

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

W.F., Appellant

and

**GENERAL SERVICES ADMINISTRATION,
SUPPLY DEPOT, Duluth, GA, Employer**

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**Docket No. 17-0313
Issued: September 18, 2017**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On November 25, 2016 appellant filed a timely appeal from an August 22, 2016 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 to consider the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss and medical compensation benefits effective October 18, 2015; and (2) whether appellant met his burden of proof to establish any continuing disability after October 18, 2015 causally related to the accepted August 20, 1984 employment injury.

On appeal appellant contends that OWCP erred in terminating his compensation benefits as the second opinion physician's report was of no probative value due to reliance on an inaccurate statement of accepted facts (SOAF) provided by OWCP.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 27, 1984 appellant, then a 31-year-old warehouseman, filed a traumatic injury claim (Form CA-1) alleging that on August 20, 1984 he pulled a neck muscle due to pulling a float from a spur. He stopped work on August 21, 1984 and returned to limited-duty work on February 25, 1985. Appellant had intermittent periods of wage loss until September 2, 1986. On September 2, 1986 he underwent anterior C3-4 cervical fusion surgery. OWCP accepted the claim for C3-4 herniated disc, aggravation of C3-4 degenerative disc disease cervical C3-4 nerve root impingement and osteophyte formation, brachial neuritis or radiculitis, C3-4 herniated nucleus pulposus, and resolved cervical and lumbosacral strains. By letter dated December 9, 1986, it placed appellant on the periodic rolls for temporary total disability effective November 23, 1986.

The record establishes that appellant had been treated by Dr. Richard W. Cohen, a Board-certified orthopedic surgeon, from December 4, 1984 until July 16, 2003 when he came under the care of Dr. Tapan K. Daftari, a Board-certified orthopedic surgeon.

Dr. Daftari continued to submit frequent medical reports to OWCP throughout the years documenting appellant's medical status and ongoing treatment. In a September 16, 2014 report, he related that in 1984 appellant had an employment injury and had experienced neck and back pain since that time. Dr. Daftari performed a physical examination which revealed limited cervical and lumbar range of motion and no tenderness on palpation of the lumbar or cervical areas. He reviewed magnetic resonance imaging (MRI) scans dated June 5, 2013 of the lumbar and cervical spines and x-ray interpretations. Dr. Daftari reported that the lumbar MRI scan revealed mild foraminal changes and a broad-based L4-5 disc bulge and the cervical MRI scan revealed C4-5, C5-6, and C6-7 mild spondylolysis and prior C3-4 fusion. Review of x-ray interpretations showed C4-5 moderate changes, C5-6 and C6-7 moderate-to-severe changes, and C3-4 autofusion. Based on his review of the medical reports and physical examination, Dr. Daftari diagnosed C3-4 fusion, a work-related injury, neck and back pain, and transitional syndrome. He recommended that appellant undergo a functional capacity evaluation (FCE).

On July 23, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, for an updated assessment of his employment-related conditions. Dr. Doman was provided a SOAF.² The memorandum detailing questions, which accompanied the referral letter, clarified that the conditions of cervical C3-4 intervertebral disc displacement without myelopathy, aggravation of C5-6 cervical intervertebral disc degeneration, and brachial neuritis or radiculitis were accepted conditions due to the August 20, 1984 employment injury.

In a July 28, 2015 report, Dr. Daftari related that appellant had been seen for neck and back pain. Appellant's physical examination revealed limited cervical and lumbar range of motion and no tenderness on palpation of the lumbar or cervical areas. Dr. Daftari reviewed x-ray interpretations and MRI scans which showed C3-4 cervical spine fusion, C4-5, C5-6, and

² The most recent SOAF is dated July 28, 2011. It noted that appellant sustained an employment injury on August 20, 1984 due to lifting heavy boxes. The SOAF noted the accepted conditions were resolved cervical and lumbosacral sprains, C3-4 nerve root impingement osteophyte formation, C3-4 herniated disc, and aggravation of C3-4 degenerative disc disease. It reported that appellant underwent an anterior cervical discectomy and fusion on June 25, 1985. The SOAF also noted the work duties of a warehouseman.

C6-7 moderate-to-severe changes, lumbar spondylosis, moderate L2-3 and L4-5 changes, L5-S1 desiccation, and L4-5 broad-based disc bulge. Dr. Daftari diagnosed transition C4-5, C5-6, and C6-7 syndrome, which he attributed to the C3-4 fusion and stable degenerative disc disease. He also opined that appellant was unable to return to his date-of-injury job as a warehouse man and again recommended an FCE to determine appellant's work capabilities.

In an August 18, 2015 report, Dr. Doman, based upon review of the medical evidence, SOAF, and physical examination, noted that the accepted conditions of cervical and lumbosacral sprains were resolved. He noted that appellant was also diagnosed with C3-4 herniated disc, C3-4, nerve root impingement with osteophyte formation, and aggravation of C4-5 disc, preexisting neck and back pain, and that C3-4 anterior cervical fusion surgery had been performed on September 2, 1986. A physical examination revealed moderate decreased cervical range of motion, limited and painful cervical and lumbar range of motion, positive left Tinel's sign, and negative bilateral Phalen's test. Dr. Doman opined that appellant had no residuals due to the accepted conditions and was capable of returning to work with no restrictions. He opined that appellant's work injury had resolved long ago with no work restrictions. In reaching this conclusion, Dr. Doman noted normal lumbar x-ray interpretations and the cervical x-ray interpretations revealed solid C3-4 cervical fusion and mild C5-7 cervical spondylosis. In addition, he reported that, prior to appellant's employment injury, he had concurrent or preexisting cervical degenerative disc disease. Dr. Doman attributed appellant's current condition to the natural progression of this condition. He also noted a concurrent nonemployment-related underlying cervical spondylosis condition.

On September 2, 2015 OWCP issued a notice proposing to terminate appellant's medical and wage-loss compensation benefits as it found he no longer had any residuals or disability due to the accepted employment injury. It determined that the weight of the medical opinion evidence rested with Dr. Doman's opinion that appellant's accepted conditions had resolved without residuals or disability.

In a letter dated September 23, 2015, appellant disagreed with OWCP's proposal to terminate his benefits. He alleged that Dr. Doman's report contained incorrect information. Appellant further argued that OWCP failed to consider Dr. Daftari's opinion or his multiple requests for authorization of pain management.

By decision dated October 13, 2015, OWCP finalized the termination of appellant's wage-loss and medical compensation benefits effective October 18, 2015.

In reports dated December 15, 2015 and March 2, 2016, Dr. Daftari diagnosed lumbar and cervical disc disease. A physical examination revealed limited cervical and lumbar range of motion and no tenderness on palpation of the lumbar or cervical areas. Dr. Daftari recommended further testing including an FCE. In the March 2, 2016 report, he noted the accepted work conditions included cervical disc disease, aggravation of degeneration disc disease, and cervical disc displacement disease. In the same report, Dr. Daftari noted that a June 5, 2013 MRI scan revealed some L2-3, L3-4, and L4-5 lumbar degeneration and mild broad-based disc bulge.

On April 20, 2016 OWCP received appellant's request for reconsideration. Appellant argued that Dr. Doman used an incorrect SOAF. He also contended that OWCP should have referred him for an impartial medical examination as there was a conflict in medical opinion.

On June 28, 2016 OWCP referred appellant to Dr. Chad M. Kessler, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Doman and Dr. Daftari as to whether the accepted employment injuries had resolved. The appointment was scheduled for August 9, 2016 at 1:00 p.m. Appellant did not appear for the scheduled appointment.

By decision dated August 22, 2016, OWCP denied modification. It noted that the evidence appellant submitted was sufficient to warrant referral to an impartial medical examiner and that an examination had been scheduled, which appellant failed to attend. OWCP further noted that, as appellant had not contacted OWCP or provide any reason for his failure to attend the scheduled medical appointment, it based its decision on the evidence of record and found it insufficient to establish that he had any residuals or disability due to the accepted August 20, 1984 employment injury.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.³ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁶ 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.⁷

Section 8123(a) of FECA provides in pertinent part: if there is 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 an examination.⁸ Where a case is referred to an impartial medical examiner 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.⁹

³ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁴ *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁶ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁷ *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

⁸ 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁹ *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to justify termination of appellant's wage-loss compensation and medical benefits.

OWCP accepted that appellant sustained C3-4 herniated disc, aggravation of C3-4 degenerative disc disease cervical C3-4 nerve root impingement and osteophyte formation, brachial neuritis or radiculitis, C3-4 herniated nucleus pulposus, and resolved cervical and lumbosacral strains due to the accepted August 20, 1984 employment injury. By decision dated October 13, 2015, it terminated appellant's wage-loss compensation and medical benefits effective October 18, 2015 based on the opinion of Dr. Doman, a second opinion physician. OWCP denied appellant's request for modification in an August 22, 2016 decision.

The Board finds, however, that there remains an unresolved conflict in the medical evidence between the opinions of appellant's treating physician, Dr. Daftari, and the second opinion physician, Dr. Doman.

Dr. Daftari started treating appellant on July 16, 2003. He submitted a series of reports to OWCP regarding appellant's treatment and documenting his medical conditions. In his July 28, 2015 report, Dr. Daftari provided examination findings and reviewed diagnostic tests. He diagnosed C4-5, C5-6, and C6-7 transition syndrome, which he attributed to the C3-4 fusion, and stable degenerative disc disease. Dr. Daftari opined that appellant was disabled from performing his date-of-injury job as a warehouseman.

In an August 18, 2015 report, the second opinion physician, Dr. Doman, opined that appellant had recovered from his accepted cervical and lumbosacral sprain. 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. In addition, Dr. Doman found appellant had no residual or disability due to the August 20, 1984 accepted work injury. He further found appellant's accepted work injuries had resolved long ago. Dr. Doman concluded that appellant was capable of returning to work with no restrictions.

Accordingly, at the time OWCP terminated appellant's compensation on October 13, 2015, there remained an unresolved conflict in the medical opinion evidence as to whether appellant had residuals and disability from the accepted employment injuries.¹⁰ Dr. Doman concluded that appellant had no residuals or disability and that the accepted conditions had resolved long ago. Dr. Daftari's report discussed appellant's continuing symptomatology and objective tests and opined that appellant continued to have residuals and disability from the accepted conditions.

It is well established that where there exists 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.¹¹ OWCP should have properly resolved the conflict prior to

¹⁰ See *J.S.*, Docket No. 15-0872 (issued September 28, 2016).

¹¹ *R.C.*, *supra* note 8; *Darlene R. Kennedy*, *supra* note 8.

termination of compensation.¹² As it failed to resolve the conflicting medical opinion evidence, the Board finds that OWCP did not meet its burden of proof to terminate benefits.¹³

When a claimant refuses to attend an OWCP-directed medical examination, the remedy is to suspend benefits until the claimant complies with the directive.¹⁴

For the above reasons, the Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss and medical compensation benefits effective October 18, 2015.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss and medical benefits compensation effective October 18, 2015. In light of the Board's disposition on the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 22, 2016 is reversed.

Issued: September 18, 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

¹² *R.R.*, Docket No. 15-380 (issued April 10, 2015); *S.J.*, Docket No. 14-1821 (issued January 23, 2015).

¹³ *See V.Y.*, Docket No. 14-828 (issued November 14, 2014).

¹⁴ *Supra* note 1 at § 8123(d); *see J.T.*, Docket No. 07-1898 (issued January 7, 2008).