

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 18, 2018, as she no longer had residuals or disability causally related to her accepted employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability after July 18, 2018.

FACTUAL HISTORY

On July 13, 2015 appellant, then a 36-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that, on that day, she injured her back when assisting a patient while in the performance of duty. She stopped work on July 17, 2015. Appellant returned to work on July 29, 2015 for four hours a day in a sedentary position with restrictions. OWCP accepted the claim for lumbar spine ligament sprain and paid her wage-loss compensation on the supplemental rolls for the period August 31, 2015 through August 26, 2016.

Under OWCP File No. xxxxxx081, appellant has an accepted claim for lumbar and thoracic sprains as a result of a July 25, 2011 traumatic injury. The prior claim remains open for authorized medical care.⁴

In an April 15, 2016 report, Dr. Daniel Pennello, a Board-certified orthopedic surgeon, indicated that appellant had an essentially normal lumbar spine examination, with full range of motion, strength, and reflexes with no signs of myelopathy. He provided an impression of lumbago with right-sided sciatica, ligament lumbar spine sprain, and lumbar strain with symptoms of periodic right radiculopathy. Dr. Pennello kept appellant on light duty and recommended referral to a spine specialist.

On July 5, 2016 OWCP referred appellant to Dr. William Dinenberg, a Board-certified orthopedic surgeon, for a second opinion examination to determine the status of her accepted conditions.

In an August 3, 2016 report, Dr. Dinenberg discussed appellant's history of injury, reviewed the statement of accepted facts (SOAF) and medical records, and provided his examination findings. He noted diminished sensation of her right lower extremity and a positive straight leg raise. Dr. Dinenberg provided an impression of lumbar sprain/strain with right lower extremity and mild degenerative disc disease of the lumbar spine. He noted that appellant had failed conservative treatment and that it was unclear why she had persistent symptoms of a lumbar sprain. Dr. Dinenberg recommended an epidural injection, with a projected improvement within six weeks of the injection. He opined that appellant could not perform her date-of-injury position due to the residuals of the employment injury, indicated that she had not reached maximum medical improvement, and noted that she was capable of working eight hours a day with restrictions. A July 29, 2016 work capacity evaluation (Form OWCP -5c) noted restrictions of: pushing, pulling, and lifting for three hours, no more than 10 pounds; squatting, kneeling, and climbing for one hour; and twisting, bending, and stooping for one hour.

⁴ The current claim under OWCP File No. xxxxxx100 has been consolidated with OWCP File No. xxxxxx081, which serves as the master file.

On August 29, 2016 the employing establishment advised appellant that, based on the restrictions of the Dr. Dinenberg, a temporary light-duty full-time position was available effective September 6, 2016. Appellant declined the position on September 1, 2016 noting that her physician had not released her to full duty.

In a February 7, 2017 report, Dr. Robert R. Reppy, an osteopath and family medical specialist, indicated that the July 13, 2015 employment injury aggravated appellant's 2011 employment injury, which remained open. He noted that appellant's symptoms persisted and that additional workup was needed.

On February 9, 2017 OWCP advised the employing establishment that Dr. Dinenberg's opinion constituted the weight of the medical evidence regarding appellant's restrictions related to the July 13, 2015 employment injury.

OWCP received a February 23, 2017 functional capacity evaluation, conducted by Dr. Reppy. It also received various diagnostic tests, including a March 8, 2017 electromyogram, the report of which noted tests findings, but did indicate a final impression. In March 15 and 30, and April 12, 2017 reports, Dr. Reppy diagnosed lumbar disc displacement with radiculopathy. In a March 30, 2017 duty status report (Form CA-17) he opined that appellant could work no more than four hours per day with restrictions of lifting no more than 20 pounds and walking no more than five minutes.

On April 5, 2017 OWCP issued a notice of proposed reduction. It advised appellant that wage-loss compensation could not be paid if appropriate light duty was available. OWCP found that the temporary full-time light-duty assignment was within the work restrictions provided by Dr. Dinenberg. It noted that while Dr. Reppy indicated that appellant was only capable of working four hours a day with restrictions, he had not provided sufficient medical rationale regarding his opinion. OWCP also informed her of the provisions of 20 C.F.R. § 10.500(a) and further advised that appellant's entitlement to wage-loss compensation would be reduced under this provision if she did not accept the offered temporary assignment or provide a written explanation with justification for her refusal within 30 days.

In an April 19, 2017 report, Dr. Reppy indicated that appellant had lumbar disc displacement, confirmed by an August 24, 2015 magnetic resonance imaging (MRI) scan. He maintained that because of her back injury and its effects, she could not work eight hours per day.

By decision dated May 16, 2017, OWCP terminated appellant's wage-loss compensation benefits effective August 29, 2016 pursuant to 20 C.F.R. § 10.500(a) as she failed to accept the August 29, 2016 temporary light-duty assignment. The weight of the medical evidence was accorded to Dr. Dinenberg's opinion that appellant was capable of working eight hours per day with restrictions.

Dr. Reppy continued to opine that appellant could work no more than four hours per day with restrictions. OWCP also continued to receive diagnostic test reports. On June 2, 2017 the employing establishment noted that appellant had been attending school to obtain her Advanced Registered Nurse Practitioner (ARNP) license while working four hours per day.

On June 5, 2017 appellant requested a review of the written record before an OWCP hearing representative. Treatment notes from Dr. Reppy indicated that appellant could work no more than four hours per day with restrictions.

By decision dated September 1, 2017, an OWCP hearing representative set aside the May 16, 2017 termination decision finding that there was an unresolved conflict of medical opinion between Dr. Dinenberg and Dr. Reppy as to how many hours per day appellant could work, which required referral to an impartial medical examiner (IME). On remand, OWCP was instructed to combine the instant case with File No. xxxxxx081 and to amend the SOAF to include information on both claims including that appellant had attended school from 2015 to 2017.

To resolve the conflict, OWCP referred appellant to Dr. Robert W. Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination.

Dr. Elkins submitted a report dated December 12, 2017 in which he noted his review of the medical records and that appellant was working four hours a day in a fairly sedentary job. He diagnosed chronic low back strain and opined that she had mild residuals from her employment injury. Dr. Elkins reported a negative neurologic examination and found no evidence of symptom magnification or pain accentuation. He indicated that there was no recent MRI scan of record and that the prior MRI scan was fairly unremarkable. Dr. Elkins opined that a “compromise was in order” and that appellant could work six hours a day. He further opined that although she can work six hours per day she needed an updated MRI scan to determine whether additional restrictions, including lifting restrictions, were feasible.

On January 26, 2018 OWCP requested that Dr. Elkins clarify his report. It requested that he review the SOAF and the complete medical record and that he revisit his assessment of residuals related to the accepted condition of lumbar strain and whether the condition remained active and caused objective symptoms.

In a February 26, 2018 addendum report, Dr. Elkins noted his review of the SOAF. He indicated that appellant had “subjective complaints, but a negative neurological examination, prior low back strain with possible radiculopathy.” Dr. Elkins noted that she had intermittent symptoms and that such symptoms were aggravated by activity. He opined, based solely on the accepted lumbar strain diagnosis, that there were no residuals of the work injury as the muscular and ligamentous strains should have resolved. Dr. Elkins also opined that appellant had no work restrictions.

Dr. Reppy continued to submit treatment notes diagnosing lumbar disc displacement with radiculopathy to the lower extremities. In a May 3, 2018 duty status report (Form CA-17) he indicated that appellant could work four hours per day for three days per week.

On May 7, 2018 OWCP proposed to terminate appellant’s wage-loss compensation and medical benefits as Dr. Elkin’s reports of December 12, 2017 and February 26, 2018 indicated that she had no residuals of the July 13, 2015 employment-related injury. It afforded her 30 days to submit additional evidence or argument, if she disagreed with the proposed termination.

Dr. Reppy continued to submit treatment notes and indicate that appellant could only work four hours per day for three days per week.

By decision dated July 17, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 18, 2018, as she had no residuals or disability due to her accepted employment injury. It accorded the reports from Dr. Elkins the special weight of the medical evidence.

On August 9, 2018 appellant, through counsel, requested reconsideration. He argued that Dr. Elkin's reports should not be accorded the special weight of the medical evidence.

Dr. Reppy continued to diagnose lumbar disc displacement with radiculopathy to the lower extremities. He also opined that appellant could only work four hours per day for three days per week.

By decision dated September 19, 2018, OWCP denied modification of its July 17, 2018 termination decision. It found that the reports from Dr. Elkins, as the IME, constituted the special weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of compensation benefits.⁵ 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 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

Section 8123(a) of FECA 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.¹⁰ 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,

⁵ *M.M.*, Docket No. 17-1264 (issued December 3, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *See R.R.*, Docket No. 19-0173 (issued May 2, 2019); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁷ *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

⁸ *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

⁹ *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹⁰ 5 U.S.C. § 8123(a); *L.T.*, Docket No. 18-0797 (issued March 14, 2019).

if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 18, 2018, as she no longer had residuals or disability causally related to her accepted employment injury.

OWCP properly found a conflict existed between Dr. Reppy, appellant's treating physician, and Dr. Dinenberg, an OWCP referral physician, regarding whether she had the ability to work eight hours a day. At the time of the referral, no conflict existed with regard to continued residuals of her employment injury, which was accepted for sprain of ligaments of lumbar spine. OWCP referred appellant to Dr. Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).

In a report dated December 12, 2017, Dr. Elkins diagnosed a chronic low back strain and indicated that she had unexplained numbness down her thigh, as well as pain. He opined that she was able to work six hours a day and that she had mild residuals of the July 13, 2015 accepted employment injury. Dr. Elkins indicated that a new MRI scan was needed to relate the numbness and the minor pain to a disc and to see whether any additional restrictions were needed relative to the August 29, 2016 modified job offer. In his February 26, 2018 addendum report, Dr. Elkins changed in his opinion, without the aid of the requested MRI scan or other new medical documentation, and opined that appellant had no residuals from the July 13, 2015 employment injury, that she could work full duty with no restrictions, and required no additional medical treatment.

The Board finds that Dr. Elkins February 26, 2018 addendum opinion is conclusory in nature. Dr. Elkins provided insufficient medical rationale for his conclusion that appellant no longer had residuals of the July 13, 2015 employment injury, that she could work full duty with no restrictions, and that she required no additional medical treatment. In determining the probative value of an IME'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 by OWCP.¹² Dr. Elkins failed to explain why the objective findings of record established that the accepted lumbar strain had resolved. He opined that there were no residuals from the current diagnosis of lumbar strain as the accepted lumbar strain should have resolved as it was muscular and ligamentous. Furthermore, Dr. Elkins provided no explanation as to why a new MRI scan was no longer needed to determine appellant's restrictions and the source of her intermittent symptoms. Given his report two months prior, his conclusion that she no longer had residuals and did not require work restrictions is conclusory at best. When an IME fails to provide medical reasoning to support his or her

¹¹ *D.W.*, Docket No. 18-0123 (issued October 4, 2018).

¹² *See D.W., id.*; *James T. Johnson*, 39 ECAB 1252 (1988).

conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the medical evidence.¹³

Because Dr. Elkin's addendum report lacks probative value and contradicts his original report in which he requested a new MRI scan, the Board finds that OWCP erred in relying on his opinion as the basis to terminate appellant's wage-loss compensation and medical benefits for the accepted lumbar strain. He provided conclusions without sufficient medical rationale to support his findings. The Board therefore reverses the termination of wage-loss compensation and medical benefits as OWCP has not met its burden of proof.¹⁴

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 18, 2018.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the September 19 and July 17, 2018 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: August 1, 2019
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

¹³ See *D.W.*, *supra* note 11; *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).

¹⁴ See *D.W.*, *supra* note 11; *Willa M. Frazier*, 55 ECAB 379 (2004).

¹⁵ In light of the disposition of this case, counsel's arguments on appeal and the second issue regarding continuing residuals will not be addressed.