United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 15-700**
	)	**Issued: June 18, 2015**
DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY, New Cumberland, PA, Employer	)	

Appearances:
Jason M. Weinstock, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 11, 2015 appellant, through counsel, timely appealed the August 14, 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 the claim.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

FACTUAL HISTORY

Appellant, a 54-year-old distribution process worker, was injured on March 16, 2010 while operating a forklift. OWCP accepted his March 16, 2010 traumatic injury claim for

[1] 5 U.S.C. §§ 8101-8193 (2006).

lumbar sprain. At the time of injury, the record included contemporaneous medical evidence of lumbar degenerative disc disease.[2] To date, OWCP has not accepted any other lumbar-related diagnoses as being causally related to the March 16, 2010 forklift incident. Appellant resumed work following his March 2010 lumbar sprain, but suffered recurrences of disability on June 11, 2010, May 26, 2011, and February 29, 2012. After his latest recurrence, OWCP placed appellant on the periodic compensation rolls.

Dr. Robert F. Draper Jr., a Board-certified orthopedic surgeon and OWCP referral physician, examined appellant on July 31, 2012. He diagnosed low back pain syndrome, which included two components: (l) lumbosacral strain; and (2) degenerative bulging lumbar disc disease and osteoarthritis of the facet joints at L3-4 and L4-5. Dr. Draper indicated that appellant's employment-related lumbosacral strain had resolved. As to the other lumbar-related diagnoses, he found no evidence of permanent aggravation of appellant's preexisting pathology. Dr. Draper further explained that currently appellant complained of low back pain due to nonaccident-related degenerative lumbar disc disease, bulging disc disease, and facet osteoarthritis. He advised that appellant was capable of performing full-time, modified-duty work with occasional lifting up to 50 pounds and frequent lifting up to 25 pounds. Dr. Draper further advised that appellant could be treated with nonnarcotic analgesics only. He saw no need for chiropractic manipulations, physical therapy, decompression therapy, or further testing.

OWCP referred Dr. Draper's report to appellant's treating physician, Dr. Bernard I. Zeliger.[3] In an August 23, 2012 report, Dr. Zeliger questioned the validity of some of Dr. Draper's findings, noting that the July 31, 2012 examination reportedly took less than five minutes and appellant did not remove either his pants or shoes. He questioned how Dr. Draper could adequately test muscle motion and sensation while appellant was clothed. Additionally, Dr. Zeliger noted that appellant had shown improvement, but still complained of pain in the low back and left leg, radiating into the left groin (inguinal) area. He recommended that appellant return to work part time (four hours/day) on a "desk job" and then gradually increase to an eight-hour workday. However, Dr. Zeliger continued to keep appellant off work pending further diagnostic studies.

In a supplemental report dated September 27, 2012, Dr. Draper clarified that the previously reported work restrictions were due solely to appellant's preexisting degenerative bulging lumbar disc disease and osteoarthritis of the facet joints at L3-4 and L4-5.

In a November 8, 2012 report, Dr. Zeliger again questioned the thoroughness of Dr. Draper's second opinion evaluation based on appellant's report that the entire examination took a total of five minutes. He indicated that he disagreed with Dr. Draper's findings.

[2] A March 31, 2010 lumbar magnetic resonance imaging (MRI) scan revealed mild degenerative disc disease at L3-4 and L4-5 with neuroforaminal narrowing.

[3] Dr. Zeliger is a Board-certified orthopedic surgeon. He first examined appellant on April 13, 2010, at which time he diagnosed lumbar strain/sprain. Dr. Zeliger reported an episode on March 16, 2010 where appellant was operating a forklift and jarred his back, resulting in immediate pain to his low back, left buttock, and left leg. He also reviewed appellant's March 31, 2010 lumbar MRI scan and noted, *inter alia*, broad-based disc bulges at L2-3, L3-4, and L4-5, which he characterized as mild.

Dr. Zeliger also provided a work capacity evaluation form (OWCP-5c) indicating that appellant was able to perform part-time, limited-duty work.

The results of a November 20, 2012 electrodiagnostic study (NCV/EMG) were compatible with left L4 and L5 radiculopathy.

Dr. Zeliger reexamined appellant on April 11, 2013, and noted that he continued to suffer from lumbar strain/sprain, with evidence of left L4-5 radiculopathy. He further noted that appellant was unable to perform gainful work and was permanently disabled.[4] Dr. Zeliger also noted that the Social Security Administration (SSA) approved appellant for disability, but thus far appellant had nothing in writing regarding his SSA disability status.

OWCP declared a conflict in medical opinion and referred appellant for an impartial medical evaluation (IME). Dr. Thomas D. DiBenedetto, a Board-certified orthopedic surgeon, examined appellant on July 16, 2013. He also reviewed various medical records, including appellant's diagnostic studies and Dr. Zeliger's treatment records from April 2010 through April 2013. Based upon the history provided, appellant's current physical examination, and a review of his medical records, Dr. DiBenedetto diagnosed lumbar sprain/strain and nonindustrial, preexisting degenerative disease and lumbar disc disease. He explained that the latter conditions were not directly caused, aggravated, precipitated, or accelerated in any way by appellant's accepted employment exposure. Dr. DiBenedetto placed no physical limitations on appellant's work-related back sprain. He found that appellant could work without restrictions and did not require any further care. Dr. DiBenedetto explained there were no hard, objective findings to support appellant's continued subjective complaints. Physical examination showed signs of symptom magnification, and appellant's MRI scans were benign and showed no compressive lesions.[5] Dr. DiBenedetto further commented that appellant's current narcotics usage was excessive. Lastly, he stated that he did not find any disabling condition due to appellant's work-related. Dr. DiBenedetto also provided a work capacity evaluation form (OWCP-5c), which indicated that appellant was capable of performing his usual job.

In a September 3, 2013 report, Dr. Zeliger noted that he reviewed Dr. DiBenedetto's July 2013 work capacity evaluation form (OWCP-5c) and disagreed that appellant was capable of resuming his prior duties as a distribution process worker. He believed that appellant was only capable of a sit-down, sedentary desk job doing paperwork, without any lifting, pushing, pulling, or twisting.

On December 19, 2013 OWCP issued a notice of proposed termination of benefits based on Dr. DiBenedetto's July 16, 2013 report. It afforded appellant 30 days to respond.

OWCP subsequently received a January 14, 2014 report from Dr. Zeliger who noted continuing complaints of low back and left leg pain. Dr. Zeliger also noted that appellant

[4] Dr. Zeliger also provided an April 11, 2013 work capacity evaluation (OWCP-5c), which included a work-related diagnosis of lumbar sprain (ICD-9 Code 847.2). He indicated that appellant was permanently disabled from performing gainful work due to back pain.

[5] Dr. DiBenedetto referenced appellant's March 31, 2010 lumbar MRI scan, as well as a June 8, 2011 MRI scan of the thoracic spine, which was normal.

reported dragging his left foot and although appellant appeared to be slowly improving, he was far from being well. Dr. Zeliger advised that appellant could return to a light-duty job where he could sit and perform light work with his hands, such as shuffling papers or keeping track of orders. He precluded heavy lifting, and pushing or pulling in excess of 10 pounds. Dr. Zeliger recommended that appellant begin working half days, and then eventually increase his work as tolerated. If light-duty work was unavailable, then appellant was currently unable to resume working.

On February 18, 2014 OWCP issued a final decision terminating appellant's wage-loss compensation and medical benefits.

Appellant timely requested a hearing. OWCP scheduled a telephonic hearing for June 11, 2014, and notified both appellant and his counsel. However, they failed to call in at the designated time. The Branch of Hearings & Review did not reschedule, and instead provided appellant a review of the written record.

OWCP received additional reports from Dr. Zeliger dated February 20, March 20, and May 6, 2014. In the February 20, 2014 report, Dr. Zeliger noted appellant's condition had not changed since he last saw him on January 14, 2014. He also noted that appellant had not yet been offered a position in accordance with the January 14, 2014 work restrictions.

Dr. Zeliger's March 20, 2014 report indicated that appellant complained of increasing pain in the mid-thoracic area, as well as pain in the low back and down the left leg. His pain had gradually worsened over the last couple days without any specific event having taken place. Dr. Zeliger also noted that appellant had not yet returned to work in any capacity. He recommended obtaining a new lumbar MRI scan to assess the status of appellant's complaints of increased pain. Dr. Zeliger did not see any changes on examination, and in fact, commented that appellant currently looked better on examination than previously.

During a May 6, 2014 follow-up examination, appellant complained of severe low back and left leg pain. Dr. Zeliger noted that appellant came in almost dragging his left leg. Appellant reported a recent increase of pain without further injury. According to Dr. Zeliger, appellant was unable to stand and bend because of severe pain in his low back and left leg. He ordered a new lumbar MRI scan and bilateral lower extremity electromyography.

By decision dated August 14, 2014, the Branch of Hearings and Review affirmed OWCP's decision terminating wage-loss compensation and medical benefits. The hearing representative relied on Dr. DiBenedetto's July 16, 2013 impartial medical evaluation as the basis for terminating all FECA benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[6] Having determined that an employee has a disability causally related to his federal employment, OWCP may not terminate compensation without

[6] *Curtis Hall*, 45 ECAB 316 (1994).

establishing either that the disability has ceased or that it is no longer related to the employment.[7] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[8] To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.[9]

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[10] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[11] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[12]

ANALYSIS

The only accepted condition arising from the March 16, 2010 forklift incident is a lumbar sprain. In a July 31, 2012 report, OWCP's referral physician, Dr. Draper, found that appellant's employment-related lumbosacral strain had resolved. He also diagnosed degenerative bulging lumbar disc disease and osteoarthritis of the facet joints at L3-4 and L4-5. However, these conditions were not employment related. Dr. Draper indicated that he found no evidence of permanent aggravation of appellant's preexisting pathology. Although appellant was unable to resume his regular duties as a distribution process worker, Dr. Draper explained that the work restrictions were solely the result of preexisting degenerative bulging lumbar disc disease and osteoarthritis of the facet joints at L3-4 and L4-5. A subsequent electrodiagnostic study revealed left L4 and L5 radiculopathy. Appellant's physician, Dr. Zeliger, reexamined him on April 11, 2013 and noted that appellant continued to suffer from lumbar strain/sprain, with evidence of left L4-5 radiculopathy. He further noted that appellant was unable to perform gainful work, and was considered permanently disabled. Based on the above-noted disagreement between Dr. Zeliger and Dr. Draper, OWCP properly declared a conflict in medical opinion. Because of this conflict, OWCP referred appellant to an impartial medical examiner (IME).

Dr. DiBenedetto, the IME, diagnosed employment-related lumbar sprain/strain and nonindustrial, preexisting degenerative disease and lumbar disc disease. Apart from the lumbar sprain/strain, appellant's other lumbar-related conditions were not directly caused, aggravated, precipitated, or accelerated in any way by his accepted employment exposure. With respect to appellant's accepted lumbar sprain/strain, Dr. DiBenedetto found no physical limitations. He

[7] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[8] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

[9] *Calvin S. Mays*, 39 ECAB 993 (1988).

[10] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321; *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[11] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[12] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

was able to work without restrictions and did not require any further care. Moreover, appellant's lumbar degenerative disc disease was not disabling. Dr. DiBenedetto stated that he found no hard objective evidence to support appellant's continued subjective complaints. Also, there were signs of symptom magnification on physical examination and appellant's MRI scans were benign. Dr. DiBenedetto's work capacity evaluation form (OWCP-5c) found appellant capable of performing his usual job.

As noted, when a case is referred to an IME to resolve a conflict, the resulting medical opinion, if sufficiently well-reasoned and based upon a proper factual background, must be given special weight.[13] The Board finds that OWCP properly deferred to Dr. DiBenedetto's July 16, 2013 opinion. Dr. DiBenedetto provided a well-reasoned report based on a proper factual and medical history. He accurately summarized the relevant medical evidence, and relied on the statement of accepted facts. Dr. DiBenedetto also examined appellant and provided a thorough review of the relevant medical records. His report included detailed findings and medical rationale supporting his opinion. As the IME physician, Dr. DiBenedetto's July 16, 2013 opinion is entitled to determinative weight.[14]

The record includes at least four additional reports from appellant's physician, Dr. Zeliger, which cover the period January 14 through May 6, 2014. During this time frame, appellant reported mid and low back pain, and various left lower extremity complaints. Dr. Zeliger's January 14 and February 20, 2014 reports indicated that appellant was able to return to work in a part-time, light-duty capacity. The March 20 and May 6, 2014 reports did not specifically address appellant's work capacity.

Subsequent reports from a physician who was on one side of a medical conflict would generally be insufficient to overcome the weight accorded the IME's report and/or insufficient to create a new medical conflict.[15] As a party to the original conflict, Dr. Zeliger's follow-up reports from January through May 2014 are insufficient to overcome the weight properly accorded Dr. DiBenedetto July 16, 2013 opinion, and are similarly insufficient to create a new conflict in medical opinion. Accordingly, the Board finds that OWCP satisfied its burden in terminating appellant's wage-loss compensation and medical benefits.

On appeal, counsel notes that OWCP's termination of FECA benefits is contrary to the SSA's finding of disability. The determination of an employee's rights or remedies under another statutory authority does not establish entitlement to benefits under FECA.[16]

[13] *Id.*

[14] *Id.*

[15] *I.J.*, 59 ECAB 408, 414 (2008).

[16] *J.F.*, 59 ECAB 331, 339 (2008); *H.S.*, 58 ECAB 554, 560 n.22 (2007); *Dianna L. Smith*, 56 ECAB 524, 527 (2005).

CONCLUSION

The Board finds OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

ORDER

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

Issued: June 18, 2015
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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