

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

A.G., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
JESSE BROWN MEDICAL CENTER,)
Chicago, IL, Employer)

Docket No. 14-1799
Issued: February 3, 2015

Appearances:

Alan J. Shapiro, 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 HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 12, 2014 appellant, through counsel, filed a timely appeal of a May 14, 2014 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.

ISSUES

The issue is whether OWCP properly terminated appellant's compensation for wage-loss and medical benefits effective September 23, 2013 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injury.

On appeal, counsel argues that the decision is contrary to law and fact.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 25, 2011 appellant, then a 58-year-old air conditioning equipment mechanic, filed a traumatic injury claim alleging that on December 27, 2010 he sustained contusion, groin pull, bruises, and sprain when he slipped on ice and fell. OWCP accepted the claim for a back contusion.² Appellant stopped work on January 19, 2011 and returned on May 11, 2011.

On June 15, 2011 appellant filed a traumatic injury claim alleging that on June 8, 2011 he sustained bilateral lumbar and cervical muscle spasms due to moving heavy equipment and materials. OWCP accepted the claim for intervertebral lumbosacral degenerative disc disease and thoracic or lumbosacral radiculitis or neuritis.³ By letter dated March 9, 2012, it placed appellant on the periodic rolls for temporary total disability.⁴

In progress notes and work status forms dated February 6, 2012, Dr. Robert E. Fink, a treating Board-certified orthopedic surgeon, provided physical findings and indicated that appellant was totally disabled for the period February 6 to March 14, 2012. He related that appellant had been referred for management of his chronic pain.

On March 29, 2012 OWCP referred to Dr. James P. Elmes, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine appellant's current medical status and work capability. In an April 17, 2012 report, Dr. Elmes, based upon a review of appellant's two employment injury claims, statement of accepted facts, review of the medical evidence and physical examination, diagnosed nonspecific low back, left radial wrist, left thumb, bilateral knee pain, bilateral ankle and mid-foot pain, lumbar disc bulge at L3-4, L5-S1, lumbar radiculopathy severe at left L-5 and mild to moderate at right S-1, lumbar degenerative disc disease at L4-5 and L5-S1 and thoracic disc bulge at T4-8. A physical examination of the back revealed some tenderness at the L4-5 and T6-7 levels, bilateral sacroiliac area, and bilateral posterior thighs. Dr. Elmes noted no spasm was present and range of motion of 10 degrees extension, 15 degrees lateral bending, and 45 degrees forward flexion. He indicated that at extreme range of motion appellant had 1+ low back pain. Dr. Elmes opined that the accepted December 27, 2010 lumbar contusion had healed with no disability or residuals. With respect to the June 8, 2011 employment injury, he opined that appellant continued to have residuals from his lumbar degenerative disc disease and thoracic lumbar neuritis as appellant had not returned to his preinjury pain level. Lastly, Dr. Elmes stated that appellant was capable of working in a sedentary position with occasional standing and walking.

In a June 27, 2012 report, Dr. Fink diagnosed lumbar bulging discs at L2-3, L3-4, L4-5, and L5-S1 with radiculopathy and bilateral neuroforaminal narrowing at these levels. He related

² OWCP assigned File No. xxxxxx804.

³ OWCP assigned File No. xxxxxx094. On September 28, 2011 it combined OWCP File Nos. xxxxxx804 and xxxxxx094, with the latter as OWCP Master File No.

⁴ In letters dated March 7 and April 11, 2012, the employing establishment informed OWCP that it had terminated appellant's employment effective November 4, 2011 for cause. The employing establishment stated that the termination occurred during appellant's probationary period and was due to written threats he had made against a federal employee.

that appellant was last seen on February 6, 2012 and that he would need to be seen again for the physician “to voice any other type of opinion.”

On August 30, 2012 OWCP referred appellant for an impartial medical examination with Dr. Jaroslaw Dzwinyk, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Fink, appellant’s treating Board-certified orthopedic surgeon, and Dr. Elmes, a second opinion Board-certified orthopedic surgeon, on the issues of recommended treatment and work-tolerance limitations.

In a September 27, 2012 report, Dr. Dzwinyk provided a history of the employment injuries, review of the medical evidence, and physical findings on examination. He reported that appellant showed pain behaviors during the physical examination and arrived at the examination with a quad cane. Dr. Dzwinyk reported that, without the use of a cane, appellant walked with a limp on the left and slow gait. Examination findings for the back revealed a straight spine, level pelvis, no obvious spasm, and tenderness on superficial palpation over the left lower lumbar area. Lumbar range of motion was voluntarily restricted to 30 degrees forward flexion and 10 degrees extension. A review of the diagnostic testing revealed no significant stenosis or a frank disc herniation, which would “explain the lumbosacral nerve root pathology.” Dr. Dzwinyk related that appellant’s chronic arachnoiditis may explain the lumbar nerve root pathology. He concluded that there were no residuals or disability due to the accepted December 27, 2010 and June 8, 2011 employment injuries. In support of this conclusion, Dr. Dzwinyk noted the lack of any objective evidence of an acute injury following the two employment injuries. He opined that appellant’s “current symptoms are markedly out of proportion to the objective findings.” Next, Dr. Dzwinyk stated that appellant was partially disabled from working due “largely or mainly to the preexisting conditions.” He provided work restrictions which included no lifting more than 25 pounds and avoiding twisting and bending. The work restrictions were unrelated to the accepted employment injuries, but were based on appellant’s symptoms secondary to his chronic preexisting conditions.

On November 29, 2012 OWCP sought clarification from Dr. Dzwinyk on whether appellant continued to have residuals due to the accepted conditions and whether the work restrictions he provided were based on appellant’s pain complaints due to a nonaccepted condition or were due to the accepted December 27, 2010 and June 8, 2011 employment injuries. Dr. Dzwinyk was also asked to provide work restrictions if appellant continued to have any restrictions due to his accepted December 27, 2010 and June 8, 2011 employment injuries. He did not respond to OWCP’s request for clarification of his opinion.

On May 24, 2013 OWCP referred appellant for a second impartial medical examination with Dr. Julie M. Wehner, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Fink, appellant’s treating Board-certified orthopedic surgeon, and Dr. Elmes, a second opinion Board-certified orthopedic surgeon, on appellant’s ability to work full time with restrictions.

In a June 19, 2013 report, Dr. Wehner, based upon a review of the statement of accepted facts, medical evidence, employment injury histories, and physical examination, diagnosed chronic back pain. A physical examination revealed that appellant had a normal gait with his cane, that he had an antalgic gait on the left hand side without the cane, mild T8-12 pain with

light palpation, moderate pain from L4-S1 with light palpation, mild pain with axial compression, moderate pain with axial rotation, no pain on hip range of motion, and normal cervical range of motion. Dr. Wehner noted that appellant has had chronic back pain since a 2001 motor vehicle accident and a 1971 military service injury. A review of a December 27, 2010 thoracic spine x-ray interpretation revealed mild bony spurring and no acute fracture. Dr. Wehner reviewed a July 23, 2011 magnetic resonance imaging (MRI) scan, which revealed disc bulges in the thoracic spine at T1-12. A March 13, 2012 MRI scan revealed a C5-6 and C6-7 mild annular disc bulge and disc bulge at L5-S1. Dr. Wehner concluded that appellant no longer had any residuals or disability due to his accepted employment conditions. She noted that appellant's December 27, 2010 slip and fall injury resulted in a back sprain/contusion and that the second injury on June 8, 2011 was a lumbar sprain due to moving tanks. A review of the radiographic findings following these injuries showed no new abnormalities and that the disc bulges seen were attributable to the normal aging process. Dr. Wehner stated that a comparison of MRI scans and computerized tomography scans prior and subsequent to the employment injuries showed no change. As there were no new radiographic findings following the employment injuries, appellant sustained soft tissue injuries which would resolve within 6 to 12 weeks. Dr. Wehner concluded that appellant was capable of returning to full-duty work with no restrictions. She opined that he required no further medical treatment for the accepted employment injuries as they had resolved. In concluding, Dr. Wehner related that appellant "has very high subjective complaints without any specific clinical or radiographic findings" explaining the subjective complaints.

In a July 15, 2013 report, Dr. Anatoly Rozman, a treating Board-certified physiatrist, reported that appellant was seen and treated for thoracic area pain. He concluded that appellant was disabled from performing his regular employment duties.

On August 22, 2013 OWCP issued a notice proposing to terminate appellant's compensation benefits based on Dr. Wehner's opinion that he no longer had any disability or residuals due to his accepted employment injuries.

Subsequent to the proposed notice, OWCP received progress notes dated August 19, and September 9, 2013 from Dr. Rozman, who in the August 19, 2013 progress notes, stated that appellant was seen for severe lower back pain complaints. Physical examination findings included six trigger points in the gluteal maximus muscle area and sacral area. In his September 9, 2013 progress note, Dr. Rozman reviewed Dr. Wehner's report and disagreed with her conclusion that appellant sustained a soft tissue injury based on the acceptance of the claim for lumbar and thoracic disease and radiculopathy. He also disagreed that appellant could return to work with no restrictions and that a functional capacity evaluation was being considered.

On September 19, 2013 OWCP received an undated letter from appellant disagreeing with the proposal to terminate his compensation benefits. Appellant argued that his arachnoiditis had been aggravated by his employment injuries and is not necessarily seen on objective testing. He stated that direct injuries to the spine can cause severe arachnoid inflammation, which may not be correlated with clinical findings and "can be extremely painful."

By decision dated September 23, 2013, OWCP finalized the termination of appellant's compensation benefits effective that day.

In a letter dated September 27, 2013, appellant's counsel requested a telephonic hearing before an OWCP hearing representative, which was held on March 5, 2014.

By decision dated May 14, 2014, the hearing representative affirmed the termination of appellant's compensation.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁵ After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁹

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.¹⁰ Where a case is referred to an impartial medical specialist 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.¹¹

ANALYSIS

OWCP accepted that appellant sustained a back contusion as the result of the accepted December 27, 2010 employment injury and intervertebral lumbosacral degenerative disc disease, and thoracic or lumbosacral radiculitis or neuritis as a result of the accepted June 8, 2011 employment injury. By decision dated September 23, 2013, it terminated his compensation benefits effective that day on the grounds that he no longer had any residuals or disability due to his accepted employment injuries. An OWCP hearing representative affirmed the September 23,

⁵ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁸ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ *Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

¹⁰ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

¹¹ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

2013 decision. The issue on appeal is whether OWCP met its burden in terminating appellant's compensation benefits.

A conflict in medical opinion evidence existed between Dr. Fink, appellant's treating physician, and the second opinion physician, Dr. Elmes, with regard to work capability and recommended treatment. OWCP properly referred appellant to Dr. Dzwinyk an impartial medical examiner, to resolve the medical conflict, pursuant to 5 U.S.C. § 8123(a). On November 29, 2012 it requested clarification from Dr. Dzwinyk on the issue of whether appellant's work restrictions were due to the accepted employment injuries and whether he continued to have residuals due to the accepted conditions. As there was no response from Dr. Dzwinyk, OWCP properly referred appellant to a second impartial medical specialist.¹²

Dr. Wehner, the selected impartial medical specialist, conducted an impartial medical examination and issued a June 19, 2013 report in which she found that appellant no longer had any residuals due to either the December 27, 2010 or June 8, 2011 employment injuries. She noted her review of the statement of accepted facts and medical record. Dr. Wehner described the history of injury and appellant's back pain complaints and performed a thorough physical examination. She advised that the physical examination revealed mild T8-12 pain with light palpation, moderate pain from L4-S1 with light palpation, mild pain with axial compression, moderate pain with axial rotation, no pain on hip range of motion, and normal cervical range of motion. Appellant walked with a normal gait with his cane and an antalgic gait on the left hand side when walking without his the cane. Dr. Wehner determined that neither employment injury caused a permanent aggravation. She opined that the evidence supported that appellant sustained soft tissue injuries, which would resolve within 6 to 12 weeks as there were no new radiographic findings following the employment injuries. Dr. Wehner opined that appellant was capable of returning to full-duty work with no restrictions and that no further medical treatment was required for the accepted employment injuries as they had resolved.

The Board finds that Dr. Wehner provided a comprehensive, well-rationalized opinion in which she clearly advised that any residuals of appellant's accepted conditions had resolved and that he could return to full-duty work. Dr. Wehner's opinion is therefore entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.¹³ There is no other medical evidence sufficient to overcome her opinion or to create a new medical conflict. OWCP therefore properly terminated appellant's compensation benefits on September 23, 2013.

The medical evidence subsequently submitted by appellant is insufficient to overcome the special weight accorded Dr. Wehner as an impartial medical specialist regarding whether he had residuals of his accepted conditions. In progress notes dated July 15 and August 19, 2013 Dr. Rozman, a treating Board-certified physiatrist, reported that appellant was seen and treated for thoracic area pain. He opined that appellant was disabled from performing his regular

¹² See *Roger W. Griffith*, 51 ECAB 491 (2000); *Talmadge Miller*, 47 ECAB 673 (1996); *Harold Travis*, 30 ECAB 1071, 1078 (1979).

¹³ See *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *R.C.*, 58 ECAB 238 (2006); *Bryan O. Crane*, 56 ECAB 713 (2005); *Sharyn D. Bannick*, 54 ECAB 537 (2003).

employment duties in the July 15, 2013 progress notes. On September 9, 2013 Dr. Rozman reviewed Dr. Wehner's report and disagreed with her conclusion that appellant sustained a soft tissue injury based on the acceptance of the claim for lumbar and thoracic disease and radiculopathy. He also disagreed that appellant could return to work with no restrictions and that a functional capacity evaluation was being considered. Dr. Rozman did not discuss the accepted conditions or explain why appellant could not perform his usual job the July 15 and August 19, 2013 progression notes. In his September 9, 2013 progress notes, he notes his disagreement with Dr. Wehner's conclusion that the accepted employment injuries only resulted in soft tissue injures and that appellant was capable of working. Dr. Rozman provided, no physical findings other than mentioning trigger points, referenced no objective data or history of the employment injury, and provided no supporting rationale for his opinion that appellant continues to suffer from residuals of his accepted conditions or is totally disabled due to his accepted conditions. His progress notes are therefore insufficient to overcome Dr. Wehner's report or to create a new medical conflict.¹⁴

The Board therefore concludes that Dr. Wehner's opinion that appellant had recovered from the employment injury and was not disabled from work-related conditions entitled to the special weight accorded an impartial medical examiner.¹⁵ Further, the additional medical evidence submitted is insufficient to overcome the special weight accorded her as an impartial medical specialist regarding whether appellant had residuals or was totally disabled due to his accepted conditions. OWCP therefore properly terminated appellant's compensation benefits effective September 23, 2013¹⁶

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 properly terminated appellant's compensation for wage-loss and medical benefits effective September 23, 2013 on the grounds that he no longer had residuals or disability causally related to his accepted employment-related injury.

¹⁴ See *Michael Hughes*, 52 ECAB 387 (2001); *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990). The Board finds that Dr. Rozman's progress notes contain no rationale on causal relationship upon which a new conflict might be based.

¹⁵ See *Sharyn D. Bannick*, *supra* note 13.

¹⁶ *Manuel Gill*, 52 ECAB 282 (2001).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 14, 2014 is affirmed.

Issued: February 3, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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