United States Department of Labor
Employees' Compensation Appeals Board

W.D., Appellant	)	
and	)	**Docket No. 14-1257**
	)	**Issued: January 28, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Pottstown, PA, Employer	)	

Appearances:
Lonnie Boylan, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On May 7, 2014 appellant, through his representative filed a timely appeal from a March 26, 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 met its burden of proof to terminate appellant's compensation benefits effective September 9, 2013 as the accepted contusions had ceased without residuals.

FACTUAL HISTORY

OWCP accepted that on May 10, 2011 appellant, then a 49-year-old letter carrier, sustained a concussion, cervical, dorsal and lumbar spine sprains, a right knee sprain, and a chest

[1] 5 U.S.C. § 8101 *et seq.*

wall contusion in the performance of duty when his postal vehicle was struck from behind by a truck. He stopped work on the date of the accident. Appellant received compensation on the daily and periodic rolls beginning June 25, 2011.

Immediately following the May 10, 2011 collision, appellant received treatment in a hospital emergency room. A May 10, 2011 noncontrast head computerized tomography (CT) scan showed no acute abnormality.

Appellant was then treated by Dr. Dennis A. DeBias, an attending Board-certified family practitioner, who submitted reports from May 12, 2011 to July 11, 2012 diagnosing a grade 2 concussion and postconcussion syndrome with cognitive changes, photophobia, tinnitus, vertigo, headaches, facial paresthesias, and ocular twitches, cervical and lumbar radiculopathy, and a torn right medial meniscus with medial collateral ligament sprain. Dr. DeBias opined that appellant's initial injuries and postconcussive syndrome were due to the accepted May 10, 2011 motor vehicle collision. He found appellant totally disabled for work from May 10, 2011.[2]

Dr. Samuel M. Puleo, an attending Board-certified orthopedic surgeon, treated appellant for the accepted right knee sprain on June 2, 2011. He noted a history of prior right knee surgery. In reports through July 29, 2011, Dr. Puleo diagnosed a right medial meniscal tear. On September 29, 2011 he performed a partial right medial meniscectomy with removal of loose body, and debridement of the lateral compartment and patellofemoral articulation.

Dr. Joseph Richards, an attending osteopath Board-certified in physiatry, submitted reports from December 19, 2011 to March 15, 2012 diagnosing a whiplash injury and cervical radiculitis caused by the May 10, 2011 motor vehicle accident, superimposed on degenerative disc disease.

Dr. Robert Elliott, an attending Board-certified neurosurgeon, submitted July 19 and August 17, 2012 reports diagnosing cervical radiculopathy, cervical spondylosis, cervicalgia, and headaches.[3]

On September 7, 2012 agents of the employing establishment's Office of Inspector General (OIG) showed Dr. DeBias surveillance video of appellant lifting, bending, and walking without apparent pain or restriction. In a September 10, 2012 affidavit, Dr. DeBias stated that, based on the surveillance video, appellant was able to perform more activities than he said he could do. He observed no indications of pain, or an active knee or back sprain. Dr. DeBias

[2] In a June 16, 2011 report, Dr. Kelly A. Geary, an attending osteopathic physician to whom appellant was referred by Dr. DeBias, provided a history of injury and treatment. She noted that a May 20, 2011 magnetic resonance imaging (MRI) scan of the brain was normal. Dr. Geary diagnosed headaches and cervical radiculopathy secondary to the accepted May 10, 2011 motor vehicle accident.

[3] A July 26, 2012 CT scan of the cervical spine showed multilevel degenerative changes from C2 through T1, most prominent at C3-4 and C6-7, with a possible disc herniation at C4-5. August 1, 2012 electromyography and nerve conduction velocity studies showed compromise of the left C6 nerve root and mild compromise of the median nerve at the right wrist. A September 7, 2012 MRI scan of the right shoulder showed moderate supraspinatus tendinosis, partial tears of the supraspinatus tendon, mild tendinosis of the infraspinatus tendon with mild partial thickness tears, a SLAP tear, minor to mild glenohumeral joint osteoarthrosis and possible derangement of the anterior-superior labrum.

released appellant to full duty, then retracted this release as appellant could not drive due to the effects of prescribed narcotic medications.

In reports from September 26, 2012 to June 29, 2013, Dr. DeBias opined that appellant could not drive safely until he discontinued narcotic medications and underwent a workup of an unexplained October 2012 syncopal episode. He noted continuing dizziness, vertigo, and cognitive difficulties. Dr. DeBias opined that appellant's right shoulder conditions were caused by the May 10, 2011 motor vehicle accident as they were not present before the collision.

In a September 12 and 24, 2012 reports, Dr. John Pasquella, an osteopath Board-certified in orthopedic surgery, diagnosed a right rotator cuff and labral tear. He opined that appellant could resume full-duty work based on the surveillance video of his activities. In a September 27, 2012 duty status report, Dr. Pasquella opined that, based the surveillance video, appellant could return to full duty without restrictions.

In a September 27, 2012 duty status report, Dr. Elliott opined that, based on a September 19, 2012 viewing of the OIG surveillance video, appellant was able to return immediately to full-duty work.

In a March 4, 2013 investigative memorandum, the employing establishment's OIG noted that video surveillance in June and August 2011 and in January and March 2012, showed appellant walking and driving long distances, pushing a child in a stroller, weeding, bending, reaching, lifting, shopping, carrying a toddler, walking a dog, playing on the ground with his child, carrying a car seat, and riding a lawn mower. Dr. DeBias, Dr. Elliott, and Dr. Pasquella released appellant to full duty after viewing the surveillance video.

In a May 24, 2013 report, Dr. Thomas H. Graham, an attending Board-certified neurologist, provided a history of the May 10, 2011 accident. He noted two subsequent head injuries, the syncopal episode in "February or March 2012 and on another occasion, was apparently on the floor playing with [appellant's] children when he fell and again struck his head." Dr. Graham opined that appellant's history and symptoms were inconsistent with concussive injury but indicative of a psychiatric condition. He emphasized that it was "physiologically unclear why a 'concussion' in which there was no actual physical head trauma would be not only unimproved, but perceived by the patient as worsening" although repeated imaging studies demonstrated no abnormalities.

On June 18, 2013 OWCP referred appellant for a second opinion examination by Dr. Robert Allen Smith, a Board-certified orthopedic surgeon. It requested that Dr. Smith describe "any nonindustrial and preexisting disability," explain which diagnoses were "medically connected to the May 10, 2011 injury," comment whether any diagnosed aggravations were temporary or permanent, describe any further treatment needed, provide a timetable for appellant's anticipated return to full duty, provide work limitations, and indicate a "reasonable timetable for [appellant] to be 'weaned off' his prescription medication."

Dr. Smith submitted a July 12, 2013 report reviewing the medical record and statement of accepted facts. He opined that appellant had reached maximum medical improvement. Dr. Smith noted that appellant had a history of a right knee injury and cervical fusion. On

examination he found a normal orthopedic examination of the shoulders, spine, hips, and a normal neurologic examination with no focal motor or reflex deficits. Dr. Smith opined that the accepted cervical and lumbar sprains, chest wall contusion, and right knee sprain had resolved without residuals. The right medial meniscus tear had also resolved completely after surgery. Dr. Smith opined that, although appellant was still on narcotic medications, his activities as shown in the surveillance videos demonstrated that he could perform the duties of a letter carrier. He noted that appellant no longer required narcotic medication as his examination was benign and the accepted conditions resolved. Dr. Smith specified that "with regard to the musculoskeletal accepted conditions of soft tissue sprains, contusions, and an old meniscal tear that, was dealt with arthroscopically, [appellant] could return to regular duty, full-time work as a letter carrier without restriction."

In a July 25, 2013 report, Dr. DeBias found that appellant continued to be totally disabled for work due to headaches, photophobia, and narcotic side effects. He noted that appellant had undergone a cervical fusion.

By notice dated August 5, 2013, OWCP advised appellant that it proposed to terminate his wage loss and medical compensation benefits because the accepted injuries had ceased without residuals, based on Dr. Smith's opinion as the weight of the medical evidence. It afforded appellant 30 days to submit additional evidence or argument.

In response, appellant submitted an August 28, 2013 letter from a union representative, asserting OWCP violated its policies by accepting medical opinions influenced by the surveillance videos. In an August 28, 2013 letter, OWCP noted that it provided appellant and his attorney, Robert Reilly, with copies of the surveillance video on August 5, 2013. It asserted that appellant's pending termination was based on the medical record.

In a September 4, 2013 letter, Mr. Reilly argued that OWCP failed to accept all conditions related to the May 10, 2011 accident, that the "OIG surveillance video was utilized contrary to various regulations," that the existence of the videos was not disclosed to appellant or his attorney, and that Dr. Smith was not qualified to offer a medical opinion. He submitted additional medical evidence.

Dr. Edward J. Murphy, an attending licensed clinical psychologist, provided a January 18, 2012 report diagnosing residual symptoms of a May 10, 2011 concussion, with slow cognitive processing, mild memory impairment, and emotional changes. In an August 30, 2013 report, Dr. DeBias noted that appellant's postconcussive headaches, vertigo, and cognitive issues remained constant since the initial May 12, 2011 examination. He found appellant disabled for work due to vertigo and narcotic side effects. In an August 7, 2013 report, Dr. Puleo noted mild right shoulder impingement and right hip pain present since the May 10, 2011 accident. He ordered additional imaging studies of the right hip.

By decision dated September 9, 2013, OWCP terminated appellant's wage loss and medical benefits effective that day, based on Dr. Smith's opinion as the weight of the medical evidence. It found that De. DeBias' additional reports did not rebut Dr. Smith's findings that the accepted conditions had ceased without residuals. OWCP noted that appellant's treating physicians released him to full duty. Also, Dr. Graham found that appellant's symptoms were

not due to a head injury. OWCP found that neither it nor the employing establishment had improper contact with appellant's physicians. It also noted that appellant's attorney did not submit any evidence substantiating that Dr. Smith was "not a proper expert."

In an October 11, 2013 letter, appellant requested a review of the written record. In letters dated from September 22 to October 29, 2013, he argued that the termination was improper, that OWCP violated his due process rights by failing to notify the lay representative of the second opinion appointment, that OWCP posed improper questions to Dr. Smith, and that the employing establishment violated OWCP procedures by showing the surveillance videos to Dr. DeBias. Mr. Reilly submitted September 30 and October 14, 2013 letters contending that Dr. Smith's opinion could not represent the weight of the medical evidence as Dr. Robert Allan Smith's medical license was suspended as of 2004 for narcotics fraud. Mr. Reilly enclosed documents from a federal law enforcement agency and a state medical board regarding the suspension. Additional medical reports were submitted.

In reports dated from August 29, 2013 to February 6, 2014, Dr. DeBias noted continued cognitive deficits, vertigo, headaches, and musculoskeletal symptoms. On September 17, 2013 Dr. Kenneth Sheinen, an attending licensed clinical psychologist, diagnosed depression due to postconcussive syndrome. Dr. Murphy, an attending licensed clinical psychologist, provided a September 20, 2013 narrative in which he diagnosed postconcussive syndrome related to the motor vehicle accident and two subsequent syncopal episodes.

In September 9 and 23, 2013 reports, Dr. Puleo opined that the May 20, 2011 motor vehicle accident exacerbated preexisting degenerative disease of the cervical spine, right knee, right shoulder, and right hip, and caused a recurrent left meniscal tear requiring arthroscopic repair on September 29, 2011.

By decision dated and finalized March 26, 2014, an OWCP hearing representative affirmed the September 9, 2013 decision terminating appellant's wage loss and medical benefits. She found that the additional reports from Dr. DeBias, and the two psychological reports were not of sufficient probative value to warrant additional development. The hearing representative found that the case was not in posture for a decision regarding whether appellant established disability for work on and after September 9, 2013, as there was a conflict of medical opinion between Dr. Puleo, for appellant, and Dr. Smith, for the government, regarding the relationship between the accepted injuries, and appellant's orthopedic conditions. She remanded the case to OWCP for appointment of an impartial medical examiner, to be followed by issuance of a *de novo* decision.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[4] Having determined that an employee has a disability

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

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.[5]

ANALYSIS

OWCP accepted that appellant sustained a concussion, cervical, dorsal, and lumbar spine sprains, a right knee sprain, and a chest wall. Appellant stopped work on May 10, 2011 and did not return. He received compensation for total disability beginning on June 25, 2011.

Dr. DeBias, an attending Board-certified family practitioner, found appellant totally disabled for work from May 12, 2011 to July 25, 2013 due to postconcussion syndrome, right lumbar radiculopathy, a right medial meniscal tear, and side effects of prescribed narcotic medications. His findings regarding the right knee were corroborated by Dr. Puleo, an attending Board-certified orthopedic surgeon, who performed a partial right medial meniscectomy on September 29, 2011. Dr. Richards, an attending Board-certified physiatrist, and Dr. Elliott, a Board-certified neurosurgeon, treated appellant for cervical radiculitis and cervical radiculopathy from December 2011 to August 2012.

Appellant was also treated for right shoulder conditions by Dr. Pasquella, an attending Board-certified orthopedic surgeon, who opined that appellant could resume full-duty work as of September 12, 2012. Dr. Graham, an attending Board-certified neurologist, opined on May 24, 2013 that appellant's apparent postconcussion syndrome was actually a psychiatric condition as appellant had no objective clinical indications of a head injury and his clinical course was inconsistent with a concussion. Dr. Murphy, an attending licensed clinical psychologist, diagnosed residual postconcussion syndrome on January 18, 2012.

As appellant's attending physicians provided inconsistent opinions regarding the nature and extent of his injury-related conditions, OWCP obtained a second opinion from Dr. Smith, a Board-certified orthopedic surgeon. In his July 12, 2013 report, Dr. Smith reviewed a statement of accepted facts and the medical record. He performed a thorough clinical examination revealing no objective residuals of the accepted injuries. Dr. Smith noted that the September 29, 2011 surgery completely resolved the accepted right knee injury. He explained that appellant could resume full duty as a letter carrier as the accepted conditions had resolved without residuals. Dr. Smith noted that the issue of narcotic side effects was moot, as appellant no longer required such drugs as the accepted conditions had resolved. He commented that the OIG surveillance video demonstrated that appellant was able to drive and perform other activities without apparent impairment due to narcotic side effects. OWCP terminated appellant's wage loss and medical benefits effective September 9, 2013, based on Dr. Smith's opinion as the weight of the medical evidence.

The Board finds that OWCP properly accorded the weight of the medical evidence to Dr. Smith, who based his opinion on the complete medical record, a statement of accepted facts and a thorough clinical examination. The Board notes that Drs. DeBias, Elliott, and Pasquella all opined that appellant could resume full duty as of September 2012, based on review of surveillance videos prepared by the employing establishment's OIG. Also, Dr. Graham opined

[5] *Taylor, id*.

that appellant's neurologic complaints were due to a psychiatric condition and not postconcussion syndrome. Therefore, OWCP's March 26, 2014 decision affirming the prior termination is appropriate under the law and facts of the case.

The Board notes that regarding continuing disability on and after September 9, 2013, as the hearing representative remanded the case to OWCP for additional development on this issue, this aspect of the claim is not presently before the Board.[6]

On appeal, appellant's representative contends that OWCP violated its regulations, procedures, and Board precedent by allowing the OIG to show surveillance videos to appellant's physicians. As the Board noted in *F.S.*,[7] and in *P.S.*,[8] the investigative practices of an employing establishment's OIG are not within the jurisdiction of the Board.[9] Therefore, the propriety of the OIG's meetings with appellant's physicians is not within the Board's jurisdiction to review. Although appellant's representative also alleges that OWCP denied appellant a reasonable opportunity to respond to the video, the Board notes that OWCP provided appellant and his attorney copies of the surveillance video on August 5, 2013.

Appellant's representative also contends that OWCP failed to notify him of the July 12, 2013 second opinion referral, thereby denying appellant the right to have a designated physician present at the examination. He asserts that this was a denial of due process. However, the record does not demonstrate conclusively that appellant had officially designated Mr. Boylan as his authorized representative at the time of the second opinion referral.

Appellant's representative also alleged that Dr. Robert Allen Smith was disqualified from serving as a second opinion physician because a state medical board suspended the license of Dr. Robert Allan Smith in 2004. However, a careful examination of the relevant documents submitted pursuant to the request for a review of the written record demonstrates that these are two different physicians with very similar names, who had practiced in the same state. The second opinion physician in this case spells his middle name "Allen." The physician whose license was suspended spells his middle name "Allan." There is no indication of any sanctions or disciplinary action against Dr. Robert Allen Smith. Therefore, appellant's representative's argument that Dr. Smith was disqualified is in error.

Alternatively, appellant's representative asserts that the questions OWCP posed to Dr. Smith were leading and biased. The Board has reviewed the questions sent to Dr. Smith, and finds that they were relevant, appropriate, and not leading or biased. Appellant's representative also contends that OWCP should have expanded the claim to include psychiatric conditions. The

[6] *See* 20 C.F.R § 501.2(c)(2) (there will be no appeal with respect to any interlocutory matter decided (or not decided) by OWCP during the pendency of a case); *see also A.W.*, Docket No. 14-1073 (issued September 15, 2014); *Douglas E. Billings*, 41 ECAB 880 (1990) (the Board and OWCP may not exercise concurrent jurisdiction over the same issue).

[7] *F.S.*, Docket No. 11-863 (issued September 26, 2012) (*petition for recon. denied*, May 8, 2014).

[8] *P.S.*, Docket No. 13-1018 (issued June 19, 2014).

[9] *F.S.*, *supra* note 7; *P.S.*, *id*.

Board notes that, although Dr. Graham posited that appellant has a psychiatric condition, he did not opine that such condition was related to the accepted injuries.

Appellant may submit new evidence or argument regarding the termination issue, 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 met its burden of proof to terminate appellant's compensation benefits effective September 9, 2013 as the accepted condition ceased without residuals.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated March 26, 2014 is affirmed.

Issued: January 28, 2015
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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