

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

O.C., Appellant)
and) Docket No. 15-0404
U.S. POSTAL SERVICE, POST OFFICE,) Issued: November 19, 2015
Federal Way, WA, Employer)
)

Appearances:

Howard L. Graham, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 8, 2014 appellant, through counsel, filed a timely appeal from a June 11, 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 the case.

ISSUE

The issue is whether OWCP met its burden of proof to justify termination of appellant's compensation benefits for her accepted injury effective June 12, 2014.

FACTUAL HISTORY

This claim has previously been before the Board. In a decision dated August 17, 2012, the Board reversed OWCP's decision dated June 28, 2011, finding that OWCP had not met its burden of proof to terminate benefits effective November 19, 2010. The Board determined that

¹ 5 U.S.C. § 8101 *et seq.*

there was a conflict of opinion between an OWCP referral physician, Dr. Richard G. McCollum, a Board-certified orthopedic surgeon, and appellant's treating physician, Dr. Arnel M. Brion, a Board-certified orthopedic surgeon, with regards to whether appellant had residuals of her accepted work-related condition of neck sprain and sprain of the lumbosacral joint ligament. The facts of the case as of that date are set forth in the Board's prior decision and are incorporated herein by reference.²

To resolve the medical conflict, on March 14, 2013, OWCP referred appellant to Dr. Donald D. Hubbard, a Board-certified orthopedic surgeon. It issued a notice of proposed termination of all benefits based on Dr. Hubbard's March 29, 2013 report. However, counsel was not provided with proper notice of the referee examination. In a memorandum dated August 15, 2013, OWCP noted that pursuant to OWCP procedures,³ appellant's counsel of record was required to receive notice of the referee examination and be provided the name of the referee physician. It found that as a result of this error appellant would be scheduled for a new referee examination.

Appellant was treated by a physician assistant on February 6 and September 10, 2013, for worsening chronic low back pain. He noted diffuse tenderness over the lumbar paraspinal muscle bands and diagnosed chronic low back pain and lumbosacral joint sprain.

Appellant was treated by Dr. Yong Zhu, a Board-certified anesthesiologist, from March 1 to July 12, 2013 for low back pain. Dr. Zhu reported onset of radiating back pain on October 23, 2007 when she was involved in a motor vehicle accident while driving a postal truck. He noted findings on examination of intact strength, decreased sensation at left L5 distribution, positive straight leg test on the left, and decreased range of motion of the lumbar spine. Dr. Zhu diagnosed chronic pain, low back pain, and radicular syndrome of the lower limbs. On May 16 and December 20, 2013 he opined that based on appellant's clinical presentation and physical examination she would benefit from lumbar sacral facet injections.

To resolve the medical conflict, on November 26, 2013, OWCP referred appellant to Dr. St. Elmo Newton, III, a Board-certified orthopedic surgeon.⁴ In a December 31, 2013 report, Dr. Newton noted reviewing the record, including the history of appellant's work injury, and examining her. He noted findings on examination of her walking with an awkward wide-based gait, Spurling's maneuver caused pain, light touch on the posterior cervical, thoracic and lumbar spine caused complaints of significant pain, there was slight left scoliosis and appellant hyper-reacted when touched in this area, and rotation was guarded with complaints of pain. The

² Docket No. 12-0432 (issued August 17, 2012). On October 23, 2007 appellant, a letter carrier, was injured when her government automobile was hit by another vehicle. OWCP accepted her claim for a neck sprain and sprain of the lumbosacral joint ligament. Appellant stopped work on October 23, 2007 and returned to part-time limited-duty work on February 7, 2008, for four hours per day.

³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500(4)(d)(1-4) (July 2011).

⁴ The November 26, 2013 referral notice advised that a conflict in medical evidence existed in appellant's case and a new referee examination was scheduled for December 31, 2013 at 9:00 a.m. The notice was sent to appellant's counsel of record.

neurological examination of the upper extremities revealed decreased light touch sensation on the fingers of the right hand, reflexes in the right arm were generally less than the left, neurological examination of the lower extremities revealed equal reflexes, normal sensation to light touch, muscle strength was equal bilaterally, and straight leg raising was negative while seated. Dr. Newton diagnosed cervical and lumbar sprain, related to the October 23, 2007 injury, evidence of L5-S1 disc bulge without evidence of neurologic impingement, severe pain behavior, and disability conviction. He opined that the residuals of appellant's rear-end auto accident resolved and there were no objective findings on examination. Dr. Newton noted severe pain behavior as manifested by body gyrations to light touch on her neck, skull, and low back. He opined that further medical treatment would not be beneficial for appellant. Dr. Newton believed chiropractic treatment would be palliative at best and noted that there was no objective evidence to continue narcotics, gabapentin, Skelaxin, or Lidoderm. He noted past evidence of carpal tunnel syndrome but no clinical evidence at this time. Dr. Newton reported appellant had radiographic evidence of a midline L5-S1 disc bulge. He noted her job as she described it required lifting up to 70 pounds which she was unable to do. Dr. Newton opined that any restrictions on appellant's ability to do any reasonable activity were "driven by her disability conviction and her pain behavior." He indicated that she could be gainfully employed and would be a candidate for vocational rehabilitation and reemployment in the future.

On March 7, 2014 OWCP proposed to terminate all compensation benefits, finding that Dr. Newton's December 31, 2013 report established no continuing residuals of her work-related conditions.

On April 3, 2014 appellant, through counsel, disagreed with the proposed termination. She asserted that OWCP failed to send counsel a statement of conflict, a list of questions to the referee physician, and a statement of accepted facts prior to the referee examination. Counsel asserted that the second opinion report, which was the basis of the conflict, was over three years old and the referee physician's report was not rationalized.

On September 23, 2013 appellant was treated by Dr. Alan B. Brown, a Board-certified orthopedist, for low back and bilateral knee pain. She reported being involved in a motor vehicle accident in her postal truck. Appellant noted findings of bilateral medial joint line tenderness and diffusely localized lumbar spine pain. Dr. Brown diagnosed disc degeneration and degenerative joint disease of the knee. Appellant submitted reports from Dr. Zhu dated September 24, 2013 to March 21, 2014 who diagnosed lumbosacral joint sprain. He administered bilateral L5-S1 transforaminal epidural steroid injections. In reports dated March 13 to April 24, 2014, Dr. Zhu treated appellant for worsening low back pain. He noted findings on examination of positive straight leg raises on the left side and pain with range of motion. Dr. Zhu diagnosed lumbosacral joint sprain and chronic pain. He recommended additional lumbar facet blocks, diet, and exercise.

In a decision dated June 11, 2014, OWCP terminated appellant's medical and wage-loss compensation benefits effective June 12, 2014 finding that Dr. Newton's December 31, 2013 report was the weight of the medical evidence and established that she had no continuing residuals of her accepted conditions.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁷

ANALYSIS

OWCP accepted that appellant sustained a neck sprain and sprain of the lumbosacral joint ligament. Appellant stopped work on October 23, 2007 and returned to work on February 7, 2008, limited duty, four hours per day. On June 28, 2011 OWCP terminated her compensation effective November 19, 2010, based on Dr. McCollum, an OWCP second opinion physician's examination and report. Subsequently, the Board reversed OWCP termination decision dated June 28, 2011. The Board found a conflict in medical opinion between Dr. McCollum and Dr. Brion, appellant's treating physician, with regard to whether appellant had residuals of her accepted work-related conditions of neck sprain and sprain of the lumbosacral joint ligament and whether she could return to work full time. The Board instructed OWCP to refer appellant to a referee physician. Consequently, OWCP referred appellant to Dr. Newton to resolve the conflict.⁸

The Board finds that, under the circumstances of this case, the opinion of Dr. Newton is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that disabling residuals of appellant's work-related conditions have ceased. Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁹

In a December 31, 2013 report, Dr. Newton reviewed appellant's history, noted findings and determined that she had no objective complaints or findings due to the accepted conditions. He opined that the residuals of her rear-end motor vehicle accident resolved. Dr. Newton noted

⁵ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁶ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁷ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

⁸ OWCP initially referred appellant to Dr. Donald D. Hubbard, a Board-certified orthopedic surgeon. Counsel was not provided with proper notice of the referee examination. OWCP, thereafter, referred appellant to a second referee physician. *See supra* note 3; *see also Rosita Mahana*, 50 ECAB 331 (1999).

⁹ *Solomon Polen*, 51 ECAB 341 (2000). *See* 5 U.S.C. § 8123(a).

severe pain behavior and hyper-reaction as manifested by body gyrations to light touch on appellant's neck, skull, and low back. He diagnosed cervical and lumbar sprain, related to the October 23, 2007 injury and severe pain behavior and disability conviction. Dr. Newton opined that there was no objective evidence to support any further medical treatment. He opined that any work restrictions were due to appellant's "disability conviction and her pain behavior." Dr. Newton opined that she could be gainfully employed and would be a candidate for vocational rehabilitation and reemployment in the future.

Appellant submitted reports from Dr. Zhu, dated March 1 to July 12, 2013, who treated her for low back pain. She reported onset of radiating back pain on October 23, 2007 when she was involved in a motor vehicle accident while driving a postal truck. Dr. Zhu diagnosed chronic pain, low back pain, and radicular syndrome of the lower limbs. Similarly, on May 16, 2013, he reported treating appellant since February 2013 for back pain following an automobile accident at work. Although Dr. Zhu supported that she had continuing symptoms, none of the reports specifically explain how her current condition and continuing disability was causally related to the accepted employment condition.¹⁰ He did not provide medical rationale to explain why the work injury would cause a continuing neck sprain and sprain of the lumbosacral joint ligament. Other reports from Dr. Zhu are of limited probative value as these reports do not address how appellant's current condition and disability was causally related to the accepted injury.¹¹

On September 23, 2013 appellant was treated by Dr. Brown for low back pain and bilateral knee pain. She reported driving her postal truck and being involved in a motor vehicle accident. Dr. Brown diagnosed disc degeneration and degenerative joint disease of the knee. He provided an impairment rating. Dr. Brown's report is of limited probative value as this report does not specifically address whether appellant had residuals of her accepted neck sprain and sprain of the lumbosacral joint ligament.¹² Thus, the reports of Drs. Zhu and Brown are insufficient to overcome the weight of Dr. Newton's report or to create a new conflict.

Appellant was also treated by a physician assistant on February 6 and September 10, 2013. The Board has held that treatment notes signed by a physician assistant are not considered medical evidence as this provider is not a physician under FECA.¹³

For these reasons, OWCP met its burden of proof to terminate appellant's benefits for the accepted neck sprain and sprain of the lumbosacral joint ligament.

¹⁰ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (where the Board found that a medical opinion not fortified by medical rationale is of little probative value).

¹¹ *Jaja K. Asaramo*, 55 ECAB 200 (2004) (medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship).

¹² *Id.*

¹³ See *David P. Sawchuk*, 57 ECAB 316 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA); 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law).

On appeal appellant, through counsel, asserted that she continued to have residuals of her accepted work-related condition. As noted above, the Board finds that Dr. Newton's opinion constitutes the special weight of the medical evidence and is sufficient to justify OWCP's termination of wage-loss and medical benefits for the accepted conditions. Dr. Newton noted reviewing the record. He opined that there was not a work-related reason for disability or treatment and his opinion is found to be probative evidence and reliable.

Appellant asserted that OWCP improperly terminated her benefits as it did not send her attorney a statement of conflict, list of questions and statement of accepted facts prior to the referee examination. The Board finds this argument to be without merit. On November 26, 2013 OWCP notified appellant and her counsel that a conflict of medical evidence existed and that an examination was being arranged under the provisions of 5 U.S.C. § 8123. These acts provided appellant an opportunity to raise any objection to the selected physician prior to examination. It provided the name and address of the physician, a warning that benefits may be suspended for failure to attend the examination, and information on claiming travel expenses. The notice was in compliance with OWCP procedures.¹⁴

Appellant further asserted that the second opinion report from Dr. McCollum, which was the basis of the conflict of opinion, was over three years old and therefore stale evidence of diminished probative value. The Board notes that a conflict of medical opinion was determined to be between OWCP referral physician, Dr. McCollum, who issued a report dated August 12, 2010 and appellant's treating physician, Dr. Brion, who issued reports dated September 2 and 10, 2010. At the time of the conflict of opinion in 2010, Dr. McCollum's August 12, 2010 report was reasonably current and sufficient to establish a conflict of opinion.

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 has met its burden of proof to justify termination of appellant's compensation benefits for her accepted injury effective June 12, 2014.

¹⁴ See *supra* note 3.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 11, 2014 is affirmed.

Issued: November 19, 2015
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board