

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

P.C., Appellant)	
)	
and)	Docket No. 20-0371
)	Issued: January 26, 2021
DEPARTMENT OF JUSTICE, FEDERAL)	
BUREAU OF INVESTIGATION, New York, NY,)	
Employer)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On December 3, 2019 appellant filed a timely appeal from a November 19, 2019 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 has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 8, 2019.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

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

In the first appeal, the Board issued a decision on July 23, 1998³ which reversed an August 11, 1995 OWCP decision as it improperly terminated appellant's compensation because he refused an offer of suitable work, pursuant to 5 U.S.C. § 8106(c)(2), in the form of a limited-duty position offered by the employing establishment on September 14, 1994.⁴ In the second appeal, the Board issued a decision on May 6, 2002⁵ reversing OWCP's June 5, 2000 decision as it improperly reduced appellant's compensation effective June 5, 2000 based on his capacity to earn wages as a retail store manager.

In the third, fourth, and fifth appeals, the Board issued decisions dated November 25, 2003,⁶ February 3, 2005,⁷ and August 10, 2006⁸ setting aside OWCP's September 24, 2002, March 9, 2004, and December 16, 2005 decisions, respectively, and remanded the case for further development of the evidence as OWCP had not provided adequate findings and reasoning for its determination regarding the amount of compensation to which appellant was entitled between September 1992 and June 2000. In the sixth appeal, the Board issued a decision on February 4, 2008⁹ which set aside OWCP's December 14, 2006 decision. The Board found that OWCP properly determined that appellant's pay rate calculations should have been based on the pay he received effective August 18, 1992. However, the Board remanded the case to OWCP for proper

² Docket No. 96-0778 (issued July 23, 1998); Docket No. 00-2334 (issued May 6, 2002); Docket No. 03-0135 (issued November 25, 2003); Docket No. 04-1042 (issued February 3, 2005); Docket No. 06-0556 (issued August 10, 2006); Docket No. 07-0562 (issued February 4, 2008); Docket No. 08-1747 (issued April 10, 2009), *petition for recon. denied*, Docket No. 08-1747 (issued August 4, 2009).

³ Docket No. 96-0778, *id.*

⁴ OWCP accepted that on December 29, 1987 appellant, then a 27-year-old special agent, sustained cervical, thoracic, and lumbar sprains, and disc subluxations at C3-4, T10-11, and L4-5 due to a motor vehicle accident which occurred while in the performance of duty. It later accepted that on May 21, 1999 he sustained thoracic and lumbar sprains, sciatica, myalgia, and myositis due to performing stretching exercises while in the performance of duty. Between December 20, 1991 and July 13, 2002, OWCP paid appellant wage-loss compensation on the supplemental rolls for intermittent periods of disability from work and, commencing July 14, 2002, it paid him wage-loss compensation on the periodic rolls. It administratively combined OWCP File No. xxxxxx961 and OWCP File No. xxxxxx924, designating the latter as the master file.

⁵ Docket No. 00-2334, *supra* note 2.

⁶ Docket No. 03-0135, *supra* note 2.

⁷ Docket No. 04-1042, *supra* note 2.

⁸ Docket No. 06-0556, *supra* note 2.

⁹ Docket No. 07-0562, *supra* note 2.

calculation of the amount of compensation appellant was entitled to receive between September 1992 and June 2000 based on this finding.

In the seventh appeal, the Board issued a decision on April 10, 2009¹⁰ affirming OWCP's June 4, 2008 decision finding that appellant received proper compensation for the period September 7, 1992 to June 4, 2000.¹¹

Appellant received periodic medical treatment from Dr. Leon N. Costa, a Board-certified orthopedic surgeon, who noted in a June 12, 2012 report that appellant exhibited limited lumbar extension and lateral bending on physical examination. Dr. Costa diagnosed chronic low back pain with left sciatica and indicated that appellant should avoid prolonged driving, lifting, bending, and stooping.¹²

Appellant also received medical treatment from Dr. Joseph Kipp, a Board-certified family practitioner, who noted in a June 29, 2016 report that appellant continued to complain of localized back pain (with pain radiating into his left leg) which he associated with his work-related motor vehicle accident. Dr. Kipp indicated that appellant had decreased muscle girth of the left lower extremity and diagnosed chronic low back pain with degenerative lumbar disc disease and lumbar radiculopathy. He advised that he was unaware of a job at the employing establishment, which would allow appellant to return to work and noted that the present level of his disability was "directly related to injury of record."

In a July 17, 2019 report, Dr. Kipp noted that appellant continued to complain of localized back pain (with pain radiating into his left leg). He advised that, compared to the right lower extremity, appellant's left lower extremity had visible muscle atrophy above and below the left knee, and diagnosed chronic low back pain and lumbar radiculopathy. Dr. Kipp again indicated that he was unaware of a job at the employing establishment, which would allow appellant to return to work and noted that the present level of his disability was "directly related to injury of record."

In a July 24, 2019 letter, OWCP advised appellant that, prior to being referred for a second opinion examination, he would be provided 45 days to submit a report from an attending physician if he had not submitted such a report within the prior 10 months. In a July 17, 2019 attending physician's report (Form CA-20), received by OWCP on July 31, 2019, Dr. Kipp listed the date of injury as May 21, 1991 and indicated that appellant sustained a low back injury due to a motor vehicle accident at work. He diagnosed degenerative disc disease at L4-5 and L5-S1 with L5 radiculopathy and chronic pain. Dr. Kipp checked a box marked "Yes" to indicate that appellant's condition was caused or aggravated by a motor vehicle accident at work. He indicated that

¹⁰ Docket No. 08-1747, *supra* note 2.

¹¹ Appellant filed a petition for reconsideration of the April 10, 2009 decision and, by order dated August 4, 2009, the Board denied the petition. *Id.*

¹² The Board notes that the case record lacks medical reports covering various periods after appellant sustained his December 29, 1987 and May 21, 1991 employment injuries. For example, the case record does not contain any medical reports produced between 1999 and 2003.

appellant was “permanently disabled” and noted, “Patient injured [May 21, 1991] and injuries are permanent -- patient will never be able to return to prior job description.”

On July 26, 2019 OWCP referred appellant for a second opinion examination with Dr. Steven J. Valentino, an osteopath Board-certified in orthopedic surgery. It provided Dr. Valentino a copy of the case record, including a recent statement of accepted facts (SOAF), and requested that he provide an opinion regarding whether appellant continued to have residuals and disability from work due to the accepted December 29, 1987 and May 21, 1991 employment injuries.

In a September 17, 2019 report, Dr. Valentino detailed the history of appellant’s accepted December 29, 1987 and May 21, 1991 employment injuries, and discussed the medical treatment he received.¹³ He noted that a June 18, 2012 report revealed left straight leg raising test reproduced low back pain at 80 degrees but did not produce any increase in left leg symptoms. Dr. Valentino further advised that appellant presented to him complaining of back pain and left leg numbness/pain. He reported findings of the physical examination he conducted, noting that regional examination of the spine revealed normal spinal curves without spasm, malalignment, subluxation, or trigger points. Appellant had full range of motion (ROM) of the cervical and thoracic spinal regions and voluntary lumbar spine ROM revealed flexion to 80 degrees, extension to 40 degrees, side bending to 45 degrees, and rotation to 45 degrees. Dr. Valentino indicated that the spinous process, interspinous ligaments, facets, iliolumbar ligament, and sacroiliac joint were normal, and that the pelvic compression test, sciatic notch/piriformis examination, thoracic compression test, straight leg raising test, and femoral stretch test were negative. The neurologic examination revealed that deep tendon reflexes were intact, and the motor and sensory examinations yielded normal results. Dr. Valentino reported that appellant had no pathologic reflexes and that he had full ROM of the hips, knees, ankles, and feet.

In the “Impression” section of his report, Dr. Valentino listed resolved cervical, thoracic, and lumbar sprains, sciatica, myalgia, myositis, and subluxations at C3-4, T10-11, and L4-5. He indicated that, based upon the physical examination he conducted, appellant presented with subjective complaints which were not substantiated by objective findings on physical examination. Dr. Valentino opined that appellant’s employment conditions had resolved given the present nature of objective findings seen on physical examination. He advised that appellant’s prognosis was good and that he did not need ongoing, further treatment related to the history of employment injury. Dr. Valentino found that, from an orthopedic/spine standpoint, appellant was capable of returning to his initial date-of-injury job without restrictions. He advised that the medical records indicated that appellant had a nonwork-related history of lumbar degenerative disc disease and he found no level of disability as a direct result of the accepted employment conditions as outlined in the SOAF.

In an October 3, 2019 letter, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits. It noted that the weight of the medical opinion evidence with respect to whether he had continuing residuals/disability due to his accepted December 29, 1987 and May 21, 1991 employment injuries rested with the September 17, 2019

¹³ In the “Treatment” portion of the report, Dr. Valentino indicated, “Treatment has consisted of rest, medication, and supervised therapy as well as injections.”

opinion of Dr. Valentino, an OWCP referral physician. OWCP provided appellant 30 days to present evidence and argument challenging the proposed termination action.

Appellant submitted an October 21, 2019 report from Dr. Kipp who indicated that appellant requested a narrative report “in defense of his work[-]related injuries,” specifically with regard to the injury residuals, which continued to disable him from returning to his previous job with the employing establishment. Dr. Kipp indicated that a recent medical reviewer, Dr. Valentino determined that appellant had recovered from the accepted injuries of cervical, thoracic, and lumbar sprains, sciatica, myalgia, myositis, and subluxations at C3-4, T10-11, and L4-5. He maintained that OWCP relied upon medical evidence from Dr. Valentino who concluded that appellant’s subjective complaints did not correspond with the objective findings on physical examination. Dr. Kipp advised that Dr. Valentino had reported that appellant’s muscle evaluation was normal, but indicated that it was not clear that he examined appellant closely as visualization showed a significant muscle atrophy of the left lower extremity, which “speaks to his longstanding nerve injury he sustained as a result of his motor vehicle accident of 1987.” He noted that, on the last examination in his office, appellant still demonstrated a positive left straight leg raise at 75 degrees, left-sided weakness upon dorsiflexion and plantar flexion, and pain with lumbar flexion, extension, and side-to-side left lower extremity motion.

Dr. Kipp further reported that appellant experienced several severe symptom exacerbations throughout the years, which would last at least a week at a time. He noted that appellant had chronic low back pain, which was adequately controlled with medication and therefore advised that additional imaging was not clinically necessary. Dr. Kipp indicated that he suspected that Dr. Valentino was “oblivious to the significant muscle wasting of the left lower extremity because he did not undress appellant.” He noted, “I would have to conclude that [Dr. Valentino] did not conduct a thorough examination, did not have significant insight into the original mechanism of injury which resulted in appellant’s ongoing condition, so that his medical opinion is incomplete, inaccurate, and inconsistent with appellant’s history.” Dr. Kipp advised that OWCP had indicated that, in assessing medical evidence, the weight of such evidence is determined by its reliability and he questioned the reliability of a physical examination during which the patient was not undressed. He noted that appellant suffered ongoing chronic low back pain with several severe exacerbations and opined that he had not recovered from the injuries of the 1987 motor vehicle accident. Dr. Kipp opined that he therefore remained permanently and totally disabled.

By decision dated November 19, 2019, OWCP terminated appellant’s wage-loss compensation and medical benefits, effective December 8, 2019. It determined that the weight of the medical opinion evidence rested with the September 17, 2019 opinion of Dr. Valentino.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee’s benefits.¹⁴ 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

¹⁴ *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).

the employment.¹⁵ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁶

Rationalized medical opinion evidence is required to establish causal relationship. The opinion of the physician must be based on a complete factual and medical background, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁷

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 8, 2019.

In his September 17, 2019 report, Dr. Valentino indicated that several tests of the back and lower extremities were normal, including thoracic compression, straight leg raising, and femoral stretch tests. He noted that the neurologic examination revealed intact deep tendon reflexes, the motor and sensory examinations yielded normal results, and there was full ROM of the hips, knees, ankles, and feet.¹⁸ In the "Impression" section of his report, Dr. Valentino listed resolved cervical, thoracic, and lumbar sprains, sciatica, myalgia, myositis, and subluxations at C3-4, T10-11, and L4-5. He indicated that, based upon the physical examination he conducted, appellant presented with subjective complaints, which were not substantiated by objective findings on physical examination. Dr. Valentino opined that appellant's employment conditions had resolved given the present nature of objective findings seen on physical examination. He found that, from an orthopedic/spine standpoint, appellant was capable of returning to his initial date-of-injury job without restrictions.

The Board finds that Dr. Valentino's September 17, 2019 report is of limited probative value regarding the termination of appellant's wage-loss compensation and medical benefits because Dr. Valentino has not provided sufficient medical rationale in support of his opinion that appellant ceased to have residuals and disability causally related to his accepted December 29, 1987 and May 21, 1991 employment injuries. Moreover, his opinion regarding continuing employment-related residuals/disability is not based on a complete factual/medical history. Appellant sustained employment injuries affecting multiple areas of his body, including cervical, thoracic, and lumbar sprains, disc subluxations at C3-4, T10-11, and L4-5, sciatica, myalgia, and myositis, but Dr. Valentino did not discuss appellant's employment-related injuries or medical treatment in detail. Despite the fact that appellant had received treatment for employment-related

¹⁵ 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).

¹⁶ *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁷ *D.M.*, Docket No. 20-0314 (issued June 30, 2020); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

¹⁸ Dr. Valentino noted that appellant had full ROM of the cervical and thoracic regions and listed ROM findings for the lumbar spine.

conditions since 1987, he only discussed a single prior medical report and the “Treatment” section of his report only contains a single sentence. Dr. Valentino merely noted, “Treatment has consisted of rest, medication, and supervised therapy as well as injections.” He did not provide any discussion of when appellant’s employment-related conditions had resolved or otherwise provide sufficient medical rationale in support of his opinion that appellant ceased to have employment-related residuals and disability. Dr. Valentino indicated that appellant’s examination findings were subjective in nature, but did not adequately discuss the basis for this comment. The Board has held that a medical opinion is of limited probative value if it is not based on a complete and accurate factual/medical history or if it contains a conclusion regarding a given medical matter which is unsupported by medical rationale.¹⁹

The September 17, 2019 report of Dr. Valentino, which served as the basis for OWCP’s termination action, does not provide a well-rationalized opinion that appellant had no residuals or disability related to his accepted December 29, 1987 and May 21, 1991 employment injuries on or after December 8, 2019.²⁰ As such the Board finds that OWCP erred in relying on Dr. Valentino’s opinion as the basis to terminate wage-loss compensation and medical benefits for the accepted employment injuries. Therefore, OWCP has not met its burden of proof to terminate appellant’s wage-loss compensation and medical benefits.²¹

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant’s wage-loss compensation and medical benefits, effective December 8, 2019.

¹⁹ See *L.G.*, Docket No. 19-0142 (issued August 8, 2019); *E.R.*, Docket No. 15-1046 (issued November 12, 2015); *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

²⁰ See *id.*

²¹ *J.H.*, Docket No. 18-0103 (issued October 15, 2018); *J.S.*, Docket No. 17-0804 (issued August 10, 2018).

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2019 decision of the Office of Workers' Compensation Programs is reversed.²²

Issued: January 26, 2021
Washington, DC

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

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

²² Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board after January 20, 2021.