United States Department of Labor
Employees' Compensation Appeals Board

P.C., Appellant	)	
and	)	**Docket No. 22-1320**
	)	**Issued: July 11, 2023**
U.S. POSTAL SERVICE, MAHWAH CARRIER ANNEX, Mahwah, NJ, Employer	)	

Appearances:
Bruce H. Didriksen, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. McGINLEY, Alternate Judge

JURISDICTION

On September 1, 2022 appellant filed a timely appeal from a May 11, 2022 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 May 11, 2022 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*.

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 11, 2022, as he no longer had disability or residuals causally related to his accepted November 21, 2001 employment injury.

FACTUAL HISTORY

On November 24, 2001 appellant, then 52-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that he sustained an upper back, neck, chest, shoulder, and arm injury when lifting a bucket of mail while in the performance of duty. OWCP assigned the claim OWCP File No. xxxxxx288 and accepted it for cervical strain.[4] Appellant stopped work on November 23, 2001 and worked intermittently thereafter. It paid him wage-loss compensation benefits on the supplemental rolls, effective May 7, 2002, and on the periodic rolls, effective December 29, 2002.

On August 14, 2017 and August 17, 2018 Dr. Brian A. Cole, a Board-certified orthopedist, treated appellant for work-related cervical spondylosis, lumbar spine stenosis, and grade 2 spondylolisthesis. He continued to have low back pain, difficulty lifting, bending, twisting, and occasional give-way of his legs. Dr. Cole diagnosed spondylolisthesis of the lumbar region caused by his work-related injury and cervical spondylosis. He noted that appellant continued to demonstrate degeneration and deformity as a result of the spondylolisthesis as seen on his x-rays with active back pain and intermittent leg pain. Dr. Cole opined that appellant's work-related conditions had not resolved and he was unable to return to work without restrictions.

In an August 6, 2020 letter, OWCP requested that Dr. Cole provide an opinion as to whether appellant had any continuing disability or continuing residuals resulting from his November 21, 2001 employment injury. It afforded him 30 days to respond.

On August 17, 2020 Dr. Cole treated appellant for bilateral hip, low back, and coccyx pain, which began after a work injury in November 2001. He diagnosed spondylolisthesis, lumbar region.

In a September 30, 2020 report, Dr. Cole advised that appellant's symptoms started after the November 2001 employment injury causing his spine to be unstable. He opined that appellant's condition was permanent and he was unable to function in any manual job, which entailed sitting, standing, twisting, walking, or lifting for any period of time. In a work capacity evaluation (Form OWCP-5c) dated September 30, 2020, Dr. Cole diagnosed grade 1 spondylolisthesis L5-S1 and noted that appellant reached maximum medical improvement (MMI) and was permanently disabled from work.

[4] Appellant has a prior claim for an October 1, 1996 traumatic injury, when he was lifting trays of flats and injured his low back while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx675 and accepted it for lumbosacral sprain and aggravation of L5-S1 spondylolistheses. It has administratively combined OWCP File Nos. xxxxxx675 and xxxxxx288, with the latter designated as the master file.

On October 6, 2020 Dr. Cole related that appellant was involved in a work-related accident on November 21, 2001 and was permanently disabled. He noted two injury claims relating to a lumbar spine and cervical spine. Dr. Cole explained that appellant's condition progressed since the injury onset and he developed grade 1 spondylolisthesis at L5-S1, which caused his spine to be unstable. He noted that appellant experienced episodic flare-ups of pain, which incapacitated him for 9 to 10 days at a time. Dr. Cole requested expansion of appellant's claim to include spondylosis without myelopathy or radiculopathy, cervical region; spinal stenosis, cervical region; and spondylolisthesis lumbar region, lumbar spine.[5]

A magnetic resonance imaging (MRI) scan of the cervical spine dated November 16, 2020, revealed posterior disc herniation at C2-C3, C3-C4, C4-C5, C5-C6, C6-C7, anterolisthesis with posterior aspect of C2 on C3 and C6-C7, retrolisthesis with posterior aspect of C3 on C4, and reversal or normal lordotic curvature of the cervical spine. An MRI scan of the lumbar spine of even date revealed posterior disc herniation at L3-L4 with associated annular tear, posterior disc herniation at L1-L2, L2-L3, and T12-L1, grade 1 retrolisthesis with the posterior aspect of L1 on L2 and L4-L5, grade 2 anterolisthesis with posterior aspect of L5 on S1 and straightening of the normal lordotic curvature of the lumbar spine.

On December 16, 2020 Dr. Cole treated appellant for bilateral hip, low back, and coccyx pain related to his November 2001 employment injury. He indicated that his spinal problem was unchanged. Dr. Cole noted findings on examination of the lumbar spine of paraspinal tenderness bilaterally, decreased range of motion, and positive straight and crossed leg raise for back pain bilaterally. He diagnosed spondylolisthesis of the lumbar region.

OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Daniel S. Rosenberg, a Board-certified physiatrist, for a second opinion examination.

In a March 2, 2021 report, Dr. Rosenberg related appellant's complaints of stiff neck, weakness in his arms and legs, paresthesia in both lower extremities, and urinary stress incontinence. He diagnosed cervical strain, lumbosacral strain, and aggravation of S1 spondylolisthesis, temporarily aggravated by the work-related injury on November 21, 2001. Findings on physical examination revealed strength in both upper and lower extremities was 4+/5 secondary to decreased volitional effort, limited range of motion of the lumbar and cervical spine, tenderness in the mid-cervical paraspinal region, accentuated upper thoracic kyphosis, tenderness in the lower thoracic and mid and upper lumbar paraspinal regions, and decreased lumbar lordosis. Dr. Rosenberg noted that appellant did not have residuals of the November 21, 2001 employment injury and opined that the present symptomology was secondary to preexisting pathology including chronic cervical and lumbar spondyloarthropathy and congenital L5-S1 spondylolisthesis. He noted strain/sprain type injuries were amendable to conservative treatment for up to eight weeks and should have resolved long before this date. Dr. Rosenberg advised that appellant was not capable of returning to his prior job as a letter carrier but should be able to

[5] On September 1, 2015, June 30, 2016, and October 11, 2019 Dr. Cole treated appellant in follow up for work-related cervical spondylosis, lumbar spine stenosis, and grade 2 spondylolisthesis. He diagnosed lumbar spine spondylolisthesis, cervical arthritis/spondylosis, chronic pain syndrome, cervical stenosis and opined that appellant remained totally disabled as a result of his employment injury.

work full duty, eight hours a day, in a sedentary capacity. He noted that appellant reached MMI and required no additional diagnostic testing. In response to the questions of whether the accepted condition of cervical strain, lumbosacral sprain and aggravation of L5-S1 spondylolisthesis resolved or reached preinjury status, Dr. Rosenberg referred to his prior findings contained in his report. In a Form OWCP-5c, he noted that appellant could return to full-time sedentary-duty work.

On March 19, 2021 OWCP requested a clarification report from Dr. Rosenberg.

In a March 29, 2021 addendum report, Dr. Rosenberg noted that the work restrictions provided on the Form OWCP-5c dated March 2, 2021, were secondary to the preexisting cervical and lumbar spondyloarthropathy, congenital L5-S1 spondylolisthesis, and chronic obstructive pulmonary disease (COPD) and were not based on the accepted employment-related conditions. He indicated that based on the review of records and evaluation of appellant there were no objective findings to support the continued presence of cervical strain, lumbosacral sprain, and aggravation of L5-S1 spondylolisthesis. Dr. Rosenberg indicated that appellant had preexisting cervical and lumbar spondyloarthropathy and congenital L5-S1 spondylolisthesis, which was temporarily exacerbated by the November 21, 2001 employment injury. He reiterated that his symptomology and treatment should have resolved long before this date. Dr. Rosenberg noted that appellant's current inability to perform his prior job function was secondary to preexisting cervical and lumbar spondyloarthropathy, congenital L5-S1 spondylolisthesis, and COPD.

On April 30, 2021 OWCP provided appellant with a copy of the SOAF, list of accepted definitions, and Dr. Rosenberg's reports and requested that he obtain a well-rationalized report from his treating physician addressing whether he agreed with the findings and opinions of Dr. Rosenberg with regard to appellant's residuals and work abilities.

In reports dated May 5 and August 27, 2021, Dr. Cole noted that appellant sustained a work injury on November 21, 2001 that was accepted for aggravation of lumbar spondylolisthesis at L5-S1. He indicated that at that time appellant declined surgery and since there has been no significant change in his medical condition. Dr. Cole reviewed the reports from Dr. Rosenberg. He treated appellant for aggravation of L5-S1 spondylolisthesis and opined that appellant's condition reached MMI. Dr. Cole advised that appellant could not return to his letter carrier position but was capable of sedentary work. In a report dated August 25, 2021, he evaluated appellant for worsening symptoms. Appellant reported his pain was 10/10 with no change in the character or location of the condition. Dr. Cole noted marked worsening of his condition since January with complaints of pain when walking and numbness in both feet. Appellant indicated that he was unable to walk for short distances without pain. He noted paraspinal tenderness bilaterally, decreased range of motion for lumbar spine, and positive straight leg raises and crossed straight leg raises for back pain bilaterally. Dr. Cole diagnosed spondylolisthesis of the lumbar region. In an August 27, 2021 attending physician's report (Form CA-20), he indicated that appellant was injured at work on November 21, 2001. Dr. Cole diagnosed degenerative spondylolisthesis at L5-S1 and checked a box marked "Yes" indicating that appellant's condition had been caused or aggravated by an employment activity. He noted that the work injury on November 21, 2001 exacerbated his lumbar spondylolisthesis at L5-S1. Dr. Cole noted that appellant was capable of sedentary work but was 71 years old and expected to be considered for retirement.

On September 30, 2021 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits as he no longer had disability or residuals causally related to his accepted employment injury. It found that the weight of the medical evidence rested with Dr. Rosenberg, who found that appellant no longer had any disability or residuals causally related to his accepted employment injuries. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing if he disagreed with the proposed termination.

On October 22, 2021 appellant, through his representative, disputed the proposed termination. He asserted that the proposed termination of benefits was based upon the second opinion medical report written by a physician who diagnosed congenital spondylolisthesis, which was not an accepted condition and not supported by the evidence of record. The representative further noted that Dr. Cole continued to treat appellant for an aggravation of spondylolisthesis and his annual reports consistently stated that appellant has had no improvement in this condition and his spine remained unstable.

By decision dated May 11, 2022, OWCP finalized the notice of proposed termination of appellant's wage-loss compensation and medical benefits, effective that date. It found that the weight of the evidence was represented by Dr. Rosenberg, who opined that appellant no longer had disability or residuals due to the accepted employment injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.[6] It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[7] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[9] To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition, which require further medical treatment.[10]

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 independent medical examiner

[6] *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).

[7] *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).

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

[9] *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

[10] *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

(IME)) who shall make an examination.[11] 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.[12] When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[13]

ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 11, 2022.

In his March 2 and 29, 2021 reports, Dr. Rosenberg found, based on his examination, that there were no objective findings to support ongoing residuals from appellant's accepted cervical strain, lumbosacral sprain, and aggravation of L5-S1 spondylolisthesis. He opined that the present symptomology was secondary to preexisting pathology including chronic cervical and lumbar spondyloarthropathy and congenital L5-S1 spondylolisthesis, which were temporarily exacerbated by the November 21, 2001 employment injury. Dr. Rosenberg determined that appellant could return to full-duty work, eight hours a day, in a sedentary capacity and advised that the restrictions were secondary to preexisting cervical and lumbar spondyloarthropathy, congenital L5-S1 spondylolisthesis, and COPD.

Appellant's treating physician, Dr. Cole, however, submitted reports through August 27, 2021, wherein he noted that he continued to treat appellant for worsening symptoms related to aggravation of lumbar spondylolisthesis at L5-S1. He opined that these conditions were sequelae of the accepted October 1, 1996 and November 21, 2001 employment injuries. Appellant reported his pain was 10/10 and noted marked worsening of his condition since January 2021. He indicated that he was unable to walk for even short distances without pain and had numbness in both feet. Dr. Cole noted paraspinal tenderness bilaterally, antalgic gait, forward flexed posture, positive straight leg raises bilaterally, and noted that appellant used a cane for assistance due to balance issues and the right leg occasionally giving out. He diagnosed spondylolisthesis of the lumbar region and opined that appellant was capable of sedentary work.

The Board, therefore, finds that there is an unresolved conflict of medical evidence between the opinions of Dr. Rosenberg, an OWCP referral physician, and Dr. Cole, appellant's treating physician, as to whether appellant had disability and residuals from the accepted aggravation of lumbar spondylolisthesis at L5-S1.[14] As there is a conflict in the medical opinion evidence prior to May 11, 2022, as to whether appellant's accepted conditions had resolved, the

[11] 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[12] 20 C.F.R. § 10.321.

[13] *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

[14] *G.F.*, *id.*; *S.S.*, Docket No. 19-1658 (issued November 12, 2020); *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

Board finds that OWCP failed to meet its burden of proof to terminate his wage-loss compensation and medical benefits.

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 11, 2022.

ORDER

IT IS HEREBY ORDERED THAT the May 11, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 11, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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