

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

L.A., Appellant

and

**DEPARTMENT OF THE NAVY, NAVAL
SHIPYARD, Philadelphia, PA, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 14-1138
Issued: September 9, 2014**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
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 April 14, 2014 appellant, through his attorney, filed a timely appeal from a December 23, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating his 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 properly terminated appellant's wage-loss compensation and medical benefits effective January 12, 2014 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injuries.

On appeal, counsel contends that the medical report of an OWCP referral physician is not entitled to the weight of the medical evidence as the statement of accepted facts provided to him contained an inaccurate summary of the accepted conditions. The record indicated that

¹ 5 U.S.C. § 8101 *et seq.*

appellant's claim was originally approved for aggravation of preexisting spondylosis, but this condition did not appear in the statement of accepted facts reviewed by the referral physician who stated that the condition was not work related. Counsel contends that Dr. Smith's opinion incorrectly stated that no electromyogram/nerve conduction velocity (EMG/NCV) diagnostic testing was performed while there were references to such testing in pre-1998 medical reports of record. He states that the test results were missing from the record. Counsel also contends that appellant's claim should have been accepted for aggravation of degenerative disc disease as found in an October 23, 1991 report of Dr. Richard S. Meyer, a Board-certified orthopedic surgeon and an impartial medical specialist, which served as a basis for appellant's referral to vocational rehabilitation services. He contends that the record is incomplete as it does not contain a statement of accepted facts prepared prior to 1998 which was referenced by numerous referral physicians.

FACTUAL HISTORY

OWCP accepted that on January 25, 1982 appellant, then a 43-year-old painter, sustained employment-related back sprain and thoracic or lumbosacral neuritis or radiculitis not otherwise specified when he slipped on ice on a dock at work. He stopped work on January 26, 1982 and returned to work on April 24, 1984. Appellant sustained a recurrence of disability on May 4, 1984. He did not return to work. OWCP paid him compensation for total disability.

The record contains a FECA Nonfatal Summary (Form CA-800) and statement of accepted facts dated May 7, 1998 which report that appellant's accepted conditions were lumbar contusion, aggravation of preexisting spondylosis, chronic lumbosacral and musculoskeletal strain and lumbar radiculitis.

In a May 9, 2013 report, Dr. Scott Kurzrok, an attending family practitioner, noted that appellant sustained a work-related back injury on January 25, 1982. He began treating appellant two years prior for chronic and ongoing back pain. Dr. Kurzrok reported that a physical examination of the lumbar spine showed limited range of motion and paravertebral muscle spasm bilaterally. He advised that appellant was unable to work at that time. Dr. Kurzrok concluded that his prognosis remained guarded to return to the workplace.

By letter dated August 1, 2013, OWCP referred appellant, together with a statement of accepted facts and case record, to Dr. Robert H. Smith, a Board-certified orthopedic surgeon, for a second opinion to determine whether he continued to have residuals of his approved work-related conditions. The August 1, 2013 statement of accepted facts provided to Dr. Smith stated that "this statement of accepted facts supersedes all previous versions." The employment-related conditions were listed as back sprain and thoracic or lumbosacral neuritis or radiculitis not otherwise specified.

In an August 30, 2013 report, Dr. Smith reviewed the statement of accepted facts and appellant's case record. He also reviewed a history of his medical treatment for his accepted lumbar contusion, and chronic lumbosacral and musculoskeletal strain. Dr. Smith noted that appellant's case was subsequently revised to include lumbosacral neuritis or radiculitis, although there was nothing in the file or by his recollection to indicate that he had neurodiagnostic or electrodiagnostic testing to confirm this latter diagnosis. He further noted that appellant's

current complaint of sensation of pressure and spasm in the back with some radiation to the right leg. On physical examination, Dr. Smith reported that appellant was alert, oriented and in no acute distress. His gait and station were satisfactory, noting that he walked for exercise. Appellant used a lumbar support that was removed for the examination. He occasionally used a cane. There was no finding of any chronic or acute spasm of appellant's back. Motion of the lumbar spine was satisfactory without any spasm or rigidity being present.

Dr. Smith reported a completely normal neurologic examination. He stated that, although doctors who examined appellant in the past believed appellant had a herniated disc with radiculitis, appellant had essentially normal magnetic resonance imaging (MRI) scan studies of the lumbar spine in September 1987² and March 1993. Both studies showed some mild desiccation of the lower lumbar discs consistent with degenerative disease, but there was no evidence of any herniation at any level. Dr. Smith noted Dr. Kurzrok's May 9, 2013 finding of back spasm, but stated that no neurological deficit was recorded. He advised that of the accepted conditions in this case, appellant's back sprain had long since resolved based on his current examination. After a diligent search on clinical examination, there was no evidence that he had any chronic or acute spasm about his back related to the remote incident in 1982. There was also no evidence, either clinical or from electrodiagnostic testing, that appellant had any lumbosacral neuritis or radiculitis related to this incident. Dr. Smith advised that the only established diagnosis in this instance would be a back sprain directly caused by the incident in question. However, he opined that this condition had long since resolved since it happened 20 years ago and currently appellant had a benign examination with no adverse soft tissue abnormalities about his spine or any neurological deficit of an objective nature. Appellant did have some degenerative change in his spine according to the most recent MRI scan study that was done many years ago. Based on the accepted condition which appeared to have completely resolved or never existed, Dr. Smith found that appellant could return to regular-duty work. However, because of his age-related debility, appellant would be capable of only performing light-duty work with restrictions. Dr. Smith opined that future treatment was not required. He concluded that based on his benign examination, appellant did not suffer any objective residuals from the January 25, 1982 work incident which happened more than 20 years ago and was accepted as a lumbosacral strain.

In a September 9, 2013 report, Dr. Kurzrok listed physical examination findings and diagnosed a lumbar strain.

On November 22, 2013 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Smith's medical opinion. Appellant was advised that he had 30 days to submit additional evidence in response to the proposed termination.

In a December 2, 2013 letter, appellant disagreed with OWCP's proposed action. He contended that Dr. Smith did not conduct a thorough medical examination. Appellant claimed that he continued to be totally disabled for employment.

² The record does not contain a September 1987 lumbar MRI scan, but a September 29, 1999 lumbar MRI scan demonstrated disc desiccation and was otherwise negative.

In a December 23, 2013 decision, OWCP finalized the termination of appellant's compensation benefits effective January 12, 2014. It found that the opinion of Dr. Smith constituted the weight of the medical evidence.³

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.⁴ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ The burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁸

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits as of January 12, 2014.

OWCP accepted that appellant sustained back sprain, thoracic or lumbosacral neuritis or radiculitis not otherwise specified while in the performance of duty. On December 23, 2013 it issued a decision terminating his compensation for total disability and medical treatment based upon the report of Dr. Smith, an OWCP referral physician, who found that appellant's employment-related back sprain had resolved and he could return to light-duty work with restrictions not related to this accepted injury. Dr. Smith noted that appellant did not sustain any lumbosacral neuritis or radiculitis related to his employment factors. His opinion is not well rationalized and is not based on an accurate factual foundation. The Board notes that OWCP accepted that appellant sustained back sprain, thoracic or lumbosacral neuritis or radiculitis not otherwise specified. The Board instructed Dr. Smith to determine whether appellant had continuing residuals of his accepted conditions. Contrary to the statement of accepted facts, Dr. Smith found that appellant's lumbosacral neuritis or radiculitis conditions were not caused by

³ Following the issuance of OWCP's December 23, 2013 decision, OWCP received additional evidence. The Board cannot consider evidence for the first time on appeal which was not before OWCP at the time it issued the final decision in the case. See 20 C.F.R. § 501.2(c)(1); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

⁴ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁶ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

factors of his employment. Having accepted lumbosacral neuritis or radiculitis as work-related conditions, OWCP erred in relying on a report from a physician whose opinion regarding the issue of whether appellant's accepted conditions had ceased, disregarded the accepted conditions. It is well established that medical reports must be based on a complete and accurate factual and medical background; medical opinions based on an incomplete or inaccurate history are of diminished probative value.⁹ The Board finds, therefore, that OWCP erred by terminating appellant's compensation in its December 23, 2013 decision. The Board will reverse OWCP's determination terminating appellant's wage-loss compensation and medical benefits.

Counsel contended that Dr. Smith's opinion incorrectly stated that no EMG/NCV diagnostic testing was performed while there were references to such testing in pre-1998 medical reports of record. He asserted that the test results were missing from the record. Dr. Smith referenced the results of pre-1988 EMG/NCV studies in his report. However, as found, his opinion regarding appellant's continuing employment-related residuals and disability is of diminished probative value as it was not based on an accurate factual background.

Counsel further contended that appellant's claim should have been accepted for aggravation of degenerative disc disease based on the October 23, 1991 report of Dr. Meyer, an impartial medical specialist, which served as a basis for appellant's referral to vocational rehabilitation services.¹⁰ The Board notes that the issue is whether OWCP properly terminated appellant's compensation benefits on the grounds that he no longer had any residuals or disability causally related to his back sprain, thoracic or lumbosacral neuritis or radiculitis, the conditions accepted by OWCP. The Board does not have jurisdiction over whether appellant has sustained other conditions causally related to the accepted employment injuries on appeal.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits.

⁹ *Douglas M. McQuaid*, 52 ECAB 382 (2001).

¹⁰ The Board notes that Dr. Meyer's report is not contained in the case record.

ORDER

IT IS HEREBY ORDERED THAT the December 23, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 9, 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