

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

K.C., Appellant)

and)

**DEPARTMENT OF COMMERCE, ECONOMICS)
& STATISTICS ADMINISTRATION, CENSUS)
BUREAU, Bowling Green, KY, Employer)**

**Docket No. 14-1212
Issued: November 19, 2014**

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
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 30, 2014 appellant, through counsel, filed a timely appeal from a March 26, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the prior 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 case.

ISSUE

The issue is whether OWCP met its burden of proof in terminating appellant's compensation benefits effective September 22, 2013 on the grounds that an accepted lumbar contusion, lumbar sprain, intervertebral disc disorder and aggravation of multilevel lumbar degenerative disc disease ceased without residuals.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, counsel contends that OWCP's March 26, 2014 decision is "[c]ontrary to law and fact."

FACTUAL HISTORY

OWCP accepted that on July 9, 2010 appellant, then a 35-year-old census enumerator, sustained a lumbar contusion, lumbar sprain, intervertebral disc disorder and temporary aggravation of degenerative lumbar disc disease when she slipped and fell on wet steps, striking her neck and back. Appellant stopped work on the date of injury and did not return. She received wage-loss compensation for total disability beginning on August 24, 2010. Appellant was separated from the employing establishment on August 28, 2010 due to a lack of available work.

Dr. David P. Rouben, an attending Board-certified orthopedic surgeon, followed appellant beginning on August 11, 2010, noting her history of two prior lumbar surgeries, the latest an L2-3 fusion performed in 2002. He found appellant totally disabled for work. On September 22, 2010 Dr. Rouben opined that appellant's condition remained unchanged from 2002. He noted that the July 9, 2010 work incident may have exacerbated degenerative lumbar disc disease, but that her symptoms were somewhat inconsistent with objective findings.

Dr. Kyaw J. Htin, an attending physician Board-certified in anesthesiology and pain medicine, provided periodic reports from January 25, 2011 to May 21, 2013 prescribing opioid medications. In an April 28, 2011 report, he advised that appellant's soft tissue injuries had resolved but that she required a repeat lumbar fusion.

In reports from April 28 to October 5, 2011, Dr. Rouben opined that appellant required a repeat lumbar fusion to address progressive deterioration of the lumbar spine with radiculopathy at all segments from L3 to S1.² On October 18, 2011 Dr. Rouben performed an anterior interbody fusion at L3-4 and L4-5 with cage fixation and autologous bone graft, approved by OWCP. He submitted a December 8, 2011 report noting that appellant's symptoms improved after surgery. On March 26, 2012 Dr. Rouben noted that appellant remained disabled for work as a deep venous thrombosis and pulmonary embolism prevented her from participating in physical therapy.³

On June 25, 2012 OWCP obtained a second opinion from Dr. Bryant Bloss, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts.

² On June 21, 2011 OWCP obtained a second opinion from Dr. Stanley W. Collis, a Board-certified orthopedic surgeon, who opined that the accepted injuries and temporary aggravation of degenerative lumbar disc disease had ceased without residuals. Following additional development and review by an OWCP medical adviser, OWCP approved Dr. Rouben's request to authorize a repeat lumbar interbody fusion.

³ Appellant also provided reports dated from January to March 2012 by a nurse practitioner. However, a nurse practitioner is not competent to render a medical opinion under FECA. Therefore, these reports are of no probative value. *D.N.*, Docket No. 13-1534 (issued March 12, 2014); *see also David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician assistants, nurses and physical therapists are not competent to render a medical opinion under FECA. *See also* 5 U.S.C. § 8101(2) (this subsection defines a physician as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law).

On examination, Dr. Bloss found that appellant's L2-3, L3-4 and L4-5 fusions were stable based on x-ray and clinical examination. He noted decreased reflexes in the lower extremities and reduced lumbar motion consistent with appellant's surgical history. Appellant used a walker to ambulate for significant distances. Dr. Bloss opined that the accepted temporary aggravation of degenerative lumbar disc disease had ceased. He recommended a work hardening program to address strength and range of motion issues. In an August 12, 2012 supplemental report, Dr. Bloss opined that the October 2011 fusion resolved the accepted conditions by stabilizing the lumbar spine and returning it to baseline.

In a December 7, 2012 report, Dr. Rouben reviewed Dr. Bloss' opinions and concurred that appellant's condition had returned to preinjury baseline status. He opined that "the only impediment for [appellant] to have reached maximum medical benefit improvement is documented, substantiated, witnessed cooperation and participation and completion of a work hardening program as suggested by Dr. Bloss." On January 2, 2013 Dr. Rouben noted that appellant fell in December 2012, resulting in left trochanteric bursitis and a concussion.⁴

By notice dated July 9, 2013, OWCP advised appellant that it proposed to terminate her wage-loss and medical compensation benefits because the accepted injury had ceased without residuals, based on Dr. Bloss' opinion as the weight of the medical evidence.

In response, appellant submitted a July 17, 2013 report from Dr. Rouben stating that while appellant's condition improved after the October 2011 repeat lumbar fusion, her symptoms still prevented her from returning to work. Dr. Rouben noted that one of the pedicle screws may have loosened.

By decision dated September 12, 2013, OWCP terminated appellant's wage-loss and medical benefits effective September 22, 2013, based on Dr. Bloss' opinion as the weight of the medical evidence.

In an October 2, 2013 letter postmarked October 11, 2013, appellant requested a review of the written record, asserting that the termination was erroneous. She contended that her physicians opined that the accepted injuries required additional testing and treatment. Appellant submitted medication management reports from Dr. Htin dated from July 23 to November 18, 2013. In a January 23, 2014 report, Dr. Htin related appellant's account that Dr. Rouben was contemplating additional surgery as one of the lower level fusion screws had loosened.

By decision dated and finalized March 26, 2014, an OWCP hearing representative affirmed OWCP's September 12, 2013 decision, finding that the additional evidence submitted was insufficient to outweigh Dr. Bloss' opinion that the accepted injuries resolved without residuals.

⁴ On March 22, 2013 the employing establishment offered appellant a modified position within her medical limitations. Appellant refused the position, asserting that she remained totally disabled for work.

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

ANALYSIS

OWCP accepted that appellant sustained a lumbar contusion, lumbar sprain, intervertebral disc disorder and temporary aggravation of degenerative lumbar disc disease. She stopped work on July 9, 2010 and did not return. Appellant received compensation for total disability.

Dr. Rouben, an attending Board-certified orthopedic surgeon, found appellant totally disabled for work from August 11, 2010 onward. Dr. Htin, an attending Board-certified anesthesiologist, provided pain management from January 2011 onward, noting that appellant's soft tissue injuries had resolved by April 28, 2011. On October 18, 2011, he performed a lumbar interbody fusion at L3-4 and L4-5, approved by OWCP.

Dr. Bloss, a Board-certified orthopedic surgeon and second opinion physician, provided June 25 and August 12, 2012 reports explaining that the accepted lumbar injuries and temporary aggravation of degenerative lumbar disc disease had ceased without residuals as the October 18, 2011 fusion stabilized the lumbar spine and returned appellant's condition to baseline. Dr. Rouben agreed with Dr. Bloss' assessment on December 7, 2012, noting that appellant would attain maximum medical improvement if she cooperated with physical therapy. He noted in January 2 and July 17, 2013 reports that appellant had fallen in December 2012, but did not opine that the fall was in any way related to the accepted injuries or their sequelae. While he indicated that one of the pedicle screws may have loosened, he offered no definite etiology for this finding. Therefore, OWCP terminated appellant's wage-loss and medical benefits effective September 22, 2013, based on Dr. Bloss' reports as the weight of the medical evidence.

Pursuant to an October 11, 2013 request for a review of the written record, appellant submitted additional pain management notes from Dr. Htin dated from July 2013 to January 2014. While Dr. Htin related appellant's account that Dr. Rouben wanted to reoperate due to a possible loose pedicle screw, he did not provide his own medical opinion on this issue or otherwise verify appellant's remarks. Therefore, OWCP issued its March 26, 2014 decision affirming the September 22, 2013 termination of appellant's wage-loss and medical compensation benefits.

The Board finds that OWCP properly accorded the weight of the medical evidence to Dr. Bloss, who based his opinion on the complete medical record, a statement of accepted facts

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

⁶ *Id.*

and a thorough clinical examination. Dr. Rouben concurred with Dr. Bloss' opinion that the accepted conditions had ceased. Therefore, OWCP's March 26, 2014 decision affirming the prior termination is appropriate under the law and facts of the case.⁷

On appeal, counsel contends that OWCP's March 26, 2014 decision is "contrary to law and fact." As stated above, Dr. Bloss provided well-reasoned reports explaining the medical reasons that appellant no longer had residuals of the accepted lumbar injuries as of September 22, 2013. Furthermore, Dr. Rouben agreed with Dr. Bloss' opinion.

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 in terminating appellant's compensation benefits effective September 22, 2013 on the grounds that an accepted lumbar sprain, lumbar contusion, intervertebral disc disorder and aggravation of multilevel lumbar degenerative disc disease ceased without residuals.

⁷ After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. The Board notes that the medical evidence submitted in support of appellant's request for a review of the written record does not address whether appellant was disabled for work on and after September 22, 2013 due to the accepted injuries. Dr. Htin's medication management notes do not address the critical issue of any causal relationship between the accepted injuries and appellant's condition on and after September 22, 2013. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits. See *Virginia Davis-Banks*, 44 ECAB 389 (1993); see also *Howard Y. Miyashiro*, 43 ECAB 1101 (1992).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 26, 2014 is affirmed.

Issued: November 19, 2014
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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