United States Department of Labor
Employees' Compensation Appeals Board

B.S., Appellant	)	
and	)	**Docket No. 15-572**
	)	**Issued: May 27, 2015**
U.S. POSTAL SERVICE, PROCESSING & DISTRUBTION CENTER, Edison, NJ, Employer	)	

Appearances:
Thomas R. Uliase, 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 January 13, 2015 appellant, through counsel, filed a timely appeal from an August 18, 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 properly terminated appellant's entitlement to wage-loss compensation and authorization for medical benefits effective February 3, 2014 as he had no further residuals or disability causally related to his accepted employment injury.

FACTUAL HISTORY

On June 18, 2011 appellant, then a 38-year-old mail handler, filed an occupational disease claim alleging that he sustained bilateral carpal tunnel syndrome, a cervical condition, and a bilateral shoulder condition due to factors of his federal employment. He indicated that his

[1] 5 U.S.C. § 8101 *et seq.*

symptoms began on April 1, 2007. Appellant stopped work on April 15, 2011 and did not return. The employing establishment noted that he was off work under file number xxxxxx314, but that OWCP had found that he did not sustain a recurrence of disability so he was filing an occupational disease claim.

OWCP accepted appellant's claim for brachial neuritis. It noted that he had a prior 2007 accepted claim for left wrist sprain, assigned file number xxxxxx355 and another 2007 claim accepted for brachial neuritis, and bilateral carpal tunnel syndrome, assigned file number xxxxxx314.

In a form report dated September 7, 2011, Dr. Mark A.P. Filippone, an attending Board-certified physiatrist, diagnosed cervical radiculopathy and found that appellant was totally disabled.

On November 18, 2011 OWCP referred appellant to Dr. Kenneth Heist, an osteopath, for a second opinion examination. In a report dated December 1, 2011, Dr. Heist reviewed the history of injury and diagnosed cervical sprain, preexisting degenerative cervical disease, and left shoulder sprain. He found that he had no current findings of brachial neuritis. Dr. Heist determined that appellant had sustained a temporary aggravation of preexisting degenerative disease of the spine. He opined that appellant could return to work without restrictions.

On January 11, 2012 OWCP notified appellant of its proposed termination of his compensation and authorization for medical benefits. It found that based on Dr. Heist's report he had also sustained a temporary aggravation of a preexisting cervical condition that had resolved.

On January 26, 2012 Dr. Filippone reviewed Dr. Heist's report and the notice of proposed termination of compensation. He found objective evidence of spasm and neurological deficits and noted that a January 10, 2011 electromyogram (EMG) showed bilateral cervical radiculopathy at C5 through C7 and carpal tunnel syndrome on the right side. Dr. Filippone further advised that a magnetic resonance imaging (MRI) scan study obtained January 13, 2011 revealed right lateral osteophyte disc complexes at C3-4 and C4-5 with right neural foraminal narrowing, a disc herniation on the left at C6-7 with thecal sac compression and foraminal narrowing on the left, and a right posterolateral T1-2 disc herniation. He opined that appellant was totally disabled from employment.

By decision dated February 14, 2012, OWCP terminated appellant's wage-loss compensation and authorization for medical treatment effective that date. It found that Dr. Heist's report constituted the weight of the evidence and established that he had no further employment-related condition or disability.

On February 22, 2012 appellant, through counsel, requested an oral hearing before an OWCP hearing representative. Following a preliminary review, in a decision dated May 2, 2012 the hearing representative reversed the February 14, 2012 decision. He noted that appellant had an accepted claim, assigned file number xxxxxx314, with continued work restrictions and an accepted condition of brachial neuritis. The hearing representative found that OWCP should double file number xxxxxx314 into the current file number and update the statement of accepted facts (SOAF) to include his work duties as mail handler. He also noted that it appeared that appellant had worked modified employment since 2009, and that the SOAF should therefore

provide his actual work duties from February 3, 2009 until April 15, 2011. The hearing representative further instructed OWCP to obtain a supplemental report from Dr. Heist based on the updated statement of accepted facts and providing a rationalized opinion regarding whether appellant's brachial neuritis had resolved.

On May 22, 2012 Dr. Gregory J. Lawler, an osteopath, began providing pain management treatment. He submitted progress reports describing his treatment of appellant throughout 2012 and 2013.

On May 30, 2012 OWCP doubled the current file number and file number xxxxxx314. It prepared an updated SOAF dated July 19, 2012 describing appellant's job as a mail handler and indicating that it had accepted left wrist sprain under file number xxxxxx355 and brachial neuritis and bilateral carpal tunnel syndrome under file number xxxxxx314.

On July 19, 2012 the employing establishment advised that it had no record of appellant performing a modified assignment. In file number xxxxxx314, appellant accepted modified job offers on December 9, 2008 and January 22, 2009.

In a report dated August 1, 2012, Dr. Filippone described appellant's continued complaints of neck pain radiating into both shoulders more pronounced on the left side. In an accompanying form report dated August 1, 2012, the physician diagnosed cervical radiculopathy and found that appellant was totally disabled.

In a supplemental report dated August 6, 2012, Dr. Heist reviewed the updated SOAF and the reports from Dr. Filippone. He concluded that appellant's left shoulder sprain, cervical sprain, and brachial neuritis had resolved and that his degenerative conditions and herniations demonstrated on MRI scan study did not result from his work duties.

OWCP determined that a conflict existed between Dr. Filippone and Dr. Heist regarding whether appellant had any continuing employment-related disability. On September 20, 2012 it referred appellant to Dr. Edward Krisiloff, a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP requested that Dr. Krisiloff provide an opinion regarding whether appellant had current findings of brachial neuritis, carpal tunnel syndrome, or cervical degenerative disc disease. It further asked that Dr. Krisiloff address whether appellant could perform his duties as a mail handler lifting up to 70 pounds.

In a report dated October 9, 2012, Dr. Krisiloff discussed appellant's history of arm problems beginning in 2007 and his history of bilateral carpal tunnel releases in 2008. He noted that he returned to his usual employment in February 2009 following his carpal tunnel releases. In December 2009, appellant began working light duty. He continued to experience symptoms of carpal tunnel syndrome. On examination Dr. Krisiloff found adequate range of motion of the cervical spine and full range of motion of the shoulders with no impingement, loss of strength, or "obvious atrophy in the upper extremities." He noted that appellant experienced pain while trying to lift his arms overhead. Dr. Krisiloff related, "[Appellant] has apparently recovered from his carpal tunnel syndrome and subsequent nerve conduction studies revealed good conduction across the wrists. He continues to complain of significant discomfort in his neck,

shoulders, and intermittent upper extremity numbness and tingling. [Appellant] feels that he cannot return to the type of work that he performed previously." Dr. Krisiloff further stated:

> "It is my medical opinion, stated within a reasonable degree of medical probability, that [appellant] certainly has underlying cervical spondylosis. [Appellant's] MRI [scan] studies reflect this quite clearly. Two separate studies were performed and there was no interval change between studies. [Appellant] did develop bilateral carpal tunnel troubles and for this, a surgical decompression was performed. [Appellant] has apparently done well and repeat nerve conduction studies performed well after his surgery showed normal conduction across the wrist joints. He has therefore recovered from his carpal tunnel troubles and this should no longer be an issue. As far as [appellant's] neck is concerned, his studies certainly show evidence of cervical spondylosis. This is a degenerative condition that is not related to the work that he did for the [employing establishment]. It is my opinion that [appellant] developed an exacerbation of this underlying condition while at work. The question that now faces us is whether this exacerbation has resolved and whether [he] is capable of a return to work.
>
> "[Appellant] certainly complains of ongoing difficulties with his neck and upper extremities, but there is simply no corroborative evidence on his physical examination. [He] does have some slight restrictions in his cervical spine range of motion but he has absolutely no evidence of any loss of strength in his upper extremities. There is no muscular atrophy. [Appellant's] sensory examination appears to be normal. There is simply no physical evidence of ongoing brachial neuritis, which is his accepted condition. [Appellant] does have evidence on EMG of bilateral partial denervation at C5, C6, and C7, but this is simply not reflected on his physical examination as far as weakness of his upper extremities. It is my medical opinion that [he] did suffer a temporary exacerbation of his underlying degenerative cervical disc disease and that condition has now resolved. I feel that [appellant] is capable of returning to work at this time. However, I do feel that certain restrictions might be necessary in returning him to work. I am primarily concerned about the 70-pound requirement in lifting in performing his duties as a mail handler. I think that it would be reasonable to schedule a Functional Capacity Evaluation [FCE] to determine exact lifting capabilities."

Dr. Krisiloff concluded that appellant had no findings of brachial neuritis and carpal tunnel syndrome, but had underlying cervical disc disease unrelated to his employment injury. He again recommended an FCE. Dr. Krisiloff advised that if appellant could not perform his regular employment it would be due to his underlying cervical disc disease rather than his work injury.

On November 14, 2012 OWCP requested that Dr. Filippone refer appellant for a FCE to determine his work ability as requested by the impartial medical examiner.

In a report dated December 5, 2012, Dr. Filippone related that appellant had abnormal electrodiagnostic studies and multiple levels of injury on MRI scan studies of the cervical and

thoracic spine. He advised that an FCE "might inadvertently hurt [appellant]" and declined to provide a referral for a FCE.

By letter dated January 10, 2013, OWCP requested that Dr. Krisiloff refer appellant for a FCE.

In a report dated January 23, 2013, Dr. Filippone noted that Dr. Lawler had referred appellant to Dr. Marc Arginteanu, a Board-certified neurosurgeon, for evaluation. On January 28, 2013 Dr. Arginteanu noted that appellant began experiencing pain in his upper extremities and neck lifting and moving heavy objects at work. He found that an MRI scan study showed "multiple disc derangement with bulging discs, osteophyte formation, and foraminal stenosis" and recommended surgery.

A March 14, 2013 cervical discography was positive at C3-4 and C6-7. A March 14, 2013 cervical MRI scan study obtained after the discography showed a posterior disc bulge and bilateral uncovertebral hypertrophy at C3-4 and C4-5 with right more than left foraminal narrowing, a disc bulge at C5-6, and a midline disc herniation at C6-7 with effacement of the ventral thecal sac and moderate bilateral neural foraminal narrowing.

On April 19, 2013 appellant's counsel requested that OWCP authorize Dr. Lawler's request to perform cervical spinal surgery. He also requested that OWCP postpone the FCE in view of Dr. Filippone's finding that it might harm appellant.

In a progress report dated May 17, 2013, Dr. Filippone reviewed the results of the MRI scan study obtained after the discogram. On July 19, 2013 he found that appellant had a positive Tinel's sign and Phalen's test and diagnosed bilateral carpal tunnel syndrome. Dr. Filippone found that he was unable to work due to his problem with his neck, spine, and upper extremities and his use of pain medication. In a form report dated July 19, 2013, he diagnosed cervical radiculopathy, checked "yes" that the condition was work related, and found that appellant was totally disabled.[2]

Appellant underwent an FCE on August 13, 2013. In a report dated August 14, 2013, the physical therapist noted that appellant took pain medication before the FCE. He stated, "[Appellant] did perform in the heavy demand level but secondary to the amount of medication taken prior to the evaluation and length of time since initial onset, [h]e is currently functioning safely in the medium work level at this time. He is capable of performing all work activities that fit the parameters tested during the FCE."

On August 28, 2013 Dr. Filippone challenged the FCE finding that appellant could perform full-time employment.

In a supplemental report dated October 30, 2013, Dr. Krisiloff noted that the FCE showed that appellant could "occasionally lift 80 pounds in a lift and carry, 70 pounds from the floor and 60 pounds to shoulder level. On a frequent basis the limits are 60 pounds, 50 pounds, and 40 pounds. On a constant basis the limits are 40 pounds, 30 pounds, and 20 pounds." Dr. Krisiloff opined that appellant could work as a mail handler and advised that the FCE

[2] Dr. Filippone submitted similar form reports throughout 2012 and 2013.

established that his "temporary aggravation of his cervical spondylosis has ceased. [Appellant] was able to exert reasonable effort and perform reasonably well at a medium work level. If [he] were suffering from a significant degree of neck pain and upper extremity troubles he would not have been able to perform at this level."

On November 14, 2013 OWCP notified appellant of its proposed termination of his compensation and authorization for medical benefits.

In a progress report dated November 27, 2013, Dr. Lawler indicated that appellant did not have weakness, but continued to experience pain. He recommended that appellant see a surgeon and obtain treatment before returning to work.

In a December 2, 2013 response to the notice of proposed termination, appellant's counsel argued that the FCE indicated that appellant could perform medium level work, but that the mail handler's position was classified as heavy work.

On December 2, 2013 Dr. Arginteanu reviewed the discogram and MRI scan study and indicated that the studies showed that a foraminotomy at C6-7 on the left "would be indicated." He noted that appellant was interested in a nucleoplasty, which he found was reasonable.

In a form report dated December 3, 2013, Dr. Filippone diagnosed cervical radiculopathy and found that appellant was totally disabled.

By decision dated February 3, 2014, OWCP terminated appellant's compensation and authorization for medical benefits effective that date. It found that Dr. Krisiloff's opinion as the impartial medical examiner represented the weight of the medical evidence and established that appellant had no further disability or residuals of his accepted work injury.

On February 10, 2014 appellant, through counsel, requested an oral hearing.[3] At the hearing, held on June 10, 2014, counsel discussed appellant's history of injuries and work duties argued that a new job appellant performed in December 2010 aggravated his condition. He argued that OWCP should amend the SOAF to include appellant's other claim and expand acceptance of the claim to include an aggravation of previously accepted cervical radiculopathy and neck condition and an aggravation of carpal tunnel syndrome. Counsel asserted that Dr. Krisiloff did not discuss his herniated discs and failed to provide rationale for his finding that appellant has no residuals of his carpal tunnel syndrome, especially given the findings on a January 10, 2011 EMG study. He also argued that the FCE demonstrated that appellant could perform medium rather than heavy work and thus Dr. Krisiloff's finding that appellant could work as a mail handler was not supported by the FCE. Counsel notes that the SOAF did not describe his job duties from 2009 to 2011.

In a letter dated June 24, 2014, appellant's counsel noted that Dr. Lawler and Dr. Arginteanu recommended surgery and resubmitted their December 2013 reports.

[3] Appellant returned to work on February 4, 2014.

By decision dated August 18, 2014, the hearing representative affirmed the February 3, 2014 decision. She found Dr. Krisiloff's opinion as the impartial medical examiner was entitled to the special weight of the evidence.

On appeal, appellant's counsel argues that the SOAF did not include information about the accepted left wrist sprain and advises that the accepted conditions should include bilateral carpal tunnel syndrome and an aggravation of cervical radiculopathy. He contends that appellant is not able to perform the work duties of a mail handler. Counsel argues that Dr. Krisiloff did not discuss the results of objective testing, that his reports are speculative, and that his opinion regarding disability is inconsistent, and that the FCE did not show that appellant could work as a mail handler.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[4] It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[5] 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.[6] Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[7] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[8]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[9] The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[10] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

[4] *Elaine Sneed*, 56 ECAB 373 (2005).

[5] *Fred Reese*, 56 ECAB 568 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[6] *Gewin C. Hawkins*, 52 ECAB 242 (2001).

[7] *T.P.*, 58 ECAB 524 (2007); *Pamela K. Guesford*, 53 ECAB 727 (2002).

[8] *Id*.

[9] 5 U.S.C. § 8123(a).

[10] 20 C.F.R. § 10.321.

the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[11]

ANALYSIS

OWCP accepted that appellant sustained brachial neuritis causally related to work factors under the current file number. It previously accepted that he sustained left wrist sprain under file number xxxxxx355 and brachial neuritis and bilateral carpal tunnel syndrome under file number xxxxxx314. OWCP further noted that, based on the opinion of Dr. Heist, appellant sustained a temporary aggravation of preexisting cervical degenerative disc disease due to his work injury. It determined that, a conflict in medical opinion existed between Dr. Heist, OWCP referral physician, and Dr. Filippone, appellant's attending physician, regarding whether appellant had any current findings of brachial neuritis, carpal tunnel syndrome, or cervical degenerative disc disease, and whether he had any employment-related disability. OWCP referred him to Dr. Krisiloff for an impartial medical examination.

Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[12] The Board finds that the opinion of Dr. Krisiloff, a Board-certified orthopedic surgeon selected to resolve the conflict in opinion, is well rationalized and based on a proper factual and medical history. Dr. Krisiloff accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about appellant's condition which comported with his findings.[13] In his October 9, 2012 report, he reviewed the medical evidence of record, including the results of MRI scan studies performed January and September 2011 and electrodiagnostic studies from January 2011. Dr. Krisiloff noted that appellant worked in his usual employment following his 2009 carpal tunnel releases until December 2009, when he began performing limited duty. He determined that he had no objective findings of brachial neuritis. Dr. Krisiloff further found that appellant had recovered from his carpal tunnel syndrome, noting that he did well after his decompression surgeries and as studies showed normal wrist conduction. He opined that appellant sustained an employment-related aggravation of underlying cervical spondylosis which had resolved. Dr. Krisiloff provided rationale for his opinion by noting that physical examination did not support the objective complaints as there was no evidence of reduced strength, muscle atrophy, or loss of sensation on examination. He further noted that an EMG study showed partial denervation at C5 through C7 that was not supported by weakness on physical examination. Dr. Krisiloff concluded that appellant had no further evidence of brachial neuritis, carpal tunnel syndrome, or an employment-related aggravation of cervical disc disease. He asserted that appellant might not be able to lift 70 pounds as required as a mail handler due to his underlying cervical degenerative condition and recommended an FCE. Dr. Krisiloff explained, however, that any inability to perform regular work duties would result from appellant's underlying cervical degenerative disc disease rather than his work injury.

[11] *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

[12] *J.M.*, 58 ECAB 478 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[13] *Manuel Gill*, 52 ECAB 282 (2001).

On October 30, 2013 Dr. Krisiloff reviewed the results of an August 2013 FCE and found that appellant had no residuals of his temporary aggravation of cervical spondylosis based on the results of the FCE. He further determined that appellant could perform his duties as a mail handler. As Dr. Krisiloff's opinion is detailed, well rationalized and based on a proper factual background, it is entitled to the special weight accorded an impartial medical examiner.[14]

Appellant's remaining medical evidence is insufficient to overcome the weight afforded to Dr. Krisiloff. Dr. Filippone submitted numerous progress reports and form reports throughout 2012 and 2013 finding that appellant was disabled from employment. On December 5, 2012 he reviewed the results of diagnostic studies and recommended against an FCE as it might hurt appellant. In a form report dated December 3, 2013, Dr. Filippone diagnosed cervical radiculopathy and found that appellant was totally disabled. He, however, was on one side of the conflict resolved by Dr. Krisiloff. A medical report from a physician on one side of a conflict resolved by an impartial medical examiner is generally insufficient to overcome the weight accorded the report of an impartial medical examiner or create a new conflict.[15]

Dr. Lawler provided reports in 2012 and 2013 describing his treatment of appellant with pain management. In a report dated November 27, 2013, he discussed appellant's complaints of pain and recommended that he obtain additional treatment and consult with a surgeon prior to returning to work. Dr. Lawler noted that appellant did not have weakness. He did not address causation or attribute the need for further treatment to appellant's employment and thus his opinion is of diminished probative value.[16]

On January 23, 2013 Dr. Arginteanu noted that appellant experienced pain in his neck and upper extremities moving heavy objects at work. He reviewed the findings on MRI scan study and recommended surgery. On December 2, 2013 Dr. Arginteanu recommended a left foraminotomy and decompression at C6-7 based on appellant's discogram but indicated that it was also reasonable to try a nucleoplasty. He did not, however, specifically address causation and thus his reports are of little probative value.[17]

On appeal, appellant's counsel contends that the SOAF did not include the accepted condition of left wrist sprain. However, the July 19, 2012 SOAF indicated that OWCP had accepted left wrist sprain under file number xxxxxx355. The SOAF did not describe appellant's modified work duties from 2009 to 2011, however, Dr. Krisiloff noted in his report that he had performed modified work beginning December 2009.

Counsel also argues that appellant is unable to work as a mail handler based on the FCE and Dr. Krisiloff's report. Dr. Krisiloff, however, specifically found that he had no residuals or disability from his accepted conditions and that any limitations resulted from nonemployment-related cervical degenerative disc disease.

[14] *See J.M., supra* note 12; *Katheryn E. Demarsh*, 56 ECAB 677 (2005).

[15] *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

[16] *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

[17] *Id*.

Appellant's counsel additionally asserts that Dr. Krisiloff's opinion is speculative, inconsistent, and not based on a review of objective testing. As discussed, however, Dr. Krisiloff provided a comprehensive and well-rationalized report and thus his opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight of the evidence.[18]

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's entitlement to wage-loss compensation and authorization for medical benefits effective February 3, 2014 as he had no further residuals of his accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the August 18, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 27, 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

[18] *See R.C.*, 58 ECAB 238 (2006); *Bryan O. Crane*, 56 ECAB 713 (2005).