United States Department of Labor
Employees' Compensation Appeals Board

M.W, Appellant	)	
and	)	**Docket No. 16-0959**
	)	**Issued: October 6, 2016**
U.S. POSTAL SERVICE, POST OFFICE, Detroit, MI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 4, 2016 appellant, through counsel, filed a timely appeal from a March 10, 2016 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.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 4, 2013, because she had no

[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.*

residuals of her March 29, 2010 work injury after that date; and (2) whether appellant met her burden of proof to establish that she had residuals of her March 29, 2010 work injury on or after July 4, 2013.

FACTUAL HISTORY

On April 19, 2010 appellant, then a 51-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on March 29, 2010 she sustained an injury to her back due to pushing heavy mail carts at work. She stopped work on April 7, 2010.

In September 2010, OWCP referred appellant and the case record to Dr. David G. Carr, an osteopath and Board-certified orthopedic surgeon, for an examination and opinion regarding whether she sustained a work injury on March 29, 2010. In an October 18, 2010 report, Dr. Carr reported physical examination findings on that date. He indicated that appellant had a work-related right sacroiliac joint strain and noted that she suffered a work-related aggravation of degenerative disc disease of her low back, which would have resolved within 12 weeks of the March 29, 2010 incident.

On November 8, 2010 OWCP accepted that appellant sustained a right sacroiliac ligament sprain and temporary aggravation of degeneration of lumbar or lumbosacral intervertebral disc disease (ceased June 21, 2010). Appellant received disability compensation on the daily rolls beginning May 14, 2010 and on the periodic rolls beginning January 16, 2011.

In a May 11, 2011 report, Dr. Dianne Obayan, an attending Board-certified physical medicine and rehabilitation physician, indicated that appellant was totally disabled from work due to her back problems.

On March 6, 2013 OWCP referred appellant and the case record to Dr. Michael E. Holda, a Board-certified orthopedic surgeon, for an examination and opinion regarding whether appellant continued to have residuals of her March 29, 2010 work injury. In a March 20, 2013 report, Dr. Holda discussed her factual and medical history and reported the findings of the physical examination he performed on that date.[3] He noted that appellant's complaints of continuous low back pain, mostly on the right side, with occasional pain and numbness in both legs. Dr. Holda reported that, upon examination, she had no scoliosis and that her lumbar lordosis was normal. Appellant flexed her back to approximately 60 degrees with complaints of pain at the extreme and had approximately 10 degrees of lumbar extension with pain. Dr. Holda noted that she had no tenderness to palpation of the lumbar paravertebral musculature and that sensation to light touch was maintained in the lower extremities. The extensor hallucis longus musculature was strong in both lower extremities.

In his March 20, 2013 report, Dr. Holda diagnosed chronic low back pain with degenerative arthritis of the lumbar spine and grade 1 degenerative spondylolisthesis of L4-5.

[3] Dr. Holda indicated that a magnetic resonance imaging (MRI) scan from November 2011 showed mild grade 1 anterolisthesis of L4 on L5, severe degenerative facet arthrosis at L4-5, and endplate degenerative signal changes at L5-S1. Electromyogram and nerve conduction studies from December 2011 revealed normal upper and lower extremities.

He found no evidence that active residuals of the March 29, 2010 work injury were present**,** such as right sacroiliac ligament sprain, and indicated that "no work restrictions would be indicated due to her accepted work-related conditions." Dr. Holda opined that appellant could work eight hours per day and noted:

> "No active residuals are identified, so no work-related treatment is indicated. In summary, I found no objective evidence of residuals concerning a work-related injury. [Appellant] does have significant degenerative disease of her lumbar spine related to her age and the aging process, and not work related. Based on these findings, I would recommend a 15-pound lifting restriction and no repetitive bending or twisting at the waist for one year. No additional treatment is indicated for residuals of [appellant's] work injury to the lumbar spine."

On April 18, 2013 OWCP wrote to appellant's attending physician, Dr. Obayan, and requested that she review the second opinion report of Dr. Holda and respond to its findings regarding work-related residuals. It provided 30 days for Dr. Obayan to provide a response, but none was received within the allotted time.

In a May 22, 2013 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she ceased to have residuals of her March 29, 2010 work injury. It indicated that the weight of the medical opinion evidence regarding work-related residuals rested with the March 20, 2013 opinion of Dr. Holda, the second opinion physician, and it provided appellant 30 days to submit evidence and argument challenging the proposed termination action.

Appellant submitted a June 22, 2013 report in which Erin Szuch, an attending nurse practitioner, discussed her low back problems.

By decision dated July 3, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits effective July 4, 2013, because she had no residuals of her March 29, 2010 work injury after that date. It found that the weight of the medical opinion evidence regarding residuals of the March 29, 2010 work injury rested with the well-rationalized March 20, 2013 opinion of Dr. Holda.

Appellant submitted a July 15, 2013 report, in which Dr. Obayan discussed her medical history and reported findings of a physical examination on that date. Dr. Obayan diagnosed facet joint arthropathy, lumbosacral spondylosis without myelopathy, and cervical disc degeneration. She posited that appellant's ongoing back pain was due to an aggravation of lumbar facet arthropathy by her March 29, 2010 work injury. Dr. Obayan noted that the mechanism of the March 29, 2010 work injury was extension of the spine while pushing a heavy load. She opined that it was extremely unlikely that appellant would be able to return to her prior employment.[4]

Appellant requested a review of the written record by an OWCP hearing representative. In a November 13, 2013 decision, the hearing representative affirmed OWCP's July 3, 2013

[4] In an August 19, 2013 form report, Dr. Obayan indicated that appellant was unable to work and that no partial or total recovery was expected within six months.

decision, but remanded the case to OWCP for further development. She found that OWCP appropriately gave the weight of medical opinion evidence to Dr. Holda and that it met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective July 4, 2013. The hearing representative found, however, that there was a new conflict in the medical opinion evidence between Dr. Holda and Dr. Obayan regarding whether appellant had residuals of her March 29, 2010 work injury after July 4, 2013. She remanded the case to OWCP for development, including referral of appellant and the case record for an impartial medical examination, and the issuance of a *de novo* decision regarding work-related residuals after July 4, 2013.

In April 2014, OWCP referred appellant and the case record to Dr. Donald F. Garver, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether she had residuals of her March 29, 2010 work injury.

In a May 29, 2014 report, Dr. Garver discussed appellant's factual and medical history, including her history of diagnostic testing, and detailed the findings of his physical examination on May 20, 2014. He indicated that, upon examination, she complained of some pain on extension of her knees. Appellant's deep tendon reflexes were negligible at both the knee and the ankle and she was able to dorsiflex her feet without difficulty. Dr. Garver noted that she complained of some pain in the left hip area and that there was some quadriceps weakness on the left side. Appellant's unsuccessful finger-to-nose testing was an indication of cerebellar dysfunction or dysmetria. Dr. Garver indicated that she had some numbness on the dorsum of her left foot to pinch testing, but was not appreciably abnormal. Appellant had a negative Babinski on sides, right and left, and that there was no evidence of weakness or atrophy in the gastrocnemius muscles.

Dr. Garver indicated that it was obvious that appellant had substantial problems with her back, dating back to at least 2003. He noted significant MRI scan evidence of facet degeneration of an advanced degree at L4-5 and endplate changes at L5-S1 as early as April 17, 2010, and pointed out that testing was repeated in November 2013 without a change in morphology. Dr. Garver indicated, "It is clear that the notes and the literature reviewed indicate that [appellant] had advanced degenerative changes in her lower back, which preexisted this incident of March 29, 2010 by a number of years." He opined that, after review of all the records and after physical examination, appellant had no residuals of the back injury of March 29, 2010, but that she was not able to work based on nonwork-related conditions, including severe left hip arthritis and cerebellar dysfunction. Dr. Garver reiterated that appellant had no residuals of the March 29, 2010 injury and noted, "[T]he findings with [appellant's] back far preexist the incident of March 29, 2010 and throughout the records are indicated to have been an ongoing problem in the life of a 55-year-old lady who has obviously been somewhat hampered by lumbosacral arthritis and degenerative process throughout the past 10+ years."

In a July 11, 2014 decision, OWCP found that appellant did not meet her burden of proof to establish that she had residuals of her March 29, 2010 work injury on or after July 4, 2013. It found that the weight of the medical opinion evidence with respect to work-related residuals rested with the opinion of Dr. Garver, the impartial medical examiner.

Appellant requested a telephonic hearing with an OWCP hearing representative. During the hearing held on February 10, 2015, counsel argued that the May 29, 2014 report of Dr. Garver did not contain adequate medical rationale to support its conclusions.

By decision dated April 28, 2015, the hearing representative affirmed OWCP's July 11, 2014 decision. She found that the weight of the medical opinion evidence with respect to work-related residuals rested with the opinion of Dr. Garver.

Appellant submitted several reports of Dr. Lucia Zamorano, an attending Board-certified neurosurgeon, including a July 23, 2014 report in which she noted that appellant had continuing problems with her low back, particularly at the L4-5 level, and with her left hip.[5] On October 20, 2014 Dr. Zamorano posited that appellant was a candidate for L4-5 transforaminal lumbar interbody fusion surgery.

In a treatment record dated April 12, 2015, Dr. David Cox, an attending Board-certified family practitioner, noted paraspinal muscle spasm and tenderness over appellant's lumbar spine on examination and diagnosed failed back syndrome.

On July 13, 2015 Dr. Peter Bono, an attending Board-certified orthopedic surgeon, performed back surgery on her including decompression, postlumbar interbody fusion, posterior arthrodesis at L4-5.[6]

In a March 10, 2016 decision, OWCP denied modification of its April 28, 2015 decision noting that the medical evidence of record did not show that appellant had residuals of her March 29, 2010 work injury on or after July 4, 2013.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[7] OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[8] It's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[9] Rationalized medical evidence must contain an opinion based on a complete factual and medical background of the employee, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature

[5] On December 13, 2013 Dr. Zamorano performed fusion surgery at L5-S1 on appellant.

[6] On July 9, 2015 Dr. Bono noted that as the prior surgery by Dr. Zamorano was felt to be work related "it is reasonable that the upcoming surgery be considered a continuation of treatment for the injuries."

[7] *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

[8] *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

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

of the relationship between the diagnosed condition and the established employment condition/factors.[10]

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a right sacroiliac ligament sprain, and temporary aggravation of degeneration of lumbar or lumbosacral intervertebral disc disease. By decision dated July 3, 2013, it terminated her wage-loss compensation and medical benefits effective July 4, 2013 because she had no residuals of her March 29, 2010 work injury after that date. OWCP found that the weight of the medical opinion evidence regarding residuals of the March 29, 2010 work injury rested with the March 20, 2013 opinion of Dr. Holda, an OWCP referral physician.

The Board finds that the weight of the medical evidence is represented by the thorough and well-rationalized opinion of Dr. Holda.[11] The March 20, 2013 report of Dr. Holda establishes that appellant had no disability or need for medical care due to her March 29, 2010 employment injury after July 4, 2013.

In his March 20, 2013 report, Dr. Holda diagnosed chronic low back pain with degenerative arthritis of the lumbar spine and grade 1 degenerative spondylolisthesis of L4-5. He found no evidence that active residuals of the March 29, 2010 work injury were present, such as right sacroiliac ligament sprain, and indicated that "no work restrictions would be indicated due to her accepted work-related conditions." Dr. Holda noted, "No active residuals are identified, so no work-related treatment is indicated. In summary, I found no objective evidence of residuals concerning a work-related injury." He also indicated that appellant had significant degenerative disease of her lumbar spine related to her age and the aging process, and noted that, based on these nonwork-related findings, he recommended a 15-pound lifting restriction and no repetitive bending or twisting at the waist for one year.

The Board has carefully reviewed the opinion of Dr. Holda and notes that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Holda provided a thorough factual and medical history and accurately summarized the relevant medical evidence.[12] He provided medical rationale for his opinion by explaining that appellant did not have objective residuals of the March 29, 2010 injury and that her continuing back problems were due to the natural progression of her nonwork-related degenerative back condition.[13]

[10] *P.K.*, Docket No. 08-2551 (issued June 2, 2009); *John W. Montoya*, 54 ECAB 306 (2003).

[11] *Id*.

[12] *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

[13] Appellant submitted a June 22, 2013 report in which Erin Szuch, an attending nurse practitioner, discussed her low back problems. However, under FECA, the report of a nonphysician, including a nurse, does not constitute probative medical evidence *L.L.*, Docket No. 13-829 (issued August 20, 2013).

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, appellant must submit rationalized medical evidence and establish by the weight of the reliable, probative, and substantial evidence that she had an employment-related disability, which continued after termination of compensation benefits.[14]

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."[15] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist 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.[16]

ANALYSIS -- ISSUE 2

As found above, OWCP properly terminated appellant's wage-loss compensation and medical benefits effective July 4, 2013 based on the opinion of Dr. Holda, OWCP's referral physician. After this proper termination of her wage-loss compensation and medical benefits clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits after July 4, 2013 shifted to her.

After the termination of appellant's wage-loss compensation and medical benefits effective July 4, 2013, OWCP properly determined that a conflict in the medical opinion arose between Dr. Holda and Dr. Obayan, an attending physician, on the issue of whether appellant continued to have residuals of the March 29, 2010 work injury.[17] In order to resolve the conflict, it properly referred her, pursuant to section 8123(a) of FECA, to Dr. Garver for an impartial medical examination and an opinion on the matter.[18]

The Board finds that the special weight of the medical evidence with respect to work-related residuals after July 4, 2103 is represented by the thorough, well-rationalized opinion of Dr. Garver and that appellant did not meet her burden for reinstating compensation benefits after July 4, 2013.[19]

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[14] *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

[15] 5 U.S.C. § 8123(a).

[16] *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[17] Dr. Obayan submitted a July 15, 2013 report in which she found that appellant continued to exhibit residuals of her March 29, 2010 work injury. This report contained an opinion that contrasted with the March 29, 2013 opinion of Dr. Holda.

[18] *See supra* note 15.

[19] *See supra* note 16.

In his May 29, 2014 report, Dr. Garver discussed appellant's factual and medical history, including her history of diagnostic testing, and detailed the findings of his physical examination on May 20, 2014. He noted significant MRI scan evidence of advanced facet degeneration of an advanced degree at L4-5 and endplate changes at L5-S1 as early as April 17, 2010, and pointed out that testing was repeated in November 2013 without a change in morphology. Dr. Garver indicated, "It is clear that the notes and the literature reviewed indicate that [appellant] had advanced degenerative changes in her lower back, which preexisted this incident of March 29, 2010 by a number of years." He posited that, after review of all the records and after physical examination, appellant had no residuals of the back injury of March 29, 2010, but that she was not able to work based on nonwork-related conditions, including severe left hip arthritis and cerebellar dysfunction.

The May 29, 2014 report of Dr. Garver establishes that appellant had no disability due to her March 29, 2010 work injury after July 4, 2013. The Board has carefully reviewed the opinion of Dr. Garver and finds that he provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Dr. Garver provided a proper analysis of the factual and medical history and the findings on examination, including the results of diagnostic testing, and reached conclusions regarding appellant's condition, which comported with this analysis. He provided medical rationale for his opinion by explaining that her continued back problems were due to her underlying nonwork-related back condition rather than residuals of the March 29, 2010 work injury.

Appellant also submitted additional medical evidence, including reports of Dr. Zamorano, Dr. Cox, and Dr. Bono, which appellant argues are sufficient to establish that she was entitled to compensation after July 4, 2013 due to residuals of her March 29, 2010 work injury. The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that she had residuals of her March 29, 2010 work injury after July 4, 2013. While Dr. Zamorano performed back surgery on December 13, 2013 and Dr. Bono performed back surgery on July 13, 2015, neither physician submitted a rationalized medical report relating appellant's surgery to residuals of the March 29, 2010 work injury.[20] For these reasons, appellant did not meet her burden of proof to establish that she had residuals of her March 29, 2010 work injury on or after July 4, 2013.

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 wage-loss compensation and medical benefits effective July 4, 2013 as she had no residuals of her March 29, 2010 work injury after that date. The Board further finds that appellant did not meet

[20] On July 9, 2015 Dr. Bono indicated that because prior surgery performed by Dr. Zamorano was felt to be work related "it is reasonable that the upcoming surgery be considered a continuation of treatment for the injuries." However, he did not provide an explanation for this opinion based on objective findings.

her burden of proof to establish that she had residuals of her March 29, 2010 work injury on or after July 4, 2013.

ORDER

IT IS HEREBY ORDERED THAT the March 10, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 6, 2016
Washington, DC

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

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

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