

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

D.E., Appellant)
and) Docket No. 17-1794
DEPARTMENT OF THE ARMY, ARMY) Issued: April 13, 2018
GARRISON, Fort Shafter, HI, Employer)

)

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 14, 2017 appellant filed a timely appeal from a June 13, 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 the case.

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 13, 2017.

On appeal appellant contends that OWCP improperly weighed the medical evidence.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts of the case as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On October 19, 1987 appellant, then a 36-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on October 15, 1987 he felt a tingling sensation in his left arm and fingers while using his ram set nail gun to fasten a piece of wood onto a concrete wall. OWCP accepted appellant's claim for cervical strain, intervertebral cervical disc disorder with myelopathy, brachial neuritis and disc protrusions, and aggravation of cervical disc dissection.³ Appellant stopped work on November 20, 1997.

The record substantiates that appellant received intermittent wage-loss benefits on the supplemental rolls and payments on the periodic rolls are documented as of June 16, 2002.

Appellant continued to seek medical treatment over time with Dr. Jose C. De Leon, a Board-certified orthopedic surgeon. Dr. De Leon continued to report that appellant was totally disabled from work.

In an April 25, 2013 report, Dr. De Leon noted that appellant still suffered from left-sided neck pain with radiation to the left hand and fingers and tingling, pain, and numbness. He noted that the basis of these symptoms was neck sprain and cervical disc disease with radiculitis. Dr. De Leon related that as appellant has suffered from the same neck pain with radiation to the left arm since the injury of October 15, 1987, it logically should be considered permanent. He further noted that appellant was totally disabled from work.

OWCP prepared a statement of accepted facts (SOAF) dated May 30, 2013. This SOAF related appellant's history of injury and that his case was accepted for cervical strain, intervertebral cervical disc disorder with myelopathy, brachial neuritis and disc protrusions, and aggravation of cervical disc dissection.

On May 31, 2013 OWCP referred appellant to Dr. Kenneth T. Kaan, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine appellant's disability status. It provided Dr. Kaan with the May 30, 2013 SOAF and informed him that the purpose of this assessment was to provide additional evidence on the nature of appellant's condition, the extent of disability, and appropriate treatment. In a July 18, 2013 opinion, Dr. Kaan noted that appellant's diagnoses were C5 and C6 radiculopathy secondary to C4-5 left disc herniation, and C5-6 left foraminal stenosis. He opined that appellant still had cervical disc disease and cervical radiculopathy. Dr. Kaan noted that, although appellant was still complaining of cervical pain, the cervical strain/sprain should have healed, but the cervical disc disease was still present and it was his chronic pain syndrome which was primarily responsible for his symptomology. He indicated

² Docket No. 15-0712 (issued June 23, 2016); Docket No. 99-1194 (issued March 22, 2001).

³ This claim has been administratively combined with OWCP File No. xxxxxxx099. On July 3, 1986 appellant felt neck and right shoulder pain while changing a light bulb in the performance of duty. This claim was never formally adjudicated.

that the diagnosis of neck sprains could be considered a result of an aggravation of an underlying condition, which was cervical disc disease. Dr. Kaan noted that it was unclear as to whether this constituted a permanent aggravation, but appellant did have chronic pain as a result of his cervical disc disease and cervical stenosis. He discussed appellant's July 1992 magnetic resonance imaging (MRI) scan, and indicated that, in general, degenerative changes as seen at C5-7 were not caused by an acute injury. Dr. Kaan noted that the C4-5 disc herniation could have been caused by an acute injury at work, but to make that determination, a cervical MRI scan prior to the employment-related injury would be required. He opined that no further treatment was indicated at this point. Dr. Kaan noted that appellant had decided to not pursue surgery. In an October 2, 2013 work capacity evaluation, he opined that appellant was able to work eight hours a day with a lifting restriction of 10 pounds, and pushing/pulling limited to 20 pounds.

OWCP found that the weight of the medical opinion evidence rested with Dr. Kaan, and referred appellant to vocational rehabilitation to be evaluated within the restrictions set by Dr. Kaan. However, appellant was uncooperative with the vocational rehabilitation program and/, by January 13, 2014 decision, OWCP notified appellant that his compensation was reduced to zero due to his refusal to participate in vocational rehabilitation. This decision was affirmed by OWCP's hearing representative on August 5, 2014. Appellant subsequently appealed to the Board.

By decision dated June 23, 2016, the Board reversed OWCP's decision.⁴ The Board determined that there was an unresolved conflict between the opinions of appellant's treating physician, Dr. De Leon, and the second opinion physician, Dr. Kaan, with regard to appellant's ability to work and whether appellant was physically capable of participating in vocational rehabilitation. The Board concluded that OWCP should have referred appellant for an impartial medical examination.

On January 10, 2017 OWCP referred appellant to Dr. Robert Smith, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict between Dr. De Leon, who indicated that appellant was incapable of working in any capacity and should be considered totally disabled, and Dr. Kaan, who indicated that appellant was capable of working eight hours a day with restrictions.

In a February 23, 2017 medical report Dr. Smith reviewed the medical reports of record. He listed appellant's diagnoses as age and genetically based preexisting degenerative disc disease of the cervical spine. He opined that the established diagnoses were not medically connected to the employment injury by direct cause, aggravation, precipitation, or acceleration. He noted that there were no current injury related factors of disability, and that appellant's subjective complaints were out of proportion to any clinical findings. With regard to appellant's employment injury, Dr. Smith opined that the mechanism of the injury reported revealed that the magnitude of exposure was minimal, and not of sufficient magnitude to count for the development of the claimed clinical presentation. He opined that "causation is uncertain. The record reviewed is full of false certainties. The mechanism of injury in both the change of ballast and the hand held nail gun incidents lack credible evidence for causation." Dr. Smith believed that appellant was capable of

⁴ *Supra* note 2.

working within a sedentary and light physical demand level for eight hours per day. However, he noted that his opinion should not be the sole basis for returning appellant to work. He opined that appellant's perceived disability was not the result of a work-related condition, and was entirely attributable to preexisting conditions of age and genetically based degenerative disc disease. He further opined that appellant no longer had any residuals from his employment injury, and that there was not a credible foundation for any of his claims. He noted that the eligibility for compensation/litigation was actually the best predictor of persistent complaints, and that the original work injuries are not responsible for all subsequent disease or illness. He agreed with Dr. Kaan's report, and opined that Dr. De Leon's script of the fear of reinjury was a well-known psychosocial determinant of disability, without basis, and thus, his opinion was of lesser probative value than Dr. Kaan's opinion.

In an April 27, 2017 report, Dr. De Leon noted that appellant was still complaining of pain at posterior aspect of his neck with radiation of pain to his left deltoid muscles. He noted that appellant had not worked since the date of injury due to his symptoms. He further noted that appellant did not develop any muscle atrophy and thus he believed that his cervical disc disease was stable although still symptomatic. Dr. De Leon opined that appellant was totally disabled from work due to his recurring neck pain with radiation to left shoulder and deltoid muscles. He stated that the posterior neck muscles and the radiating pain to the left shoulder and deltoid muscle were aggravated by certain rotation movement of the shoulder and lifting more than 15 pounds and that this limited his ability to be engaged in any gainful job.

On May 11, 2017 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits as the weight of the medical evidence established that appellant no longer had any residuals or continuing disability stemming from his accepted employment injury based on the opinion of the impartial medical examiner, Dr. Smith.

By June 5, 2017 response, appellant noted that his physician, Dr. De Leon, opined that he was permanently disabled and was unable to work in a part-time or limited-duty capacity. Appellant contended that the report of his treating physician should be entitled to greater weight than the physicians who performed one-time evaluations. He further argued that Dr. Smith emphasized that specific restrictions are generally the purview of the treating physician.

In an undated report received by OWCP on June 12, 2017, Dr. Leon K Liem, Board-certified in neurosurgery, noted that appellant had cervical radiculopathy with marked weakness and atrophy. He noted that he discussed with appellant the option of surgical decompression, and appellant indicated that he would consider it. However, Dr. Liem indicated that it was doubtful that appellant would have any increase in strength.

By decision dated June 13, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 13, 2017 as Dr. Smith's report constituted the special weight of the medical evidence and established that appellant no longer had any residuals related to his accepted employment-related medical condition or disability work as a result of the October 15, 1987 injury.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.⁵ 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.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁸ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

Section 8123(a) provides that, if there is a 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.¹⁰ The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

ANALYSIS

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

OWCP accepted appellant's claim for cervical strain, intervertebral cervical disc disorder with myelopathy, brachial neuritis and disc protrusions, and aggravation of cervical disc dissection. In the prior appeal, the Board found by decision dated June 23, 2016 that OWCP

⁵ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁶ *Id.*

⁷ *Roger G. Payne*, 55 ECAB 535 (2004).

⁸ *Pamela K. Guesford*, 53 ECAB 726 (2002).

⁹ *T.P.*, 58 ECAB 524 (2007); *Furman G. Peake*, 41 ECAB 351 (1975).

¹⁰ *R.C.*, Docket No. 12-0437 (issued October 23, 2012).

¹¹ 20 C.F.R. § 10.321.

¹² *F.C.*, Docket No. 14-0560 (issued November 12, 2015).

improperly reduced appellant's compensation benefits as there was an unresolved conflict between appellant's treating physician, Dr. De Leon, and the second opinion physician, Dr. Kaan with regard to appellant's ability to return to work and whether appellant was physically capable of participating in vocational rehabilitation.¹³

On remand, OWCP referred appellant to Dr. Smith for an impartial medical examination to determine appellant's disability status. While the referral letter referred to the 2013 SOAF, a copy of the SOAF was not attached to the referral letter. In his opinion of January 10, 2017, Dr. Smith determined that appellant had no residuals from his accepted employment injury. Based on Dr. Smith's medical opinion, OWCP terminated appellant's compensation effective June 13, 2017.

The Board finds that OWCP improperly found that Dr. Smith's report should be entitled to the special weight afforded an impartial medical examiner.

While Dr. Smith reviewed appellant's medical record in detail, his report does not relate that he was provided a copy of the 2013 statement of accepted facts, or that he accepted these facts in rendering his medical opinion. It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a statement of accepted facts.¹⁴ OWCP procedures dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁵

Dr. Smith, in his voluminous report, indicated that he reviewed the medical reports of record in detail and ultimately concluded that appellant did not sustain injury as a result of the accepted employment injury. Contrary to the SOAF, he opined that the mechanism of injury did not cause the accepted conditions. Dr. Smith indicated that there was not a credible foundation for appellant's claims although the SOAF indicated that the conditions were accepted for neck sprain, intervertebral cervical disc disorder with myelopathy, brachial neuritis and aggravation of cervical disc disease. The Board has explained that the report of an impartial medical examiner who disregards a critical element of the SOAF and disagrees with the medical basis for acceptance of a condition is defective and insufficient to resolve the existing conflict of medical opinion evidence.¹⁶ Dr. Smith's report is of diminished probative value as his opinion did not rely on the 2013 SOAF and it contradicted critical elements of the SOAF. The Board notes that it is the function of a medical expert to give an opinion only on medical questions, not to find facts.¹⁷ Dr. Smith did not rely on a SOAF and as such his report is not based on an accurate history of

¹³ *Supra* note 2

¹⁴ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁵ See *K.V.*, Docket No. 15-0960 (issued March 9, 2016).

¹⁶ See *V.C.*, Docket No. 14-1912 (issued September 22, 2015).

¹⁷ See *Paul King*, 54 ECAB 356 (2003).

injury. His report is therefore insufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits.¹⁸

Accordingly, OWCP improperly terminated appellant's wage-loss compensation and medical benefits effective June 13, 2017.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 13, 2017.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 13, 2017 is reversed.

Issued: April 13, 2018
Washington, DC

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

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

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

¹⁸ *Supra* note 16.