United States Department of Labor
Employees' Compensation Appeals Board

L.J., Appellant	)	
and	)	**Docket No. 18-1426**
	)	**Issued: April 5, 2019**
DEPARTMENT OF AGRICULTURE, FOOD SAFETY & INSPECTION SERVICE, Boyden, IA, Employer	)	

Appearances:
Appellant, pro se
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 18, 2018 appellant filed a timely appeal from a January 19, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (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 has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 1, 2017, as he no longer had residuals or disability causally related to the accepted employment injury; and (2) whether appellant has met his burden of proof to establish continuing residuals or disability of his employment injury on or after May 1, 2017.

[1] 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On October 27, 2014 appellant, then a 58-year-old food inspector, filed an occupational disease claim (Form CA-2) alleging that he developed bilateral shoulder, elbow, and forearm pain and bilateral hand numbness due to his repetitive work duties. He noted that he first became aware of his claimed conditions and their relationship to his federal employment on June 1, 2013.

Appellant stopped work on October 27, 2014 and filed claims for compensation for leave without pay (CA-7 forms) commencing on that date. He claimed that the employing establishment could not accommodate his work restrictions.

By development letter dated October 29, 2014, OWCP informed appellant that the evidence of record was insufficient to support his claim. It advised him of the medical and factual evidence required and provided her with a questionnaire for completion. OWCP afforded appellant 30 days to submit the requested evidence.

By decision dated December 24, 2014, OWCP denied appellant's occupational disease claim, finding that, although he established that evidence supported the injury or events occurred as described, he had not submitted any medical evidence containing a firm medical diagnosis in connection with the accepted injury or events.

On January 8, 2015 appellant requested reconsideration.

OWCP received medical evidence, including reports dated December 9, 2013 and December 8 and 18, 2014 from Dr. Jeffrey S. Kalo, an attending orthopedic surgeon, who examined appellant and diagnosed, among other things, lateral epicondylitis and mild biceps tendinitis/tendinosis of the right elbow.

By decision dated February 11, 2015, OWCP modified its December 24, 2014 decision to find that the medical evidence of record was sufficient to establish a diagnosis of lateral epicondylitis and mild biceps tendinitis. However, the claim remained denied as causal relationship had not been established between the diagnosed medical conditions and the accepted employment factors.

Appellant requested reconsideration on March 16, 2015. He submitted narrative reports from Dr. Kalo dated January 12 and 16 and April 15, 2015 and an attending physician's report (Form CA-20) dated February 26, 2015. Dr. Kalo opined that appellant's right elbow lateral epicondylitis was causally related to his repetitive work duties.

OWCP, by decision dated May 14, 2015, vacated its February 11, 2015 decision and accepted appellant's claim for right-sided lateral epicondylitis. It paid him wage-loss compensation for temporary total disability on the supplemental rolls beginning October 27, 2014. Supplemental rolls payments continued through May 30, 2015. Effective May 31, 2015, OWCP transferred appellant to the periodic compensation rolls.

OWCP received additional reports dated April 15 and July 15, 2015 from Dr. Kalo, who advised that appellant continued to have right elbow epicondylitis. Dr. Kalo recommended that appellant undergo a functional capacity evaluation to determine his work restrictions.

By letter dated May 20, 2016, QTC Medical Services, OWCP's scheduling contractor, OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a set of questions, to Dr. Anthony C. Nwakana, a Board-certified orthopedic surgeon, for a second opinion to determine whether he had any continuing residuals, work restrictions, and need for medical treatment due to his accepted employment injury.

In a June 22, 2016 report, Dr. Nwakana indicated that on June 7, 2016 he reviewed the SOAF and medical record, including Dr. Kalo's reports and a December 18, 2014 magnetic resonance imaging (MRI) scan of appellant's right elbow. He discussed examination findings and diagnosed work-related tendinitis of the right elbow. Dr. Nwakana advised that appellant may have a slight residual of his work-related condition, but it was insignificant enough to warrant him being off work. The condition "appeared to have resolved between the time of the last day worked on October 31, 2014 to the examination on June 7, 2016." Dr. Nwakana determined that appellant had reached maximum medical improvement. He concluded that appellant could return to his food inspector position without limitations.

On August 4, 2016 OWCP determined that there was a conflict in medical opinion between Dr. Kalo and Dr. Nwakana as to whether appellant had any continuing residuals or disability due to the accepted employment condition.

On August 29, 2016 OWCP referred appellant together with a SOAF, the medical record, and a list of questions, to Dr. Paul A. Cederberg, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a September 29, 2016 report, Dr. Cederberg noted appellant's history and reviewed the SOAF and medical record, including the December 18, 2014 right elbow MRI scan. On examination, he reported that appellant was pleasant and in no acute distress. The right upper arm measured 13 inches in circumference compared to 12-1/4 inches on the left. The right forearm measured 11-3/4 inches compared to 11 inches on the left. Grip strength averaged 60 pounds on the right and 45 pounds on the left. The right elbow lacked 10 degrees of full extension and could flex to 135 degrees. The left elbow could fully extend to 0 degrees and flex to 135 degrees. There was normal pronation and supination. There was tenderness over the biceps insertion into the radius, the medial epicondyle, but nontender over the lateral epicondyle, and the triceps insertion into the right elbow. There was also generalized tenderness and trace effusion of the right elbow compared to the left. Provocation tests for lateral epicondylitis were negative. Circulatory, motor, and sensory examinations were otherwise intact. Reflexes at the triceps, biceps, and brachioradialis were brisk and symmetrical. Dr. Cederberg opined that appellant had a slight loss of full extension of the elbow, commonly found in individuals with primary osteoarthritis of the elbow. He had diffuse tenderness about the attachments and origins of the elbow tendons, but not over the lateral epicondyle. Dr. Cederberg noted that appellant's clinical findings were typical of someone with mild osteoarthritis to the right elbow, although he had no history of intra-articular trauma or injury. He opined that the accepted work-related condition of lateral epicondylitis was neither active nor causing any objective symptoms. Dr. Cederberg related that, at that time, appellant only had a mild lack of extension of the elbow and functional range of motion of the right elbow. Appellant's grip strength was elevated over that of the left, as expected. Dr. Cederberg found that appellant was not totally disabled from work. Appellant was capable of working with restrictions related to the use of his right arm. With respect to his reasoning for his

opinions, Dr. Cederberg indicated that appellant had no complaints of his work-related lateral epicondylitis. He found that this condition had resolved. Appellant had mild osteoarthritis of the right elbow unrelated to his lateral epicondylitis condition. Dr. Cederberg noted that osteoarthritis of the elbow was predominantly an age and genetically determined condition. In an accompanying work capacity evaluation (Form OWCP-5c) dated September 29, 2016, he indicated that appellant could perform his usual job and could work eight hours a day with permanent restrictions.

On March 16, 2017 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because he no longer had residuals or disability causally related to the accepted employment injury. It determined that the special weight of the medical evidence rested with the September 29, 2016 impartial medical report of Dr. Cederberg. OWCP afforded appellant 30 days to submit additional evidence or argument.

OWCP received a March 31, 2017 progress note from Dr. Grant W. Eyjolfson, Board-certified in family medicine. Dr. Eyjolfson noted a history of appellant's medical treatment, including his own, and appellant's chronic musculoskeletal complaints. He discussed examination findings and diagnosed tendinopathy/tear and/or medial/lateral epicondylitis of the right elbow causally related to appellant's accepted work-related injury. However, Dr. Eyjolfson related that he did not have any significant objective medical findings to indicate that the work-related condition was still active and causing symptoms. He explained that he did not have any occupational therapy or physical therapy consultations. Dr. Eyjolfson further explained that appellant had a rather benign examination. Some of appellant's symptoms seemed to be exaggerated on examination as he had some muscle twitching and spasm in the elbow that seemed unrelated and changed with distraction. Thus, Dr. Eyjolfson maintained that he could not comment if these types of residuals were specifically attributed to the work-related condition. He related that any improvement in appellant's symptoms would be related to him being off work and not being exposed to repetitive trauma. Dr. Eyjolfson again stated that it was difficult for him to comment as he had not been intimately involved in his medical care. Based on Dr. Kalo's notes, he advised that it was likely that appellant could only return to work with restrictions. He was not a surgical candidate at that time for the noted diagnoses. Dr. Eyjolfson further advised that by appellant's own story, he could return to part-time or full-time modified duties.

By decision dated May 1, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that same date. It found that the opinion of Dr. Cederberg as the impartial medical examiner (IME) constituted the special weight of the evidence and established that he no longer had any residuals or disability due to the accepted condition.

Appellant requested an oral hearing before an OWCP hearing representative on May 18, 2017. No additional medical evidence was submitted. A telephonic hearing was held on November 16, 2017.

By decision dated January 19, 2018, an OWCP hearing representative affirmed the termination of appellant's compensation benefits. He found that the special weight of the medical opinion evidence rested with the well-rationalized opinion of Dr. Cederberg, the IME, who found that appellant no longer had any residuals or disability from his accepted employment condition of right lateral epicondylitis.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify termination or modification of benefits.[2] OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.[3] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[4]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[5] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.[6]

Section 8123(a) of FECA provides that, 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.[7] The implementing regulations states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[8] In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME 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.[9]

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 1, 2017.

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[2] *See A.C.*, Docket No. 16-1670 (issued April 6, 2018); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[3] *See R.P., id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[4] *See R.P., supra* note 2; *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

[5] *See R.P., supra* note 2; *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

[6] *See R.P., supra* note 2; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake, id.*

[7] 5 U.S.C. § 8123(a).

[8] 20 C.F.R. § 10.321.

[9] *R.C.*, 58 ECAB 238 (2006); *Barry Neutuch*, 54 ECAB 313 (2003); *David W. Pickett*, 54 ECAB 272 (2002).

OWCP accepted that appellant sustained lateral epicondylitis of the right elbow causally related to his repetitive work duties. It paid him wage-loss compensation for total disability on the supplemental rolls from October 27, 2014 through May 30, 2015. Effective May 31, 2015, OWCP transferred appellant to the periodic compensation rolls.

OWCP later determined that a conflict in medical opinion arose between appellant's attending physician, Dr. Kalo, and Dr. Nwakana, an OWCP referral physician, regarding whether he had any further disability or residuals of his accepted employment injury. It properly referred him to Dr. Cederberg, a Board-certified orthopedic surgeon, for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a).

Where there exists 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.[10] The Board finds that the opinion of Dr. Cederberg is well rationalized and based on a proper factual and medical history. Dr. Cederberg accurately summarized the relevant medical evidence, provided detailed findings on examination, and reached conclusions about appellant's condition which comported with his findings.[11] In his September 29, 2016 report, he reviewed in detail the medical evidence of record. On examination, Dr. Cederberg found that appellant had a slight loss of full extension of the elbow, commonly found in individuals with primary osteoarthritis of the elbow. He further found that appellant had diffuse tenderness about the attachments and origins of the elbow tendons, but not over the lateral epicondyle. Dr. Cederberg noted that appellant's clinical findings were typical of someone with mild osteoarthritis to the right elbow, although he had no history of intra-articular trauma or injury. He opined that the accepted work-related condition of lateral epicondylitis had resolved. Dr. Cederberg further opined that appellant was capable of working with right arm restrictions, which he listed in his September 29, 2016 Form OWCP-5c. He reasoned that appellant only had a mild lack of extension of the elbow and functional range of motion of the right elbow and his grip strength was elevated over that of the left, as expected. Dr. Cederberg further reasoned that appellant had no complaints of his work-related lateral epicondylitis. He noted that appellant had mild osteoarthritis of the right elbow that was unrelated to his accepted lateral epicondylitis condition. Dr. Cederberg related that osteoarthritis of the elbow was predominantly an age and genetically determined condition. His findings and conclusions establish that appellant has no employment-related medical residuals or disability due to his accepted condition.

As Dr. Cederberg's September 29, 2016 report is detailed, well rationalized and based on a proper factual background, his opinion is entitled to the special weight accorded an IME.[12] OWCP, therefore, met its proof to terminate appellant's wage-loss compensation and medical benefits for the accepted condition of lateral epicondylitis of the right elbow.

[10] *See C.V.*, Docket No. 17-1159 (issued April 6, 2018); *J.M.*, 58 ECAB 478 (2007); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[11] *See C.V., id*; *Manuel Gill*, 52 ECAB 282 (2001).

[12] *See C.V.* and *J.M., supra* note 10; *Katheryn E. Demarsh*, 56 ECAB 677 (2005).

The medical evidence appellant submitted prior to the termination is insufficient to overcome the special weight accorded to Dr. Cederberg as an IME. While Dr. Eyjolfson, in his March 31, 2017 progress note, found that appellant had ongoing residuals of his accepted employment-related right elbow condition, his progress note was not well rationalized and, as he even explained, not based on objective medical evidence. A medical opinion which is not well rationalized and is not based on objective medical evidence is of limited probative value.[13]

Thus, the Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 1, 2017.

On appeal, appellant contends that OWCP's two consulting physicians did not review MRI scan results which established his epicondylitis condition and was confirmed by Dr. Kalo, Dr. Eyjolfson and Dr. Jonah H. Luzier, a physician specializing in diagnostic radiology. The Board notes that Dr. Nwakana and Dr. Cederberg each indicated in their reports that they reviewed the results of the December 18, 2014 right elbow MRI scan. Thus, contrary to appellant's contention, the opinions of Dr. Nwakana and Dr. Cederberg were based on a complete and accurate view of the medical record.[14]

LEGAL PRECEDENT -- ISSUE 2

Once OWCP meets its burden of proof to terminate appellant's compensation benefits, the burden shifts to the claimant to establish that he or she has continuing residuals or disability causally related to the accepted employment injury.[15] To establish causal relationship between the disability claimed and the employment injury, the employee must submit rationalized medical opinion evidence, based on a complete factual and medical background, establishing such causal relationship.[16]

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met his burden of proof to establish continuing residuals or disability of his employment injury after May 1, 2017.

Given the Board's finding that OWCP properly relied upon the opinion of Dr. Cederberg, the IME, in terminating compensation, the burden of proof shifted to appellant to establish that he remained entitled to compensation after that date.[17] The issue of whether appellant has established continuing disability following termination is a medical one, based on the medical evidence of record.[18] He did not, however, submit any additional medical evidence supporting continuing

[13] *See S.B.*, Docket No. 16-0933 (issued December 9, 2016); *A.C.*, Docket No. 11-1339 (issued March 9, 2012).

[14] *See L.G.*, Docket No. 15-1334 (issued January 28, 2016).

[15] *See C.V., supra* note 10; *A.C., supra* note 2; *George Servetas*, 43 ECAB 424, 430 (1992).

[16] *A.C., supra* note 2.

[17] *See supra* note11.

[18] *See P.C.*, Docket No. 16-1226 (issued March 23, 2017).

disability subsequent to OWCP's termination of his wage-loss compensation and medical benefits and thus failed to meet his burden of proof. Consequently, appellant has not established continuing employment-related disability after May 1, 2017.

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 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 1, 2017, as he no longer had any residuals or disability causally related to the accepted employment injury. The Board further finds that he has not met his burden of proof to establish continuing residuals or disability of his employment injury after May 1, 2017.

ORDER

IT IS HEREBY ORDERED THAT the January 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2019
Washington, DC

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

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

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