United States Department of Labor
Employees' Compensation Appeals Board

R.W., Appellant	)	
and	)	**Docket No. 15-1498**
	)	**Issued: October 16, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Jacksonville, FL, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 1, 2015 appellant, through counsel, filed a timely appeal from a March 26, 2015 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 appellant has met his burden of proof to establish disability beginning July 5, 2008 causally related to his May 14, 2008 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[2] OWCP accepted that on May 14, 2008 appellant, then a 46-year-old mail handler, sustained a low back contusion after he was struck

[1] 5 U.S.C. § 8101 *et seq.*

[2] Docket No. 10-382 (issued October 18, 2010).

from behind by a general purpose container. Appellant stopped work on May 21, 2008 and did not return. He received continuation of pay from May 12 through July 4, 2008.

By decisions dated July 24 and October 19, 2009, OWCP denied appellant's claim for wage-loss compensation beginning July 5, 2008 causally related to the accepted May 14, 2008 low back contusion. Appellant appealed to the Board on November 25, 2009.

In a decision dated October 18, 2010, the Board set aside the July 24 and October 19, 2009 OWCP decisions denying appellant's claim for disability compensation finding that the reports from Dr. John E. Carey, the attending Board-certified anesthesiologist, were sufficient to warrant further development of the evidence.[3] The Board instructed OWCP, on remand, to further develop the medical evidence. The facts and circumstances as set forth in the prior decision of the Board are incorporated by reference.

On November 24, 2010 OWCP requested that Dr. Carey provide an updated opinion.

In a December 17, 2010 response, Dr. Carey referred OWCP to his initial evaluation reports.

In a progress report dated January 28, 2011, Dr. Carey evaluated appellant. He attributed the diagnosed conditions to the May 14, 2008 employment injury. Dr. Carey provided findings on examination and diagnosed cervical and lumbar disc displacement without myelopathy, sciatica, lumbago, and brachial neuritis. He provided similar progress reports dated 2011 to 2013.

Electrodiagnostic studies obtained on March 7, 2011 yielded normal findings.

On April 22, 2011 OWCP referred appellant to Dr. Steven J. Lancaster, a Board-certified orthopedic surgeon, for a second opinion examination. It prepared a statement of accepted facts indicating that it had accepted the claim for a back contusion and noting that he had previously injured his neck and lower back in February 1995, May 1997, and August 2005 motor vehicle accidents. OWCP advised that appellant had not submitted any medical records regarding his prior injuries.

In a report dated June 15, 2011, Dr. Lancaster opined that appellant's back contusion had resolved within a few months of his injury. He diagnosed lumbar spondylosis and a lumbar and cervical herniated nucleus pulposus that preexisted the May 14, 2008 work injury. Dr. Lancaster noted that the statement of accepted facts did not list an aggravation of a preexisting cervical disc herniation as an accepted condition. He concluded that the L4-5 herniated disc was unrelated to

[3] In a report dated July 29, 2009, Dr. Carey discussed his treatment of appellant in 2005 for the effects of motor vehicle accidents in 1995, 1999, and 2004. He advised that at the end of treatment in 2006 appellant had few symptoms. Dr. Carey examined appellant on June 4, 2008 and found muscle spasms, a positive straight leg raise and limited cervical and lumbar range of motion. He obtained diagnostic studies which he found showed a new central disc herniation at L4-5 effacing the thecal sac and corresponding to appellant's complaints of left lower radiculopathy. Dr. Carey also found an acute progression of a preexisting disc herniation at C4-5 without acute impingement. He concluded that appellant sustained new injuries due to his May 14, 2008 employment injury.

the accepted employment injury. Dr. Lancaster found that appellant had work restrictions as the result of nonemployment-related conditions.

On August 12, 2011 OWCP requested that Dr. Lancaster address the issue of whether appellant sustained an aggravation of a preexisting cervical disc herniation due to the May 14, 2008 work injury. In an August 24, 2011 response, Dr. Lancaster advised that "a blow to the lumbar spine would not normally cause a condition in the neck unless it was a severe whiplash-type phenomenon, which does not appear to have been what was described. As such I do not believe that there was any aggravation of a preexisting cervical disc herniation by history and available medical records." Dr. Lancaster opined that appellant's back contusion "would have healed by the date of the original report in June 2011 and as such any restrictions that are placed are based on his preexistent problems."

On October 28, 2011 OWCP determined that a conflict existed between Dr. Carey and Dr. Lancaster regarding the diagnosed conditions due to the May 14, 2008 injury and whether appellant had any further disability due to the injury. It referred him to Dr. Robert Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated December 8, 2011, Dr. Elkins reviewed appellant's history of injury and noted that his prior low back problems had required him to use a cane from 1995 until 2005. He also discussed the medical evidence of record and his current complaints of back pain radiating into the left lower extremity with numbness in his toes and foot. On examination Dr. Elkins provided range of motion findings and found a nonphysiologic loss of sensation of the right lower extremity. He diagnosed chronic low back pain, lumbar strain, a possible L4-5 herniated disc, possible spondylosis, moderate symptom magnification, and a herniated cervical disc not accepted as work related. Dr. Elkins related, "I really cannot state that the accepted conditions are still prevalent in [appellant]. A lumbar sprain certainly should have resolved by this time. His findings are mixed with moderate symptom magnification and pain accentuation, but he does have some objective findings on imaging studies. I feel that his lumbar sprain has resolved." He further stated, "I do not feel [appellant's] cervical spine is related in any way to his lumbar spine. I do not feel a blow in the back would cause the symptoms he is complaining of." Regarding whether the L4-5 disc herniation resulted from the May 14, 2008 work injury, Dr. Elkins related, "This is difficult to state whether it was preexisting or not. [Appellant] has a prolonged history of low back pain, chronic low back pain, and the age of this herniated disc on his imaging studies is difficult to determine." He advised that appellant's subjective complaints outweighed the objective findings. In response to the question of whether appellant had limitations from his accepted work injury, Dr. Elkins opined that appellant could work with restrictions.

By decision dated September 27, 2013, OWCP denied appellant's claim for disability beginning July 5, 2008. It found that Dr. Elkins' opinion represented the weight of the evidence and established that his current conditions were unrelated to his work injury.

On October 3, 2013 appellant, through counsel, requested a telephone hearing before an OWCP hearing representative.

Following a preliminary review of the record, in a decision dated February 10, 2014, an OWCP hearing representative set aside the September 27, 2013 decision. She found that

Dr. Elkins provided insufficient rationale for his opinion. The hearing representative instructed OWCP to obtain a supplemental report from Dr. Elkins addressing whether the accepted condition had resolved, whether the work injury aggravated appellant's preexisting cervical condition, whether it caused the herniated lumbar disc, and whether he had any disability beginning July 2008.

On February 19, 2014 OWCP requested that Dr. Elkins clarify his opinion.

In a supplemental report dated February 20, 2014, Dr. Elkins advised that he did not believe that appellant's neck condition was due to the 2008 employment injury to his low back. In answer to the question posed by OWCP regarding whether the May 14, 2008 employment injury aggravated a preexisting condition, he related:

> "Low back pain, degenerative disc disease, and degenerative arthritis are conditions which tend to progress, recur, and most of the time get worse with age. [W]hether or not he had a herniated disc on a prior [magnetic resonance imaging] MRI [scan] from the prior incidences is unknown, but he had use of a cane, had multiple invasive treatments and in looking back at his records I feel that his prior conditions appear to be moderately severe and certainly need to be taken into consideration when looking at the July 2008 report."

Dr. Elkins further stated:

> "There is always a possibility that there was an aggravation of a preexisting problem, however [appellant's] aggravation appears to be mostly subjective in nature and some of this is nonphysiologic in nature and, if the only accepted diagnosis is a lumbar sprain, then this should have resolved. I feel this was an exacerbation of his problems causing a temporary increase in symptomatology, and I cannot state that his lumbar sprain caused any permanent aggravation to his underlying condition."

Dr. Elkins noted that the herniated disc demonstrated on MRI scan was the sole objective finding and may well have been present prior to the work injury. He advised that he could identify whether the disc herniation was preexisting by reviewing an MRI scan that predated 2008. Dr. Elkins concluded, "I feel the aggravation was temporary, and feel the aggravation to [appellant's] low back ceased on March 27, 2011, after his normal electrodiagnostic studies."

On March 12, 2014 OWCP requested that appellant provide records documenting his medical treatment prior to 2008, including any MRI scan studies of his back.

In a decision dated June 6, 2014, OWCP denied appellant's claim for compensation for disability beginning July 5, 2008.

On June 13, 2014 appellant, through counsel, requested a telephone hearing. At the telephone hearing, held on January 13, 2015, appellant related that he sustained additional injuries to his left shoulder and teeth on May 14, 2008. The hearing representative requested that he provide medical records addressing his neck and back condition prior to May 14, 2008.

In a report dated August 15, 2013, received by OWCP on March 10, 2015, Dr. Kevin Murphy, a Board-certified orthopedic surgeon, evaluated appellant for pain in his left shoulder.[4] He obtained a history of symptoms "present since 2008 when he smashed his arm between two containers." Dr. Murphy diagnosed shoulder osteoarthritis, a rotator cuff tear, tendinitis/bursitis of the rotator cuff, shoulder synovitis, and shoulder impingement.[5] On September 26, 2013 Dr. Stephan Esser, a Board-certified physiatrist, diagnosed left shoulder pain, impingement, and synovitis. He noted that appellant provided a history of shoulder problems after a May 2008 employment injury.

By decision dated March 26, 2015, an OWCP hearing representative affirmed the June 6, 2014 decision, relying on the report of Dr. Elkins.

LEGAL PRECEDENT

The term disability as used in FECA[6] means the incapacity because of an employment injury to earn the wages that the employee was receiving at the time of injury.[7] Whether a particular injury caused an employee disability for employment is a medical issue which must be resolved by competent medical evidence.[8] When the medical evidence establishes that the residuals of an employment injury are such that, from a medical standpoint, they prevent the employee from continuing in the employment held when injured, the employee is entitled to compensation for any loss of wage-earning capacity resulting from such incapacity.[9] The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so would essentially allow employees to self-certify disability and entitlement to compensation.[10]

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.[11] 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

[4] In a report dated November 24, 2014, Dr. Kent New, a Board-certified neurosurgeon, diagnosed chronic pain syndrome. He noted that appellant had received a pain pump one month earlier.

[5] The record also contains reports from a physician assistant dated September 12, 2013 and January 8, 2014.

[6] 5 U.S.C. § 8101 *et seq.*; 20 C.F.R. § 10.5(f).

[7] *Paul E. Thams*, 56 ECAB 503 (2005).

[8] *Id*.

[9] *Id*.

[10] *William A. Archer*, 55 ECAB 674 (2004); *Fereidoon Kharabi*, 52 ECAB 291 (2001).

[11] 5 U.S.C. § 8123(a).

physician who is qualified in the appropriate specialty and who has no prior connection with the case.[12]

OWCP's procedures provide:

> "If the referral specialist submits an opinion which is equivocal, lacks rationale, or fails to address the specified medical issues or conflict, the CE [claims examiner] should seek clarification or further rationale from that physician. When the OWCP undertakes to develop the evidence by referring the case to an [OWCP]-selected physician, it has the obligation to seek clarification from that physician upon receiving a report that did not adequately address the issues that OWCP sought to develop. As such, the CE should seek clarification from the referee physician and request a supplemental report to clarify specially noted discrepancies or inadequacies in the initial report.
>
> "Only if the referee physician does not respond, or does not provide a sufficient response after being asked, should the CE request a new referee examination."[13]

ANALYSIS

OWCP accepted that appellant sustained a low back contusion as the result of a May 14, 2008 work injury. On prior appeal, the Board found that the opinion of Dr. Carey was sufficient to warrant further development to determine whether he sustained an aggravation of a preexisting cervical disc herniation or a herniated lumbar disc due to the work injury and, if so, any disability. Following development of the evidence, OWCP found that a conflict existed between Dr. Carey, an attending physician, and Dr. Lancaster, an OWCP referral physician, regarding whether appellant sustained a herniated lumbar disc and an aggravation of a preexisting cervical disc herniation causally related to his May 14, 2008 employment injury. It referred him to Dr. Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination.

When a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a prior factual and medical background, must be given special weight.[14] The Board finds, however, that Dr. Elkins' opinion is insufficient to resolve the conflict in medical opinion. In his December 8, 2011 report, Dr. Elkins discussed appellant's history of back problems necessitating the use of a cane from 1995 to 2005. He diagnosed chronic low back pain, lumbar strain, a possible herniated disc at L4-5, possible spondylosis, a herniated cervical disc, and moderate symptoms magnification. Dr. Elkins found that appellant's cervical condition was unrelated to the May 14, 2008 employment injury. He advised that the lumbar sprain had resolved and that it was "difficult to state" whether the disc herniation at L4-5 occurred before the May 14, 2008 work

[12] 20 C.F.R. § 10.321.

[13] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810(11)(e) (September 2010).

[14] *See M.M.*, Docket No. 15-0979 (issued August 27, 2015); *James F. Weikel*, 54 ECAB 660 (2003).

injury. In response to OWCP's question regarding whether appellant had restrictions due to the accepted injury, Dr. Elkins responded that appellant could work with restrictions.

In a decision dated February 10, 2014, an OWCP hearing representative determined that Dr. Elkins' December 8, 2011 report was insufficiently rationalized to resolve the conflict of medical opinion. Based on the hearing representative's instructions on February 19, 2014, OWCP requested that Dr. Elkins provide a rationalized opinion regarding whether appellant's May 14, 2008 employment injury aggravated a preexisting cervical condition, whether he sustained a herniated disc due to the work injury, and whether any employment-related cervical or lumbar condition caused disability beginning July 2008.

In the supplemental report, Dr. Elkins indicated that appellant's neck condition was unrelated "to his low back incident in 2008 as stated in the original report." He found that the issue of whether appellant sustained a herniated disc due to the injury could be resolved by looking at an MRI scan study that predated the injury. Dr. Elkins noted that he had an extensive history of back problems before the May 14, 2008 injury and elements of symptoms magnification on examination. He found that the lumbar sprain had not permanently aggravated any underlying condition. Dr. Elkins opined that the temporary aggravation of appellant's preexisting condition due to his May 2008 work injury ceased on March 27, 2011.

Dr. Elkins' opinion is insufficient to resolve the conflict in medical opinion. The Board notes that Dr. Elkins identified the accepted condition as a lumbar strain rather than a lumbar contusion. Consequently, Dr. Elkins did not directly address the issue of whether appellant had any disability due to his accepted condition as requested by OWCP.

Dr. Elkins further found that it was difficult to determine whether the employing injury caused the disc herniation at L4-5, particularly without reviewing MRI scan studies from before May 2008. He advised that appellant's lumbar strain, which he incorrectly identified as the accepted condition, did not cause a permanent aggravation of his lumbar condition. Dr. Elkins found, however, that he had a temporary aggravation of an unspecified lumbar condition that resolved on March 27, 2011. His opinion is equivocal regarding whether appellant sustained an additional condition due to the May 14, 2008 employment injury. Dr. Elkins also appears to find that appellant had disability due to the employing injury until March 27, 2011 without providing any rationale for his opinion.

Appellant has the burden to establish that he sustained additional employment-related conditions and disability beginning July 5, 2008. Once OWCP undertakes development of a claim, however, it has the burden to resolve the relevant issue in the case.[15] As noted above in OWCP's procedures, as well as in Board precedent,[16] when OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report. When the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report does not

[15] *See Richard F. Williams*, 55 ECAB 343 (2004).

[16] *See Harold Travis*, 30 ECAB 1071, 1078 (1979).

sufficiently address the issues, OWCP should refer the claimant to a second impartial specialist.[17] On remand, OWCP should refer appellant to a new impartial medical examiner to resolve the issues of whether he sustained any periods of employment-related disability. Following such development as deemed necessary, it should issue a *de novo* decision.[18]

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2015 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this opinion of the Board.

Issued: October 16, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

[17] *Id*.

[18] On August 15, 2013 Dr. Murphy noted that appellant related a history of left shoulder pain beginning in 2008 after he smashed his arms between containers. He diagnosed left shoulder osteoarthritis, a rotator cuff tear, tendinitis, synovitis, and impingement. On September 26, 2013 Dr. Esser treated appellant for left shoulder pain, impingement, and synovitis. He discussed his history of a May 2008 work injury and noted that the incident was a matter of "[ongoing] litigation." Neither physician, however, directly related any diagnosed condition to the May 14, 2008 employment injury, accepted only for a lumbar contusion. Consequently their reports are of little probative value. *See A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004).