

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 25, 2017, as he no longer had residuals or disability causally related to his accepted employment injury; and (2) whether appellant has met his burden of proof to establish continuing employment-related disability or residuals, on or after June 25, 2017, due to the accepted employment injuries.

FACTUAL HISTORY

On April 15, 1986 appellant, then a 40-year-old fire safety engineer, filed a traumatic injury claim (Form CA-1) alleging that on April 14, 1986 he sustained back and left leg injuries when he slipped and fell on a wet floor while responding to a fire alarm. He stopped work on April 15, 1986. OWCP accepted the claim for low back strain, L4-5 herniated nucleus pulposus, and depression. Appellant returned to light-duty modified work on July 1, 1986 and worked intermittently until he stopped work completely on March 20, 1987. OWCP paid him wage-loss compensation on the periodic rolls as of February 13, 1988.

On September 9, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, for an opinion regarding the status of appellant's accepted work conditions, and his current work restrictions.

In a report dated September 29, 2015, Dr. Smith noted appellant's history of injury and opined that his L4-5 herniated disc had resolved by 2012. He further opined that the April 1986 employment injury did not cause an aggravation of any preexisting back or knee conditions. A physical examination of the back revealed no trigger points, atrophy or any spasms, satisfactory range of motion, no focal motor or reflex deficit, and no focal muscle atrophy. Dr. Smith noted that, while appellant complained of back pain, his neurologic examination was normal and there were no findings of rigidity or spasms during the range of motion examination. He concluded that it was likely the lumbar herniation resolved by 2012 and that the lumbar strain had also resolved without any residuals. Dr. Smith determined that any disability appellant had was due to nonemployment-related spinal and bilateral knee arthritis.

On October 13, 2015 OWCP referred appellant for a second opinion evaluation with Dr. Andrew Gergely, a Board-certified psychiatrist, for an opinion on whether appellant continued to have residuals and disability due to his accepted depression.

Dr. Gergely, in a November 9, 2015 report concluded that appellant currently had no psychiatric condition. He opined that appellant could return to work.

In a March 16, 2017 report, Dr. Emad R. Al-Banna, a general surgeon, opined that the medical evidence established that appellant's April 14, 1986 employment injury caused a permanent disc injury, and his condition was the same or worse due to age-related generalized arthritis. He reported that on physical examination appellant had limited mobility due to chronic back pain and limited flexibility. Dr. Al-Banna opined that appellant's condition had not improved over the years and there was no possibility of him ever returning to work.

On April 11, 2017 OWCP again referred appellant to Dr. Smith for a second opinion evaluation.

Dr. Smith, in a report dated May 2, 2017, noted that he had previously seen appellant regarding his April 14, 1986 employment injury. He summarized appellant's history of injury and medical treatment. Dr. Smith related that appellant's physical examination findings included no spasm, deformity, scarring, atrophy, or trigger points. He reported appellant's active range of motion was self-limited due to complaints of pain, but there was no finding of spinal rigidity or spasm during the maneuvers performed. Dr. Smith reported a normal neurologic examination. Based on his review of a March 14, 2012 magnetic resonance imaging (MRI) scan, he concluded that appellant's L4-5 herniation had resolved without residuals. The MRI scan showed mild multilevel degenerative spondylosis and grade 1 L4-5 anterolisthesis with no mention of any disc herniation. Dr. Smith determined that appellant was capable of returning to his date-of-injury job without work restrictions. However, he noted that appellant's nonwork related age-related disability and deconditioning could possibly preclude his ability to return to work.

On May 15, 2017 OWCP issued a notice of proposed termination of wage-loss compensation and medical benefits. It indicated that the weight of the medical opinion evidence rested with the well-rationalized opinion of Dr. Smith, OWCP referral physician, who found that appellant no longer had residuals or disability causally related to the accepted employment injury.

In a letter dated June 14, 2017, appellant, through counsel, disagreed with the proposed termination of wage-loss compensation and medical benefits. He submitted a June 13, 2017 report by Dr. Joshua B. Macht, a Board-certified internist, in support of his contention.

Dr. Macht, in a June 13, 2017 report, diagnosed chronic low back sprain with multi-level spondylosis. He opined that appellant continued to have residuals from the April 14, 1986 employment injury, together with the expected changes over 30 years. Dr. Macht reviewed appellant's multiple computerized tomography and MRI scans from 1986 onward and concluded that his diagnostic test findings were consistent with appellant's initial L4-5 disc herniation sustained on April 14, 1986 extrapolated over the course of 30 years. He opined that appellant continued to be totally disabled from work due to the accepted employment injury, which he opined caused permanent impairment.

By decision dated June 22, 2017, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective June 25, 2017. It found that Dr. Smith's opinion constituted the weight of the medical opinion evidence that appellant no longer had any residuals or disability due to the accepted April 14, 1986 employment injury. OWCP also found that appellant's accepted psychiatric condition had resolved based on the opinion of Dr. Gergely.

In a letter dated June 28, 2017, appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on November 29, 2017.

OWCP continued to receive medical evidence. In a July 27, 2017 report, Dr. Al-Banna noted that appellant sustained a lumbosacral herniated disc as a result of his 1986 employment injury. Since the injury 31 years prior, appellant's lumbar spine had experienced changes due to

disc deterioration. Dr. Al-Banna noted that, while some of the deterioration could be age related, he opined that the employment injury also played a role in appellant's spinal deterioration. He explained that the employment injury caused chronic pain and appellant experienced difficulty walking which impacted appellant's gait and affected his spinal deterioration. Dr. Al-Banna indicated that it could not be expected that appellant would return to work due to his age and the fact that he not worked in 31 years, and he concluded that appellant was permanently disabled from returning to work.

In a December 11, 2017 report, Dr. Ralph Salvagno, a Board-certified orthopedic surgeon, reviewed appellant's medical records in detail and attributed appellant's residual symptoms to ongoing disc pathology from his accepted L4-5 herniation, with radiculopathy. He also noted that appellant's physical examination revealed limited spinal range of motion, slight bilateral dorsiflexion weakness, and loss of left ankle jerk reflex and slight left ankle weakness on dorsiflexion, which was consistent with appellant's prior radiculopathy. Dr. Salvagno reviewed and compared from MRI scans dated March 14, 2012, October 26, 2015, May 27, 2016, and October 26, 2017. Of particular note, was the finding of L4-5 disc bulge/pseudo bulge, severe facet joint osteoarthritis, and mild hypertrophy of ligamentum flavum indenting ventral and lateral thecal sac aspect seen on the October 26, 2017 MRI scan. Dr. Salvagno explained that it would be inappropriate to find a resolution of any pathology based on simple radiographic changes. He concluded that appellant was disabled from performing his date-of-injury job, but was capable of performing sedentary work with restrictions.

In an addendum dated December 22, 2017, Dr. Salvagno attributed appellant's residual symptoms to disc level pathology from the employment-related disc herniation. He explained that appellant's diagnoses due to the accepted April 14, 1986 employment injury included L4-5 disc herniation, L4-5 anterolisthesis with some mild-to-moderate bilateral central foraminal stenosis, and L2 and L3 disc protrusion and osteophytes impacting the left L2 and L3 nerve roots and bilateral L4-5 nerve roots.

By decision dated January 16, 2018, OWCP's hearing representative affirmed the termination of appellant's wage-loss compensation and medical benefits. However, he found a conflict in the medical opinion evidence between Dr. Salvagno and Dr. Smith as to whether appellant had any residuals or disability on or after June 25, 2017 due to the accepted April 14, 1986 employment injury. OWCP's hearing representative instructed OWCP to refer appellant for impartial medical evaluation to determine whether appellant had residuals of the accepted L4-5 disc herniation, whether he had any other spinal conditions causally related to the accepted April 14, 1986 employment injury, and to determine the extent of appellant's injury-related disability.

On January 25, 2018 OWCP referred appellant, together with a statement of accepted facts (SOAF), list of questions, and medical record, to Dr. Gary W. Pushkin, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Smith, an OWCP referral physician, and Dr. Salvagno, a treating physician.

In a February 22, 2018 report, Dr. Pushkin, based upon a review of the medical record and SOAF, diagnosed chronic low back pain, accepted low back strain, accepted depression, and accepted L4-5 disc herniation. He concluded that appellant had no residuals or disability due to

his accepted April 14, 1986 employment injury. Dr. Pushkin related that his physical examination of appellant's lumbosacral spine revealed L5-S1 tenderness, pain with pinch, decreased left calf medial aspect sensation, and absent left knee and ankle reflexes. He summarized findings from his review of MRI scans from September 28, 1987 through October 26, 2017. In support of Dr. Pushkin's opinion that the accepted L4-5 disc herniation had resolved, he explained that disc fragments resorb and reduce in size over time. He also related that literature has shown that two years following injury patients are clinically the same whether or not surgery had been performed. Dr. Pushkin disagreed with Dr. Salvagno's opinion regarding the L4-5 disc herniation, which he observed was based on subjective complaints rather than objective findings. He found that appellant's current diagnoses were multilevel degenerative changes of the lumbar spine. Dr. Pushkin also opined that appellant was capable of returning to full-duty work with no restrictions.

By decision dated May 1, 2018, OWCP found that appellant had not established continuing residuals or disability due to the accepted conditions and that Dr. Pushkin's opinion was entitled to the special weight accorded an impartial medical examiner.³

On April 30, 2019 appellant, through counsel, requested reconsideration of the May 1, 2018 decision and submitted a supplemental report from Dr. Salvagno in support of his request.

In a November 17, 2018 supplemental report, Dr. Salvagno disagreed with IME Dr. Puskin's opinion that appellant had no residuals or disability due to the April 14, 1986 employment injury. He explained that, while a soft tissue injury such as a sprain/strain normally resolves within six to eight weeks, that was not the situation in this case as a disc herniation was an accepted condition. Dr. Salvagno noted that the natural history of disc herniation was a slow resolution of the herniation itself. He also explained that appellant sustained post-traumatic L4-5 degenerative changes due to the disc herniation as shown on the October 26, 2015 MRI scan, which were not found at other disc levels. Dr. Salvagno concluded that appellant's L4-5 post-traumatic degenerative changes were due to the employment-related disc herniation which in turn resulted in appellant's disability from performing his date-of-injury job. He observed that Dr. Pushkin based his opinion on his belief that appellant did not sustain a herniated disc and that the only injury was a strain/sprain. In addition, Dr. Salvagno opined that Dr. Pushkin's statements failed to consider the post-traumatic degenerative changes caused by the accepted disc herniation.

In a report dated May 6, 2019, Dr. Al-Banna noted that appellant's MRI scan showed an L3-4 disc bulge with edema and L4-5 disc protrusion, which he attributed to the 1986 employment injury. He explained that, while the most recent MRI scan did not show disc bulges, appellant's October 2017 MRI scan showed T12-L1, L2-3, L4-5, and L5-S1 disc protrusions. While some of the degenerative changes could be attributed to the aging processes, Dr. Al-Banna also attributed the disc bulges to herniated discs. He opined that appellant's condition has not improved since the 1986 employment injury and appellant's current condition was directly related to the accepted

³ On July 11, 2018 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. By decision dated August 3, 2018, OWCP denied appellant's request for a telephonic hearing as the request had not been submitted within 30 days of the May 1, 2018 decision.

injury. In concluding, Dr. Al-Banna disagreed with the termination of appellant's benefits and opined that appellant remained totally disabled from work.

By decision dated July 26, 2019, OWCP denied modification. It found the weight of the medical opinion evidence continued to rest with the well-rationalized opinion of Dr. Pushkin, the impartial medical 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.⁴ 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 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

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁷ 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.⁸

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.⁹ The implementing regulations provides that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP district medical adviser, OWCP shall appoint a third physician to make an examination. This is called an independent medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁰

⁴ *D.G.*, Docket No. 19-1259 (issued January 29, 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).

⁵ *D.G.*, *id.*; *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 *D.G.*, *id.*; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ *D.G.*, *id.*; *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 (1990).

⁸ *D.G.*, *id.*; *A.G.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake*, *id.*

⁹ 5 U.S.C. § 8123(a); *see D.G.*, *id.*; *A.M.*, Docket No. 18-1243 (issued October 7, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

¹⁰ 20 C.F.R. § 10.321; *D.G.*, *supra* note 4; *R.C.*, 58 ECAB 238 (2006).

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 June 25, 2017.

In his May 2, 2017 report, Dr. Smith related that appellant's physical and neurologic examinations were normal, and based on his March 14, 2012 MRI scan, appellant's L4-5 herniation had resolved without residuals. He also opined that appellant's age-related disability and deconditioning were the limiting factors regarding appellant's return to work. Dr. Gergely, in a November 9, 2015 report, concluded that appellant currently had no psychiatric condition. He opined that appellant could return to work. In contrast, Dr. Al-Banna and Dr. Macht both opined that appellant continued to have residuals and disability due to the accepted April 14, 1986 employment injury. Dr. Al-Banna, in his March 16, 2017 report, and Dr. Macht, in a June 13, 2017 report, opined that appellant sustained a permanent L4-5 disc injury from appellant's accepted April 14, 1986 employment injury.

Thus, there was disagreement as to whether appellant had residuals of his accepted conditions and on the nature and extent of a period of disability caused by his accepted April 14, 1986 employment injury between OWCP's referral physicians and appellant's treating physicians, when OWCP terminated appellant's wage-loss and medical benefits, on June 22, 2017. Pursuant to 5 U.S.C. § 8123(a) and 20 C.F.R. § 10.321, OWCP should have referred appellant for an impartial medical evaluation prior to terminating his wage-loss compensation and medical benefits on June 22, 2017.¹¹

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 25, 2017.¹²

¹¹ *Supra* note 8.

¹² In light of the Board's disposition of issue 1, issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the July 26, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 23, 2022
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board