United States Department of Labor
Employees' Compensation Appeals Board

J.B., Appellant	)	
and	)	**Docket No. 13-2155**
	)	**Issued: September 2, 2014**
DEPARTMENT OF THE NAVY, NAVAL AIR SYSTEMS COMMAND STATIONS, Cherry Point, NC, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 23, 2013 appellant filed a timely appeal of an August 27, 2013 decision of the Office of Workers' Compensation Programs (OWCP) denying his claim for continuing compensation. The Board also has jurisdiction over a March 29, 2013 decision. 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 properly terminated appellant's wage-loss and medical compensation benefits effective August 30, 2012 on the grounds that no residuals from the work injury remained; and (2) whether appellant is entitled to continuing compensation benefits for an accepted medical condition after August 30, 2012.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 23, 1985 appellant, then a 40-year-old public affairs officer, injured his low back when he slipped on the threshold of a door causing him to fall and twist his back. OWCP accepted the claim for lumbosacral sprain and displacement of a lumbar intervertebral disc, left at L4. Appellant received wage-loss benefits. He underwent lumbar surgery on October 20, 1986. OWCP placed appellant on the periodic compensation rolls.

In April and June 2011 the employing establishment performed an investigation of appellant who was filmed walking, standing, bending, carrying a leaf blower and performing clean-up activities around his home.

Appellant's treating physician, Dr. Gary Heck, a Board-certified internist, reported on August 5, 2011 that appellant had spinal stenosis, chronic lumbar instability and dorsolumbar scoliosis. He noted that appellant's low back was deteriorating and unstable with grossly limited range of motion in his lumbar spine and was unable to sit or stand for more than a few minutes at a time. Dr. Heck concluded that appellant had a permanent and disabling injury to his lumbar spine, and from associated complications that resulted from that injury. He opined that it would be inadvisable to return appellant to a work setting because of the unstable nature of his low back and left leg.

On November 15, 2011 OWCP provided Dr. Heck with a copy of the surveillance video for review. It requested that he address the nature and extent of disability between appellant's current condition and the August 23, 1985 work injury.[2]

In a December 19, 2011 response, Dr. Heck stated that appellant had residuals of atrophy of left leg, limp with left leg, chronic weakness of left leg and had reached maximum medical improvement. Appellant also had chronic documented atrophy of the left leg and continued on multiple medications for pain. Dr. Heck found that appellant was not a viable candidate for a job which required careful analysis of sensitive material given appellant's multiple medications. He indicated that appellant's use of chronic mediations, including narcotics, would preclude him from the multiple duties outlined in the July 25, 2011 job offer and he was unable to participate in vocational rehabilitation.

In a February 1, 2012 report, Dr. William A. Somers, a Board-certified orthopedic surgeon and second opinion physician, reviewed the medical records of file; statement of accepted facts; a copy of the video surveillance dated April 22 and June 23, 2011; and a copy of the July 25, 2011 job offer. He noted that the only radiographic record was a cervical spine magnetic resonance imaging (MRI) scan of December 2011. Dr. Somers noted that appellant reported having polio between the age of three and four and listed examination findings, which included antalgic gait on the left, tender to palpation over the midline in the L4 and L5 and about the sciatic nerve in the left buttock regions and visible atrophy in the left thigh and leg region. He stated, "I wonder whether any of this could be related to his old polio." Dr. Somers opined

[2] Appellant was copied on this request to Dr. Heck. On November 23, 2011 he requested copies of the investigative reports and associated pictures. By letter dated January 5, 2012, OWCP forwarded copies of the investigative video to appellant. *See J.M.*, 58 ECAB 478 (2007).

that work-related sprain of lumbosacral region and intervertebral disc have not resolved, that appellant had not reached maximum improvement and that vocational rehabilitation was not indicated for someone of the age of 66.

On March 14, 2012 OWCP requested that Dr. Somers' clarify his opinion regarding the cause of appellant's atrophy and weakness in his left leg and thigh. In a March 21, 2012 report, Dr. Somers noted that he could not say whether the polio or the work injury caused the muscle weakness and atrophy, as it could be a combination of the two. After reviewing the July 25, 2011 job offer, he opined that appellant was capable of working four hours a day for up to a year with sedentary work limitations. Dr. Somers advised that the video surveillance showed appellant engaging in a sedentary level of physical activity.

OWCP determined that a conflict in medical opinion arose between Dr. Heck and Dr. Somers with regard to appellant's disability status and work capacity. It referred appellant for an impartial medical examination to Dr. Ralph A. Summers, a Board-certified orthopedic surgeon.

In a June 28, 2012 report, Dr. Summers noted the history of injury as reported by appellant, which included his statement that he had an injury to his left knee with left knee reconstruction 25 or 30 years prior. Appellant also reported seeing an urologist for pain into his scrotum and genital area. The urologist opined that the pain might be a radicular type of pattern from his lower back. Dr. Summers reviewed the medical records of file, the statement of accepted facts; a copy of the April 22 and June 23, 2011 video surveillance; the July 25, 2011 job offer and presented examination findings. Appellant had a slow and methodical gait in the examination room, in contrast to his gait when he was observed walking down the hallway and out of the building following his examination. On examination, there was atrophy of the left leg and pain with Waddell's rotation testing of the spine. Deep tendon reflexes were 2/4 and bilaterally equal at the patellar tendon and Achilles tendon with positive straight leg raising on the left side at 45 degrees of extension. Dr. Summers found that appellant's left leg atrophy was related to his history of polio and prior left leg surgery and that the difference in appellant's gait while unobserved versus during the examination, suggested symptom magnification. He also noted that appellant's subjective complaints of balance trouble were not demonstrated in the video surveillance. Dr. Summers opined that appellant had recovered from the accepted work-related sprain of lumbosacral joint ligament and displacement of lumbar intervertebral disc left at L4 with no restrictions on sitting, standing, walking or driving, and that he could perform the date-of-injury job, as it was sedentary. He stated that the reason for his opinion was provided in the MRI scan reports, which failed to demonstrate any additional herniated disc, arthritis or impingement of neural structures. Dr. Summers stated that any continued complaints related to appellant's underlying preexisting degenerative disc disease.

On July 24, 2012 OWCP notified appellant that it proposed to terminate his compensation benefits based on the impartial opinion of Dr. Summers. Appellant was provided 30 days to submit additional evidence or argument.

By decision dated August 30, 2012, OWCP terminated appellant's compensation for medical benefits and wage loss effective that day. It found that the special weight of the medical opinion evidence rested with the opinion of Dr. Summers, the impartial medical specialist, who

found that there were no residuals from the work injury and appellant could perform his date-of-injury job with no restrictions.

Appellant requested an oral hearing with an OWCP representative, which was held telephonically on January 10, 2013. He resubmitted reports previously of record.

In a September 13, 2012 report, Dr. Timothy Garner, a Board-certified neurosurgeon, advised that he examined appellant and reviewed records provided by appellant, which demonstrated that multiple physicians supported his long-standing disability. He opined, "Suffice it to say, that it is my opinion that he suffered an injury in 1985 that was subsequently surgically treated from which he never fully recovered." Dr. Garner also noted that he agreed with Dr. Heck's "multiple assessments of this man's continued disability" as well as Dr. Somers' characterization of his disability in the February 2012 evaluation. He concluded that appellant was disabled from his date-of-injury job and would not be able to return to work.

By decision dated March 29, 2013, an OWCP hearing representative affirmed the August 30, 2012 termination decision. The hearing representative found that the weight of the medical opinion rested with the impartial specialist, Dr. Summers, who provided a well-reasoned opinion based upon the available medical records, the statement of accepted facts and findings on examination. The hearing representative further found that appellant failed to meet his burden of proof to establish that he had ongoing disability causally related to the work injury as Dr. Garner's report was insufficient to overcome the special weight accorded the impartial specialist.

In a May 8, 2013 letter, appellant requested reconsideration. He contended that Dr. Garner's medical report supports the continuing difficulties he experiences daily as a result of the workplace injury. Appellant submitted a duplicate copy of his May 25, 2012 letter and an April 9, 2013 letter.

In an April 22, 2013 report, Dr. Garner stated that he last saw appellant on September 13, 2012. Appellant had long-standing disability from his original injury and was not able to return to work in his original date-of-injury position. He reviewed with appellant the history of work injury and medical treatment received. Appellant voiced complaints about the impartial medical specialist's examination. Dr. Garner noted that appellant's symptoms, which were described as pain in the back, left hip and radiating pain into the left leg; pain in the testicular region (left side), which his urologist found due to neurological problems from his back. He had difficulty with coughing, sneezing, riding, sitting or prolonged periods of time, and ongoing pain since his original diagnosis and surgery. Dr. Garner stated that it appeared appellant had a herniated disc removed at L4 and L5 in the mid-eighties and that appellant has tried to avoid further fusion surgery. Appellant showed all the signs of having a nerve root problem in his back. On examination, there was generalized atrophy of the left leg. Dr. Garner noted that appellant had multiple pictures of his left leg at various stages in his life without evidence of atrophy. He stated appellant's examination and history was that of someone with either an acute back problem or a chronic injury from which he did not recover. Dr. Garner thought appellant was more likely in the latter category than the former, but he did not have any recent studies of appellant's lumbar spine. Appellant could have developed a more acute problem in recent months accounting for his significant ongoing pain. Dr. Garner opined that it

was very likely that appellant has degenerative change and segmental instability and needed spinal fusion. He stated that, even with a fusion, appellant would not be able to return to his job. Dr. Garner opined that appellant continues to suffer long lasting effects and disability from the 1985 work injury that subsequently required surgery. He noted that further study of appellant's lumbar spine was needed.

By decision dated June 10, 2013, OWCP denied modification of its March 29, 2013 decision. It found that Dr. Garner's opinion was insufficient to overcome the special weight of the medical evidence accorded to Dr. Summers.

In a July 17, 2013 letter, appellant requested reconsideration. He argued that the medical evidence reflected that his injury had not resolved. Appellant submitted a June 20, 2013 MRI scan that showed postoperative changes at L4-5 with a probable small subarticular disc protrusion that may impinge the traversing left L5 nerve. Significant epidural fibrosis was noted in that region. Degenerative changes were noted at other levels without neural impingement.

In a July 11, 2013 report, Dr. Garner reviewed the MRI scan and advised that it showed some spurring and scarring at L4-5 on the left and maybe a little ruptured disc pushing on his L5 nerve root. This was an anatomical substrate for the problems of which appellant had complained through the years. Dr. Garner stated that, given the degree of mechanical back pain that appellant had, it would not be adequate to fix this pathology. He opined that a lumbar fusion would be necessary, but appellant was not ready to pursue surgery. Dr. Garner opined that appellant has ongoing disability from a problem that started in 1985 and which never really changed. He stated that appellant now has documented an anatomical substrate for that continued pain and that the only operation possible to fix it would be a lumbar fusion.

By decision dated August 27, 2013, OWCP denied modification of its June 10, 2013 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[3] Having determined that an employee has a disability causally related to his or her federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[4] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[5]

Section 8123(a) of FECA provides in pertinent part: 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] In situations where

[3] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[4] *Id.*

[5] *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[6] 5 U.S.C. § 8123(a).

there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

ANALYSIS -- ISSUE 1

OWCP terminated appellant's wage-loss compensation and medical benefits based on the June 28, 2012 report of Dr. Summer. It determined that there was a conflict in the medical opinion between Dr. Heck, appellant's treating physician, and Dr. Somers, the second opinion physician, with regard to appellant's disability status and work capacity. Dr. Somers found that appellant was capable of returning to modified part-time work while Dr. Heck determined that appellant was totally disabled. In order to resolve the conflict, OWCP properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Summers, a Board-certified orthopedic surgeon, for an impartial medical examination.

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits as Dr. Summers' June 28, 2012 report is insufficiently rationalized to support that he had no further residuals or disability due to his accepted employment injury.

Dr. Summers attributed appellant's problems to his preexisting degenerative condition and the left leg atrophy to his history of polio and prior left leg surgery. The Board finds that he did not provide sufficient medial reasoning in support of his determination that appellant had no further employment-related residuals or disability.[8] While Dr. Summers noted that appellant did not exhibit objective evidence of the accepted work injuries, he failed to provide an explanation as to why the accepted work-related injuries have resolved. He did not identify any preexisting back disease or cite any medical evidence in the file to support his opinion that appellant's accepted conditions have resolved. Dr. Summers also fails to provide any objective evidence or medical rationale as to why the left leg atrophy was the result of polio early in his life and unrelated to appellant's work injury. While he concluded that the L4 accepted condition had not progressed based on MRI scan findings, Dr. Summers failed to specify the MRI scan results he relied upon or explain the comparison baseline that was used to support his conclusion that no additional herniation, arthritis or impingement existed. The record reflects that appellant had exploratory surgery at L5-S1 in 1985 and a hemilaminectomy and discectomy at L4-5 in 1986. However, Dr. Summers barely acknowledged these procedures and does not offer an opinion as to whether appellant's back surgery is related, in whole or in part, to the accepted conditions and, if related, whether there is any remaining impairment. While he notes that appellant went to an urologist, he failed to explain whether appellant's diagnosis is related or unrelated to the accepted back injury. Dr. Summers further fails to explain why the video surveillance was dispositive on the questions of maximum medical improvement, ability to work and medical restrictions. He failed to comment on the various conditions that appellant has and to provide a well-rationalized opinion on whether such conditions are related to appellant's work injury and,

[7] *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

[8] *See Elaine Sneed*, 56 ECAB 373 (2005).

if related, whether there is any remaining impairment. Accordingly, Dr. Summers' opinion that the accepted conditions have resolved without residuals and that appellant has no remaining disability is of little probative value. Accordingly, his opinion is insufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits.[9]

In light of the Board's disposition of this case, the second issue concerning appellant's entitlement to continuing compensation for an accepted medical condition after August 30, 2012 is moot. Appellant's arguments on appeal also will not be addressed.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits effective August 30, 2012.

ORDER

IT IS HEREBY ORDERED THAT the August 27, June 20 and March 29, 2013 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: September 2, 2014
Washington, DC

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

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

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

[9] *Id*.