United States Department of Labor
Employees' Compensation Appeals Board

D.M., Appellant	)	
and	)	**Docket No. 15-119**
	)	**Issued: March 10, 2015**
DEPARTMENT OF THE AIR FORCE, WURTSMITH AIR FORCE BASE, MI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 20, 2014 appellant filed a timely appeal from a May 2, 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 medical and wage-loss benefits effective August 8, 2013.

FACTUAL HISTORY

On January 21, 1969 appellant, then a 30-year-old mess attendant, filed a traumatic injury claim alleging that she injured her back and hip on that date. She alleged that she slipped on a

[1] 5 U.S.C. § 8101 *et seq.*

greasy wet floor while carrying trays. Appellant's claim was accepted for acute lumbosacral muscle strain. Later, her claim was expanded to include acute lumbosacral strain superimposed on preexisting spondylosis and a bulging disc at L4. Appellant stopped work on January 22, 1969. She returned to intermittent work until March 12, 1969 when she stopped all work at the employing establishment. Appellant received appropriate wage-loss compensation after her work stoppage.

On September 2, 2011 OWCP requested that appellant provide a medical report addressing her current status whether her accepted conditions remained present and active. In a September 29, 2011 report, Ann Thibodeau-Ashford, a physician assistant, advised that appellant continued to experience chronic back pain.[2] She noted that the pain began 30 years ago when appellant slipped and fell while working at the employing establishment. Ms. Thibodeau-Ashford further noted that appellant had difficulty getting up and down from the examination table and had tenderness with palpitation of the lumbar spine at L2-L5. She advised that appellant had nonwork-related conditions including hypertension, hyperlipidemia, asthma, obesity, chronic kidney disease, and depression. Ms. Thibodeau-Ashford opined that appellant remained totally disabled due to her back pain and recommended weight loss and physical therapy.

On July 3, 2012 OWCP referred appellant, together with the medical record, and a statement of accepted facts to Dr. Earl Rhind, a Board-certified orthopedic surgeon, for a second opinion regarding appellant's status and whether she had residuals of her accepted conditions. In an August 8, 2012 report, Dr. Rhind noted that appellant was injured when she slipped on a greasy wet floor while carrying trays that weighed approximately 30 pounds. He advised that appellant worked part time in 1977 as a bookkeeper and as a telemarketer in 1984, but was unable to continue those jobs because she could not sit for an extended period of time. Dr. Rhind noted that appellant had a very restricted activity level and low back pain that radiated to her right buttock area with prolonged standing, walking, bending, twisting, or lifting. On physical examination, he advised that appellant did not exhibit any overt pain behaviors and walked slowly with a fairly balanced gait pattern. Dr. Rhind noted that her cervical spine had functional range of motion with no painful or tender areas and her lumbar spine was rather straight. Appellant had very limited mobility of the lumbosacral spine. Straight leg raises as well as sensory and motor examination of the legs were unremarkable. Dr. Rhind opined that, as a result of chronic pain and age, there was a far advanced and rather hopeless level of deconditioning which would limit an individual of appellant's age from doing work activity on a consistent regular basis. He noted that appellant's condition was stable and had reached maximum medical improvement.

By letter dated October 2, 2012, OWCP advised Dr. Rhind that his report did not sufficiently address the questions as posed to him. It requested that he submit an addendum report addressing whether there remained residuals of lumbosacral strain superimposed on preexisting spondylosis and a bulging disc at L4 as causally related to the January 21, 1969 work-related incident remained. Dr. Rhind was also asked whether appellant had any current

[2] The record indicates that Ms. Thibodeau-Ashford works with Dr. Thomas Marshall, Board-certified in family medicine.

conditions that were caused, aggravated, or accelerated by the January 21, 1969 work incident. A February 21, 2013 e-mail from OWCP's medical scheduler advised that Dr. Rhind refused to submit an addendum report.

On February 28, 2013 OWCP referred appellant, together with the medical record, and a statement of accepted facts, to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, for a second opinion regarding appellant's work-related conditions. In an April 5, 2013 report, Dr. Obianwu advised that appellant was initially injured when she slipped on a greasy wet floor while working at the employing establishment. He noted that appellant had ongoing back pain, difficultly standing and sitting for any length of time, and that she could only walk short distances. Dr. Obianwu reviewed the medical record and noted that initially many of appellant's physicians attributed her back pain to aggravation of grade 1 spondylolisthesis at L5-S1, finding it to be congenital or developmental, with secondary chronic lumbosacral strain irritation. He reported examination findings, noting that appellant had difficulty walking on her toes and heels. Appellant was tender in the midline of the lumbar spine. There was no atrophy in the muscle groups of the legs. Straight leg raising on the right side caused significant low back pain. Lumbar spine x-ray showed grade 1 spondylolisthesis at L5-S1 with almost complete obliteration of the disc space, as well as degenerative changes in the entire lumbar spine. Dr. Obianwu diagnosed severe chronic lumbar spondylosis, multilevel degenerative disc disease, and developmental spondylosis at L5 with grade 1 spondylolisthesis at L5 on S1. He opined that the accepted lumbosacral sprain had resolved, finding that there was no swelling in her lumbar spine or tightness of the muscles of the lumbar spine. Dr. Obianwu also noted that imaging studies did not reveal any bulging at the L4 disc. He stated that there were no residuals specifically attributable to the accepted conditions and work incident. Dr. Obianwu further opined that the basis for appellant's lower back pain was the developmental condition of bilateral spondylosis of L5 and the grade 1 spondylolisthesis of L5 on S1, which was not an accepted condition. He stated that appellant's present disability was nonwork related and developmental, noting that many of appellant's previous physicians also described her condition as congenital. Dr. Obianwu opined that appellant was unable to perform duties of her date-of-injury job because of concurrent conditions not attributable to her work injury. He opined that was not currently disabled from all work and that she could return to limited duties.

In an April 30, 2013 letter, OWCP notified Dr. Marshall, appellant's primary care physician of record, that a second opinion physician found that appellant no longer had the residuals of the accepted conditions. It sent him a copy of Dr. Obianwu's report and a statement of accepted facts and requested that he submit comments within 30 days.

By letter dated July 8, 2013, OWCP advised appellant that it proposed a termination of compensation and medical benefits. It advised that the weight of the evidence was represented by Dr. Obianwu who found that there were no residuals of her accepted condition causally related to the January 21, 1969 work injury. Appellant was further advised that she had 30 days to submit additional evidence and argument to contest the proposed termination. She subsequently notified OWCP that she had a scheduled appointment with a spine specialist on the first open date of July 10, 2013.

By decision dated August 8, 2013, OWCP terminated appellant's wage-loss and medical benefits effective August 8, 2013. It found that the weight of medical opinion was represented by Dr. Obianwu.

On August 12, 2013 appellant's attorney requested a telephone hearing. At the February 13, 2014 hearing, he contended that OWCP was doctor shopping and that there was no need for a second opinion examination by Dr. Obianwu because there was no conflict in the record. Appellant's attorney also accused Dr. Obianwu of being anti-claimant and accused OWCP of terminating appellant's benefits because she had received compensation for such a long period of time.

On August 27, 2013 OWCP received the July 10, 2013 report from appellant's scheduled appointment with Dr. Boyd Richards, Board-certified in neurological surgery, who advised that appellant twisted her back while working at the employing establishment and noted that she was asymptomatic prior to the work incident. Dr. Richards advised that July 10, 2013 lumbar spine x-rays revealed spondylosis on L4-S1, grade 1 spondylolisthesis of L4 on L5 and L5 on S1. Appellant also submitted a March 6, 2014 report from Dr. Sean Coyle, an internist, who advised that appellant complained of back pain related to a 1969 work injury. Dr. Richards stated that he reviewed appellant's medical records and imaging reports. He noted that she had significant lumbar arthritis and multilevel disc disease. On physical examination Dr. Richards found osteoarthritis and leg weakness. He opined that appellant was incapable of obtaining or maintaining meaningful employment due to extensive arthritis and instability.

By decision dated May 2, 2014, an OWCP hearing representative found that OWCP met its burden of proof in establishing that appellant no longer had the disabling residuals of the accepted conditions.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[3] 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.[4]

In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality.[5] The factors that comprise the evaluation of medical opinion evidence include the opportunity for and thoroughness of examination, the accuracy or

[3] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[4] *Id*.

[5] *See Nicolette R. Kelstrom*, 54 ECAB 570 (2003).

completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's conclusions. Medical opinion regarding causal relationship must be based on a complete factual history and medical background, one of reasonable medical certainty, and supported by rationale explaining the nature of the relationship between the diagnosed condition and employment factors.[6]

ANALYSIS

OWCP accepted appellant's traumatic injury claim for acute lumbosacral strain superimposed on preexisting spondylosis and bulging disc at L4. Appellant received wage-loss compensation and medical benefits based on the accepted conditions since 1969. In 2013 OWCP referred appellant to Dr. Obianwu for a second opinion regarding the status of appellant's accepted conditions.[7]

In his April 5, 2013 report, Dr. Obianwu set forth the history of appellant's accepted back condition and reviewed the medical treatment records related to appellant's conditions, as well as the statement of accepted facts. He diagnosed spondylolisthesis at L5-S1, degenerative changes of the lumbar spine, and developmental bilateral spondylosis at L5. Dr. Obianwu opined that the accepted work condition of lumbosacral sprain and bulging L4 disc had resolved, finding that there was no swelling in her lumbar spine or any tightness of the muscles of the lumbar spine and that imaging studies did not reveal any bulging at the L4 disc. He stated that there were no residuals specifically attributable to the accepted conditions or the January 21, 1969 work incident. Dr. Obianwu explained that the basis for appellant's lower back pain was the developmental condition of bilateral spondylosis of L5 and the grade 1 spondylosis of L5 on S1 which was not employment related. He stated that appellant's present disability was nonwork related and developmental, noting that a review of the medical record supported that the condition was congenital. Dr. Obianwu opined that, although appellant could not perform her date-of-injury duties, this was due to conditions not attributable to her work injury.

Appellant subsequently submitted a March 6, 2014 report from Dr. Coyle who diagnosed significant lumbar arthritis and multilevel disc disease. Dr. Coyle opined that appellant was incapable of obtaining or maintaining meaningful employment due to extensive arthritis and instability. This report is insufficient to create a conflict with or to overcome the weight of Dr. Obianwu's report because it does not specifically address whether residuals of appellant's accepted conditions remain. Dr. Richard's July 10, 2013 report is also insufficient to overcome the weight of Dr. Obianwu's report because it also does not offer a clear opinion regarding whether appellant remained disabled from work due to residuals of the 1969 work injury.

[6] *See M.D.*, 59 ECAB 211 (2007).

[7] OWCP previously referred appellant to Dr. Rhind for a second opinion. Although Dr. Rhind provided an August 8, 2012 report which generally supported continuing work-related disability, OWCP requested a supplemental opinion as he did not sufficiently explain how continuing disabling residuals were attributable to the January 21, 1969 work injury. As noted, *infra*, he did not provide a supplemental report. As such it was proper for OWCP to refer appellant to Dr. Obianwu to further develop the medical record. *See William B. Webb*, 56 ECAB 156 (2004) (OWCP has the discretion to have a claimant submit to an examination by a physician designated or approved by OWCP after the injury and as frequently and at the times and places as may be reasonably required).

The Board finds that the weight of medical opinion is represented by the reports of Dr. Obianwu whose reports were based on a full and accurate history, a review of the medical records, and provided a rationalized medical opinion addressing the basis for his conclusion that appellant's ongoing disability was no longer related to appellant's accepted conditions. In contrast, the reports by Drs. Coyle and Richards do not specifically address whether the residuals of the accepted conditions remain as causally related to the January 21, 1969 work incident. Although counsel asserted at appellant's hearing that Dr. Obianwu was biased, the Board has held that mere allegations are not sufficient to establish bias. There must be evidence of actual bias or unfairness by the physician used by OWCP as a referral physician.[8] Here, counsel did not provide evidence showing that Dr. Obianwu acted in a biased manner toward appellant.

CONCLUSION

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

ORDER

IT IS HEREBY ORDERED THAT the May 2, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 10, 2015
Washington, DC

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

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

[8] *J.C.*, Docket No. 08-1833 (issued March 23, 2009).