

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

G.B., Appellant)

and)

DEPARTMENT OF THE ARMY, CORPS OF)
ENGINEERS, ROGUE RIVER BASIN)
PROJECT, Trail, OR, Employer)

**Docket No. 14-1241
Issued: June 22, 2015**

Appearances:
Appellant, pro se
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 May 5, 2014 appellant filed a timely appeal from a January 9, 2014 merit 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 issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation benefits effective April 17, 2012 on the grounds that he no longer had residuals of the accepted employment-related conditions; and (2) whether appellant established that he had any continuing employment-related disability or condition after April 17, 2012 due to the accepted conditions.

¹ 5 U.S.C. §§ 8101-8193.

On appeal, appellant asserts that the digital video disc (DVD) in the record does not adequately display his disability or whether he could perform his job duties for eight hours a day.

FACTUAL HISTORY

On January 18, 1989 appellant, then a 37-year-old maintenance worker, sustained an employment-related low back strain with subluxations. A February 17, 1989 magnetic resonance imaging (MRI) scan study of the lumbar spine was normal. Appellant was off work until April 26, 1989 when he returned to light-duty work as a utility man. He continued working light duty until April 5, 1990 when he slipped on a rock and slid down a slope at work. An April 26, 1990 lumbar myelogram with postmyelogram computerized tomography (CT) scan demonstrated a disc herniation at L4-5, since the February 1989 MRI scan study, unilateral, and possibly bilateral lumbosacral pars defects. A May 22, 1990 lumbar spine MRI scan showed a very mild disc bulge at L4-5 and probable developmental asymmetry in the facets and lamina at L5. The claim was accepted for a herniated disc at L4-5. Dr. Thomas J. Purtzer, a Board-certified neurosurgeon, performed microlumbar decompression surgery with discectomy on June 16, 1990. On August 28, 1990 he indicated that appellant could return to regular duty. Appellant returned to light duty on September 10, 1990 and resigned his position on September 13, 1990.² On October 30, 1990 Dr. Purtzer indicated that appellant was doing quite well with normal strength and sensation, a minimal decrease in back range of motion, and intermittent leg aching. He provided a 50-pound lifting restriction. The claims were doubled, with the 1989 claim becoming the master file. After his resignation, appellant worked at various jobs including a caretaker on a ranch, a light-duty janitor, an equipment operator, a laborer for a river navigation service, a bartender and resort clerk.

On May 9, 1996 Dr. Purtzer reported that appellant had returned after a lengthy absence and complained of back and right leg pain. Back range of motion was 40 percent of normal on physical examination.

On October 10, 1997 appellant filed a recurrence of disability claim, stating that the recurrence occurred from "1989 to present." He indicated that he was unable to perform light-duty work due to chronic back pain and clinical depression. On November 19, 1997 an OWCP medical adviser recommended a second opinion evaluation.

OWCP referred appellant to Dr. Richard C. Arbeene, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an August 21, 1998 report, Dr. Arbeene provided physical examination findings and diagnosed status post L4-5 microlaminectomy and discectomy in June 1990 and question of preexisting lumbosacral pars defect. He expressed his opinion that only the discectomy was employment related and concluded that appellant appeared to be disabled due to a nonemployment-related condition.

By decision dated September 29, 1998, OWCP denied the recurrence of disability claim. Appellant requested a hearing and submitted a November 20, 1998 report in which Dr. Purtzer indicated that appellant's constant chronic back problems, which could be further degeneration

² OWCP adjudicated the 1989 claim under file number xxxxxx776 and the 1990 claim under file number xxxxxx702.

of the joint space, should be further investigated. Dr. Purtzer opined that appellant's current condition was related to his employment injury.

In a July 14, 1999 decision, an OWCP hearing representative affirmed the September 29, 1998 decision. Appellant requested reconsideration and submitted a September 10, 1999 report from Dr. Purtzer, who reviewed and disagreed with Dr. Arbeene's report with his conclusion that appellant's current back condition was due to a preexisting condition. Dr. Purtzer opined that appellant had a reasonable basis for claiming that his pain emanated from the work injury. An October 19, 1999 lumbar spine MRI scan study showed a small recurrent herniation at L4-5 and a tiny protrusion at L5-S1. In a merit decision dated November 8, 1999, OWCP denied modification of the prior decision. On December 2, 1999 it accepted that appellant sustained a recurrent herniated disc at L4-5. Appellant elected to receive FECA benefits, effective May 19, 1996. He was paid retroactive compensation beginning that day, and placed on the periodic compensation rolls.

The record was devoid of medical reports from April 2000 until appellant was seen by Dr. Christopher L. Hatlestad, a Board-certified family physician, in September 2007 and May 2008. The next medical reports of record are from Dr. Anthony Hadden, a Board-certified neurosurgeon, who saw appellant in June 2010 and January 2011. Dr. Hadden diagnosed lumbar failed back syndrome with symptoms of sacroilitis and a herniated disc and advised that appellant could work eight hours a day with permanent restrictions on sitting, walking, standing, and reaching and no bending or stooping, and a weight limit of 15 pounds.

A memorandum to file dated November 14, 2011 noted review of an Office of Inspector General investigative DVD that showed appellant performing physical activities in August 2011. The activities described included that appellant was repetitively and forcefully jabbing into the ground; bending, picking up, lifting, and carrying boxes, blankets, a chair and perhaps a cooler; lifting and placing a small child on his shoulders and walking with the child; and repetitively bending over and picking up items off the ground.

In November 2011, OWCP referred appellant to Dr. Mitchell A. Weinstein, Board-certified in neurosurgery, for a second opinion evaluation. Dr. Weinstein was provided the medical record, a statement of accepted facts and a set of questions that asked him to review the surveillance DVD. By letter dated November 14, 2011, appellant was also provided a copy of the statement of accepted facts and the set of questions which explicitly referred to surveillance evidence.

In a December 7, 2011 report, Dr. Weinstein noted appellant's two work injuries, the 1990 microdiscectomy at L4-5 and that he had not worked since 1991. He noted his review of the medical record and described appellant's symptoms of chronic low back pain with occasional bilateral leg aching, exacerbated by almost any physical activity including activities of daily living. Examination demonstrated no distress when sitting and moderate pain behavior when walking around the examination room. No weakness or atrophy was noted in bilateral upper and lower extremities. Sensation was intact to touch, pin, and vibration, and there were no pathologic reflexes. Appellant complained of pain on spinal range of motion testing. Waddell's testing was mildly positive and appellant complained of pain on straight leg raising. Dr. Weinstein reviewed MRI scan study reports and a myelogram. He indicated that the initial

MRI scan study was felt to be normal and that subsequent studies reported some degree of disc disease, especially at L4-5 and bilateral pars defects at L5, most likely a congenital finding. A 1999 MRI scan study was reported as showing postoperative changes at L4-5 and a small extradural defect which could have represented a small recurrent disc herniation. Dr. Weinstein diagnosed axial back pain, bilateral L5 spondylolysis and postoperative changes seen on MRI scan study and no objective radiculopathy findings. In answer to specific OWCP questions, he indicated that appellant had no objective residuals and no further medical treatment was needed. Dr. Weinstein stated that appellant appeared to be doing a moderate amount of physical activity without restriction on the DVD, noting that he manifested pain behavior in his physical examination. He indicated that the record did not indicate that appellant had any preexisting conditions and that physical limitations should be no lifting greater than 10 pounds and no repeated stooping or bending, but noted that appellant appeared to do these without difficulty on the DVD. Dr. Weinstein concluded that appellant could be employed within the parameters of a physical capacity evaluation completed on December 21, 2010. On an attached work capacity evaluation, he indicated that he could work eight hours a day with the restriction that he not operate heavy equipment and was limited to two hours walking, six hours twisting, no bending, and stooping, one to two hours squatting, with a 10 pound restriction on pulling and lifting and a 25-pound restriction on pushing. In a January 11, 2012 supplemental report, Dr. Weinstein indicated that the restrictions were not due to the work injuries.

In a March 15, 2012 letter, OWCP proposed to terminate appellant's compensation and medical benefits on the grounds that the weight of the medical evidence, as characterized by Dr. Weinstein's report, established that he no longer had residuals or disability due to the accepted conditions. Appellant objected to the proposed termination and requested a copy of the surveillance DVD. He complained that OWCP would not authorize an MRI scan study and that Dr. Weinstein could not make an accurate assessment of his condition without this study. OWCP forwarded a copy of the DVD to appellant on March 30, 2012. Appellant submitted an April 2, 2012 treatment note in which Dr. Hadden reiterated appellant's complaint of radiating low back pain. Dr. Hadden provided physical examination findings including normal motor tests, a negative straight-leg raising, and sensory examination intact to light touch. He diagnosed lumbar failed back syndrome, chronic pain, herniated disc and sacroilitis and recommended a lumbar MRI scan study.

By decision April 16, 2012, OWCP finalized the termination of wage-loss and medical compensation benefits, effective April 17, 2012.

On April 27, 2012 appellant requested reconsideration. An April 17, 2012 MRI scan study of the lumbar spine demonstrated spondylosis at L3-4, small disc protrusions along the lumbar spine without significant neural foraminal compromise and contrast enhancement compatible with S1 myeloneuritis. At L4-5 there was mild facet arthrosis with a small left annular fissure and mild lateral recess compromise. On April 25, 2012 Dr. Hadden reviewed the MRI scan study and advised that this showed mild multilevel degenerative disc disease, L3-4 spondylolisthesis, and possible S1 neuritis. He reiterated his diagnoses.

In a merit decision dated July 25, 2012, OWCP reviewed the evidence submitted and denied modification of the prior decision.³ Appellant again requested reconsideration.⁴ He maintained that Dr. Hadden told him that his back pain was directly related to the employment injuries. In a nonmerit decision dated September 5, 2012, OWCP denied appellant's reconsideration request.

On February 7, 2013 appellant requested reconsideration, he submitted a November 26, 2012 report in which Dr. Purtzer noted appellant's complaint of chronic lower back pain due to a work injury that were consistent for the past 22 years and characterized by burning, stabbing, pins and needles, and aching that radiated into the thighs, calves, and toes. Dr. Purtzer noted his review of medical records and advised that appellant reported that he was depressed and had an addiction to pain medication in the past. On examination, appellant was uncomfortable, tense, and anxious. He manifested moderate pain behavior, moaning and groaning, crying out with certain movements, and exhibited guarding, grimacing, and rigidity. Neck and back range of motion were diminished and there was slight weakness of the left extensor hallucis longus and dorsiflexors. Dr. Purtzer disagreed with Dr. Weinstein's report, stating that he provided no reasoning as to how appellant had healed. He diagnosed a herniated disc at L4-5 and postlaminectomy syndrome with continuous and ongoing intractable, chronic pain since the date of injury, with significant, untreated neuropsychological difficulties. Dr. Purtzer concluded that appellant was totally disabled.

On January 22, 2013 Dr. Purtzer advised that appellant remained totally and permanently disabled due to the accepted condition and its resulting problems. He advised that appellant had continuous back pain since the injury and had no benefit from surgery. Dr. Purtzer indicated that the work injury caused damage to appellant's lumbar spine and this led to the brain developing a memory of pain that could not be reversed. He maintained that chronic pain conditions are much more complicated than just having a damaged disc and involved complex neuropsychological problems that resided in the central nervous system with no known curative procedures that could erase these profound brain abnormalities. Dr. Purtzer attached two medical journal articles.⁵ He again disagreed with Dr. Weinstein's conclusions and opined that appellant suffered a significant low back injury at L4-5 and L5-S1 with significant comorbidities. Dr. Purtzer stated that, although appellant was noted to have pain behavior, he viewed this as a symptom of continuous and ongoing significant untreated chronic pain and did not indicate that appellant was faking or malingering. He concluded that appellant had an incurable chronic painful condition with associated neuropsychological problems and was totally disabled.

In a merit decision dated May 21, 2013, OWCP denied modification of the prior decisions on the grounds that the medical evidence submitted was of insufficient probative value. It noted its review of the evidence, including Dr. Purtzer's November 26, 2012 and

³ OWCP initially issued a decision on July 23, 2012, that was replaced by the July 25, 2012 decision.

⁴ The request was dated July 23, 2012 and received by OWCP on August 13, 2012.

⁵ One article entitled "Low Back Pain" was sponsored by Endo Pharmaceuticals, Inc., and is from the International Association for the Study of Pain. The second, entitled "Pain and the Neuromatrix in the Brain," is from the Journal of Dental Education.

January 22, 2013 reports, indicating that Dr. Purtzer's report that appellant was exhibiting pain behavior was contradicted by the DVD evidence.

Appellant thereafter appealed to the Board. By order dated December 18, 2013, the Board remanded that case to OWCP because the case record before the Board did not contain the surveillance DVD. OWCP was to issue a *de novo* decision on the merits of appellant's claim.⁶

In a merit decision dated January 9, 2014, OWCP denied modification of the prior decisions.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

ANALYSIS -- ISSUE 1

The accepted conditions in this case are low back strain with subluxations and a herniated disc at L4-5 due to 1989 and 1990 employment injuries, respectively. On December 2, 1999 OWCP accepted that appellant sustained a recurrence of disc herniation at L4-5.

In November 2011, OWCP referred appellant to Dr. Weinstein, Board-certified in neurosurgery, for a second opinion evaluation. Dr. Weinstein was provided the medical record, a statement of accepted facts and a set of questions that asked him to review the surveillance DVD. Appellant was provided a copy of the statement of accepted facts and set of questions and was furnished a copy of the DVD.⁹

In a December 7, 2011 report, Dr. Weinstein noted appellant's two work injuries, the 1990 microdiscectomy at L4-5, and that appellant had not worked since 1991. He reviewed the medical record, including diagnostic studies and described appellant's symptoms of chronic low back pain with occasional bilateral leg aching, exacerbated by almost any physical activity including activities of daily living. Dr. Weinstein provided examination findings, noting that appellant showed no distress when sitting and exhibited moderate pain behavior when walking around the examination room. He diagnosed axial back pain, bilateral L5 spondylolysis and postoperative changes seen on MRI scan study and no objective findings of radiculopathy. Dr. Weinstein indicated that appellant had no objective residuals and no need for further treatment. He stated that appellant appeared to be doing a moderate amount of physical activity

⁶ Docket No. 13-1474 (issued December 18, 2013).

⁷ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁸ *Id.*

⁹ From review of the record on appeal it is not clear when appellant requested a copy of the surveillance evidence.

without restriction on the DVD, reiterating that appellant manifested pain behavior in his physical examination. Dr. Weinstein indicated that the record did not indicate that appellant had any preexisting conditions and that physical limitations should be no lifting greater than 10 pounds and no repeated stooping or bending, but noted that appellant appeared to do these without difficulty on the DVD. He concluded that appellant could be employed and provided work restrictions. In a supplemental report dated January 11, 2012, Dr. Weinstein indicated that the restrictions provided were not due to the work injuries.

The Board finds that Dr. Weinstein's opinion represents the weight of the medical evidence and that OWCP properly relied on his opinion in terminating appellant's compensation and medical benefits effective April 17, 2012. Dr. Weinstein's opinion was based on proper factual and medical history as he reviewed a statement of accepted facts and appellant's prior medical history and test results. He provided comprehensive examination findings in support of his opinion that the accepted work-related conditions had resolved and concluded that appellant's current condition was not due to the employment injuries.

There is no contemporaneous medical evidence of equal weight supporting that appellant's disability on April 17, 2012 continued to be due to the accepted conditions. Although Dr. Hadden advised on April 2, 2012 that appellant had lumbar failed back syndrome, chronic pain, herniated disc, and sacroilitis and recommended a lumbar MRI scan study, his report is of diminished probative value as he did not relate the diagnosed conditions to appellant's employment injuries. For conditions not accepted by OWCP as employment related, it is the claimant's burden to provide rationalized medical evidence sufficient to establish causal relationship.¹⁰

The Board finds that OWCP properly determined that the weight of the medical opinion evidence rested with the opinion of Dr. Weinstein who provided a comprehensive report in which he outlined examination findings and provided a rationalized explanation for his opinion that appellant's accepted lumbar conditions had resolved. OWCP therefore met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective April 17, 2012.¹¹

¹⁰ See *G.A.*, Docket No. 09-2153 (issued June 10, 2010).

¹¹ *C.S.*, Docket No. 12-163 (issued February 21, 2013). Under certain circumstances, video evidence may be of value to a physician offering an opinion regarding a claimant's medical condition. It may reflect on the patient's reliability as a historian or on the actual ranges of motion, lifting or other physical activities the claimant may perform. However, a videotape may be incorrect or misleading to a physician if there are errors, such as the identity of the individual recorded on the videotape or whether certain activities were facilitated by the use of medication. OWCP has the responsibility to make the claimant aware that it is providing videotape evidence to a medical expert. If the claimant requests a copy of the videotape, one should be made available and the employee given a reasonable opportunity to offer any comment or explanation regarding the accuracy of the recording. *J.M.*, 58 ECAB 478 (2007). In this case, appellant was informed that a copy of the DVD was provided to Dr. Weinstein, and appellant was provided a copy of the surveillance DVD on March 30, 2012, prior to the termination of benefits.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's wage-loss compensation on April 17, 2012, the burden shifted to him to establish that he had any disability causally related to the accepted lumbar conditions.¹² Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that he has continuing residuals of his accepted lumbar conditions on or after April 17, 2012.

An April 17, 2012 MRI scan study of the lumbar spine did not provide a cause of any diagnosed conditions and medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹⁴ Likewise, the April 25, 2012 report from Dr. Hadden does not include an opinion as to the cause of any diagnosed condition.

Dr. Purtzer advised on November 26, 2012 and January 22, 2013 that appellant continued to be disabled due to the accepted lumbar conditions. He described significant pain behavior on examination and explained that the work injury caused damage to appellant's lumbar spine that led to his brain developing a memory of pain that could not be reversed. Moreover, a pain condition has not been accepted as employment related. Dr. Purtzer did not explain why on August 28, 1990 he stated that appellant could return to regular duty. The record does not indicate that he treated appellant between October 1990 and May 1996. During this period appellant worked at various jobs including a caretaker on a ranch, a light-duty janitor, a trackhoe operator, paver operator, laborer for a river navigation service, bartender, and resort clerk. Dr. Purtzer did not discuss how these impacted appellant's condition. He continued to treat appellant intermittently until April 19, 2000 at which time he indicated that appellant had been totally disabled since May 9, 1996. The record is devoid of medical evidence after April 2000 until appellant was seen in September 2007 by Dr. Hatlestad. There is no indication in the record that appellant saw Dr. Purtzer between 2000 until November 2012. As such, the Board finds Dr. Purtzer's opinion is of insufficient probative value to meet an employee's burden to establish that he continues to have work-related disability due to the accepted conditions after the termination of benefits on April 17, 2012.¹⁵

¹² See *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

¹³ *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

¹⁴ *Willie M. Miller*, 53 ECAB 697 (2002).

¹⁵ *S.S.*, 59 ECAB 315 (2008).

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 met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective April 17, 2012 on the grounds that he had no residuals of the accepted conditions and that he did not establish that he had any continuing employment-related disability or condition after that date causally related to the 1989 and 1990 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the January 9, 2014 decision of the Office of Workers' Compensation Programs is affirmed.¹⁶

Issued: June 22, 2015
Washington, DC

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁶ Michael E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014