United States Department of Labor
Employees' Compensation Appeals Board

S.W., Appellant	)	
and	)	**Docket No. 17-0215**
	)	**Issued: September 19, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Waretown, NJ, Employer	)	

Appearances:
Aaron B. Aumiller, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 31, 2016 appellant, through counsel, filed a timely appeal from a May 5, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to

[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] Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from May 5, 2016, the date of OWCP's last decision was November 1, 2016. Since using November 4, 2016, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is October 31, 2016 rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

the Federal Employees' Compensation Act[3] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's compensation benefits on March 17, 2015; and (2) whether appellant met his burden of proof to establish continuing employment-related disability or residuals after March 17, 2015.

On appeal counsel asserts that a conflict in medical opinion evidence has been created between the opinions of appellant's attending Board-certified neurosurgeon, Dr. Bruce R. Rosenblum, an osteopath and a Board-certified neurosurgeon, and Dr. Stanley Askin, a Board-certified orthopedic surgeon, who completed a second opinion evaluation for OWCP.

FACTUAL HISTORY

On April 30, 2012 appellant, then a 47-year-old retail clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 9, 2012 he injured the lumbar region of his back while putting mail in boxes. He stopped work the next day.

Appellant initially sought treatment in an emergency department on April 10, 2012 from a nurse practitioner who diagnosed low back pain and lumbar strain. Dr. Alfred E. Palmieri, an orthopedic surgeon, began treating appellant on April 17, 2012. Following physical examination, he diagnosed lumbosacral syndrome, prescribed medication, and physical therapy, and advised that appellant should be off work for two weeks. Dr. Palmieri continued to treat appellant and recommended a lumbar magnetic resonance imaging (MRI) scan, that was done on May 15, 2012. The MRI scan demonstrated a disc bulge at L5-S1 with a small protrusion where there was a tear in the annulus, and a mild disc bulge at L4-5. Dr. Palmieri referred appellant for pain management.[4]

On August 2, 2012 Dr. Palmieri related a history that appellant began experiencing back pain on April 9, 2012 when he bent over while placing mail in lower mail boxes. He noted the MRI scan findings, opining that, while they were preexisting, the April 9, 2012 bending incident at work exacerbated his lumbar condition.

On August 13, 2012 OWCP accepted exacerbation of preexisting herniated lumbar disc. Appellant, who had received continuation of pay from April 16 to May 24, 2012, and thereafter filed claims (Form CA-7) for compensation, beginning August 29, 2012. He received wage-loss compensation, beginning that day and was placed on the periodic compensation rolls.

An October 4, 2012 electrodiagnostic study of the lower extremities demonstrated mild S1 radiculopathy. Appellant began pain management with Dr. Yin Michael Yu, a Board-certified anesthesiologist, in December 2012.

[3] 5 U.S.C. § 8101 *et seq.*

[4] At this time appellant was represented by James P. Brady, Esq.

In December 2012 OWCP referred appellant to Dr. Kenneth P. Heist, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion examination. In a January 2, 2013 report, Dr. Heist noted the history of injury, his review of the medical record, and statement of accepted facts (SOAF), and appellant's complaint of low back pain, aggravated by increased activity. He described examination findings and advised that the exacerbation of appellant's preexisting lumbar condition had resolved. Dr. Heist diagnosed lower lumbar nerve root compression due to bulging discs at L5-S1, which he did not feel was disabling. On an attached work capacity evaluation (Form OWCP-5c), he advised that appellant could return to work as a retail clerk with no restrictions.

Dr. Yu saw appellant on a monthly basis, and on February 27, 2013 performed an epidural steroid injection. In a March 26, 2013 report, Dr. Rosenblum noted the history of injury and provided physical examination findings. He advised that appellant had post-traumatic lumbosacral spine syndrome, and recommended a discogram. Dr. Yu performed a discogram on May 22, 2013. On June 18, 2013 Dr. Rosenblum noted that the discogram showed concordant pain at L4-5 and L5-S1. He recommended a follow-up computerized tomography (CT) scan of the lumbar spine and referred appellant to Dr. Keith M. Rinkus, a Board-certified orthopedic surgeon, for consideration of lumbar surgery. Dr. Rosenblum advised that appellant could not work.

Dr. Rinkus initially evaluated appellant on July 1, 2013. He noted appellant's complaints, reviewed medical records, and described findings. Dr. Rinkus diagnosed lytic spondylolisthesis grade 1 at L5-S1 with back pain and lower extremity radicular pain, and L4-5 concordant pain on discogram. Following review of a lumbar MRI scan, he recommended surgical intervention and asked that the procedure be authorized.

OWCP referred the surgical request to its medical adviser, Dr. Henry J. Magliato, a Board-certified orthopedic surgeon. In a September 19, 2013 report, Dr. Magliato noted his review of the medical record. He concluded that appellant should be referred for a second opinion evaluation regarding the need for surgery, whether the proposed surgery was related to the employment-related aggravation, and, if surgery was indicated, what procedure should be performed.[5]

In a February 4, 2014 report, Dr. Rosenblum noted that appellant was not working and was under no treatment or medication for his radiating low back pain. He reiterated his opinion that appellant's back condition was work related and noted that scheduled surgery had been cancelled. Dr. Rosenblum concluded that based on appellant's clinical syndrome, history, and radiologic findings, surgery was warranted. He completed a work capacity evaluation (Form OWCP-5c) on February 6, 2014 in which he diagnosed lumbar radiculopathy and advised that appellant could not work. On an attending physician's report (Form CA-20), Dr. Rosenblum noted that appellant began to feel low back pain when he bent to put mail in a post office box. He described MRI scan findings of degenerative disc disease, diagnosed lumbar radiculopathy, and advised that appellant could not work. Dr. Rosenblum checked a box marked "yes," indicating that the diagnosed condition was employment related.

[5] On October 7, 2013 appellant changed his legal representation to Aaron B. Aumiller, Esq. who continues to represent him.

On November 25, 2014 OWCP referred appellant, a SOAF, and evidence of record to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion evaluation. Dr. Askin was specifically asked to comment on whether appellant had disabling residuals of the accepted condition and whether the recommended surgery should be authorized.

In his December 19, 2014 report, Dr. Askin noted the accepted condition of exacerbation of preexisting herniated lumbar disc, the history of injury, his review of the SOAF and medical record, and appellant's complaints of lower back pain and a sensation of fatigue in his lower extremities. Appellant related that his pain was the same as when it first occurred. Physical examination demonstrated an area of reported pain, but no tenderness to touch. Dr. Askin advised that appellant's low back muscles relaxed appropriately with no muscle spasm present. Range of motion elicited pain, muscle function was within normal limits, sensation was preserved to light touch throughout both lower extremities, and deep tendon reflexes were symmetrical. Dr. Askin indicated that appellant reported a tension sensation on active straight leg raising on the right. He opined that appellant had no disabling residuals of the accepted condition, noting that if he had a symptomatic disc herniation he would have muscle atrophy or weakness, dermatomal anesthesia, and asymmetry of deep tendon reflexes, none of which were present. Dr. Askin opined that appellant needed no further treatment and that the recommended surgery would be inappropriate, noting that it would not address any condition caused by appellant's work activities. He concluded that appellant's lumbar condition was age appropriate, that he could return to work, and that he was capable of lifting 70 pounds occasionally. Dr. Askin recommended that appellant lose weight and exercise. In an attached work capacity evaluation, he indicated that appellant could return to full-time work without restrictions.

On February 5, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits. It found that the weight of the medical opinion evidence rested with the opinion of Dr. Askin who advised that appellant had no residuals of the accepted condition and could return to work without restrictions.

Appellant did not respond to the notice of proposed termination. By decision dated March 17, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that day. It found that the weight of the medical evidence rested with the opinion of Dr. Askin.

Appellant, through counsel, timely requested a hearing with OWCP's Branch of Hearings and Review. He submitted a March 31, 2015 report in which Dr. Rosenblum noted that appellant was not working and had persistent low back pain without a major radicular component. Examination findings included a negative straight-leg raising, and gait was unimpaired, with decreased strength of the extensor hallucis longus and extensor digitorum at 4+/5 on the right. Dr. Rosenblum recommended that appellant return to Dr. Rinkus to undergo the previously recommended surgery for spondylolisthesis.

At the hearing, held on September 16, 2015, counsel argued that, because Dr. Askin was an orthopedic surgeon and not a neurologist or a neurosurgeon, his opinion should not carry the weight of the medical evidence, rather the opinions of Dr. Rinkus and Dr. Rosenblum were more appropriate. Appellant testified that he was not working.

In an October 11, 2015 report, Dr. Rosenblum reported examination findings from March 26, 2013, February 4, 2014, and March 31 and June 18, 2015 office visits. He noted that a lumbar spine MRI scan demonstrated degenerative disc disease with disc space narrowing at L5-S1 and to a lesser extent at L4-5. Dr. Rosenblum opined that appellant suffered a post-traumatic right lumbar radiculopathy as a result of the April 9, 2012 employment incident which failed to respond to conservative management and he had lytic spondylolisthesis, L5-S1, bilateral foraminal stenosis, and concordant pain at L4-5, with an abnormal-appearing disc at L4-5 demonstrated on postdiscogram CT scan.[6] He reiterated that he and Dr. Rinkus recommended lumbar surgery. Dr. Rosenblum maintained that the recommended procedure was causally related to the April 9, 2012 work injury as it was to alleviate post-traumatic lumbar radiculopathy. He advised that appellant had initially reported a sensation of weakness in his right leg which demonstrated a radicular component to his pain, and that he had a partial motor deficit with weakness of 4+/5 of the right extensor digitorum, gastrocnemius, and extensor hallucis longus on March 31, 2015, all of which were indicative of radicular dysfunction which did not preexist appellant's work-related injury.

By decision dated November 13, 2015, an OWCP hearing representative found that Dr. Rosenblum failed to explain how the April 9, 2012 employment injury resulted in post-traumatic right lumbar radiculopathy. He found that the weight of the medical evidence rested with the opinion of Dr. Askin and affirmed the March 17, 2015 decision.

On January 25, 2016 appellant, through counsel, requested reconsideration. He submitted a December 26, 2015 report in which Dr. Rosenblum maintained that appellant's post-traumatic lumbosacral spine syndrome was clearly related to the April 9, 2012 work injury because he had no prior problems with his lumbosacral spine before this injury. Dr. Rosenblum related that lumbosacral spine disorders were caused by the type of injury, bending to place mail in a post office box. He reiterated his examination findings and concluded that appellant's current syndrome was related to the April 9, 2012 employment injury.

In a merit decision dated May 5, 2016, OWCP again found that the weight of the medical evidence rested with the opinion of Dr. Askin and denied modification of the November 13, 2015 decision.

LEGAL PRECEDENT -- ISSUE 1

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

[6] A copy of the CT scan report is not found in the case record.

[7] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[8] *Id.*

ANALYSIS -- ISSUE 1

OWCP accepted that on April 9, 2012 appellant sustained exacerbation of preexisting herniated lumbar disc. It terminated his wage-loss compensation and medical benefits on March 17, 2015, based on the opinion of Dr. Askin, an OWCP referral physician.

The medical evidence relevant to the March 17, 2015 termination includes Dr. Askin's comprehensive December 19, 2014 report. He noted the accepted condition of exacerbation of preexisting herniated lumbar disc, the history of injury, his review of the SOAF and medical record, and appellant's complaints of lower back pain and a sensation of fatigue in his lower extremities. Dr. Askin thoroughly described his examination findings. He opined that appellant had no disabling residuals of the accepted condition, noting that if he had a symptomatic disc herniation he would have muscle atrophy or weakness, dermatomal anesthesia, and asymmetry of deep tendon reflexes, none of which were present. Dr. Askin advised that appellant needed no further treatment and that the recommended surgery would be inappropriate, noting that it would not address any condition caused by appellant's work activities. He concluded that appellant's lumbar condition was age appropriate, and that he could return to full-time work with no restriction and was capable of lifting 70 pounds occasionally.

The medical evidence submitted by appellant closest in time to Dr. Askin's December 19, 2014 report were from Dr. Rosenblum dated February 4 and 6, 2014. He noted a history that appellant bent to put mail in a post office box and began to feel low back pain and that he was not working and was under no treatment or medication for his radiating low back pain. Dr. Rosenblum diagnosed lumbar radiculopathy, opined that the condition was employment related, and advised that appellant could not work. While he opined that appellant's April 9, 2012 work injury had not resolved, he did not offer any explanation of the mechanics of how this injury caused appellant's diagnoses almost two years after the employment injury or why he continued to be disabled. Moreover, Dr. Rosenblum indicated that appellant was under no treatment and taking no medication on February 4, 2014.

The Board finds that Dr. Rosenblum's February 2014 reports, which predated the termination by over one year, are insufficient to establish a conflict in medical evidence with the well-rationalized opinion of Dr. Askin whose opinion represents the weight of the medical evidence at the time OWCP terminated benefits. OWCP properly relied on his report in terminating appellant's wage-loss compensation and medical benefits. Dr. Askin had full knowledge of the relevant facts and evaluated the course of appellant's accepted conditions. His opinion was based on proper factual and medical history and his report contained a detailed summary of this history. Dr. Askin addressed the medical record and made his own examination findings to reach a reasoned conclusion regarding appellant's conditions.[9] At the time benefits were terminated, he found no basis on which to attribute any residuals or continued disability to appellant's accepted condition of exacerbation of preexisting herniated lumbar disc. Dr. Askin's

[9] *See Michael S. Mina*, 57 ECAB 379 (2006) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

opinion is found to be probative evidence and reliable, and sufficient to justify OWCP's termination of benefits for the accepted condition.[10]

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits on March 17, 2015, the burden shifted to him to establish continuing disability causally related to the accepted knee conditions.[11] Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[12]

ANALYSIS -- ISSUE 2

The Board finds that appellant failed to meet his burden of proof to establish continuing residuals or disability related to the accepted exacerbation of preexisting herniated lumbar disc after March 17, 2015.

Subsequent to the termination appellant submitted a March 31, 2015 report in which Dr. Rosenblum reported examination findings from office visits from March 26, 2013, February 4, 2014, and March 31 and June 18, 2015. Dr. Rosenblum noted the MRI scan findings of degenerative disc disease with disc space narrowing at L5-S1 and to a lesser extent at L4-5. He opined that appellant suffered a post-traumatic right lumbar radiculopathy as a result of the April 9, 2012 employment injury which failed to respond to conservative management. Dr. Rosenblum reported that on March 31, 2015 appellant had a partial motor deficit with weakness of 4+/5 of the right extensor digitorum, gastrocnemius, and extensor hallucis longus on March 31, 2015, all of which were indicative of radicular dysfunction which did not preexist appellant's work-related injury. In a December 26, 2015 report, he maintained that appellant's post-traumatic lumbosacral spine syndrome was clearly related to the April 9, 2012 work injury because he had no prior problems with his lumbosacral spine. Dr. Rosenblum related that lumbosacral spine disorders were caused by the type of injury, bending to place mail in a post office box. He concluded that appellant's current syndrome was related to the April 9, 2012 employment injury.

An opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury, but symptomatic after it, is insufficient, without supporting rationale, to establish causal relationship.[13] Dr. Rosenblum must provide an opinion on whether the described employment injury caused or contributed to claimant's diagnosed medical condition and support that opinion with medical reasoning to demonstrate that the

[10] *Supra* note 7.

[11] *See Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

[12] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[13] *Michael S. Mina*, 57 ECAB 379 (2006).

conclusion reached is sound, logical, and rational.[14] He provided no real explanation as to how the April 9, 2012 work injury caused appellant's condition or disability after March 17, 2015. Dr. Rosenblum did not begin treating appellant until March 26, 2013, almost one year after the employment injury. He failed to explain how the conditions that he found on his last examination of record, March 31, 2015, were due to the employment injury, and these conditions were not described until March 31, 2015, almost three years after the April 9, 2012 employment injury.

The opinion of a physician supporting causal relationship must be one of reasonable medical certainty that the condition for which compensation is claimed is causally related to a claimant's federal employment and such relationship must be supported with affirmative evidence, explained by medical rationale and be based upon a complete and accurate medical and factual background of the claimant.[15] The Board has long held that medical opinions not containing rationale on causal relation are of diminished probative value and are generally insufficient to meet appellant's burden of proof.[16] The Board finds that Dr. Rosenblum's reports are of limited probative value on the issue of whether appellant had any continuing disability or condition due to the April 9, 2012 employment injury.

The factors that comprise the evaluation of medical evidence include the opportunity for and the thoroughness of physical examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[17] As there is no medical evidence of record of sufficient rationale to establish that appellant continued to be disabled due to the April 9, 2012 employment injury, he did not meet his burden of proof to establish that he continued to be disabled due to the accepted exacerbation of preexisting lumbar herniated disc after March 17, 2015.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits on March 17, 2015 and that he did not meet his burden of proof to establish a continuing employment-related disability or residuals after March 17, 2015.

[14] *John W. Montoya*, 54 ECAB 306 (2003).

[15] *A.D.*, 58 ECAB 149 (2006).

[16] *Carolyn F. Allen*, 47 ECAB 240 (1995).

[17] *Nicolette R. Kelstrom*, 54 ECAB 570 (2003).

ORDER

IT IS HEREBY ORDERED THAT the May 5, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 19, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board