

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

L.G., Appellant)	
)	
and)	Docket No. 18-0401
)	Issued: August 28, 2018
)	
DEPARTMENT OF VETERANS AFFAIRS,)	
VETERANS ADMINISTRATION MEDICAL)	
CENTER, Philadelphia, PA, Employer)	
)	

Appearances:
Aaron B. Aumiller, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 15, 2017² appellant, through counsel, filed a timely appeal from a June 19, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of the last OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. One hundred and eighty days from June 19, 2017, the date of OWCP's decision, was Saturday, December 16, 2017. In computing a time period, the date of the event from which the designated period of time begins to run shall not be included while the last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday. 20 C.F.R. § 501.2(f)(2). See also *John B. Montoya*, 43 ECAB 1148 (1992). The time period was thus extended to the following business day, Monday, December 18, 2017. Since December 19, 2017, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is December 15, 2017, which renders the appeal timely filed. See 20 C.F.R. § 501.3(f)(1).

Federal Employees' Compensation Act³ (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 June 11, 2013 as her accepted injuries had ceased without residuals.

FACTUAL HISTORY

On January 13, 2012 appellant, then a 44-year-old medical support assistant, filed a traumatic injury claim (Form CA-1) alleging that on January 6, 2012, while at work, she slipped and fell when walking through the double doors of the geriatric ward, landing on her buttocks. She alleged that this incident caused a lumbar sprain and left knee contusion. Appellant stopped work at the time of injury.

Appellant was first examined by Dr. David L. Wagman, a chiropractor, who had previously treated appellant on December 15, 2011 for low back pain of unspecified etiology. In an undated report, Dr. Wagman diagnosed acute soft tissue damage to the "middle and lower aspect of the back as well as left knee." In a January 20, 2012 narrative report, he noted that spinal x-rays were obtained on January 7, 2012. On examination Dr. Wagman found multiple thoracolumbar subluxations and fixations. He diagnosed acute thoracic and lumbar strain/sprains, possible sciatica, and a left knee contusion.

Dr. Richard S. Glick, an attending osteopathic physician Board-certified in obstetrics and gynecology, provided chart notes dated from February 6 to 24, 2012. He noted a history of a November 7, 2011 back injury that had resolved prior to the claimed January 6, 2012 employment incident. Dr. Glick diagnosed a lumbar strain and left knee contusion.

In a report dated February 13, 2012, Dr. Glick noted that appellant had returned to work prior to the claimed January 6, 2012 employment incident from several prior injuries. On examination he found limited lumbar motion and lumbar paraspinal tenderness. Dr. Glick diagnosed an acute lumbar strain and sprain "with injury to myoligamentous structures superimposed on previous back problems," and a history of a post-traumatic left knee sprain and contusion. He held appellant off work indefinitely. Dr. Glick prescribed physical therapy.⁴ He submitted periodic progress reports.

OWCP accepted the claim for a lumbar sprain and left knee contusion. It paid appellant wage-loss compensation benefits on the supplemental rolls commencing February 21, 2012.

³ 5 U.S.C. § 8101 *et seq.*

⁴ Appellant participated in physical therapy treatments from May through November 2012.

An April 17, 2012 lumbar magnetic resonance imaging (MRI) scan showed disc degeneration with a broad-based disc herniation at L3-4, mild facet joint overgrowth at L4-5 and L5-S1, and possible impingement of the left L4 and L5 nerve roots.

In a report dated April 18, 2012, Dr. Amelia L.A. Tabuena, an attending physiatrist, diagnosed an unresolved severe lumbar sprain and strain. She obtained electromyography (EMG) and nerve conduction velocity (NCV) studies on May 8, 2012, which demonstrated multilevel lumbar radiculopathy with bilateral nerve root involvement at L4 and on the left at L5. Dr. Tabuena submitted periodic reports holding appellant off work due to an unresolved severe lumbar sprain and strain, aggravation of lumbar degenerative joint disease, herniated L4 and L5 discs, and bilateral radiculopathy.

On May 24, 2012 OWCP obtained a second opinion from Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, who opined that the accepted lumbar sprain and left knee contusion had ceased without residuals. Dr. Smith noted that OWCP had not accepted the herniated lumbar discs which were the most prominent features of appellant's clinical presentation. He returned appellant to full-duty work.

In a report dated June 13, 2012, Dr. Glenn Miller, an attending Board-certified anesthesiologist specializing in pain management, diagnosed a herniated nucleus pulposus at L3-4 with left-sided lumbar radiculopathy. He prescribed medication and recommended epidural steroid injections.⁵

On December 14, 2012 OWCP notified appellant of its proposed termination of her wage-loss compensation and medical benefits, based on Dr. Smith's opinion as the weight of the medical evidence. It afforded her 30 days to submit additional evidence or argument.

In response, appellant submitted a January 8, 2013 narrative report from Dr. Glick following his review of the medical record. Dr. Glick contended that objective medical evidence clearly established that the accepted lumbar injuries remained active and disabling. He noted that although appellant had sustained a prior lumbar injury on November 7, 2011, contemporaneous imaging studies were within normal limits, and she had returned to full duty prior to the January 6, 2012 slip and fall.⁶ Dr. Glick opined in an April 22, 2013 report that appellant remained disabled from work.

Appellant also provided a February 11, 2013 narrative report from Dr. Tabuena, who noted that a December 27, 2012 functional capacity evaluation demonstrated a sedentary demand level below the physical requirements of appellant's date-of-injury position. Dr. Tabuena diagnosed an unresolved severe lumbosacral sprain and strain with myoligamentous injury, a herniated L3-4 disc with lumbar nerve root involvement at L4 and L5, bilateral L4 radiculopathy, and an unresolved severe left knee contusion. She attributed these diagnoses to the accepted January 6, 2012 employment injury.

⁵ Appellant underwent a series of approved epidural injections from June 2012 to April 2013.

⁶ Dr. Glick retired from medical practice on April 1, 2013.

OWCP determined that there was a conflict of medical opinion between Dr. Smith, for the government, and Dr. Glick, for appellant, regarding whether the accepted injuries had resolved. To resolve the conflict, it selected Dr. Stuart Trager, a Board-certified orthopedic surgeon, as impartial medical specialist. OWCP provided a copy of the medical evidence of record and a statement of accepted facts (SOAF). The SOAF noted that under File No. xxxxxx632, appellant sustained an accepted lumbosacral sprain on December 21, 2011.

Dr. Trager reviewed the medical record and submitted a May 1, 2013 report. He commented that, according to the SOAF, an “additional date of injury of December 21, 2011 for a lumbosacral sprain is noted.” Appellant related that while working at the [employing establishment nursing home in 2001 and 2002 she had pulled a muscle on her back. She was out for six months and had x-rays, but could not recall that lumbar spine MRI scan had been completed. Appellant also described a bus door closing on her in “October 2011” after which her back was “a little sore.” On examination Dr. Trager noted limited lumbar motion in all planes, subjective tenderness of the spinal midline and left buttock, some pulling in the left thigh on supine straight leg raising test, and a full range of left knee motion without crepitus. He commented that appellant “apparently has an established history of back injury, which occurred in approximately 2001 or 2002 and was not noted by multiple other providers, and according to [appellant] caused her to be out of work for approximately six months.” Dr. Trager opined that because appellant had degenerative changes in the lumbar spine and a “history of prior low back injury,” it was not possible to ascertain with medical certainty that her ongoing complaints were related to the accepted lumbar strain/sprain “rather than to the progression of her underlying degenerative condition.”

By decision dated June 11, 2013, OWCP terminated appellant’s wage-loss compensation and medical benefits effective that day, finding that the medical evidence of record established that the accepted injuries had ceased without residuals. It accorded Dr. Trager’s opinion the special weight of the medical evidence.

Appellant submitted chart notes dated from June 17 to August 15, 2013 from Dr. Miller, finding her condition unchanged.

On June 19, 2013 appellant requested a telephonic oral hearing before a representative of OWCP’s Branch of Hearings and Review. At the hearing, held January 5, 2015, counsel contended that Dr. Trager found that the accepted injuries had resolved because he assumed wrongly that appellant sustained herniated lumbar discs in a prior injury although contemporaneous imaging studies were within normal limits.

By decision dated February 23, 2015, OWCP’s hearing representative affirmed the June 11, 2013 OWCP decision. The hearing representative found that Dr. Trager’s opinion was based on an accurate factual and medical history and was sufficiently well rationalized to represent the special weight of the medical evidence.

On February 23, 2016 appellant, through counsel, requested reconsideration. He contended that Dr. Trager misstated appellant’s history of injury. Counsel submitted February 9, 2001 and June 7, 2002 lumbar MRI scan reports which noted normal studies with no evidence of disc herniation.

By decision dated March 22, 2016, OWCP denied modification, finding that the additional evidence submitted was insufficient to outweigh Dr. Trager's opinion or to cast doubt on its correctness.

On March 22, 2017 appellant, through counsel, requested reconsideration. Counsel contended that Dr. Trager based his opinion on assumptions rather than a thorough review of the evidence of record. He submitted additional reports from Dr. Tabuena dated from April 16 to June 10, 2016, finding appellant's condition unchanged. A June 10, 2016 EMG/NCV study demonstrated chronic bilateral L4 radiculopathy, chronic left-sided L5 radiculopathy, and ongoing denervation in the L4 and L5 innervated muscles in the left lower extremity.

By decision dated June 19, 2017, OWCP denied modification, finding that Dr. Trager's opinion remained controlling, as it was thorough and based on all relevant evidence.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁷ 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.⁸ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.¹⁰ 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.¹¹

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.¹² 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.¹³ 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 the conflict, the

⁷ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁸ *Id.*

⁹ *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

¹⁰ *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹¹ *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

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

¹³ *Delphia Y. Jackson*, 55 ECAB 373 (2004).

opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹⁴

ANALYSIS

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

Dr. Smith, a Board-certified orthopedic surgeon acting as a second opinion physician on behalf of OWCP, opined, in a May 24, 2012 report, that appellant's accepted lumbar sprain and left knee contusion had ceased without residuals. Dr. Glick, an attending Board-certified obstetrician, submitted reports from February 6, 2012 to January 8, 2013, finding that the accepted injuries continued to be active and disabling. Dr. Tabuena, an attending physiatrist, submitted reports from April 18, 2012 to February 11, 2013, in which she opined that appellant remained disabled for work due to the accepted January 6, 2012 work injuries. She also opined that the accepted employment injury caused or aggravated a severe lumbosacral strain and herniated L3-4 and L4-5 discs.

OWCP referred appellant to Dr. Trager to resolve the conflict of medical opinion between Dr. Glick, for appellant, and Dr. Smith, for the government. It based its decision to terminate appellant's medical benefits on Dr. Trager's May 1, 2013 report. The Board finds, however, that OWCP's termination of appellant's medical benefits effective June 11, 2013 must be reversed because Dr. Trager's medical opinion is of insufficient probative quality to carry the special weight of the medical evidence as an impartial medical examiner.

In his May 1, 2013 report, Dr. Trager reviewed appellant's history of injury and treatment, and the SOAF. However, the SOAF contains a typographical error.¹⁵

The Board finds that Dr. Trager provided insufficient medical rationale for his conclusions that the accepted injuries had ceased without residuals. Dr. Trager performed a full physical examination and found no evidence of muscle spasm, weakness, or isolated reflex abnormalities. However, these physical findings, combined with his acknowledgment of the findings of abnormalities on testing fail to explain the etiology of the ongoing midline low back pain and difficulties with activity. Dr. Trager opined that because appellant had a history of lumbar injuries prior to the accepted January 6, 2012 employment injury, he could not ascertain whether her ongoing condition remained occupationally related. He opined that he "did not believe it is possible to include any degree of medical certainty that ongoing complaints are related to the sprain/strain, which is the accepted injury rather than to the progression of her underlying degenerative condition." Dr. Trager's medical opinion therefore is found to be vague and incomplete and is insufficient to support termination of wage-loss compensation and medical benefits.

¹⁴ *Anna M. Delaney*, 53 ECAB 384 (2002).

¹⁵ The Board notes that the SOAF does incorrectly state the prior date of injury was December 21, 2011, however, Dr. Trager's report noted that the prior injury in OWCP File No. xxxxxx632 was a decade earlier.

In determining the probative value of an impartial medical examiner's report, the Board considers such factors as the opportunity for and thoroughness of examination performed by the physician, 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 by the physician on the issues addressed to him or her by OWCP.¹⁶ Dr. Trager's opinion and his reasoning is vague and incomplete in nature.¹⁷ It is therefore of greatly reduced probative quality¹⁸ and is thus of insufficient weight to resolve the conflict of medical opinion between Dr. Glick, for appellant, and Dr. Smith for the government. When an impartial medical examiner fails to provide medical reasoning to support his or her conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the medical evidence.¹⁹

Because Dr. Trager's report lacks dispositive probative value, the Board finds that OWCP erred in relying on his opinion as the basis to terminate wage-loss compensation and medical benefits for the accepted injuries. The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 11, 2013.²⁰

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 11, 2013.

¹⁶ *James T. Johnson*, 39 ECAB 1252, 1256 (1988).

¹⁷ *See C.L.*, Docket No. 14-1585 (issued December 16, 2014); *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

¹⁸ *See Steven S. Saleh*, 55 ECAB 169 (2003).

¹⁹ *See A.R.*, Docket No. 12-0443 (issued October 9, 2012); *see also P.F.*, Docket No. 13-0728 (issued September 9, 2014); *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (a medical report consisting solely of conclusory statements without supporting rationale is of little probative value).

²⁰ *Curtis Hall*, 45 ECAB 316 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 19, 2017 is reversed.

Issued: August 28, 2018
Washington, DC

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

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

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