

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

F.S., Appellant

and

**U.S. POSTAL SERVICE, PRIORITY MAIL
PROCESSING CENTER, Miami, FL, Employer**

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**Docket No. 17-1219
Issued: October 27, 2017**

Appearances:
Appellant, pro se
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 May 5, 2017 appellant filed a timely appeal from a February 23, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective February 24, 2017.

FACTUAL HISTORY

On July 16, 2003 appellant, then a 52-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that her employment duties caused lower back pain. She had stopped work on July 9, 2003. OWCP accepted bulging disc at L1-2. Appellant accepted a

¹ 5 U.S.C. § 8101 *et seq.*

modified-duty employment position on July 28, 2003 and claimed intermittent compensation thereafter. In a July 29, 2004 decision, OWCP denied her claim for intermittent compensation for the period August 10, 2003 to May 14, 2004. Appellant continued modified duty.

In reports dated March 18 to April 19, 2004, Dr. Jon D. Donshik, a Board-certified orthopedic surgeon, noted appellant's history of employment-related back pain. He provided findings and diagnosed neuroforaminal stenosis at multiple levels, probably due to loss of disc space heights. Dr. Donshik indicated that electrodiagnostic testing of the lower extremities was normal. On May 25, 2004 he noted that he explained to appellant that her complaints and symptoms were out of proportion to objective findings, and that he would see her in follow up as needed. On August 17, 2004 Dr. Donshik advised that appellant was working full duty, but continued to complain of lower extremity pain.²

In May 2005, appellant began treatment with Dr. Lance J. Lehmann, Board-certified in anesthesiology and pain medicine. Dr. Lehmann provided treatment on a monthly basis including epidural steroid injections to the lumbar spine.

On November 6, 2009 appellant filed a recurrence of disability claim (Form CA-2a), alleging that the recurrence occurred on October 28, 2009 when she stopped work. OWCP accepted the recurrence of total disability and appellant received wage-loss compensation and was thereafter placed on the periodic compensation rolls in January 2010. Appellant did not return to work.

In April 2010, appellant was referred to James S. Sullivan, a rehabilitation counselor for vocational rehabilitation services.³ Mr. Sullivan prepared labor market surveys for the positions of secretary, receptionist, and administrative assistant.

Dr. Lehmann continued to treat appellant on a monthly basis.

In October 2010, OWCP referred appellant to Dr. Brad K. Cohen, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an October 7, 2010 report, Dr. Cohen diagnosed work-related L1-2 annular disc bulging, chronic back pain, multilevel lumbar degenerative disease with neural foraminal stenosis and lower extremity radiculopathy, and obesity. He advised that the accepted L1-2 bulging disc had resolved without residuals and that appellant's continued symptoms were secondary to nonemployment-related multilevel lumbar degenerative changes, and that she had no employment-related restrictions. In an attached work capacity evaluation (Form OWCP 5c) he advised that appellant could not return to her regular job and provided permanent restrictions that were due to her lumbar degenerative disc disease.

² In May 2004, OWCP referred appellant to Dr. Ismael Montane, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a July 1, 2004 report, Dr. Montane noted that appellant had no lumbar radiculopathy and could return to her usual job.

³ In an August 11, 2010 decision, OWCP notified appellant that her compensation had been suspended as of August 1, 2010 because she failed to submit a requested EN1032 form. The form was submitted on August 20, 2010 and wage-loss compensation was resumed.

On October 22, 2010 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that the weight of the medical opinion evidence rested with the opinion of Dr. Cohen who advised that appellant's work-related condition had resolved and that she had no residuals or disability due to the employment injury.

On November 2, 2010 Dr. Lehman noted appellant's complaint of back and bilateral leg pain. He diagnosed herniated discs from L1-2 through L5-S1 and described appellant's treatment. Dr. Lehmann advised that appellant could perform light-duty work.

OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Lehmann and Dr. Cohen regarding whether the accepted condition had resolved and appellant's work capabilities. It then referred appellant to Dr. Kenneth I. Jarolem, Board-certified in orthopedic surgery, for an impartial evaluation.

In a January 28, 2011 report, Dr. Jarolem diagnosed persistent complaints of lower back and radiating leg pain and degenerative scoliosis. He opined that the work injury did not cause appellant's objective radiographic findings which were clearly a degenerative progress, but that appellant's work activities permanently aggravated the accepted condition at L1-2 which had not resolved. Dr. Jarolem opined that appellant's prolonged disability was due to her substantial degenerative condition, but that she did have continued pain due to the employment injury and; therefore, she could not return to the mail handler position, but was capable of work. On an attached work capacity evaluation form, Dr. Jarolem advised that appellant had permanent restrictions of no twisting, bending, stooping, squatting, or kneeling, with a 10-pound restriction on pushing, pulling, and lifting.

In a supplemental report dated May 18, 2011, Dr. Jarolem noted that he had reviewed a May 16, 2011 lumbar spine magnetic resonance imaging (MRI) scan.⁴ He opined that, based on his review of the MRI scan, there were no changes to his previous opinion.

On July 5, 2011 OWCP proposed to reduce appellant's compensation based on her capacity to earn wages as a secretary, a sedentary position.

Dr. Lehmann continued to submit monthly reports describing appellant's treatment.

By decision dated September 1, 2011, OWCP reduced appellant's wage-loss compensation based on her capacity to earn wages as a secretary, effective July 5, 2011. It utilized the *Shadrick* formula⁵ and found that appellant had a 51 percent loss of wage-earning capacity.

Appellant continued monthly treatment with Dr. Lehmann, including epidural injections.

In August 2016, OWCP referred appellant to Dr. Donshik for a second opinion evaluation. In an August 30, 2016 report, Dr. Donshik noted the history of injury, appellant's complaint of back and knee pain, and his review of the medical record. Lumbar x-rays that day

⁴ A copy of the MRI scan report is not found in the record.

⁵ *Albert C. Shadrick*, 5 ECAB 376 (1953). See discussion *infra*.

showed curvature and lumbar spondylosis. Pelvis x-ray demonstrated no evidence of hip or pelvic fracture or osteoarthritis. Examination of the cervical spine demonstrated full range of motion. Appellant complained of diffuse lower lumbar spine pain on thoracolumbar spine examination which showed no palpable spasm. She could bend and touch her toes with some knee flexion. Straight leg raising and femoral stretch tests were negative. Bilateral lower extremities revealed no gross evidence of sensory or motor deficit. Dr. Donshik advised that the work injury had resolved, noting that disc bulging typically did not cause back pain. He opined that appellant had degenerative scoliosis and lumbar spondylosis which more likely caused her back pain. Dr. Donshik concluded that, while appellant could not return to a mail handler position, this was due to her age and not because she was injured at work.

In a November 1, 2016 report, Dr. Lehmann reiterated his previous findings and conclusions.

On November 30, 2016 OWCP proposed to terminate appellant's wage-loss and medical benefits. It found that the weight of the medical opinion evidence rested with the opinion of Dr. Donshik who advised that appellant's work-related condition had resolved and that she had no residuals or disability due to the employment injury.

Appellant thereafter submitted a December 14, 2016 report in which Dr. Lehmann noted a chief complaint of back and upper leg pain. Dr. Lehmann diagnosed lumbar herniated discs and facet syndrome. He noted that appellant ambulated with minimal difficulty and could function and do most of her daily activities, but was limited with prolonged standing or walking. He noted that he had reviewed the proposed termination which was based on an August 2016 report that deemed that her work-related injury had resolved and her findings have progressed to chronic changes in the lumbar spine. Dr. Lehmann indicated that appellant's treatment would continue and she needed to check with OWCP to find out how her insurance would transition to Medicare since her workers' compensation case had now resolved.⁶

By decision dated February 23, 2017, OWCP terminated appellant's wage-loss and medical benefits, effective February 24, 2017. It noted that Dr. Lehmann did not dispute Dr. Donshik's findings and found that the weight of the medical evidence established that the accepted L1-2 annular bulging disc had resolved with no residuals and that appellant had no disability due to the employment injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify 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.⁷

⁶ Dr. Lehmann also provided a procedure note for an epidural injection on November 4, 2016.

⁷ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

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.⁸

ANALYSIS

OWCP accepted appellant's occupational disease claim for bulging annular disc at L1-2. It terminated her wage-loss compensation and medical benefits on February 24, 2017, based on the opinion of Dr. Donshik, an OWCP referral physician.

The medical evidence relevant to the March 17, 2015 termination includes Dr. Donshik's comprehensive August 30, 2016 report. Dr. Donshik noted the history of injury, appellant's complaint of back and knee pain, and his review of the medical record. He thoroughly described his examination findings, noting that appellant had no palpable spasm on thoracolumbar spine examination. Although she complained of back pain, appellant could bend and touch her toes with some knee flexion. Straight leg raising and femoral stretch tests were negative. Bilateral lower extremities revealed no gross evidence of sensory or motor deficit. Dr. Donshik advised that the work injury had resolved, noting that disc bulging typically did not cause back pain and that appellant had degenerative scoliosis and lumbar spondylosis which more likely caused her back pain. He concluded that, while appellant could not return to a mail handler position, this was due to her age and not because she was injured at work.

Dr. Lehmann, appellant's attending pain management specialist, noted on December 14, 2016 a chief complaint of back and upper leg pain and diagnosed lumbar herniated discs and facet syndrome, neither of which are accepted conditions. He reported that appellant ambulated with minimal difficulty and could function and do most of her daily activities, but was limited with prolonged standing or walking. Dr. Donshik indicated that he reviewed the proposed termination which was based on an August 2016 report that deemed that her work-related injury had resolved and her findings had progressed to chronic changes in the lumbar spine. He indicated that appellant's treatment would continue, but she needed to find out how her insurance would transition to Medicare since her workers' compensation case had now resolved.

Dr. Lehmann did not dispute Dr. Donshik's conclusion. His opinion is certainly insufficient to establish a conflict in medical evidence. Dr. Donshik provided a well-rationalized opinion explaining that appellant's employment-related condition had resolved and that she had no employment-related disability. It, thus, represents the weight of the medical evidence at the time OWCP terminated benefits. OWCP properly relied on Dr. Donshik's report in terminating appellant's wage-loss compensation and medical benefits. Dr. Donshik had full knowledge of the relevant facts and evaluated the course of appellant's accepted conditions. His opinion was based on proper factual and medical history and his report contained a detailed summary of this history. Dr. Donshik addressed the medical record and made his own examination findings to reach a reasoned conclusion regarding appellant's conditions.⁹ He found no basis on which to

⁸ *Id.*

⁹ *See Michael S. Mina, 57 ECAB 379 (2006)* (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

attribute any residuals or continued disability to appellant's accepted condition of exacerbation of preexisting herniated lumbar disc. Dr. Donshik's opinion is found to be probative evidence and reliable, and sufficient to justify OWCP's termination of benefits for the accepted condition.¹⁰

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective February 24, 2017.

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 27, 2017
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

¹⁰ *Jaja K. Asaramo, supra* note 7.