

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

C.B., Appellant)

and)

NATIONAL SECURITY AGENCY,)
SCIENTIFIC ADVISORY BOARD,)
Fort Meade, MD, Employer)

**Docket No. 16-0571
Issued: October 4, 2016**

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
COLLEEN DUFFY KIKO, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 2, 2016 appellant, through counsel, filed a timely appeal from the December 2, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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.*

ISSUES

The issues are: (1) whether OWCP properly terminated compensation for wage-loss and medical benefits effective March 8, 2015; and (2) whether appellant met his burden of proof to establish residuals or continuing disability causally related to the accepted injury after the termination of his compensation benefits.

FACTUAL HISTORY

On March 24, 1998 appellant, then a 37-year-old security specialist, sustained a back injury while moving a 600 to 700-pound safe on a moving dolly. The safe slipped off the dolly and pinned him against a wall. OWCP accepted the claim for lumbosacral spasm under claim number xxxxxx969. Appellant stopped work on April 9, 1998. He accepted a limited-duty assignment on March 1, 1999. On October 4, 1999 appellant's chair collapsed at work causing him to fall. OWCP accepted the claim for lumbar sprain, lumbar spasm, and cervical spasm under claim number xxxxxx174.³ On January 22, 2000 appellant stopped work and began receiving wage-loss compensation.

An initial magnetic resonance imaging scan of the lumbar spine revealed degenerative changes at the T12-L1 and L5-S1 intervertebral discs, no disc herniation, no spinal stenosis, and slight lumbar levoscoliosis. A July 23, 1998 computerized tomography (CT) scan of the lumbar spine revealed a bulging disc at L3-4 without disc herniation and small disc herniation at L5-S1. An October 22, 1998 electromyography and nerve conduction study revealed normal results with no evidence of lumbosacral radiculopathy, lumbosacral plexus lesion, or generalized peripheral neuropathy.

In a January 12, 1999 report, Dr. Clifford Turen, a Board-certified orthopedic surgeon, advised that appellant had minimal tenderness along the lower lumbar spine in the midline, tenderness over the left sacroiliac (SI) joint, posterior pelvis pain at the SI joint with radiation to the groin, and intact sensation. He recommended a steroid injection and requested a CT scan. A February 4, 1999 diagnostic report revealed a normal bone scan of the abdomen and pelvis. In a May 4, 1999 report, Dr. Turen advised that appellant injured his left SI joint while at work on March 24, 1998. He assessed SI joint arthritis and noted that appellant had no previous condition to that area. Dr. Turen recommended a SI joint fusion, but encouraged a referral opinion from Dr. Robert Brumback, a Board-certified orthopedic surgeon. In a July 6, 1999 report, Dr. Brumback advised that appellant had lumbar disc problems and SI joint abnormalities after the March 1998 work injury. He diagnosed SI joint dysfunction and ordered a CT of the SI joint. A July 21, 1999 CT of the SI joints revealed mild symmetric degenerative changes.

OWCP referred appellant to a second opinion examination to determine the extent of his disability. In a September 20, 2000 second opinion examination, Dr. William Launder, a Board-certified orthopedic surgeon, diagnosed traumatic arthritis of the left SI joint and indicated that this was a residual of the March 24, 1998 employment injury. He opined that appellant was able to work, but was unable to do any significant lifting or prolonged sitting and standing.

³ OWCP doubled claim numbers xxxxxx969 and xxxxxx174, with claim number xxxxxx969 serving as the master file.

Dr. Launder acknowledged that most of the findings were subjective and opined that there was a degree of embellishment, but he contended that the underlying diagnosis of SI arthritis was substantiated by the fact that the SI joint injection took away appellant's pain for a day and a half. He recommended a SI joint fusion. On May 4, 2001 OWCP authorized a SI joint fusion; however, appellant declined to have the surgery. Appellant remained on the disability rolls.

On May 21, 2004 appellant was referred for another second opinion examination with Dr. Robert Smith, a Board-certified orthopedic surgeon. Dr. Smith opined that appellant's accepted lumbosacral spasm was resolved and that all treatment of his SI joint complaints was unrelated to the March 24, 1998 work injury. He indicated that the bone scan and the CT scan of the SI joint area ruled out any traumatic pathology to the SI area. Dr. Smith noted that the minor degenerative changes in his back and SI joints were preexisting and were neither caused nor aggravated by the work injury.

On February 6, 2009 OWCP asked appellant to provide medical evidence regarding his condition. It noted that it had not received responses to prior requests for medical updates.

On March 9, 2009 Dr. M.A. Reischer, a Board-certified physiatrist, noted that appellant presented with persistent back pain that radiated down his legs. He advised that appellant wished to have disability forms completed. Dr. Reischer noted that appellant had a work injury almost 11 years earlier, but advised that he last saw appellant 10 years earlier. He noted that appellant was using medications for pain management. Dr. Reischer noted findings and assessed multiple muscular, connective tissue, and biomechanical dysfunction. Appellant also had some findings suggestive of SI joint dysfunction. On February 2, 2010 Dr. Reischer noted that appellant continued evidence of SI joint and facet joint dysfunction. He recommended a functional capacity evaluation (FCE). On May 10, 2010 appellant underwent an FCE. It determined that he lacked the ability to perform his job.

OWCP continued to request medical updates from appellant while being on the periodic rolls. In February 19, 2013 and January 27, 2014 work capacity evaluation forms, (OWCP's) Dr. Nandita Kinley, Board-certified in family medicine, advised that he was unable to perform his work duties. She noted that activities of daily living posed a huge challenge to appellant and therefore any sort of work would be even harder. Dr. Kinley advised that her assessment was based on her long patient relationship with him dating back to 2006.

On March 11, 2014 OWCP again referred appellant, together with the medical record and a statement of accepted facts (SOAF) to Dr. Willie Thompson, a Board-certified orthopedic surgeon, for a second opinion regarding appellant's status and whether he had residuals of his accepted conditions. The SOAF did not address the second October 4, 1999 work injury. In an April 11, 2014 report, Dr. Thompson advised that appellant was injured on March 24, 1998 at work when a safe slipped off a dolly and pinned him against a wall. On examination he noted forward flexion limited to 40 degrees, extension at 10 degrees, adequate and symmetrical right and left lateral bending at 30 degrees, subjective tenderness over the left SI joint, no paraspinal muscle spasm, negative straight leg raising with low back pain, no motor sensory deficits, 5/5 muscle strength, and intact tendon reflexes. Dr. Thompson noted that appellant's findings on examination were negative except for subjective complaints. He opined that there was no need

for any continued medical care and that appellant was able to return to work in regular-duty capacity without restrictions.

OWCP updated the SOAF to include the October 4, 1999 work injury and requested that Dr. Thompson submit a supplemental report. Medical records and diagnostic studies not previously provided were also forwarded to him.

In a June 26, 2014 report, Dr. Kinley advised that appellant sustained a March 24, 2008 work injury that ended his career. She noted that he had chronic back pain after his injury for which he had not found relief despite various tests and procedures. Dr. Kinley noted that appellant's current medication regime did not allow him to complete much beyond the activities of daily living. She indicated that, due to his disability, he had narcotic-induced constipation, chronic insomnia, and major psychological trauma. Dr. Kinley noted that the stress of not being able to support appellant's family resulted in psychological stress. Appellant was unable to sit during the interview due to protracted pain with prolonged sitting. Dr. Kinley noted that a mental status examination revealed a somewhat depressed mood regarding his current situation. She advised that past examinations revealed that appellant was intact neurologically with adequate strength, pain with flexion and extension, and limited flexion and extension of the back due to pain. Dr. Kinley opined that he was not able to be rehabilitated. She noted that appellant's history demonstrated repeated attempts to alleviate his symptoms to no avail and opined that he was unable to return to work.

In a July 8, 2014 supplemental report, Dr. Thompson advised that he reviewed the updated SOAF and additional medical records. He reiterated that there was no evidence of ongoing pathology that would preclude appellant from returning to work without restrictions.

OWCP determined that there was a conflict in medical opinion between the treating physician, Dr. Kinley, and OWCP's second opinion physician, Dr. Thompson, regarding whether appellant had continuing residuals of his employment injury. By letter dated August 6, 2014, it scheduled an impartial medical examination with Dr. Daniel Hely, a Board-certified orthopedic surgeon.

In an August 21, 2014 report, Dr. Hely detailed the history of the injury and appellant's treatment. On examination he noted a slow gait without an antalgic component, no visible deformity of the thoracic or lumbar spine, no visible muscle atrophy in the paraspinal muscle of the lumbar area, and extremely limited spinal motion. Dr. Hely indicated that attempting to flex the lumbar spine to put hands to the thighs and extension of the spine to look to the ceiling was guarded and resulted in a jerky movement. Side bending was less than 15 degrees to either side with guarding, rotation was at 45 degrees to either side with no apparent guarding, no palpable deformity was present over the spinous processes, and tenderness on palpation at the left SI area and left buttocks. Dr. Hely noted that the medical record supported that appellant sustained a back sprain of the lumbar region with muscle spasm. He noted that any sprain to the ligaments or muscles of the low back have since healed. Dr. Hely advised that pain symptoms at the left SI joint and the diagnosis of post-traumatic arthritis of the SI joint did not correlate with any objective evidence on physical examination or on imaging studies. He indicated that appellant was opiate dependent and had symptoms associated with chronic opiate use. However, Dr. Hely noted that there were no objective findings to establish that appellant's opiate use was a direct

cause of the work injury incident. He opined that appellant returned to his preinjury level of function six months following the March 24, 1998 work injury and that there was no objective evidence in the medical record to support that his condition was worsened by the 1999 work injury. Dr. Hely noted that appellant was not capable of doing anything more than sedentary activity, which he attributed to appellant's ongoing opiate use. He reiterated that this limitation was not a result of the March 1998 work injury.

By letter dated October 15, 2014, OWCP advised appellant that it proposed a termination of wage-loss and medical compensation benefits. It advised that the weight of the evidence was represented by Dr. Hely who found that there were no residuals of appellant's accepted conditions and that he was no longer disabled from work. Appellant was advised that he had 30 days to submit additional evidence or argument if he disagreed with the proposed termination.

In an October 31, 2014 report, Dr. Harry Doyle, a Board-certified psychiatrist, performed a psychiatric evaluation. He opined that appellant's complaints were authentic with no clinical evidence to suggest symptom exaggeration or malingering. Dr. Doyle diagnosed status post strain of the lumbar back, post spasm of the SI joint, SI joint dysfunction, persistent depressive disorder, somatic symptom disorder with predominate pain, and dysthymic disorder. He indicated that appellant developed persistent depressive disorder due to residuals of the work injury, the loss of his career, and the loss of his former state of physical and psychological well-being. Dr. Doyle noted that appellant was potentially physically dependent on opioid medications, but there were no signs of psychological dependence or opioid use disorder. He opined that appellant was totally disabled for work as his physical and psychiatric impairments prevented him from performing at a constant pace, maintaining attention and concentration, comprehending and following complex instructions, performing repetitive tasks on an ongoing basis, coping with work stressors, relating appropriately to coworkers and supervisors, and completing a normal work week without interruptions from psychologically-based symptoms.

By decision dated February 13, 2015, OWCP terminated appellant's wage-loss and medical benefits effective March 8, 2015. It found that the weight of medical opinion was represented by Dr. Hely. OWCP also found that the evidence did not indicate that the March 24, 1998 work injury caused or led to emotional disorders and that Dr. Doyle's opinion was insufficient to establish a link between an emotional condition and the work injury.

By letter dated February 18, 2015, appellant, through counsel, requested an oral hearing before an OWCP hearing representative. He argued that portions of the file, including OWCP-directed medical reports, were missing and that OWCP failed to update the list of appellant's accepted conditions. Appellant requested that OWCP reconstruct the file, update the SOAF, accept the consequential emotional condition, or refer the issue to a second opinion psychiatrist. On September 17, 2013 an oral telephone hearing took place. Counsel also argued that Dr. Doyle's psychiatric report found that appellant had somatic symptom disorder attributed to the accepted work injury.

By decision dated December 2, 2015, an OWCP hearing representative affirmed OWCP's February 13, 2015 decision.

On appeal counsel asserts that OWCP did not provide OWCP's second opinion and referral physicians with a proper SOAF and therefore their opinions should not be credited. He maintains that the SOAF should have included appellant's diagnosis of SI joint dysfunction, as OWCP authorized an SI joint fusion. Counsel further maintained that the record was incomplete as appellant provided copies of many missing reports when he received the proposed termination. He noted that missing reports were from directed medical examiners, Drs. Brumback and Turen. Counsel also contended that Dr. Doyle's report established that appellant had consequential emotional conditions. He requested that OWCP reconstruct the file, update the SOAF, and accept the consequential emotional condition or refer the issue to a second opinion psychiatrist.

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. After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. 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.⁵

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.⁶ 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.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

⁴ *Kenneth R. Burrow*, 55 ECAB 157 (2003).

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

⁶ 5 U.S.C. § 8123(a).

⁷ 20 C.F.R. § 10.321.

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

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for lumbosacral, lumbar, and cervical spasm, and lumbar sprain. Appellant received wage-loss compensation and medical benefits based on the accepted conditions. OWCP referred appellant to Dr. Thompson for a second opinion regarding the status of his accepted conditions. In his April 11, 2014 report and July 8, 2014 addendum, Dr. Thompson noted appellant's history and opined that he had no residuals of the accepted condition. He opined that there was no need for continued medical care and that appellant was able to return to work without restrictions. However, appellant's treating physician, Dr. Kinley, indicated that appellant still had ongoing symptoms of the work injury and was unable to work. OWCP found that this created a conflict of medical opinion. Therefore, in accord with 5 U.S.C. § 8123(a), it properly referred the case to Dr. Hely for an impartial medical examination and an opinion as to whether appellant continued to have employment-related residuals.

In his September 22, 2014 report, Dr. Hely reviewed appellant's history, reviewed the medical evidence of record, and noted findings on examination. He indicated that the medical record supported that appellant sustained a back sprain of the lumbar region with muscle spasm which would have healed six months following the injury. Dr. Hely advised that symptoms of pain at the left SI joint and the diagnosis of post-traumatic arthritis of the SI joint did not correlate with any objective evidence of injury on physical examination or on imaging studies. He indicated that appellant was opiate dependent and was experiencing symptoms associated with chronic opiate use. However, Dr. Hely concluded that there were no objective findings to support that his opiate use was caused by the work injury. He further opined that any sprain to the ligaments or muscles of the low back have since healed. Dr. Hely explained that appellant was incapable of doing anything more than sedentary activity, but this was attributable to his ongoing opiate use.

The Board finds that the special weight of the medical evidence rests with the well-rationalized report of Dr. Hely. Dr. Hely's opinion is based on a complete and accurate factual and medical history and is entitled to special weight. The Board finds that OWCP met its burden of proof to terminate wage-loss compensation effective March 8, 2015.

In his October 31, 2014 report, Dr. Doyle opined that appellant was totally disabled for work due to his physical and psychiatric impairments. He assessed persistent depressive disorder, somatic symptom disorder with predominate pain, and dysthymic disorder attributable to the work injury. Dr. Doyle opined that appellant's persistent depressive disorder was due to residuals of the work injury, the loss of his career, and the loss of his former state of physical and psychological well-being. The Board finds that this report does not overcome the weight of Dr. Hely's report because it fails to specifically explain how the accepted conditions remained active or how they caused or aggravated persistent depressive disorder, somatic symptom disorder, and dysthymic disorder. OWCP has not accepted any emotional conditions and Dr. Doyle did not sufficiently explain how the March 24, 1998 work injury caused or contributed to an emotional condition.⁹ The Board has long held that medical opinions not containing

⁹ See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury).

rationale on causal relation are of diminished probative value and are generally insufficient to meet appellant's burden of proof.¹⁰

LEGAL PRECEDENT -- ISSUE 2

It is well established that after termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability or residuals, which continued after termination of compensation benefits.¹¹

ANALYSIS -- ISSUE 2

OWCP accepted that appellant sustained lumbar sprain, lumbosacral spasm, lumbar spasm, and cervical spasm. It properly terminated his wage-loss and medical benefits effective March 8, 2015 based on the opinion of Dr. Hely, the referee physician, who found that the accepted conditions ceased without residuals. The burden now shifts to appellant to demonstrate that he continued to have residuals or disability for work on and after due to the accepted injury.¹²

After the termination of appellant's compensation benefits, he did not submit additional medical evidence. However, counsel argues that OWCP did not provide OWCP's second-opinion and referral physicians with a proper SOAF and therefore their opinions should not be credited. He maintains that the SOAF should have included appellant's diagnosis of SI joint dysfunction, as OWCP authorized an SI joint fusion. However, the record indicates that OWCP never accepted SI joint dysfunction. The Board has held that the mere fact that OWCP authorized and paid for medical treatment does not establish that the condition for which the employee received treatment is employment related.¹³ The issue here is whether appellant has continuing residuals or disability due to his accepted conditions of lumbar sprain, lumbosacral spasm, lumbar spasm, and cervical spasm. Counsel further maintains that the record was incomplete, as appellant provided copies of many missing reports when he received the proposed termination. He noted that missing reports were from directed medical examiners, Drs. Brumback and Turen. The Board has reviewed the record and there is no evidence to suggest that OWCP has not assembled the most complete record available. Both Drs. Thompson and Hely provided a detailed history of the medical record, which included the reports from Drs. Brumback and Turen.

Counsel also contended that Dr. Doyle's report established that appellant had consequential emotional conditions. He requested that OWCP accept the consequential emotional condition or refer the issue to a second opinion psychiatrist. As noted, Dr. Doyle's

¹⁰ *Carolyn F. Allen*, 47 ECAB 240 (1995).

¹¹ *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

¹² *Virginia Davis-Banks*, *id.*

¹³ *See Gary L. Whitmore*, 43 ECAB 441 (1992).

report is insufficient to establish that appellant's consequential emotional condition attributable to the accepted conditions.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate wage-loss compensation effective March 8, 2015 and that appellant failed to meet his burden of proof to establish any continuing disability or medical residuals on or after March 8, 2015.

ORDER

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

Issued: October 4, 2016
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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