

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective July 20, 2012 as he no longer had any residuals or disability causally related to his accepted employment injury.

On appeal, counsel contends that the medical report of the second opinion physician is insufficient to meet OWCP's burden to terminate appellant's compensation benefits as his report is devoid of any explanation regarding the issue of whether the accepted aggravation was temporary or permanent. He states that the physician noted significant physical findings and work limitations, and recommended potential back surgery. Counsel, thus, contends that appellant continues to suffer disability from his accepted employment-related injury. Alternatively, he contends that there is a conflict in medical opinion between the second opinion physician and appellant's treating physician.

FACTUAL HISTORY

On March 14, 2011 OWCP accepted that on May 30, 2009 appellant, then a 46-year-old clerk, sustained an aggravation of preexisting radiculopathy of the lumbar spine as a result of lifting trays at work. Appellant stopped work, returned to work with restrictions on June 10, 2009 and performed full-duty work with restrictions as of August 16, 2010. Thereafter, he missed work intermittently commencing June 18, 2011 because the employing establishment had no work available within his restrictions. Appellant stopped work completely on September 16, 2011 and has not returned.

In a September 13, 2011 duty status report (Form CA-17), Dr. Steven D. Grossinger, an attending Board-certified neurologist specializing in pain management, provided an unknown diagnosis and advised that appellant could work eight hours a day with restrictions. In an October 3, 2011 form report, he advised that appellant was temporarily totally disabled until further notice. Dr. Grossinger stated that he was unfit to return to his mail processor position. In an office note dated October 3, 2011, he noted appellant's complaint of low back pain that extended into his left leg, greater than right, poor tolerance for prolonged standing, bending, and twisting. Dr. Grossinger provided examination findings and an impression of persistent signs of chronic lumbar strain with myofascial pain and sacroiliac dysfunction with lumbar radiculopathy which had been aggravated since the May 30, 2009 employment injury. He stated that appellant's restrictions remained the same.

OWCP scheduled appellant for a March 27, 2012 second opinion examination with Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon. In his medical report, Dr. Hanley reviewed the statement of accepted facts, the results of a lumbar magnetic resonance imaging scan, and history of the accepted May 30, 2009 employment injury and appellant's medical treatment. On physical examination, he found that appellant was not in any acute distress. Appellant had good range of motion. His back had limited motion. Appellant extended about 10 degrees and flexed about 40 degrees, but Dr. Hanley did not feel any spasm in the paraspinal muscles at rest. A straight leg raising test caused some back pain, more in the left than the right. Reflexes were intact at the ankle and absent at the knee, but strength was normal. The back was straight without any evidence of kyphosis, scoliosis, or spasm. Dr. Hanley diagnosed

degenerative disc disease at L5-S1 with left-sided radiculopathy. He did not believe that the effects of the work injury were still present. Dr. Hanley believed that appellant had a temporary aggravation of his condition. His condition was symptomatic prior to the aggravation and it remained symptomatic after the aggravation. Dr. Hanley stated that this meant the aggravation was temporary and resolved. He believed that appellant was fit for light-duty activities. However, the need for these light duties was not a result of the May 30, 2009 employment injury, but rather a consequence of a preexisting and progressive degenerative process well documented in the medical record. Dr. Hanley believed that appellant had clearly been unsuccessfully overtreated. He stated that appellant should consider the possibility of surgical intervention. Dr. Hanley advised that there was a chance that appellant's condition would not resolve even with surgical intervention and that it would leave him permanently limited to light-duty activities. In a March 27, 2012 work capacity evaluation (Form OWCP-5c), he listed appellant's work restrictions.

By letter dated April 25, 2012, OWCP requested that Dr. Grossinger review Dr. Hanley's March 27, 2012 report and provide an opinion with regard to whether he agreed with the findings.

By notice dated May 29, 2012, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits because Dr. Hanley's March 27, 2012 report found that he had no continuing residuals or disability due to his accepted May 30, 2009 employment injury. It noted that Dr. Grossinger had not responded to its April 25, 2012 letter. OWCP afforded appellant 30 days to submit additional evidence or argument regarding the proposed termination.

The employing establishment submitted a June 25, 2012 Form CA-17 report from Dr. Grossinger who diagnosed appellant as having depression and anxiety due to his May 30, 2009 employment injury. Dr. Grossinger advised that appellant could perform light-duty work with restrictions.

A June 25, 2012 office note of Dr. Grossinger provided examination findings and an impression of persistent chronic lumbar strain with myofascial pain, lumbar radiculopathy, and sacroiliac dysfunction as a result of appellant's May 30, 2009 work-related injury.

By decision dated July 23, 2012, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective July 20, 2012. It found that the medical evidence submitted was insufficient to establish any residuals or disability causally related to his May 30, 2009 employment-related injury.

In a July 25, 2012 letter, appellant, through counsel, requested a telephone hearing with an OWCP hearing representative which was held on April 16, 2013.

By decision dated July 3, 2013, an OWCP hearing representative affirmed the July 23, 2012 decision. He found that the weight of the medical opinion evidence rested with Dr. Hanley's March 27, 2012 report, which stated that appellant no longer had any employment-related residuals or disability.

In a June 30, 2014 letter, appellant's counsel requested reconsideration and submitted medical evidence. In a June 26, 2014 report, Dr. Grossinger reviewed Dr. Hanley's March 27, 2012 report and noted that there were contradictions evident in his report. He noted Dr. Hanley's finding that appellant had a temporary aggravation of his condition, that an ongoing requirement for a light-duty restriction was not related to his May 30, 2009 employment injury, and that the light-duty restriction was a consequence of a preexisting and progressive degenerative process. Dr. Grossinger indicated that appellant was working full duty without restriction prior to his May 30, 2009 work injury and that the preexisting process had not limited his activity until the aggravation. He noted Dr. Hanley's finding that appellant had persistent problems after the May 30, 2009 employment injury despite receiving various treatments which did not improve his condition and Dr. Hanley's recommendation for surgical intervention. Dr. Grossinger stated that, at no point did he indicate that appellant had improved following the May 30, 2009 employment injury and he acknowledged an aggravation. Dr. Hanley's statements were consistent with appellant's aggravation which had remained permanent and required his ongoing need for a restricted work-duty status.

Dr. Grossinger noted the definition of temporary aggravation under FECA guidelines and stated that appellant had an acknowledged aggravation, but he did not return to his previous physical status. Appellant worked in a full-duty status as of May 30, 2009, despite having a history of low back complaints. There was no gradual worsening of his status, but rather an abrupt worsening followed by an acknowledged requirement for modified/accommodated duty which had persisted. Dr. Grossinger noted the definition of permanent aggravation under FECA guidelines and reported that appellant's clinical course was consistent with this definition. He continued to work sporadically after his May 30, 2009 work injury and did so in excess of what was recommended which contributed to permanent aggravation of his accepted injury. Dr. Grossinger opined that appellant should be compensated for the intermittent dates he missed work due to the significant aggravation caused by his May 30, 2009 employment injury. Despite his best efforts to exceed his medical restrictions and continue working, appellant could not perform his full-job duties without a worsening of his condition. Dr. Grossinger related that this led to intermittent days missed from work and appellant's restrictions. It remained his opinion that these restrictions were reasonable, necessary, and causally related to the aggravation that occurred on May 30, 2009. Dr. Grossinger disagreed with Dr. Hanley's opinion that an underlying degenerative process caused a sudden worsening of appellant's status and requirement for these limitations.

In a September 26, 2014 decision, OWCP denied modification of its termination decision. It found that Dr. Grossinger's June 26, 2014 report was of diminished probative value because it was not based on any objective findings.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.³ It may not terminate compensation

³ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

without establishing that the disability ceased or that it was no longer related to the employment.⁴ The burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶ 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.⁷

ANALYSIS

OWCP accepted that appellant sustained an aggravation of preexisting lumbar radiculopathy while in the performance of duty on May 30, 2009. Appellant received monetary compensation after he stopped work. OWCP terminated his wage-loss compensation and medical benefits effective July 20, 2012 as the accepted condition ceased without residuals or disability. It based its termination on the medical opinion of Dr. Hanley, a second opinion physician.

As argued on appeal, the Board finds that Dr. Hanley's opinion is insufficient to meet OWCP's burden of proof to establish that the accepted aggravation of a preexisting lumbar condition had ceased without residuals. Although Dr. Hanley found, in his May 27, 2012 report, that the accepted May 30, 2009 aggravation of appellant's preexisting lumbar radiculopathy was temporary and it had resolved, he did not provide sufficient medical rationale to explain his conclusion that appellant no longer had any employment-related residuals. He reported that the underlying lumbar condition was symptomatic prior to the aggravation and it remained symptomatic after the aggravation which meant that the temporary aggravation had resolved. However, a medical report from John Hopkins Medical Department of Orthopedic Surgery dated January 8, 2009 notes appellant may be employed full-time, full duty with no restrictions. Such medical status was his base line prior to his accepted May 30, 2009 work injury. As Dr. Hanley continues to restrict appellant to permanent light duty, he has failed to provide sufficient medical rationale for his opinion that the residuals of the work injury have resolved. He did not clearly explain the basis for determining that appellant had only a temporary employment-related aggravation. Further, Dr. Hanley recommended possible back surgery because appellant's previous medical treatment had been unsuccessful, but he did not clearly state that the recommended surgery was not related to residuals of the accepted work-related injury.

As Dr. Hanley did not clearly find that appellant had no further residuals of his accepted temporary aggravation of preexisting lumbar radiculopathy, his opinion is insufficient to meet

⁴ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁷ *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits for the May 30, 2009 employment injury.⁸

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective July 20, 2012.

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2014 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 11, 2015
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

⁸ *J.M., supra* note 5.