United States Department of Labor
Employees' Compensation Appeals Board

R.H., Appellant	)	
and	)	**Docket No. 20-1442**
	)	**Issued: February 9, 2022**
DEPARTMENT OF HOMELAND SECURITY, TRANSPORTATION SECURITY ADMINISTRATION, Seattle, WA, Employer	)	

Appearances:
Stephanie Leet, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On July 27, 2020 appellant, through counsel, filed a timely appeal from a January 29, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

[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 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] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that, following the January 29, 2020 decision, appellant submitted additional evidence to OWCP. 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*.

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits, effective June 14, 2018, as he no longer had disability causally related to his accepted January 1, 2005 employment injury; and (2) whether appellant has met his burden of proof to establish continuing disability on or after June 14, 2018, causally related to his accepted January 1, 2005 employment injury.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.[4] The facts and circumstances as set forth in the Board's decision are incorporated herein by reference. The relevant facts are as follows.

On February 22, 2005 appellant, then a 65-year-old lead security screener, filed a notice of recurrence of a medical condition (Form CA-2a) alleging that on January 1, 2005, he experienced a recurrence of previously accepted cervical and lumbar spine conditions.[5] He stopped work on February 12, 2005 and did not return. OWCP developed the recurrence claim as one for a new occupational condition.[6] On May 5, 2005 it accepted a lumbar strain, cervical-thoracic strain, and lumbar radiculopathy. On July 27, 2005 OWCP expanded its acceptance of the claim to include the additional diagnosis of an L4-5 disc herniation. On August 29, 2005 Dr. Daniel G. Nehls, a Board-certified neurosurgeon, performed an OWCP-authorized laminectomy, facetectomy, and foraminotomy at L4 and L5.[7] OWCP paid wage-loss compensation benefits. It placed him on the periodic rolls, effective February 19, 2006.[8]

Appellant remained under medical treatment. He underwent a series of OWCP-authorized cervical facet block and cervical epidural injections from January 12 through July 18, 2007, and lumbar epidural steroid injections on August 28, 2007.[9] Appellant underwent a series of OWCP-authorized bilateral L3, L4, and L5 medial branch and dorsal ramus blocks on December 30, 2014. On March 24, 2015 he underwent an OWCP-authorized right-sided radiofrequency ablation from

[4] Docket No. 17-1423 (issued November 8, 2017).

[5] Appellant has a previous traumatic injury claim under OWCP File No. xxxxxx865, accepted for lumbar strain, cervical-thoracic strain, and lumbar radiculopathy. OWCP has administratively combined File Nos. xxxxxx840 and xxxxxx865, with File No. xxxxxx840 serving as the master file.

[6] A March 4, 2005 lumbar magnetic resonance imaging (MRI) scan demonstrated multilevel disc bulges and severe degenerative disc disease.

[7] Appellant participated in postoperative physical therapy treatments through July 2006.

[8] A January 23, 2006 cervical MRI scan demonstrated disc narrowing at C4-5, C5-6, and C6-7 with degenerative disc bulges.

[9] A June 3, 2008 lumbar MRI scan demonstrated bilateral posterior laminectomies at L4-5 with 5 mm anterolisthesis of L4 on L5, increased since a March 4, 2005 study, resulting in bilateral neural foraminal narrowing, with possible compression of the left exiting L4 nerve root, a posterior osteophyte at L5-S1 contributing to moderate bilateral neural foraminal narrowing with contact of the exiting L5 nerve roots bilaterally, mildly increased posterior disc bulge at L2-3 with mild spinal canal and neural foraminal narrowing, and moderate-to-severe facet arthropathy at L4-5. June 3, 2008 lumbar x-rays demonstrated a grade 1 anterolisthesis of L4 on L5 with instability, and prominent degenerative disc disease present at L5-S1.

L3 through L5, and authorized left L3 and L4 medial branch and left L5 dorsal ramus radiofrequency ablation. Appellant also underwent an OWCP-authorized series of caudal epidural steroid and bilateral L4-5 transforaminal epidural steroid injections from September 10, 2015 through January 23, 2017. He participated in physical therapy treatments from March 2016 through April 2017.

On May 30, 2017 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions to Dr. Vicki Kalen, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of appellant's accepted January 1, 2005 employment injury. In a June 21, 2017 report, Dr. Kalen described the January 1, 2005 employment injury and noted appellant's accepted lumbar strain, cervicothoracic strain, lumbar radiculopathy, and L4-5 herniated disc. On examination she noted a well-healed surgical scar over the lumbar spine, limited cervical and lumbar spine motion in all planes, full strength of the upper and lower extremities with no atrophy, intact reflexes and normal motor testing in all extremities, and overreaction to lumbar and cervical spine motion. Dr. Kalen opined that multilevel degenerative changes visible on imaging studies were normal for appellant's age, and that surgery had resolved the accepted L4-5 disc herniation. She found that the accepted occupational injuries had resolved without residuals. Dr. Kalen returned appellant to full-time sedentary or light duty with restrictions. In a July 10, 2017 supplemental report, she noted that the work limitations were due exclusively to appellant's age of 78 and age-related spinal complaints and unrelated to the accepted occupational injury.

In a July 20, 2017 report, Dr. Russel R. Kinder, Board-certified in pain medicine and anesthesia, diagnosed a sprain of the ligaments of the cervical and lumbar spine. On September 6, 2017 he performed authorized bilateral transforaminal epidural steroid injections at L4-5. Dr. Kinder diagnosed lumbar radiculopathy.

OWCP received chart notes dated from January 31 through April 25, 2018 by Catherine Milgate, a physician assistant.

A December 6, 2017 MRI scan of the cervical spine demonstrated moderate-to-severe spondylosis at C5-6, C6-7, and C7-T1 with spinal stenosis, multiple areas of facet arthrosis, and neuroforaminal narrowing.

On March 20, 2018 OWCP referred appellant for an impartial medical examination with Dr. Lowell Anderson, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between Dr. Kalen, for the government, and Dr. Kinder, for appellant, regarding appellant's continuing employment-related disability and medical residuals. An updated SOAF, dated Mach 6, 2018, noted accepted conditions of lumbar sprain, cervical-thoracic sprain, lumbar radiculitis, and herniated lumbar (L4-5) disc.

In an April 18, 2018 report, Dr. Anderson, serving as the impartial medical examiner (IME), reviewed appellant's history of injury, medical records, and the SOAF. On examination he observed restricted range of motion of the cervical spine, paraspinal tenderness to palpation of the cervical spine, left intrascapular region, and lumbosacral junction, possible mild weakness of the left lower extremity evident on toe-raise and step testing, possible mild hamstring weakness in the left lower extremity, subjective decreased sensation in the second, third, and fourth fingers of the left hand, minimally decreased sensation in the fifth finger of the left hand, limited lumbar range of motion, decreased sensation in the entire left lower extremity, and negative seated straight

leg raising tests bilaterally. Dr. Anderson also noted that thigh circumference at 10 centimeters proximal to the patella was 51/49, right over left. He diagnosed multilevel cervical spondylosis, cervical spinal stenosis, likely left upper extremity radiculopathy symptoms related to nerve root irritation at multiple levels of the cervical spine, central cervical stenosis related to genetic and age-related progression of a preexisting cervical condition. Dr. Anderson opined that the accepted injury "with likely L4-5 herniated disc" and surgery had resolved without residuals as it was "likely satisfactorily treated" by surgery. He noted that appellant's ongoing cervical and lumbar conditions were due only to age-related degenerative changes. Dr. Anderson indicated that appellant had attained maximum medical improvement "many years ago." He found appellant unable to perform his date-of-injury position due to nonoccupational, age-related degenerative changes of the cervical and lumbar spine.

On May 9, 2018 OWCP proposed to terminate appellant's wage-loss compensation benefits because he no longer had disability from work due to the accepted January 1, 2005 injuries, based on Dr. Anderson's report. It afforded him 30 days to respond.

In a letter dated June 6, 2018, appellant, through counsel, contended that Dr. Anderson failed to differentiate between the sequelae of the accepted occupational injuries and surgery and age-related degenerative changes. He submitted a June 1, 2018 report by Dr. Xi Tian, Board-certified in anesthesiology and pain medicine, diagnosing a cervical spine ligamentous sprain and chronic postoperative pain.

By decision dated June 14, 2018, OWCP terminated wage-loss compensation, effective that date, based on the special weight accorded Dr. Anderson's report as the IME.

On July 3, 2018 appellant requested a telephonic oral hearing before a representative of OWCP's Branch of Hearings and Review. During the hearing, held on November 14, 2018, counsel contended that Dr. Anderson's opinion should not have been accorded special weight as it was equivocal and insufficiently rationalized. Following the hearing, in a December 11, 2018 letter, counsel asserted that OWCP should have accepted an L5-S1 disc herniation, lumbar stenosis, and failed back syndrome.

OWCP received a June 7, 2018 report, Dr. Tian diagnosed a sprain of ligaments of cervical spine. When asked by appellant, Dr. Tian indicated that he would not provide an opinion on whether appellant remained disabled for work.

In reports dated June 22 and November 1, 2018, Dr. Richard N.W. Wohns, a Board-certified neurosurgeon, noted the accepted January 1, 2005 occupational injury. He diagnosed cervical stenosis, cervical radiculopathy, cervical pain, bilateral occipital neuralgia, and low back pain.[10] Dr. Wohns opined that appellant's cervical radiculopathy, cervical stenosis, bilateral occipital neuralgia, and low back pain remained related to the accepted January 1, 2005 injury, in

[10] A July 11, 2018 MRI scan of the lumbar spine demonstrated central stenosis at L2-3 with broad-based central protrusion, L3-4 central stenosis with broad-based bulging, small central canal, and left foraminal and central disc protrusion, degenerative spondylosis at L4-5 with marked narrowing of the right nerve root and marked flattening of the existing L4 nerve, L5-S1 broad-based disc bulging and retrolisthesis with bilateral neuroforaminal narrowing, and right S1 nerve root displacement.

part, because latent, asymptomatic conditions were aggravated, activated, or made symptomatic by the accepted injury.

In an October 25, 2018 report, Dr. David Hoffman, a Board-certified family practitioner, reviewed a history of injury and treatment and referred appellant to a medical clinic.

In a January 10, 2019 report, Dr. Darin Blackburn, a Board-certified family practitioner, noted that he had been treating appellant since the January 1, 2005 occupational injury. He opined that appellant's injury-related cervical and lumbar spine symptoms had not yet resolved. Dr. Blackburn noted work limitations attributable to the accepted occupational injury.

By decision dated January 29, 2019, the hearing representative affirmed the June 14, 2018 termination, finding that Dr. Anderson's opinion continued to carry the special weight of the medical opinion evidence.

On January 16, 2020 appellant, through counsel, requested reconsideration and submitted additional evidence.

In a November 15, 2018 report, Dr. Tian diagnosed lumbago, other chronic postoperative pain, and sprain of ligaments of lumbar spine.

In reports dated January 25 and April 10, 2019, Dr. Michael J. Martin, a Board-certified orthopedic surgeon, noted a history of the accepted January 1, 2005 occupational injury and subsequent treatment. On examination he noted slightly diminished cervical and lumbar lordosis, limited range of cervical and lumbar spine motion, normal motor and sensory findings in all extremities, and negative straight leg raising tests bilaterally. Following additional imaging studies,[11] Dr. Martin recommended physical therapy.

In July 1, September 3, 2019 and January 8, 2020 reports, Dr. Wohns opined that appellant should undergo a C5-6, C6-7 anterior cervical discectomy and fusion, and extension of the prior laminectomy to include L2 and L3 due to severe stenosis.

In a January 17, 2020 report, Dr. Kathy Wang, an osteopath Board-certified in anesthesiology, administered a provocative lumbar discography and discogram at L2-3, L3-4, and L5-S1 which demonstrated nonconcordant pain at L2-3, L3-4, L4-5. She noted that discography was not performed at L5-S1 due to a posterior osteophyte complex and autofusion.

Appellant also submitted reports dated from March 27 through November 25, 2019 by Soo Yoon, a nurse practitioner.

By decision dated January 29, 2020, OWCP denied modification.

[11] A March 8, 2019 MRI scan of the cervical spine, and April 9, 2019 MRI scans of the thoracic and lumbar spine demonstrated degenerative changes throughout the spine as evident on prior imaging studies. The April 9, 2019 lumbar MRI scan demonstrated a midline laminectomy with excellent decompression of the spinal canal at L4-5 and L5-S1.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify termination or modification of benefits.[12] It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[13] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[14]

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[15] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[16]

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective June 14, 2018.

OWCP properly identified a conflict of medical opinion between Drs. Kalen and Kinder, and referred appellant to Dr. Anderson for an impartial medical evaluation. In his April 18, 2018 report, Dr. Anderson reviewed appellant's history of injury, medical records, and the SOAF. He noted that the accepted January 1, 2005 injury "likely" caused an L4-5 herniated disc, "likely satisfactorily treated" by the authorized August 29, 2005 laminectomy, facetectomy, and foraminotomy at L4-5.

The Board finds that Dr. Anderson's report is inconsistent with the SOAF. OWCP specifically accepted that the L4-5 herniated disc was caused by the accepted January 1, 2005 occupational injury.[17] It is well established that a physician's opinion must be based on a complete and accurate factual and medical background. When OWCP has accepted an employment

[12] *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[13] *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[14] *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

[15] 5 U.S.C. § 8123(a); *D.B.*, Docket No. 19-0663 (issued August 27, 2020); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[16] *D.B.*, *id*.; *D.W.*, Docket No. 18-0123 (issued October 4, 2018).

[17] *D.B.*, *supra* note 15; *Willa M. Frazier*, 55 ECAB 379 (2004).

condition as occurring in the performance of duty, the physician must base his opinion on these accepted conditions.[18]

The Board therefore finds that Dr. Anderson's opinion is of limited value on the relevant issue in this case, and is insufficient to carry the special weight of the medical evidence.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective June 14, 2018.[19]

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 9, 2022
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

[18] *Id.*; *V.C.*, Docket No. 14-1912 (issued September 22, 2015).

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