

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective April 10, 2013 as his accepted lumbosacral sprain/strain had ceased without residuals; and (2) whether appellant established continuing residuals or associated disability due to the accepted lumbosacral sprain/strain on and after April 10, 2013.

FACTUAL HISTORY

This case has previously been before the Board. The facts relevant to the present appeal are set forth below.

OWCP accepted that on June 5, 2007 appellant, then a 61-year-old lead security screener, sustained a lumbosacral sprain/strain when he lifted a suitcase from a conveyor belt. Appellant stopped work that day and did not return. He received compensation for total disability on the supplemental rolls beginning July 21, 2007 and on the periodic rolls as of September 30, 2007.³

In 2007 and 2008, appellant was followed by several physicians for a severe lumbosacral sprain with L3-4 disc herniation and degeneration, an L3-4 annular tear, L3-4 disc bulge, lumbar facet arthropathy, bradykinesia and increased muscle tone. Dr. John Dellorso, a Board-certified internist consulting to the employing establishment, submitted reports from June 6 to 27, 2007 diagnosing a severe lumbosacral sprain with L3-4 disc herniation and degeneration caused by the June 5, 2007 lifting incident. Dr. Scott L. Gottlieb, an attending Board-certified anesthesiologist, administered lumbar nerve block injections in February 2008 to address an L3-4 disc bulge and lumbar facet arthropathy.

On March 25, 2008 OWCP obtained a second opinion from Dr. David Rubinfeld, a Board-certified orthopedic surgeon. On examination, Dr. Rubinfeld noted bilaterally positive straight leg raising tests, restricted lumbar motion, decreased sensation in "the foot" and that appellant was unable to heel walk. Appellant diagnosed a lumbosacral strain. Dr. Rubinfeld found no current disability from other nonoccupational, preexisting, or subsequent conditions. He opined that appellant could perform full-time restricted duty. Dr. Rubinfeld limited pushing, pulling, and lifting to 40 pounds and no more than four hours a day, squatting and kneeling to three hours a day, and climbing to two hours a day.

In an April 16, 2008 report, Dr. Daniel R. Van Engel, an attending Board-certified neurologist, opined that appellant's lower extremity dysesthesias, masked facies, slow walk, and cogwheel rigidity all supported a diagnosis of Parkinson's disease. In a June 18, 2008 report, Dr. Van Engel opined that appellant's back pain was caused by degenerative lumbar facet disease.

³ Appellant submitted medical records regarding preexisting musculoskeletal conditions. He underwent a C4-5 anterior fusion due to a fracture in 1965. A March 6, 2006 magnetic resonance imaging (MRI) scan showed a large annular bulge at C6-7 with bilateral neural foraminal narrowing and ventral flattening of the spinal cord. Dr. Lee Berman, an attending Board-certified internist, treated appellant for arthritis of the left knee in August 2006.

On October 7, 2008 the employing establishment offered appellant a limited-duty assignment as a lead transportation security officer. Duties to be performed while standing included monitoring exit points, inspecting passengers, and directing passengers through detection equipment. The physical requirements matched Dr. Rubinfeld's restrictions.

In an October 17, 2008 letter, OWCP advised appellant that the October 7, 2008 job offer was suitable work within Dr. Rubinfeld's March 25, 2008 restrictions. Appellant was afforded 30 days to accept the offer or provide good cause for refusal.

In a November 1, 2008 letter, appellant explained that he neither accepted nor rejected the job offer. He submitted August 13 and October 28, 2008 reports from Dr. James C. Farmer, an attending Board-certified orthopedic surgeon, noting absent Achilles' reflexes bilaterally and restricted lumbar motion. Dr. Farmer reviewed a May 8, 2008 MRI scan showing a left-sided L2-3 herniation with compression of the left L3 nerve root and significant disc degeneration at L4-5. He diagnosed discogenic back pain and recommended a lumbar fusion.

In a November 18, 2008 letter, OWCP advised appellant that he had not provided sufficient reasons for refusing the offered position. It noted that it would not consider any further reasons to justify his refusal of the job offer. Appellant provided December 2, 2008 letters, explaining that he had retired from the employing establishment effective May 31, 2008.

Dr. Carl W. Heise, an attending Board-certified neurologist, submitted a December 2, 2008 report noting an old C4-5 wedge fracture with fusion and spinal cord atrophy and a protruding C5-6 disc with moderate-to-severe stenosis. He noted that appellant's Parkinson's disease had progressed in the right leg.

By decision dated December 24, 2008, OWCP terminated appellant's monetary compensation benefits effective December 16, 2008, finding that he refused an offer of suitable work under 5 U.S.C. § 8106(c)(2).

In a January 13, 2009 letter, appellant requested a telephonic hearing, held before an OWCP hearing representative on May 14, 2009. At the hearing, he asserted that OWCP had failed to consider his cervical fusion and Parkinson's disease when it determined the offered transportation security officer position was suitable work. Following the hearing, appellant submitted a May 27, 2009 report from Dr. Heise noting worsening Parkinson's disease, severe spinal stenosis at C6-7 and a complex situation at C4-5 due to the old fracture.

By decision dated August 5, 2009, OWCP's hearing representative affirmed the December 24, 2008 decision.

On September 28, 2009 appellant requested reconsideration. He submitted a September 21, 2009 report from Dr. Heise finding that, as of November 18, 2008, he was unable to stand more than 10 to 15 minutes due to severe discogenic pain

By decision dated December 17, 2009, OWCP denied modification, finding that the new medical evidence failed to establish that appellant was medically incapable of performing the offered position.

On December 23, 2009 counsel requested reconsideration, contending that Dr. Rubinfeld was biased and unqualified. OWCP denied reconsideration by a March 4, 2010 nonmerit decision, finding that the evidence and arguments submitted were irrelevant to the medical issue in the claim.

Appellant appealed to the Board on April 26, 2010. By order issued June 23, 2010,⁴ the Board dismissed his appeal at counsel's request.

Counsel requested reconsideration on May 20, 2010. He submitted an April 28, 2010 operative report of appellant's L3-4 fusion and L4-5 interbody cage placement.

By decision dated August 3, 2010, OWCP denied modification of the December 17, 2009 decision, finding that the April 28, 2010 operative report failed to establish that appellant was disabled from performing the offered transportation security officer position. Appellant appealed to the Board.

By decision issued August 23, 2011,⁵ the Board reversed OWCP's August 3, 2010 decision, finding a conflict of medical opinion between Dr. Rubinfeld, for the government, and appellant's physicians, regarding appellant's physical work capacity. The Board found that OWCP should have complied with section 8123(a) of FECA⁶ by appointing an impartial medical examiner to resolve the conflict. As OWCP did not do so, the suitable work termination was reversed.⁷

To resolve the outstanding conflict of medical opinion between Dr. Rubinfeld, for the government, and appellant's physicians, OWCP utilized the Physicians Directory System (PDS). It identified four physicians in appellant's zip code cluster, but determined that either there was no current contact information or that the physicians were not neurosurgeons.⁸ As there was no Board-certified neurosurgeon available within appellant's residence zip code cluster, OWCP increased the search radiance to 14 miles outside the cluster. Using the new search parameter, it identified Dr. Alonso Corea, in zip code 07503, and Dr. David Segal, in zip code 10901. As there was no current contact information for either physician, OWCP selected Dr. Jeffrey Oppenheim, a Board-certified neurosurgeon, as the impartial medical specialist. Dr. Oppenheim's medical office was in Suffern, New York, zip code 10901, 13.82 miles outside of appellant's residential zip code cluster. The case record contains a November 11, 2012 referee medical examiner referral form noting that Dr. Oppenheim was selected using the PDS, and a November 19, 2012 Form ME023 Appointment Schedule Notification reflecting same.

⁴ Docket No. 10-1387 (issued June 23, 2010).

⁵ Docket No. 10-2087 (issued August 23, 2011).

⁶ 5 U.S.C. § 8123(a).

⁷ On return of the case OWCP reinstated appellant's monetary compensation benefits.

⁸ OWCP identified Drs. Arthur Canerio, Kenneth Levitsky, and Ram Setia, Board-certified orthopedic surgeons. There was no current contact information for Dr. Chester Kosarek in Wayne, NJ.

Dr. Oppenheim submitted a February 7, 2013 report reviewing the medical record and a statement of accepted facts (SOAF). He related appellant's complaints of back pain with prolonged standing. Dr. Oppenheim noted that appellant had Parkinson's disease and had undergone placement of a deep brain stimulator in the past year, and had previously undergone lumbar surgery. He reviewed imaging studies provided by appellant that were previously of record. On examination Dr. Oppenheim observed bilaterally positive straight leg raising signs at 75 degrees, an intact sensory examination in all dermatomes of both lower extremities, normal reflexes throughout both legs, no paraspinal spasm or tenderness, normal gait, and a full range of lumbar motion in all planes. He commented that appellant had masked facies and rigidity of movement, but no evidence of tremor. Dr. Oppenheim found that appellant had no focal neurologic deficit on examination. The medical record did not identify any structural abnormalities of the spine that "related to any specific neurological findings." Appellant's physicians did not identify any persistent, reproducible neurologic deficit related to a structural injury. Dr. Oppenheim explained that appellant's lumbar stiffness and bilateral lower extremity symptoms were due to the muscular rigidity of Parkinson's disease, and not the accepted lumbar sprain which had resolved within weeks of the injury. He found appellant totally and permanently disabled for work due to Parkinson's disease. Dr. Oppenheim emphasized that the transient lumbosacral sprain no longer affected appellant in any way. He found that appellant had reached maximum medical improvement regarding the lumbar sprain, as it had resolved without residuals.

By notice dated March 5, 2013, OWCP advised appellant that it proposed to terminate his medical and wage-loss compensation benefits as the accepted conditions had ceased without residuals, based on Dr. Oppenheim's opinion as impartial medical examiner.

In response, appellant submitted his March 22, 2013 statement, contending that he remained disabled for work due to herniated lumbar discs and not Parkinson's disease. Counsel asserted in a March 23, 2013 letter that Dr. Oppenheim's opinion was not sufficiently rationalized to represent the special weight of the medical evidence.

By decision dated April 10, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective that day, based on Dr. Oppenheim's opinion that the accepted lumbosacral sprain had ceased without residuals.

In an April 22, 2013 letter, counsel requested a telephonic hearing. At the hearing, held September 12, 2013, appellant noted a remote history of cervical traction following a wrestling injury. He noted that the April 28, 2010 lumbar fusion improved his back and lower extremity symptoms. Counsel contended that appellant remained disabled for work due to herniated lumbar discs that he believed were occupationally related. He submitted a duplicate copy of the April 28, 2010 operative note.

By decision dated December 4, 2013, an OWCP hearing representative affirmed OWCP's April 10, 2013 decision, finding that Dr. Oppenheim's report resolved the conflict of medical opinion regarding appellant's work capacity.

In a December 2, 2014 letter, counsel requested reconsideration, reiterating that Dr. Oppenheim's report was insufficiently rationalized to represent the special weight of the

medical evidence. He submitted a September 21, 2009 letter from Dr. Heise, summarizing his 2008 clinical findings of severe discogenic lumbar pain, a history of an old cervical spine fracture, and Parkinson's disease. Counsel also provided a December 28, 2011 letter from Dr. Noel I. Perin, an attending Board-certified neurosurgeon who performed the April 2010 lumbar fusion, noting a history of a C5 fracture that remained symptomatic, causing radicular symptoms in the right upper extremity. In a May 19, 2014 letter, Dr. Perin noted that appellant's cervical spine symptoms had improved. Appellant continued to have lumbar pain with occasional radiation to the right hip. Dr. Perin characterized appellant's Parkinson's disease as "well-controlled with the deep brain stimulation."

By decision dated February 25, 2016, OWCP denied modification, finding that the additional medical evidence did not discuss the accepted lumbar injury or whether it continued to disable appellant for work.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.⁹ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.¹⁰ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹¹

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.¹² 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.¹³

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.¹⁴ When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.¹⁵ 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

⁹ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

¹⁰ *Id.*

¹¹ *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

¹² *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹³ *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

¹⁴ 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

¹⁵ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁶

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a lumbosacral sprain/strain on June 5, 2007 when he lifted a heavy suitcase in the course of his employment. Appellant did not return to work following the injury. His attending physicians and Dr. Dellorso, for the employing establishment, diagnosed a L3-4 disc bulge or herniation. They found appellant disabled for work. Dr. Rubinfeld, a second opinion physician, attributed appellant's symptoms to Parkinson's disease. He found appellant able to perform limited duty. The employing establishment offered appellant a limited-duty position on October 7, 2008 which OWCP determined to be suitable work. OWCP terminated appellant's monetary compensation effective December 16, 2008, based on his refusal of suitable work. It affirmed the termination on August 3, 2010. Pursuant to the first appeal, the Board reversed OWCP's August 3, 2010 decision, finding that OWCP improperly terminated appellant's wage-loss benefits as there was a conflict of medical opinion regarding his work capacity between Dr. Rubinfeld, for the government, and appellant's physicians.

Pursuant to the present appeal, OWCP selected Dr. Oppenheim as impartial medical specialist to resolve the conflict between Dr. Rubinfeld and appellant's physicians. Dr. Oppenheim provided a February 7, 2013 report reviewing the medical record and a SOAF. He noted detailed findings on examination, including that appellant had no neurologic impairment of either lower extremity. Dr. Oppenheim explained that appellant's lumbar pain and bilateral leg symptoms were attributable to the muscular rigidity of Parkinson's disease. He opined that the accepted lumbosacral sprain/strain had resolved within weeks of the injury. Based on Dr. Oppenheim's opinion, OWCP issued an April 10, 2013 decision terminating appellant's wage-loss and medical compensation benefits effective that day. Following a telephonic hearing that did not involve the submission of new medical evidence, OWCP affirmed the termination on December 4, 2013.

The Board finds that OWCP properly accorded Dr. Oppenheim's opinion the special weight of the medical evidence. Dr. Oppenheim's report was based on the medical record and a SOAF. He presented detailed clinical findings showing no neurologic abnormality of either leg. Dr. Oppenheim provided a comprehensive explanation supporting that appellant's continuing lumbar and bilateral lower extremity symptoms were related to Parkinson's disease. As his opinion is sufficiently rationalized and based on a complete medical and factual background, his report is entitled to special weight.¹⁷ Therefore, OWCP's February 25, 2016 decision is proper under the law and facts of this case.

¹⁶ *Anna M. Delaney*, 53 ECAB 384 (2002).

¹⁷ *Id.*

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden of proof for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.¹⁸

ANALYSIS -- ISSUE 2

As found above, OWCP properly terminated appellant's wage-loss compensation and medical benefits effective April 10, 2013, and affirmed the termination on December 4, 2013, based on the opinion of Dr. Oppenheim, a Board-certified neurosurgeon and impartial medical examiner, who opined that the lumbosacral sprain/strain ceased without residuals. The burden then shifted to appellant to demonstrate that he continued to be disabled for work on and after April 10, 2013 due to the accepted injuries.¹⁹

In support of a request for reconsideration, counsel submitted a September 21, 2009 letter from Dr. Heise, an attending Board-certified neurologist, summarizing his 2008 clinical findings of discogenic lumbar pain, an old cervical spine fracture, and Parkinson's disease. He also submitted December 28, 2011 and May 19, 2014 letters from Dr. Perin, an attending Board-certified neurosurgeon, noting a history of a C5 fracture, lumbar pain, and Parkinson's disease "well-controlled with the deep brain stimulation." By decision dated February 25, 2016, OWCP denied modification, as the reports of Dr. Heise and Dr. Perin did not address the accepted lumbar injury.

The Board finds that OWCP properly found that Dr. Oppenheim's opinion should continue to represent the special weight of the medical evidence. His report was comprehensive, well-rationalized, and based on a complete and accurate history. In contrast, Dr. Heise and Dr. Perin did not address the accepted lumbar injury or provide medical rationale explaining why that injury would continue to affect appellant's condition. They are insufficient to establish continuing disability or residuals following OWCP's termination of appellant's wage-loss compensation and medical benefits. Therefore, OWCP's February 25, 2016 decision is proper under the law and facts of this case.

On appeal, counsel contends that OWCP should have accepted an L3-4 disc herniation, based on the opinion of Dr. Dellorso, a Board-certified internist consulting to the employing establishment. The Board notes, however, that while Dr. Dellorso provided conclusory support for causal relationship, he did not provide sufficient medical rationale to support that theory.

Counsel also contended that OWCP did not properly select Dr. Oppenheim as impartial medical examiner as his office was in Suffern, New York, which he characterized as "upstate New York." The Board notes, however, that the record contains numerous, detailed screen

¹⁸ See *Virginia Davis-Banks*, 44 ECAB 389 (1993); see also *Howard Y. Miyashiro*, 43 ECAB 1101 (1992).

¹⁹ *Id.*

captures and memoranda documenting OWCP's appropriate use of the PDS to select Dr. Oppenheim. OWCP provided bypass screen captures demonstrating that the neurosurgeons in appellant's zip code cluster did not have current contact information in the system. It explained that the lack of Board-certified neurosurgeons in his zip code cluster necessitated expanding the search parameter into a neighboring cluster where Dr. Oppenheim had his medical practice.

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 appellant's wage-loss compensation and medical benefits effective April 10, 2013 as his accepted lumbosacral sprain/strain had ceased without residuals. The Board further finds that he failed to establish continuing residuals or associated disability due to the accepted lumbosacral sprain/strain on and after April 10, 2013.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 25, 2016 is affirmed.

Issued: April 17, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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