

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

_____)
D.C., Appellant)

and)

U.S. POSTAL SERVICE, PEKIN POST)
OFFICE, Pekin, IL, Employer)
_____)

Docket No. 21-0780
Issued: December 22, 2021

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On March 17, 2021 appellant filed a timely appeal from a March 2, 2021 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.

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits and medical benefits, effective March 2, 2021, as she no longer had disability or residuals causally related to her accepted January 31, 1983 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board.² The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 3, 1983 appellant, then a 29-year-old distribution clerk, filed a traumatic injury claim (Form CA-1) alleging that on January 31, 1983 she sustained a low back injury when pushing overloaded trucks of newspapers while in the performance of duty. She stopped work on January 31, 1983 and intermittently returned to work thereafter. OWCP accepted the claim for acute lumbosacral strain and permanent aggravation of L4-5 degenerative disc disease.

In an August 18, 1987 decision, OWCP issued a formal loss of wage-earning capacity (LWEC) determination. It found that appellant's actual earnings as an insurance clerk effective April 22, 1985 fairly and reasonably represented her wage-earning capacity. OWCP reduced her wage-loss compensation finding that she had a 39 percent wage-earning capacity.

By decision dated August 28, 1997, OWCP modified the August 18, 1987 LWEC determination finding that appellant earned more in her position as a supervisor than in her prior position. It found that the supervisor position, effective August 7, 1989, fairly and reasonably represented her wage-earning capacity and was vocationally suitable. OWCP concluded that appellant had an 87 percent wage-earning capacity.

In a letter dated April 6, 2017, appellant advised OWCP that she was considering retiring as she would turn 64 on May 28, 2017. She, in e-mail correspondence dated April 12, 2017, informed OWCP that May 12, 2017 would be her last day of work due to her retirement. On June 21, 2017 appellant elected to receive FECA benefits in preference to Office of Personnel Management benefits.

On June 24, 2020 OWCP informed appellant that periodic medical reports were required for claimants receiving prolonged disability compensation to support any claims for continuing disability. It advised her regarding the information required to be included in the medical report and afforded her 30 days to provide this evidence.

In a progress note dated August 31, 2020, Dr. Thomas F. Gleason, a Board-certified orthopedic surgeon, noted appellant's history of injury and medical treatment. He advised that he had treated her since 2016 for cervical syndrome, cervical spondylosis, questionable lumbar radicular syndrome, and had last evaluated her on January 25, 2018. Under impression, Dr. Gleason diagnosed left lumbar questionable radicular syndrome with degenerative disc disease involving L1-2 and L3-5. A review of x-rays taken that day showed moderate-to-severe lumbar degenerative disc disease with disc space narrowing and spurring listhesis at right L3-4. Dr. Gleason noted no change since the prior August 10, 2017 x-rays. Next, he reviewed a July 11, 2016 lumbar magnetic resonance (MRI) scan which demonstrated L1-2, L3-5 severe degenerative disc disease with L1-2 inferiorly extruded disc with L2-3 and L4-5 moderate stenosis. In response to OWCP's June 24, 2020 letter, Dr. Gleason indicated that causal relationship between the

² Docket No. 85-0275 (issued February 26, 1985).

January 31 1983 employment injury and diagnosed conditions was based upon subjective complaints. He indicated that appellant's disability due to the January 31, 1983 employment injury was reflected by her low back and left lower extremity examination findings.

In an October 5, 2020 electromyograph (EMG), Dr. Igor Rechitsky, a neurologist, reported a normal bilateral lower extremity and lumbar paraspinal electrodiagnostic study. He found no evidence of lumbosacral radiculopathy.

On October 26, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Theodore J. Suchy, an osteopathic Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of her accepted January 31, 1983 employment injury.

A November 10, 2020 MRI scan of appellant's lumbar spine revealed progression in degree of S-shaped scoliosis, L1-2 central/left paracentral herniation, slightly progressed left foraminal stenosis, and progression of spondylosis.

In a report dated November 19, 2020, Dr. Suchy noted that he had reviewed the SOAF and appellant's medical record. He related that as a result of her January 31, 1983 employment injury she had sustained a lumbar strain, with lumbar myositis, and perhaps a temporary aggravation of some degenerative disc disease. Dr. Suchy provided physical examination findings and reported that appellant's current diagnoses were long standing lumbar and thoracic spondylosis with progressive degenerative scoliosis and degenerative disc disease, and no evidence of lumbar radiculopathy. He opined that her condition was unrelated to her work injury 30 years ago and instead was a natural progression of her thoracolumbar degenerative disc disease, he added that this progression was "in no way initiated or accelerated by the injury in 1983." Dr. Suchy concluded that appellant had no disability due to the January 31, 1983 work injury. In an attached work capacity evaluation (Form OWCP-5c) form of even date, he advised that she was capable of performing sedentary work with restrictions.

On December 16, 2020 OWCP issued a notice, proposing to modify the August 28, 1987 LWEC determination based on Dr. Suchy's opinion that appellant no longer had disability due to the accepted January 31, 1983 employment injury. It advised her that it recommended to reduce her compensation to zero and that no further medical treatment be approved as she no longer had disability or residuals causally related to the January 31, 1983 employment injury.

By notice dated January 25, 2021, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because she no longer had disability or residuals causally related to her accepted January 31, 1983 employment injury. It found that the weight of the medical evidence rested with Dr. Suchy, who found that she no longer had any disability or residuals due to the accepted January 31, 1983 employment injury. OWCP afforded appellant 30 days to submit any opposing evidence. No additional evidence was received.

By decision dated March 2, 2021, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that day. It found that the weight of the medical opinion evidence rested with the November 19, 2020 report of Dr. Suchy who indicated that she

was neither disabled from work, nor had residuals as a result of her January 31, 1983 employment injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of compensation benefits.³ It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶ 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.⁷

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective March 2, 2021.

OWCP accepted the claim for acute lumbosacral strain and permanent aggravation of L45 degenerative disc disease. On October 26, 2020 it referred appellant, a SOAF, and a series of questions to Dr. Suchy for a second opinion evaluation. In his November 19, 2020 report, Dr. Suchy advised that appellant sustained a lumbar strain with lumbar myositis and perhaps a temporary aggravation of her degenerative disc disease due to the January 31, 1983 employment injury. He also concluded that her condition was chronic, had not been aggravated by the January 31, 1983 employment injury, and that her condition was the natural progression of her thoracolumbar spine degenerative disease disc disease, unrelated to the January 31, 1983 employment injury. Dr. Suchy found that appellant had no disability due to the January 31, 1983 employment injury.

³ *R.R.*, Docket No. 20-1653 (issued May 17, 2021); *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁴ *J.M.*, Docket No. 21-0071 (issued August 27, 2021); *T.S.*, Docket No. 19-0476 (issued September 24, 2020); *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ *J.O.*, Docket No. 20-0519 (issued November 30, 2020); *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *M.R.*, Docket No. 20-0993 (issued August 27, 2021); *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁷ *M.E.*, Docket No. 20-0877 (issued August 17, 2021); *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

The Board finds that Dr. Suchy's report was inconsistent with the SOAF. OWCP accepted that appellant sustained a permanent aggravation of L4-5 degenerative disc disease due to the January 31, 1983 work injury. It is well 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.⁸ OWCP procedures and Board precedent dictate that when an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.⁹

As noted, in his November 19, 2020 report, Dr. Suchy found that appellant might have sustained a temporary aggravation of her degenerative disc disease, but not a permanent aggravation. He further found that the progression of appellant's degenerative condition was a natural progression "in no way initiated or accelerated by the injury in 1983." As Dr. Suchy did not rely on the SOAF regarding the accepted conditions, the Board finds his report to be of diminished probative value.¹⁰ Accordingly, the Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 2, 2021.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 2, 2021.

⁸ *G.B.*, Docket No. 20-0750 (issued October 27, 2020); *V.S.*, Docket No. 19-1792 (issued August 4, 2020); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990). See also *D.E.*, Docket No. 17-1794 (issued April 13, 2018); *K.V.*, Docket No. 15-0960 (issued March 9, 2016); *Paul King*, 54 ECAB 356 (2003).

¹⁰ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the March 2, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 22, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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