

August 9, 2012. He stated on the claim form that he was sitting in a utility vehicle when he was rear-ended by another utility vehicle. Appellant described injuries to his neck and lower back.

OWCP accepted the claim on October 5, 2012 for neck and lumbosacral sprain. The record contains a magnetic resonance imaging (MRI) scan report dated April 10, 2012 from Dr. Mark Timken, a radiologist, reporting an L4-5 broad-based left parasagittal disc herniation. In an MRI scan report dated September 17, 2012, Dr. Timken stated the L4-5 disc herniation appeared more prominent since the previous examination. As to a cervical MRI scan dated September 17, 2012, Dr. Timken noted disc bulges C2-5, with broad-based disc herniation at C5-6. In a report dated November 12, 2012, Dr. Jose Zuniga, a Board-certified neurologist, provided a history and results on examination. He diagnosed carpal tunnel syndrome, cervical disc disease, degeneration of lumbar intervertebral disc, and polyneuropathy in diabetes.

On November 20, 2012 OWCP accepted intervertebral disc disorder with myelopathy. Appellant returned to work in a part-time light-duty position. By letter dated December 11, 2013, the employing establishment indicated that the light-duty position was no longer available. Appellant began receiving wage-loss compensation for total disability on the periodic rolls.

In a report dated January 2, 2014, Dr. Robert Reppy, an osteopath, provided a history of injury and results on examination. He diagnosed cervical and lumbar disc disorder.

OWCP prepared a statement of accepted facts (SOAF) and referred appellant, along with medical records, to Dr. Jonathan Black, a Board-certified orthopedic surgeon, for a second opinion examination. In a report dated February 11, 2014, Dr. Black provided a history and results on examination. His report examination showed “no step-off or bruising” and alignment was normal. Dr. Black stated that appellant had sustained an aggravation of preexisting lumbar degenerative disease with L4-5 disc herniation, and cervical degenerative disc disease. He opined that these conditions were the result of the work-related injury. Dr. Black reported that appellant was completely neurologically intact on physical examination. He noted that appellant continued to complain of low back and neck pain, but appellant “does admit to the presence of these conditions prior to the accident, it is unclear whether or not they have returned to their baseline.” According to Dr. Black, appellant’s ongoing symptoms were “in line with the nature of degenerative conditions.” He reported that appellant’s subjective complaints were out of proportion with the clinical findings as related to the work injury. Dr. Black stated, “Although the MRI [scan] findings in the lumbar spine suggest worsening of the compression on the left L5 nerve root compared with the prior study, that condition was present to a large extent in the prior study, and prior to the work-related injury and being treated with tramadol.” He concluded, “As the claimant is completely neurologically intact and the MRI [scan] findings do not appear to be markedly different from those of the preinjury MRI [scan] he is capable of performing the duties of a tractor operator as described in the [s]tatement of [a]ccepted [f]acts full duty.”

On March 5, 2014 OWCP requested that Dr. Black provide a supplemental report clarifying his opinion. In a report dated April 1, 2014, Dr. Black stated that the lumbar and cervical sprains had resolved. He stated there was no evidence on examination of a continuing muscle sprain. Dr. Black opined that changes on the postinjury MRI scan were most likely due to age-related phenomena. Appellant had sustained a temporary aggravation of preexisting cervical and lumbar degenerative disease. Dr. Black stated that there was no objective evidence

that the aggravation of preexisting lumbar degenerative disc herniation at L4-5 and cervical degenerative disease were “active in disabling.” He concluded that appellant was at baseline and residual symptoms were due to the natural progression of the underlying preexisting conditions.

In a report dated April 23, 2014, Dr. Reppy indicated that appellant continued to have neck and low back pain. He provided results on examination and diagnosed L4-5 herniated disc, bilateral radiculopathy, lumbar disc syndrome, and cervical disc syndrome with radiculopathy. Dr. Reppy indicated that the neck and lumbar sprains had resolved. He stated that the “accepted diagnosis of lumbar disc disease” is correct. In addition, Dr. Reppy stated that OWCP was not taking into account appellant’s cervical diagnoses. He stated that a January 2, 2014 cervical MRI scan showed broad-based posterior disc bulge at C5-6 with osteophytes and spinal stenosis. Dr. Reppy further stated that the damage to appellant’s neck was consistent with being struck from behind at high speed by another vehicle. Appellant had stated that the impact snapped his neck backwards, and “any chiropractor will confirm that this is the most common etiology for cervical disc disease that there is. To not be included in the list of accepted conditions is doing this patient a disservice, as well as ignoring the medical evidence as presented.”

By report dated July 8, 2014, Dr. Reppy diagnosed L4-5 herniated disc, bilateral radiculopathy, lumbar disc syndrome, cervical disc syndrome with radiculopathy, and hypertension. He stated, “the proper diagnoses are listed above, which are supported by medical evidence and physical fact. Also, it is my medical opinion with all reasonable certainty that these diagnoses were caused and aggravated by the accidents [appellant] sustained at work on [August 9, 2012].” On July 25, 2014 appellant submitted a duty status report (Form CA-17) from Dr. Reppy indicating that appellant remained totally disabled.

In a letter dated August 28, 2014, OWCP advised appellant that it proposed to terminate compensation for wage-loss and medical benefits, based on the weight of the medical evidence. It advised him to submit evidence or argument within 30 days.

On September 9, 2014 appellant submitted an August 29, 2014 report from Dr. Reppy providing results on examination. He also submitted a functional capacity evaluation from Dr. Reppy dated September 4, 2014.

In a report dated September 16, 2014, Dr. Reppy indicated that he had reviewed Dr. Black’s report and discussed in detail his disagreement with Dr. Black’s conclusions. He stated that Dr. Black’s finding that the inspection of the cervical spine showed no “step-off” supported the diagnoses found on the cervical MRI scan, and cervical disc herniations would not change the cervical alignment. Dr. Reppy stated that Dr. Black did not explain his opinion as to conditions preexisting the work injury and he disagreed with Dr. Black that MRI scan findings were age related. He stated that disc herniations do not simply resolve on their own. Dr. Reppy discussed the mechanism of the work injury, stating that the force of the impact is transferred to the spinal column and exceeds the capacity of the connective tissue to withstand it. He opined that appellant’s work-related conditions had not ceased, and he would require surgery to repair the spinal herniated discs. Dr. Reppy reiterated that he stood by his statements regarding appellant’s inability to return to work. In a duty status report dated September 26, 2014, he indicated that appellant remained totally disabled.

By decision dated November 5, 2014, OWCP terminated compensation for wage-loss and medical benefits. It found the weight of the evidence was represented by Dr. Black. As to Dr. Reppy's September 16, 2014 report, OWCP stated that he did not mention accepted conditions and, as to a cervical injury, only a sprain had been accepted.

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 employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.² The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. 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.³

FECA provides that, if there is a 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 the examination.⁴ 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 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.⁵

ANALYSIS

In the present case, OWCP terminated compensation for wage-loss and medical benefits as of November 5, 2014. It found the weight of the evidence represented by Dr. Black, the second opinion physician. In his reports dated February 11 and April 1, 2014, Dr. Black indicated that the August 9, 2012 work injury had aggravated preexisting lumbar and cervical degenerative disc disease. He opined, however, that the aggravation was temporary and appellant's current cervical and lumbar disc disease was not related to the employment injury.

OWCP found that the reports of Dr. Black were sufficient to terminate compensation. However, appellant had submitted a detailed report dated September 16, 2014 from attending physician Dr. Reppy. He provided a reasoned medical opinion that disagreed with Dr. Black. Dr. Reppy found that appellant continued to have an employment-related cervical and lumbar disc disease that had not ceased and continued to cause disability. He discussed the work incident, the mechanism of injury, the medical record and provided a detailed explanation of his disagreement with Dr. Black's findings.

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

³ *Furman G. Peake*, 41 ECAB 361 (1990).

⁴ 5 U.S.C. § 8123.

⁵ 20 C.F.R. § 10.321 (1999).

In the November 5, 2014 decision, OWCP found that the weight of the medical evidence rested with Dr. Black. As to Dr. Reppy's September 16, 2014 report, OWCP stated that he did not mention the accepted conditions and as to cervical disease only a cervical sprain had been accepted. Dr. Black had been asked to describe all employment-related conditions, and he had clearly found there was causal relationship between the cervical disc disease and the August 9, 2012 employment injury. It is evident that Dr. Black and Dr. Reppy disagreed as to whether appellant continued to have an employment-related condition and disability. The Board also notes that OWCP had accepted lumbar intervertebral disc disorder, and the physicians disagreed as to whether appellant continued to have an employment-related lumbar condition.

It is well established that the proper procedure when confronted with a disagreement between an attending physician and a second opinion physician, whose opinions are of virtually equal weight and rationale, is for OWCP to select a referee physician to resolve the conflict.⁶ OWCP should have properly resolved the conflict prior to termination of compensation. It is OWCP's burden of proof to terminate compensation for wage-loss and medical benefits. When a medical conflict remains unresolved, OWCP has failed to meet its burden of proof to terminate compensation as of November 5, 2014.⁷

CONCLUSION

The Board finds OWCP did not meet its burden of proof to terminate compensation for wage-loss and medical benefits effective November 5, 2014.

⁶ 5 U.S.C. § 8123(a); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁷ *See S.J.*, Docket No. 14-1821 (issued January 23, 2015).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 5, 2014 is reversed.

Issued: April 10, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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