

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

M.C., Appellant)

and)

DEPARTMENT OF THE ARMY, IDAHO)
ARMY NATIONAL GUARD, Boise, ID,)
Employer)

**Docket No. 24-0901
Issued: October 22, 2024**

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
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On September 9, 2024 appellant filed a timely appeal from an August 2, 2024 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, effective August 2, 2024.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the August 2, 2024 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

FACTUAL HISTORY

On April 20, 2001 appellant, then a 32-year-old logistics management specialist, filed a traumatic injury claim (Form CA-1) alleging that on March 27, 2001 he developed lower back pain as he bent over a sink to retrieve his toothbrush from his shaving kit, which was located on the floor, when on a temporary-duty assignment while in the performance of duty. OWCP accepted the claim for lumbosacral joint ligament strain, and lumbar intervertebral disc displacement without myelopathy.³ It paid appellant wage-loss compensation on the supplemental rolls commencing October 21, 2002, and on the periodic rolls commencing January 8, 2003.

By decision dated July 11, 2006, OWCP reduced appellant's wage-loss compensation, effective August 22, 2005, based on its finding that he had actual earnings as a help desk representative in private employment with wages of \$360.00 per week. It continued to pay him wage-loss compensation on the periodic rolls based on his loss of wage-earning capacity (LWEC).

On February 14, 2024 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case record, and a series of questions, to Dr. James Olson, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of his accepted conditions.

In a March 5, 2024 report, Dr. Olson recounted his review of the SOAF and the medical record. He noted appellant's complaints of lumbar pain with bilateral lower extremity radiculopathy, and episodes of extreme muscle weakness greater in the left leg than the right. On physical examination, Dr. Olson reported slightly decreased sensation below the inguinal ligament bilaterally and involving all dermatomes below, decreased bilateral motor function, and chronic ulceration of the great right toe plantar surface. He explained that appellant's objective findings correlated with his subjective complaints. Dr. Olson diagnosed permanent lumbar spondylolysis aggravation; fusion of L3-S1 by way of multiple surgical procedures; lumbar spinal stenosis status post multiple decompressive procedures from L2 to L5; persistent bilateral lower extremity radiculopathy with compromise of muscular function and sensory function; presence of low back pain requiring application of a transcutaneous electrical nerve stimulation (TENS) unit. He opined that appellant continued to have residuals due to his accepted employment injuries. Dr. Olson concluded that if appellant's date-of-injury job was sedentary without any special physical demands he could return to that job. He explained that it was clear that appellant had been able to work in a sedentary job for many years since he continued to work as a substitute schoolteacher. Dr. Olson also completed a work capacity evaluation (Form OWCP 5c) wherein he indicated that appellant could not return to his date-of-injury position, but could perform sedentary work for eight hours a day. He related appellant's restrictions as 10-pound limitation on pushing, pulling and lifting; no climbing; and one hour of squatting and kneeling.

³ Appellant underwent a number of OWCP-authorized surgical procedures including a right and left L4-5 microscopic laminotomy and partial discectomy on February 19, 2002; posterior revision decompression with laminectomy, partial facetectomy and foraminotomies bilaterally at L4-5, posterior spinal fusion L4-5 and L5-S1 on March 12, 2014; removal of existing instrumentation from L4-S1, exploration of previous fusion mass from L4-S1, revision decompression with laminectomy partial facetectomy and foraminotomy bilaterally at L4, complete vaginal decompression with laminectomy, partial facetectomy and foraminotomy at L3, posterior spinal fusion at L3-4 and posterior instrumentation L3-4 on March 5, 2018; posterior lumbar decompression with laminectomy, partial facetectomy and foraminotomy at L2, revision decompression with partial laminectomy, facetectomy and foraminotomy at L3 on the right side, selective nerve root block right L3 on March 16, 2020.

On April 3, 2024 OWCP requested that Dr. Olson clarify whether or not based on his objective findings appellant could return to his date-of-injury position.

In a May 15, 2024 addendum report, Dr. Olson related a detailed summary of the duties and physical requirements of appellant's date-of-injury position. He explained that the position did not require significant physical demands, including lifting. While appellant had significant lower extremity deficits, Dr. Olson opined that these deficits would not preclude him from a sedentary job, such as the logistic management specialist position.

Based on Dr. Olson's reports, by decision dated June 6, 2024, OWCP expanded acceptance of his claim to include permanent aggravation of lumbar spondylolysis, permanent aggravation of lumbar spondylolisthesis, lumbar spinal stenosis, and lumbar radiculopathy.

By notice dated June 27, 2024, OWCP advised appellant that it proposed to terminate his wage-loss compensation based on Dr. Olson's opinion that he no longer had disability due to his accepted March 27, 2001 employment injury. It afforded him 30 days to respond.

In a July 12, 2024 reports, Kellan Kalbaugh, a physician assistant, noted appellant's medical history, reviewed diagnostic tests, and provided examination findings. He diagnosed lumbar radiculopathy and lumbar spondylosis.

By decision dated August 2, 2024, OWCP terminated appellant's wage-loss compensation effective that date based upon Dr. Olson's opinion that he could perform sedentary work. Specifically, Dr. Olson found that appellant's date-of-injury position was within his sedentary restrictions.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ Its 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, effective August 2, 2024.

⁴ See *H.S.*, Docket No. 24-0211 (issued April 5, 2024); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *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).

⁵ See *H.S., id.*; *D.B.*, Docket No. 17-1335 (issued January 5, 2018); *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

⁶ *H.S., id.*; *K.W.*, Docket No. 19-1224 (issued November 15, 2019); see *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

In a report dated March 5, 2024, Dr. Olson, OWCP's second opinion physician, related appellant's medical history and his current physical examination findings. He reported slightly decreased sensation below the inguinal ligament bilaterally and involving all dermatomes below, decreased bilateral motor function, and chronic ulceration of the great right toe plantar surface. Dr. Olson explained that appellant's objective findings correlated with his subjective complaints. He related that appellant had residuals of his employment injury and provided appellant's current diagnoses as permanent aggravation of lumbar spondylolysis; fusion of L3-S1 by way of multiple surgical procedures; lumbar spinal stenosis status post multiple decompressive procedures from L2 to L5; persistent bilateral lower extremity radiculopathy with compromise of muscular function and sensory function; presence of low back pain requiring application of a TENS unit. Dr. Olson opined that appellant could perform sedentary work and could perform his date of injury if it was sedentary without any special physical demands. He explained that appellant could work in a sedentary position given that he had worked in a sedentary job for a number of years as a substitute schoolteacher. In a May 15, 2024 addendum, Dr. Olson reviewed the duties and physical requirements of logistic management specialist and found it was within appellant's work restrictions. He explained that while appellant had significant lower extremity deficits, the position did not have significant physical requirements and was a sedentary position.

The Board finds that the opinion of Dr. Olson has reliability, probative value, and convincing quality with respect to its conclusion that appellant could return to his date-of-injury job. Dr. Olson reviewed the factual and medical history and accurately summarized the relevant medical evidence. He explained the medical rationale for his opinion, noting that appellant could perform his date-of-injury job, even given the residual deficits of his employment injuries. Accordingly, OWCP properly relied on Dr. Olson's second-opinion report in terminating appellant's wage-loss compensation.⁷

The remaining evidence submitted prior to OWCP's termination of appellant's wage-loss compensation is insufficient to overcome the weight accorded to Dr. Olson as the second-opinion physician.

The record contains a July 12, 2023 report from a physician assistant. This report is of no probative value, however, because physician assistants are not considered physicians as defined by FECA.⁸

The Board, therefore, finds that OWCP properly terminated appellant's wage-loss compensation, effective August 2, 2024.⁹

⁷ See *D.D.*, Docket No. 24-0201 (issued April 23, 2024); *P.B.*, Docket No. 21-0894 (issued February 8, 2023); *E.S.*, Docket No. 20-0673 (issued January 11, 2021); *K.W.*, *supra* note 6; *N.G.*, Docket No. 18-1340 (issued March 6, 2019); *A.F.*, Docket No. 16-0393 (issued June 24, 2016).

⁸ Section 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). See *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA). See also *R.D.*, Docket No. 21-0857 (issued August 20, 2024) (the reports of physician assistants and physical therapists do not constitute probative medical evidence as they are not physicians under FECA); *George H. Clark*, 56 ECAB 162 (2004) (physician assistants are not considered physicians under FECA).

⁹ *D.D.*, *supra* note 7; *D.G.*, Docket No. 17-0608 (issued March 19, 2018).

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective August 2, 2024.

ORDER

IT IS HEREBY ORDERED THAT the August 2, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 22, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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