

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On January 26, 2009 appellant, then a 57-year-old lead contact representative, filed a traumatic injury claim (Form CA-1) alleging that on that date she tripped while ascending stairs while at work and injured her right leg, knee, and wrist. She stopped work on that day. On March 29, 2009 OWCP accepted appellant's claim for a closed dislocation subluxation at L5. It paid appellant compensation on the supplemental rolls commencing March 28, 2009 and on the periodic rolls commencing July 5, 2009. On June 1, 2011 OWCP expanded acceptance of the claim to include a lumbar sprain, closed dislocation lumbar vertebra, aggravation of lumbar degenerative disc disease at L4-5, and chronic pain syndrome.

Dr. Stephen Boyajian, an attending osteopathic physician specializing in pain management, followed appellant from April 2009 through May 2015. Dr. Laura E. Ross, an attending Board-certified orthopedic surgeon, followed appellant beginning in July 2015. Appellant was also treated by Dr. Saute K. Dean, a chiropractor.

Appellant returned to work on July 17, 2015 at the employing establishment for four hours per day with restrictions assigned by Dr. Ross.

On September 1, 2015 appellant filed a notice of recurrence (Form CA-2a) claiming disability as of August 24, 2015, while working limited duty. She provided reports from Dr. Ross and Dr. Dean noting increased subjective pain symptoms. By decision dated October 28, 2015, OWCP denied appellant's claim for recurrence of disability as the medical evidence of record did not establish disability for the claimed period or an objective worsening of the accepted lumbar conditions. Following an oral hearing, by decision dated March 23, 2016, an OWCP hearing representative affirmed OWCP's October 28, 2015 decision. Appellant then appealed to the Board.

Appellant continued to submit weekly chiropractic chart notes from Dr. Dean dated from February 29, 2016 to February 22, 2017 noting chronic, severe lumbar pain.³

In a report dated March 10, 2016, Dr. Ross opined that a March 12, 2016 lumbar magnetic resonance imaging (MRI) scan demonstrated no significant change from prior studies.⁴ She diagnosed an exacerbation of disc pathology at L2-3 and L4-5 with a lumbar sprain/strain and

² Docket No. 16-1480 (issued March 22, 2017).

³ Following the issuance of the Board's prior decision, appellant submitted chart notes from Dr. Dean dated from February 27 to June 26, 2017.

⁴ A March 12, 2016 lumbar MRI scan showed a right-sided annular bulge at L2-3, a slight annular bulge at L3-4 with bilateral foraminal extensions, a mild annular bulge at L4-5, facet degeneration from L3 through L5, mild left foraminal narrowing at L2-3, L3-4, and L4-5, and mild right foraminal narrowing at L2-3.

continued lumbar radiculitis. In a report dated April 22, 2016, Dr. Ross noted appellant's account of bilateral lower extremity paresthesias. She prescribed physical therapy.

On May 3, 2016 appellant sought treatment at a hospital emergency room for back pain. Dr. Jason Hartis, a physician specializing in emergency medicine, diagnosed chronic back pain and lumbosacral radiculopathy.⁵

In a report dated May 27, 2016, Dr. Ross related that appellant "threw" her back out on May 3, 2016 while making a bed at home. She diagnosed a "re-exacerbation of lumbar disc pathology." Appellant again sought treatment for back pain at a hospital emergency department on November 1, 2016.

By decision dated March 3, 2017, OWCP reduced appellant's continuing wage-loss compensation effective November 13, 2016 based on her actual earnings as a contact representative with weekly wages of \$1,308.37 effective July 17, 2015.

By decision and order issued March 22, 2017, the Board affirmed OWCP's March 23, 2016 decision, finding that the medical evidence of record did not establish a material worsening of the accepted conditions effective August 24, 2015 or that the accepted conditions disabled her for work for the claimed period.⁶

In a report dated May 5, 2017, Dr. Ross prescribed a lumbar brace. She opined that prolonged sitting at work in July 2016 caused increased lumbar pain and worsened her condition. Dr. Ross found appellant disabled from work.⁷ She again prescribed physical therapy.

On June 29, 2017 OWCP obtained a second opinion regarding the nature and extent of appellant's employment-related condition from Dr. Noubar Didizian, a Board-certified orthopedic surgeon. Dr. Didizian reviewed a statement of accepted facts (SOAF) and a copy of the medical record provided by OWCP. He related that appellant wore a lumbar brace and used a transcutaneous electrical stimulation (TENS) unit. On examination, Dr. Didizian observed limited lumbar motion in all planes and bilaterally positive straight leg raising tests. He diagnosed underlying degenerative lumbar disc disease, and congenital lumbarization of S1 causing mechanical problems and intermittent chronic pain. Dr. Didizian opined that the accepted lumbar conditions had resolved without residuals and that appellant's ongoing symptoms were caused by "prior preexisting degenerative disease and congenital anomaly." He returned appellant to full duty with no restrictions.

⁵ A lumbar MRI scan performed on May 4, 2016 showed a small right foraminal protrusion at L2-3, a small left foraminal protrusion at L3-4, and disc desiccation at L4-5. Dr. James J. Bloor, a Board-certified radiologist, opined on May 13, 2016 that there was no change from a March 18, 2015 MRI scan.

⁶ *Supra* note 2.

⁷ Dr. Ross ordered a lumbar MRI scan performed on July 3, 2017, which demonstrated a mild right-sided disc herniation at L2-3, a small left-sided disc herniation at L3-4, and a small central disc herniation at L4-5 with mild encroachment upon the adjacent structures.

In a narrative report dated September 25, 2017, Dr. Ross opined that sitting for prolonged periods at work from June to August 24, 2015 exacerbated appellant's accepted lumbar condition, causing a recurrence of disability commencing August 24, 2015. She noted that a February 12, 2016 lumbar MRI scan showed an asymmetrical L2-3 disc bulge, increased from prior studies, and a new L3-4 disc bulge. Dr. Ross found appellant totally and permanently disabled for work.

OWCP found a conflict of medical opinion between Dr. Ross, for appellant, and Dr. Didizian, for the government, as to whether appellant's ongoing lumbar condition remained related to the accepted lumbar injury. To resolve the conflict, it selected Dr. Ian B. Fries, a Board-certified orthopedic surgeon, as an impartial medical examiner (IME). Dr. Fries provided an October 16, 2017 report in which he reviewed the medical record, diagnostic studies, and SOAF. On examination, he observed difficulty with heel walking, limited lumbar motion in all planes, bilaterally positive straight leg raising tests at 60 degrees, and "some giving-way weakness on right knee extension compared to the left." Dr. Fries noted that appellant had been treated for ulcerative colitis since she was a teenager, managed with intravenous infusions and periodic hospitalizations. He diagnosed chronic low back pain, symptom magnification or malingering, possible right trochanteric bursitis, substance abuse with possible addition to opioids and alcohol, chronic psychiatric pathology, and ulcerative colitis. Dr. Fries opined that the accepted lumbar condition had ceased without residuals and there was no objective indication of a lumbar subluxation. He attributed the disc bulges and degenerative changes demonstrated by imaging studies to idiopathic age-related degeneration unrelated to the accepted lumbar injury. Dr. Fries opined that appellant had attained maximum medical improvement (MMI) and returned her to full-duty work with no restrictions.

On January 10, 2018 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits as a result of her accepted lumbar conditions. It afforded her 30 days to respond.

Appellant responded on January 30, 2018. In a detailed statement, she asserted that Dr. Fries did not examine her thoroughly and behaved in a brusque and unprofessional manner. Appellant contended that her attending physicians strongly disagreed with Dr. Fries' conclusion that the accepted lumbar conditions had resolved. She enclosed a complaint to a state board of medical examiners against Dr. Fries. Appellant also provided an employing establishment reasonable accommodation request form dated July 31, 2015 requesting telework.

By decision dated February 23, 2018,⁸ OWCP terminated appellant's wage-loss compensation and medical benefits, effective February 24, 2018. It accorded Dr. Fries' opinion the weight of the medical evidence.

⁸ On its face, the decision is dated February 23, 2016 and February 26, 2016. The inclusion of the February 26, 2016 date appears to be a harmless typographical error.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁹ 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.¹⁰ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹¹

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.¹² 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.¹³

Section 8123(a) 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.¹⁴ The implementing regulation provides that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. 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.¹⁵

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁶

⁹ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *C.S.*, Docket No. 18-0952 (October 23, 2018); *see S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

¹⁰ *A.G.*, *id.*; *C.S.*, *id.* *See I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

¹¹ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

¹² *See T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹³ *See Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

¹⁴ 5 U.S.C. § 8123(a).

¹⁵ 20 C.F.R. § 10.321.

¹⁶ *A.G.*, *supra* note 9; *C.S.*, *supra* note 9; *R.C.*, 58 ECAB 238 (2006); *David W. Pickett*, 54 ECAB 272 (2002); *Barry Neutuch*, 54 ECAB 313 (2003).

ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective February 24, 2018, as she no longer had residuals of her January 26, 2009 employment injury.

OWCP properly determined that a conflict in medical opinion arose between Dr. Ross, appellant's attending physician, and Dr. Didizian, an OWCP referral physician, regarding her current condition and the extent of her disability due to her accepted employment injury. It referred her to Dr. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination.

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, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁷ The Board finds that the opinion of Dr. Fries is well rationalized and based on a proper factual and medical history. Dr. Fries accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about appellant's condition which comported with his findings.¹⁸ In a report dated October 16, 2017, he reviewed the medical evidence of record, including the results of diagnostic studies. On examination, Dr. Fries found no deficits in the lower extremities demonstrating radiculopathy. He advised that appellant had reached MMI and could return to her employment without restrictions. Dr. Fries determined that she had continued subjective complaints due to age-related degenerative changes, but no objective findings showing ongoing residuals of her January 26, 2009 employment injury. As his report is detailed, well rationalized, and based on a proper factual background, Dr. Fries' opinion is entitled to the special weight accorded an IME.¹⁹

The remaining evidence submitted prior to OWCP's termination of appellant's wage-loss compensation and medical benefits is insufficient to overcome the special weight afforded Dr. Fries as the IME. Appellant's January 30, 2018 statement, her complaint against Dr. Fries, and the reasonable accommodation form are not medical evidence and are therefore of no probative value in establishing causal relationship.²⁰

The Board, therefore, finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective February 26, 2018.²¹

¹⁷ *C.S.*, *supra* note 9; *J.M.*, 58 ECB 478 (2007).

¹⁸ *C.S.*, *supra* note 9; *Manuel Gill*, 52 ECAB 282 (2001).

¹⁹ *See J.M.*, *supra* note 17; *Kathryn E. Demarsh*, *supra* note 12.

²⁰ *W.C.*, Docket No. 15-1878 (issued January 6, 2016); *see James A. Long*, 40 ECAB 538 (1989); *Susan M. Biles*, 40 ECAB 420 (1988) (where the Board held that the statement of a layperson is not competent evidence on the issue of causal relationship).

²¹ *C.S.*, *supra* note 9; *see G.T.*, Docket No. 17-1959 (issued June 22, 2018); *D.G.*, Docket No. 17-0608 (issued March 19, 2018).

On appeal, appellant contends that OWCP should not have relied on Dr. Fries' opinion as he only examined her once for a very brief period. As discussed, however, OWCP properly relied on Dr. Fries' thorough, well-rationalized opinion as impartial medical specialist.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective February 24, 2018, as she no longer had residuals of her January 26, 2009 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated February 26, 2018 is affirmed.

Issued: January 7, 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