

FACTUAL HISTORY

On September 24, 2004 appellant, then a 41-year-old inventory management specialist, filed a traumatic injury claim (Form CA-1) alleging that on September 23, 2004 she sustained an injury to her lumbar spine radiating into her right hip and right lower extremity when she lifted several heavy boxes off and on a shelf while in the performance of duty. She stopped work on September 24, 2004 and returned to work on September 29, 2004. Appellant again stopped work on September 30, 2004 and did not return.² OWCP accepted the claim for a lumbar strain. It paid appellant wage-loss compensation on the supplemental rolls effective November 8, 2004 and on the periodic rolls effective October 26, 2008.³ Appellant remained under medical care.

In a February 13, 2009 report, Dr. Michael S. Chung, a Board-certified physiatrist, noted that appellant injured her back at work on September 23, 2004 while lifting heavy boxes and collapsed to the floor. On examination, he noted an antalgic gait, instability in heel and toe walking and a positive straight leg raise test of the right lower extremity. Dr. Chung diagnosed chronic pain syndrome, cervicgia/bilateral shoulder pain, thoracolumbalgia, bilateral hip pain, left elbow pain, and a history of herniated lumbar disc. He submitted monthly reports through June 10, 2019 diagnosing a herniated L5-S1 disc, bilateral thoracolumbalgia, chronic lumbalgia, bilateral hip pain, chronic bilateral lumbar radiculopathy, give-way weakness in the right leg with a significant fall on September 21, 2018, sacroiliac joint pain, thoracic kyphoscoliosis, cervical disc herniation, and cervical stenosis. Dr. Chung administered periodic trigger point injections and held appellant off work.⁴

Thereafter, OWCP referred appellant for a second opinion by Dr. Robert Franklin Draper, Jr, a Board-certified orthopedic surgeon. It provided the case record, a statement of accepted facts (SOAF). The SOAF listed appellant's preexisting conditions of chronic lumbalgia, bilateral hip and sacroiliac joint pain, herniated lumbar disc, facet arthropathy, neuroforaminal stenosis, right lumbar radiculopathy, multiple herniated cervical discs, cervical stenosis, insomnia, and

² Appellant was terminated from the employing establishment effective January 5, 2007. Following her termination from the employing establishment, she elected FECA benefits retroactive to September 23, 2004.

³ By decisions dated October 11, 2005, January 19 and December 8 and 11, 2006, OWCP denied appellant compensation for disability from work during the periods April 8 through July 15, 2005, July 25 through October 12, 2005, and November 13, 2005 through July 22, 2006. By notice dated March 19, 2007 and finalized May 1, 2007, it terminated appellant's wage-loss compensation and medical benefits based on a February 22, 2007 report by Dr. Kevin F. Hanley, a Board-certified orthopedic surgeon serving as a second opinion physician. Following a September 18, 2007 hearing, an OWCP hearing representative affirmed the termination by decision issued October 15, 2007. By decision dated November 15, 2007, following a review of the written record, another hearing representative found that OWCP failed to provide her with appropriate due process for claims of wage-loss compensation for the period November 13, 2005 through July 22, 2006, and remanded the claim for additional development.

⁴ On February 15, 2008 OWCP obtained a second opinion report from Dr. Bahman Sadr, an orthopedic surgeon, who opined that the accepted lumbar injury had resolved and that no further treatment was needed. It obtained a second opinion report on December 16, 2014 from Dr. Amy Traylor, a Board-certified neurologist, who opined that the September 23, 2004 employment injury caused a chronic lumbar strain, chronic lumbar myofascial pain syndrome, and aggravated lumbar degenerative disc disease. Thereafter, OWCP obtained a second opinion report from Dr. Chester DiLallo, a Board-certified orthopedic surgeon, who submitted June 2, 2017 and July 16, 2018 reports opining that the accepted lumbar strain had resolved without residuals.

adjustment disorder with depressed mood. It also requested that Dr. Draper address a number of questions, including whether the September 23, 2004 employment incident aggravated any of these conditions, the natural or expected course of the conditions, if they were affected by her employment duties, whether such effects caused material change in the underlying conditions, whether such aggravation would have resolved upon her removal from the work environment, or at which point such changes or symptoms would have resolved.

In a June 11, 2019 report, Dr. Draper reviewed the SOAF and the medical record. On examination, he observed full strength throughout both lower extremities, a normal neurologic examination of both lower extremities, a normal gait, and submaximal effort with lumbar range of motion testing. Dr. Draper opined that the accepted lumbar strain had resolved without residuals. He noted that appellant had not worked since 2004 and suffered from some deconditioning, unrelated to the accepted lumbar strain. Dr. Draper opined that due to the general deconditioning, she was capable of medium-duty work. In response to OWCP's inquiries, he opined that there was "no work-related aggravation of underlying conditions based on review of the record and today's examination." Dr. Draper noted that appellant did not require physical therapy, or surgery, or treatment other than over-the-counter medications.

On July 26, 2019 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits as she no longer had disability or residuals related to her accepted employment injury. It allowed her 30 days to respond.

In response, appellant, through counsel, asserted that new reports from Dr. Chung contradicted Dr. Draper's opinion.

Dr. Chung, in a July 10, 2019 report, related that appellant ambulated with a cane and utilized a shower chair as she could not stand for prolonged periods. He noted continued chronic thoracic and lumbar spine pain, right sacroiliac joint pain, right hip pain, thoracic kyphosis, and a herniated lumbar disc. Dr. Chung diagnosed facet arthropathy, neuroforaminal stenosis, and right lumbar radiculopathy. He diagnosed chronic persistent bilateral lumbalgia, hip, sacroiliac joint pain left greater than right, bilateral lower thoracic pain, thoracic kyphosis, herniated lumbar disc with facet arthropathy and neuroforaminal stenosis, and right lumbar radiculopathy.

In an August 7, 2019 report, Dr. Chung noted that appellant had sustained a left shoulder injury due to a fall when her right leg gave way. On examination, he observed paraspinal tenderness to palpation in the thoracic and lumbar regions, 4+/5 weakness in the right lower extremity, and decreased pinprick and light touch sensation in the right lower leg. Appellant shared Dr. Draper's report with Dr. Chung who noted that Dr. Draper focused only on the lumbar strain and had not addressed appellant's lumbar radiculopathy or give-way weakness in the right lower extremity.

By decision dated October 31, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits effective November 10, 2019, based on Dr. Draper's opinion as the weight of the medical evidence.

On November 29, 2019 appellant, through counsel, requested an oral hearing with a representative of OWCP's Branch of Hearings and Review, conducted on March 10, 2020. Following the hearing, appellant submitted additional evidence.

A September 28, 2004 lumbar magnetic resonance imaging (MRI) scan demonstrated minimal posterior bulging of the L5-S1 intervertebral disc with a tiny annular fissure without central canal or neuroforaminal stenosis.⁵

In an April 6, 2005 report, Dr. Tajammul Ehsan, a Board-certified neurologist, held appellant off work through April 30, 2005 or until cleared due to back pain caused by the September 2004 occupational injury.

In an April 25, 2005 report, Dr. Mert T. Kivanc, an osteopath Board-certified in internal medicine and rheumatology, diagnosed lumbar strain, chronic refractory back pain since the September 23, 2004 occupational injury, bulging L5-S1 disc, chronic back spasms, chronic myofascial pain, and chronic pain requiring opioid analgesics. He found appellant totally and permanently disabled for work.

In a November 15, 2007 report, Dr. Kivanc noted that an MRI scan four days after the accepted injury showed L5-S1 disc bulging, "which proved that [appellant's] condition was not just a [s]prain." He diagnosed bulging L5-S1 discs, severe lumbar strain, spinal stenosis, and myofascial pain. Dr. Kivanc opined that the September 23, 2004 injury continued to totally disable appellant for work.

A July 31, 2015 lumbar MRI scan demonstrated an asymmetrical disc bulge at L5-S1, greater on the left, without significant encroachment of the canal, nerve root compression, or nerve root displacement, and continuing left paracentral annular fissure at L5-S1.

By decision dated May 19, 2020, an OWCP hearing representative affirmed the October 31, 2019 termination 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.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, OWCP must

⁵ Following the hearing, the employing establishment submitted an April 3, 2020 report by Dr. David Sack, a Board-certified physician in occupational medicine providing consultation to the employing establishment. Dr. Sack opined that the September 28, 2004 lumbar MRI scan did not demonstrate a herniated disc. He reviewed medical records, but did not examine appellant.

⁶ *R.V.*, Docket No. 20-0005 (issued December 8, 2020); *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).

⁷ *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 10, 2019.

In a June 11, 2019 report, Dr. Draper reviewed the SOAF and accurately described the September 23, 2004 employment injury. Upon examination, he observed normal neurologic findings and full strength throughout both lower extremities. Dr. Draper diagnosed a resolved lumbar strain and opined that appellant could perform medium-duty work. He opined that there was no work-related aggravation of her underlying conditions based on clinical findings or the medical record.

The Board finds, however, that Dr. Draper's opinion was conclusory in nature and did not contain sufficient medical reasoning to establish that appellant no longer had residuals or disability due to her September 23, 2004 employment injury.⁹ Additionally, the Board notes that Dr. Draper did not address all of the questions posed by OWCP.

In assessing medical evidence, the number of physicians supporting one position or another is not controlling, the weight of such evidence is determined by its reliability, its probative value, and its convincing quality.¹⁰ The factors that determine the probative medical evidence include the opportunity for and thoroughness of examination performed by the physician, the accuracy or completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed by the physician on the issue addressed to him by OWCP.¹¹ Once OWCP undertook development of the record it was required to complete development of the record by procuring medical evidence that would resolve the relevant issue in the case.¹²

The Board finds that Dr. Draper's report lacks sufficient medical reasoning to establish that appellant's accepted lumbar strain had resolved with no aggravation of underlying conditions. Dr. Draper opined that her accepted lumbar strain had resolved and that she could return to medium-duty work. However, Dr. Draper did not give a sufficient medical explanation to support his conclusion that the employment injury had not caused any aggravation of appellant's underlying cervical and lumbar conditions, insomnia, and adjustment disorder with depressed mood as listed in the SOAF. Rationalized medical evidence must include rationale explaining how

⁸ *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

⁹ *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *A.G.*, Docket No. 20-0187 (issued December 31, 2020); *see J.W.*, *supra* note 7; *S.W.*, Docket No. 18-0005 (issued May 24, 2018).

¹⁰ *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Nicolette R. Kelstrom*, 54 ECAB 570 (2003).

¹¹ *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *James T. Johnson*, 39 ECAB 1252 (1988).

¹² *See J.F.*, Docket No. 17-1716 (issued March 1, 2018).

the physician reached the conclusion he or she is supporting.¹³ Accordingly, the Board finds that Dr. Draper did not provide an opinion with sufficient medical reasoning to establish that appellant no longer had residuals or disability due to her accepted September 23, 2004 employment injury.¹⁴ Therefore, OWCP has not met its burden of proof in terminating appellant's wage-loss compensation and medical benefits based on his June 11, 2019 report.¹⁵

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 10, 2019.

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 15, 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

¹³ *B.B.*, Docket No. 19-1102 (issued November 7, 2019); *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁴ *C.B.*, *supra* note 9; *A.G.*, *supra* note 9; *S.W.*, *supra* note 9.

¹⁵ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.