

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

C.P., Appellant)

and)

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Edison, NJ,
Employer**)

**Docket No. 14-1163
Issued: October 8, 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
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On April 23, 2014 appellant, through counsel, filed a timely appeal from a January 15, 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 met its burden of proof to terminate appellant's wage-loss compensation effective July 28, 2013.

FACTUAL HISTORY

On September 16, 2005 appellant, then a 48-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that she sustained a back injury on September 5, 2005 while sweeping a

¹ 5 U.S.C. § 8101 *et seq.*

sorting machine. OWCP accepted a lumbar sprain with lumbosacral/thoracic neuritis/radiculitis. On August 28, 2006 appellant underwent an epidural injection performed by Dr. Sayed Bakhaty, an anesthesiologist. She received wage-loss compensation as of August 28, 2006.

In a report dated January 24, 2007, Dr. Bakhaty advised that a lumbar provocative discography at L3-4, L4-5 and L5-S1 was performed. On February 21, 2007 Dr. Bakhaty performed an L5-S1 microdiscectomy. By report dated November 28, 2007, Dr. Bakhaty noted that appellant underwent surgery that day for an L4-5 and L5-S1 disc decompression.

OWCP referred appellant to Dr. Sarveswar Naidu, a Board-certified orthopedic surgeon, for a second opinion evaluation. In his report date May 27, 2008, Dr. Naidu provided a history of injury, results on examination and opined that appellant had no residuals of the employment injury.

Following a notice of proposed termination dated October 27, 2008, by decision dated December 3, 2008, OWCP terminated appellant's compensation for wage-loss and medical benefits effective December 21, 2008.

After a hearing request by appellant's counsel, in a decision dated July 13, 2009, an OWCP hearing representative reversed the termination decision. He found that Dr. Naidu had not been advised that the three 2007 surgeries were considered work related, and therefore his opinion was not based on an accurate medical background.

OWCP referred appellant to Dr. Barry Koffler, a Board-certified orthopedic surgeon, for a new second opinion evaluation. In a report dated October 13, 2009, Dr. Koffler opined that appellant's initial lumbar strain had resolved. Appellant's ongoing back pain was a residual of the underlying degenerative disc disease and spinal stenotic changes.

On January 12, 2010 OWCP proposed to terminate appellant's monetary compensation based on the report of Dr. Koffler. In a report dated February 26, 2010, Dr. M. Dalton Hanowell, a Board-certified anesthesiologist, provided a history and results on examination. He stated that appellant's radicular pain in her right leg might be a combination of scar tissue from her previous surgeries, as well as irritation of the L5 nerve root from disc herniations.

By decision dated April 1, 2010, OWCP terminated wage-loss compensation and medical benefits effective April 11, 2010. It found that Dr. Koffler represented the weight of the medical evidence.

Following a second request for a hearing, by decision dated May 18, 2010, an OWCP hearing representative reversed the termination decision. He found that OWCP had not asked Dr. Koffler whether appellant had residuals of the accepted conditions or from the authorized surgical procedures. The hearing representative noted Dr. Hanowell's reference to scar tissue from prior surgeries.

OWCP prepared a new statement of accepted facts and requested Dr. Koffler to provide a supplemental medical opinion. In a report dated July 7, 2010, Dr. Koffler stated that there was a paucity of physical findings on examination. He stated that it was impossible to determine

whether any residuals were related to the degenerative disc disease, stenotic changes or the prior surgeries.

On January 7, 2013 OWCP referred appellant for another second opinion examination by Dr. Eric Furie, an orthopedic surgeon. In his report dated January 29, 2013, Dr. Furie reviewed a history of injury and medical treatment. He reviewed x-rays of the pelvis and lumbar spine and did not find any objective evidence on physical examination or x-ray that prevented appellant from returning to her date-of-injury position. Dr. Furie advised that there were no work restrictions and appellant had reached maximum medical improvement.

In a supplemental report dated March 21, 2013, Dr. Furie advised that appellant had undergone an electromyogram (EMG) on March 11, 2013, which showed a chronic L4-5 radiculopathy. He noted that she reported a loss of sensation in her left thigh, but no loss of sensation in the leg or foot, which would more likely be associated with an L4-5 radiculopathy. Dr. Furie concluded that the results of the EMG would not limit appellant from the physical duties previously outlined.

OWCP requested an additional report from Dr. Furie, addressing the issue of whether appellant had any residuals from the three approved surgeries. In a response dated May 3, 2013, Dr. Furie stated that appellant had subjective complaints regarding lumbar sprain and lumbar radiculitis, but physical examination did not reveal any objective findings. He noted that appellant's injury was eight years old and there did not appear to be any objective findings to treat. Dr. Furie found that appellant was capable of performing the job duties of mail processing clerk. As he had stated earlier, the EMG study and sensory loss findings did not correlate.

By letter dated May 30, 2013, OWCP proposed to terminate compensation for wage loss based on the weight of the evidence of record. It found that Dr. Furie's reports represented the weight of the evidence. In a letter dated June 7, 2013, appellant, through her representative, argued that Dr. Furie's reports were insufficient to terminate compensation.

In a decision dated July 18, 2013, OWCP terminated wage-loss compensation effective July 28, 2013.

Appellant requested another hearing before an OWCP hearing representative, which was held on November 8, 2013. On December 4, 2013 appellant submitted a brief report from Dr. Hanowell, dated September 23, 2013. He stated that appellant could return to work without restriction. In a report dated January 4, 2014, Dr. Alison Hanowell, also a Board-certified anesthesiologist, provided results on examination. Dr. A. Hanowell stated that medial branch nerve blocks were scheduled to help relieve pain.

By decision dated January 15, 2014, the hearing representative affirmed the July 18, 2013 termination decision. He found that the weight of the evidence was represented by Dr. Furie.

LEGAL PRECEDENT

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.²

ANALYSIS

In the present case, OWCP terminated wage-loss compensation effective July 28, 2013. The July 18, 2013 decision and the May 30, 2013 notice of proposed termination specifically noted that the decision did not terminate appellant's medical benefits.

The Board finds that the weight of the medical evidence rests with the second opinion physician, Dr. Furie. In reports dated January 29, March 21 and May 3, 2013, Dr. Furie reviewed a complete and accurate background and provided a reasoned medical opinion that appellant could perform her date-of-injury position. Dr. Furie noted the lack of objective findings based on physical examination and reviewed the diagnostic studies. He determined that appellant's accepted condition had resolved and the EMG findings did not correlate to physical findings based on the physical examination. Dr. Furie concluded that she could return to her date-of-injury position. The Board notes that there is no contemporaneous medical evidence from an attending physician that discussed a continuing employment-related disability. Prior to the termination, the last report from Dr. M. Hanowell was a May 25, 2011 report noting that appellant had received a lumbar medial branch nerve block. On September 23, 2013 Dr. Hanowell briefly indicated that appellant could return to work without restriction, without discussing the interim period.

On appeal, counsel argued that Dr. M. Hanowell agreed that appellant still had disabling residuals of the employment injury. It is not clear to what specific report appellant is referring. Dr. Hanowell did not provide medical reports regarding her condition. Counsel also argued that Dr. Furie did not explain his conclusion as to lack of physical findings. He provided findings such as loss of sensation, but stated that the EMG study and sensory loss findings did not correlate. Dr. Furie did explain that L4-5 radiculopathy was normally associated with leg or foot sensory deficit, not the thigh as reported by appellant. He clearly stated that, based on his examination and the diagnostic testing, there were insufficient objective findings to establish disability.

The Board finds that OWCP met its burden of proof to terminate compensation for wage loss effective July 28, 2013.

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 to terminate wage-loss compensation effective July 28, 2013.

² *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 15, 2014 is affirmed.

Issued: October 8, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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