

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

C.R., Appellant)	
)	
and)	Docket No. 17-1262
)	Issued: May 21, 2018
U.S. POSTAL SERVICE, POST OFFICE,)	
Bronx, NY, Employer)	
)	

Appearances:
Stephen Larkin, for the appellant¹
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
COLLEEN DUFFY KIKO, Judge

JURISDICTION

On May 21, 2017 appellant, through her representative, filed a timely appeal from a March 3, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 25, 2013; and (2) whether appellant has

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.*

met her burden of proof to establish continuing residuals or disability causally related to her March 14, 2001 employment injuries on or after October 25, 2013.

On appeal counsel contends that OWCP accepted that appellant sustained additional occupational injuries to the lumbar spine.³ He further asserts that OWCP did not consider appellant's requests for reconsideration in a timely manner; that OWCP did not consider appellant's subsequent occupational disease claims in terminating her wage-loss compensation and medical benefits; that the weight of the medical evidence rests with Dr. Marini who found that the conditions accepted in appellant's additional claims resulted from her accepted employment injury; and that appellant's claims should be combined as they all involve the same part of the body.

FACTUAL HISTORY

On May 2, 2001 appellant, then a 42-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that, on March 14, 2001, she sustained a herniated disc while moving heavy bundles of mail. She stopped work on April 6, 2001. On July 19, 2001 OWCP accepted her claim for herniated discs at L4-5 and L5-S1. Appellant received wage-loss compensation for total disability on the periodic rolls from June 16, 2002 until May 4, 2013.

OWCP continued to receive narrative progress reports through the years from appellant's treating physician, Dr. Madhu Boppan, a Board-certified orthopedic surgeon. Dr. Boppan continued to report that appellant remained totally disabled.

In a report dated June 13, 2012, Dr. Boppan related that appellant could work part time with restrictions.

OWCP referred appellant for a second opinion examination with Dr. Leon Sultan, a Board-certified orthopedic surgeon, on July 25, 2012. In a report dated August 8, 2012, Dr. Sultan found that appellant could return to her date-of-injury position as a clerk. He further opined that she did not require additional medical treatment.

Appellant submitted a series of reports from Dr. Robert A. Marini, a physiatrist, beginning on March 4, 2013. Dr. Marini performed electrodiagnostic testing and found right L4-5 lumbar nerve root irritation. He noted that appellant's test results did not meet the strict criteria for lumbar radiculopathy, but the findings were consistent with her symptomatology. On March 29, 2013 Dr. Marini diagnosed chronic lumbar radiculopathy.

The employing establishment offered appellant a modified-duty position on March 14, 2013 working four hours a day as a modified parcel post distribution clerk. Appellant accepted

³ In OWCP File No. xxxxxx925, OWCP accepted appellant's May 27, 2013 occupational disease claim (Form CA-2) for subluxation of lumbar vertebra on September 11, 2013. In OWCP File No. xxxxxx575, OWCP found that appellant's October 29, 2013 recurrence claim (Form CA-2a) under File No. xxxxxx925, should be developed as a new occupational disease claim, which was accepted for aggravation of herniated disc at L4-5 and L5-S1 on May 12, 2015.

the position and returned to work on April 8, 2013, as a modified parcel post distribution clerk, working 20 hours a week.⁴

On June 27, 2013 OWCP referred appellant for an impartial medical examination with Dr. Stanley Soren, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between appellant's physicians and Dr. Sultan regarding appellant's current diagnoses and the need for further medical treatment. It provided Dr. Soren with the surveillance video included in the record.

Dr. Marini completed a note on June 28, 2013 and found that appellant could work four hours a day with restrictions.

By decision dated July 24, 2013, OWCP found that the position of modified parcel post distribution clerk working four hours a day effective April 10, 2013 fairly and reasonably represented appellant's wage-earning capacity.

In a report dated August 16, 2013, Dr. Soren reviewed appellant's history of injury, the statement of accepted facts (SOAF), and her medical history. On physical examination he found that her gait was normal, with no spasm in the lumbar spine. Dr. Soren reported normal sensation in the lower extremities with equal reflexes. He diagnosed L4-5 disc bulge and L5-S1 disc herniation based on the April 6, 2001 magnetic resonance imaging (MRI) scan. Dr. Soren also found symptomatic lumbar radiculopathy and degenerative spondylitic changes as well as morbid obesity. He found that on clinical examination appellant had no evidence of lumbar abnormalities and no positive neurological findings. Dr. Soren attributed her ongoing symptoms to preexisting and progressive spondylitic changes in the low back and her excessive weight. He also noted that there was no clear evidence of any ongoing disability related to appellant's March 14, 2001 employment injury. Dr. Soren found that there was no need for any further medical treatment due to appellant's accepted employment injuries.

OWCP provided appellant with a notice of proposed termination of compensation on September 23, 2013. It found that Dr. Soren's report was entitled to special weight and established that she was no longer disabled and had no medical residuals due to her accepted employment injury.

By decision dated October 25, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. Appellant requested an oral hearing before an OWCP hearing representative on November 7, 2013.

Dr. Marini completed a progress note on October 28, 2013 and continued to report that appellant could work only four hours a day.

⁴ Appellant received compensation based on her loss of wage-earning capacity from July 13 through October 24, 2013.

Appellant testified at the oral hearing before an OWCP hearing representative on May 9, 2014. She described her employment injury and her return to modified duty on April 8, 2013. Appellant noted that she had filed an additional occupational disease claim.

By decision dated July 23, 2014, OWCP's hearing representative affirmed the October 25, 2013 decision finding that appellant had no disability or medical residuals related to her accepted March 14, 2001 employment injury.

Appellant's representative requested reconsideration of the July 23, 2014 decision on July 28, 2014. He submitted additional medical evidence. In a progress note dated May 22, 2014, Dr. Marini reviewed appellant's May 7, 2014 MRI scan which demonstrated disc herniations at L4-5 and L5-S1 with impingement on the nerve roots. He opined that she was totally disabled. Dr. Marini opined that appellant's diagnosed conditions were causally related to her 2001 employment injury and were exacerbated by her return to work on April 10, 2013 which involved bending and lifting small packages.

By decision dated February 5, 2015, OWCP denied modification of the July 23, 2014 decision finding that appellant had not submitted rationalized medical opinion evidence supporting her claim for continued disability and medical residuals due to her March 14, 2001 employment injury.

Appellant's representative requested reconsideration on March 17, 2015 and submitted an additional report from Dr. Marini. In the March 13, 2015 report, Dr. Marini again noted appellant's history of injury and attributed her ongoing symptoms and disability to the repetitive bending and lifting that she performed in her light-duty position from April 10 to May 16, 2013 and May 28 to August 30, 2013. He opined that her repeated acts of bending to scan mail and lift packages aggravated her bulging discs resulting in herniated discs at L3-4 and L5-S1.

By decision dated October 28, 2015, OWCP declined to reopen appellant's claim for consideration of the merits. Appellant's representative appealed this decision to the Board. By *Order Remanding Case*, dated May 2, 2016, the Board remanded the case for OWCP to issue an appropriate decision on the merits of the claim in order to preserve appellant's appeal rights.⁵

By decision dated March 3, 2017, OWCP reviewed the merits of appellant's claim and denied modification of the October 25, 2013 decision. It found that the weight of the medical evidence rested with Dr. Soren.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of proof to establish that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.⁶ 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

⁵ Docket No. 16-0250 (issued May 2, 2016).

⁶ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

it is no longer related to the employment.⁷ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ 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.⁹

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which provides that, 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 and resolve the conflict of medical evidence.¹⁰ 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 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 opinion of such specialist, if sufficiently well-rationalized and based on a proper factual background, must be given special weight.¹²

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective October 25, 2013.

OWCP accepted that appellant sustained herniated discs at L4-5 and L5-S1 due to her March 14, 2001 traumatic injury. It subsequently determined that a conflict in medical evidence had been created between the opinions of appellant's physicians Drs. Marini and Boppan, and Dr. Sultan, an OWCP referral physician, regarding whether appellant had any continuing residuals or disability causally related to the accepted employment injuries. OWCP then properly referred her to Dr. Soren, a Board-certified orthopedic surgeon, for an impartial medical evaluation.¹³

The Board finds that Dr. Soren's impartial medical opinion is entitled to special weight and establishes that appellant no longer has any disability due to the accepted employment injuries. In his August 16, 2013 report, Dr. Soren reviewed the SOAF and the medical file and noted essentially normal findings on physical examination. He opined that appellant's accepted employment injuries had clinically resolved and that her current condition and disability was due

⁷ *Id.*

⁸ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁹ *Id.*

¹⁰ 5 U.S.C. §§ 8101-8193, 8123; *M.S.*, 58 ECAB 328 (2007); *B.C.*, 58 ECAB 111 (2006).

¹¹ *R.C.*, 58 ECAB 238 (2006).

¹² *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

¹³ *Supra* note 11.

to her preexisting spondylitic condition and her excessive weight. Dr. Soren found that she did not need further medical treatment.

The Board finds that Dr. Soren provided a comprehensive, well-rationalized opinion in which he found that appellant could return to her preinjury job. Dr. Soren had full knowledge of the relevant facts and the course of her condition. His opinions were based on a proper factual and medical history and on the SOAF. Dr. Soren's report contained a detailed summary of the history of the claim.¹⁴ Additionally, he addressed the medical records, examined appellant, and reached a reasoned conclusion regarding her conditions.¹⁵ Dr. Soren's opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.¹⁶ OWCP therefore properly terminated appellant's wage-loss compensation and medical benefits based on Dr. Soren's opinion.

On appeal counsel contends that OWCP failed to timely consider requests for reconsideration. As noted above, the Board previously remanded this case on that issue. As OWCP has since issued a merit decision, the timely adjudication of request for reconsiderations is not currently before the Board.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that she had disability causally related to her accepted employment injury.¹⁷ To establish a causal relationship between the condition, as well as any disability claimed, and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual background, supporting such a causal relationship. Rationalized medical opinion evidence is medical evidence which includes a physician's detailed opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant. The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.¹⁸

¹⁴ See *R.G.*, Docket No. 16-0271 (issued May 18, 2017).

¹⁵ *T.M.*, Docket No. 17-0915 (issued August 29, 2017); *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).

¹⁶ See *Melvina Jackson*, 38 ECAB 443 (1987); *T.M.*, *id.*

¹⁷ *George Servetas*, 43 ECAB 424, 430 (1992).

¹⁸ *James Mack*, 43 ECAB 321 (1991).

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision on the issue of whether appellant has met her burden of proof to establish any disability or medical residuals causally related to her March 14, 2001 employment injuries on or after October 25, 2013.

On July 19, 2001 OWCP accepted her traumatic injury claim for herniated discs at L4-5 and L5-S1. In a separate file, OWCP File No. xxxxxx575, it had accepted appellant's occupational disease claim for subluxation of lumbar vertebra on September 11, 2013. Following the October 25, 2013 termination decision, on May 12, 2015 OWCP also accepted appellant's occupational disease claim for aggravation of herniated discs at L4-5 and L5-S1. Counsel contends on appeal that appellant's claims should be combined as the claims involve the same part of the body.

OWCP procedures provide that cases should be combined when correct adjudication of the issues depends on frequent cross-referencing between files. For example, if a new injury case is reported for an employee who previously filed an injury claim for a similar condition or the same part of the body, doubling is required.¹⁹ The evidence pertaining to File No. xxxxxx575, however, is not in the case record presently before the Board.

For a full and fair adjudication, the case must be returned to OWCP to combine the current case record with File No. xxxxxx575, and determine whether appellant continues to experience disability or medical residuals as a result of her accepted conditions on or after October 25, 2013. Following this and such further development as OWCP deems necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective October 25, 2013. The Board further finds that the case is not in posture for decision on the issue of whether appellant has established any disability or medical residuals causally related to her March 14, 2001 employment injuries on or after October 25, 2013.

¹⁹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *File Maintenance & Management*, Chapter 2.400.8(c) (February 2000). The Board notes that since these claims have not been consolidated that it is unable to determine whether appellant has received wage-loss benefits under the occupational disease claims.

ORDER

IT IS HEREBY ORDERED THAT March 3, 2017 decision of the Office of Workers' Compensation Programs is affirmed in part and remanded in part for further development consistent with this decision of the Board.²⁰

Issued: May 21, 2018
Washington, DC

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

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

²⁰ Colleen Duffy Kiko, Judge, participated in the decision, but was no longer a member of the Board effective December 11, 2017.