United States Department of Labor
Employees' Compensation Appeals Board

T.F., Appellant	)	
and	)	**Docket No. 15-1204**
	)	**Issued: September 23, 2015**
U.S. POSTAL SERVICE, POST OFFICE, Perry, GA, Employer	)	

Appearances:
Appellant, pro se
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 May 5, 2015 appellant filed a timely appeal from a November 12, 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.[2]

ISSUES

The issues are: (1) whether OWCP properly terminated compensation for wage-loss and medical benefits effective January 12, 2014; and (2) whether appellant has established continuing residuals or disability after the termination of his compensation benefits.

[1] 5 U.S.C. § 8101 *et seq.*

[2] On appeal, appellant submitted additional evidence. However, the Board lacks jurisdiction to review new evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

On April 28, 2012 appellant, then a 41-year-old rural carrier associate, sustained a neck and back injury as she was stopped at a mailbox when her postal vehicle was hit from behind by another vehicle. She stopped work on the date of injury. OWCP accepted the claim for sprained neck and back (lumbar region).

Appellant accepted a limited-duty assignment on June 6, 2012 received intermittent wage-loss compensation for hours in which the employing establishment was unable to accommodate her work restrictions, and on August 26, 2012 she was placed on the periodic compensation rolls.

Initial medical reports assessed cervical sprain, neck sprain, lumbar sprain, and degenerative lumbar disc. A June 20, 2013 lumbar spine magnetic resonance imaging (MRI) scan showed intervertebral disc space height loss and disc desiccation at L4-5 with a central posterior disc protrusion and a high intensity zone suspicious of an annular tear. A cervical spine MRI scan revealed mild degenerative changes of the cervical spine more pronounced at C5-6, no evidence of acute cervical spine fracture or significant spondylolisthesis, and probable small Tornwaldt cyst within the posterior nasopharynx.

On October 24, 2012 Dr. Daxes Banit, a Board-certified orthopedic surgeon, advised that appellant had back and leg pain for three and one half months and that the cause of her symptoms was job related when her vehicle was rear-ended. He diagnosed lumbar degenerative disc disease, lumbar spondylosis with myelopathy, and thoracic and lumbar neuritis radiculopathy. Dr. Banit noted surgical options to address appellant's symptoms. In a December 13, 2012 report, he stated that she had opted for surgery to treat her condition. Dr. Banit advised that he would attempt to get appellant's diagnosis codes updated to reflect her current condition instead of the initial sprain diagnosis.

On December 27, 2012 Dr. Keathren Scott Malone, a Board-certified physiatrist and an associate of Dr. Banit, advised that conservative treatment failed to give appellant any long-term relief. He noted that Dr. Banit requested surgical authorization. Dr. Malone acknowledged that appellant's current accepted conditions did not warrant the requested surgery, but requested that the claim be expanded to include lumbar degenerative disc disease, spondylosis with myelopathy, and lumbosacral neuritis or radiculitis.

On January 31, 2013 OWCP referred appellant to Dr. Raju Vanapalli, a Board-certified orthopedic surgeon, for a second opinion regarding the status of her work-related conditions and whether she needed surgery. In a report dated April 23, 2013 from a February 26, 2013 visit, Dr. Vanapalli advised that appellant sustained a neck and lumbar sprain following a car accident. On examination of the cervical spine, he noted normal alignment, no paraspinal tenderness, spasm, or trigger points, right lateral rotation of 80 degrees, left lateral rotation of 60 degrees, right lateral tilt 30 degrees, left tilt 20 degrees, forward flexion 20 degrees, and extension 20 degrees. On lumbar spine examination, Dr. Vanapalli noted no deformity, normal curvature, pain at the lumbosacral junction, mild tenderness over the right paraspinal muscles, no spasm, no trigger point, forward flexion 60 degrees, extension 10 degrees, side to side tilt 30 degrees. He noted that appellant's current diagnoses were degenerative disc disease, disc desiccation,

and protrusion at L4-5, cervical sprain, lumbar sprain, and lumbar radiculitis. Dr. Vanapalli opined that her work-related diagnoses, cervical, and lumbar sprain, were resolved. He stated that the strain of paraspinal muscles, cervical spine, and lumbar spine were generally resolved in three to six months. Dr. Vanapalli advised that he could not substantiate any continuing residuals of the injury with objective findings on examination. He advised that appellant's complaints of pain were radicular in nature and attributable to degenerative disc disease and not the work-related sprains. Dr. Vanapalli opined that she was not capable of performing the duties of her job. He further opined that he saw no indication for surgical intervention.

OWCP determined that there was a medical conflict between the treating physicians, Drs. Malone and Banit, and OWCP referral physician, Dr. Vanapalli, regarding whether the accepted conditions had resolved, whether the claim should be expanded, and whether appellant required surgery. It scheduled a referee examination with Dr. Charles Hopkins, a Board-certified orthopedic surgeon.

In a September 12, 2013 report, Dr. Hopkins noted the history of appellant's injury and treatment history. He found that diagnostic testing revealed a hint of degenerative changes at C6-7, no more than that expected due to age, mild disc space height at L3-4, large bulge without canal or neural foraminal stenosis at L4-5, and a central disc protrusion suggestive of mild spinal canal stenosis without significant foraminal narrowing, and the L5-S1 was suspicious of a possible annular tear at L4-5. On examination, appellant had full range of neck motion without radicular signs. Straight leg raising caused low back pain. Motor and sensory examination of the legs was normal. Dr. Hopkins assessed chronic low back pain without objective evidence of radiculopathy, and a history of a cervical strain which was apparently resolved. He noted that Dr. Banit recommended an L4-5 fusion; however, he noted that the June 20, 2012 MRI scan only showed mild stenosis at L4-5. Dr. Hopkins opined that Dr. Banit's assessment of narrowing of the recesses at L5 was contradicted by the MRI scan report. He opined that appellant had chronic low back pain with no evidence of radiculopathy and that there was nothing to suggest any ongoing pathology secondary to her initial complaint.

Dr. Hopkins advised that any lumbar strain should have resolved within the first three to four months. He stated that appellant's objective findings were most compatible with typical age-related changes. Dr. Hopkins stated that he was concerned about her heavy use of narcotics which were of no benefit to her condition. He noted that subjective complaints far outweighed objective clinical findings and opined that there were no objective findings that would preclude appellant from returning to her rural carrier position. However, lifting 70 pounds would possibly aggravate her nonwork-related condition and that lifting 20 to 50 pounds would be more reasonable. Dr. Hopkins advised that appellant was at maximum medical improvement and opined that the June 20, 2012 MRI scan and other objective evidence did not indicate a condition that was surgically correctable.

By letter dated December 2, 2013, OWCP advised appellant that it proposed a termination of wage-loss and medical compensation benefits. It advised that the weight of the evidence was represented by Dr. Hopkins who found no residuals of her accepted conditions and that she was no longer disabled from work.

In a December 11, 2013 report, Dr. Banit noted reviewing Dr. Hopkins' report. On examination he noted tenderness at the midline of the back, difficulty with heel raise on the right, difficulty with toe raise on the left, positive straight leg raise, diminished sensation in the right anterior leg, and dorsum of the foot. Dr. Banit assessed lumbar degenerative disc disease, and lumbosacral neuritis or radiculitis. He noted that he agreed with Dr. Hopkins that appellant did not have significant central stenosis, but reiterated that his view of the films revealed a tear at L4-5 and recess narrowing. Dr. Banit noted that his recommendation for surgery was based on her significant course of therapy, medications, and selective injections, with only transient relief.

Dr. Banit reiterated his request for surgery in his December 31, 2013 report due to the relief patterns appellant achieved with nerve root blocks. He opined that she continued to experience residual medical problems from the work injury.

In a December 31, 2013 statement, appellant argued that a conflict in the medical opinion evidence remained with regard to whether there had been an aggravation of her degenerative disc disease and that the reports by Dr. Vanapalli and Dr. Hopkins were not sufficiently rationalized to uphold termination.

By decision dated January 10, 2014, OWCP terminated appellant's wage-loss and medical benefits effective January 12, 2014. It found that the weight of medical opinion was represented by Dr. Hopkins.

By letter dated January 23, 2014, appellant requested an oral hearing. In a January 27, 2014 diagnostic report, Dr. Michael Todd Jones, Board-certified in diagnostic radiology, advised that an MRI scan of the lumbar spine revealed abnormal linear signal in the left paracentral location virtually identical to the prior examination suggesting an annular tear or perhaps a miniscule paracentral disc protrusion without appreciable mass effect and no neuroforaminal narrowing at L4-5.

In an April 30, 2014 operative report, Dr. Banit advised that appellant underwent decompressive laminectomy, foraminotomy, partial facetectomy, and spinal fusion of L4-5. Also provided were preoperative reports which assessed worsening weakness in the lower back. Subsequent to the surgery, progress reports were provided from Dr. Banit beginning on May 21, 2014. Dr. Banit advised that appellant saw a 75 percent improvement following surgery. He advised that her pain was moderate and intermittent, but not hindering function and daily life to the same extent as prior to surgery. Dr. Banit assessed low back pain and lumbar postlaminectomy.

On September 9, 2014 a telephone hearing took place. Appellant argued that Dr. Hopkins' report was not sufficiently rationalized to constitute the weight of the evidence. She argued that her claim should have been expanded to include aggravation of her preexisting lumbar degenerative disc disease, yet neither Dr. Hopkins, nor Dr. Vanapalli addressed whether the work injury aggravated her preexisting lumbar condition. Appellant also contended that Dr. Hopkins did not properly address the annular tear. She noted that she had been able to work without restrictions prior to the injury, yet following the injury both the second opinion and referee physician opined that she was unable to perform her job duties. Appellant also argued

that Dr. Hopkins suggested a dependency on prescribed narcotics; therefore, OWCP should have evaluated whether this was a residual of her work injury.

In a September 24, 2014 report, Dr. Banit detailed appellant's treatment history. He advised that he requested that OWCP update her accepted conditions. Dr. Banit opined that appellant's lumbar conditions were a result of her April 28, 2012 work-related injury.

By decision dated November 12, 2014, an OWCP hearing representative affirmed the January 10, 2014 decision of OWCP.

On appeal appellant argues that the oral hearing did not address whether her claim should have been expanded to include additional accepted conditions. She also argues that she did not have any preexisting cervical of lumbar degenerative disc disease. Appellant contends that the pain she was experiencing was caused by the annular tear and disc herniation at L4-5, not the degenerative disc disease and that the surgical intervention performed by Dr. Banit instantly relieved her pain and numbness. She had now returned to her position as a rural carrier.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[3] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. 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.[4]

FECA provides that, if there is a 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 the examination.[5] 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 or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[6]

[3] *Kenneth R. Burrow*, 55 ECAB 157 (2003).

[4] *Furman G. Peake*, 41 ECAB 361 (1990).

[5] 5 U.S.C. § 8123(a).

[6] 20 C.F.R. § 10.321.

It is well established that, when 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.[7]

ANALYSIS -- ISSUE 1

OWCP accepted appellant's traumatic injury claim for sprained neck and sprained back in the lumbar region. Appellant received wage-loss compensation and medical benefits based on the accepted conditions. On October 24, 2012 Dr. Banit advised that she had work-related conditions and on December 13, 2012 he stated that she had opted for surgery and that her conditions should be upgraded beyond the accepted sprains. In his December 27, 2012 report, Dr. Malone, Dr. Banit's associate, requested surgical authorization and requested that the accepted conditions be expanded to include lumbar degenerative disc disease, spondylosis with myelopathy, and lumbosacral neuritis or radiculitis. OWCP referred appellant to Dr. Vanapalli for a second opinion regarding the status of her accepted condition. Dr. Vanapalli opined that her work-related diagnoses, cervical and lumbar sprain, were resolved and that there was no indication of a need for surgery. OWCP found that this created a conflict of medical opinion. Therefore, in accord with 5 U.S.C. § 8123(a), OWCP properly referred the case to Dr. Hopkins for a referee examination and an opinion as to whether appellant continued to have employment-related residuals, whether the claim should be expanded and whether surgery should be authorized.

In his September 12, 2013 report, Dr. Hopkins provided a history, results on examination, and reviewed medical evidence. He opined that appellant had chronic low back pain with no objective evidence of radiculopathy and that there was no evidence of any ongoing pathology secondary to her initial complaint. Dr. Hopkins advised that any lumbar strain should have resolved within the first three to four months. He also indicated that the cervical sprain had resolved. Dr. Hopkins stated that appellant's findings were most compatible with typical age-related changes. He explained that, while Dr. Banit recommended an L4-5 fusion, a June 20, 2012 MRI scan only showed mild stenosis at L4-5. Dr. Hopkins noted that subjective complaints far outweighed objective clinical findings as there were no objective clinical findings. He opined that appellant could return to her regular duties although lifting 70 pounds or more could possibly aggravate her nonwork-related condition. Dr. Hopkins advised that the June 20, 2012 MRI scan and other objective evidence did not indicate a condition that was surgically correctable. He noted no basis on which residuals of any condition were attributable to appellant's employment.

The Board finds that the weight of the medical evidence rests with the well-rationalized report of Dr. Hopkins. Dr. Hopkins' opinion is based on a complete and accurate factual and medical history and is entitled to special weight. The Board finds that OWCP met its burden of proof to terminate wage-loss compensation effective January 12, 2014.

In response to OWCP's proposed termination, appellant provided additional medical evidence. On December 11, 2013 Dr. Banit noted reviewing Dr. Hopkins' report. He assessed

[7] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

lumbar degenerative disc disease, and lumbosacral neuritis or radiculitis. Dr. Banit agreed with Dr. Hopkins that appellant did not have significant central stenosis, but reiterated that his view of the films showed a tear at L4-5 and recess narrowing. He recommended surgery since all other modes of treatment provided only transient relief. On December 31, 2013 Dr. Banit opined that appellant continued to have residuals from the work injury.

Although Dr. Banit provides some support for a continuing employment-related condition, he was on one side of the conflict that Dr. Hopkins resolved. The Board has held that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[8]

The Board finds that Dr. Hopkins represents the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 2

It is well established that after termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative, and substantial evidence that she had an employment-related disability or residuals which continued after termination of compensation benefits.[9]

ANALYSIS -- ISSUE 2

OWCP accepted that appellant sustained a sprained neck and back. It properly terminated his wage-loss and medical benefits effective January 12, 2014 based on the opinion of Dr. Hopkins, the referee physician, who found that the accepted neck and back sprain had ceased without residuals and no residuals of appellant's condition were attributable to the work injury. The burden now shifts to appellant to demonstrate that she continued to have residuals or disability for work on and after January 12, 2014 due to the accepted injury.[10]

Dr. Banit provided preoperative and postoperative status reports. In his September 24, 2014 report, he attributed appellant's lumbar conditions to the accepted work injury and requested that OWCP expand the accepted conditions. Appellant also provided a January 27, 2014 MRI scan report from Dr. Jones. This evidence is insufficient to create a new conflict with or to overcome the weight of Dr. Hopkins' report. Most of these reports are of limited probative value because they do not address causal relationship.[11] Furthermore, while Dr. Banit's September 24, 2014 report supports for causal relationship it is insufficient to create a new conflict with or to overcome the weight of Dr. Hopkins' report. As noted, reports from a

[8] *E.H.*, Docket No. 08-1862 (issued July 8, 2009); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[9] *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

[10] *Virginia Davis-Banks*, *id*.

[11] *See Jaja K. Asaramo, supra* note 8 (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).

physician who was on one side of a medical conflict are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[12] Dr. Banit did not provide any new rationale to explain why appellant's continuing condition was employment related.

On appeal appellant argues that the September 9, 2014 oral hearing did not address whether her claim should have been expanded to include additional accepted conditions. She also argues that she did not have any preexisting cervical or lumbar degenerative disc. Appellant attributes her continuing disability to an annular tear and disc herniation at L4-5; however, these conditions have not been accepted by OWCP. The Board had held that where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[13] Appellant did not meet her burden of proof to establish that an annular tear and disc herniation at L4-5 were causally related to the work incident.

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 met its burden of proof to terminate appellant's compensation benefits and that she has failed to meet her burden of proof to establish any continuing disability or medical residuals on or after January 12, 2014.

[12] *See supra* note 8.

[13] *Id.*; *T.M.*, Docket No. 08-975 (issued February 6, 2009).

ORDER

IT IS HEREBY ORDERED THAT the November 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 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