

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

S.B., Appellant and DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Orlando, FL, Employer))))))))))	Docket No. 16-0779 Issued: January 5, 2017
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Appearances:
Appellant, pro se
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 March 7, 2016 appellant filed a timely appeal from a February 4, 2016 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.²

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits effective February 7, 2016 as she was no longer totally disabled from work due to her December 18, 2000 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence following the February 4, 2016 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

FACTUAL HISTORY

OWCP accepted that on December 18, 2000 appellant, then a 34-year-old program support assistant, strained her lower back when she lifted a box with patient records in the performance of duty. Appellant stopped work and returned to sedentary duty on April 21, 2001. OWCP accepted her claim for displacement of lumbar intervertebral disc without myelopathy and lumbosacral joint sprain.

On September 20, 2001 appellant filed a recurrence of disability claim (Form CA-2a) alleging that she continued to experience constant pain since the original injury. She requested wage-loss compensation for intermittent periods of disability. OWCP accepted appellant's recurrence claim and paid compensation for intermittent periods of disability.

Appellant continued to receive medical treatment and was authorized by OWCP to undergo lumbar decompression and fusion surgery. On February 17, 2003 she stopped work while awaiting surgery and received wage-loss compensation benefits. On May 7, 2003 OWCP placed appellant on the periodic rolls.

On May 20, 2003 appellant underwent surgery for bilateral laminectomy, bilateral lateral fusion, and bilateral screw rod instrumentation at L5-S1 by Dr. Michael J. Broom, a Board-certified orthopedic surgeon.

Dr. Broom continued to treat appellant and indicated in a June 11, 2003 follow-up examination note that her back pain and leg symptoms had markedly improved. He reported that x-ray examinations revealed good implant position with fusion mass visible bilaterally. In a February 6, 2004 office note, Dr. Broom related that appellant continued to show improvement with physical therapy. Upon examination, he reported negative straight leg raise testing bilaterally. Dr. Broom authorized appellant to return to work with restrictions of no repetitive twisting, no bending or lifting over 20 pounds, no prolonged walking or standing, and frequent breaks from prolonged sitting.

On March 22, 2004 appellant returned to full-time modified duty as a program support assistant.

By decision dated September 20, 2004, OWCP reduced appellant's compensation based on her actual wages as a program support assistant. It found that she had demonstrated her ability to perform the duties of her job for at least 60 days and that her actual wages met or exceeded the current wages of her date-of-injury job.

Appellant continued to receive medical treatment. On November 9, 2005 she underwent a magnetic resonance imaging (MRI) scan examination of the lumbar spine by Dr. Mark J. Timken, a Board-certified diagnostic radiologist. Dr. Timken related appellant's complaints of increasing low back pain and noted that she had a history of lumbar surgery in 2003 and of a slip and fall at work in August 2005. He indicated that she had no significant central spinal canal stenosis and was status postlaminectomy and fusion at L5-S1.

Effective May 29, 2006 appellant was terminated from employment with the employing establishment due to excessive absences and failure to properly request leave.

Appellant filed various claims for wage-loss compensation (Form CA-7) for the periods April 25 to May 22, 2006; May 30 to July 10, 2006; and May 8 to July 26, 2006. These claims were denied and she filed various requests for reconsideration to OWCP.

On October 17, 2008 OWCP issued a decision reopening appellant's claim for wage-loss compensation for the period August 3, 2005 to February 15, 2008 because it did not follow appropriate procedures in the development of her claim. In a decision dated June 25, 2009, it accepted a recurrence of disability beginning August 3, 2005. OWCP paid wage-loss compensation benefits and placed appellant on the periodic rolls. Appellant continued to receive medical treatment.

On December 17, 2010 OWCP referred appellant to Dr. Donald Mauldin, a Board-certified orthopedic surgeon, to determine whether she continued to be disabled from work. In an April 11, 2011 report, Dr. Mauldin provided an accurate history of the December 18, 2000 employment injury and reviewed appellant's medical treatment. He conducted an examination and noted no objective abnormalities. Dr. Mauldin diagnosed status post lumbar strain, status post lumbar decompression and fusion at L5-S1, and failed back surgery syndrome with chronic pain. He reported that the effects of the work injury would not cease as appellant would always have some subjective complaints of pain as a failed back surgery syndrome. Dr. Mauldin opined that she would be capable of returning to a sedentary-type work activity based on her physical examination and prior MRI scan findings. He recommended sedentary-type work activity with restrictions from repetitive bending or lifting and prolonged standing or walking in excess of 10 to 15 minutes. In a May 2, 2011 supplemental report, Dr. Mauldin clarified that appellant would need a change of position from seated activity on an every two-hour basis if that was available.

OWCP referred appellant for vocational rehabilitation and was informed that her restrictions would not qualify for a rehabilitation program.³

Appellant continued to receive medical treatment and receive wage-loss and medical compensation benefits.

In order to determine appellant's current ability to work, on September 23, 2015 OWCP referred her and the case record, to Dr. James E. Butler, III, a Board-certified orthopedic surgeon, for another second opinion examination to determine whether she continued to suffer residuals of her December 18, 2000 employment injury.

Dr. Butler examined appellant and in an October 19, 2015 report he accurately described the December 18, 2000 employment injury and discussed the medical records that he reviewed. He mentioned that she underwent lumbar surgery on May 20, 2003 and that the most recent MRI scan of the lumbar spine on November 9, 2005 revealed status postlaminectomy and fusion with no significant central spinal canal stenosis. Dr. Butler related appellant's current complaints of pain in the neck, lower back, mid back, upper back, upper extremities, and lower extremities and

³ On May 25, 2011 Teresa Collins, a vocational rehabilitation specialist, reviewed appellant's case for possible referral. She noted that appellant was restricted to walking, standing, and bending for 15 minutes per workday and a 10- to 15-minute break every hour. Ms. Collins advised that at the time appellant's case did not qualify for vocational rehabilitation as her work restrictions were not feasible for the program.

associated numbness and tingling in her hands and toes. Appellant indicated that her pain was intermittent in nature and worsened with bending, sitting, pulling, pushing, reaching, standing, sitting, and walking. Upon examination, Dr. Butler observed tenderness at L4 through sacrum bilaterally upon palpation of the lumbar spine. He reported that Kernig/Brudzinski and sitting root tests were negative bilaterally. Patrick/Faber tests were positive bilaterally and straight leg raise testing was 90 degrees bilaterally. Dr. Butler further described that appellant's lumbar range of motion appeared to be decreased with full effort secondary to pain. Examination of the lower extremities revealed normal strength and sensation testing. Dr. Butler diagnosed status post L5-S1 laminectomy and fusion and bilateral facet arthrosis with sacroiliac dysfunction.

In response to OWCP's questions, Dr. Butler described appellant's objective residuals of the lower lumbar spine as SI joint tenderness, decreased range of motion, and positive Patrick/Faber test producing SI joint pain bilaterally. He further explained that, although she had residuals from her work injury, it was not sufficiently disabling to prevent her from performing her usual duties as a program support assistant as described in the statement of accepted facts. Dr. Butler pointed out that appellant's usual duties did not require heavy lifting, repetitive twisting or bending, or prolonged standing and walking. He concluded that she had reached maximum medical improvement and had no restrictions to perform the duties of a program support assistant.⁴

Dr. David Martincheck, a pain medicine specialist, treated appellant and in an October 9, 2015 report he related that she continued to have bilateral leg pain following a work-related injury. He reviewed her history and conducted an examination. Dr. Martincheck observed no clubbing, cyanosis, edema, or deformity of the extremities with normal full range of motion of all joints. He diagnosed worsened sciatica and chronic pain syndrome.

On December 30, 2015 OWCP issued a notice of proposed termination of appellant's wage-loss compensation because she was no longer disabled from work due to her accepted work injury. It determined that the weight of medical evidence rested on the October 19, 2015 second opinion report of Dr. Butler. Appellant was afforded 30 days in which to submit additional evidence or argument.

In a letter dated January 25, 2016, appellant responded to OWCP's proposal to terminate her wage-loss compensation benefits and expressed her disagreement with Dr. Butler's second opinion examination. She noted that he told her to follow a completely different treatment plan than what she had received and that he recommended a current MRI scan examination, which she never received. Appellant also alleged that OWCP's proposal letter contained a false accusation that she wished to clarify about her history. She stated that she was not terminated from her position, but that the employing establishment had refused to allow her to medically retire until a Federal Administrative Law Judge in Georgia ruled in her favor.

Appellant provided a May 23, 2009 notice from the Office of Personnel Management informing her of a social security award overpayment and a November 12, 2010 form, which indicated that she elected to receive FECA benefits.

⁴ In an attached work capacity form, Dr. Butler indicated that appellant could work without restrictions.

Appellant also submitted a May 1, 2009 report by Dr. John T. Legowik, a Board-certified pathologist, which was previously of record. Dr. Legowik noted that he had treated her since December 22, 2005 for back pain following a “December 20, 2000” work injury. He discussed his medical treatment and examination findings. Dr. Legowik opined that appellant was unable to perform many activities of daily living that required bending, stooping, sitting, standing, pushing, and pulling for an extended period of time and doing anything on a repetitive basis. He explained that her lumbar condition had certainly progressed and reported that she could not perform any work activities on a continuous basis.

By decision dated February 4, 2016, OWCP terminated appellant’s wage-loss compensation benefits, effective February 7, 2016. It noted that the weight of the medical evidence rested with the well-rationalized October 19, 2015 second opinion report of Dr. Butler, which demonstrated that she was no longer disabled from work as a result of the December 18, 2000 work injury. Appellant’s claim remained open for medical treatment.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁵ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

ANALYSIS

OWCP accepted that on December 18, 2000 appellant strained her lower back when she lifted a box with patient records at work. Her claim was accepted for displacement of lumbar intervertebral disc without myelopathy and lumbosacral joint sprain. On May 20, 2003 appellant underwent lumbar laminectomy and fusion. She was on and off work and received wage-loss compensation and medical benefits. In an October 19, 2015 second opinion report, Dr. Butler opined that appellant continued to suffer residuals of her accepted lumbar injury, but was able to return to her date-of-injury position as a program support specialist. OWCP determined that his opinion constituted the weight of the evidence and thereafter terminated appellant’s entitlement to wage-loss compensation benefits.

The Board finds that OWCP failed to meet its burden of proof to terminate appellant’s wage-loss compensation benefits because the medical evidence of record does not establish that she was no longer disabled from work as a result of her December 18, 2000 employment injury.

OWCP terminated appellant’s wage-loss compensation benefits based on the October 19, 2015 report of Dr. Butler, the second opinion examiner. The Board finds, however, that OWCP

⁵ *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁶ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁷ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

improperly accorded the weight of medical evidence to his second opinion report. Dr. Butler reviewed appellant's history and described his physical examination findings. He noted objective residuals of the lower lumbar spine as SI joint tenderness, decreased range of motion, and positive Patrick/Faber test producing SI joint pain bilaterally. Dr. Butler further explained that although appellant had residuals from her work injury, they were not sufficiently disabling to prevent her from performing her usual duties as a program support assistant as described in the statement of accepted facts. He pointed out that appellant's usual duties did not require heavy lifting, repetitive twisting or bending, or prolonged standing and walking. Dr. Butler concluded that appellant had no restrictions to perform the duties of a program support assistant.

Although Dr. Butler determined that appellant was able to return to her date-of-injury position, the Board finds that he did not adequately explain how appellant was no longer disabled from work. He did not provide any medical rationale or explanation for how appellant still had residuals of her accepted lumbar injury, but was now able to return to work. The Board has held that medical evidence that states a conclusion but does not offer any rationalized medical explanation is of limited probative value.⁸ A well-rationalized medical opinion is especially needed in this case when the record reveals that on May 25, 2011 a vocational rehabilitation specialist determined that appellant's work restrictions were not feasible for her to be referred to vocational rehabilitation. Dr. Butler does not offer any medical explanation for how appellant's work-related condition had now improved to the extent that she was able to return to work even though her work restrictions prevented her from participating in vocational rehabilitation in the past. On the contrary, his opinion appears to be based solely on the description of a program support assistant's duties as detailed in the statement of accepted facts. Dr. Butler, however, overlooked the fact that appellant's initial injury resulted from lifting a box of patients' records in the performance of duty. He did not provide any medical reasoning, or otherwise detailed analysis, to support his conclusory statements about appellant's ability to perform the duties of a program support assistant.⁹ Because Dr. Butler does not support his opinion with medical rationale, his report is insufficient to justify termination of appellant's wage-loss compensation benefits.

In assessing medical evidence, the number of physicians supporting one position or another is not controlling. Rather, the weight of such evidence is determined by its reliability, its probative value, and its convincing quality.¹⁰ The factors that comprise the evaluation of medical opinion evidence include the opportunity for and thoroughness of examination, the accuracy or 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.¹¹ In this case, the Board finds that Dr. Butler's opinion is lacking. Accordingly, his opinion has diminished probative value and is not entitled to the weight of medical evidence sufficient to justify termination of appellant's wage-loss compensation. The Board, therefore,

⁸ *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

⁹ *See A.R.*, Docket No. 12-443 (issued October 9, 2012).

¹⁰ *See Nicolette R. Kelstrom*, 54 ECAB 570 (2003).

¹¹ *See M.D.*, 59 ECAB 211 (2007).

will reverse OWCP's termination and will remand the case for a proper reinstatement of wage-loss compensation benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation effective February 7, 2016.

ORDER

IT IS HEREBY ORDERED THAT the February 4, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 5, 2017
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