United States Department of Labor
Employees' Compensation Appeals Board

V.C., Appellant	)	
and	)	**Docket No. 14-1912**
	)	**Issued: September 22, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Tampa, FL, Employer	)	

Appearances:
Lenin V. Perez, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 3, 2014 appellant, through his representative, filed a timely appeal from an August 11, 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 compensation benefits effective December 7, 2012 on the grounds that his accepted cervical condition had ceased without residuals.

On appeal, appellant's representative contends that the second opinion evaluation lacked probative value.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In December 2011, OWCP accepted that appellant, then a 46-year-old mail processing clerk, sustained a subluxation at C6-7 due to factors of his federal employment, including repetitive loading and sweeping on an automation machine. Appellant received appropriate medical and wage-loss compensation benefits.

OWCP referred appellant to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion evaluation on July 27, 2012 to determine the nature and extent of his employment-related condition. In an August 6, 2012 report, Dr. Dinenberg reviewed a statement of accepted facts, history of the injury, and the medical evidence of record and conducted a physical examination. He noted that appellant had a history of cervical strain, cervical disc syndrome, cervical spondylosis, radiculopathy of the right upper and lower extremity, lumbar strain, lumbar disc syndrome, and lumbar herniated disc at L4-5 and L5-S1. Upon examination of the cervical spine, Dr. Dinenberg found decreased range of motion. There was 20 degrees of flexion, 30 degrees of rotation to the left and right, and 10 degrees of extension. Dr. Dinenberg found no radiation of pain with extension or rotation either to left or right on the side cervical spine. Appellant had decreased sensation to light touch involving the dorsal and plantar surfaces of the right upper extremity in a glove distribution bilaterally. Dr. Dinenberg indicated that magnetic resonance imaging (MRI) scan studies dated November 1, 2011 revealed a two-millimeter posterior subluxation of C6-7. He opined that the subluxation at C6-7 was not appellant's employment-related condition. Dr. Dinenberg opined that appellant "sustained a cervical and lumbar sprain/strain as a result of the work injury in October 2011." He indicated that the cervical subluxation at C6-7 was degenerative and anticipated that it would be a chronic, long-lasting condition that would most likely progress over time. Dr. Dinenberg opined that appellant's subluxation at C6-7 was "not work related" and indicated that he was "unable to cite specific residuals based on the cervical subluxation, as [he did] not feel that this [was appellant's] work-related diagnosis."

An electromyography and nerve conduction studies (EMG/NCS) of the upper and lower extremities dated August 15, 2012 were abnormal with findings mostly consistent with bilateral S1 radiculopathies.

In a September 13, 2012 addendum report, Dr. Dinenberg reviewed the August 15, 2012 EMG/NCS and found that they revealed abnormalities with bilateral S1 radiculopathies on the lower extremity. No upper extremity abnormalities were noted. Dr. Dinenberg reiterated his opinion that appellant's cervical and lumbar strains were causally related to his federal employment. He indicated that these conditions were typically resolved within a 6- to 12-week period and, therefore, appellant's medical restrictions were secondary to his preexisting conditions and not to his employment-related cervical or lumbar strains. Dr. Dinenberg opined that appellant had reached maximum medical improvement from his employment injury.

By letter dated October 17, 2012, OWCP notified appellant that it proposed to terminate his compensation benefits based on the weight of the medical evidence, as represented by Dr. Dinenberg. It afforded him 30 days to submit additional evidence or argument in disagreement with the proposed action.

By decision dated December 7, 2012, OWCP terminated appellant's compensation benefits effective that day. It found the weight of the evidence was represented by Dr. Dinenberg.

On December 27, 2012 appellant, through his representative, requested a telephonic oral hearing before an OWCP hearing representative, which was held on April 17, 2013.

By decision dated July 2, 2013, OWCP hearing representative affirmed the December 7, 2012 termination decision, finding that Dr. Dinenberg represented the weight of the medical evidence.

In a letter received by OWCP on August 13, 2013 appellant, through his representative, requested reconsideration. He submitted a position description, a description of the automation machine, and illustrations of his duties. Appellant also submitted an April 11, 2014 physical capacity evaluation and reports dated August 8, 2013 through February 27, 2014 from Dr. Orlando Ruano, a Board-certified psychiatrist, diagnosing major depressive disorder.

In reports dated August 26 through October 22, 2013, Dr. Claude Barosy, a family practitioner, diagnosed chronic cervical strain, cervical disc syndrome, cervical spondylosis most pronounced at C5-6 and C6-7, right and left upper extremity radiculopathy, chronic lumbosacral strain, lumbar disc syndrome, herniated lumbar disc at L4-5 and L5-S1, bilateral lower extremity radiculopathy, "subluxation of C6 on C7 of two millimeters and subluxation of C5 on C6 with one millimeter of anterior subluxation, [and] posterior subluxation of L5 on S1 of three millimeters."

Appellant submitted reports dated March 12, 2013 through April 10, 2014 from his attending physician Dr. Samy Bishai, an orthopedic surgeon, who diagnosed chronic cervical strain, cervical disc syndrome, cervical spondylosis most pronounced at C5-6 and C6-7, right and left upper extremity radiculopathy, chronic lumbosacral strain, lumbar disc syndrome, herniated lumbar disc at L4-5 and L5-S1, bilateral lower extremity radiculopathy, "subluxation of C6 on C7 of two millimeters and subluxation of C5 on C6 with one millimeter of anterior subluxation, [and] posterior subluxation of L5 on S1 of three millimeters." Dr. Bishai indicated that appellant continued to complain of pain in his neck with radiation down the arms, pain in his lower back with radiation down the legs, and pain in the upper back between the shoulder blades.

By decision dated August 11, 2014, OWCP denied modification of its July 2, 2013 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[2] 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

[2] *See S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

related to the employment.[3] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4] The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[5] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.[6]

Section 8123(a) of FECA provides in pertinent part: 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.[7] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[8]

ANALYSIS

In December 2011, OWCP accepted appellant's claim for subluxation at C6-7. It subsequently terminated his compensation benefits effective December 7, 2012 based on reports from Dr. Dinenberg, a Board-certified orthopedic surgeon serving as a second opinion examiner. On appeal, appellant's representative contends that the second opinion evaluation lacked probative value.

On July 10, 2012 OWCP referred a statement of accepted facts, comprised of a history of appellant's claim and a series of questions to Dr. Dinenberg for second opinion evaluation. The statement indicated that appellant sustained an injury to the back, neck, and shoulders as a result of his postal duties. It further stated that OWCP accepted the claim for subluxation at C6-7 and that appellant had stopped work on October 1, 2011. With regard to the inquiries, it specifically asked whether the work-related condition of subluxation at C6-7 had resolved, what are the current objective findings, what conditions are related to appellant's postal duties, whether he has any continuing restrictions, and if so are they temporary or permanent.

In his August 6, 2012 report, Dr. Dinenberg indicated that MRI scan studies dated November 1, 2011 revealed a two-millimeter posterior subluxation of C6-7. He determined that the subluxation at C6-7 was not appellant's employment-related condition and opined that appellant "sustained a cervical and lumbar sprain/strain as a result of the work injury in October 2011." Dr. Dinenberg concluded that appellant's subluxation at C6-7 was "not work

[3] *See I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[4] *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[5] *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[6] *See James F. Weikel*, 54 ECAB 660 (2003).

[7] 5 U.S.C. § 8123(a). *See R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[8] *See V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

related," indicating that he was "unable to cite specific residuals based on the cervical subluxation, as [he did] not feel that this [was appellant's] work-related diagnosis." In a September 13, 2012 addendum report, Dr. Dinenberg reiterated his opinion that appellant's cervical and lumbar strains were causally related to his federal employment that should have resolved with a 6- to 12-week period.

In his initial report of August 6, 2012, Dr. Dinenberg did not rely on the statement of accepted facts in formulating his opinion. He specifically concluded that appellant's accepted employment injury of October 10, 2011 was not the cause of his subluxation at C6-7 and attributed the subluxation at that level to a preexisting degenerative condition.

The Board finds the reports of Dr. Dinenberg to be of diminished probative value. It is well established that a physician's opinion must be based on a complete and accurate factual and medical background. When OWCP has accepted an employment condition as occurring in the performance of duty, the physician must base his opinion on the accepted facts.

In *Paul King*[9] the Board found that the report of an impartial medical examiner who disregarded a critical element of the statement of accepted facts was of diminished probative value. In *King*, the impartial medical examiner also disagreed with the medical basis for acceptance of a condition. The Board found that this defective report was not sufficient to resolve the existing conflict of medical opinion evidence.

Dr. Dinenberg likewise disregarded the statement of accepted facts and, as in *King*, did not rely on the statement of accepted facts for the determination of the initial injury of a subluxation at C6-7. The Board finds that his report is of diminished probative value as his opinion disregarded critical elements of the statement of accepted facts and is therefore flawed. The Board notes that it is the function of a medical expert to give an opinion only on medical questions, not to find facts.[10] Dr. Dinenberg disregarded the statement of accepted facts and as such his report is not based on an accurate history of injury and is therefore not sufficient to resolve the issue relative to OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits.[11]

For these reasons, the Board finds that Dr. Dinenberg's reports are of limited probative value on the relevant issue of this case and OWCP improperly relied upon his opinion to terminate appellant's compensation benefits.

[9] 54 ECAB 356 (2003).

[10] *Id.*

[11] *Id.*, *see also C.C.*, Docket No. 13-446 (issued May 15, 2013) (finding that the impartial medical examiner disagreed with an accepted condition and that his report was therefore of diminished probative value resulting in an unresolved conflict of medical opinion evidence and failure of OWCP to meet its burden of proof to terminate compensation benefits).

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation benefits effective December 7, 2012 on the grounds that his accepted cervical condition had ceased without residuals.

ORDER

IT IS HEREBY ORDERED THAT the August 11, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 22, 2015
Washington, DC

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

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

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