

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

_____)	
T.C., Appellant)	
)	
and)	Docket No. 20-1163
)	Issued: July 13, 2021
DEPARTMENT OF THE NAVY, NORFOLK)	
NAVAL SHIPYARD, Portsmouth, VA, 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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 18, 2020 appellant filed a timely appeal from a March 17, 2020 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.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 9, 2019, as he no longer had residuals or disability causally related to his accepted December 20, 2004 employment conditions; and (2) whether appellant has met his burden of proof to establish continuing employment-related disability or residuals on or after October 9, 2019.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 20, 2004 appellant, then a 43-year-old painter, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his back when shoveling, bagging, and throwing bags of rocks into a dumpster while in the performance of duty. He stopped work on December 21, 2004. OWCP initially accepted appellant's claim for thoracolumbar strain. It paid him wage-loss compensation on the supplemental rolls, effective March 2, 2005, and on the periodic rolls, effective September 4, 2005.

In a report dated November 28, 2017, Dr. James H. Henick, Board-certified in anesthesiology and interventional pain, diagnosed lumbar sprain, lumbar spondylosis, lumbar facet arthropathy, and degeneration of the lumbar intervertebral disc. He performed an OWCP-authorized thermocoagulation of the lumbar medial branch nerves at L3-4, L4-5, and L5-S1 on that day.

In a letter addressed to the Department of Veterans Affairs dated November 7, 2018, OWCP noted that appellant's claim was accepted for lumbar sprain, and thoracic or lumbosacral neuritis or radiculitis not otherwise specified, and that it was adjudicating appellant's entitlement to FECA wage-loss compensation.

On May 14, 2019 OWCP referred appellant for a second opinion examination, along with a statement of accepted facts (SOAF), a series of questions, and the medical record to Dr. James Schwartz, a Board-certified orthopedic surgeon, to determine the extent and degree of any work-related disability and whether appellant continued to suffer from residuals of his accepted work-related conditions. The SOAF provided to Dr. Schwartz noted that the case was only accepted for thoracolumbar strain.

In an August 23, 2019 report, Dr. Schwartz noted his review of the SOAF and medical records. He examined appellant and noted that appellant sat "awkwardly," had a slow reciprocal gait, could barely get his heels off the floor, could not lift his toes off the floor when trying to stand on his heels, could not straighten at the hips, and was unable to extend his spine into the normal lordotic position. Dr. Schwartz opined that appellant had non-physiologic pain behavior and his subjective complaints did not correspond to objective findings. He advised that the soft tissue thoracolumbar strain had resolved and that appellant's lumbar degenerative disease was unlikely to have been aggravated by the work-related injury. Dr. Schwartz opined that appellant's present level of disability was not due to his accepted condition of thoracolumbar strain, but rather was due to non-physiological pain behavior. He opined that appellant had "no diagnosed structural injury, and all symptoms from this injury should have resolved." Dr. Schwartz advised that, "There is no need for any further treatment. Treatment is unlikely to help in any manner."

On September 5, 2019 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, based upon the opinion of Dr. Schwartz that the accepted conditions had resolved without residuals or disability. It afforded appellant 30 days to submit additional evidence or argument challenging the proposed termination.

In a letter dated September 26, 2019, appellant indicated that he was responding to the September 5, 2019 letter from OWCP. He advised that he was still having problems with both

knees, back pain, and was unable to work. Appellant alleged that Dr. Schwartz did not perform a physical examination.

In reports dated September 17 and 18, 2019, Dr. Theresa Jackson, Board-certified in physical medicine and rehabilitation, reviewed diagnostic test results of the lumbar spine from September 17, 2019, and a lumbar spine magnetic resonance imaging (MRI) scan from December 7, 2016. She diagnosed in pertinent part lumbar sprain, lumbar radiculopathy, lumbar facet arthropathy, muscle spasm, and other chronic pain. Dr. Jackson also noted disc bulges and facet arthropathy at L3, L4-L5, and S1, mild-to-moderate narrowing of the neural foramen and central canal, and mild progression of degenerative disease.

OWCP received a September 25, 2019 MRI scan of appellant's lumbar spine, which revealed moderate spinal stenosis at L4-5 and crossing nerve contact on the left at L3-4 and L4-5.

By decision dated October 9, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective October 9, 2019, finding that the medical evidence submitted was insufficient to outweigh Dr. Schwartz's opinion.

On December 18, 2019 appellant requested reconsideration and submitted additional evidence.

In October 21, 2019 treatment notes, Dr. Jackson diagnosed lumbar radiculopathy, lumbosacral neuritis, lumbar spine ligaments sprain, lumbar facet arthropathy, muscle spasm, and other chronic pain. She performed an L3-4 lumbar nerve block and noted that appellant was scheduled for surgery.

OWCP also received hospital records dated September 25 and October 8, 2019, and results from an October 8, 2019 bone scan.

By decision dated March 17, 2020, OWCP denied modification of the October 9, 2019 termination decision, finding that the opinion of Dr. Schwartz constituted the weight of the medical evidence in concluding that appellant had no employment-related residuals or disability.

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.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

² See *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

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 compensation.⁵ 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.⁶

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 October 9, 2019.

OWCP referred appellant to Dr. Schwartz for a second-opinion evaluation to determine the status of his accepted conditions and his work capacity. In his August 23, 2019 report, Dr. Schwartz described appellant's December 20, 2004 employment injury and noted that the SOAF listed thoracolumbar strain as the accepted condition. However, the Board notes that OWCP also accepted the claim for thoracic or lumbosacral neuritis or radiculitis not otherwise specified. It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.⁷ OWCP's procedures dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF, which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.⁸ As Dr. Schwartz was not provided with an accurate SOAF, his report was based upon an inaccurate or incomplete history. The Board, therefore, finds that his report was insufficient to constitute the weight of the medical opinion evidence and to establish that appellant no longer had any employment-related residuals or disability. OWCP, therefore, did not meet its burden of proof to terminate appellant's compensation benefits.⁹

³ See *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁴ *K.W.*, Docket No. 19-1224 (issued November 15, 2019); *see M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *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).

⁶ *K.W.*, *supra* note 4; *see A.G.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake*, *id.*

⁷ *J.N.*, Docket No. 19-0215 (issued July 15, 2019); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see L.J.*, Docket No. 14-1682 (issued December 11, 2015).

⁹ *Furman G. Peake*, *supra* note 6; *Sarah A. Lawson*, Docket No. 04-825 (issued July 13, 2004).

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 9, 2019.¹⁰

ORDER

IT IS HEREBY ORDERED THAT the March 17, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 13, 2021
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹⁰ In light of the disposition of Issue 1, Issue 2 is rendered moot.