

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

_____)
W.N., Appellant)

and)

DEPARTMENT OF THE INTERIOR, SALT)
LAKE DISTRICT, Salt Lake City, UT, Employer)
_____)

Docket No. 20-1600
Issued: August 18, 2022

Appearances:
David J. Holdsworth, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On September 8, 2020 appellant, through counsel, filed a timely appeal from an August 3, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 an 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 Appellant through counsel 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). Counsel asserted that oral argument should be granted because it would provide an opportunity to explain that OWCP's reliance on a second opinion physician's December 14, 2018 report was flawed. 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 a review of the case as submitted on the record.

Federal Employees' Compensation Act³ (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 has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 31, 2019, as he no longer had disability or residuals causally related to the accepted September 21, 1982 employment injury; and (2) whether appellant has met his burden of proof to establish continuing employment-related disability or residuals on or after May 31, 2019, causally related to the accepted September 21, 1982 employment injury.

FACTUAL HISTORY

On September 28, 1982 appellant, then a 31-year-old engineering aid/helper, filed a traumatic injury claim (Form CA-1) alleging that on September 21, 1982 he attempted to hand crank a portable electric generator and experienced low back pain while in the performance of duty. OWCP accepted the claim for sprain of the lumbar back and thoracic or lumbosacral neuritis or radiculitis. Appellant underwent reexploration surgery for chronic pain at L4-5 and L5-S1 on October 4, 1982 and had a fusion at L5-S1 on April 2, 1984. He stopped work on September 22, 1982. OWCP paid appellant wage-loss compensation on the periodic rolls pursuant to a loss of wage-earning capacity determination from June 16, 2002 through May 30, 2019.

Appellant treated with Dr. Joel T. Dall, a Board-certified physiatrist, from December 23, 2002 through August 6, 2008, for chronic multifactorial low back pain dating back to a work injury in 1982. In a February 19, 2007 report, Dr. Dall noted assuming appellant's care in 1996 when appellant's treating physician/surgeon retired. Appellant reported injuring himself in 1979 while working for the Bureau of Land Management and noted that he underwent lumbar surgery in 1980. He was then reinjured at work in 1982, and on October 4, 1982, he underwent a laminectomy of L5 and bilateral foraminotomy at L4-5 and L5-S1. The surgery was unsuccessful, and Dr. Dall diagnosed failed lumbar surgery syndrome with persistent radicular symptoms consistent with nerve root scarring. He opined that appellant was totally and permanently disabled from work.

An August 13, 2008 magnetic resonance imaging (MRI) scan of the lumbar spine revealed advanced degenerative disc disease at L2-3, L3-4, and L5-S1; left paracentral disc protrusion slightly displacing the transiting left L4 nerve root at L3-4; severe degenerative disc disease, postoperative changes at L5-S1; and facet arthropathy at L4-5.

Appellant continued treatment with Dr. Dall from December 1, 2008 through October 23, 2012 for chronic low back pain. Dr. Dall noted objective findings on examination revealed marked loss of range of motion consistent with radiographic findings of severe multi-level degenerative disease in the lumbar spine status post multi-level fusions. He advised that the effects of the work-related injury continued to be present and produce persistent, disabling pain. Dr. Dall further noted that appellant was on long-acting opiate medications, appellant's ability to ambulate was significantly limited, and as a result he was not capable of gainful employment. He found that

³ 5 U.S.C. § 8101 *et seq.*

vocational rehabilitation was unsuitable due to appellant's limitations. Dr. Dall noted exhausting all forms of treatment and opined that it was unlikely that appellant's condition would improve.

Appellant attended physical therapy treatment from November 16 through 30, 2012.

On January 23, 2017 Dr. Dall performed x-rays of the lumbar spine, which revealed a solid fusion at L5-S1, mild anterolisthesis of L4 on L5, loss of disc space, end plate hypertrophy, and reactive osteophytes at L2-3 and L3-4.

Appellant underwent an MRI scan of the lumbar spine on September 9, 2017 which revealed multilevel degenerative disc disease without significant spinal canal stenosis, multilevel lateral recess and neural foraminal narrowing, and stable postsurgical changes at L5-S1.

Dr. Dall related in a May 22, 2018 report that appellant's back pain was slowly worsening. He diagnosed failed lumbar surgery syndrome (status post three surgeries), status post fusion L5-S1, multilevel lumbar disc degeneration, lumbar facet arthropathy, opiate dependent pain, opiate induced constipation, and opiate induced dry mouth. Dr. Dall noted instability at L4-5 and recommended medial branch block and rhizotomy.

Appellant was evaluated by Dr. Arun Rajagopal, a Board-certified anesthesiologist, on July 5, 2018 for a long-standing history of right-sided low back pain with radiation into his right hip and right anterior thigh. He reported undergoing a fusion at L5-S1 in 1983 and recently experienced worsening right-sided lower back pain. Findings on examination revealed antalgic gait, a well-healed surgical scar of the lumbar spine, and pain with palpation over the lumbar spine paraspinal muscles, facet and sacroiliac joints. Dr. Rajagopal diagnosed spondylosis without myelopathy or radiculopathy of the lumbar region and postlaminectomy syndrome. He performed a medical branch block targeting L3-4 and L4-5. Dr. Rajagopal saw appellant in follow up on August 16, 2018 and performed a lumbar radiofrequency rhizotomy.

Dr. Dall continued to treat appellant through September 11, 2018 for chronic low back pain. Appellant reported no improvement in his condition after the medial branch blocks and rhizotomy. Dr. Dall diagnosed chronic low back pain decades out from an L5-S1 fusion and recommended a second rhizotomy.

On October 3, 2018 OWCP referred appellant, the case file, a statement of accepted facts, and a series of questions to Dr. John Ballard, a Board-certified orthopedic surgeon, for a second opinion examination. It requested his opinion on appellant's employment-related conditions, disability and whether he continued to suffer from residuals of his work-related injury and whether he was capable of returning to gainful employment.

In a December 14, 2018 report, Dr. Ballard described appellant's September 21, 1982 employment injury, noting that appellant was cranking a gas generator and bent over and had an onset of lower back pain. He recounted appellant's medical history, reviewed diagnostic reports, and provided findings on physical examination. Dr. Ballard noted some loss of lumbar lordosis, a well-healed lumbar surgical scar, nontender to palpation in the lumbar spine, intact lower extremity strength, normal sensation to light touch and pinprick, with no evidence of pain behavior, or symptom magnification. He diagnosed history of lumbosacral strain, status post lumbar laminectomy twice at L4-5 and L5-S1, and status post lumbar fusion at L5-S1. Dr. Ballard

indicated that the accepted condition of thoracic and lumbosacral neuritis generally resolves within three to four months; however, with appellant's "previous symptoms to his lower back," these conditions resolved six months after the injury or by April 1983. He explained that appellant's accepted conditions were no longer active, and his diagnosis remained chronic low back pain secondary to preexisting degenerative changes and preexisting surgeries. Dr. Ballard noted subjective complaints that correlated to objective findings noting a lumbar fusion with residual chronic lower back pain. He advised that appellant was currently taking methadone, which was appropriate for his chronic pain and his goals of pain control and functionality. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Ballard noted that appellant reached maximum medical improvement (MMI) and was capable of performing his usual job without restrictions. He noted that appellant was capable of sedentary, light, medium, and heavy strength levels. Dr. Ballard opined that there were no limitations due to the accepted conditions.

In a January 8, 2019 progress report, Dr. Dall noted that appellant reported no significant changes to his medical condition or medication. He presented appearing uncomfortable, shifting in his seat, and transitioning slowly. Dr. Dall diagnosed chronic multifactorial low back pain, status post L5-S1 fusion 30 years ago. He made no changes to appellant's care.

On April 24, 2019 OWCP issued a notice proposing to terminate appellant's medical benefits and wage-loss compensation as he no longer had disability or residuals causally related to his accepted contusion of the sprain of the lumbar back and thoracic or lumbosacral neuritis or radiculitis. It found, based on Dr. Ballard's report, that appellant had no current disability and no medical residuals due to his accepted conditions. OWCP allowed appellant 30 days to respond.

Appellant submitted additional evidence. In a February 5, 2018 consultation, Dr. Paul G. Amstutz, a Board-certified neurosurgeon, evaluated appellant for pain in the right low back L5 region. He noted appellant's history was significant for three lumbar surgeries, the last spinal fusion occurring in 1982. Examination of the back revealed a well-healed surgical scar, no tenderness to palpation in the lumbosacral region, negative straight leg raising and Patrick maneuver, and intact strength throughout. Dr. Amstutz indicated that an electromyogram (EMG) and nerve conduction velocity (NCV) testing performed at an outside facility revealed chronic L5 and S1 radiculopathy of long-standing nature. He diagnosed lumbar spondylosis with mechanical back pain. Dr. Amstutz noted that the L4-5 facet joints were very degenerated as anticipated above an L5-S1 fusion many years ago. Lumbar spine x-rays revealed postsurgical changes of L5-S1 posterior decompression with osseous fusion, 7-millimeter (mm) anterolisthesis of L4 on L5 in flexion, reducing to 5 mm in extension, and moderate multilevel disc degeneration unchanged. Dr. Amstutz noted findings consistent with L4-5 spondylolisthesis, which was unstable and supported that the degenerative changes at this level were responsible for appellant's low back pain. He recommended medial branch blocks and radiofrequency ablation procedures. Dr. Amstutz was unable to comment on whether appellant had a work injury for which three surgeries were required, but he opined that appellant had lumbar spondylitic type back pain and an MRI scan with facet joint deterioration that correlated with these findings.

In a computerized tomography (CT) scan of the abdomen and pelvis dated July 30, 2018, revealed no acute abnormality.

In an April 30, 2019 report, Dr. Dall noted treating appellant for pain management for over 20 years. He reviewed Dr. Ballard's December 18, 2018 report and responded to the proposed termination of appellant's benefits for the work injury. Dr. Dall indicated that appellant's original injury was described as a lumbar strain, and he concurred with Dr. Ballard's opinion that it should have resolved within a few months. However, he further stated that appellant's condition did not resolve as expected. Dr. Dall noted that because of the work-related lumbar strain appellant underwent three surgeries and opined that the residuals and consequences of the surgeries were work related and the reason that he continued to be treated. He advised that appellant's problem was not so much related to appellant's original injury as it was to the treatment for that injury. Appellant also submitted a February 19, 2007 report from Dr. Dall previously of record.

By decision dated May 31, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that the weight of the medical evidence rested with the report of Dr. Ballard, the second opinion physician.

Appellant subsequently submitted reports from Dr. Dall dated February 19, 2007 and April 30, 2019; Dr. Amstutz dated February 5, 2018; and x-rays of the lumbar spine dated February 5, 2018, all previously of record.

On August 26, 2019 appellant, through counsel, requested reconsideration. He referenced Dr. Dall's April 30, 2019 report that explained that the work-related lumbar strain caused the decisions to undergo three surgeries, which resulted in appellant's failed back syndrome. Dr. Dall indicated that the long-term consequences of the lumbar fusion was accelerated degeneration above and below the fusion site. He concluded that his residuals of chronic pain, need for ongoing medical treatment, and back surgeries, resulted from the work-related accident and should continue to be compensable.

By decision dated December 2, 2019, OWCP denied modification of the May 31, 2019 termination decision.

OWCP subsequently received an EMG/NCV study report dated November 27, 2017, which revealed significant electrophysiologic evidence suggestive of chronic long-standing neuropathic process involving L5-S1 nerve roots bilaterally.

Appellant resubmitted reports from Dr. Dall dated September 11, 2018 and April 30, 2019, all previously of record.

On May 6, 2020 appellant request reconsideration. In support of his request, he submitted a January 5, 2020 report from Dr. Cindi Jo Leech, a Board-certified internist. Dr. Leech indicated that appellant sustained a back injury on September 21, 1982 and he underwent a spinal fusion of the L5 vertebral body to S1 (sacrum), reporting chronic pain since this time. She indicated that he attempted to find gainful employment, but has been unable to sustain employment because of his severe back pain. Dr. Leech noted that an EMG/MCV performed on November 27, 2017, revealed chronic nerve damage bilaterally at the L5-S1 nerve roots. She explained that this was the level of the original injury, which was surgically fused and revealed the damage was significant and persisted. Dr. Leech further indicated that an MRI scan of the lumbar spine performed on September 9, 2017 showed moderate neuroforaminal narrowing at L4-5 and no spinal stenosis or

neuroforaminal narrowing at L5-S1. She explained that this study demonstrates that there was no ongoing compression of the nerve roots as compared to the EMG/NCV study, which showed chronic damage to the nerve roots. Dr. Leech opined that appellant had surgery for an injury that occurred while he was at work, that injury resulted in permanent damage to the L5-S1 nerve roots, and as a result he has chronic neuropathic and mechanical pain in his back that precludes him from working. She advised that he was totally and permanently disabled as a result of the back injury in 1982.

By decision dated August 3, 2020, OWCP denied modification of the December 2, 2019 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.⁴ 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.⁵ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

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 May 31, 2019.

In his December 14, 2018 report, Dr. Ballard diagnosed a history of lumbosacral strain, status post lumbar laminectomy twice at L4-5 and L5-S1, and status post lumbar fusion at L5-S1. He indicated that the accepted condition of thoracic and lumbosacral neuritis resolved six months after the injury, or by April 1983. However, Dr. Ballard advised that appellant was currently taking methadone, which was appropriate for appellant's chronic pain and his goals of pain control and functionality. He related that his accepted conditions were no longer active, and his diagnosis remained chronic low back pain secondary to preexisting degenerative changes and preexisting surgeries. Dr. Ballard found that appellant reached MMI and was capable of performing his usual job without restrictions. He opined that there were no limitations due to the accepted conditions.

The Board has held that the weight of a medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested, and the

⁴ *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).

⁵ *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).

⁶ *See R.P., id.*; *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

medical rationale expressed in support of stated conclusions.⁷ Dr. Ballard provided a conclusory opinion, without rationalized objective support for his opinion that appellant's disability had ceased.⁸ The Board therefore finds that Dr. Ballard's opinion is of limited probative value on the underlying issue of this case because he failed to provide a rationalized medical opinion that appellant ceased to have disability or residuals of his accepted employment-related physical conditions.⁹

For these reasons, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 31, 2019.¹⁰

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 31, 2019.

⁷ *G.B.*, Docket No. 20-0750 (issued October 27, 2020); *A.R.*, Docket No. 20-0335 (issued August 7, 2020).

⁸ *R.G.*, Docket No. 16-0271 (issued May 18, 2017).

⁹ *G.B.*, *supra* note 7.

¹⁰ In light of the Board's disposition in Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the August 3, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 18, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board