

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

R.Z., Appellant)	
)	
and)	Docket No. 23-0351
)	Issued: December 21, 2023
U.S. POSTAL SERVICE, POST OFFICE,)	
Staten Island, NY, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 12, 2023 appellant filed a timely appeal from a July 29, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the July 29, 2022 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.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 29, 2022, as he no longer had disability or residuals causally related to his accepted February 8, 2021 employment injury.

FACTUAL HISTORY

On February 11, 2021 appellant, then a 39-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 8, 2021 he injured his lower back and tailbone when he slipped and fell on black ice while in the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for lumbar herniated disc with radiculopathy. It paid appellant wage-loss compensation on the supplemental rolls commencing March 26, 2021 and on the periodic rolls commencing December 5, 2021.

In a March 17, 2021 medical report, Dr. Joseph Weinstein, an osteopathic orthopedic surgeon, noted that appellant had a history of a work injury on February 8, 2021 and related complaints of pain and stiffness in his lumbar spine. On physical examination, he documented pain to palpation at the paraspinal musculature of the lumbar spine, decreased sensation in the right L5-S1 distribution, and reduced range of motion in the lumbar spine with flexion, extension, and right and left bending. Dr. Weinstein diagnosed lumbar radiculopathy and recommended that appellant undergo physical therapy, x-rays, and magnetic resonance imaging (MRI) scans of the lumbar spine.

Appellant began a course of physical therapy treatment to his lower back on March 22, 2021.

A report of a March 29, 2021 MRI scan of the lumbar spine demonstrated a posterior disc herniation at L4-5 migrating inferiorly behind L5 to the right of midline and a posterior disc herniation at L5-S1 to the left of midline. A report of x-rays of the lumbar spine of even date was normal.

In an April 21, 2021 follow-up report, Dr. Weinstein noted examination findings of decreased sensation, pain, and reduced range of motion of the lumbar spine. He referred appellant to pain management and advised that he was unable to return to work.

In a May 20, 2021 medical report, Dr. Didier Demesmin, a Board-certified anesthesiologist and pain medicine specialist, noted that appellant related complaints of lower back pain, which he attributed to falling on ice on February 8, 2021. He performed a physical examination, which revealed pain with range of motion, midline tenderness to palpation of the lumbar spine, palpable trigger points over the quadratus lumborum, erector spinae, and latissimus dorsi musculature bilaterally, positive straight leg raise bilaterally, positive Patrick's test, and diminished deep tendon reflexes of the right knee and ankle. Dr. Demesmin diagnosed lumbalgia, myofascial pain, and lumbar disc herniation with radiculopathy and recommended a caudal epidural steroid injection under fluoroscopic guidance and lumbar trigger point injections. He attributed appellant's back pain to his February 8, 2021 employment injury.

OWCP thereafter received reports by Dr. Weinstein dated June 2, July 14, and October 13, 2021, who continued to document examination findings and recommend that appellant remain out of work.

On January 18, 2022 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Stephen D. Koss, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of his accepted conditions and current work restrictions. The SOAF listed the accepted employment injury as lumbar herniated disc with radiculopathy.

Following the referral, OWCP received additional medical records, including reports of caudal epidural steroid injections on June 12 and September 3, 2021, an August 5, 2021 follow-up report by Dr. Demesmin, who noted ongoing complaints, positive straight leg raise bilaterally, and diminished deep tendon reflex in the right knee and ankle; and a report dated December 16, 2021 by Dr. Fady Wassef, a Board-certified anesthesiologist and pain medicine specialist, who documented similar physical examination findings to Dr. Demesmin and diagnosed lumbalgia, myofascial pain, and lumbar disc herniation with radiculopathy.

In a February 9, 2022 report, Dr. Koss noted his review of the SOAF and medical records and also that appellant reported that he had undergone spinal injections for his accepted employment injury. He performed a physical examination, where he observed tenderness over the left buttock sciatic notch; reduced range of motion in left and right lateral flexion; intact sensation and reflexes; and negative straight leg raise bilaterally. Dr. Koss diagnosed a resolved contusion of the lumbar spine causally related to the February 8, 2021 employment injury and opined that there were no objective signs on physical examination of radicular symptoms. He indicated that any further treatment would not provide clinical improvement. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Koss opined that appellant had reached maximum medical improvement (MMI) and could perform his usual job without restrictions.

In a March 25, 2022 letter, OWCP requested that Dr. Koss review the SOAF and clarify his opinion regarding the accepted condition of lumbar disc herniation with radiculopathy.

Dr. Koss, in a March 31, 2022 addendum, opined that appellant's accepted work-related condition of lumbar disc herniation with radiculopathy had resolved. He indicated that the February 9, 2022 physical examination findings were normal and did not correspond with his subjective complaints. Dr. Koss opined that appellant could return to his date-of-injury position.

OWCP thereafter received a March 3, 2022 follow-up report by Dr. Demesmin, who evaluated appellant for complaints of low back pain after a February 8, 2021 fall on black ice. On examination he found painful and limited range of motion, palpable trigger points and muscle spasms, positive straight leg raise bilaterally, diminished deep tendon reflexes at the right knee and ankle, and positive Patrick's test bilaterally. Dr. Demesmin diagnosed lumbar radiculopathy, low back pain, lumbar intervertebral disc displacement, and myofascial pain. He related that appellant continued to "experience post-traumatic low back pain affecting his activities of daily living that is causally related to an injury which occurred on February 8, 2021." Dr. Demesmin found that appellant was totally disabled from employment due to his injury and noted that he

worked as a mailman. He recommended spinal surgery, including a lumbar discectomy with annuloplasty at L4-5 and L5-S1.

In a report dated March 23, 2022, Dr. Weinstein noted that appellant was injured at work on February 8, 2021 and discussed his complaints of pain and stiffness in the lumbar spine. On examination he found pain to palpation at the paraspinal musculature, decreased sensation bilaterally in the L4-5 and L5-S1 distributions, and positive straight leg raise bilaterally. Dr. Weinstein opined that appellant remained totally disabled.

On June 7, 2022 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits, as the evidence of record, as represented by Dr. Koss' February 9, 2022 report and supplemental March 31, 2022 report, established that he no longer had employment-related residuals or disability due to his accepted work-related conditions. It afforded him 30 days to submit additional evidence or argument in writing if he disagreed with the proposed termination of benefits.

OWCP thereafter received a duty status report (Form CA-17) dated July 27, 2022 from Dr. Weinstein, who diagnosed lumbar radiculopathy and released appellant to return to light-duty work with no lifting over 10 pounds and no climbing stairs, kneeling, bending, stooping, twisting, pushing, or pulling.

By decision dated July 29, 2022, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, finding that the medical evidence of record established that he no longer had residuals or disability due to his accepted employment injury. The weight of the medical evidence was accorded to the opinion of the second opinion physician, Dr. Koss.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.³ 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.⁴ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

³ *R.G.*, Docket No. 22-0165 (issued August 11, 2022); *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).

⁴ *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁵ *P.C.*, Docket No. 22-1320 (issued July 11, 2023); *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶ 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.⁷

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical examiner (IME)) who shall make an examination.⁸ 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, DMA, OWCP shall appoint a third physician to make an examination. This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 29, 2022.

OWCP referred appellant to Dr. Koss for a second opinion evaluation to determine the status of appellant's accepted conditions and his work capacity. In reports dated February 9 and March 31, 2022, Dr. Koss noted his review of the medical record and the SOAF and provided examination findings. With regard to the accepted work-related conditions, in his March 31, 2022 report, he opined that appellant had fully recovered, that no further or ongoing medical care was warranted, that appellant did not have any residuals of the accepted conditions, and that appellant was able to return to his full-time regular duties with no restrictions.

In contradistinction, appellant's treating physician, Dr. Demesmin, on March 3, 2022 provided a history of the February 8, 2021 employment injury and noted lumbar examination findings of pain with range of motion, palpable trigger points and muscle spasm, positive straight leg raise bilaterally, positive Patrick's test, and diminished deep tendon reflexes of the right knee and ankle. He diagnosed lumbar radiculopathy, low back pain, lumbar intervertebral disc displacement, and myofascial pain. Dr. Demesmin attributed appellant's continued low back symptoms to his February 8, 2021 employment injury and opined that he was totally disabled from employment as a result of this injury. He recommended a lumbar discectomy at L4-5 and L5-S1.

⁶ *J.P.*, Docket No. 23-0075 (issued May 26, 2023); *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, 364 (1990).

⁷ *See A.G., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

⁸ 5 U.S.C. § 8123(a); *see J.P., supra* note 6; *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

⁹ 20 C.F.R. § 10.321; *S.J.*, Docket No. 22-0936 (issued April 27, 2023); *D.G., supra* note 3.

The Board finds that the medical reports of Dr. Koss and Dr. Demesmin are of virtually equal weight and rationale, and therefore an unresolved conflict in medical opinion exists between Dr. Koss and Dr. Demesmin regarding whether appellant's accepted February 8, 2021 employment injury had resolved. It is well established that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the case should be referred to an IME for the purpose of resolving the conflict.¹⁰ As a conflict in medical evidence regarding whether appellant's accepted February 8, 2021 employment injury had resolved remains prior to the July 29, 2022 termination, the Board finds that OWCP has not met its burden of proof to terminate his wage-loss compensation and medical benefits.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 July 29, 2022.

ORDER

IT IS HEREBY ORDERED THAT the July 29, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 21, 2023
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

¹⁰ *Supra* notes 8 and 9.

¹¹ *S.J., supra* note 9.