United States Department of Labor
Employees' Compensation Appeals Board

A.A., Appellant	)	
and	)	**Docket No. 15-0937**
	)	**Issued: August 17, 2015**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Philadelphia, PA, Employer	)	

Appearances:
Jason S. Lomax, 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 H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On March 17, 2015 appellant, through counsel, filed a timely appeal from a September 22, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). 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.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation and authorization for medical treatment effective March 9, 2014 as she had no further disability or residuals of her January 27, 2011 employment injury.

FACTUAL HISTORY

On February 3, 2011 appellant, then a 44-year-old practical nurse, filed a traumatic injury claim alleging that on January 27, 2011 she injured her low back, left hip, and both wrists when

[1] 5 U.S.C. § 8101 *et seq.*

she slipped and fell on ice in the parking lot of the employing establishment. She stopped work on January 28, 2011. OWCP accepted the claim for lumbar sprain, bilateral wrist sprain, bilateral carpal tunnel syndrome, and a bilateral lesion of the ulnar nerve. It paid appellant disability compensation beginning March 15, 2011 and placed her on the periodic rolls beginning October 23, 2011.

Dr. Asif M. Ilyas, a Board-certified orthopedic surgeon, performed a right carpal and cubital tunnel release on October 14, 2011 and a left carpal and cubital tunnel release on January 20, 2012. On June 4, 2012 he released appellant to resume work without restrictions.

In a work restriction evaluation dated June 7, 2012, Dr. Amelia L.A. Tabuena, who specializes in pain management, found that appellant was disabled as a result of her back injury. In a progress report dated July 16, 2012, she discussed appellant's history of an injury to her back in January 2011.[2] Dr. Tabuena diagnosed unresolved chronic lumbar sprain/strain, herniated discs at L5-S1, bulging discs at L4-5, lumbar radiculopathy, status post bilateral carpal tunnel releases, and chronic bilateral wrist tendinitis. She opined that appellant should not work to prevent an increase in back pain.

On October 1, 2012 OWCP referred appellant to Dr. Robert F. Draper, a Board-certified orthopedic surgeon, for a second opinion examination. It enclosed a statement of accepted facts (SOAF) listing the accepted conditions and noting that appellant had nonemployment-related conditions of a herniated disc at L5-S1, a bulging disc at L4-5, and lumbar radiculopathy. In a report dated November 13, 2012, Dr. Draper reviewed the history of injury and medical reports of record. He diagnosed status post bilateral carpal and cubital tunnel releases, lumbar sprain, and degenerative disc disease at L3-4 and L5-S1 not related to employment. Dr. Draper further found a small disc herniation at L5-S1 that was "consistent with preexisting degenerative bulging disc disease." He determined that appellant could perform modified duty, lifting not more than 25 pounds frequently and 50 pounds occasionally, and standing and walking no more than six hours per day. Dr. Draper stated, "These would be permanent restrictions due to the unrelated degenerative spinal disease."

On December 31, 2012 Dr. Tabuena disagreed with Dr. Draper's opinion that appellant had a degenerative condition. She attributed appellant's lumbar radiculopathy and herniated disc at L5-S1 to her January 28, 2011 work injury. Dr. Tabuena opined that appellant was unable to resume her regular employment, but could perform sedentary duties.

Electrodiagnostic testing performed on February 25, 2013 revealed lumbar radiculopathy at L3-4 on the left and L4-5 on the right.

An April 22, 2013 magnetic resonance imaging (MRI) scan study revealed mild degenerative annular bulging at L3-4 with no herniation, mild annual fissuring and bilateral facet arthropathy at L4-5 with no herniation, and a stable, small central disc herniation at L5-S1.

In a report dated May 16, 2013, Dr. Leonard Bruno, a Board-certified neurosurgeon, evaluated appellant for low back pain radiating into her left lower extremity. He noted that she

[2] Dr. Tabuena continued to provide progress reports listing findings on examination and discussing her treatment of appellant from 2012 through 2014.

slipped and fell at work on January 27, 2012. Dr. Bruno reviewed an April 22, 2013 MRI scan study and opined that it was an "age-appropriate study, and appears improved by the report from March 14, 2011." He diagnosed lumbar sprain and left spondylosis and radiculitis. Dr. Bruno found that appellant had no need for surgery and had "no significant herniated nucleus pulposus…."

OWCP determined that a conflict existed between Dr. Tabuena and Dr. Draper regarding the extent of appellant's employment-related disability. It referred her to Dr. Amir Fayyazi, a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP provided him with a June 13, 2013 addendum to the SOAF that did not include the accepted conditions.

In a report dated July 18, 2013, Dr. Fayyazi discussed appellant's history of injury and of bilateral carpal tunnel and ulnar nerve releases. On examination he found a loss of motion of the lumbar spine and "diffuse discomfort along the bilateral paraspinal muscles and bilateral PSIS [posterior superior iliac spine]." Dr. Fayyazi further measured reduced wrist motion bilaterally with full strength and normal sensation of the bilateral upper and lower extremities. He noted that electrodiagnostic testing performed February 25, 2013 showed chronic lumbar radiculopathy. Dr. Fayyazi diagnosed lumbar sprain, traumatic left carpal tunnel syndrome, right wrist sprain, and an aggravation of preexisting right carpal tunnel syndrome due to the January 27, 2011 employment injury. He advised that there was "no indication [appellant] suffered any injury to her ulnar nerve" and opined that the cubital tunnel release "was not medically reasonable and was unrelated to the injury that occurred on January 27, 2011." Dr. Fayyazi determined that appellant's lumbar sprain, left carpal tunnel syndrome, right wrist sprain, and aggravation of preexisting right carpal tunnel syndrome had resolved. He also diagnosed preexisting degenerative lumbar disc disease unrelated to the work injury. Dr. Fayyazi found symptom magnification and dependency to narcotic medication. He opined that appellant had received "complete unreasonable" medical treatment, including excessive physical therapy. Dr. Fayyazi noted that she originally received nonnarcotic pain management, but began taking the narcotic medication on October 11, 2011. He stated, "At this time, I feel that [appellant] should be weaned off all narcotics. She clearly demonstrates evidence of narcotic dependency." Dr. Fayyazi was asked to review the lumbar MRI scan study to "further clarify the preexisting lumbar condition." He concluded:

> "At the time of my examination, [appellant] was not suffering from lumbar radiculopathy. As stated above, her symptoms appeared to be exaggerated. [Appellant] suffered a lumbar sprain and strain injury and she has fully recovered. She has also fully recovered from bilateral carpal tunnel syndrome. At this time, I see no reason why [appellant] cannot return to full, unrestricted duty. Restrictions, however, will be necessary with respect to the current narcotic dosage. As stated above, the narcotic usage should be limited and discontinued.
>
> "[Appellant] does require restrictions with respect to her comorbidities. She is a 47-year-old overweight individual and appeared to be deconditioned. These restrictions are outside the scope of the January 27, 2011 incident."

On December 20, 2013 OWCP advised appellant that it proposed to terminate her compensation and authorization for medical benefits based on the opinion of Dr. Fayyazi that she had no further employment-related disability or need for medical treatment.

In a report dated January 14, 2014, Dr. Tabuena diagnosed displacement of a lumbar intervertebral disc without myelopathy, a prolapsed lumbar intervertebral disc, thoracic or lumbosacral neuritis or radiculitis, lumbosacral radiculitis, tenosynovitis of the wrist or hand, wrist tendinitis, and status post carpal tunnel release. She stated, "I disagree with Dr. Fayyazi that [appellant] is no longer disabled." Dr. Tabuena advised that she could perform sedentary employment but had "sustained a serious injury to the lumbar spine with consequent deficits in bending, lifting, sitting, walking, standing, and pushing and pulling."

On January 17, 2014 appellant related that her physicians diagnosed ulnar nerve damage and bilateral carpal tunnel syndrome due to her January 27, 2011 falls. She noted that she was also diagnosed with "herniated and bulging discs." Appellant advised that both OWCP referral physicians evaluated her for less than five minutes without performing an examination. She challenged Dr. Fayyazi's opinion that she was overweight, deconditioned, and addicted to narcotics.

By decision dated February 11, 2014, OWCP terminated appellant's compensation and authorization for medical benefits effective March 9, 2014.

On February 17, 2014 appellant, through counsel, requested a telephone hearing with an OWCP hearing representative.

At the hearing, held on August 4, 2014, counsel questioned why the impartial medical examiner found no evidence of radiculopathy even though an EMG was positive for lumbar radiculopathy. He also noted that a functional capacity evaluation showed that appellant had restrictions and that she had put forth maximum effort. Counsel additionally noted that the impartial medical examiner wanted to review an MRI scan study.

In a decision dated September 22, 2014, the hearing representative affirmed the February 11, 2014 decision. He found that the opinion of Dr. Fayyazi, as impartial medical examiner, represented the weight of the evidence and established that appellant had no further residuals of her accepted employment injury.

On appeal appellant's counsel argues that the impartial medical examiner, Dr. Fayyazi, provided an ostensibly detailed report that was devoid of any medical rationale. He contends that Dr. Fayyazi did not explain why appellant's degenerative condition was unrelated to the injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[3] It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[4] OWCP's burden of proof in terminating compensation includes the necessity of furnishing

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

[4] *Fred Reese*, 56 ECAB 568 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

rationalized medical opinion evidence based on a proper factual and medical background.[5] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[6] 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.[7]

Section 8123(a) provides that, 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.[8] 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 an OWCP medical adviser, it 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.[9] In situations where 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.[10]

OWCP procedures provide as follows:

> "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."[11]

ANALYSIS

OWCP accepted that appellant sustained lumbar sprain, bilateral wrist sprain, bilateral carpal tunnel syndrome, and a bilateral lesion of the ulnar nerve as a result of a January 27, 2011 slip and fall on ice. Appellant underwent a right carpal and cubital tunnel release on October 14, 2011 and a left carpal and cubital tunnel release on January 20, 2012. OWCP paid her compensation for disability beginning March 15, 2011 and placed her on the periodic rolls as of October 23, 2011.

[5] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[6] *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

[7] *Id*.

[8] 5 U.S.C. § 8123(a).

[9] 20 C.F.R. § 10.321.

[10] *R.C.*, 58 ECAB 238 (2006); *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

[11] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

OWCP determined that a conflict arose between Dr. Tabuena, an attending physician, and Dr. Draper, an OWCP referral physician, regarding the nature and extent of appellant's disability from employment. It referred appellant to Dr. Fayyazi, a Board-certified orthopedic surgeon, for an impartial medical examination.

When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[12] The Board finds, however, that Dr. Fayyazi's report is of diminished probative value as it was not based on an accurate factual history. In his July 18, 2013 report, Dr. Fayyazi found that appellant had reduced motion of the lumbar spine and bilateral wrists and normal sensation and strength of the upper and lower extremities. He diagnosed lumbar sprain, left carpal tunnel syndrome, an aggravation of preexisting right carpal tunnel syndrome, and right wrist sprain due to the accepted work injury. Dr. Fayyazi found that appellant did not sustain an ulnar nerve injury and did not require bilateral cubital tunnel releases.

To assure that the report of a medical specialist is based upon a proper factual background, OWCP provides information to the physician through the preparation of a SOAF. One of the essential elements in the SOAF is a list of the conditions claimed.[13] If the SOAF is inaccurate or incomplete, the probative value of the physician's opinion is greatly diminished.[14] With its referral letter, OWCP provided Dr. Fayyazi with an addendum to the SOAF that did not include the accepted conditions including bilateral wrist sprain, lumbar sprain, bilateral carpal tunnel syndrome, and a bilateral lesion of the ulnar nerve. Consequently, Dr. Fayyazi based his opinion on an incomplete factual history, and thus his report is insufficient to meet OWCP's burden of proof.[15]

Further, Dr. Fayyazi found that appellant did not sustain a bilateral ulnar nerve lesion and sustained only an aggravation of right carpal tunnel syndrome due to the accepted employment injury. OWCP, however, accepted her claim for bilateral ulnar lesions and right carpal tunnel syndrome. Consequently, Dr. Fayyazi's opinion is outside the SOAF and is of reduced probative value.[16]

Additionally, it appears that Dr. Fayyazi found that appellant had work restrictions as a result of employment-related narcotic dependency. He advised that she required work restrictions due to her "current narcotic dosage," and recommended that the medication be gradually stopped. Dr. Fayyazi opined that appellant's narcotic usage resulted in limitations, but did not specifically address whether her narcotic dependency was causally related to her accepted employment injury. As OWCP further developed the evidence by referring her to

[12] *See R.H.*, 59 ECAB 382 (2008); *R.C.*, 58 ECAB 238 (2006).

[13] Federal (FECA) Procedure Manual, Part 2, -- Claims, *Statement of Accepted Facts*, Chapter 2.809.5 (September 2009).

[14] *Id*. at Chapter 3.600(3) (October 1990).

[15] *See V.A.*, Docket No. 14-722 (issued May 8, 2014); *T.F.*, Docket No. 12-209 (issued June 18, 2012).

[16] *See Willa M. Frazier*, 55 ECAB 379 (2004).

Dr. Fayyazi, it has the obligation to resolve the pertinent issues raised by his report.[17] As the conflict in medical opinion remains unresolved, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's compensation and authorization for medical treatment.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation and authorization for medical treatment effective March 9, 2014.

ORDER

IT IS HEREBY ORDERED THAT the September 22, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 17, 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

[17] *See generally Michael E. Hogue*, Docket No. 03-1809 (issued November 13, 2003); *Mae Z. Hackett*, 34 ECAB 1421 (1983).