

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits, effective February 8, 2016; and (2) whether appellant met his burden of proof to establish continuing employment-related disability after February 8, 2016.

On appeal, counsel contends that OWCP wrongfully terminated appellant's wage-loss compensation benefits based on the opinion of Dr. Michael A. Steingart, a Board-certified orthopedic surgeon and OWCP referral physician. He asserts that while Dr. Steingart found that appellant's employment injuries had resolved, the physician opined that appellant was unable to perform his date-of-injury position due to injuries sustained in a subsequent nonwork-related motorcycle accident. Counsel contends that based on Board precedent and OWCP procedures regarding subsequently acquired conditions, appellant's date-of-injury position is unsuitable as he is totally disabled due to his left forearm and hand injuries sustained as a result of the motorcycle accident.

FACTUAL HISTORY

OWCP accepted that on November 25, 2006 appellant, then a 30-year-old border patrol agent, sustained thoracic or lumbosacral neuritis or radiculitis not otherwise specified when he fell into a hole while walking a group of apprehended suspects back to a truck.³ It authorized right L5-S1 foraminotomy, facetectomy, and discectomy and the use of intraoperative microscope for dissection of neurilemmas and intraoperative fluoroscopy for joint localization performed on February 12, 2007. OWCP later expanded the acceptance of appellant's claim to include displacement of a lumbar intervertebral disc without myelopathy. It authorized reexploration of the right L5-S1 segment for discectomy and use of intraoperative microscope for decompression of neural elements performed on July 2, 2007.

Appellant stopped work on December 9, 2006 and returned to light-duty work on February 24, 2007. He again stopped work on May 2, 2007 due to surgery to treat his lumbar herniated nucleus pulposus and radiculopathy and returned to limited-duty work on October 1, 2007. Appellant stopped work again on December 28, 2007 and has not returned to work. OWCP paid wage-loss compensation and medical benefits.

A notification of personnel action (Form SF-50) dated May 8, 2011 indicated that appellant was removed from the employing establishment effective May 6, 2011 because his medical condition prevented him from performing the full range of the duties of his position.

In an October 17, 2014 medical report, Dr. Duane D.H. Pitt, an attending Board-certified orthopedic surgeon, noted a history of the November 25, 2006 employment injuries and appellant's medical, family, and social background. He also noted that appellant had a nonwork-related motorcycle accident in March 2014 which resulted in a facial fracture, near loss of his left

³ The record indicates that appellant had a military service-connected traumatic degenerative joint disease of the lumbar spine and sciatic radiculopathy involving the right leg, secondary to a service-connected disability back strain. These conditions were rated as 20 percent and 10 percent disabling, respectively, by the Department of Veterans Affairs as a result of his military service with the United States Navy from July 26, 1994 to July 25, 1996.

arm with multiple fractures requiring skin grafts and muscle transfers from his left leg, and a pneumothorax. Appellant was in a coma for approximately three weeks. Dr. Pitt indicated that appellant's complaints of pain in his low back and legs became worse with sitting and prolonged standing, but not while riding a motorcycle. He reported normal findings on examination of appellant's thoracic and lumbar spines, legs, and hip. Dr. Pitt reviewed the results of a January 9, 2008 lumbar magnetic resonance imaging (MRI) scan which were consistent with single-level disc degeneration at L5-S1 and revealed evidence of epidural fibrosis on the left of the midline at L5-S1 where there was a prior laminectomy defect. Appellant had L5-S1 laminectomy discectomies twice in 2007, L5-S1 mild single-level degenerative spondylosis, mechanical back pain, and a history of polytrauma.

In a May 6, 2015 letter, OWCP informed appellant that it needed a current medical report regarding his accepted conditions to support his continued receipt of benefits under FECA. Appellant was afforded 30 days to provide the information requested. He did not respond within the allotted time period.⁴

By letter dated September 17, 2015, OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Steingart for a second opinion.

In an October 12, 2015 report, Dr. Steingart noted a history of the November 25, 2006 work injury and surgeries, appellant's service-connected injuries, and the motorcycle accident. He also reviewed the SOAF and the medical record. On examination, he found sensation deprivation on the dorsum and volar surface of the left arm secondary to the motorcycle collision and issues with multiple skin grafts and marked deformity resulting from this accident. Dr. Steingart noted appellant's scars including a six-centimeter low back scar with palpable defect into the musculature region. Appellant was able to move off and on a table, in and out of a chair, and from a lying to a sitting position. He could turn a doorknob, pick up a coin from the floor, and bend forward without difficulty. Appellant's posture was normal. A lumbar spine evaluation demonstrated active motion, but the joint flexions had 60 degrees of flexion, 0 degrees of extension, and 10 degrees of rotation on right and left. Appellant was able to balance on each foot. Toe walking and heel walking were normal. Cervical spine examination was normal without radiation of pain on motion, muscle spasm, or tenderness. Flexion, extension, and right and left lateral flexion and rotation were within normal limits with modified strength 2/5 to the neck muscles. Lower extremity examination revealed a long 27-cm scar on the left leg region. There was a 16-cm scar on the upper left leg. In a sitting position, there was negative passive straight leg raising from 0 to 90 degrees. Appellant had 5/5 motor strength to great toe extension, ankle dorsiflexion, and knee extension. There were bilateral contractures of interphalangeal (IP) joints of full toes with normal toe nails function. A Tinel's sign of the lower extremity was negative to the peroneal and the posterior tibialis. Reflexes in the Achilles and the patellar reflexes were 2+/4+. Knee and ankle examination were normal in strength and motion. A negative supine straight leg raising test was 40 degrees. Sensation was fully intact distally to

⁴ In a July 17, 2015 decision, OWCP suspended appellant's wage-loss compensation benefits effective June 28, 2015 because he failed to submit a completed Form EN1032. Benefits were reinstated when he submitted the requested form.

the lower and upper extremities. There was no sensation loss. Dr. Steingart also noted upper extremity findings.

In response to OWCP queries, Dr. Steingart noted appellant's two lumbar laminectomies and related that no further diagnosis other than low back scars could be established based on his normal evaluation. He noted appellant's complaint of low back pain and advised that his lumbosacral spine conditions appeared to be related to the November 25, 2006 work injury as set forth in the SOAF. However, Dr. Steingart noted that he did not have any records prior to that date to suggest whether this injury directly caused, aggravated, precipitated, or accelerated appellant's previously rated degenerative lumbar spine condition. He indicated that his objective findings only related to the scar on appellant's back. Appellant's subjective pain complaints did not correlate with the history he provided on examination and his ability to walk and stand. Dr. Steingart noted that he was observed using an elevator, going down stairs, and getting into a sport utility vehicle (SUV) on the date of his examination. He advised that there were no injury-related factors of disability and that appellant did not appear disabled. From appellant's own admission, he could climb Camelback Mountain, a rough and rigorous mountain in Phoenix, Arizona. He was able to ride a motorcycle, which he stated was comforting because he sat on it differently than he would sit at a desk.

Dr. Steingart advised that on an objective medical basis, appellant was not totally disabled and it appeared that his work injury had resolved. He noted that appellant did not report dermatomal changes in the S1 nerve root as he had previously reported in 2011. In addition, Dr. Steingart did not have a straight leg raise test or a focal neurological deficit to the ankle and foot or leg. He related that he could not explain why appellant was unable to work full-time moderate and even light duty. Dr. Steingart related that appellant was able to sit for over 30 minutes during the extensive interview. It did not appear that he was getting up and moving about. Appellant was able to sit through the examination both in a straight chair and on an examination table. He did not have pain behavior. Dr. Steingart reviewed appellant's border patrol agent job description and noted that he was required to perform considerable strenuous physical exertion, stand, walk, run over rough, uneven, and rocky surfaces, and drive standard and all-wheel drive vehicles over rough surfaces for long periods of time. He opined that, based on his evaluation of the lumbar spine, appellant could return to his job. However, based on the physical limitations posed regarding his left forearm injury and skin graft, appellant would not be able to apprehend criminals and defend himself against them or protect others. Based on appellant's lumbar spine, Dr. Steingart did not see any reason why he could not perform home employment duties. He noted that he did not have the MRI scan results ordered by Dr. Pitt or a recent electromyogram to determine whether there was any residual nerve injury. Based on the information provided, however, Dr. Steingart advised that appellant appeared to have enough strength in his body to resume these previous strenuous activities. He indicated that he had no basis upon which to attribute any disability related to appellant's work injury. Appellant had subjective complaints of pain, but Dr. Steingart found no evidence that he was being treated by a physician. Regarding appellant's pain, he related that appellant appeared to be very active and able to deal with this problem. Dr. Steingart found that no further treatment was needed based on the medical record and his clinical examination. He concluded that appellant appeared to have resolved symptomatology. In an October 22, 2015 work capacity evaluation (Form OWCP-5c), Dr. Steingart advised that appellant was capable of performing his usual job without

restrictions. He listed work restrictions related to his nonwork-related left forearm injury and skin graft.

On December 8, 2015 OWCP issued a notice of proposed termination of wage-loss compensation. It explained that appellant no longer had any continuing disability and that he was able to perform his full work duties based on Dr. Steingart's opinion. OWCP afforded appellant 30 days to submit additional evidence or argument.

By letters dated January 6, 2016, counsel contended that Dr. Steingart specifically explained why appellant's current left upper extremity condition would adversely affect his safety and the safety of others if he attempted to perform his border patrol agent position. He referenced Board precedent and contended that OWCP erred as it failed to consider appellant's subsequently acquired left arm problems before finding that he could return to work. Counsel also noted Dr. Steingart's statement that he was not privy to Dr. Pruitt's diagnostic test results and recommended that OWCP provide such evidence to Dr. Steingart for his review and obtain a supplemental report from him regarding appellant's work capacity.

In a February 8, 2016 decision, OWCP terminated appellant's wage-loss compensation effective that day, finding that Dr. Steingart's referral opinion represented the weight of the medical evidence. It clarified that it was not terminating medical benefits.

On March 7, 2016 appellant, through counsel, requested reconsideration. Counsel submitted a copy of OWCP procedures regarding the suitability of an offered job when a condition that has arisen subsequent to a compensable injury disabled an employee from the offered position. He contended that OWCP failed to consider Dr. Steingart's opinion that the injuries sustained by appellant in his March 2014 motorcycle accident precluded him from returning to his border patrol agent position.

By decision dated April 29, 2016, OWCP denied modification of the February 8, 2016 decision. It found that Dr. Steingart's October 12, 2015 report represented the weight of the medical opinion evidence regarding the termination of appellant's compensation benefits. OWCP further found that the Board precedent and procedure manual references cited by counsel related to job suitability and not to the relevant issue of whether appellant had any continuing disability due to his accepted work-related November 25, 2006 employment injuries.

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. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

⁵ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁶ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained thoracic or lumbosacral neuritis or radiculitis not otherwise specified and displacement of a lumbar intervertebral disc without myelopathy as a result of a fall into a hole on November 25, 2006 while in the performance of duty. It subsequently authorized two lumbar surgeries performed on February 12 and July 2, 2007. Appellant had intermittent periods of total disability commencing on December 9, 2006 and completely stopped work on December 28, 2007. OWCP paid compensation wage-loss compensation and medical benefits. In a February 8, 2016 decision, it terminated appellant's wage-loss compensation after finding that the opinion of Dr. Steingart, who provided a second opinion, established that he had no disability due to the accepted November 25, 2006 employment injuries. OWCP did not terminate his medical benefits.

The Board finds that Dr. Steingart's opinion is sufficient to support the termination of appellant's wage-loss compensation. In his report dated October 12, 2015, Dr. Steingart provided essentially normal findings on physical examination with respect to the accepted conditions. He reported no diagnosis other than low back scars resulting from appellant's two authorized lower lumbar laminectomies. Dr. Steingart found no objective evidence supporting his complaints of low back pain and work-related disability. He explained that appellant's complaints did not correlate with his history provided on examination and ability to walk and stand. Dr. Steingart noted that appellant was observed going down stairs and getting into an SUV and that appellant acknowledged climbing a rough and rigorous mountain. Dr. Steingart opined that appellant's total disability from the accepted work injuries had resolved. He reviewed a description of his border patrol agent position and found that appellant could perform the required duties. Although Dr. Steingart noted that appellant would not be able to apprehend criminals and defend himself against them or protect others, he did not attribute his inability to perform such tasks to the accepted November 25, 2006 employment injuries. Rather, appellant's limitations were due to his left forearm injury and skin graft resulting from the nonwork-related March 2014 motorcycle accident. Further, as noted, Dr. Steingart opined that he had no disabling residuals of the accepted employment-related conditions.

The Board finds that Dr. Steingart's second opinion report represents the weight of the medical evidence and that OWCP properly relied on his report to terminate appellant's wage-loss compensation for the accepted conditions on February 8, 2016. Dr. Steingart's opinion is based on a proper factual and medical history as he reviewed the SOAF and appellant's prior medical treatment and job description. He also related his comprehensive examination findings in support of his opinion that appellant no longer had any residuals or disability causally related to his accepted thoracic and lumbar conditions.⁷

Prior to terminating appellant's wage-loss compensation benefits, OWCP afforded him 30 days to submit additional evidence. Appellant did not submit any new medical evidence supporting continuing work-related disability prior to the termination of his wage-loss benefits.

⁷ *Supra* note 6.

Before OWCP and on appeal, counsel contends that OWCP wrongfully terminated appellant's wage-loss compensation benefits based on Dr. Steingart's opinion. He asserts that while Dr. Steingart found that appellant's employment injuries had resolved, the physician opined that appellant was unable to perform his date-of-injury position as a result of injuries sustained in a subsequent nonwork-related motorcycle accident. Counsel contends that based on Board precedent and OWCP procedures regarding subsequently acquired conditions, appellant's date-of-injury position is unsuitable. The Board notes that OWCP must consider preexisting and subsequently acquired conditions in the evaluation of suitability of an offered position when terminating an employee's monetary compensation because he or she refused an offer of suitable work pursuant to 5 U.S.C. § 8106(c).⁸ In the instant case, however, OWCP has not invoked 5 U.S.C. § 8106(c). The relevant issue is whether OWCP properly terminated appellant's monetary benefits on February 8, 2016 because he no longer had disability causally related to the accepted November 25, 2006 employment injuries. As discussed, the Board finds that Dr. Steingart's report represents the weight of the medical evidence. Dr. Steingart's opinion was based on an accurate history, results of physical examination, and accompanied by a rationalized explanation on causal relation to support that appellant's disability due to his accepted conditions had ceased.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminates appellant's compensation benefits, the burden shifts to appellant to establish continuing disability after that date related to his or her accepted injury.⁹ To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.¹⁰ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹¹

ANALYSIS -- ISSUE 2

As OWCP met its burden to terminate appellant's compensation, the burden shifted to appellant to prove that any disability or residuals were due to the accepted thoracic or lumbosacral neuritis or radiculitis not otherwise specified and displacement of a lumbar intervertebral disc without myelopathy. In requesting reconsideration, appellant did not submit any new medical evidence. Instead, counsel submitted a copy of OWCP procedures regarding the suitability of an offered job when a condition that has arisen subsequent to a compensable injury disabled an employing from the offered position. He contended that OWCP failed to

⁸ *S.H.*, Docket No. 10-1531 (issued April 13, 2011); *Richard P. Cortes*, 56 ECAB 200 (2004); see Federal (FECA) Procedure Manual, Part 2 -- Claims, *Job Offers and Return to Work*, Chapter 2.814.4(c)(7) (June 2013).

⁹ See *Manuel Gill*, 52 ECAB 282 (2001).

¹⁰ *Id.*

¹¹ *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

consider Dr. Steingart's opinion that the injuries sustained by appellant in his March 2014 motorcycle accident precluded him from returning to his border patrol agent position.¹²

As noted above, OWCP found that disability related to appellant's accepted conditions had resolved and terminated his benefits effective February 8, 2016. Counsel has not provided any medical evidence showing that appellant had any disability due to the accepted employment-related conditions on or after February 8, 2016.

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 benefits, effective February 8, 2016. The Board further finds that appellant has not met his burden of proof to establish continuing employment-related disability after February 8, 2016.

ORDER

IT IS HEREBY ORDERED THAT the April 29, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 16, 2017
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

¹² These assertions are addressed in the issue one analysis, *infra*.