United States Department of Labor
Employees' Compensation Appeals Board

E.C., Appellant	)	
and	)	**Docket No. 17-1645**
	)	**Issued: June 11, 2018**
DEPARTMENT OF THE TREASURY, Richmond, VA, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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 July 24, 2017 appellant, through counsel, filed a timely appeal from a June 1, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 26, 2017; and (2) whether appellant has established continuing employment-related residuals or disability after January 26, 2017.

On appeal counsel argues that OWCP's decisions are contrary to fact and law.

FACTUAL HISTORY

On October 10, 2014 appellant, then a 43-year-old customer service representative, filed a traumatic injury claim (Form CA-1) alleging that on October 8, 2014 he injured his back when elevator doors closed on him while at work. The employing establishment controverted the claim. Appellant initially returned to work four hours a day, but stopped work on October 14, 2015 and did not return.

On February 18, 2015 appellant underwent L4-5 lumbar discectomy surgery.[3]

On September 22, 2015 OWCP accepted appellant's claim for annular tear at L4-5, right, aggravation of preexisting condition at L5-S1, and aggravation of preexisting spinal stenosis, lumbar region. Appellant received wage-loss compensation and medical benefits retroactively, and received benefits on the periodic rolls as of January 10, 2016.

In a May 10, 2016 report, Dr. Paul Richin, appellant's treating Board-certified orthopedic surgeon, assessed acute low back pain without sciatica and unspecified back pain laterally. He listed the onset of the condition as October 8, 2014 when an elevator shut on appellant's back and stomach. Dr. Richin noted that appellant had a lumbosacral fusion and subsequently went back to work, but was reinjured in 2014, and that he had an L5 discectomy in 2015. He noted that since that time appellant has had chronic back problems and was even paralyzed right after his 2015 surgery. Dr. Richin noted that appellant's lower back pain was worsening, but that he did not see any reason for the need for surgery at this point. He recommended physical therapy, weight reduction, medication, and orthotic therapy. In a May 10, 2016 note, Dr. Richin indicated that appellant was under his medical care and may not return to work at this time. He noted that he would reevaluate appellant in four weeks as to his work status.

On May 9, 2016 OWCP referred appellant to Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, for a second opinion. In a May 26, 2016 report, Dr. Doman noted that appellant had long-standing preexisting conditions in his lumbar spine including lumbar spinal stenosis and a previous annular tear at L4-5 and L5-S1. He noted that appellant had previously undergone two lumbar spine surgeries, and continued to complain of low back pain following surgery. Dr. Doman found that appellant had no residuals from the accepted work injuries related to the incident of October 8, 2014. He opined that the accepted injuries had long ago resolved. Dr. Doman explained that it was clear that appellant was grossly exaggerating his complaints with extreme symptom magnification, clearly indicative of a patient that was malingering. He opined

[3] Appellant had a back injury during military service in 1990 that required L5-S1 decompression/fusion in 2010 and revision for hardware failure that same year.

that appellant's accepted conditions had returned to their preinjury status and that appellant was currently capable of performing the full duties of a customer service representative without restrictions.

In a May 24, 2016 report, Dr. Joseph A. Martino, a Board-certified orthopedic surgeon, noted that appellant was involved in an employment-related injury on October 8, 2014 when "he was slammed in an elevator door." He diagnosed: (1) acute right annular tear with protruding disc herniation at L4-5 secondary to work-related injury, October 8, 2014; (2) aggravation of preexisting moderate spinal stenosis at L4-5 secondary to same work-related injury; and (3) aggravation of preexisting condition at L5-S1 from previous fusion. Dr. Martino noted that appellant had undergone extensive conservative management, which offered only temporary relief. He recommended that appellant consider surgical intervention or a chronic pain management program.

Appellant also was seen by Dr. Julio Petilon, a Board-certified orthopedic surgeon. In a July 14, 2016 report, Dr. Petilon noted that appellant injured his back on October 8, 2014 when an elevator door shut on him. He noted that appellant failed conservative management. Dr. Petilon indicated that appellant had a prior back injury while serving in the military. He indicated that he would like to personally review appellant's recent magnetic resonance imaging (MRI) and that he believed that it would verify that appellant required a right L4-5 laminoforaminotomy, microdiscectomy, and possible partial medial facetectomy to address his symptoms. In a July 20, 2016 letter of medical necessity, Dr. Petilon noted that appellant's MRI scan of May 6, 2016 was positive for L4-5 facet and ligamentum flavum hypertrophy as well as disc herniation with resultant moderate central canal and right greater than left foraminal stenosis. Physical examination revealed pain with lumbar flexion, weakness of the right quadriceps, ankle dorsiflexon, ankle plantar flexion, and positive right straight leg raise. He noted that given appellant's history, physical examination, and imaging findings, he discussed surgical options with appellant. In an August 3, 2016 report, Dr. Petilon diagnosed lumbar spinal stenosis; arthropathy of lumbar facet; postlaminectomy syndrome, lumbar region; and lumbar disc herniation with radiculopathy. He noted that, after discussion, appellant wished to proceed with decompression and Coflex stabilization.

On August 12, 2016 appellant was seen in the emergency department by Dr. Amy Blackburn, an emergency room physician, who noted "acute on chronic" low back pain with sciatic symptoms and hyperglycemia without acidosis. He was also seen on August 15, 2016 by Dr. Taylor Fletcher, an emergency room physician, who noted that appellant presented with low back pain. Dr. Fletcher discussed appellant's military injury as well as his employment injury. He diagnosed "acute on chronic" back pain with large central T8-9 disc herniation and placed appellant on pain medication and a brief course of steroids.

An OWCP medical adviser reviewed appellant's medical file on September 13, 2016. He determined that the low back surgery was not medically necessary as there was no clear documentation that appellant exhausted all conservative therapies including adequate trials of pain medication nor did he exhibit good compliance with physical therapy. The medical adviser also noted no clear evidence of L5 root compression and no electromyogram findings supporting the diagnosis of radiculopathy.

As there existed a conflict between appellant's treating physicians and OWCP's second opinion physician regarding the status of appellant's accepted conditions, on September 16, 2016 OWCP referred appellant to Dr. Howard Krone, a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP provided Dr. Krone a statement of accepted facts and appellant's medical records.

In an October 24, 2016 report, Dr. Krone noted appellant's history of injury that he was struck on his stomach and back when elevator doors closed suddenly. He reviewed appellant's medical history in detail and provided his own physical examination findings. Dr. Krone opined that appellant's findings were all chronic in nature, and are not unusual findings in the joint after a previous fusion. He did not believe that appellant had any residuals from his accepted annular tear at L4-5, right, or aggravation of preexisting L5-S1 condition, or aggravation of preexisting spinal stenosis. Dr. Krone explained that appellant had no physical findings such as objective muscle weakness in the lower extremities that would go along with significant nerve root involvement at L4-5. He noted that appellant had no objective findings of the accepted conditions. Dr. Krone concluded that there was no demonstration of any sequelae from pathology at the L4-5 disc space or at L5-S1, and that the aggravation of his preexisting spinal stenosis of the lumbar region now returned to the preinjury status, meaning the aggravation had ceased. He opined that from an objective standpoint, appellant was capable of returning to full duties as a customer service representative. Dr. Krone believed that appellant had reached maximum medical improvement.

On November 18, 2016 OWCP issued a notice of its intention to terminate appellant's wage-loss compensation and medical benefits. Based on the opinion of the impartial medical examiner, Dr. Krone, it determined that the weight of the medical evidence established that appellant no longer had any residuals or continuing disability from work stemming from his work injury.

Subsequent to the issuance of its intention to terminate appellant's benefits, appellant submitted further evidence. In treatment notes dated from October 13 through December 20, 2016, Countiss Williams, a nurse practitioner, noted appellant's intractable low back pain with lower extremity radiculopathy secondary to L4-5 facet and ligamentum flavum hypertrophy as well as disc herniation with resultant moderate central canal and right left foraminal stenosis, and status post right L4-5 discectomy and L5-S1 fusion.

In a November 2, 2016, report, Dr. Kathleen Funk, a physician Board-certified in emergency medicine, noted that appellant presented with an acute exacerbation of chronic lumbar pain radiating down his right lower extremity that caused swelling to the right calf, ankle and foot. She diagnosed acute exacerbation of chronic back pain.

In a December 29, 2016 report, Dr. Raymond Walkup, a neurosurgeon, excused appellant from work for four months starting December 27, 2016. He noted that appellant had spine surgery on January 15, 2017 and would be under his care for three-months postoperative.

On January 26, 2017 OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It determined that the weight of the medical evidence of record established that appellant no longer had residuals related to his accepted employment-related

medical condition and that he had no continued disability from work as a result of the October 8, 2014 employment injury.

Subsequent to OWCP's termination of benefits, appellant submitted an additional report from Nurse Williams dated January 23, 2017. Appellant also submitted a report by Rick Chappuis, a physician assistant, dated June 24, 2015, wherein he listed diagnoses as mechanical hardware failure S1 screw secondary to previous L5-S1 fusion, intractable back and lower extremity pain with recent mainly invasive surgery, aggravation of long-standing low back pain dating back to 1990, and right sacroiliitis. He gave appellant an injection of Torodol and fitted him for a brace. Appellant also submitted physical therapy notes.

In an August 3, 2015 report Dr. Francis K. Acquah, a physician Board-certified in anesthesiology who specializes in pain medicine, listed his impression as chronic low back pain with acute exacerbation following a work-related injury in 2014. He gave appellant a right L4-5 block. In an August 18, 2015 report, Dr. Acquah noted that he gave appellant a right L4 selection root block.

On March 21, 2017 appellant requested reconsideration.

In a March 22, 2017 report, Dr. Victor Osisanya, a physiatrist, described appellant's employment incident and discussed his medical history since that time. He noted that appellant reported some functional improvement with respect to pain since his last visit and that he continued to heal from surgery. However, Dr. Osisanya indicated that appellant told him that he was not yet close to his baseline.

By decision dated June 1, 2017, OWCP conducted a merit review of appellant's case and determined that the evidence submitted with appellant's request for reconsideration was insufficient to warrant modification of the prior decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.[4] 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.[5]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[6] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which

[4] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[5] *Id.*

[6] *Roger G. Payne*, 55 ECAB 535 (2004).

require further medical treatment.[7] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 26, 2017.

OWCP properly referred appellant to Dr. Krone for an impartial medical examination to resolve the existing conflict in medical opinion between appellant's treating physicians, Drs. Richin and Petilon, and the opinion of OWCP's second opinion physician, Dr. Doman with regard to whether appellant had residuals from the accepted employment injury, causing disability. In his October 24, 2015 report, Dr. Krone described appellant's employment injury, the results of his review of the medical evidence, and physical examination. He noted that there was no evidence of sequelae from the pathology at the L4-5 disc space or the L5-S1 and aggravation preexisting spinal stenosis lumbar region had now returned to its preinjury status, meaning the aggravation had ceased. Dr. Krone opined that, from an objective standpoint, appellant was capable of returning to full duties as a customer service representative.

The Board finds that Dr. Krone had full knowledge of the relevant facts and properly evaluated the course of appellant's condition. Dr. Krone's opinion is based on a proper factual and medical history and his report supported a detailed knowledge of this history. He reviewed appellant's extensive medical records and made his own examination findings to reach a reasoned conclusion regarding appellant's conditions.[9] At the time benefits were terminated, Dr. Krone found no basis for the existence of residuals of the accepted conditions or to attribute any continued disability to appellant's accepted conditions. His opinion as set forth in his October 24, 2016 report is found to be probative evidence and reliable. The Board finds that Dr. Krone's opinion is entitled to special weight and is sufficient to justify OWCP's termination of benefits for the accepted conditions.[10]

Dr. Krone resolved the conflict in the medical evidence between Drs. Richin and Petilon and Dr. Doman and OWCP's medical adviser. None of the other evidence appellant submitted prior to the termination of his compensation benefits was sufficient to establish that his benefits were improperly terminated, especially in light of the well-rationalized opinion of the impartial medical examiner.

[7] *Pamela K. Guesford*, 53 ECAB 726 (2002).

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

[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).

[10] *See G.C.*, Docket No. 17-0062 (issued December 11, 2017); *Bryan O. Crane*, 56 ECAB 713 (2005).

Drs. Blackburn, Fletcher, and Funk, emergency room physicians, did not provide reports containing a well-rationalized opinion, based on objective findings, which established residuals due to the employment incident. Dr. Walkup excused appellant from work for four months starting December 27, 2016 and noted appellant's previous spine surgery. These reports are of limited probative value and are not in equipoise with that of Dr. Krone as they offered no probative medical opinion, based upon objective current findings, as to whether appellant had residuals or disability causally related to his October 8, 2014 employment injury.[11]

Dr. Martino provided medical diagnoses which he attributed to the October 8, 2014 employment accident. Although Dr. Martino's opinion is generally supportive of causal relationship, he did not provide adequate medical rationale explaining that appellant's diagnosed conditions were residuals of the accepted injury and caused disability.[12]

The opinion of Nurse Williams is insufficient to establish entitlement to benefits, as she is not considered a physician under FECA and therefore her report has no probative value.[13]

Accordingly, the Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective January 26, 2017.

LEGAL PRECEDENT -- ISSUE 2

As OWCP properly terminated appellant's compensation benefits, the burden shifts to the employee to establish continuing disability after that date causally related to his or her accepted injury.[14] To establish causal relationship between the accepted conditions as well as any attendant disability claimed and the employment injury, the employee must submit rationalized medical evidence based on a complete medical and factual background supporting such relationship.[15]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that that he had continuing residuals of his accepted right annular tear at L4-5 or aggravation of preexisting spinal stenosis, lumbar region after the termination of his wage-loss compensation and medical benefits on January 26, 2017.

[11] *See J.O.*, Docket No. 16-1401 (issued February 23, 2018).

[12] *J.S.*, Docket No. 14-0818 (issued August 7, 2014).

[13] A medical report may not be considered as probative medical evidence if there is no indication that the person completing the report qualifies as physician as defined in 5 U.S.C. § 8101(2). Section 8101(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See Merton J. Sills*, 39 ECAB 572, 575 (1988). Healthcare providers such as licensed clinical social workers, nurses, acupuncturists, physician assistants, and physical therapists are not considered physicians under FECA and their reports and opinions do not constitute competent medical evidence to establish a medical condition, disability, or causal relationship. *See D.F.*, Docket No. 17-0135 (issued June 5, 2017).

[14] *Manuel Gill*, 52 ECAB 282 (2001).

[15] *R.D.*, Docket No. 16-0982 (issued December 20, 2016); *R.F.*, Docket No. 16-0845 (issued July 25, 2017).

The issue of whether appellant remains entitled to compensation for continuing disability and whether he continued to experience residuals from his accepted condition is a medical one, based on the medical evidence of record. Following the termination of his benefits, appellant requested reconsideration. In support of his reconsideration request, he submitted an additional report by Nurse Williams, a report by a physician assistant, and physical therapy notes. As these opinions were not offered by a physician and do not constitute medical evidence, they are therefore not sufficient to establish continuing disability.[16]

Appellant also provided medical reports by Drs. Acquah and Osisanya. Drs. Acquah and Osisanya treated appellant with injections to relieve appellant's back pain. However, neither of these physicians explained how appellant's current back condition was related to his employment incident. Medical reports without adequate rationale on causal relationship are of diminished probative value and do not meet appellant's burden of proof.[17] Appellant did not provide a probative medical opinion, based upon objective medical findings establishing that he was disabled or currently required medical treatment due to an employment-related condition.[18] For the reasons discussed above, appellant has not met his burden of proof to establish continuing disability after January 26, 2017.

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 and medical benefits, effective January 26, 2017. The Board further finds that appellant has not established continuing employment-related residuals or disability after January 26, 2016.

[16] *See supra* note 12.

[17] *See F.T.*, Docket No. 09-0919 (issued December 7, 2009); *Cecilia M. Corley*, 56 ECAB 662 (2005).

[18] *See P.M.*, Docket No. 16-1321 (issued January 10, 2017).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 1, 2017 is affirmed.

Issued: June 11, 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