

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

_____)	
G.Y., Appellant)	
)	
and)	Docket No. 19-1683
)	Issued: March 16, 2021
DEPARTMENT OF THE AIR FORCE, TINKER)	
AIR FORCE BASE, OK, Employer)	
_____)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 6, 2019 appellant filed a timely appeal from a March 14, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees'

¹ The Board notes that following the March 14, 2019 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.³

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 27, 2018, as he no longer had residuals or disability due to his accepted October 18, 2011 employment injury; and (2) whether appellant has met his burden of proof to establish continuing employment-related disability or residuals on or after May 27, 2018.

FACTUAL HISTORY

On November 9, 2011 appellant, then a 37-year-old electrician, filed a traumatic injury claim (Form CA-1) alleging that on October 18, 2011 he was helping a coworker lift a tool box off a work truck to place it on the floor when he twisted his back while in the performance of duty. OWCP accepted the claim for degeneration of lumbar or lumbosacral intervertebral disc and sprain of back, left lumbar region. Appellant stopped work on the date of injury and OWCP paid him wage-loss compensation on the supplemental rolls. He returned to work in a light-duty capacity from September 9 through October 16, 2013, and from April 14 through 16, 2014. Appellant thereafter stopped work again and did not return. OWCP paid him wage-loss compensation on the periodic rolls as of May 4, 2014.

Appellant sought medical treatment beginning October 19, 2011, the day following the employment incident, and underwent a course of lumbar injections and physical therapy for his conditions. A December 12, 2011 magnetic resonance imaging (MRI) scan of the lumbar spine revealed a moderate to large central protrusion and borderline extrusion at L4-5, abutting the subarachnoid space at the origins of the L5 nerve roots. On November 16, 2012 Dr. Shon Cook, a Board-certified neurological surgeon, proposed L4-5 decompression and interbody fusion surgery. Appellant declined to undergo back surgery.

Subsequently, appellant sought treatment with Dr. John W. Ellis, Board-certified in family and environmental medicine. In a February 15, 2017 medical report, Dr. Ellis determined that appellant's lumbar strain and degeneration of lumbosacral intervertebral disc were permanent in nature. He reported that appellant was unable to work in any capacity and his conditions would

² 5 U.S.C. § 8101 *et seq.*

³ Appellant submitted a timely request for oral argument before the Board. 20 C.F.R. § 501.5(b). Pursuant to the Board's *Rules of Procedure*, oral argument may be held in the discretion of the Board. 20 C.F.R. § 501.5(a). In support of appellant's oral argument request, he asserted that oral argument should be granted so that he could have the opportunity to explain why he should at least receive the offered training and explain how his injury has affected his life and his family. The Board, in exercising its discretion, denies appellant's request for oral argument because this matter requires an evaluation of the medical evidence presented. As such, the arguments on appeal can adequately be addressed in a decision based on a review of the case record. Oral argument in this appeal would further delay issuance of a Board decision and not serve a useful purpose. As such, the oral argument request is denied and this decision is based on the case record as submitted to the Board.

continue to deteriorate over time. Dr. Ellis opined that appellant's disability was a direct result of the work-related injuries.

On September 26, 2017 OWCP received a September 20, 2017 report of investigation from the employing establishment injury compensation specialist. The employing establishment requested that OWCP schedule a second opinion examination to evaluate appellant's conditions and work restrictions, noting that his physician claimed that he was unable to perform chores due to his work-related injury. The compensation specialist explained that the employing establishment conducted surveillance on appellant from September 7 through 9, 2017, which demonstrated his ability to bend, stoop, lift, and walk without limitations or signs of duress as evidenced in the accompanying video provided to OWCP. In the video, appellant was seen picking up and carrying a child without any limitations, bending down several times to pat a dog, and was walking normally without any visible medical aids.

On October 26, 2017 OWCP referred appellant to Dr. Gregory Zeiders, a Board-certified orthopedic surgeon, for a second opinion evaluation and determination regarding whether he had any residuals or disability causally related to the October 18, 2011 work-related injury.

In a separate letter to appellant also dated October 26, 2017, OWCP advised him that a surveillance video submitted by the employing establishment had been provided to the second opinion physician as part of the case record.⁴

On January 29, 2018 Dr. Zeiders evaluated appellant for the purpose of the second opinion evaluation. In his February 18, 2018 report, he documented appellant's physical examination findings, discussed his history of injury, and summarized past medical reports and diagnostic studies dating back to the October 18, 2011 work-related injury. In addition, Dr. Zeiders discussed the surveillance video, which showed appellant engaging in physical activity when he lifted a small child from a car seat, and also demonstrated active mobilization in flexion with no antalgic gait, both in ambulation as well as lifting. He opined that appellant no longer suffered from residuals or disability as a result of the October 18, 2011 employment injury. Dr. Zeiders noted that upon examination, appellant was able to ambulate through the hallway with no significant antalgic gait or need for assistive devices. He observed flexion, extension, and range of motion (ROM) measurements, noting that appellant's complaints were not consistent with his limited physical examination findings. Dr. Zeiders opined that there were no ongoing spinal conditions permanently worsened by the lifting event due to appellant's convoluted history, confusing subjective complaints, and physical examination findings. He explained that there were no examination findings that lent credence to his subjective complaints and no residual disabling component to his October 18, 2011 injury. Dr. Zeiders found that no further treatment was needed, maximum medical improvement had been reached, and appellant could return to full-duty work without restrictions.

In a February 21, 2018 report, Dr. Ellis reported that appellant's examination revealed decreased ROM of the lumbar spine, continued tightness, stiffness, and tenderness in the paraspinous muscles of the lumbar spine, and radiculopathy in the legs bilaterally. He reported

⁴ The record reflects that on November 3, 2017 appellant requested a copy of the surveillance video, which was provided to him on November 29, 2017.

that any prolonged standing, sitting, and walking increased his pain and symptoms, explaining that appellant struggled with everyday activities and chores. Dr. Ellis determined that appellant's lumbar strain and degeneration of lumbosacral intervertebral disc had not resolved and were permanent in nature. He found that appellant was unable to work in any capacity and that his conditions would continue to deteriorate over time. Dr. Ellis stated that appellant's disability was a direct result of his work-related injuries and that he should continue to follow-up on a monthly basis for medication refills and referrals.

By notice dated April 11, 2018, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because he no longer had any residuals or disability causally related to his October 18, 2011 work-related injury.

In a May 1, 2018 narrative statement, appellant contested the proposed termination arguing that Dr. Zeiders did not spend enough time with him during the examination, and therefore, could not have properly assessed his medical conditions.

In support of his claim, appellant submitted a May 7, 2018 report from Dr. Ellis who discussed his history of injury and summarized previous medical records. Dr. Ellis noted that appellant continued to complain of severe pain in the midline of the low back. While he initially reported numbness and weakness down the left leg, appellant was now experiencing these symptoms bilaterally. Dr. Ellis reported that appellant had to use a cane because of instability, mostly out of his left leg, which gave way on him frequently. He further complained of radicular pain shooting into the dorsal and lateral aspects of both feet and into his left knee. Dr. Ellis provided findings on physical examination, which revealed spasms in the thoracic and lumbar muscles, loss of normal lordotic curvature, and decreased ROM. He diagnosed lumbar sprain and lumbosacral disc degeneration that were ongoing conditions, which also resulted in impingement to the spinal nerves and bladder dysfunction. Dr. Ellis explained that the injury to appellant's back and the deranged discs were causing more impingement of the right L4, L5, and S1 spinal nerves and left L3, L4, L5, and S1 spinal nerves, as well as cauda equine syndrome resulting in decreased sexual and bladder dysfunction. He further explained that the chronic pain and sleep deprivation had caused neurochemicals in the brain resulting in organic depression. Dr. Ellis opined that the additional conditions and ongoing disability were related to appellant's employment injury. He reported that appellant did not need to undergo an FCE and recommended a magnetic resonance imaging (MRI) scan of the lumbar spine and an electromyography/nerve conduction velocity (EMG/NCV) study. Dr. Ellis concluded that appellant was temporarily totally disabled until the diagnostic reports could be evaluated to determine whether he was capable of some type of sedentary work.

By decision dated May 24, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective May 27, 2018. It found that the weight of the medical evidence rested with Dr. Zeiders' February 19, 2018 opinion, which established that appellant's accepted work-related conditions had ceased and he no longer had any residuals or disability as a result of the October 18, 2011 employment injury.

On June 4, 2018 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

In a narrative statement received on June 11, 2018, appellant contested the termination decision and noted submission of new medical reports, which provided updated examination and clinical findings.

Appellant submitted a May 18, 2018 MRI scan of the lumbar spine from Dr. Oliver A. Cvitanic, a Board-certified diagnostic radiologist, in support of his claim. Dr. Cvitanic described a small circumferential disc bulge at L4-5, which was centered to the left side, but did not cause significant epidural encroachment either centrally or laterally. The remainder of the lumbar spine had a normal appearance.

In a May 22, 2018 diagnostic report, Dr. Gabriel Pitman, a Board-certified neurologist, provided findings on physical examination and noted review of the May 18, 2018 MRI scan of the lumbar spine. He reported that appellant's EMG/NCV study revealed right L3-4 radiculopathy and normal EMG findings of the left lower extremity. Dr. Pitman diagnosed left paracentral disc herniation at L4-5, right L3-4 radiculopathy, and traumatic sacral shearing/sacroiliitis.

In a May 31, 2018 addendum report, Dr. Ellis reported that appellant's MRI scan of the lumbar spine revealed a small L4-5 circumferential disc bulge centered to the left, which did not cause significant encroachment. He also noted that EMG/NCV testing demonstrated right L3-4 radiculopathy. Dr. Ellis reported that Dr. Pitman noted a stretching injury, discogenic pain, and recommended surgical intervention due to the fact that appellant failed conservative treatments. He addressed the May 24, 2018 termination decision arguing that appellant's medical benefits should be restored immediately. Dr. Ellis further recommended a neurosurgeon for surgical evaluation to prevent permanent nerve damage from occurring. Appellant also submitted a separate medical report from Dr. Ellis dated August 16, 2018, which repeated the findings of his May 31, 2018 report.

By decision dated September 18, 2018, OWCP's hearing representative affirmed, in part, the May 24, 2018 decision, finding that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 27, 2018, based on the medical opinion of Dr. Zeiders, its second opinion examiner. The hearing representative found, however, that the case was not in posture for decision as to whether appellant had continuing residuals or disability on or after May 27, 2018 causally related to his accepted employment injury. The hearing representative instructed OWCP to remand the case and the newly submitted medical evidence to Dr. Zeiders for a supplemental report regarding whether appellant had any continuing residuals or disability of his employment injury.

On February 25, 2019 OWCP referred appellant, the additional medical and diagnostic reports, an updated statement of accepted facts (SOAF), and a job description for the position of electrician to Dr. Zeiders to determine whether the most recently received medical submissions changed his opinion regarding appellant's medical condition and ability to work.

In his February 25, 2019 report, Dr. Zeiders reviewed and summarized the newly submitted medical reports and diagnostic studies. He referenced his prior February 18, 2018 report for a history of the October 18, 2011 injury, review of past records, and pertinent examination findings. Dr. Zeiders evaluated appellant, provided current findings on physical examination, and reviewed the additional medical and diagnostic reports. He reconfirmed his prior opinion that appellant no

longer suffered from residuals or disability as a result of the October 18, 2011 work-related injury. Dr. Zeiders explained that appellant's subjective findings were out of proportion to his physical examination, which was significantly scattered with regard to positioning, noting that examination of the lower extremities and axial spine were inconsistent with his subjective complaints of pain and ability to perform the physical movements. He determined that given conflicting findings and lack of documentation pertaining to the diagnosis, appellant did not have any type of emergent cauda equine. Dr. Zeiders noted that the newly submitted diagnostic studies revealed a relatively benign EMG and limited MRI scan findings. He further reported that appellant did not require surgery as a result of this injury as his subjective complaints did not match his physical examination. Dr. Zeiders concluded that given the changes and variability with the two examinations performed, the benign nature of the MRI scan testing from the year before, and the relatively benign EMG and limited MRI scan findings from the current diagnostic studies, appellant did not have any ongoing spinal condition made permanently worse from his prior injury.

By decision dated March 14, 2019, OWCP denied modification of the May 24, 2018 decision, finding that the weight of medical evidence rested with Dr. Zeiders as the second opinion examiner.

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.⁵ After it has been determined that, an employee has a disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁸ 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.⁹

The Federal (FECA) Procedure Manual provides that the findings of an OWCP referral physician or impartial medical specialist must be based on the factual underpinnings of the claim,

⁵ *Z.D.*, Docket No. 19-0662 (issued December 5, 2019); *see 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).

⁶ *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).

⁷ *See R.P.*, *id.*; *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *Z.D.*, *supra* note 5; *see R.P.*, *id.*; *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁹ *See R.P.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake*, *id.*

as set forth in the SOAF.¹⁰ When OWCP's referral physician or impartial medical specialist does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is diminished or negated altogether.¹¹

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 May 27, 2018.

OWCP accepted that appellant sustained degeneration of lumbosacral intervertebral disc and left lumbar sprain of back as a result of his October 18, 2011 employment injury. By decision dated May 24, 2018, it terminated his wage-loss compensation and medical benefits effective May 27, 2018, based on the opinion of Dr. Zeiders, the second opinion examiner, who concluded in a February 19, 2018 report that appellant's accepted work-related conditions had resolved and he no longer suffered from residuals or disability as a result of the October 18, 2011 employment injury.

The Board finds that Dr. Zeiders' opinion was not well rationalized and failed to carry the weight of the medical evidence.¹² In his February 18, 2018 report, Dr. Zeiders provided a conflicting history of injury. He indicated that appellant had no ongoing spinal conditions, which were permanently worsened from the lifting event due to his convoluted history, confusing subjective complaints, and physical examination findings. Dr. Zeiders failed to explain how appellant's history was convoluted as he sought treatment and underwent diagnostic testing immediately following the October 18, 2011 employment incident, which OWCP accepted for degeneration of lumbosacral intervertebral disc and sprain of back, left lumbar region. Furthermore, his opinion does not carry the weight of the medical evidence that appellant's work-related conditions and disability had resolved as the physician provided no specific discussion to the accepted work-related conditions, only generally noting that appellant had no residual disabling component to his previously treated work injury.¹³ This discrepancy casts doubt on Dr. Zeiders' understanding of the facts of appellant's claim.¹⁴ His opinion that he could return to full-duty work was conclusory without sufficient medical rationale to support his findings.¹⁵ Given Dr. Zeiders' failure to acknowledge the accepted employment conditions, his opinion is, therefore, of

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.1 (September 2009).

¹¹ *Id.* at Chapter 3.600.3(10) (October 1990).

¹² *M.R.*, Docket No. 17-0634 (issued July 24, 2018).

¹³ *J.S.*, Docket No. 18-0513 (issued March 1, 2019); *K.J.*, Docket No. 14-1874 (issued February 26, 2015); *J.J.*, Docket No. 11-1958 (issued June 27, 2012).

¹⁴ *S.R.*, Docket No. 19-1229 (issued May 15, 2020).

¹⁵ *Id.*

diminished probative value regarding OWCP's termination of his wage-loss compensation and medical benefits.¹⁶

The Board therefore finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 27, 2018, as the medical evidence of record is insufficient to establish that he no longer had residuals or disability causally related to his accepted degeneration of lumbar or lumbosacral intervertebral disc and sprain of back, left lumbar region.¹⁷

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 27, 2018.¹⁸

ORDER

IT IS HEREBY ORDERED THAT the March 14, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 16, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

¹⁶ *P.E.*, Docket No. 19-0837 (issued October 20, 2020).

¹⁷ *L.B.*, Docket No. 20-0692 (issued November 20, 2020).

¹⁸ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.