

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

R.T., Appellant

and

DEPARTMENT OF JUSTICE, U.S. MARSHALS
SERVICE, New York, NY, Employer

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**Docket No. 15-438
Issued: March 28, 2016**

Appearances:

Capp P. Taylor, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On December 17, 2014 appellant, through her attorney, filed a timely appeal from a September 16, 2014 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 this case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation effective September 21, 2014 on the grounds that she no longer had any disability causally related to her accepted employment-related injuries.

On appeal counsel contends that the medical report of an OWCP referral physician is not entitled to the weight of the medical opinion evidence, as it is speculative and fails to provide a rationalized opinion explaining how the accepted employment-related degeneration of the lumbar intervertebral disc has resolved. He contends that the referral physician failed to demonstrate his knowledge of the physical requirements of appellant's job or her residual

¹ 5 U.S.C. § 8101 *et seq.*

physical capacity as he only reviewed the duties of the position without discussion and reviewed prior diagnostic test results without citing to recent diagnostic test results in support of his opinion that there are no objective findings of a residual disabling condition. Counsel also failed to discuss whether appellant's limitations related to her consequential right knee condition allow her to resume her date-of-injury position or any other suitable position.

FACTUAL HISTORY

This case has previously been before the Board. In an October 14, 2009 decision, the Board found that OWCP properly suspended appellant's compensation effective November 23, 2008 for failing to submit a Form EN1032, as requested.² In an April 3, 2014 decision, the Board reversed OWCP's termination of her compensation based on its finding that she had no further employment-related residuals or disability.³ The facts of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

OWCP accepted that on March 30, 1981 appellant, then a 26-year-old deputy marshal, sustained employment-related low back derangement and degeneration of the lumbar or lumbosacral intervertebral disc when she slipped while exiting a vehicle. Appellant stopped work on the date of injury and has not returned to work. OWCP paid compensation for total disability.

In a February 18, 2013 progress note, Dr. G. Clay Baynham, an attending Board-certified orthopedic surgeon, provided a history of the March 30, 1981 employment injuries and appellant's medical treatment, social, and family background. He noted her complaints of back pain and bilateral leg, right groin, and left foot pain and numbness. Dr. Baynham provided findings on physical examination and magnetic resonance imaging scan test results. He also provided an impression of back and bilateral left greater than right lower extremity radicular pain, numbness, and paresthesias. Dr. Baynham advised that on physical examination appellant had no focal neurological deficit. Appellant's complaints appeared to be generally consistent with a femoral radiculopathy. Radiographically, her complaints appeared to correlate well with lateral recess stenosis bilaterally at L3-4. Dr. Baynham concluded that appellant's complaints of groin pain on the left appeared to correlate well with a focal left lateral herniation at L2-3 and addressed her treatment plan.

By letter dated April 15, 2014, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, for a second opinion. In a May 15, 2014 report, Dr. Millheiser reviewed a history of the March 30, 1981 employment injuries and appellant's medical record. He noted her complaint of constant and sharp back pain that radiated to her pelvis in both legs more on the left than on the right. The back pain increased with bending, lifting, twisting, walking, sitting, standing, and sleeping, but not with coughing, sneezing, or bowel movements. The pain went down to both feet, more on the left than on the right, and there was numbness in both feet. On examination of the lumbar spine, he reported mildly restricted range of motion. There was no tenderness, trigger

² Docket No. 09-675 (issued October 14, 2009).

³ Docket No. 14-75 (issued April 3, 2014).

points, spasm, list, tilt, or sciatic scoliosis. A motor and sensory examination of the lower extremities was normal. Knee and ankle reflexes were equal and active bilaterally. A straight leg raising test was negative. Sitting caused back pain at 80 degrees on the right. Over exaggeration tests were negative. The right calf measured .25 inch more than the left calf. Dr. Millheiser reported that appellant was not using orthosis and she had normal ability to get on and off an examination table. Appellant had normal gait and station. Dr. Millheiser diagnosed postlumbar radiculopathy, postlumbar sprain, and degenerative disease of the lumbar spine. He reviewed the duties of a federal marshal. Dr. Millheiser found no significant objective findings in the lumbar spine. He advised that there were no objective findings to support residuals or disability from the compensable medical conditions as indicated in the statement of accepted facts. Dr. Millheiser concluded that appellant could perform the physical requirements of her deputy marshal job as listed in the statement of accepted facts without restrictions and on a full-time basis.

On June 30, 2014 OWCP issued a notice of proposed termination of appellant's wage-loss compensation based on Dr. Millheiser's medical opinion. Appellant was advised that she had 30 days to submit additional evidence in response to the proposed termination.

In a July 6, 2014 letter, appellant stated that OWCP failed to provide her with 30 days to respond to its notice. She related that she was not able to get an appointment with her physician until the end of July 2014 due to the Fourth of July holiday and vacation. Appellant contended that there were no changes in her health and back pain since her 1981 employment injury and that she continued to require medical treatment.

In a September 16, 2014 decision, OWCP finalized the termination of appellant's wage-loss compensation benefits effective September 21, 2014. It found that the opinion of Dr. Millheiser constituted the weight of the medical evidence. OWCP did not terminate medical benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.⁴ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ The burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation as of September 21, 2014. OWCP accepted that appellant sustained low back derangement and degeneration of the lumbar or lumbosacral intervertebral disc while in the

⁴ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁶ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

performance of duty. It subsequently referred her to Dr. Millheiser for a second opinion evaluation.

In a May 15, 2014 report, Dr. Millheiser reviewed a complete and accurate factual and medical background, and provided a reasoned medical opinion that appellant could return to her date-of-injury position. He noted the lack of significant objective findings based on physical examination and reviewed the diagnostic studies. Dr. Millheiser found essentially normal examination findings with the exception of mildly restricted range of motion of the lumbar spine. He determined that there were no objective findings to support any disability due to the accepted conditions. Dr. Millheiser reviewed a description of appellant's deputy marshal position. He concluded that she could return to this full-time position without restrictions. The Board notes that there is no contemporaneous medical evidence from an attending physician that discussed a continuing employment-related disability. Prior to the termination,⁷ the February 18, 2013 report of Dr. Baynham found that appellant had back and bilateral leg pain, numbness, and paresthesias. However, he did not address the issue of continuing employment-related disability.

The Board finds that Dr. Millheiser's report represents the weight of the medical evidence and that OWCP properly relied on his report in terminating appellant's wage-loss compensation for the accepted employment-related conditions on September 16, 2014.

On appeal counsel contended that Dr. Millheiser's report was not entitled to the weight of the medical opinion evidence. He asserted that his report was extremely speculative and failed to provide a rationalized opinion explaining how the accepted employment-related degeneration of the lumbar intervertebral disc had resolved. Dr. Millheiser opined that there were no objective findings to support residuals of appellant's accepted conditions, yet he also diagnosed lumbar spine degenerative disease, an accepted employment-related condition. While Dr. Millheiser did not provide a definitive opinion as to whether appellant had any continuing employment-related residuals, the Board notes that OWCP did not terminate medical benefits for any of her accepted conditions.

Counsel further asserted that Dr. Millheiser failed to demonstrate his knowledge of the physical requirements of appellant's job and her residual physical capacity as he only reviewed the duties of the position without discussion and he reviewed prior diagnostic test results without citing to recent diagnostic test results in support of his opinion that there were no objective findings of a residual disabling condition. There is no evidence that Dr. Millheiser's examination was deficient in any way. He provided detailed clinical findings, and reviewed the medical record and a description of appellant's deputy marshal duties. After a thorough examination, Dr. Millheiser concluded that there were no objective findings to support any residual employment-related disability and that appellant could return to her regular work duties with no restrictions.

Lastly, counsel contended on appeal that Dr. Millheiser failed to discuss limitations related to appellant's consequential right knee condition and whether she could resume her date-of-injury position or any other suitable position due to this condition. However, OWCP has not

⁷ The Board notes that, prior to OWCP's September 16, 2014 termination decision, OWCP properly gave appellant 30 days to respond to its June 30, 2014 pretermination notice. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.7 (February 2013).

accepted appellant's claim for a right knee condition. For conditions not accepted by OWCP as being employment related, it is appellant's burden to provide rationalized medical evidence sufficient to establish causal relation.⁸ Appellant did not submit any rationalized medical evidence establishing that she sustained a right knee condition as a consequence of her accepted employment-related injuries.

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 properly terminated appellant's wage-loss compensation effective September 21, 2014 on the grounds that she no longer had any disability causally related to her accepted employment-related injuries.

ORDER

IT IS HEREBY ORDERED THAT the September 16, 2014 decision of the Office of Workers' Compensation Programs is affirmed.⁹

Issued: March 28, 2016
Washington, DC

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

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

⁸ *T.M.*, Docket No. 08-975 (issued February 6, 2009).

⁹ James A. Haynes, Alternate Judge, participated in the original decision but was no longer a member of the Board effective November 16, 2015.