United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 16-0980**
	)	**Issued: November 8, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Alexandria, VA, Employer	)	

Appearances:
Richard A. Daniels, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 7, 2016 appellant, through his representative, filed a timely appeal of a February 2, 2016 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 to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective February 12, 2015; and (2) whether

[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.*

appellant has met his burden of proof to establish any continuing disability or medical residuals on or after February 12, 2015.

On appeal, appellant's representative contends that the physician selected as the impartial medical examiner was not entitled to the weight of the medical evidence as his report dismissed appellant's electromyogram (EMG) findings and was internally inconsistent and contradictory.

FACTUAL HISTORY

On February 26, 2014 appellant, then a 44-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he fell down steps coated with ice and snow injuring his back on February 25, 2014. OWCP accepted his claim on April 15, 2014 for lumbar sprain and sprain of the sacroiliac ligament.

Dr. John A. Bruno, a Board-certified orthopedic surgeon, examined appellant on April 24, 2014. He noted appellant's history of slipping and falling on icy steps on February 25, 2014. Dr. Bruno found that appellant demonstrated severe back spasm with right sciatica, weakness in his right leg, and numbness in his right leg. He opined that the additional condition of sciatica should be accepted by OWCP.

Appellant underwent a lumbar magnetic resonance imaging (MRI) scan on April 26, 2014 which demonstrated that all lower thoracic and upper lumbar disc levels were within normal limits. The MRI scan also demonstrated a diffuse disc bulge at L4-5 as well as mild spondylosis at L4-5. The test indicated that appellant had a central disc protrusion at L5-S1 extending into the epidural fat with no thecal sac compression or nerve root impingement. He also had mild spondylosis at L5-S1 with no evidence of significant stenosis or nerve root impingement.

On May 28, 2014 Dr. Bruno diagnosed lumbosacral strain and sciatica. He found that appellant demonstrated severe pain, limited range of motion, and sciatica unresponsive to medication.

Dr. Suneetha Budampati, a Board-certified physiatrist and physician at the National Spine Pain Center, examined appellant on June 16, 24, and July 11, 2014 and described his history of injury. He reviewed the April 26, 2014 MRI scan and diagnosed L5-S1 central herniated disc and L4-5 diffuse disc bulge with mild hypertrophic changes to the facet joints. Dr. Budampati diagnosed lumbar radiculopathy, low back pain, and lumbar disc displacement. He found that appellant was totally disabled.

On June 24, 2014 Dr. Budampati noted that appellant's primary area of pain was his low back. Appellant also described symptoms of numbness, weakness, tingling, and burning. Dr. Budampati found an antalgic gait, taut bands in the lower paraspinal, the gluteus medius, and gluteus maximus. He noted that appellant was tender to palpitation in the bilateral sciatic notches and through the lumbosacral area. Dr. Budampati continued to diagnosed lumbar radiculopathy, lumbago, and lumbar disc displacements. He found that appellant was totally disabled.

OWCP referred appellant for a second opinion examination with Dr. Willie E. Thompson, a Board-certified orthopedic surgeon. In his June 24, 2014 report, Dr. Thompson described appellant's history of injury and medical treatment. He noted that appellant reported localized low back pain without radiculopathy and found diffuse tenderness in the lumbar spine and limited motion in all planes. Appellant demonstrated decreased sensation of the S1 distribution bilaterally, but motor function in the lower extremities was intact. Dr. Thompson found that appellant's MRI scan was "essentially within normal limits." He attributed appellant's current symptoms of low back pain to soft tissue injuries and found no evidence of any intrinsic injury to the spinal cord. Dr. Thompson attributed appellant's disability to his accepted employment injury and found that appellant could perform sedentary work eight hours a day within work restrictions.

Dr. Bruno examined appellant on July 8, 2014 and found that appellant was in severe pain and unable to work. Appellant underwent an EMG and motor nerve conduction velocity (NCV) studies on July 25, 2014 which demonstrated left moderate L4 through S1 radiculopathy and right moderate-to-severe S1 radiculopathy.

Dr. Budampati examined appellant on July 29 and August 14 and 28, 2014 and performed epidural steroid injections. On September 12, 2014 he determined that appellant sustained no benefit from the injections.

Dr. Bruno reviewed appellant's EMG/NCV results on August 14, 2014 and diagnosed bilateral lower extremity radiculitis. On September 15, 2014 he noted that appellant demonstrated marked muscular spasm in the lower back with loss of motion. Dr. Bruno diagnosed lumbar strain with chronic pain syndrome. He opined that appellant was unfit for his usual job. On October 20, 2014 Dr. Bruno recommended a neurosurgical consultation as appellant's condition had not changed.

OWCP referred appellant to Dr. Wylie Lowery, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical opinion evidence between Drs. Bruno and Thompson.

Dr. Bruno examined appellant on October 30, 2014 and again opined that appellant was totally disabled. He noted that appellant was using a cane, wearing a back brace, and had a nerve stimulation unit. Dr. Bruno again recommended a neurosurgical consultation.

Dr. Lowery examined appellant on December 18, 2014. He indicated that he reviewed records, x-rays, and some scans. Dr. Lowery described appellant's history of injury as falling on icy steps and listed his medical treatment. He noted that the conflict arose concerning appellant's ability to work. Dr. Lowery noted that appellant used a slow gait, a cane, and a back brace. Appellant reported lower back pain worse than his leg pain. He did report generalized pain and numbness in the entirety of both lower extremities, as well as generalized weakness not explained on any dermatomal patterns, or specific muscle groups. Dr. Lowery found apparent symptom magnification with some disproportionate pain behavior on examination. He found that appellant had positive Waddell signs including superficial skin tenderness as well as low back pain with downward pressure of the skull while standing. Dr. Lowery found no evidence of herniated disc on appellant's MRI scan and instead reported mild disc desiccation and some

degenerative disc changes. He opined that appellant's claim should not be expanded beyond the accepted conditions of lumbar strain and lumbosacral iliac strain. Dr. Lowery reported no objective findings noting that the EMG findings of radiculitis were nonspecific, did not relate to any findings on clinical examination, and did not relate to any findings on appellant's MRI scan. He concluded that appellant did not have any demonstrable injury to his nerves. Dr. Lowery also opined that appellant "should and has fully recovered from this particular diagnosis, the diagnosis of strain."

On January 8, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that Dr. Lowery, the impartial medical examiner, was entitled to the special weight of the medical opinion evidence. OWCP afforded appellant 30 days for a response.

Dr. Budampati completed a report on January 5, 2015 and repeated his previous findings and conclusions.

On January 14, 2015 Dr. Bruno reviewed Dr. Lowery's report and disagreed with his findings. He emphasized that appellant had an abnormal EMG study with bilateral lower extremity radiculitis. Dr. Bruno also contended that appellant's MRI scan demonstrated disc herniations. He continued to opine that appellant required treatment and was disabled from his date-of-injury position.

By decision dated February 12, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits effective February 12, 2015 based on Dr. Lowery's IME report.

Following the February 12, 2015 decision, appellant submitted a report dated February 6, 2015 from Nora Tobin, a physician assistant. On April 14, 2015 Dr. Ramatia Mahboobi, a Board-certified anesthesiologist, examined appellant due to bilateral lower extremity pain. He found a small central herniated disc at L5-S1 on appellant's MRI scan and noted that appellant's EMG showed radiculopathy.

Appellant sought medical treatment from Dr. Austin W. Reynolds, a physician Board-certified in emergency medicine, on November 22, 2014 due to low back pain. He reported radiation of pain down the back of both legs, which he attributed to multiple herniated lumbar discs. Dr. Reynolds diagnosed chronic back pain.

Appellant's representative requested reconsideration on July 23, 2015 and argued that Dr. Lowery's report was not entitled to the weight of the medical evidence as he did not review the actual MRI scan and ignored the EMG/NCV test results. He further contended that Dr. Lowery contradicted himself regarding radiculopathy as he noted that appellant complained of numbness in addition to pain. The representative opined that Dr. Lowery's conclusions did not coincide with his physical examination.

By decision dated February 2, 2016, OWCP reviewed the merits of appellant's claim, but denied modification of the termination decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify 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] Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[5] 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.[6]

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA, which provides that, 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 and resolve the conflict of medical evidence.[7] This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[8]

In situations where there are opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[9]

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective February 12, 2015.

OWCP accepted appellant's claim for lumbar sprain and sprain of the sacroiliac ligament as a result of his work-related fall on February 25, 2014. Appellant's attending physicians, Drs. Bruno and Budampati, diagnosed a herniated lumbar disc based on MRI scan, found evidence of radiculopathy on EMG, and concluded that appellant was totally disabled due to these additional conditions.

[3] *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

[4] *Id.*

[5] *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[6] *Id.*

[7] 5 U.S.C. § 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

[8] *R.C.*, 58 ECAB 238 (2006).

[9] *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

OWCP referred appellant for a second opinion evaluation with Dr. Thompson who reported on June 24, 2014 that appellant had diffuse tenderness in the lumbar spine and limited motion in all planes. Dr. Thompson also found that appellant demonstrated decreased sensation of the S1 distribution bilaterally. He determined that appellant's MRI scan was "essentially within normal limits" and diagnosed soft tissue injuries resulting from low back pain with no intrinsic injury to his spinal cord. Dr. Thompson concluded that appellant could perform sedentary work eight hours a day and offered work restrictions.

Due to the disagreement between appellant's physicians and Dr. Thompson regarding the extent of appellant's employment-related conditions and his resulting disability, the Board finds that OWCP properly determined that there was a conflict of medical evidence necessitating referral to an impartial medical specialist.

OWCP referred appellant to Dr. Lowery to resolve the ongoing issues of disability and medical conditions. Dr. Lowery reviewed the statement of accepted facts and described appellant's employment injury. He also described appellant's medical treatment and analyzed electrodiagnostic studies including appellant's MRI scan and EMG. Dr. Lowery found strong evidence of symptom magnification on physical examination and no objective physical findings in support of appellant's reports of back and lower extremity pain. He noted that appellant reported generalized pain and numbness in the entirety of both lower extremities, as well as generalized weakness, which were not explained by any dermatomal patterns or specific muscle groups. Dr. Lowery noted that appellant had positive Waddell signs including superficial skin tenderness as well as low back pain with downward pressure of the skull while standing. He determined that appellant's MRI scan did not demonstrate a herniated disc, but instead showed mild disc desiccation and some degenerative disc changes. Dr. Lowery determined based on his review of the medical evidence and his physical examination that appellant's claim should not be expanded beyond the accepted conditions of lumbar strain and lumbosacral iliac strain. He determined that the EMG findings of radiculitis were nonspecific, did not relate to any findings on clinical examination, and did not relate to any findings on appellant's MRI scan. Dr. Lowery concluded that appellant did not have any demonstrable injury to his nerves. However, he also opined that appellant "should and has fully recovered from this particular diagnosis, the diagnosis of strain."

The Board finds that Dr. Lowery's report is insufficient to constitute the special weight of the medical evidence as it does not address the issue of appellant's ability to work and is ambiguous on the issue of whether he has recovered from his accepted employment injuries. Dr. Lowery noted that appellant should be capable of returning to his "normal line of work." However, he failed to describe or mention appellant's ability to perform his date-of-injury position and did not declare that appellant could return to his date-of-injury position without restrictions. Furthermore, while Dr. Lowery concluded that appellant's accepted diagnoses of lumbar strain and sacroiliac strain were appropriate, he noted that appellant both "should or has fully recovered from this diagnosis." The ambiguity of his findings regarding whether appellant's strains had resolved as well as the complete lack of opinion on appellant's possible need for work restrictions as found by Dr. Thompson, the second opinion physician, or his total disability for work as determined by appellant's physicians, render his opinion insufficient to meet OWCP's burden of proof. Due to the deficiencies, the Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation or medical benefits.

Given the Board's holding with respect to the first issue presented it is not necessary to address the second issue.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits as the impartial medical adviser did not resolve the issues for which he has selected.

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 8, 2016
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board