United States Department of Labor
Employees' Compensation Appeals Board

D.B., Appellant	)	
and	)	**Docket No. 16-0648**
	)	**Issued: July 21, 2016**
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Carol Stream, IL, Employer	)	

Appearances:
Lenin V. Perez, for the appellant[1]
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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On February 18, 2016 appellant, through his representative, filed a timely appeal from a December 16, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 justify termination of appellant's wage-loss and medical benefits for his accepted injuries effective February 25, 2015.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 4, 2008 appellant, then a 47-year-old mail handler, filed a traumatic injury claim (Form CA-1) for injuries to his back, left buttocks, and left thigh that he sustained on October 29, 2008 while unloading a trailer of recycled mail. OWCP accepted the claim for lumbar strain on November 14, 2008. On December 24, 2008 it accepted an additional condition of lumbar disc herniation, and on June 26, 2009 it accepted an additional condition of C4-5 left paracentral disc herniation. Appellant received supplemental roll benefits as of December 14, 2008 and periodic roll benefits as of June 5, 2011.

In a report dated February 12, 2014, Dr. Francisco Espinosa, a Board-certified neurosurgeon, examined appellant and diagnosed a bulging disc at C3-4; a herniated disc and osteophyte complex at C4-5 with indentation and compression of the spinal cord at C5-6; and foraminal stenosis with a bulging disc at L5-S1. He recommended that, due to spinal cord compression at C4-5 and C5-6, appellant needed to undergo surgeries including an anterior cervical discectomy; spinal cord decompression and fusion with instrumentation using Peek cages; bone graft, and plate screws; and laminectomy, foraminotomy; and nerve decompression at L5-S1.

Appellant requested authorization on February 27, 2014 for surgical procedures including an anterior cervical discectomy; spinal cord decompression and fusion with instrumentation using Peek cages, bone graft, and plate screws; laminectomy; foraminotomy; and nerve decompression.

By letter dated April 30, 2014, OWCP notified appellant that his request for authorization could not be approved at that time, and that a district medical adviser (DMA) would have to review the request. On the same date, it referred appellant's case history to a DMA, noting relevant underlying conditions of preexisting degenerative disc disease of the cervical and lumbar spine. OWCP requested that the DMA render an opinion on the issue of whether the requested surgeries were necessary to treat the accepted work injuries of October 28, 2008.

By letter dated May 12, 2014, the DMA responded to OWCP's request. He noted that appellant had been initially seen by a Dr. Montella on November 10, 2008. As early as 2009, Dr. Montella indicated that appellant had also injured his neck at work. However, there was no incident report of record relating any neck injury. Dr. Montella's initial evaluation from November 10, 2008 did not discuss the neck. The DMA noted that appellant had degenerative conditions of his neck and low back. Given his preexisting degenerative disease of the neck and low back, it is much more likely true that any and all surgery as it related to appellant's spine was due to a preexisting degenerative condition and not to any work injury.

On June 5, 2014 OWCP forwarded the case file to Dr. Safwan Barakat, a Board-certified neurosurgeon, along with a statement of accepted facts, for an impartial medical evaluation in order to resolve the conflict of medical opinion between Dr. Espinosa and the DMA. Dr. Barakat was asked to resolve eight questions. First, OWCP requested that he determine whether the requested surgeries were necessary to treat appellant's accepted work-related injuries; second, whether appellant's current conditions were causally related to his accepted work-related injury; third, whether there were any additional work-related diagnoses; fourth, whether residuals of appellant's work-related injuries existed, and to what extent any current

conditions were related to natural age-related degenerative changes versus the original injury; fifth, what course of treatment would be recommended if the surgery were not approved; sixth, whether appellant was currently disabled from work; seventh, whether the treating physician's work restrictions were appropriate; and eighth, when it was anticipated that appellant would reach maximum medical improvement.

OWCP prepared a June 5, 2014 statement of accepted facts, which noted appellant's history of injury, medical history, employment duties, as well as his preexisting degenerative disc disease of the cervical and lumbar spine. The statement of accepted facts did not state that any of appellant's medical conditions had been accepted as employment related.

In a report dated October 1, 2014, Dr. Barakat rendered his responses to OWCP's inquiries based upon an examination and review of appellant's records conducted on September 30, 2014. He noted that appellant's requested surgery was not medically necessary to treat his work-related injury, as appellant presented with a preexisting degenerative disease of the lumbar spine and a disc bone complex degenerative condition in his cervical spine. Dr. Barakat noted that appellant's symptoms on examination of the cervical area did not fit with the findings of previous diagnostic studies and did not comport with the purpose of the proposed surgery. He opined that appellant's condition had returned to its preinjury status, namely the degenerative disease in his neck and back. Dr. Barakat noted that appellant had no additional work-related conditions, and that his condition was a degenerative disc disease resulting from natural wear and tear on the spine. He recommended no further treatment for this condition, as appellant had already undergone extensive physical therapy and an epidural steroid injection. Dr. Barakat opined that appellant was partially disabled from work as a result of his underlying and preexisting degenerative disc disease. He noted that appellant was not able to return to his preinjury position without restrictions, but that he may be able to work on restricted duty, after a functional capacity evaluation. Dr. Barakat observed that appellant had reached maximum medical improvement and had a fair prognosis.

By decision dated October 24, 2014, OWCP denied appellant's request for authorization of surgery.

On January 7, 2015 OWCP proposed to terminate appellant's medical and wage-loss compensation as Dr. Barakat had opined that appellant no longer had residuals of his work-related injury. On the same date, it issued an updated list of appellant's accepted conditions, which included sprain of the lumbosacral joint/ligament; displacement of the lumbar intervertebral disc without myelopathy; and displacement of the left cervical intervertebral disc without myelopathy.

By decision dated February 25, 2015, OWCP terminated appellant's medical benefits and wage-loss compensation.

On March 3, 2015 appellant requested a telephonic hearing before an OWCP hearing representative.

The hearing was held on October 13, 2015. At the hearing, appellant's representative argued that Dr. Barakat's report was speculative, because he only opined that the aggravation of appellant's underlying degenerative conditions was temporary and had resolved. He further

argued that Dr. Barakat's opinion, that appellant's condition was degenerative, was not well rationalized. Appellant stated that he had undergone the cervical surgery under his own private insurance, but that he had engaged with disputes with his insurance companies and the employing establishment with regard to his coverage. He reported that he still had symptoms of his conditions. Appellant asked how OWCP could update the list of accepted conditions and then immediately terminate his benefits. The hearing representative afforded appellant 30 days to submit additional evidence.

In a report dated November 4, 2015, Dr. Espinosa reviewed appellant's medical history and opined that the surgery for his cervical spine and lumbar spine should be approved, as it was related to his approved injury.

By decision dated December 16, 2015, the hearing representative affirmed OWCP's termination of appellant's compensation benefits. She found that Dr. Barakat had been asked to resolve a conflict in medical opinion only on the issue of whether appellant's surgeries ought to be authorized as work related. The hearing representative explained that because this was the scope of the conflict put before Dr. Barakat, he was not an impartial medical specialist on the issue of work-related residuals. However, she noted that Dr. Barakat's report could still be considered for its own intrinsic value and therefore could still constitute the weight of the medical evidence on the issue of work-related residuals. The hearing representative found that Dr. Espinonsa's November 4, 2015 report did not opine on the issue of whether appellant continued to suffer from work-related residuals related to the accepted injury of October 29, 2008. As such, she found that the weight of medical evidence remained with Dr. Barakat, and that as such OWCP met its burden of proof in terminating his compensation benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.[3] 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.[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] *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001); *Alice J. Tysinger*, 51 ECAB 638, 645 (2000).

[4] *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

[5] 5 U.S.C. § 8123(a).

[6] 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 be supported by medical rationale.[7] Medical rationale is a medically sound explanation for the opinion offered.[8]

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.[9]

ANALYSIS

OWCP found a medical conflict between appellant's physician, Dr. Espinosa, and a DMA, on the issue of whether certain surgeries should to be authorized by OWCP as necessary and related to his accepted conditions. It referred appellant to Dr. Barakat for an impartial medical examination to resolve the conflict of opinion with respect to surgery. However, he was also asked to opine on other questions related to appellant's condition, such as whether he continued to have work-related residuals of his condition. Dr. Barakat opined that appellant's temporary work-related aggravation of degenerative spinal conditions had resolved and that his current medical conditions were related only to the preexisting degenerative conditions. He further opined that the accepted work-related injury of October 29, 2008 had resolved and appellant returned to a preinjury status.

The Board finds that, under the circumstances of this case, the referee examiner was not acting as an impartial medical specialist on the issue of whether appellant's conditions had resolved or returned to their preinjury status. The relevant conflict of medical opinion was limited to the issue of authorization of surgery for the accepted cervical and lumbar spine conditions.

While the referee examiner's report was not entitled to the special weight afforded to an opinion of an impartial medical specialist, his report can still be considered for its own intrinsic value[10] and can still constitute the weight of the medical evidence. However, the Board finds that, due to the deficiency of the June 5, 2014 statement of accepted facts, Dr. Barakat's opinion is of limited probative value.

The Board has stated that when an OWCP medical adviser, a second opinion specialist, or a referee physician renders a medical opinion based on an incomplete or inaccurate statement of accepted facts, the probative value of the opinion is diminished or negated altogether.[11]

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[7] *Jennifer Atkerson*, 55 ECAB 317, 319 (2004).

[8] *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).

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

[10] *See Leanne E. Maynard*, 43 ECAB 482 (1992) (finding that a physician's opinion is probative even though he was not an impartial medical examiner and that the opinion of this physician and another physician were sufficient to establish causal relation); *Rosa Whitfield Swain*, 38 ECAB 368 (1987) (finding that a physician was improperly designated as an impartial medical specialist, but that his opinion nonetheless constituted the weight of the medical evidence).

[11] *J.D.*, Docket No. 15-0305 (issued August 5, 2015).

OWCP procedures also require that the statement of accepted facts include a specific description of the conditions accepted.[12]

Dr. Barakat relied upon a statement of accepted facts that did not provide any information regarding conditions already accepted by OWCP. To insure that the report of an OWCP referral physician is based upon an accurate factual background, OWCP provides information to the physician through the preparation of a statement of accepted facts. The statement of accepted facts must include a description of the accepted conditions, or the opinion of the referral physician will be based upon an in incomplete framework and will be of limited probative value.[13] On January 7, 2015 OWCP prepared an updated list of appellant's accepted employment-related conditions, but this information was never provided to Dr. Barakat. As Dr. Barakat's opinion was based upon an incomplete framework and was of diminished probative value. His report, therefore, is an insufficient basis upon which to prove justification to terminate compensation. The Board therefore finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss and medical benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation and medical benefits for his accepted injuries effective February 25, 2015.

[12] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

[13] *See J.D.*, *supra* note 11.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 16, 2015 is reversed.

Issued: July 21, 2016
Washington, DC

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

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

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