

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's compensation benefits effective May 4, 2014 as her accepted conditions had ceased without residuals; and (2) whether appellant met her burden of proof to establish any continuing employment-related residuals or disability.

On appeal, counsel contends that the May 1, 2013 report from Dr. Ian Fries, a Board-certified orthopedic surgeon serving as OWCP's impartial medical examiner, lacked probative value and was insufficient to terminate appellant's compensation benefits. He argues that the medical evidence of record is sufficient to reinstate appellant's compensation benefits and requests that the Board reverse OWCP's decision.

FACTUAL HISTORY

On May 24, 2000 appellant, a 56-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) for a severe back injury sustained at work on October 19, 1998. OWCP accepted the claim for a lumbar sprain and acquired spondylolisthesis.⁴ Appellant stopped work on October 19, 1998 and received intermittent wage-loss compensation beginning that date. She was placed on the periodic compensation rolls for total disability beginning September 8, 2002.⁵

OWCP subsequently referred appellant to Dr. Richard Steinfeld, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of her employment-related conditions. In his November 19, 2012 report, Dr. Steinfeld reviewed a statement of accepted facts, history of the injury, and the medical evidence of record. He conducted a physical examination and found no masses or lesions in the lumbar spine. Appellant was palpably nontender about the lumbar spine and exhibited active forward flexion to 80 degrees, extension to zero, and lateral bend to five degrees bilaterally. Dr. Steinfeld diagnosed chronic low back pain and lumbar radiculopathy. He noted that appellant revealed some limited range of motion involving her lumbar spine and seemed extremely emotional, almost to the point of depression, during her evaluation. Dr. Steinfeld opined that appellant's accepted lumbar sprain had resolved. He explained that her lumbar spondylolisthesis "has likely not resolved as this is an anatomic abnormality that may develop over time with degenerative conditions." Dr. Steinfeld concluded that appellant had reached maximum medical improvement and released her to full-time work with lifting up to 70 pounds.

⁴ The record before the Board also includes some records for an occupational injury sustained on or about October 21, 1996, which OWCP had accepted under OWCP File No. xxxxxx644 for lumbar strain, sacroiliac strain, and myofascial pain syndrome. Appellant returned to work about six weeks after the injury. The current claim on appeal, OWCP File No. xxxxxx553, has not been combined with the October 21, 1996 occupational disease claim, OWCP File No. xxxxxx644.

⁵ By decision dated May 25, 2004, OWCP made a preliminary determination that appellant was overpaid in the amount of \$249.90 because she had been reimbursed for pharmacy services in error, and she was at fault in the creation of the overpayment because she accepted a payment that she knew or reasonably should have known was incorrect.

On January 3, 2013 the employing establishment offered appellant a limited-duty job as a modified rural carrier associate with the following restrictions: lifting up to 25 pounds; pushing and pulling up to 25 pounds; standing and sitting for eight hours per day, intermittently.

By letter dated January 18, 2013, OWCP advised appellant that the modified rural carrier associate position had been found to be suitable and that it conformed to the work limitations provided by Dr. Steinfeld in his November 19, 2012 report. It allowed her 30 days to accept the position or provide her reasons for refusal.

Appellant submitted a narrative statement arguing that the job offer was not suitable and reports dated January 7 through March 8, 2013 from Dr. Gary Weiss, a Board-certified neurologist, who diagnosed continued low back pain to the right lower extremity, herniated nucleus pulposus (HNP) at L3-5, and chronic pain syndrome. Dr. Weiss opined that appellant continued to suffer residuals from her October 19, 1998 work injury and was permanently totally disabled from work based on her complaints, symptomatology, and neurological examination.

OWCP found a conflict in the medical evidence and referred appellant to Dr. Fries for an impartial medical examination to resolve the conflict in medical opinion between Drs. Weiss and Steinfeld on the issue of whether she continued to have any disability or residuals as a result of the accepted employment conditions. In his May 1, 2013 report, Dr. Fries reviewed a statement of accepted facts, history of the injury, and the medical evidence of record. He conducted a physical examination and found some pinch tenderness at about the mid-lumbar spine area, but no skin sensitivity nor deep tenderness any place over her low back, pelvis, or buttocks. Appellant preferred to stand in a 20-degree flexed position. Spinal extension was 0 degrees and forward trunk flexion was to 60 degrees with heavy support on both hands. Motion was almost completely at her hips and the lumbar spine remained immobile and straight without normal lordosis. Right and left bending was limited to about 10 degrees each, with some pain in the same areas, but also the lateral left thigh to ankle. There were no increased symptoms with vertex compression nor pelvic rotation. Dr. Fries found that appellant's spine remained quite flat with all motions and there were no palpable step-offs. Appellant had at least six small transverse well-healed surgical endoscopic incisions all to the left of her low back, which were not locally tender. Dr. Fries asserted that while OWCP had accepted the diagnosis of acquired spondylolisthesis, only one treating physician mentioned this condition and there was no indication on any imaging that confirmed its existence. He further explained that acquired spondylolisthesis was a degenerative condition, not a traumatic injury. Dr. Fries found that the May 1, 1997 magnetic resonance imaging (MRI) scan of the lumbar spine showed only minor degenerative findings, but no evidence of trauma or spondylolisthesis. Moreover, a December 21, 1998 MRI scan of the lumbar spine showed mild multilevel degeneration had advanced, but no evidence specific for trauma, no findings requiring surgery, no neural element compression, and no mention of spondylolisthesis. Regarding the accepted lumbar sprain, Dr. Fries asserted that complaints of pain and loss of motion were not credible evidence of residuals from a spinal or sacroiliac sprain or strain more than a decade earlier. He concluded that appellant had no residuals from the October 19, 1998 employment injury and had reached maximum medical improvement. Dr. Fries released appellant to work without restrictions.

In an August 29, 2013 letter, OWCP notified appellant that it proposed to terminate her medical and wage-loss compensation benefits on the basis that her accepted conditions had

ceased without residuals, relying on Dr. Fries' May 1, 2013 report. It afforded her 30 days to submit additional evidence or argument in disagreement with the proposed action.

Appellant submitted new MRI scans of the lumbar spine dated September 18, 2013 and January 20, 2014 which revealed HNP with stenosis and spondylolisthesis at L4-5 causing severe narrowing at this level, as well as HNP with stenosis at T12-L3. There was also a fusion of L3 and L4 and a mild posterior spondylolisthesis of L5 compared to L4.

In reports dated September 19, 2013 through March 27, 2014, Dr. Weiss diagnosed memory loss, severe stenosis, and spondylolisthesis at L4-5 with HNP at T12-L3 with pain into the right lower extremity. On October 6, 2013 Dr. Weiss asserted that it was clear to anyone looking at an MRI scan of appellant's lumbar spine, that it alone made her permanently totally disabled for work. He opined that her lumbar spine was too severely damaged to recommend surgery unless she could no longer walk even with a cane or a walker.

By decision dated April 21, 2014, OWCP terminated appellant's compensation benefits effective May 4, 2014. It found the weight of the evidence was represented by Dr. Fries.

Appellant's counsel requested an oral hearing before an OWCP hearing representative and submitted reports dated March 25 and December 19, 2014 from Dr. Weiss who reiterated his diagnoses and opinions. Appellant further submitted reports dated March 10 and April 23, 2014 from a nurse practitioner.

A telephonic hearing was held before an OWCP hearing representative on December 10, 2014.

By decision dated March 2, 2015, the OWCP hearing representative affirmed the April 21, 2014 termination decision, finding that the weight of the medical evidence was represented by Dr. Fries. He further found that appellant failed to establish any continuing employment-related residuals or disability causally related to her accepted injuries.

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.⁶ 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.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

⁶ See *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ See *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁸ See *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁹ 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.¹⁰

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.¹¹ 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.¹²

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for a lumbar sprain and acquired spondylolisthesis. It terminated her medical and wage-loss compensation benefits because the accepted employment-related conditions had resolved without residuals based on the opinion of the impartial medical examiner, Dr. Fries. It is OWCP that bears the burden to justify modification or termination of benefits.¹³

On appeal, appellant's counsel contends that the report from Dr. Fries lacked probative value and was insufficient to terminate appellant's compensation benefits. He argues that the medical evidence of record is sufficient to reinstate appellant's compensation benefits and requests that the Board reverse OWCP's decision.

OWCP based its decision to terminate appellant's benefits on a May 1, 2013 report from Dr. Fries, the impartial medical examiner, who conducted a physical examination and reviewed appellant's medical history. Dr. Fries concluded that appellant had no residuals of her accepted conditions and had reached maximum medical improvement as of the date of his examination. Although he thoroughly reviewed the medical evidence, Dr. Fries clearly was not provided the complete record. He noted the lack of medical records surrounding the original injury, the lack of any diagnostic tests reflecting spondylolisthesis, the lack of evidence surrounding two motor vehicle accidents (in 2000 and 2002) which were sufficient to warrant surgeries and the lack of evidence regarding two left hip replacements.¹⁴

⁹ See *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁰ See *James F. Weikel*, 54 ECAB 660 (2003).

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

¹² See *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

¹³ See *Curtis Hall*, 45 ECAB 316 (1994); see also *K.B.*, Docket No. 15-11 (issued April 7, 2015).

¹⁴ Medical opinions based on an incomplete history are of little probative value. *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962).

After Dr. Fries' report, appellant had provided MRI scans of the lumbar spine dated September 18, 2013 and January 20, 2014 which revealed HNP with stenosis and spondylolisthesis at L4-5 causing severe narrowing at this level, as well as HNP with stenosis at T12-L3. There was also a fusion of L3 and L4 and a mild posterior spondylolisthesis of L5 compared to L4. In reports dated September 19, 2013 through December 19, 2014, Dr. Weiss diagnosed severe stenosis and spondylolisthesis at L4-5 with HNP at T12-L3 with pain into the right lower extremity. On October 6, 2013 he asserted that it was clear to anyone looking at an MRI scan of appellant's lumbar spine that her lumbar spine alone made her permanently totally disabled for work.

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits because it failed to provide a complete medical record to Dr. Fries and failed to provide the newly received MRI scans to Dr. Fries to obtain a supplemental report. The Board notes that the reports and treatment records of Dr. Weiss were of record prior to the April 21, 2014 termination decision. The Board finds that where OWCP received the reports from Dr. Weiss, it should have submitted them to Dr. Fries, the impartial medical examiner, and requested a supplemental report before issuing a final decision on appellant's entitlement to medical and wage-loss compensation.

The impartial medical examiner's report must actually fulfill the purpose for which it was intended, it must resolve the conflict in medical opinion.¹⁵ OWCP should ensure that the report is comprehensive, clear, and definite and that it is based on the entire medical record and current information.¹⁶ It is its responsibility to secure a supplemental report from the impartial medical examiner to correct any defects.¹⁷ As OWCP failed to adequately resolve the conflict in medical opinion, the Board finds that it did not meet its burden of proof to terminate appellant's compensation benefits.¹⁸

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

¹⁵ See *M.G.*, Docket No 14-1361 (issued December 8, 2014); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11d(2) (September 2010).

¹⁶ *Id.* See also *Billie M. Gentry*, 38 ECAB 498 (1987).

¹⁷ *Id.*

¹⁸ In light of the Board's disposition of the termination issue, the second issue of whether appellant met her burden of proof to establish any continuing employment-related residuals or disability is moot.

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 8, 2016
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