United States Department of Labor
Employees' Compensation Appeals Board

M.B., Appellant	)	
and	)	**Docket No. 16-0559**
	)	**Issued: October 27, 2016**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION HOSPITAL, Chicago, IL, 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 February 3, 2016 appellant filed a timely appeal of an October 22, 2015 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 to consider the merits of the case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits on January 28, 2015.

FACTUAL HISTORY

On July 24, 2006 appellant, a 59-year-old practical nurse, filed a traumatic injury claim (Form CA-1) alleging that she injured her lower back and right knee when she tripped on a chair

[1] 5 U.S.C. § 8101 *et seq.*

leg and fell. OWCP accepted the claim for right knee contusion and lumbosacral sprain. It subsequently accepted the additional conditions of lumbosacral spondylosis without myelopathy, thoracic or lumbosacral neuritis, or radiculitis. Appellant stopped work on the date of injury. She received wage-loss compensation benefits on the supplemental rolls as of August 20, 2006 and on the periodic rolls as of December 23, 2007.

Appellant received ongoing treatment from Dr. Charles Slack, a specialist in orthopedic surgery.

On January 7, 2008 OWCP determined that a second opinion evaluation was necessary to determine the status of appellant's accepted conditions. Appellant was referred to Dr. Jeffrey M. Tioco, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a report dated January 30, 2008, Dr. Tioco noted her history of injury and examination findings. He concluded that appellant's diagnoses were L4-5 spondylolisthesis, low back pain, and status post stroke with left-sided weakness. Dr. Tioco concluded that her L4-5 spondylolisthesis and low back pain were causally related to her July 24, 2006 work injury and had not resolved. He related that appellant was not totally disabled, but could work with restrictions regarding walking and standing, as well as pushing, pulling, lifting, and climbing.

In a report dated October 18, 2012, Dr. Slack, appellant's treating physician, advised that appellant was experiencing ongoing back and leg symptoms with a burning sensation in her legs. He reported that she had difficulty with any sustained activities. Dr. Slack noted that appellant had a persistent low back derangement with radicular symptoms associated with lumbar spinal stenosis at L3-4 and L4-5 with spondylolisthesis. He reported that he had discussed surgical intervention with her, a two-level decompression at L3-4 and L4-5 with instrumentation fusion, given the fact that she had spondylolisthesis at those levels. Dr. Slack advised that appellant remained temporarily totally disabled.

In order to determine appellant's current condition and ascertain whether she still suffered residuals from her accepted conditions, OWCP again referred her for a second opinion examination with Dr. James Elmes, Board-certified in orthopedic surgery. In an April 25, 2013 report, Dr. Elmes reviewed the medical history and the statement of accepted facts and noted findings on examination. He advised that appellant's right knee and lumbosacral sprain condition had resolved. Dr. Elmes noted that her aggravation of lumbar spinal stenosis and aggravation of the L4-5 lumbar spondylolisthesis conditions were still ongoing. He opined, however, that appellant could perform sedentary work if accommodations were made for a work conditioning program. In an April 25, 2013 work capacity evaluation (Form 5-c), Dr. Elmes noted that she was capable of performing her usual job with restrictions and had reached maximum medical improvement.

OWCP found that there was a conflict in the medical evidence between Dr. Slack and Dr. Elmes, the second opinion physician, as to whether appellant still had residuals from her accepted conditions. In a statement of accepted facts dated July 16, 2013, it was noted that the accepted conditions were lumbosacral strain and right knee contusion.

OWCP referred appellant to Dr. Klaud Miller, Board-certified in orthopedic surgery, for an impartial medical examination. In a report dated December 3, 2013, Dr. Miller provided

findings on examination, reviewed the statement of accepted facts and her medical history and concluded that she had no residuals from her July 24, 2006 employment injury. He advised that, based on the history and examination, appellant's right knee condition had completely resolved. Dr. Miller further opined that there was absolutely no evidence that her spondylolisthesis was caused in any way by the July 24, 2006 work injury. He advised that Dr. Slack, appellant's treating physician, provided no information regarding this underlying condition, for which Dr. Slack had treated her prior to the work injury. Dr. Miller asserted that, without any further records, there was nothing in the records that could not be explained by spontaneous onsets of symptoms from her spondylolisthesis.

Dr. Miller noted that appellant suffered a stroke 8 or 10 weeks after the July 24, 2006 work injury and clearly deteriorated after that. He opined that her stroke was not causally related to the 2006 work injury. Dr. Miller opined that the only disability that could be related to the incident in question was during the approximately 10-week period between the accepted incident and her stroke, which occurred on October 11, 2006. Appellant's lumbar sprain would have resolved by that point.

Dr. Miller determined that appellant was clearly capable of at least a sedentary job and probably a moderate-intensity job. He asserted that she displayed significant symptom magnification and perhaps even fabrication. Dr. Miller indicated that he could not confirm any objective residual physical limitations based upon appellant's spondylolisthesis. He opined that she could return to work with a 20-pound lifting restriction, although a significant percentage of her lifting capacity was due to the residuals of her stroke; he attributed the remainder of her disability to her preexisting spondylolisthesis. Dr. Miller related that appellant had no restrictions specifically related to her July 24, 2006 work injury.

Dr. Miller concluded that appellant's symptoms had been aggravated by normal daily activities. He opined that the July 24, 2006 work injury was a temporary symptomatic aggravation, which was superseded by the residuals of her stroke. Appellant had no residuals that could be related to the 2006 work injury.

On November 20, 2014 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits. It noted that her claim was accepted for lumbosacral strain, right knee contusion, and lumbosacral spondylosis without myelopathy, thoracic or lumbosacral neuritis, or radiculitis. OWCP found that the weight of the medical evidence, as represented by Dr. Miller's impartial opinion, established that appellant's accepted conditions had resolved.

In a December 11, 2014 report, Dr. Theodore J. Fisher, Board-certified in orthopedic surgery, advised that appellant underwent radiographs of the lumbar spine dated on May 29, 2014, which showed spondylolisthesis of L3-4 and L4-5, accentuated with flexion. He reported that there appeared to be an auto fusion or congenital fusion of the transverse processes of L5 to the sacrum. Appellant also underwent a magnetic resonance imaging (MRI) scan of the lumbar spine on November 24, 2014 which showed a grade 1 spondylolisthesis of L3 on L4 with severe central stenosis; a slightly larger grade 1 spondylolisthesis at L4-5; and at L5-S1, the disc space was maintained and also appears to be an auto fusion or congenital fusion of the transverse processes of L5 to the sacrum. Dr. Fisher concluded that she had L4-5 and L5-S1

spondylolisthesis and spinal stenosis with lumbago and recurrent lower extremity radiculopathy/neurogenic claudication. He related that because appellant's symptoms were affecting her activities of daily living, her ability to exercise and rehabilitate her back, she wanted to undergo lower back surgery.

Dr. Fisher expressed his disagreement with the opinion of Dr. Miller, the impartial medical specialist. He agreed with Dr. Miller that appellant's spondylolisthesis most likely was a degenerative condition that predated her work injury; however; he opined that her symptoms were aggravated or accelerated by the work injury and had persisted since that time. Dr. Fisher advised that the fact that she had a stroke did not change the fact that she had severe low back pain and recurrent lower extremity radicular symptoms related to her spondylolisthesis and spinal stenosis.

Dr. Fisher concluded that, within the degree of medical and surgical certainty, appellant's current condition was a direct result of her work accident. He opined that she most likely had preexisting degenerative changes of the lumbar spine that were aggravated/accelerated by her work injury. Dr. Fisher asserted that, because appellant failed to improve with nonoperative measures, including physical therapy, medications, epidural steroid injection, and time, she was now a surgical candidate. He advised that he would schedule her for surgery in the form of an L3-4 and L4-5 decompression and fusion procedure as soon as it was approved by her insurance company.

In a January 16, 2015 report, Dr. Slack advised that appellant had a persistent lumbar -- radiculopathy with lumbar spinal stenosis and spondylolisthesis at L3-4 and L4-5, which were medically connected to the July 24, 2006 work injury. He opined that these conditions constituted an aggravation/acceleration of the lumbar spinal stenosis and spondylolisthesis that had been present prior to the incident, but was not symptomatic until the July 2006 work injury. Dr. Slack advised that this was a permanent aggravation as appellant's condition had not improved; appellant had ongoing pain and limitations of activity and had a progression of the severity of her spondylolisthesis and stenosis as noted by internal x-rays and lumbar MRI scan. He reiterated that she was unable to work at that time.

By decision dated January 28, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, finding that Dr. Miller's impartial opinion represented the weight of the medical evidence.[2]

On February 4, 2015 appellant, through her representative, requested a hearing before an OWCP hearing representative, which was held on July 9, 2014.

By decision dated October 22, 2015, OWCP's hearing representative affirmed the January 28, 2015 termination decision, finding that Dr. Miller's report constituted the weight of the medical evidence.

[2] OWCP subsequently issued an amended decision dated February 6, 2015. The termination finding was not changed, but the name of the employing establishment, which was listed as the U.S. Postal Service in the original January 28, 2015 termination decision, was corrected and changed to Department of Veterans Affairs.

LEGAL PRECEDENT

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] The burden of proof on OWCP includes the necessity of furnishing rationalized medical opinion evidence which is based upon a proper factual and medical history.[4]

In assessing medical evidence, the weight of a physician's opinion is determined by its reliability, the opportunity for and thoroughness of the examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, and the care manifested in the medical rationale expressed to support the physician's opinion on causal relationship.[5]

Section 8123(a) 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 an examination.[6] 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]

The Board has previously stated that, when OWCP refers to an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from the specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting a defect in the original report. When the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the specialist is unable to clarify or elaborate on the original report or if the specialist's supplemental report is also vague, speculative, or lacks rationale, OWCP must submit the case record together detailed statement of accepted facts to a second impartial specialist for a rationalized medical opinion on the issue in question. Unless this procedure is carried out by OWCP, the intent of section 8123(a) will be circumvented when the impartial specialist's medical report is insufficient to resolve the conflict of medical evidence.[8]

ANALYSIS

OWCP accepted appellant's claim for right knee contusion and lumbosacral sprain. By the time it issued the proposed termination of compensation on November 20, 2014 it had also accepted the conditions of lumbosacral spondylosis without myelopathy, thoracic, or

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

[4] *J.M.*, 58 ECAB 478 (2007).

[5] *See Michael E. Mina*, 57 ECAB 379 (2006); *Anna C. Leanza*, 48 ECAB 115 (1996).

[6] *Regina T. Pellecchia*, 53 ECAB 155 (2001).

[7] *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

[8] *Roger W. Griffith*, 51 ECAB 491 (2000).

lumbosacral neuritis/radiculitis. The last statement of accepted facts, dated July 16, 2013, however, only listed the accepted conditions of lumbosacral strain and right knee contusion. The Board has previously explained that when an OWCP medical adviser, a second opinion specialist, or an independent medical examining physician renders a medical opinion based on an incomplete or inaccurate statement of accepted facts or does not use the statement of accepted facts as the framework in forming the opinion, the probative value of the opinion is diminished, or negated altogether.[9]

The January 28, 2015 decision terminating appellant's wage-loss compensation and medical benefits relied on the December 3, 2014 report of Dr. Miller, the impartial medical examiner, to find that appellant's accepted conditions had resolved. He, however, did not address whether lumbosacral spondylosis without myelopathy, thoracic or lumbosacral neuritis/radiculitis conditions had ceased and that she no longer had any residuals from these conditions. The Board finds that, based upon the flawed statement of accepted facts, OWCP did not meet its burden of proof.

The Board finds that OWCP improperly relied on Dr. Miller's opinion, which was not based on an accurate statement of accepted facts.

The Board, therefore, finds that OWCP erred in relying on Dr. Miller's December 3, 2014 report to terminate appellant's wage-loss compensation and medical benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits as of January 28, 2015.

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

ORDER

IT IS HEREBY ORDERED THAT the October 22, 2015 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 27, 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