

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 6, 2014; and (2) whether appellant established any continuing employment-related disability after April 6, 2014.

On appeal counsel challenges OWCP's evaluation of the medical evidence.

FACTUAL HISTORY

On June 16, 2011 appellant, then a 59-year-old food service worker, filed a traumatic injury claim (Form CA-1) alleging that on June 13, 2011, while lifting three crates of milk weighing 60 pounds, he suffered low back strain/pain. On August 17, 2011 OWCP accepted appellant's claim for sprain of the thoracic and lumbar regions of his back. It paid wage-loss compensation and medical benefits.

Appellant began treatment with Dr. Conrad K. King, a physiatrist and pain management specialist, on June 21, 2011, at which time he diagnosed acute thoracic strain and sprain, acute lumbar strain and sprain, and rule out lumbar herniated nucleus pulposus. He continued to receive treatment from Dr. King and his associates. In a September 12, 2011 report, Dr. Damon Cary, an osteopath and associate of Dr. King, diagnosed thoracic and lumbar spine strain and sprain improved but not resolved -- rule out radiculitis. He noted that appellant remained disabled. In an October 10, 2011 report, Dr. Cary noted that appellant had been involved in a motor vehicle accident "last Friday." Appellant told Dr. Cary that he was stopped in a parking lot when another vehicle backed into the passenger's side of the vehicle. At that time, he noted that he had some "irritation" of his mid and low back and some pain in his neck, but no further complaints. Dr. Cary assessed appellant with acute flare-up of thoracic spine strain and sprain and acute flare-up of lumbar spine strain and sprain with left L4 and left L5 radiculopathy. In reports dated April 24 and May 15, 2012, Dr. King indicated that appellant continued to ambulate with a cane.

In a May 30, 2012 letter a human resources specialist, G.G., with the employing establishment reported that appellant had been placed under surveillance for several days, and it appeared "that he had no debilitating conditions and that he is quite capable of doing some type of work." She contended that he could move about, bend, and twist in his everyday functions. G.G. requested a second opinion. The record also contains the summary report from the investigation conducted from March 12 through April 18, 2012. The investigator noted that appellant was observed operating a motor vehicle with no apparent hindrances, and observed walking to and from his vehicle numerous times with no apparent hindrances and without the assistance of any walking devices.

In an October 4, 2012 response to queries from OWCP, Dr. King noted that he had treated appellant since June 21, 2011 for injuries he sustained while working on June 13, 2011. He noted that, despite treatment, appellant continued to experience mild and low back pain and when seen in follow up on September 12, 2011 he was still experiencing ongoing back pain which clinically correlated with objective evidence on physical examination of persistent paradorsal and paralumbar myospasm. Dr. King also noted that appellant was experiencing

ongoing lower extremity radicular pain. He noted that a subsequent electromyogram (EMG) performed on September 28, 2011 revealed electrodiagnostic evidence of left L4 and L5 radiculopathy. Dr. King indicated that these objective findings clinically correlated with appellant's subjective complaints of lower extremity radicular pain. He noted that appellant had completed a functional capacity evaluation (FCE) on November 30, 2011 which revealed that appellant was capable of sedentary to medium-duty work depending on the activity involved. However, Dr. King noted that since that time appellant has reached a clinical plateau and in his most recent follow up on October 2, 2012 his back pain and left lower extremity radicular symptoms had increased in frequency and intensity and his pain level was 10/10. He noted that appellant remained limited in his ability to tolerate activities of daily living.

Dr. King opined that as a direct result of the employment injury of June 13, 2011 appellant sustained thoracic and lumbar strain and sprain aggravating preexisting lumbar degenerative disc disease with left L4-5 radiculopathy. He opined that as a result of his injuries, appellant was permanently partially disabled. Dr. King noted that appellant was incapable of returning to his preinjury position, but could resume working in a light-duty capacity.

In a December 11, 2012 report, Dr. King noted ongoing low back pain and lower extremity radicular symptoms. He listed his impression as acute flare-up of chronic residuals of thoracic and lumbar strain and sprain with L4-5 radiculopathy. Dr. King determined that appellant could continue his treatment regimen to maximum benefit but that, given the severity of his symptoms and his poor sitting tolerance, he did not believe that appellant would be able to perform even sedentary duties on a part-time basis, since prolonged sitting would exacerbate his symptoms and cause him to miss inordinate amounts of time from work. He therefore opined that appellant was totally disabled as he was unable to sustain even part-time sedentary duty on a day-in day-out, week-in week-out basis.

In a February 26, 2013 note, Dr. King advised that appellant continued to experience back discomfort though he did have some improvement in his mid and low back pain following his massage therapy sessions. On April 30, 2013 he reported that appellant's mid and low back pain continued to occur on a daily basis, and that his sitting tolerance was poor. Dr. King noted that he was going to discontinue all formal treatment and that appellant would be switched to a self-directed home treatment regimen, including heat and ice applications, stretching, and range of motion exercise. He concluded that appellant remained totally disabled.

An addendum statement of accepted facts (SOAF) dated April 16, 2013 OWCP noted as follows:

On May 21, 2012 the Veterans Affairs Medical Center Police provided a report of surveillance of the claimant from March 12 to April 1, 2012. During the surveillance period, the claimant was observed operating a motor vehicle with no apparent hindrances. He maintained proper speed, signaled and tracked in the lane normally. The claimant was additionally observed walking to and from his vehicle numerous times with no apparent hindrances and without the assistance of any walking devices. He was observed making regular stops and conducting daily activities.

On April 18, 2013 OWCP referred appellant to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, for a second opinion. In a May 13, 2013 report, Dr. Smith diagnosed soft tissue injuries to the neck and back. He opined that, with regard to the accepted conditions of soft tissue sprains and strains of the mid and low back areas, appellant was at maximum medical improvement. Dr. Smith noted that, within the medical file, there was a series of surveillance reports generated by the employing establishment. He related: "According to a note dated May 30, 2012 written by G.G., the surveillance reports that lasted several days indicate that [appellant] 'has no debilitating conditions and that he is quite capable of doing some type of work. It appears that he can move about, bend, twist, and perform his everyday functions.'" Dr. Smith further noted that he could find no evidence that appellant had any active radiculopathy in his lower extremities and that this was never an accepted condition. He opined that given the benign findings on the magnetic resonance imaging (MRI) scan of August 3, 2011, he determined that the EMG results were obviously false positives or a reflection of his degenerative changes rather than anything post-traumatic related to his federal employment. Dr. Smith further opined that since appellant did not continue to suffer any discernible objective residuals with regard to the employment injury of June 13, 2011, it was his opinion that appellant had fully recovered and would not require any additional treatment, testing, or activity modification in that regard. He noted that there appeared to be no identifiable ongoing organic pathology in his back preventing him from returning to regular-duty work as a food service worker with the employing establishment. Dr. Smith further indicated that, according to the treating physician's notes, appellant had an intervening injury when he was in a motor vehicle accident in October 2011.

In a September 3, 2013 letter, Dr. King responded to questions from OWCP's claims examiner. He noted that at the time of his initial examination on October 4, 2012, he believed that appellant was permanently partially disabled, but that he was subsequently placed on social security disability and it was his opinion that at that time he was totally and permanently disabled from any and all employment. Dr. King indicated that appellant's prognosis was poor, and that his treatment plan at this time was self-directed home exercises as well as heat and ice applications at home and intermittent use of over-the-counter analgesics for pain control. He also completed a work-capacity evaluation wherein he indicated that appellant was totally and permanently disabled due to back pain radiating into left leg and poor sitting tolerance.

In an accompanying September 10, 2013 report, Dr. King listed his impression as acute flare-up of chronic residuals of lumbar strain and sprain superimposed upon preexisting discogenic disease with left L4-5 radiculopathy. He noted that appellant's low back pain continued to flare up and that he was ambulating with a cane since he was having difficulty walking due to the left lower extremity radicular pain and bilateral lower extremity weakness.

In a November 5, 2013 report, Dr. King noted that appellant's low back pain persisted, and that he was having weakness in both legs which was worsening. He noted that appellant derived relief of his back pain and left lower extremity radicular pain with the use of pain medication. Dr. King noted that he would refer appellant to Dr. Pawan Rastogi, a Board-certified neurosurgeon, for an evaluation. In a November 26, 2013 report, he listed his impressions as, "Chronic residuals of lumbar strain and sprain with disc protrusions at L3-4 and L4-5 as well as left L4-5 radiculopathy; rule out new right lumbar radiculopathy and worsening

of left L4-5 radiculopathy; rule out new right lumbar radiculopathy and worsening of left L4-5 radiculopathy.”

In a November 20, 2013 report, Dr. Rastogi diagnosed significant lower extremity weakness. He recommended a cervical and thoracic spine MRI scan to rule out any compression and recommended that he continue physical therapy. Dr. Rastogi referred appellant to Dr. Emmanuel Devotta, a Board-certified anesthesiologist with a Board-certified subspecialty in pain medicine, for a consultation.

In a January 8, 2014 report, Dr. Devotta listed his impression as lumbar radiculopathy and lumbar facet joint syndrome. He planned to schedule appellant for a lumbar epidural steroid injection.

In a January 9, 2014 letter to Dr. King, Dr. Rastogi wrote that appellant had significant cervical myelopathy. With regard to appellant’s lower back, he recommended conservative management. In response to questions posed by OWCP in a January 17, 2014 letter, Dr. King replied that appellant required surgery, and that he was totally disabled pending surgery.

On February 11, 2014 OWCP proposed terminating appellant’s medical benefits and wage-loss compensation as the weight of the medical evidence established that he no longer had any residuals or continuing disability from work stemming from his accepted thoracic and lumbar sprain injuries. It found that the weight of the evidence rested with the opinion of the second opinion physician, Dr. Smith.

In a February 18, 2014 letter responding to the proposed termination of benefits, Dr. King noted that Dr. Rastogi, a Board-certified neurosurgeon, opined that appellant had ongoing pathology related to his lower back and made recommendations regarding an updated MRI scan and EMG study following his evaluation. He disagreed with Dr. Smith’s conclusion that the EMG on January 6, 2014 had a “false positive.” Dr. King noted that the EMG was objective evidence of radiculopathy involving the lower extremities bilaterally which clinically correlated to appellant’s subjective complaints of lower extremity radicular pain. He further noted that appellant had consistently demonstrated on physical examination objective evidence of paralumbar myospasm. Dr. King concluded that appellant had objective evidence of ongoing residuals of his injuries of June 13, 2011 and remained totally and permanently disabled. He asked OWCP to reconsider their decision to terminate appellant’s compensation. Dr. King submitted a copy of the December 19, 2013 MRI scan of appellant’s cervical spine which showed multilevel degenerative changes.

In a January 6, 2014 EMG, Dr. Cary found results consistent with left L4 radiculopathy, right and left L5 radiculopathy, and right and left S1 radiculopathy. He also found right and left superficial peroneal nerve and right and left tibia nerve generalized peripheral neuropathy.

On January 15 and 29, 2014 Dr. Devotta administered a caudal epidural steroid block on appellant for his low back pain.

On March 31, 2014 OWCP terminated appellant’s medical benefits and wage-loss compensation, effective April 6, 2014. It found that the weight of the medical evidence rested

with Dr. Smith and established that appellant had no employment-related residuals or disability due to the June 13, 2011 employment injuries.

On April 8, 2014 appellant requested review of the written record by an OWCP hearing representative.

In an April 3, 2014 note, Dr. Devotta explained that the two epidural injections had not helped appellant. Accordingly, he referred appellant to Dr. Rastogi to determine whether appellant was a surgical candidate.

On May 15, 2014 counsel requested a copy of the case record.

In a June 3, 2014 report, Dr. King reiterated his impression of chronic residuals of lumbar strain and sprain with disc protrusions at L3-4 and L4-5 and bilateral multilevel lumbar radiculopathy.

In a June 10, 2014 report, Dr. King discussed his treatment of appellant, including his consultations with his nurse case manager. He opined within a reasonable degree of medical certainty that as a direct result of the employment accident of June 13, 2011, appellant sustained lumbar strain and sprain with multilevel disc protrusions of the lumbar spine as well as bilateral lumbar radiculopathy. Dr. King noted that appellant continued to manifest ongoing subjective complaints of debilitating low back pain with lower extremity radicular symptoms and these subjective complaints clinically correlated with objective evidence on physical examination of persistent paralumbar myospasm and objective evidence on MRI scan and EMG studies. He noted that given the consistency of appellant's subjective complaints with objective physical findings and objective MRI scan and EMG findings, it was his opinion within a reasonable degree of medical certainty that this confirmed residual impairment was directly related to the injury which occurred on June 13, 2011.

OWCP responded to counsel's request for a copy of the case record on June 13, 2014. It stated that it was providing a complete copy of the imaged portion of the case record.

In an August 22, 2014 letter, counsel argued that Dr. King had clearly established that appellant continued to suffer from residuals of the employment injury, and that OWCP had improperly terminated appellant's compensation benefits. He argued that there remained a conflict of medical evidence between Drs. King and Smith which required referral of the matter to a referee physician.

By decision dated October 6, 2014, the hearing representative affirmed OWCP's March 31, 2014 decision.

On December 3, 2014 appellant, through counsel, requested reconsideration. In support thereof, counsel submitted a November 25, 2014 report wherein Dr. Rastogi noted that he was currently treating appellant for cervical myelopathy and chronic low back pain. He described the work injury. Dr. Rastogi noted that at this point appellant continued to have significant pain in his lower back with radiation into both legs. He noted that his EMG showed significant radiculopathy bilaterally at the L5 and S1 levels, and that his MRI scan showed a bulging disc with some narrowing of the foramen with no frank disc herniation. Dr. Rastogi opined that the

employment injury exacerbated his underlying lumbar pathology and has led to his persistent symptoms. He further opined that in terms of his employment status, appellant was totally disabled and unable to work. As he remained symptomatic, Dr. Rastogi opined that “he will remain on total disability.” He further noted that appellant has other factors that are contributing to his total disability, *i.e.*, his cervical spine with residual cervical myelopathy.

By decision dated December 15, 2014, OWCP denied modification. It found that the opinion of Dr. Smith remained the weight of the medical evidence and established that it met its burden of proof in terminating compensation benefits as of April 6, 2014. OWCP also found that appellant had not submitted sufficient medical evidence to establish continuing disability.

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 Following a proper termination of compensation benefits, the burden of proof shifts back to the claimant to establish continuing employment-related disability.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.⁶

Where there exist opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.⁷

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to justify termination of benefits.

OWCP accepted appellant’s claim for sprain of the thoracic and lumbar regions of the back. It terminated appellant’s wage-loss compensation and medical benefits, effective April 6, 2014 because the weight of the medical evidence established that he no longer had any residuals or continuing disability from work stemming from his employment-related injuries. In evaluating the medical evidence, OWCP determined that the weight of the medical evidence rested with the second opinion physician, Dr. Smith.

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991); *see also J.P.*, Docket No. 13-1049 (issued August 16, 2013).

⁴ *John F. Glynn*, 53 ECAB 155 (2001).

⁵ *See T.P.*, 58 ECAB 524 (2007).

⁶ *See I.J.*, 59 ECAB 408 (2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁷ *See Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

The Board finds, however, that there is an unresolved conflict in the medical evidence between the opinions of appellant's treating physicians and the second opinion physician. Dr. King started treating appellant on June 21, 2011, shortly after the June 13, 2011 employment injury. He submitted multiple reports since his initial report. Dr. King noted in his December 11, 2012 report that, although appellant had been treated with medication and physical therapy, he had chronic residuals of lumbar and thoracic strain and sprain. He opined that due to the severity of appellant's symptoms and his poor sitting tolerance, he did not believe that appellant would be able to perform even sedentary duties on a part-time basis. Dr. King noted continuing residuals from appellant's employment injury in his follow-up reports of February 6 and April 30, 2013.

In a May 13, 2013 report, the second opinion physician, Dr. Smith, opined that since appellant did not continue to suffer discernible objective residuals with regard to the June 13, 2011 employment injury, it was his opinion that appellant had fully recovered and would not require any additional treatment, testing, or activity modification. He opined that there was no identifiable ongoing organic pathology in his back that would prevent him from returning to regular-duty work as a food service worker with the employing establishment.

Appellant submitted multiple reports from treating physicians following Dr. Smith's second opinion report supporting continuing employment-related residuals. Dr. King completed a work capacity evaluation, which he forwarded with his September 3, 2013 response, indicating that appellant was totally and permanently disabled due to back pain which radiated down to his left leg and which caused difficulty for him when seated. He noted on September 10, 2013 that appellant required assistance with a cane to ambulate resulting from left lower extremity radicular pain and bilateral lower extremity weakness. In his November 5, 2013 report, Dr. King reported that low back pain persisted and that he was experiencing weakness in both legs as a result. He referred appellant for consultation to Dr. Rastogi.

In a November 20, 2013 report, Dr. Rastogi assessed appellant with significant lower extremity weakness, and referred appellant to Dr. Devotta for a consultation. Dr. Devotta listed his impression as lumbar radiculopathy and lumbar facet joint syndrome, and gave appellant lumbar epidural steroid injections on January 15 and 29, 2014. A January 6, 2014 electromyogram by Dr. Cary was interpreted as showing results consistent with left L4 radiculopathy and right and left L5 radiculopathy and right and left S1 radiculopathy. Dr. Cary also found right and left superficial peroneal nerve and right and left tibia nerve generalized peripheral neuropathy.

Accordingly, at the time OWCP terminated appellant's compensation on April 6, 2014, there remained an unresolved conflict in the medical opinion evidence as to whether appellant had residuals from the accepted employment injury. Dr. Smith concluded that appellant had no residuals. As discussed, his opinion was disputed by Dr. King, Dr. Rastogi, Dr. Devotta, and Dr. Cary, all of whom found ongoing symptoms. Drs. King and Rastogi noted that appellant remained totally disabled. Although OWCP noted that Dr. Smith was a Board-certified orthopedic surgeon, the Board notes that Dr. King, a physiatrist and specialist in pain management, began treating appellant shortly after the claimed incident, and has submitted multiple well-rationalized reports wherein he discussed appellant's continuing symptomatology and objective tests. Furthermore, Dr. King sought consultations with Dr. Rastogi, a Board-

certified neurosurgeon, and Dr. Devotta, who has a Board-certification in pain management. The reports of Drs. Rastogi and Devotta were in agreement with the report of Dr. King.

It is well established that where there exist opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.⁸ OWCP should have properly resolved the conflict prior to termination of compensation.⁹ As OWCP failed to resolve the conflicting medical opinion evidence, the Board finds that it did not meet its burden of proof to terminate benefits.¹⁰

In light of the disposition of the first issue, the second issue is moot.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 6, 2014.

⁸ *Supra* note 7.

⁹ *R.R.*, Docket No. 15-380 (issued April 10, 2015).

¹⁰ *See V.Y.*, Docket No. 14-828 (issued November 14, 2014).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated December 15 and October 6, 2014 are reversed.

Issued: September 28, 2016
Washington, DC

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

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board