United States Department of Labor
Employees' Compensation Appeals Board

J.L., Appellant	)	
and	)	**Docket No. 19-1901**
	)	**Issued: April 7, 2021**
DEPARTMENT OF THE NAVY, NAVAL SUBMARINE BASE NEW LONDON, Groton, CT, Employer	)	

Appearances:
Douglas Sughrue, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On September 16, 2019 appellant, through counsel, filed a timely appeal from a May 20, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[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.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 29, 2018, as he no longer had residuals or disability causally related to his accepted January 10, 2002 employment injury; and (2) whether appellant has met his burden of proof to establish continuing residuals or disability causally related to his accepted January 10, 2002 employment injury on or after April 29, 2018.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference.

On January 10, 2002 appellant, then a 43-year-old heavy mobile equipment mechanic, filed a traumatic injury claim (Form CA-1) alleging that he sustained a back injury on that date when he lifted a crane tire weighing approximately 300 pounds and turned its rim on a tire machine while in the performance of duty.[4] OWCP initially accepted his claim for lumbosacral strain and later expanded the accepted conditions to include displacement of lumbosacral disc without myelopathy. Appellant stopped work on January 10, 2002 and returned to limited-duty work on a full-time basis on February 14, 2002. OWCP paid him wage-loss compensation on the supplemental rolls for disability from work commencing March 13, 2002.[5]

Appellant came under the care of Dr. Joel Abramovitz, a Board-certified neurosurgeon, who noted on January 22, 2002 that appellant reported a prior history of lumbar disc surgery in 1980 for left-sided pain and in 1981 for right-sided pain.[6] Dr. Abramovitz indicated that on physical examination appellant exhibited symptoms of acute back strain with some symptoms, if not convincing signs, of left L3 or L4 radiculopathy. The findings of a July 18, 2002 magnetic resonance imaging (MRI) scan showed normal disc space at L1-2 and L5-S1, diffuse disc bulges at L2-3 and L3-4 with moderate facet hypertrophy, and degenerative disc disease at L4-5 with postoperative changes (no evidence of recurrent disc herniation).

On October 21, 2004 appellant began receiving medical treatment from Dr. John Paggioli, a Board-certified anesthesiologist, who advised that on physical examination appellant reported mild-to-moderate tenderness over the left-sided lumbar joints (with the most intense pain left of the midline at L4-5). Dr. Paggioli diagnosed lumbar discogenic pain. A September 12, 2005 MRI

[3] Docket No. 13-2124 (issued April 21, 2014); Docket No. 14-2015 (issued March 18, 2015).

[4] OWCP assigned the claim File No. xxxxxx046.

[5] OWCP paid appellant wage-loss compensation on the periodic rolls for disability commencing January 17, 2010. The case record reveals that OWCP has accepted the following prior traumatic employment injuries: a January 26, 1983 sprain and medial meniscus tear of the right knee, assigned File No. xxxxxx677; a January 11, 1989 sprain and medial meniscus tear of the left knee assigned File No. xxxxxx526; a March 11, 1992 back contusion assigned File No. xxxxxx174; and a November 13, 2001 strain and subluxation of the left shoulder, assigned File No. xxxxxx433. Appellant's prior claims have not been administratively combined.

[6] Medical evidence subsequently entered into the case record reveals that appellant underwent L4-5 discectomies in 1980 and 1981.

scan of the low back showed multilevel degenerative disc changes. There was a small central disc herniation at L2-3 without discrete nerve impingement being evident. On January 20, 2010 Dr. Paggioli noted that appellant complained of pain in his low/mid back, left buttock, and left thigh, and he diagnosed degeneration of lumbosacral intervertebral disc and lumbosacral spondylosis.

The findings of an April 11, 2013 electromyogram and nerve conduction velocity (EMG/NCV) study of appellant's left lower extremity showed no active or subacute radiculopathy but there was a possibility of a chronic radiculopathy based on reduced motor unit recruitment. The study did not show evidence of diffuse peripheral polyneuropathy.

On September 29, 2017 OWCP referred appellant for a second opinion examination to Dr. Robert Moskowitz, a Board-certified orthopedic surgeon. It requested that Dr. Moskowitz provide an opinion regarding whether appellant continued to have residuals or disability causally related to his accepted January 10, 2002 employment injury.

In a November 8, 2017 report, Dr. Moskowitz discussed appellant's factual and medical background, including the medical treatment he received for his January 10, 2002 employment injury. He briefly summarized medical reports, dated beginning in 1983, which referenced appellant's complaints/symptoms involving the back and other body parts. Appellant reported to Dr. Moskowitz that he had pain located in the left side of his low back and that "[e]very once in a while" he experienced numbness in his entire left leg and foot. Dr. Moskowitz indicated that, on physical examination, appellant had discomfort when bending from the side, more when bending to the left. Appellant could only bend forward to the extent that his hands were a little past his knees. Dr. Moskowitz noted that appellant probably could bend further, but that bending further would produce pain. He advised that, when in a lying position, appellant had some discomfort at end range of internal rotation with his left hip in extension and also internal rotation with his left hip in 90 degrees of flexion. Appellant exhibited depressed reflex in his right ankle. Dr. Moskowitz indicated that appellant had been claiming unremitting pain since his January 10, 2002 accident, at times at the 8/10 level, despite having been on light-duty work and having received medications, facet injections, physical therapy, and chiropractic treatment. He maintained that the latest medical literature showed that chronic unremitting pain such as in appellant's case, particularly in the compensation setting, was psychosocial and not structural in origin. Dr. Moskowitz provided several quotes from Dr. Robert J. Barth, a clinical psychologist whom he characterized as an expert regarding mental illness and chronic pain. He noted that Dr. Barth had said that it was highly unlikely for chronic pain in one body part to develop for someone who has not previously had significant problems with pain in other body parts.[7] Dr. Moskowitz noted that appellant had complained of pain and other symptoms "from his head to his toes" and then discussed medical reports, dated between 2003 and 2017, which referenced appellant's complaints of pain and other symptoms/conditions involving various body parts,

[7] Dr. Moskowitz advised that Dr. Barth also indicated that psychological and social factors were the driving forces behind most chronic benign pain, especially when the presentation occurred within a legal claim.

including his head, chest, left shoulder, left finger, right hand, right elbow, low back, knees, and feet.[8]

Dr. Moskowitz then further discussed the risk factors for chronic pain outlined by Dr. Barth, noting the importance of the compensation setting in chronic pain, as was the case with appellant, as well as the risk of the presence of psychiatric disease in chronic pain. He reported that appellant informed him that he had periodically experienced anxiety due to interactions at work with supervisors and unspecified "bullies," but he did not have depression and did not seek psychiatric treatment for anxiety because "he did not think it was that bad." Dr. Moskowitz noted that other risk factors for chronic pain included a history of chronic pain complaints for another part of the body, a previous history of filing medical-legal claims, being away from work, excessive health care, and use of narcotics. He discussed a number of prior work injury claims filed by appellant and referenced his use of narcotic pain medicine for 16 years. Dr. Moskowitz indicated that appellant's symptoms were widespread in that at times he reported only having left-sided low back pain, but at other times he reported also having the added component of lower thoracic spine pain. He noted that appellant also would complain at times of bilateral low back pain, but that at other times the pain was isolated to his left sacroiliac joint. In addition, appellant reported at times that he had left lower extremity symptoms, but at other times only complained of right lower extremity symptoms. Dr. Moskowitz noted that the only positive test on physical examination that might support the existence of radiculopathy was a depressed reflex of his right ankle, but indicated that appellant's primary symptoms were left-sided and that "local involvement" of his right ankle might have affected the ankle reflex. He maintained that an April 11, 2013 EMG/NCV study of the left lower extremity showed no active or subacute radiculopathy, and that a September 12, 2005 MRI scan of the lumbar spine revealed multilevel disc degenerative changes, including a small central herniation at L2-3 without discrete nerve root impingement. Dr. Moskowitz posted that the physical examination and diagnostic study findings did not support appellant's chronic subjective pain complaints.

Dr. Moskowitz indicated that the latest medical literature showed that, because chronic pain (pain for over three months) was psychosocial and not structural in origin, it followed that appellant's claims of having chronic low back pain for over 15½ years was not work related and therefore his January 10, 2002 low back strain had long since reached maximum medical improvement. He further opined that any psychogenic cause of appellant's pain should be treated outside of the workers' compensation system. Dr. Moskowitz noted that Dr. Barth had written that the findings of scientific research on the subject of the causes of mental illness often failed to indicate any role in occupational exposures or any other type of adult life experience. He noted that work seemed to be a protective factor against psychological dysfunction rather than a cause of it. Dr. Moskowitz advised that scientific findings had indicated that psychological factors were the best predictor of new onset low back pain and that the best predictors of the filing a workers' compensation claim were job dissatisfaction and psychological vulnerability. He maintained that appellant's chronic low back pain did not have a structural origin and, therefore he would not recommend any further chiropractic treatment. Dr. Moskowitz opined that appellant's January 10,

[8] Dr. Moskowitz advised that appellant had undergone 10 prior surgeries, including right carpal tunnel surgery, left rotator cuff repair surgery, bilateral bunionectomies, right elbow surgery, and bone grafting in the fourth finger of the left hand.

2002 low back injury did not leave him with any residuals or disability. He advised that appellant had long since recovered from the January 10, 2002 low back injury and indicated that this injury would not be the reason he could not return to his job as a heavy mobile equipment mechanic. Dr. Moskowitz asserted that there were nonwork-related factors, which would not allow appellant to return to this job, including the fact that the natural aging of his body would make it more difficult for him to perform heavy labor. He also maintained that not having performed heavy labor for 16 years would have rendered appellant's body "out of shape." Dr. Moskowitz indicated that appellant apparently had other conditions, including bilateral knee and left shoulder problems, that might prohibit him from working as a heavy mobile equipment mechanic.[9]

In a January 23, 2018 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits, effective April 29, 2018, because he ceased to have residuals or disability causally related to his accepted January 10, 2002 employment injury. It informed appellant that the weight of the medical opinion evidence with respect to work-related residuals/disability rested with Dr. Moskowitz' November 8, 2017 report. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed termination action.

Appellant submitted January 25 and March 22, 2018 reports in which Dr. Paggioli collectively noted appellant's complaints of low back, left buttock, left thigh, and left calf pain, and diagnosed other intervertebral disc degeneration of the lumbar spine and long-term (current) use of opiate analgesic.

In reports dated December 27, 2017 through March 23, 2018, Dr. Benjamin Szczypek, an attending chiropractor, diagnosed subluxation complex (vertebral) of the lumbar region, other intervertebral disc degeneration of the lumbosacral region, lumbar ligament sprains, and thoracic spine pain.

By decision dated April 5, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits effective April 29, 2018, because he had no residuals or disability causally related to his accepted January 10, 2002 employment injury after that date. It found that the weight of the medical opinion evidence with respect to work-related residuals/disability rested with Dr. Moskowitz' November 8, 2017 report.

On March 6, 2019 appellant, through counsel, requested reconsideration of the April 5, 2018 decision. Counsel argued that Dr. Moskowitz' November 8, 2017 opinion that appellant ceased to have residuals of the accepted January 10, 2002 employment injury was not supported by adequate medical rationale.

In reports dated March 28 through April 27, 2018, Dr. Szczypek diagnosed subluxation complex (vertebral) of the lumbar region, other intervertebral disc degeneration of the lumbosacral region, lumbar ligament sprains, and thoracic spine pain.

In an August 10, 2018 report, Dr. Paggioli indicated that he had reviewed Dr. Moskowitz' November 8, 2017 report and he maintained that appellant's pain complaints had been consistent

[9] Dr. Moskowitz noted that he had only been asked to comment on whether appellant had residuals or disability related to the accepted January 10, 2020 "low back injury."

since the date of his 2002 injury, *i.e.*, low back pain, which radiated into his left buttock and left thigh with occasional pain noticed on the right side. He noted that appellant suffered from discogenic pain emanating from a disc itself, rather than from nerve compression. Dr. Paggioli advised that appellant's pain was worse with bending forward, a symptom consistent with painful lumbar disc degeneration. He asserted that Dr. Moskowitz listed appellant's multiple medical issues as though he were a hypochondriac. However, Dr. Paggioli maintained that appellant was not a hypochondriac as he had valid medical problems that required surgery or other medical treatment. Appellant did not have a significant psychological pathology and did not complain of multiple medical issues without being prompted. Dr. Paggioli advised that the fact that appellant had no back pain for decades following successful lumbar surgery, that pain occurred due to the accident at work in 2002, and that the pain had remained since that accident "shows that the accident aggravated his preexisting condition."

In progress notes dated November 15 and December 17, 2018, Dr. Paggioli diagnosed L4-5 disc herniation and left lumbar radiculitis. He indicated that appellant was a candidate for L4-5 fusion surgery. In a February 26, 2019 report, Dr. Paggioli compared appellant's MRI scans performed in 2004, 2006, 2009, and 2012, along with a 2012 computerized tomography (CT) scan. He advised that the MRI scan findings had worsened over the years.

By decision dated May 20, 2019, OWCP denied modification of the April 5, 2018 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.[10] 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.[11] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[12]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[13] 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.[14]

[10] *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[11] *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[12] *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[13] *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[14] *See A.G., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

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 April 29, 2018.

The Board has reviewed the November 8, 2017 opinion of Dr. Moskowitz and finds that it does not contain adequate medical rationale supporting a finding that appellant had no residuals or disability due to his accepted January 10, 2002 employment injury after April 29, 2018.[15]

In his November 8, 2017 report, Dr. Moskowitz opined that appellant had long since recovered from his January 10, 2002 low back injury and that he ceased to have any residuals or disability related to that injury. However, he did not provide any notable discussion of appellant's accepted conditions from the January 10, 2002 incident (lumbosacral strain and displacement of lumbosacral disc without myelopathy) or describe the pathophysiological process through which they would have resolved. Importantly, Dr. Moskowitz provided no mention whatsoever that OWCP had accepted appellant's claim for displacement of lumbosacral disc without myelopathy. He briefly referenced diagnostic tests from 2005 and 2013 to support his opinion that appellant ceased to have residuals of the January 10, 2002 employment injury by late-2017, but he did not provide a sufficient discussion of the diagnostic tests of record. Nor did Dr. Moskowitz adequately explain why the physical findings he obtained on physical examination supported a finding that appellant had no residuals of the January 10, 2002 employment injury or correlate these findings to the diagnostic test results of record. He noted that the only positive test on physical examination that might support the existence of radiculopathy was a depressed reflex of appellant's right ankle. Although Dr. Moskowitz generally noted that appellant's primary symptoms were left-sided and that "local involvement" of the right ankle might have affected the ankle reflex, he did not provide sufficient explanation regarding why this finding would not show that appellant continued to have some residuals of his accepted January 10, 2002 employment injury. He reported that, on physical examination, appellant had limited motion and/or pain upon range of motion testing of the back and hips, but he did not adequately explain why these findings would not be related, at least in part, to the January 10, 2002 employment injury. Although Dr. Moskowitz indicated in his November 8, 2017 report that appellant had long since recovered from his January 10, 2002 low back injury, he did not provide any indication when or how this recovery occurred.

In his November 8, 2017 report, Dr. Moskowitz suggested that appellant's low back and lower extremity symptoms could be explained by psychological or "psychosocial" reasons rather than by objective structural physical conditions.[16] However, he did not identify a specific psychological condition or otherwise describe a nonwork-related psychological cause for appellant's complaints. Dr. Moskowitz acknowledged that, upon questioning, appellant only

[15] *See supra* note 11. *See also W.C.*, Docket No. 18-1386 (issued January 22, 2019); *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of analysis manifested and the medical rationale expressed in support of the physician's opinion).

[16] Dr. Moskowitz indicated that the latest medical literature showed that, because chronic pain (pain for over three months) was psychosocial and not structural in origin, it followed that appellant's claim of having chronic low back pain for over 15½ years was not work related. He opined that any psychogenic cause of appellant's pain should be treated outside of the workers' compensation system.

referenced intermittent feelings of anxiety, which he felt were not serious enough to require treatment and the case record does contain medical evidence showing that appellant has a diagnosed psychological condition. He provided extensive quotes from medical literature regarding the risk factors for chronic pain, which he felt included not only psychological vulnerability, but also included factors such as a history of prior claim filing and experiencing symptoms in multiple body parts. Dr. Moskowitz then suggested that appellant's pain complaints were related to these risks factors without adequately explaining how the specifics of appellant's circumstances applied to the general principles he delineated. Such generalized discussions lack probative value with respect to the question of continuing work-related residuals/disability.[17] Dr. Moskowitz suggested appellant's multiple complaints of symptoms outside the back region invalidated his complaints of back symptoms. He did not adequately explain why appellant's multiple non-back conditions were not valid medical conditions and, in fact, the case record reveals that appellant underwent surgery and other significant medical treatment for a number of these conditions. Medical reports without adequate rationale on causal relationship are of diminished probative value and are insufficient to meet an employee's burden of proof.[18]

For these reasons, OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 29, 2018.[19]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 29, 2018.

[17] The Board has held that, in the absence of adequate interpretation by a physician in the context of a claimant's specific case, medical texts and excerpts from publications lack probative value in establishing a medical issue given that such materials are of general application. *See generally, D.F.*, Docket No. 20-0773 (issued December 8, 2020).

[18] *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *C.J.*, Docket No. 18-0148 (issued August 20, 2018); *Franklin D. Haislah*, 52 ECAB 457 (2001).

[19] In light of the Board's finding with regard to Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 20, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 7, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board