanent impairment of the left leg. Appellant's wage-loss compensation was reinstated after the schedule award ended on August 14, 2003. He submitted work capacity evaluation forms from Dr. Antonio V. Yu, Jr., a Board-certified internist, indicating that he remained partially disabled and could not work more than two hours a day.

On March 5, 2013 OWCP referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Ronald Lampert, a Board-certified orthopedic surgeon.

In a March 20, 2013 report, Dr. Lampert noted appellant's history of injury and treatment and noted his examination of appellant. His findings included that appellant walked with a cane in his right hand with a left antalgic gait. Dr. Lampert indicated that appellant could not stand on his heels or toes because of pain in his back. He determined that forward flexion was 5 to 10 degrees and side to side bending was 5 to 10 degrees. Dr. Lampert advised that with "hardly touching his skin in the low back area he complains of pain in the low back. With minimal, pressure downward on his shoulders and minimal pressure downward on his head, appellant has severe pain in the low back area. With his arms at his sides and turning his entire trunk as one to the left and right he has pain in the low back area."

Dr. Lampert advised that "straight leg raise in the sitting position is to 90 degrees; however, in the supine position, straight leg raise bilaterally is to 10 degrees. However, appellant is able to sit up on the examining table with his knees essentially straight and his hips flexed at 90 degrees, which is essentially a 90-degree straight leg raise test. Strength of the hip flexors, knee extensors, hip abductors and hip adductors all have give-way sensation. There is decreased sensation in the lower extremities anterior, posterior, medial and lateral, less on the left than the right, however, the right is not normal either. All of the above are not consistent with a true physiological or organic problem but would be consistent with a symptom exaggerator."

Dr. Lampert diagnosed low back pain and radicular pain by history. He opined that he could find no objective findings to indicate any residuals of a lumbosacral strain. Dr. Lampert explained that appellant's symptoms were extremely out of proportion to his physical findings,

[2] Appellant has several conditions which were not accepted as work related. They include preexisting chronic low back pain, chronic leg pain, herniated lumbar disc at L4-5, low back syndrome and cervical and thoracic strain.

which were consistent with a symptom exaggerator. He also indicated that appellant could return to any work that he was qualified to do without restrictions as he was no longer disabled in any way due to his work injury.

On April 9, 2013 OWCP issued a notice of proposed termination of wage-loss and medical benefits. It found that the weight of the medical evidence, as represented by the report of Dr. Lampert established that appellant had no continuing work-related disability or objective residuals of his April 19, 1995 employment injury.

In an April 15, 2013 statement, appellant indicated that he disagreed with the proposed termination and argued that his work-related condition continued. He argued that Dr. Lampert's examination was flawed, erroneous, speculative and insufficient to establish that he was no longer disabled. Appellant also provided additional evidence that included a March 19, 2013 report from Dr. Yu who stated that appellant was under his care since 2007. Dr. Yu noted that besides appellant's multiple medical problems, he continued to have pain in his lower back, legs, and feet which he described as knife like and as an electric shock, especially in the standing position, as well as walking and sitting for prolonged periods. He explained that this interfered with his sleep and caused him to have mood disorder and depression. Dr. Yu noted that the examination revealed a limp on his gait, hyperreflexia and noticeable spasticity. He advised that the magnetic resonance imaging (MRI) scan, revealed bulging and degenerative discs. Dr. Yu opined that he hoped appellant remained stable and indicated that appellant had permanent nerve damage with a guarded prognosis.

In an April 24, 2013 report, Dr. Demetri Adarmes, a Board-certified physiatrist, noted appellant's history and treatment including the 1995 work injury and a preexisting service-connected low back problem from the 1980's. Findings included normal range of motion of the hips, knees and ankles bilaterally with no joint or muscular tenderness. For the spine, appellant had forward flexion to 35 degrees, extension to 10 degrees and 20 degrees of lateral bending. Appellant had a negative right-seated straight leg raise test and a positive left-seated straight leg raise test at 60 degrees. He also had pain with facet loading maneuvers and tenderness and spasm of the lower lumbar paraspinal muscles. Sensation was diminished to pinprick in the bilateral L4 and L5 dermatomes. March 18, 2013 lumbar x-rays showed mild-to-moderate bulges from L3 to S1 with mild to moderate degenerative changes. Dr. Adarmes diagnosed lumbar sprain, preexisting lumbar degenerative disc disease that was permanently aggravated by the April 19, 1995 incident, and bilateral lower lumbar radicular pain related to the April 19, 1995 incident. He also noted that the main focus of Dr. Lampert's examination was to elicit Waddell's signs. Dr. Adarmes advised that Section 2.56, page 27, of the American Medical Association, *Guides to the Evaluation of Permanent Impairment,* (6th ed. 2009) (A.M.A., *Guides*) explained that "cultural differences between the examiner and the patient can greatly increase the risk of the examiner misinterpreting the patient's responses," that "Waddell's signs are not valid in non-Anglo cultures as the reliability has been tested only among English and North American patients," and that, "When patients from a different culture have an unexpected response to treatment of their condition, consider cultural differences."[3]

[3] The record indicates that appellant was born in the Philippines.

Dr. Adarmes opined that "what Dr. Lampert was observing are cultural differences in a response to pain behavior." He also noted that Dr. Lampert had material deficits in his examination as there was no reflex examination, nor did his report note any limb girth measurements. Dr. Adarmes explained that his examination revealed a deficit to pinprick sensation, as noted. He stated that, while Dr. Lampert found a global decrease in sensation in both lower limbs, the method of testing the loss of sensation was not noted. Dr. Adarmes opined that, with regard to Dr. Lampert's finding that appellant's symptoms were "extremely" out of proportion to physical findings, "indicative of a symptom exaggerator," this was improper as Dr. Lampert failed to take appellant's ethnic background into consideration. He opined that the April 19, 1995 accident aggravated appellant's preexisting condition that he developed while in the Navy. Dr. Adarmes explained that appellant had positive objective examination findings to show that there was some degree of impairment as a result of his lumbar spine condition. April 25 and 26, 2013 electromyography (EMG) scan and nerve conduction studies read by Dr. Adarmes, revealed evidence of lumbar radiculopathy.

On May 16, 2013 OWCP received an undated report from Dr. Yu, who advised that appellant was under his care since November, 2007 for multiple medical problems. Dr. Yu noted that appellant was mostly suffering from his back, leg and feet pain coming from spinal neuropathy and radiculopathy which were severe enough to interfere with his daily living and quality of life. He related that appellant described "stabbing knife-like and electric shock type pains while standing, walking, during prolonged sitting and even when lying down in bed at night. Dr. Yu advised that this caused appellant to have hardly any restful sleep, related mood problems and depression. He noted that on his most recent visit he decided to reevaluate appellant's spinal cord and nerves. Dr. Yu indicated that appellant had an MRI scan which revealed bulging discs and annular tear on the left at L3-4; focal disc herniation and posterior annular tear at the left neural foraminal level of L4-5 resulting in contact and impingement upon the left L4 exiting nerve root out laterally; L5-S1 right focal neural and foraminal disc herniation which also causes mild impingement upon the right L5 exiting nerve root laterally. Appellant's examination showed limping of his gait, hyperreflexia and spastic muscles all consistent with radiculopathy. Dr. Yu indicated that he hoped that appellant would stabilize, not worsen and cause permanent damage to his nerves without surgery. However, his overall prognosis remained guarded and he doubted that appellant would be able to engage in any gainful occupation.

By decision dated May 17, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 2, 2013. It found that the weight of the medical opinion was represented by Dr. Lampert, the second opinion physician.

On June 10, 2013 appellant requested a telephonic hearing, which was held on November 6, 2013. Appellant's representative argued that an unresolved conflict in medical opinion existed between Dr. Lampert and Dr. Adarmes. The hearing representative indicated that appellant was in need of a medical opinion explaining why his preexisting condition continued to be aggravated by his work-related condition dating back to 1995, and how his work-related condition continued to cause residuals and or disability causally related to the work injury.

By decision dated January 10, 2014, an OWCP hearing representative affirmed the May 17, 2013 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[4] 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.[5]

Section 8123(a) 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.[6] The implementing regulations state 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 an OWCP 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.[7]

ANALYSIS

The Board finds that OWCP did not meet its burden to justify termination of benefits.

OWCP based its decision to terminate appellant's benefits effective June 2, 2013 on a March 20, 2013 report by Dr. Lampert, the second opinion physician, who opined that the original injury had long resolved. Dr. Lampert opined that there were no objective findings of any residuals of a lumbosacral strain and opined that appellant's symptoms were extremely out of proportion to his findings.

Alternatively, appellant provided an April 24, 2013 report from his physician Dr. Adarmes, who examined him, provided findings and opined that appellant's accepted lumbar sprain remained active. Dr. Adarmes also found as well as supporting that the April 19, 1995 work injury caused or aggravated appellant's radicular symptoms and his preexisting degenerative lumbar condition. He disagreed with Dr. Lampert's opinion that appellant exaggerated his symptoms. Dr. Adarmes also questioned whether Dr. Lampert performed a comprehensive examination, noting that Dr. Lampert did not report limb girth measurements or indicate if he performed a reflex examination. In contrast, he explained that his examination revealed deficits to pinprick sensation in the bilateral L4 and L5 dermatomes. Dr. Adarmes also

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[4] *Curtis Hall,* 45 ECAB 316 (1994).

[5] *Jason C. Armstrong,* 40 ECAB 907 (1989).

[6] 5 U.S.C. § 8123(a); *Barry Neutuch*, 54 ECAB 313 (2003).

[7] 20 C.F.R. § 10.321.

observed that, while Dr. Lampert found a global decrease in sensation in both lower limbs, he did not note in his method of testing a loss of sensation. He concluded that appellant's April 19, 1995 work injury aggravated his preexisting condition and that his examination elicited positive objective findings to show that there was some degree of impairment as a result of his lumbar spine condition.

Accordingly, at the time OWCP terminated appellant's compensation on June 2, 2013 there was an unresolved conflict in the medical opinion evidence as to whether he had residuals from the accepted employment injury. Both Dr. Lampert and Dr. Adarmes had the opportunity to examine him and the medical record, but each reached differing conclusions with regard to whether appellant had residuals from this accepted injury. The Board finds that the relevant and probative medical evidence is in equipoise. It is well established that where there exists opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.[8] As OWCP failed to resolve the conflicting medical opinion evidence, the Board finds that it did not meet its burden of proof to terminate benefits.[9]

CONCLUSION

The Board finds that OWCP did not meet its burden of proof in terminating appellant's compensation benefits effective June 2, 2013.

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[8] *See Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[9] Having issued a formal wage-earning capacity determination on May 2, 2002, such decision remains in place unless it is modified. *See Katherine T. Kreger*, 55 ECAB 633 (2004). However, in certain situations, unlike in the case, if the medical evidence is sufficient to meet OWCP's burden of proof to terminate benefits, the same evidence may also negate a loss of wage-earning capacity such that a separate evaluation of the existing wage-earning capacity determination is unnecessary. *See A.P.,* Docket No. 08-1822 (issued August 5, 2009). As explained, *infra,* OWCP has not yet met its burden of proof.

ORDER

IT IS HEREBY ORDERED THAT the January 10, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 18, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

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