

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

S.J., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Detroit, MI, Employer**

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**Docket No. 14-1821
Issued: January 23, 2015**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On August 19, 2014 appellant, through counsel, filed a timely appeal from a July 23, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP) affirming the termination of her compensation benefits. 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 this case.

ISSUE

The issue is whether OWCP properly terminated appellant's compensation benefits effective November 1, 2013 on the ground that her accepted conditions had ceased without residuals.

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

In a decision dated October 16, 2006, OWCP accepted that appellant, then a 43-year-old letter carrier, sustained an aggravation of right sciatica, aggravation of a herniated disc at L5-S1, and aggravation of lumbar radiculopathy due to factors of her federal employment. It subsequently accepted right sciatica, displacement of lumbar intervertebral disc without myelopathy, and thoracic or lumbosacral neuritis or radiculitis, and a recurrence on January 7, 2013. Appellant had also previously sustained a lumbosacral sprain, right hip contusion, and buttock contusion on January 6, 2005, which OWCP accepted under claim number xxxxxx665.

In an August 20, 2013 report, Dr. Bradford Woelke, a Board-certified family practitioner, indicated that appellant fell on her right hip in January 2006 and continued to suffer residual pain in her low back, right buttock, and right leg. He opined that she was disabled for work and would likely never be able to return to full duty.

OWCP referred appellant for a second opinion evaluation to determine the nature and extent of her employment-related conditions. In a June 28, 2013 report, Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, reviewed a statement of accepted facts, history of the injury, and the medical evidence of record, and conducted a physical examination. He indicated that appellant “exhibited excessive pain behavior” and “assumed an asymmetric posture with the entire trunk tilted to the left.” Appellant sat in an oblique manner, with the right buttocks hanging off her chair and when Dr. Obianwu asked her why, she stated that it was because of her pain. Regarding range of motion of the thoracolumbar spine, appellant had 10 degrees of flexion, less than 5 degrees of extension, and lateral bending to either side of 5 degrees. Dr. Obianwu indicated that her range of motion was so restricted that he informed her “that such severe impairment of spinal mobility was essentially nonphysiologic.” Appellant reported that this had been so for quite some time and Dr. Obianwu indicated that “if indeed she has had this asymmetric posture for any length of time, there would be a severe atrophy in the musculature of the right lower extremity.” Dr. Obianwu found inappropriate tenderness, simulated axial rotation, and the global loss of sensation in the entire right lower extremity constituted positive Waddell’s findings and clearly indicated the presence of overt symptom magnification. He further indicated that when appellant left the examining room she “exhibited such a severe, nonphysiologic limp that it could not be explained, regardless of pathology within the lower extremities or in the spine.” Dr. Obianwu diagnosed mild degenerative arthritis of the lumbar spine, mild disc bulge at L5-S1, and overt symptom magnification. He concluded that appellant’s employment-related conditions of aggravation of right sciatica, aggravation of herniated disc at L5-S1, aggravation of lumbar radiculopathy, lumbosacral sprain, right hip contusion, and buttock contusion had resolved.

By letter dated October 1, 2013, OWCP notified appellant that it proposed to terminate her compensation benefits based on the weight of the medical evidence, as represented by Dr. Obianwu. It afforded her 30 days to submit additional evidence or argument in disagreement with the proposed action.

Appellant submitted an April 22, 2013 report from Dr. Sharon Minott, a Board-certified anesthesiologist and pain medicine specialist, who indicated that appellant was seen for pain in

the right back and lower extremity. She had positive Yeoman's testing and bilateral right greater than left sacroiliac joint tenderness. Dr. Minott found that appellant only sat on her left buttock and was hesitant to have her right buttock examined. There was no noticeable atrophy of the gluteal or posterior thigh or leg muscles when appellant was standing, and no atrophic changes visible on the skin. Dr. Minott found left pectoralis muscle tenderness, positive hip compression on the right, and a positive Patrick's sign on the right.

By decision dated November 1, 2013, OWCP terminated appellant's compensation benefits effective that day finding that the weight of the evidence was represented by Dr. Obianwu.

On November 6, 2013 appellant, through counsel, requested an oral hearing before an OWCP hearing representative and submitted an August 27, 2013 report from Dr. Minott, who diagnosed lumbar radiculopathy, piriformis syndrome of the right side, and sacroiliac dysfunction.

A telephonic hearing was held before an OWCP hearing representative on May 8, 2014.

On May 22, 2014 Dr. Woelke indicated that appellant had persistent and permanent loss of function in the right leg and right buttock and opined that she was disabled for work due to her employment-related injury to the lower back and right sciatica.

By decision dated July 23, 2014, the hearing representative affirmed the November 1, 2013 termination decision, finding that Dr. Obianwu represented the weight of the medical evidence.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.² 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.³ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁵ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁶

² See *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

³ See *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁴ See *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁵ See *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁶ See *James F. Weikel*, 54 ECAB 660 (2003).

Section 8123(a) of FECA provides in pertinent part: 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.⁷ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁸

ANALYSIS

The Board finds that OWCP did not meet its burden to justify termination of benefits.

On appeal, counsel contends that OWCP's decision is contrary to fact and law. The Board finds that there is an unresolved conflict in medical opinion between Dr. Obianwu and Dr. Minott.⁹ For a conflict to arise the opposing physicians viewpoints must be of virtually equal weight and rationale.¹⁰ It is OWCP that bears the burden to justify modification or termination of benefits.¹¹

OWCP based its decision to terminate appellant's benefits on a June 28, 2013 report by Dr. Obianwu, the second-opinion physician, who conducted a physical examination and reviewed her medical history. Dr. Obianwu concluded that appellant's employment-related conditions of aggravation of right sciatica, aggravation of herniated disc at L5-S1, aggravation of lumbar radiculopathy, lumbosacral sprain, right hip contusion, and buttock contusion had resolved noting excessive pain behavior.

In an April 22, 2013 report, Dr. Minott indicated that appellant had positive Yeoman's testing and bilateral right greater than left sacroiliac joint tenderness. She found left pectoralis muscle tenderness, positive hip compression on the right, and a positive Patrick's sign on the right. On August 27, 2013 Dr. Minott diagnosed lumbar radiculopathy, piriformis syndrome of the right side, and sacroiliac dysfunction.

Drs. Obianwu and Minott both reviewed appellant's medical history and conducted physical examinations. However, their findings are significantly divergent. It is noted that the medical report of Dr. Obianwu is of greater length than the report of Dr. Minott. The Board, however, recognizes that the length of Dr. Obianwu's report fails to equate to more rationalized medical opinion as his report is largely conclusory. Dr. Obianwu concluded that appellant's employment-related conditions had resolved, whereas Dr. Minott diagnosed lumbar

⁷ 5 U.S.C. § 8123(a). See *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁸ See *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

⁹ FECA provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination. See 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

¹⁰ See *Darlene R. Kennedy*, *supra* note 7 at 416.

¹¹ See *Curtis Hall*, 45 ECAB 316 (1994).

radiculopathy, piriformis syndrome of the right side, and sacroiliac dysfunction, of which one condition has been accepted by OWCP as employment related. Thus, the Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective November 1, 2013. As of that date a conflict in medical opinion existed between Dr. Obianwu and Dr. Minott. Each physician had the opportunity to examine appellant and review the diagnostic studies of record. With respect to the existence and extent of any ongoing employment-related residuals, the Board finds that the relevant and probative medical evidence is in equipoise.

It is well established that, where there exists opposing medical reports of virtually equal weight and rationale, the case should be referred to an impartial medical specialist for the purpose of resolving the conflict.¹² The Board notes that the reports and treatment records of Dr. Minott were of record prior to the November 1, 2013 termination decision of OWCP and the hearing representative's July 23, 2014 decision affirming the termination decision. The Board finds that once OWCP received Dr. Minott's reports it should have submitted them to Dr. Obianwu and requested a supplemental report before issuing a final decision on appellant's entitlement. As OWCP failed to base its decision on a resolution of the opinion evidence, the Board finds that it did not meet its burden of proof to terminate appellant's benefits. Referral to an impartial medical specialist is warranted. Accordingly, OWCP's decision to terminate appellant's compensation and medical benefits is reversed.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective November 1, 2013.

¹² *H.S.*, Docket No. 10-1220 (issued May 24, 2011); see *Darlene R. Kennedy*, *supra* note 7.

ORDER

IT IS HEREBY ORDERED THAT the July 23, 2014 decision of the Office of Workers' Compensation Programs is reversed and the case remanded for further action consistent with this opinion of the Board.

Issued: January 23, 2015
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board