

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

J.A., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Hattiesburg, MS, Employer**

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**Docket No. 16-0213
Issued: August 19, 2016**

Appearances:
Appellant, pro se
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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On November 16, 2015 appellant filed a timely appeal from a May 20, 2015 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 this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits, effective May 20, 2015.

FACTUAL HISTORY

On January 11, 2013 appellant, then a 60-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging injuries to her neck and back as a result of a vehicular incident on December 27, 2012. She stopped work on December 27, 2012. By decision dated

¹ 5 U.S.C. § 8101 *et seq.*

February 14, 2013, OWCP accepted appellant's claim for acute sprains of the neck and back, lumbar region. Appellant began receiving benefits on the periodic rolls as of February 11, 2013.

By letter dated April 12, 2013, OWCP sent a letter to appellant's treating physician, Dr. Michael C. Patterson, a Board-certified orthopedic surgeon, requesting information as to whether appellant's acute neck and lumbar sprains had resolved and whether she was currently able to work at her date-of-injury position. In a report dated June 6, 2013, Dr. Patterson noted that his current diagnosis was facet joint syndrome. He opined that her lumbar sprain had resolved without residuals, though she was still experiencing issues with her cervical spine and facet joint syndrome. Dr. Patterson noted that appellant had requested authorization for facet joint injections, but was denied.

On July 3, 2013 OWCP scheduled an appointment with a second opinion physician to determine whether appellant's accepted conditions had resolved without residuals. In a second opinion report dated July 18, 2013, Dr. Byron T. Jeffcoat, a Board-certified orthopedic surgeon, opined that appellant's lumbar sprain had resolved without any acute changes. He also noted that appellant's acute neck sprain had resolved, noting that she had degenerative cervical changes and facet arthrosis which were present prior to the accepted injury. Dr. Jeffcoat noted that appellant did not suffer any disabling residuals due to her accepted conditions.

By letter dated September 18, 2013, OWCP notified appellant of its proposed termination of medical and wage-loss benefits based on the report of Dr. Jeffcoat. It noted that she had preexisting conditions of a compression fracture at L1 and L5, lumbar degenerative disc disease, left cervical degenerative changes at C4-5, left cervical facet arthrosis with mild foraminal stenosis at C5-6, and right carpal tunnel syndrome. OWCP noted that appellant stopped work on December 27, 2012, returned to work at full duty on December 29, 2012, and stopped work again on January 28, 2013. Appellant had not returned to work since January 28, 2013. OWCP further noted that, although Dr. Patterson diagnosed cervical facet joint syndrome, his report lacked sufficient rationale to explain how this condition was related to the incident of December 27, 2012. It concluded that Dr. Jeffcoat's report established that appellant's accepted medical conditions had resolved without residuals and, therefore, recommended that her medical and wage-loss benefits be terminated.

On November 21, 2013 OWCP finalized its decision to terminate appellant's medical and wage-loss benefits associated with her claim.

On December 15, 2013 appellant requested a review of the written record before an OWCP hearing representative.

By decision dated March 31, 2014, the hearing representative reversed the November 21, 2013 decision to terminate appellant's wage-loss compensation and medical benefits. She found that OWCP had failed to sufficiently develop the question of whether appellant had additional conditions related to the incident, given that Dr. Patterson had reported that she had additional conditions related to the incident of December 27, 2012. The hearing representative noted that OWCP should have obtained a supplemental opinion from Dr. Jeffcoat on this issue prior to termination.

By letter dated April 4, 2014, OWCP requested that Dr. Jeffcoat address the question of whether appellant had any cervical conditions, other than those already accepted, related to the incident of December 27, 2012, with specific reference to Dr. Patterson's reports.

In a report dated June 12, 2014, Dr. Gary D. Carr, Board-certified in family medicine, noted that he wanted appellant to discontinue work at the employing establishment as she presently was unable to do this work. Appellant stated that she wanted to wait to see how much improvement she would get by not working.

In a record of a telephonic conversation dated June 13, 2014, an OWCP representative received a call from appellant informing her that Dr. Jeffcoat had retired and therefore could not provide a clarification report. OWCP scheduled an appointment with a new second opinion specialist, Dr. Douglas N. Lurie, a Board-certified orthopedic surgeon.

In a second opinion report dated June 24, 2014, Dr. Lurie examined appellant and opined that appellant's current soft tissue conditions had been aggravated as a result of the accepted incident.

In response to OWCP's query, Dr. Lurie stated that appellant's conditions had been aggravated by the accepted incident, but that appellant was capable of working regular duty.

On July 31, 2014 expanded the accepted conditions to include an aggravation of the cervical intervertebral disc.

On August 5, 2014 OWCP notified appellant of its proposed termination of wage-loss benefits based on the report of Dr. Lurie, who had opined that she had no continuing disability and could work full duty without restrictions. It noted that the opposing report of record from Dr. Carr indicated only that she had continued disability due to complaints of pain and her own opinion that she should not work, and that, as such, the weight of medical evidence rested with Dr. Lurie.

In a report dated August 25, 2014, Dr. Howard T. Katz, Board-certified in physical medicine and rehabilitation, examined appellant and diagnosed "status post motor vehicle [incident], December 27, 2012," status postacute cervical strain with ongoing neck pain and headaches, status post left shoulder strain, temporomandibular joint dysfunction, cervical spondylosis, neck pain with left-sided nonverifiable radicular complaints, status postacute lumbar sprain, an L4-5 broad-based disc bulge with mild neuroforaminal narrowing, a history of L1 and L5 compression fractures prior to the motor vehicle incident, lumbar spondylosis, and mechanical lower back pain. He opined that she had ongoing neck pain, headaches, and myofascial pain in the left shoulder girdle and neck secondary to her acute cervical strain and left shoulder strain. Dr. Katz further explained that as a result of the motor vehicle incident, her preexisting history of lower back pain had been made worse, and he noted that she continued to have low back pain that was worse on the date of examination than prior to the accepted incident.

With regard to appellant's disability from work, Dr. Katz reported, "[Appellant] is capable of performing light and sedentary activities." He went on to describe several specific limitations, including frequent lifting limited to 10 pounds, and occasional lifting, carrying, and pushing/pulling up to 20 pounds.

On December 1, 2014 Dr. Constantine P. Charoglu, a Board-certified orthopedic surgeon, examined appellant and listed a history of injury of bilateral Morton's neuromas, left rotator cuff bursitis, cervical spine problems, and a bilateral carpal tunnel release. He assessed her current conditions as damage to the plantar nerve causing pain, numbness, and muscle spasms in the foot, as well as and ankle and foot joint pain.

In a report dated December 8, 2014, Dr. David Weiss, a Board-certified internist, examined appellant for a rheumatology consultation on reference from Dr. Carr. He diagnosed cervical myofascial pain with findings of spondylosis, degenerative disc disease, facet arthropathy, and mechanical lower back pain. Dr. Weiss recommended a lumbar spine support brace for appellant's back pain. In a follow-up report dated February 5, 2015, he noted that she had chronic mechanical neck and lower back pain, with possible symptoms of lumbar radiculopathy.

By decision dated May 20, 2015, OWCP finalized its decision to terminate appellant's wage-loss compensation benefits associated with this claim. In its decision, it analyzed the reports of Drs. Katz, Charoglu, and Weiss, finding that each of the reports was deficient and of diminished probative value, and that, as such, Dr. Lurie's medical opinion constituted the weight of medical evidence.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation 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 related to the employment.³

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.⁴ 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.⁵

² *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001); *Alice J. Tysinger*, 51 ECAB 638, 645 (2000).

³ *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

⁴ 5 U.S.C. § 8123(a).

⁵ 20 C.F.R. § 10.321.

To be of probative value, a medical opinion must be based on a complete factual and medical background, must be of reasonable medical certainty, and must be supported by medical rationale.⁶ Medical rationale is a medically sound explanation for the opinion offered.⁷

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.⁸

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to justify termination of wage-loss benefits.

As of July 31, 2014, the accepted conditions in this case included neck and lumbar sprain, and aggravation of cervical intervertebral disc degeneration. OWCP based its decision to terminate appellant's wage-loss benefits on the second opinion report of Dr. Lurie dated June 24, 2014. In this report, Dr. Lurie opined that appellant's accepted conditions no longer caused disability and that she was capable of returning to her date-of-injury position. He noted, "I think [appellant] is capable of working regular duty. [Appellant] does not have functional deficits that would prevent her from working... She is capable of working full duty with no restrictions."

On August 25, 2014 Dr. Katz examined appellant and opined that "Based on the history given by [appellant], this preexisting history of low back pain has been made worse and she continues to have low back pain that is worse today than prior to December 27, 2012." With regard to appellant's disability from work, Dr. Katz noted, "[Appellant] is capable of performing light and sedentary activities." He detailed physical limitations including frequent lifting and carrying up to 10 pounds, and occasional lifting and carrying to 20 pounds. Dr. Katz therefore opined, in contradiction to Dr. Lurie, that appellant's accepted cervical and lumbar sprains continued to cause secondary pain and headaches, and required physical restrictions, such that she could not return to her date-of-injury position without restrictions.

Dr. Katz' report, as well as that of Dr. Lurie, contained results of an examination, an accurate medical history, and a well-reasoned opinion that appellant's conditions had been aggravated by the accepted incident. Their opinions, however, differed as to whether appellant could return to full-duty work. The Board finds that Dr. Katz' August 25, 2014 report contains no inaccuracies or discrepancies such that his report would be of diminished probative value. As such, his report is of probative value on the issue of whether appellant had residual disability as a result of her accepted injury, and is of equal weight to that of Dr. Lurie.⁹

⁶ *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

⁷ See *Ronald D. James, Sr.*, Docket No. 03-1700 (issued August 27, 2003); *Kenneth J. Deerman*, 34 ECAB 641 (1983) (the evidence must convince the adjudicator that the conclusion drawn is rational, sound, and logical).

⁸ *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

⁹ See *J.H.*, Docket No. 15-1726 (issued January 19, 2016).

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation effective May 20, 2015, because as of this date there was an unresolved conflict of medical opinion between Drs. Lurie and Katz. Each physician had the opportunity to examine her and review the diagnostic studies of record. The reports provided equally well-rationalized explanations for their opinions on appellant's continued disability and work restrictions. With respect to the existence and extent of any ongoing employment-related disability, the Board finds that the relevant and probative medical evidence is in equipoise.

It is well established that, where there exist opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.¹⁰ The Board finds that OWCP should have submitted both Dr. Lurie's and Dr. Katz' reports to an impartial specialist to resolve the conflict in medical opinion evidence before rendering a termination decision. As OWCP failed to base its decision on a resolution of the opinion evidence, the Board finds that it did not meet its burden of proof to terminate appellant's wage-loss benefits. Accordingly, OWCP's decision to terminate appellant's wage-loss benefits is reversed.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective May 20, 2015.

¹⁰ *H.S.*, Docket No. 10-1220 (issued May 24, 2011).

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 19, 2016
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