

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

M.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE
Freeport, NY, Employer**

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**Docket No. 14-1981
Issued: June 24, 2015**

Appearances:
Thomas S. Harkins, 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 September 15, 2014 appellant, through counsel, filed a timely appeal from a March 27, 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 properly terminated appellant's wage-loss compensation as of September 12, 2012 finding that she no longer had any disability causally related to her January 5, 2008 employment injuries; (2) whether appellant established that she had any continuing disability relating to her accepted employment injuries after September 12, 2012; and (3) whether she sustained lumbar conditions as a consequence of her accepted employment injuries.

¹ 5 U.S.C. § 8101 *et seq.*

On appeal, counsel contends that the medical evidence of record establishes that appellant is entitled to continuing wage-loss compensation. He further contends that her claim should be expanded to include all injuries and conditions including, a herniated disc as outlined in the medical evidence by her treating physician.

FACTUAL HISTORY

OWCP accepted that on January 5, 2008 appellant, then a 33-year-old letter carrier, sustained a right ankle sprain, lumbago, and sciatica when she fell after tripping over a cord laying on the grass. Appellant stopped work on the date of injury.

In medical reports dated March 4, 2010 to March 12, 2012, Dr. Benzion Benatar, an attending Board-certified orthopedic surgeon, advised that appellant remained totally disabled for work and provided physical restrictions.

By letter dated April 4, 2012, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion to determine whether she had any continuing employment-related residuals or total disability. It asked Dr. Sultan to review the employing establishment's surveillance digital versatile discs (DVD) showing appellant's activities and to respond to specific questions.²

In an April 19, 2012 medical report, Dr. Sultan reviewed a history of the January 5, 2008 employment injuries and appellant's medical treatment, as well as the statement of accepted facts. He reviewed diagnostic test results and provided thoracolumbar and right ankle examination findings, including range of motion measurements. Dr. Sultan diagnosed status post lower lumbar derangement with preexisting degenerative disc disease at L4-5 and minor L4-5 herniation now in remission. He also diagnosed status post sprain of the right foot and ankle that had clinically resolved. Dr. Sultan advised that appellant's lower back and right ankle conditions were related by direct cause. He further advised that the accepted conditions as stated in the statement of accepted facts, were no longer active and there were no objective findings on physical examination, but provided no reasoning in support of the conclusory opinion. Dr. Sultan concluded that appellant could return to full-time work as a letter carrier, eight hours a day with no restrictions.

On May 21, 2012 OWCP requested that Dr. Sultan respond to additional questions regarding appellant's treatment. In an addendum report dated May 23, 2012, Dr. Sultan advised that her prognosis was favorable and his April 19, 2012 examination did not confirm any need for additional testing or treatment. He further advised that surgical intervention was not recommended, noting that his examination did not confirm any residual orthopedic disability that warranted invasive treatment. Dr. Sultan concluded that appellant had reached maximum medical improvement from the January 5, 2008 work injury. Appellant's lower back condition was in remission and again she did not require any additional testing or treatment causally related to this condition.

² In a September 30, 2011 investigative memorandum, the employing establishment's Office of Inspector General documented appellant's activities from June 23, 2009 to June 7, 2011.

On July 17, 2012 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Sultan's second opinion. Appellant was advised that she had 30 days to submit additional evidence in response to the proposed termination.

In a July 16, 2012 report, Bethany Sumner, a physician assistant in Dr. Benatar's office, provided lumbar spine examination findings, including a range of motion measurement. She provided an impression of chronic lumbar myofasciitis with herniated nucleus pulposus, degenerative disc disease, and radiculopathy. Ms. Sumner concluded that appellant remained totally disabled from her prior occupation.

In an August 6, 2012 letter, appellant disagreed with the proposed termination. She contended that she still suffered from her January 5, 2008 employment injuries. Appellant stated that in fact these injuries and her quality of life had worsened. She contended that Dr. Sultan's findings were completely wrong. Appellant expressed her desire to return to work.

In a July 16, 2012 duty status report (Form CA-17), Dr. Benatar stated that appellant had lumbar herniated nucleus pulposus and radiculopathy due to her January 5, 2008 employment injury. He advised that she was totally disabled. In an attending physician's report (Form CA-20) dated July 16, 2012, Dr. Benatar provided a history that on January 5, 2008 appellant fell at work and injured her back. He reiterated his diagnosis of lumbar herniated nucleus pulposus radiculopathy and checked the box marked "yes" when asked if the condition was caused or aggravated by the employment activity, noting that appellant fell at work on January 5, 2008. Dr. Benatar advised that she was totally disabled from January 5, 2008 to the present date.

In an August 22, 2012 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective August 26, 2012. It found that the medical evidence submitted was insufficient to outweigh Dr. Sultan's opinion.

On September 24, 2012 appellant requested a telephone hearing with an OWCP hearing representative.

In August and October 2012 reports, Ms. Sumner provided lumbar and right ankle examination findings, including range of motion measurements. On August 2 and 27, and October 8, 2012 she reported lumbar motion, noting that it was restricted by pain. On August 2 and 27, 2012 Ms. Sumner released appellant to return to work in a sedentary capacity with restrictions. On October 18, 2012 she provided an impression of chronic lumbar myofasciitis with lumbar radiculopathy, chronic right ankle sprain, and magnetic resonance imaging (MRI) scan evidence of degenerative disc disease and herniated nucleus pulposus. Ms. Sumner stated that appellant's pain was a direct result of her January 5, 2008 work injury. She released appellant to return to full-duty work with a moderate partial disability.

In CA-17 and CA-20 forms dated July 16 to September 27, 2012, Dr. Benatar reiterated his diagnoses of lumbar herniated nucleus pulposus and radiculopathy, and chronic right ankle sprain. He again checked the box marked "yes" when asked if appellant's diagnosed lumbar and right ankle conditions were caused or aggravated by the employment activity, stating that she fell at work on January 5, 2008 and injured her back. Dr. Benatar advised that she was totally

disabled from January 5, 2008 to September 17, 2012. He reiterated these diagnoses and his opinion on causal relationship in Form CA-17 reports dated August 27 and September 17, 2012. In the August 27, 2012 report, Dr. Benatar stated that appellant could not perform her regular work, but she could resume work with restrictions. In the September 17, 2012 report, he released her to return to her regular work on a full-time basis with no restrictions.

In a September 12, 2012 narrative report, Dr. Benatar reviewed the findings on examination from appellant's August 2, 2012 office visit. He also reviewed Dr. Sultan's April 19, 2012 findings and noted his opinion that her lumbar and right ankle injury was a direct result of her work injury. Dr. Benatar stated that Dr. Sultan's physical examination was not significantly different than the range of motion measurements taken during appellant's previous examinations in his office. He noted that Dr. Sultan found that she had a preexisting lower back problem, but she denied such a problem when she first presented in his office and there was no indication of this condition under the past history provided on Dr. Sultan's examination. Dr. Benatar further noted that appellant was highly motivated to return to work. He did not agree that further treatment was unwarranted even though Dr. Sultan found that she had reached maximum medical improvement and her range of motion was within normal limits. Dr. Benatar stated that appellant may continue to perform a home exercise program. He related that she may experience exacerbations of lumbar and lower extremity pain and maybe ankle pain upon her return to work, but stated that she was willing to take this risk because she was highly motivated to return to work. Dr. Benatar, therefore, concluded that based on appellant's current diagnoses of chronic lumbar myofasciitis with herniated nucleus pulposus, degenerative disc disease, and lumbar radiculopathy, she had indeed reached maximum medical improvement and she may return to her letter carrier job without restrictions. He completed a work capacity evaluation (Form OWCP-5c) on September 27, 2012, reiterating that she could perform her usual job with no restrictions.

In a December 18, 2012 decision, an OWCP hearing representative vacated the August 22, 2012 termination decision. She found that OWCP improperly terminated appellant's compensation benefits as it did not advise her that it had the employing establishment's surveillance videos and it did not allow her to view or comment on the videos prior to the termination of her compensation. The hearing representative remanded the case for OWCP to reinstate appellant's wage-loss compensation for the period August 26 to September 12, 2012, and to advise her that she was not entitled to wage-loss compensation after September 12, 2012 based on Dr. Benatar's September 12, 2012 report and that the surveillance videos were provided to Dr. Sultan as part of a second opinion examination.

In a January 7, 2013 decision, OWCP reinstated appellant's medical benefits and also her wage-loss compensation for the period August 26 to September 12, 2012. It found that she was not entitled to wage-loss compensation after September 12, 2012 based on Dr. Benatar's report which released her to return to full-duty work with no restrictions. OWCP stated that appellant remained entitled to medical benefits for her accepted injury-related conditions.

On December 30, 2013 appellant, through counsel, requested reconsideration. Counsel contended that she was entitled to wage-loss compensation subsequent to September 12, 2012 as she was unable to return work on November 16, 2012 as requested by the employing

establishment due to her January 5, 2008 work-related injuries. He further contended that appellant sustained a herniated lumbar disc as a consequence of her accepted injuries.

A November 20, 2012 lumbar MRI scan report from Dr. David J. Panasci, a Board-certified radiologist, revealed degenerative disc disease at L4-5 with a large central disc herniation with an extruded fragment with significant compression of the thecal sac and right L5 nerve root.

In a December 28, 2012 Form CA-20 report, Dr. Benatar reiterated the history of the January 5, 2008 employment injury. He again checked the box marked “yes” to indicate that appellant’s lumbar herniated nucleus pulposus radiculopathy and chronic right ankle sprain were caused or aggravated by the January 5, 2008 employment incident. Dr. Benatar advised that she was totally disabled from January 24, 2008 to the present.

In a March 27, 2014 decision, OWCP denied modification of the January 7, 2013 decision. It found that there was no rationalized medical evidence to establish that appellant had any continuing disability after September 12, 2012 causally related to her January 5, 2008 employment injuries. OWCP also found that she did not sustain a herniated lumbar disc as a consequence of her accepted work injuries.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁴

The right to medical benefits for an accepted condition is not limited to the period entitlement for disability.⁵ 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.⁶

ANALYSIS -- ISSUE 1

OWCP accepted appellant’s claim for right ankle sprain, lumbago, and sciatica. It terminated her wage-loss compensation and medical benefits effective August 26, 2012 finding that the accepted employment-related conditions had resolved without residuals or disability based on the opinion of Dr. Sultan, an OWCP referral physician. The hearing representative vacated this determination on December 18, 2012, finding that OWCP did not advise appellant

³ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁴ *Id.*

⁵ *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁶ *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

that it had the employing establishment's surveillance videos and it did not allow her to view or comment on the videos prior to the termination of her compensation. She remanded the case for reinstatement of appellant's wage-loss compensation for the period August 26 to September 12, 2012 and to advise her that she was not entitled to wage-loss compensation after September 12, 2012 based on Dr. Benatar's September 12, 2012 report. In a January 7, 2013 decision, OWCP reinstated appellant's medical benefits and wage-loss compensation for the stated period, but found that she was not entitled to wage-loss compensation after September 12, 2012. It stated that she remained entitled to medical benefits for her accepted injury-related conditions. OWCP affirmed this determination on March 27, 2014.

The Board finds that by determining that appellant was not entitled to wage-loss compensation after September 12, 2012, OWCP in effect terminated her wage-loss compensation as of that date. The Board further finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation as of September 12, 2012.

In a narrative report dated September 12, 2012 and Form OWCP-5c reports dated September 17 and 27, 2012, Dr. Benatar, the treating physicians, released appellant to return to full-duty work as a letter carrier with no restrictions. In his September 12, 2012 report, he noted Ms. Sumner's August 2, 2012 and Dr. Sultan's April 19, 2012 examination findings. Dr. Benatar found that Dr. Sultan's physical examination was not significantly different than the range of motion measurements taken during appellant's previous examinations in his office. He stated that contrary to Dr. Sultan's finding appellant did not have a preexisting lower back problem as appellant did not report this condition when she was first evaluated in his office and the condition was not mentioned under her medical history in Dr. Sultan's report. Dr. Benatar diagnosed chronic lumbar myofasciitis with herniated nucleus pulposus, degenerative disc disease, and lumbar radiculopathy, and agreed with Dr. Sultan's opinion that appellant had reached maximum medical improvement and she could return to her letter carrier position with no restrictions. He stated that appellant was highly motivated to return to work and was willing to take the risk of experiencing exacerbations of lumbar, lower extremity, and ankle pain. Dr. Benatar disagreed, however, with Dr. Sultan's opinion that no further medical treatment was warranted and advised that appellant could continue to perform a home exercise program.

As appellant's attending physician, Dr. Benatar, had a thorough knowledge of appellant's condition. His opinion, therefore, is probative on the issue of whether she had any further disability due to her accepted employment injury.⁷ OWCP properly relied upon Dr. Benatar's September 12, 2012 opinion to terminate appellant's monetary compensation effective that date.

In CA-17 and CA-20 form reports dated July 16 to September 27, 2012, Dr. Benatar reiterated his diagnoses of lumbar herniated nucleus pulposus, lumbar radiculopathy, and chronic right ankle sprain. He indicated with an affirmative mark that appellant's conditions were caused or aggravated by the accepted January 5, 2008 employment injuries. Dr. Benatar advised that she was totally disabled from January 5, 2008 to September 17, 2012. The Board has held that an opinion consisting of a physician's checkmark is of diminished probative value without

⁷ See *E.C.*, Docket No. 13-2144 (issued March 12, 2014); *C.B.*, Docket No. 10-1623 (issued April 11, 2011); *C.D.*, Docket No. 10-918 (issued October 26, 2010).

any explanation or rationale for the conclusion reached.⁸ Dr. Benatar did not explain how the diagnosed conditions and resultant total disability were caused or contributed to by the accepted employment-related injuries. The need for rationale is especially important since he, on September 12, 2012 and thereafter, released appellant to return to full-duty work without restrictions. The Board finds that Dr. Benatar's reports are insufficient to establish continuing employment-related disability following his release of her to full-duty employment.

The July 16, 2012 report from Ms. Sumner, a physician assistant, has no probative medical value in determining whether appellant was totally disabled for work. A physician assistant is not considered a physician as defined under FECA.⁹

On appeal, counsel contends that the medical evidence of record established that appellant was entitled to continuing wage-loss compensation. As discussed, the medical evidence did not contain a rationalized medical opinion addressing whether appellant sustained any disability beyond September 12, 2012 due to her accepted January 5, 2008 employment injuries. Therefore, the Board finds that OWCP properly terminated appellant's wage-loss compensation.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had disability causally related to her accepted employment injury.¹⁰ To establish causal relationship between the claimed disability and the employment injury, appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship.¹¹

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that she has any continuing disability causally related to the accepted work-related right ankle sprain, lumbago, and sciatica after September 12, 2012.

After the termination of her benefits by OWCP, appellant submitted a diagnostic test report dated November 20, 2012 from Dr. Panasci who found that she had degenerative disc disease at L4-5 with a large central disc herniation with an extruded fragment with significant compression of the thecal sac and right L5 nerve root. However, Dr. Panasci's report failed to provide an opinion on whether she had continuing disability causally related to the accepted

⁸ *D.D.*, 57 ECAB 734 (2006); *Sedi L. Graham*, 57 ECAB 494 (2006).

⁹ *A.C.*, Docket No. 08-1453 (issued November 18, 2008). Under FECA, a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2). See also *Charley V.B. Harley*, 2 ECAB 208, 211 (1949) (where the Board held that medical opinion, in general, can only be given by a qualified physician).

¹⁰ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001); *George Servetas*, 43 ECAB 424, 430 (1992).

¹¹ *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

January 5, 2008 employment injuries. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.¹² The Board finds that Dr. Panasci's report is insufficient to establish appellant's burden of proof.

In a December 28, 2012 Form CA-20 report, Dr. Benatar indicated with an affirmative mark that appellant had lumbar herniated nucleus pulposus radiculopathy and chronic right ankle sprain due to her January 5, 2008 employment injuries. He advised that she was totally disabled from January 24, 2008 to the present. However, Dr. Benatar did not explain how appellant's diagnosed conditions and resultant total disability were caused or contributed to by the accepted employment-related injuries.¹³ Consequently, appellant has not met her burden of proof to establish that she had any employment-related condition or disability after September 12, 2012.

LEGAL PRECEDENT -- ISSUE 3

With respect to consequential injuries, it is an accepted principle of workers' compensation law that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause which is attributable to the employee's own intentional conduct.¹⁴ The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.¹⁵

A claimant bears the burden of proof to establish a claim for a consequential injury.¹⁶ As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. Causal relationship is a medical question that can generally be resolved only by rationalized medical opinion evidence.¹⁷ Rationalized medical evidence is evidence which relates a work incident, work injury or factors of employment to a claimant's condition, with stated reasons of a physician.¹⁸ The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment injury.¹⁹

¹² See *C.B.*, Docket No. 09-2027 (issued May 12, 2010); *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *K.W.*, 59 ECAB 271 (2007); *A.D.*, 58 ECAB 149 (2006).

¹³ See cases cited *supra* note 8.

¹⁴ See *Albert F. Ranieri*, 55 ECAB 598 (2004); A. Larson, *The Law of Workers' Compensation* § 10.01 (November 2000).

¹⁵ See *Charles W. Downey*, 54 ECAB 421-23 (2003).

¹⁶ *J.A.*, Docket No. 12-603 (issued October 10, 2012).

¹⁷ See *Steven S. Saleh*, 55 ECAB 169, 172 (2003).

¹⁸ See *supra* note 15.

¹⁹ *Id.*

ANALYSIS -- ISSUE 3

OWCP accepted appellant's claim for right ankle sprain, lumbago, and sciatica. Appellant claimed that she sustained additional lumbar injuries, including a herniated lumbar disc, as a consequence of her accepted right ankle and lumbar conditions. She bears the burden of proof to establish her claim for a consequential injury. The Board finds that appellant has not submitted sufficient medical evidence to establish her additional lumbar condition as a consequence of her accepted right ankle and lumbar employment injuries.

Dr. Benatar's Form CA-20 reports dated July 16 to December 28, 2012 found that appellant had lumbar herniated nucleus pulposus and radiculopathy. Although he checked the box marked "yes" when asked if he believed that her conditions were caused or aggravated by the accepted January 5, 2008 employment injury, he failed to explain the mechanism of injury by detailing how tripping and falling would cause the diagnosed conditions. A mere checkmark or affirmative notation in response to a form question on causal relationship is not sufficient to establish causal relationship.²⁰ The Board notes that Dr. Benatar's remaining reports dated July 16 to September 17, 2012 stated that appellant had chronic lumbar myofasciitis with herniated nucleus pulposus, degenerative disc disease, and lumbar radiculopathy due to the January 5, 2008 employment injury. However, Dr. Benatar again failed to provide a rationalized opinion explaining the causal relationship between the diagnosed conditions and the accepted injuries. A medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.²¹ The Board finds, therefore, that Dr. Benatar's reports are insufficient to meet appellant's burden of proof.

Dr. Panasci's November 20, 2012 diagnostic test results addressed appellant's lumbar conditions, but he did not offer a specific opinion as to whether the diagnosed conditions were caused by the accepted employment injury.²²

The August and October 2012 reports from Ms. Sumner, a physician assistant, have no probative medical value in establishing whether appellant sustained additional lumbar conditions as a consequence of the accepted injuries. As stated, a physician assistant is not considered a physician as defined under FECA.²³

The Board finds there is insufficient rationalized medical evidence of record to establish that appellant's lumbar conditions are a consequence of her accepted employment injuries. Appellant did not meet her burden of proof to establish a consequential injury.

On appeal, counsel contended that appellant's claim should be expanded to include all injuries and conditions including, a herniated lumbar disc. It is appellant's burden of proof to

²⁰ See cases cited, *supra* note 8.

²¹ *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

²² See cases cited, *supra* note 12.

²³ See cases cited *supra* note 9.

submit the necessary medical evidence to establish a new or consequential injury. Appellant has not met her burden of proof as the medical evidence submitted is insufficient to establish a consequential relationship between her accepted work-related conditions and her claimed back conditions.

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 wage-loss compensation as of September 12, 2012 finding she no longer had any disability causally related to her January 5, 2008 employment injuries. The Board also finds that she failed to establish that she had any continuing disability relating to her accepted employment injuries after September 12, 2012. The Board also finds that appellant has failed to establish that she sustained a lumbar condition as a consequence of her accepted January 5, 2008 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the March 27, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 24, 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