

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

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| R.O., Appellant |) | |
| |) | |
| and |) | Docket No. 19-0885 |
| |) | Issued: November 4, 2019 |
| DEPARTMENT OF THE TREASURY, |) | |
| INTERNAL REVENUE SERVICE, Fresno, CA, |) | |
| Employer |) | |
| |) | |

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 18, 2019 appellant filed a timely appeal from a November 5, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective November 5, 2018.

FACTUAL HISTORY

On October 5, 2015 appellant, then a 43-year-old tax examining technician, filed a traumatic injury claim (Form CA-1) alleging that on September 30, 2015 she tripped over a cart

¹ 5 U.S.C. § 8101 *et seq.*

and injured her knee and back while in the performance of duty. OWCP accepted the claim for contusion of the left front wall of thorax, sprain of ligaments of lumbar spine, strain of unspecified muscles and tendons of the lower left leg, and contusion of the lower back and pelvis. Appellant stopped work on September 30, 2015 and received continuation of pay beginning October 1, 2015. OWCP paid her supplemental wage loss from November 15, 2015 to March 1, 2018.

A magnetic resonance imaging (MRI) scan of the lumbar spine dated December 5, 2015 revealed moderate-to-severe disc height loss, central to left paracentral disc extrusion extending to the inferior endplate of L4, mildly stenotic spinal canal narrowing of the left lateral recess, and left neural foraminal stenosis.

Appellant was treated by Dr. Adam J. Brant, a Board-certified neurosurgeon, on January 13 and March 28, 2016 for a two-year history of low back pain. He noted that appellant was treated for a previous lumbar condition at Kaiser Permanente in the prior two years and underwent five epidural injections without relief. Dr. Brant provided diagnoses including exacerbation of preexisting pain and sciatica following an on-the-job fall on September 30, 2015. He noted worsening symptoms despite limited conservative treatment. Dr. Brant recommended physical therapy.

On June 17, 2016 OWCP referred appellant to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, along with a statement of accepted facts (SOAF) and a copy of the medical record, for a second opinion examination to determine whether she continued to suffer residuals and remained disabled due to her September 30, 2015 employment injury. In an August 2, 2016 report, Dr. Swartz reviewed appellant's medical history and provided findings on physical examination. He diagnosed status post trip and fall with temporary aggravation of preexisting condition of the lumbar spine. Dr. Swartz noted normal range of motion of the lumbar spine, normal neurologic examination of the lumbar spine, and no radiculopathy. He noted inconsistencies in his examination of appellant with no clearly valid findings on examination. Dr. Swartz requested, for comparison purposes, that OWCP obtain the prior imaging studies from Kaiser Permanente for treatment received in 2013 and 2014. He concluded that appellant was able to perform her job duties with restrictions. In a supplemental report dated October 5, 2016, Dr. Swartz indicated that he was informed that the previous films were unavailable. He noted preexisting conditions of degenerative disc disease with moderate left and right neuroforaminal stenosis at L4-5 and preexisting spondylosis which would have resolved by December 30, 2015. Dr. Swartz opined that appellant was able to return to work full time with restrictions relating to her preexisting conditions.

On October 27, 2016 appellant's treating physician, Dr. Kulraj S. Sidhu, a Board-certified internist, disagreed with Dr. Swartz's opinion and indicated that appellant's aggravation of preexisting conditions was not resolved and that she continued to be totally disabled. On January 23, 2017 he returned appellant to work four hours a day with restrictions. In a duty status report (Form CA-17) dated February 13, 2017, Dr. Sidhu diagnosed herniated lumbar disc at L4-5 and increased her work to six hours per day with restrictions.

On November 22, 2016 OWCP determined that a conflict in medical opinion existed between Dr. Sidhu, appellant's treating physician, and Dr. Swartz, OWCP's referral physician, with respect to her employment-related conditions and disability. It referred appellant, along with

a SOAF and a copy of the record, to Dr. Ernest Miller, a Board-certified orthopedic surgeon, to resolve the conflict. In a May 31, 2017 report, Dr. Miller reviewed the SOAF and recounted appellant's medical history, and diagnosed morbid obesity with a 60-pound weight gain since September 30, 2015, chronic low back pain with severe degenerative disc disease at L4-5, no evidence of radiculopathy, and no evidence of strain/sprain injury, but evidence of poor muscle tone. He opined that all strain/sprain injuries accepted as a result of the September 30, 2015 injury resolved and would have resolved within three to six months of the fall. Dr. Miller noted that physical examination and medical record review demonstrated no residual evidence of the accepted injuries. He indicated that a possible temporary aggravation of chronic lower back pain secondary to obesity and degenerative disc disease at L4-5 may have occurred, but it would have been resolved within one year of the September 30, 2015 employment injury. Dr. Miller noted that an x-ray dated September 30, 2015 revealed severe degenerative disc disease at L4-5 which preexisted the September 30, 2015 injury; however, the medical records pertaining to appellant's prior five years of treatment with Kaiser Permanente were unavailable for review. He returned appellant to work with preexisting work restrictions based on poor muscle tone and obesity.

The diagnostic studies previously unavailable were received by OWCP and included MRI scans of the lumbar spine dated July 27, 2012, November 7, 2014, and December 5, 2015, which generally revealed worsening degenerative disc disease at L4-5. An electromyogram (EMG) dated March 21, 2018 revealed no abnormalities.

Dr. Sanjay J. Chauhan, a Board-certified neurologist, treated appellant from September 20, 2017 to May 2, 2018, and reviewed the previously unavailable MRI scan results which demonstrated a clear worsening of the disc at L4-5 since the MRI scan in 2012 and in 2014. He opined that the September 30, 2015 employment injury caused a permanent severe aggravation of appellant's preexisting low back pain and disc degeneration with new radicular symptoms from 2012 as evidenced on imaging. Dr. Chauhan further addressed appellant's left knee, noting that she sustained an abrasion and bruising post fall on September 30, 2015 which has worsened with symptoms of give-away weakness and popping.

On April 27, 2018 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that the weight of medical evidence rested with the opinion of the impartial medical examiner, Dr. Miller, who determined in a May 31, 2017 report that there were no objective findings to demonstrate continued residuals of her accepted September 30, 2015 employment injury. OWCP advised appellant that she had 30 days to submit additional evidence or argument if she disagreed with the decision.

On May 29, 2018 OWCP requested Dr. Miller review the March 19 and May 2, 2018 reports from Dr. Chauhan along with preinjury MRI scan results from 2012 and 2014 that were not previously available for comparison with the post-injury results and advise whether this evidence would alter his May 31, 2017 opinion that the work injury had resolved.

In an OWCP telephone memorandum (Form CA-110) dated June 27, 2018, Dr. Miller's office contacted OWCP and spoke with the senior claims examiner and requested a copy of the SOAF. The claims examiner updated the SOAF and faxed it to Dr. Miller's office. No supplemental report was received.

By decision dated November 5, 2018, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that date. It determined that weight of the medical evidence rested with Dr. Miller's May 31, 2017 report which found that the medical evidence failed to demonstrate that appellant continued to suffer residuals or continuing disability as a result of his September 30, 2015 employment injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.² 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.³ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ 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.⁶

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.⁷ 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.⁸ When there exists 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.⁹

Board precedent further provides that when OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the

² *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

³ *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁴ *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

⁵ *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

⁶ *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

⁷ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

⁸ 20 C.F.R. § 10.321.

⁹ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

specialist's opinion requires clarification or elaboration, it must secure a supplemental report from the specialist to correct the defect in his original report. Only when the impartial specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, should OWCP refer the claimant to a second impartial specialist.¹⁰

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits, effective November 5, 2018.

OWCP accepted that appellant sustained a contusion of the left front wall of thorax, sprain of ligaments of lumbar spine, strain of unspecified muscles and tendons of the lower left leg, and contusion of the lower back and pelvis. Appellant stopped work on October 1, 2015 and OWCP paid her wage-loss compensation and medical benefits until November 5, 2018. In reports dated August 2 and October 5, 2016, Dr. Swartz, an OWCP referral physician, determined that appellant's employment injuries had resolved and that she was able to return to work full time with restrictions. He requested, for comparison purposes, that OWCP obtain the prior imaging studies from Kaiser Permanente for treatment received in 2013 and 2014. In various reports dated October 27, 2016 to February 13, 2017, Dr. Sidhu, appellant's treating physician, opined that appellant continued to have work-related residuals and disability. To resolve the conflict of medical opinion evidence between appellant's physicians and the referral physician, OWCP referred appellant to Dr. Miller for an impartial examination. The Board finds that OWCP properly determined that a conflict in medical opinion existed and referred appellant for an impartial medical examination in order to resolve the conflict, pursuant to 5 U.S.C. § 8123(a).

Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.¹¹ OWCP issued a notice of proposed termination of benefits based on Dr. Miller's May 31, 2017 report. As noted, prior to the final termination of appellant's wage-loss compensation and medical benefits it received additional medical evidence. OWCP requested Dr. Miller, the impartial medical specialist, review the additional medical evidence and advise whether this evidence altered his May 31, 2017 opinion that the work injury had resolved. No further action was taken by OWCP to obtain a supplemental report prior to termination of appellant's benefits.

Proceedings under FECA¹² are not adversarial in nature. OWCP shares responsibility in the development of the evidence and has an obligation to see that justice is done.¹³ The Board finds, therefore, that OWCP erred by terminating appellant's compensation effective November 5,

¹⁰ *See id.*

¹¹ *See Roger Dingess*, 47 ECAB 123 (1995).

¹² 5 U.S.C. §§ 8101-8193.

¹³ *William B. Webb*, 56 ECAB 156 (2004).

2018 based on Dr. Miller's May 31, 2017 impartial medical report. The Board will reverse OWCP's decision terminating appellant's wage-loss compensation and medical benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 5, 2018.

ORDER

IT IS HEREBY ORDERED THAT the November 5, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 4, 2019
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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