United States Department of Labor
Employees' Compensation Appeals Board

R.R., Appellant	)	
and	)	**Docket No. 17-0994**
	)	**Issued: October 5, 2017**
DEPARTMENT OF THE ARMY, CORPUS CHRISTI ARMY DEPOT, Corpus Christi, TX, 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
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On April 6, 2017 appellant, through counsel, filed a timely appeal from a February 2, 2017 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.

[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.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits on April 18, 2016; and (2) whether appellant met his burden of proof to establish continuing disability or residuals after his benefits were terminated.

On appeal counsel asserts that the February 2, 2017 decision is contrary to fact and law.

FACTUAL HISTORY

On March 20, 2013 appellant, then a 46-year-old aircraft mechanic, filed an occupational disease claim (Form CA-2) alleging that his repetitive work duties caused bilateral elbow and lower back conditions. On April 30, 2013 OWCP accepted the conditions of displacement of lumbar intervertebral disc without myelopathy, lumbar sprain, bilateral medial epicondylitis, bilateral lateral epicondylitis, and bilateral sprain of elbow and forearm. Appellant stopped work on April 15, 2013 and did not return. He received wage-loss compensation and was placed on the periodic compensation rolls.

On April 18, 2013 Dr. Patrick L. Gleason, a Board-certified neurosurgeon replaced a dorsal column stimulator generator that had been initially inserted seven years previously.[3]

In October 2013, OWCP referred appellant to Dr. James E. Butler, a Board-certified orthopedic surgeon, to determine his work capacity. In an October 14, 2013 report, Dr. Butler noted a past medical history of back injury in 2001. He provided extensive physical examination findings and diagnosed failed back syndrome, bilateral L5 radiculopathy, and painful elbows, probably inflammatory. Dr. Butler advised that appellant was able to work modified duty with permanent restrictions.

On October 16, 2013 appellant came under the care of Dr. Michael McLeod, Board-certified in physical medicine, rehabilitation, and pain medicine. Dr. McLeod noted a past history of lumbar fusion and decompression from L4 to S1. Following physical examination, he diagnosed chronic pain syndrome, long-term use of medication, depression, anxiety disorder, insomnia, lumbar root lesion, and postlaminectomy syndrome.

In a December 31, 2013 report, Dr. James D. Key, an attending Board-certified orthopedic surgeon, noted his disagreement with Dr. Butler's report. He indicated that he did not think it was safe for appellant to work while taking medication.[4]

OWCP found that a conflict had been created regarding appellant's work capabilities and referred him to Dr. Charles W. Kennedy, Jr., Board-certified in orthopedic surgery, for an impartial evaluation. In a March 24, 2014 report, Dr. Kennedy noted a significant lower back

[3] A May 15, 2013 computerized tomography (CT) scan of the lumbar spine demonstrated status post fusion and decompression from L4 to S1 and no significant disc bulges, extrusions, or spinal canal stenosis.

[4] Dr. Key had provided a previous report dated April 9, 2013 on which OWCP had relied in accepting appellant's claim.

history with two prior surgeries. He reported physical examination findings and advised that appellant was unable to work, noting that he was taking inappropriate and excessive pain medication. Dr. Kennedy recommended psychological testing.

On May 18, 2014 Dr. Ryan B. Thomas, a Board-certified orthopedist, began treating appellant's bilateral elbow pain. He described upper extremity physical examination findings and diagnosed bilateral lateral and medial epicondylitis.

Dr. Thomas Martens, an osteopath, prepared an impairment evaluation on June 10, 2014.

On September 2014 OWCP referred appellant to Dr. Jairo A. Fuentes, a Board-certified physiatrist, for a second opinion evaluation to determine appellant's current work capacity. In a September 19, 2014 report, Dr. Fuentes noted appellant's history of back problems dating back to 1999 with subsequent surgeries. He described physical examination findings and diagnosed tendinitis and synovitis of both elbows, status post lumbar fusion, and chronic pain syndrome, lumbar spine. Dr. Fuentes advised that appellant's chronic pain syndrome was due to failed back surgery and subsequent infection at the site of implantation of a stimulator battery. He also found a great deal of functional overlay and advised that appellant was taking too many narcotic analgesics without significant benefit and recommended appropriate medication.

On May 11, 2015 OWCP again referred appellant to Dr. Walter A. Del Gallo, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine appellant's current work capacity.[5] In a report dated May 28, 2015, Dr. Del Gallo noted his review of the medical record, the accepted conditions, and the physical requirements of appellant's date-of-injury job. He described a preexisting lower back condition with prior surgeries and a problematic spinal cord stimulator implantation which had been removed. Dr. Del Gallo noted appellant's use of significant opioid medication. He reported physical examination findings of diffuse tenderness in both elbows including the medial and epicondylar areas, lumbar paraspinal tenderness, restricted lumbar range of motion, and pain with straight leg raising bilaterally, both seated and supine. Motor strength was 5/5 and symmetrical in all extremities, and sensation to light touch was intact and symmetrical in all extremities.

Dr. Del Gallo opined that appellant's lumbar spine problems were clearly preexisting. He advised that there was insufficient evidence to support that appellant's job duties caused the diagnosed bilateral medial and lateral epicondylitis, noting that the symptoms were unimproved even though appellant had ceased work two years before. Dr. Del Gallo explained that appellant's lack of response to any treatment for these conditions supported the lack of these diagnoses. He advised that appellant's pain was due to preexisting conditions and was not work related.

In answer to specific OWCP questions, Dr. Del Gallo advised that the accepted work-related conditions had resolved, noting the absence of displacement of a lumbar intervertebral disc on CT or physical examination, and no evidence of a lumbar sprain on physical examination. He indicated that both the elbow sprain and the bilateral medial and lateral

[5] The statement of accepted facts (SOAF) and the list of questions provided to the physician by OWCP set forth the conditions accepted by OWCP as employment related.

epicondylitis were not employment related. Dr. Del Gallo recommended that appellant be weaned off pain medication. He advised that, in regard to the accepted conditions, appellant could return to full duty as an aircraft mechanic, but that appellant would have significant restrictions due to his preexisting and concurrent conditions. On an attached work capacity evaluation (OWCP-5c form), Dr. Del Gallo advised that appellant had permanent restrictions and could not work eight hours daily.[6]

In an August 11, 2015 report, Dr. Martens noted his disagreement with Dr. Del Gallo's report. He acknowledged that appellant had a preexisting back condition, but opined that his job duties as an aircraft mechanic aggravated his back condition. Dr. Martens further opined that the epicondylitis and sprain diagnoses were also caused by appellant's work duties, and that he was only on one narcotic medication and had not seen pain management for quite some time. He advised that appellant was unable to return to work due to severe pain.

In October 2015, OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. Del Gallo and Dr. Martens regarding appellant's condition status, treatment opinions, and work capability.

A March 2, 2016 CT scan of the lumbar spine demonstrated hardware from previous surgery, moderate spinal stenosis at L2-3 with borderline spinal canal size at L3-4, and no acute abnormality otherwise identified.

On March 4, 2016 Dr. Martens requested that additional conditions be accepted. He noted the accepted conditions, reviewed some medical evidence, and recommended that chronic pain syndrome and major depressive disorder be added to the accepted conditions.

In a March 7, 2016 report, Dr. Ryan Potter, Board-certified in anesthesiology and pain medicine, noted appellant's complaint of mid-back, low-back, and bilateral leg pain. Following physical examination which included a positive straight-leg raising bilaterally, he diagnosed opioid dependence, low back pain, and radiculopathy. Dr. Potter recommended further studies.

On March 11, 2016 OWCP proposed to terminate appellant's wage-loss and medical benefits. It found that the weight of the medical opinion evidence rested with the opinion of Dr. Del Gallo who advised that appellant's work-related conditions had ceased and that he was no longer disabled due to the accepted conditions.[7]

In a treatment note dated April 4, 2014, a nurse practitioner working with Dr. Potter, noted the accepted conditions. She indicated that appellant was being scheduled for a caudal injection.

[6] The record also includes emergency department reports dated May 30 and June 1 and 3, 2015 noting that appellant was seen for a pilonidal cyst abscess.

[7] In correspondence dated March 17, 2016, OWCP notified appellant that a conflict in medical evidence had been created and referred him to Dr. Goran Jezic, a Board-certified physiatrist. The appointment was cancelled as the March 11, 2016 notice had been issued.

By decision dated April 18, 2016, OWCP terminated appellant's wage-loss and medical benefits, effective that day. It found that the weight of the medical evidence rested with the opinion of Dr. Del Gallo.

A report submitted on April 25, 2016 indicated that Dr. Potter performed a caudal epidural injection that day.

On April 22, 2016 appellant requested a hearing with OWCP's Branch of Hearings and Review.

At the hearing, held on December 7, 2016, counsel asserted that, as Dr. Del Gallo had not based his opinion on the accepted conditions listed in the SOAF, his opinion was insufficient to meet OWCP's burden of proof to terminate. He noted that Dr. Del Gallo indicated that the epicondylitis diagnoses could not be employment related and that the evidence did not establish a displaced disc. The hearing representative advised appellant to submit an updated medical opinion. Nothing further was submitted.

In a February 2, 2017 decision, an OWCP hearing representative found that the weight of the medical evidence rested with the opinion of Dr. Del Gallo and affirmed the April 18, 2016 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.[8] 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.[9]

ANALYSIS

OWCP accepted the conditions of displacement of lumbar intervertebral disc without myelopathy, lumbar sprain, bilateral medial epicondylitis, bilateral lateral epicondylitis, and bilateral sprain of elbow and forearm. Appellant stopped work on April 15, 2013, did not return, and was placed on the periodic compensation rolls. By decision dated April 18, 2016, OWCP terminated his wage-loss and medical benefits, effective that day. It found that the weight of the medical evidence rested with the opinion of Dr. Del Gallo, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for OWCP.

The Board finds that this case is not in posture for decision because Dr. Del Gallo's opinion was not consistent with the SOAF. Bilateral medial and bilateral lateral epicondylitis and lumbar disc displacement conditions had been accepted as work related.[10] It is well

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

[9] *Id.*

[10] *See Willa M. Frazier*, 55 ECAB 379 (2004).

established that a physician's opinion must be based on a complete and accurate factual and medical background. When OWCP has accepted an employment condition as occurring in the performance of duty, the physician must base his opinion on these accepted conditions.[11]

As noted, in his May 28, 2015 report, Dr. Del Gallo opined that appellant's lumbar spine problems were clearly preexisting and also advised that there was insufficient evidence to support that appellant's job duties caused the diagnosed bilateral medial and lateral epicondylitis. He indicated that appellant's pain was due to preexisting conditions and was not work related.

Medical opinions based on an incomplete or inaccurate history are of diminished probative value.[12] When OWCP has accepted an employment condition as occurring in the performance of duty, the physician must base his opinion on the accepted facts.[13]

In *Paul King*,[14] the Board found that the report of an impartial medical examiner who disregarded a critical element of the SOAF was of diminished probative value. In *King*, the impartial medical examiner also disagreed with the medical basis for acceptance of a condition. The Board found that this defective report was insufficient to resolve an existing conflict of medical opinion evidence.[15]

Dr. Del Gallo likewise disregarded the SOAF and, as in *King*, did not rely on the SOAF regarding the accepted conditions. The Board therefore finds his report to be of diminished probative value. The Board notes that it is the function of a medical expert to give an opinion only on medical questions, not to find facts.[16]

The Board therefore finds that Dr. Del Gallo's opinion is of limited value on the relevant issue in this case, and OWCP improperly relied on his opinion to terminate appellant's wage-loss compensation and medical benefits.[17]

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits on April 18, 2016.

[11] *V.C.*, Docket No. 14-1912 (issued September 22, 2015).

[12] *L.G.*, Docket No. 09-1692 (issued August 11, 2010).

[13] *J.H.*, Docket No. 16-0590 (issued September 12, 2016).

[14] 54 ECAB 356 (2003).

[15] *Id*.

[16] *Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

[17] In view of the Board's disposition of the first issue, it is not necessary to address the second issue.

ORDER

IT IS HEREBY ORDERED THAT the February 2, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 5, 2017
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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