

FACTUAL HISTORY

This case has previously been before the Board. In a decision dated February 2, 2007, the Board reversed a June 22, 2006 OWCP decision terminating appellant's entitlement to wage-loss and schedule award compensation as he refused an offer of suitable work under 5 U.S.C. § 8106(c).² The Board found that the medical evidence then of record was insufficient to support that the offered position was medically suitable. The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal are set forth below.

On March 2, 1993 appellant, then a 32-year-old janitor, filed a traumatic injury claim (Form CA-1) alleging that on February 24, 1993 he sustained back pain when he fell carrying a bag of salt while in the performance of duty. OWCP accepted the claim for low back strain, an aggravation of preexisting spinal stenosis at L3-4 and L4-5, and an aggravation of degenerative disc disease at L5-S1. Appellant performed limited-duty employment until July 1993, when he resumed his usual work duties. In June 1995, he underwent a lumbar laminectomy at L3-4, L4-5, and L5-S1 and a discectomy at L5-S1. After sustaining intermittent periods of disability, appellant stopped work in 1997 and did not return. OWCP paid him compensation for wage-loss disability.³

A computerized tomography (CT) scan of the lumbar spine dated June 22, 2004 revealed evidence of a prior laminectomy at L4-5, but no acute changes. A magnetic resonance imaging (MRI) scan study of the lumbar spine obtained April 6, 2006 showed bilateral neural foraminal stenosis at L4-5 and L5-S1 and disc bulging at L3 through S1.

OWCP did not receive updated medical evidence regarding appellant's condition from 2007 until 2013. By letter dated March 21, 2013, it requested that he submit a medical report from his attending physician describing his current condition and its relationship to the accepted work injury.

In a report dated May 30, 2013, Dr. James K. McKechnie, a Board-certified orthopedic surgeon, noted that appellant "apparently was injured in 1993" and reviewed his history of a laminectomy at multiple levels in 1996. He discussed his complaints of numbness and tingling in his legs, with increasing weakness such that he used a cane. Dr. McKechnie diagnosed lumbar degenerative disc disease, recurrent sciatica. To rule out spinal stenosis or a disc herniation he referred appellant for an MRI scan study.

² Docket No. 06-1607 (issued February 2, 2007). The Board also issued an order dated November 1, 2005 dismissing appellant's appeal from a June 10, 2005 OWCP decision denying modification of its termination of his compensation for refusing suitable work under section 8106(c)(2). *Order Dismissing Appeal*, Docket No. 05-1414 (issued November 1, 2005). It noted that he requested dismissal of the appeal so that he could request reconsideration before OWCP.

³ By decision dated June 8, 2004, OWCP terminated appellant's compensation for refusing suitable work under section 8106(c). In decisions dated November 5, 2004 and June 22, 2006, it denied modification of its termination of his compensation for refusing suitable work. As noted, the Board, in a decision dated February 2, 2007, reversed the suitable work termination.

On March 2, 2015 OWCP notified appellant that a conflict in medical opinion existed and referred him to Dr. Timothy A. VanFleet, a Board-certified orthopedic surgeon, for an impartial medical examination.⁴ In a report dated April 3, 2015, Dr. VanFleet discussed the history of the February 25, 1993 work injury. On examination, he found morbid obesity, normal hip and knee range of motion, pitting edema below the knees, and a loss of sensation to light touch below the knees. Dr. VanFleet related that x-rays showed some degenerative disc disease without spondylolisthesis or a loss of disc space height. He opined that appellant's current condition was "related to his underlying obesity, his underlying diabetes, as well as an underlying degenerative condition within the lumbar spine." Dr. VanFleet advised that he had sustained a temporary aggravation of an underlying condition due to his work injury, but found that his current condition was unrelated to the 1993 work injury. He determined that appellant could not perform his usual employment as a result of his morbid obesity, insulin-dependent diabetes, and possible mental health status unrelated to his accepted employment injury.

Dr. VanFleet, in a supplemental report dated April 21, 2015, diagnosed obesity, diabetic disease, and lumbar degenerative disc disease, all unrelated to appellant's work injury. He advised that appellant sustained a temporary aggravation of his lumbar degenerative disc disease at the time of his work injury but that there was "no relationship to his current diagnosis at this time and the accident in 1993." Dr. VanFleet related that the temporary aggravation would have resolved within four months of his surgery for lumbar spinal stenosis. He found that appellant was unable to work due to the nonemployment-related conditions of obesity, diabetes, and lumbar degenerative disc disease.

OWCP, on December 3, 2015, referred appellant to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion examination.

In a report dated April 1, 2016, Dr. Brecher obtained a history of the 1993 work injury and reviewed the medical evidence of record. He noted that in February 1993 appellant was in a motor vehicle accident "when his car went into a snow drift." Dr. Brecher noted that he was using a walker and was currently undergoing tests for dizziness. On examination, he found full strength of the lower extremities with intact sensation, and discomfort of the back with straight leg raise bilaterally. Dr. Brecher related that appellant had chronic pain with insignificant findings on MRI scan studies and "nothing on neurological examination." He found no objective evidence of spinal stenosis, noting that the examination findings were normal. Dr. Brecher opined that appellant sustained a temporary aggravation of spondylosis due to his work injury that had resolved by July 1993. He advised that he required no further medical treatment and that, based on his review of the record, the diagnostic studies, and examination findings, he could return to his usual employment without restrictions. Dr. Brecher noted that other medical complaints, such as dizziness, might limit appellant's work ability.

By letter dated August 29, 2016, OWCP notified appellant of its proposed termination of his compensation and authorization for medical benefits. It found that the opinion of Dr. VanFleet, as a second opinion examining physician, represented the weight of the evidence and established that he had no further employment-related condition or disability. OWCP indicated that it had

⁴ The Board notes that at the time appellant was referred to Dr. VanFleet for an impartial medical examination. However, OWCP later noted that he was properly considered a second opinion physician.

erroneously determined that a conflict in medical opinion existed and referred appellant to Dr. Brecher. It advised that it would not utilize the opinion of Dr. Brecher as there was no medical conflict.

Appellant, in a September 17, 2016 response, summarized the reports from physicians finding that he was totally disabled. He questioned why Dr. VanFleet and Dr. Brecher did not mention that he used a walker. Appellant maintained that Dr. VanFleet and Dr. Brecher found that his disability was unrelated to his employment without reviewing x-rays and questioned why OWCP was not using Dr. Brecher's opinion. He submitted medical evidence from 2004 and 2005 and diagnostic studies of the brain, elbow, and right upper quadrant of the abdomen.

A February 16, 2016 magnetic resonance imaging (MRI) scan of the cervical spine, received by OWCP on October 11, 2016, showed moderate-to-severe left foraminal stenosis and mild right foraminal stenosis at C2-3 and mild right foraminal stenosis at C4-5.

A nurse practitioner completed a work restriction evaluation (Form OWCP-5c) on November 2, 2016. She diagnosed spinal stenosis at L3-4 and an aggravation of degenerative disc disease at L5-S1 and indicated that appellant was unable to work.

By decision dated December 1, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective December 1, 2016. It found that Dr. Brecher was not a referee physician, but instead a second opinion physician. OWCP reviewed his report and determined that it constituted the weight of the evidence and established that appellant had no further residuals of his employment injury.

In a work capacity evaluation (Form OWCP-5c) dated January 10, 2017, Dr. Jesse P. Butler, a Board-certified orthopedic surgeon, diagnosed L3-4 spinal stenosis and degenerative disc disease. He found that appellant could not work and provided restrictions. Dr. Butler noted that appellant's injury was employment related.

Appellant, on January 23, 2017, requested reconsideration. He submitted physical therapy reports dated October 2016. In a statement dated February 14, 2017, appellant reviewed Dr. Brecher's report. He contended that Dr. Brecher inaccurately found he was in a motor vehicle accident on February 26, 1993 when he was instead stuck in a snow drift. Appellant advised that he did not deny back pain or allege that he was dizzy due to his work injury.

By decision dated April 7, 2017, OWCP denied modification of its December 1, 2016 decision. It found that appellant had not submitted sufficient evidence to overcome the weight afforded Dr. Brecher's report, which was based on a recent physical examination and review of the case record.

In a report dated May 25, 2017, Dr. Butler obtained a history of appellant experiencing chronic pain that began at work due to a fall. He diagnosed chronic bilateral low back pain without sciatica and status post laminectomy. Dr. Butler discussed appellant's complaints of pain in his whole body, diabetic neuropathy, and pain radiating into his legs. He found that he had chronic low back pain status post laminectomy for congenital stenosis. Dr. Butler related, "[Appellant] has asked for me to make commentary regarding the work relatedness of his current condition. I

have no opinion on this as I would not be able to make any determination based on a 16-year-old workers' compensation case in a 15-minute evaluation.”

On June 1, 2017 appellant requested reconsideration. He submitted numerous diagnostic studies in support of his reconsideration request, including x-rays of the shoulder and elbow and a December 23, 2015 emergency room report regarding his treatment on that date for pain and swelling of the right elbow.

By decision dated August 16, 2017, OWCP denied modification of its April 7, 2017 decision. It found that appellant had not submitted medical evidence sufficient to show that he had continuing disability due to his February 25, 1993 employment injury.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁵ After it has determined that an employee has disability causally related to his federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

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 would require further medical treatment.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained low back strain, an aggravation of preexisting spinal stenosis at L3-4 and L4-5, and an aggravation of degenerative disc disease at L5-S1 due to a February 24, 1993 employment injury. Appellant underwent a lumbar laminectomy at L3-4, L4-5, and a lumbar laminectomy and discectomy at L5-S1. OWCP paid him wage-loss compensation for total disability from 1997 onward. By decision dated December 1, 2016, it terminated appellant's wage-loss compensation and medical benefits, effective that date based on the report of Dr. Brecher, a second opinion physician.

⁵ See *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁶ See *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ See *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁸ See *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ See *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

The Board finds that the weight of the medical evidence establishes that OWCP properly terminated appellant's wage-loss compensation and medical benefits as the opinion of Dr. Brecher constitutes the weight of the evidence.

On April 1, 2016 Dr. Becher discussed appellant's history of a work injury in 1993 and reviewed the medical evidence of record. He provided examination findings of full lower extremity strength and no loss of sensation, and found that appellant had chronic pain without significant findings on diagnostic studies or abnormalities on neurological examination. Dr. Brecher found no evidence of spinal stenosis. He advised that appellant had experienced a temporary aggravation of spondylosis that had resolved by July 1993. Dr. Brecher determined that appellant had no need for further medical treatment and that he had no limitations from resuming his usual employment due to his work injury. He provided rationale for his opinion by explaining that there were no objective findings on examination showing any further condition and noting that his findings were supported by his review of the record and the diagnostic studies. Dr. Brecher provided a thorough review of the factual and medical background and accurately summarized the relevant medical evidence. Moreover, he provided detailed findings on examination and reached conclusions regarding appellant's condition which comported with his findings.¹⁰ Consequently, Dr. Brecher's opinion is entitled to the weight of the evidence and establishes that appellant had no further disability or need for medical treatment due to his employment injury.¹¹

Additionally, Dr. Brecher's opinion is bolstered by the report of Dr. VanFleet, also an OWCP referral physician. While OWCP initially indicated that Dr. VanFleet was a referee physician, the record did not contain a conflict in opinion at the time of the referral and thus his opinion is that of a second opinion physician.¹² On April 3, 2015 Dr. VanFleet obtained a history of the February 25, 1993 employment injury and advised that x-rays showed degenerative disc disease with no loss of disc space or spondylolisthesis. He provided examination findings of morbid obesity, normal hip and knee range of motion, pitting edema below the knees, and a loss of sensation to light touch below the knees. Dr. VanFleet found that appellant had sustained a temporary aggravation of an underlying condition due to his work injury that had resolved. He opined that appellant was disabled from employment due to conditions unrelated to the accepted employment injury. In an April 21, 2015 supplemental report, Dr. VanFleet diagnosed obesity, diabetic disease, and lumbar degenerative disc disease, all unrelated to appellant's work injury. He advised that appellant sustained a temporary aggravation of his lumbar degenerative disc disease at the time of his work injury, but that his current condition was unrelated to employment. Dr. VanFleet's opinion is reasoned and based on a proper factual history and supports the finding that appellant had no further employment-related disability or residuals of his work injury.¹³

The remaining evidence submitted prior to OWCP's termination of compensation is insufficient to show that appellant had further disability or need for medical treatment due to his employment injury. On May 30, 2013 Dr. McKechnie noted that he was apparently injured in

¹⁰ See *Pamela K. Guesford*, 53 ECAB 726 (2002).

¹¹ See *S.W.*, Docket No. 17-0215 (issued September 19, 2017).

¹² See *Y.S.*, Docket No. 15-1949 (issued April 11, 2016).

¹³ See *T.M.*, Docket No. 16-1033 (issued June 22, 2017).

1993. He diagnosed lumbar degenerative disc disease, recurrent sciatica, and to rule out spinal stenosis or a disc herniation. Dr. McKechnie did not address the cause of the diagnosed conditions. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of diminished probative value on the issue of causal relationship.¹⁴ Additionally, Dr. McKechnie did not address the relevant issue of whether appellant was disabled from work due to his accepted injury.¹⁵

Appellant also submitted the results of a February 16, 2016 MRI scan study. However, a diagnostic report which offers no opinion regarding causal relationship is of limited probative value.¹⁶ On November 2, 2016 a nurse practitioner completed a form report regarding disability. However, a nurse or nurse practitioner is not considered a "physician" under FECA and thus cannot render a medical opinion.¹⁷

The Board finds that the weight of the evidence establishes that appellant had no employment-related disability or need for medical treatment effective December 1, 2016, the date OWCP terminated his wage-loss compensation and medical benefits.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminates a claimant's compensation benefits, he or she has the burden of proof to establish that he or she has continuing disability after that date related to the accepted injury.¹⁸ To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.¹⁹ A claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.²⁰

¹⁴ See *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Conard Hightower*, 54 ECAB 796 (2003).

¹⁵ *Carol A. Lyles*, 57 ECAB 265 (2005) (whether a particular injury caused an employee disability from employment is a medical issue which must be resolved by competent medical evidence).

¹⁶ See *E.B.*, Docket No. 17-0305 (issued July 10, 2017).

¹⁷ 5 U.S.C. § 8101(2) provides that a physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by state law. See also *L.C.*, Docket No. 16-1717 (issued March 2, 2017) (a nurse is not considered a physician under FECA); *A.F.*, Docket No. 17-1514 (issued April 10, 2018) (a report from a nurse practitioner is not considered probative medical evidence).

¹⁸ See *T.M.*, Docket No. 17-0915 (issued August 29, 2017); *Manual Gill*, 52 ECAB 282 (2001).

¹⁹ *Id.*

²⁰ See *J.A.*, Docket No. 15-0908 (issued August 6, 2015).

ANALYSIS -- ISSUE 2

As noted, given the Board's finding that OWCP properly relied upon the opinion of Dr. Brecher in terminating compensation, the burden of proof shifted to appellant to establish that he remained entitled to compensation after that date.²¹

Appellant submitted an emergency room report dated December 22, 2015 describing his treatment for right elbow pain and swelling and the results of diagnostic studies of the shoulder and elbow. As this evidence is not relevant to the pertinent issue of whether he had any continuing employment-related disability or need for medical treatment after December 1, 2016 due to his accepted back injury, it is of little probative value.

In a work capacity evaluation dated January 10, 2017, Dr. Butler diagnosed stenosis at L3-4 and degenerative disc disease. He indicated that appellant was unable to work and noted it was an employment-related injury. Dr. Butler did not provide any rationale explaining the causal relationship between any disability for work and the February 25, 1993 employment injury; thus, his opinion is of diminished probative value.²²

Dr. Butler, on May 25, 2017, noted that appellant experienced chronic pain beginning after a fall at work. He discussed his complaints of whole body pain and diabetic neuropathy. Dr. Butler diagnosed chronic bilateral low back pain without sciatica and status post laminectomy. He declined to address whether appellant's current condition was work related and, consequently, his opinion is of little probative value.

Appellant contends that he injured his arm and shoulders due to his back injury.²³ However, OWCP has not issued a final decision on this issue. The Board's jurisdiction is limited to reviewing final adverse decisions of OWCP issued under FECA.²⁴ Thus, this issue is not before the Board at this time.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective December 1, 2016 as he had no further disability or residuals causally

²¹ See *Manual Gill*, *supra* note 18.

²² See *O.G.*, Docket No. 17-1501 (issued January 5, 2018).

²³ Where appellant claims that a condition not accepted or approved by OWCP was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence. See *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

²⁴ 20 C.F.R. §§ 501.2(c) and 501.3(a).

related to his February 25, 1993 employment injury. The Board further finds that he has not established continuing employment-related disability after December 1, 2016.

ORDER

IT IS HEREBY ORDERED THAT the August 16, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 1, 2018
Washington, DC

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

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

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