United States Department of Labor
Employees' Compensation Appeals Board

G.T., Appellant	)	
and	)	**Docket No. 18-1302**
	)	**Issued: October 22, 2019**
DEPARTMENT OF THE ARMY, MADIGAN ARMY MEDICAL CENTER, JOINT BASE LEWIS-McCHORD, WA, Employer	)	

Appearances:
Howard L. Graham, 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
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On June 18, 2018 appellant, through counsel, filed a timely appeal from a May 23, 2018 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.

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 2, 2017, as she no longer had

[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.*

residuals or disability causally related to her accepted employment injuries; and (2) whether appellant has met her burden of proof to establish residuals or disability causally related to her accepted employment injuries after October 2, 2017.

FACTUAL HISTORY

On April 13, 2011 appellant, then a 41-year-old assistant program manager, filed an occupational disease claim (Form CA-2) alleging that she sustained injuries to her upper extremities and neck due to her federal employment duties including typing on a computer and a hand-held device. She indicated that she first became aware of her alleged injury on June 1, 2008 and first realized its relation to her federal employment on September 1, 2010. Appellant stopped work on April 15, 2011.[3]

In July 2011 OWCP accepted appellant's claim for bilateral carpal tunnel syndrome and enthesopathy of the right wrist/carpus. On September 26, 2011 appellant underwent right carpal tunnel release surgery and, on January 16, 2012, she underwent left carpal tunnel release surgery. OWCP authorized both surgeries.[4]

Between 2012 and 2014 OWCP developed the medical evidence by referring appellant for multiple second opinion evaluations. Based on this development, it expanded the accepted conditions to include bilateral cubital tunnel syndrome, bilateral de Quervain's tenosynovitis, and a single episode of major depression (moderate-to-severe).[5]

In July 2016 OWCP referred appellant to Dr. Aaron Hunt, a Board-certified psychiatrist, for a second opinion examination and requested that Dr. Hunt provide an opinion regarding whether appellant continued to have residuals of her accepted employment-related emotional condition, a single episode of major depression (moderate-to-severe).[6]

In an August 23, 2016 report, Dr. Hunt discussed appellant's history of emotional problems and reported the findings of his psychological evaluation. He indicated that, during the evaluation, appellant related her emotional problems to her belief that she had worked in a hostile work environment at the employing establishment. Dr. Hunt reported that her speech demonstrated normal rate, volume, and articulation, and that her cognitive presentation was intact. He noted that appellant briefly exhibited tearfulness when discussing issues during the evaluation, but that she otherwise maintained a fairly neutral mood. Dr. Hunt advised that appellant was a poor historian

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[3] Appellant retired from federal service effective February 23, 2012.

[4] OWCP paid appellant wage-loss compensation on the daily rolls commencing April 15, 2011 and on the periodic rolls commencing January 15, 2012.

[5] As part of a second opinion examination in mid-2013, OWCP provided the OWCP referral physician with a copy of a surveillance video, obtained by the employment establishment on June 24, 2013, which showed appellant holding a mobile phone and typing on it. Counsel, on behalf of appellant, requested a copy of the surveillance video and, in January 2014, counsel received a copy for inspection.

[6] OWCP provided Dr. Hunt with a document entitled, "questions to the second opinion examiner," which posed 13 questions for him to answer regarding appellant's emotional condition.

regarding her psychological condition and he indicated that her conversation was driven by her own concerns.

Under the Axis I category, Dr. Hunt diagnosed a single episode of major depressive disorder (moderate-to-severe, administratively accepted), which had resolved with regard to the industrial injury; adjustment disorder with depressed and anxious mood, unrelated, primarily related to occupational factors; pain disorder, associated with psychological factors, unrelated; and rule out factitious disorder versus malingering. Under the Axis II category, he noted that he was deferring a diagnosis and indicated, "Though I would recommend that [sic] either the MMPI (Minnesota Multiphasic Personality Inventory) [or] Millon testing to address underlying psychological dysfunction. Clarification would be related, because it would help clarify Axis I diagnoses." Dr. Hunt indicated that the only way to relate appellant's major depression to the accepted employment injuries would be to relate it to an actual existing physical injury, and he advised that the evidence of record no longer showed that such an injury existed.[7] He determined that appellant could return to her regular work from a psychiatric standpoint and advised that any depression or psychiatric dysfunction she was experiencing was not due to the accepted industrial injury.

In a September 8, 2016 work capacity form (Form OWCP-5c), Dr. Hunt checked a box marked "Yes" indicating that appellant could perform her usual job, and he added the notation, "Psychiatrically, related to the injury, yes."

In a September 13, 2016 letter to Dr. Hunt, OWCP noted that he had indicated in his August 23, 2016 report that he was deferring an Axis II diagnosis and was recommending that either MMPI or Millon testing be performed in order to address appellant's underlying psychological dysfunctions. It requested that Dr. Hunt proceed with such testing and, after completion of the testing, to "revisit your responses to the 13 questions posed in this case and please revise any response as needed."

The findings of October 5, 2016 upper extremity electromyogram and nerve conduction velocity (EMG/NCV) testing contained an impression of mild residual bilateral carpal tunnel syndrome (median nerve entrapment at the wrists) affecting sensory components and no electrodiagnostic evidence of bilateral cubital tunnel syndrome.

In April 2017 OWCP referred appellant to Dr. Eric Rudd, a Board-certified orthopedic surgeon, for a second opinion examination and requested that Dr. Rudd provide an opinion regarding whether appellant continued to have residuals or disability causally related to her accepted upper extremity injuries.[8]

In a May 22, 2017 report, Dr. Rudd discussed appellant's factual and medical history and noted that she complained of pain in her neck and multiple locations in her upper and lower

[7] Dr. Hunt indicated that appellant's belief that she had adversarial relationships with supervisors appeared to be the primary reason she "sustained depressive illness over time."

[8] OWCP provided Dr. Rudd with a copy of June 2013 surveillance video.

extremities.[9] He reported physical examination findings and indicated that appellant's shoulder regions could barely be palpated due to exquisite trigger-point tenderness (right greater than left), particularly in the trapezial areas. Dr. Rudd characterized appellant's pain responses to testing as being more globally myofascial in origin than mechanical. Appellant could barely be palpated in any area of her upper extremities due to exquisite pain responses which were immediate in nature. Dr. Rudd could not identify true dermatomal or myotomal deficits in connection with these pain responses.[10] He reported that appellant exhibited diffuse tenderness in both elbows and forearms, and that she complained of diffuse right thumb pain extending into the first web space/thenar eminence which was not well localized in an anatomic structure.

Dr. Rudd concluded that appellant's employment-related bilateral carpal tunnel syndrome had resolved. He opined that appellant did not then have bilateral cubital syndrome because the most recent EMG/NCV testing had not shown the presence of the condition and the Tinel's sign testing he carried out produced pain, but no paresthesias. Dr. Rudd further found that appellant did not then have bilateral de Quervain's tenosynovitis because Finkelstein's sign testing yielded negative results and she exhibited tenderness in multiple soft tissue zones of the wrists rather than only in the first dorsal compartments. He also diagnosed fibromyalgia which he identified as the source of appellant's diffuse pain complaints, but he indicated that he did not believe this condition was related to her accepted employment injuries. Dr. Rudd noted that it was difficult to relate a widespread myofascial pain syndrome, such as fibromyalgia, to appellant's "structural injury/overuse on the job." He determined that, based on objective orthopedic findings, she could return to her regular duties as an assistant program manager without restrictions.[11] In a June 8, 2017 work capacity form (Form OWCP-5c), Dr. Rudd checked a box marked "Yes" indicating that appellant could perform her usual job without restrictions.

In a July 19, 2017 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she ceased to have residuals and disability causally related to her accepted employment injuries. It informed appellant that the proposed termination action was based on the opinions of Dr. Rudd and Dr. Hunt, OWCP's referral physicians. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed termination action.

In response, counsel argued in an August 14, 2017 document that Dr. Rudd and Dr. Hunt had not provided adequate medical rationale in their reports to explain why appellant ceased to have residuals or disability due to her accepted employment injuries.

By decision dated October 2, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective October 2, 2017, as she no longer had residuals or disability causally related to her accepted employment injuries. It found that the weight of the medical

[9] Dr. Rudd indicated that the June 2013 surveillance video showed appellant using a mobile phone and typing on it. He provided a summary of the medical evidence in the case record and noted that October 5, 2016 EMG/NCV testing contained an impression of mild residual bilateral carpal tunnel syndrome affecting sensory components.

[10] Dr. Rudd advised that Finkelstein's sign testing of appellant's wrists yielded negative results.

[11] Dr. Rudd also noted, "Based on her subjective complaints with widespread pains reaching 10/10, work will be problematic."

evidence with respect to employment-related residuals/disability rested with the well-rationalized opinions of Dr. Rudd and Dr. Hunt.

On October 23, 2017 appellant, through counsel, requested an oral hearing with a representative of OWCP's Branch of Hearings and Review.

During the hearing, held on February 14, 2018, counsel argued that the opinions of the OWCP referral physicians did not contain adequate medical rationale to support the termination of appellant's wage-loss compensation and medical benefits. Appellant testified that she continued to experience pain and weakness in her upper extremities and that she struggled with depression and anxiety.

Appellant subsequently submitted a February 6, 2018 report from Dr. Stephen Langer, a Board-certified psychiatrist, who opined that appellant continued to have residuals and disability causally related to her accepted employment-related single episode of major depression.

By decision dated May 23, 2018, OWCP's hearing representative affirmed the October 2, 2017 decision. She found that OWCP's October 2, 2017 termination action was proper and further found that, after that proper termination action, appellant had not met her burden of proof to establish entitlement to wage-loss compensation or medical benefits on or after October 2, 2017.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.[12] OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[13] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[14]

Section 8123(a) of FECA provides in pertinent part: "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."[15] In situations where there exist 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

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[12] *L.L.,* Docket No. 18-1426 (issued April 5, 2019); *C.C.,* Docket No. 17-1158 (issued November 20, 2018); *I.J.,* 59 ECAB 408 (2008); *Vivien L. Minor,* 37 ECAB 541 (1986).

[13] *A.D.,* Docket No. 18-0497 (issued July 25, 2018). In general, the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury. *See* 20 C.F.R. § 10.5(f).

[14] *See R.P.,* Docket No. 17-1133 (issued January 18, 2018).

[15] 5 U.S.C. § 8123(a).

specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16]

ANALYSIS -- ISSUE 1

The Board first finds that OWCP has met its burden of proof to terminate appellant's medical benefits, effective October 2, 2017, with respect to her accepted bilateral cubital tunnel syndrome and bilateral de Quervain's tenosynovitis, but has not met its burden of proof terminate her medical benefits, effective the same date, with respect to her accepted bilateral carpal tunnel syndrome and enthesopathy of the right wrist/carpus.

In his May 22, 2017 report, Dr. Rudd, an OWCP referral physician, provided an opinion that the accepted condition of bilateral cubital syndrome had resolved. He supported this opinion by explaining that October 5, 2016 EMG/NCV testing confirmed that appellant did not have such a condition and that his examination did not reveal objective signs of its existence. Dr. Rudd also explained that appellant no longer had bilateral de Quervain's tenosynovitis because the medical evidence of record did not contain objective findings confirming the existence of this condition.[17] Therefore, the Board finds that, with respect to continuing residuals of these conditions, the weight of the medical evidence is represented by the opinion of Dr. Rudd. Dr. Rudd provided a thorough factual and medical history, accurately summarized the relevant medical evidence, and provided medical rationale for his opinion that appellant had no continuing residuals of the accepted bilateral cubital tunnel syndrome and bilateral de Quervain's tenosynovitis.[18]

In addition, Dr. Rudd opined, without elaboration, that appellant's accepted condition of bilateral carpal tunnel syndrome had resolved. The Board finds, however, that he did not provide a clear explanation for this conclusion. Dr. Rudd acknowledged that the October 5, 2016 EMG/NCV testing contained an impression of bilateral carpal tunnel syndrome affecting sensory components, but he did not indicate when appellant's carpal tunnel condition had resolved or otherwise explain how these diagnostic findings comported with his opinion that the condition had resolved.[19] The Board further notes that Dr. Rudd did not provide an opinion regarding whether appellant continued to have residuals of the accepted enthesopathy of the right wrist/carpus and, therefore, OWCP has not presented a basis for its determination that appellant ceased to have residuals of this condition. For these reasons, the Board finds that OWCP has not met its burden of proof to terminate appellant's medical benefits with respect to her accepted bilateral carpal

[16] *D.M.,* Docket No. 18-0746 (issued November 26, 2018); *R.H.,* 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

[17] Dr. Rudd indicated that appellant's Finkelstein's sign testing yielded negative results and that she exhibited tenderness in multiple soft tissue zones of the wrists rather than only in the first dorsal compartments.

[18] *See W.C.,* Docket No. 18-1386 (issued January 22, 2019); *Melvina Jackson*, 38 ECAB 443 (1987) (regarding the importance, when assessing medical evidence, of such factors as a physician's knowledge of the facts and medical history, and the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion).

[19] In the physical findings portion of his May 22, 2017 report, Dr. Rudd indicated that bilateral Tinel's sign testing produced exquisite pain without a physiologic paresthesia response which would suggest active carpal tunnel syndrome, but he also noted that bilateral Phalen's sign testing was equivocal at best with respect to the presence of a carpal tunnel condition.

tunnel syndrome and enthesopathy of the right wrist/carpus, and she would be entitled to receive continuing medical benefits related to these conditions.

The Board further finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective October 2, 2017, with respect to her accepted upper extremity injuries. In his May 22, 2017 report, Dr. Rudd provided a comprehensive description of the symptoms related to appellant's upper extremities. He concluded that there were no objective medical findings in her upper extremities that would prevent her from returning to her regular work as an assistant program manager. Dr. Rudd explained that appellant's widespread upper extremity symptoms were subjective in nature and were related to the nonwork-related condition of fibromyalgia.[20] In his May 22, 2017 report, he provided a thorough factual and medical history, accurately summarized the relevant medical evidence, and provided medical rationale for his opinion that appellant had no continuing disability causally related to her accepted upper extremity injuries.[21]

On appeal counsel argues that Dr. Rudd did not provide adequate medical rationale to explain why appellant ceased to have residuals or disability on or after of October 2, 2017 due to her accepted upper extremity injuries. However, as detailed above, he provided a rationalized medical opinion supporting the termination of wage-loss compensation related to appellant's accepted upper extremity injuries and the termination of medical benefits related to her accepted bilateral cubital tunnel syndrome and bilateral de Quervain's tenosynovitis.

On appeal counsel also argues that the provision of June 2013 video surveillance to Dr. Rudd tainted his opinion on continuing employment-related residuals and disability. OWCP procedures provide that, once a surveillance video is provided to OWCP with a request that it be used in the management of the case, it becomes part of the official case record and a copy will be released to the claimant, if he or she requests it, just like any other portion of the case record. Its procedures make reference to *J.M.*,[22] a case in which the Board held that, if the claimant requests a copy of surveillance video, one should be made available and the claimant given a reasonable opportunity to comment regarding the accuracy of the recording.[23] The Board notes that, in the present case, appellant was provided an opportunity to view the June 2013 surveillance video and comment on it prior to the May 22, 2017 referral examination of Dr. Rudd. Counsel did, in fact, request a copy of the June 2013 surveillance video on behalf of appellant and, in January 2014, counsel received a copy for inspection.

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[20] The Board notes that OWCP has not accepted appellant's claim for fibromyalgia or a chronic pain condition, and the case record does not contain a rationalized medical opinion establishing the existence of such an employment-related condition. Although Dr. Rudd indicated that "work will be problematic" with appellant's widespread pain complaints related to fibromyalgia, he emphasized that these complaints were entirely subjective in nature.

[21] *See Melvina Jackson*, *supra* note 18. In addition, in a June 8, 2017 Form OWCP-5c, Dr. Rudd provided an opinion that appellant could perform her usual job without restrictions.

[22] 58 ECAB 478 (2007).

[23] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.9g (September 2010). *See also R.B.,* Docket No. 15-0420 (issued August 10, 2015) (citing the principle that, upon request, a claimant should be provided a reasonable opportunity to respond to the accuracy of video surveillance materials provided to a physician).

The Board further finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 2, 2017, with respect to her accepted single episode of major depression.

In his August 23, 2016 report, Dr. Hunt discussed appellant's history of emotional problems and reported the findings of his psychological evaluation. Under the Axis I category, he diagnosed a single episode of major depressive disorder (moderate-to-severe, administratively accepted), which had resolved with regard to the industrial injury; adjustment disorder with depressed and anxious mood, unrelated, primarily related to occupational factors; pain disorder, associated with psychological factors, unrelated; and rule out factitious disorder versus malingering. Under the Axis II category, Dr. Rudd noted that he was deferring a diagnosis and recommended that appellant undergo MMPI or Millon testing to address her underlying psychological dysfunction. He indicated, "Clarification would be related, because it would help clarify Axis I diagnoses."[24]

In September 2016 OWCP determined that additional development of the medical evidence was necessary with respect to appellant's emotional condition. It requested that Dr. Hunt proceed with the psychological testing he recommended in his August 23, 2016 report. OWCP further requested that, after completion of the testing, he revisit his responses to the questions it posed when it initially referred the case to him in July 2016.

However, Dr. Hunt did not provide a supplemental report per OWCP's development letter and there is no evidence in the case record that he conducted additional psychological testing. The Board finds that the further development of the medical evidence commenced by OWCP was necessary to clarify Dr. Hunt's August 23, 2016 report, particularly given his own indication that clarification was needed regarding appellant's Axis I diagnoses. The Board has previously indicated that OWCP shares responsibility in the development of the evidence.[25] Accordingly, once OWCP undertakes to develop the medical evidence further, it has the responsibility to do so in the proper manner.[26] Given the lack of completion of the above-described necessary development, the Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 2, 2017, with respect to her accepted single episode of major depression.[27]

[24] In his August 23, 2016 report, Dr. Hunt determined that appellant could return to her regular work from a psychiatric standpoint and advised that any depression or psychiatric dysfunction she was experiencing was not due to the accepted industrial injury. In a September 8, 2016 Form OWCP-5c, Dr. Hunt checked a box marked "Yes" indicating that appellant could perform her usual job, and he added the notation, "Psychiatrically, related to the injury, yes."

[25] *See D.V.,* Docket No. 17-1590 (issued December 12, 2018); *Russell F. Polhemus,* 32 ECAB 1066 (1981).

[26] *See A.K.,* Docket No. 18-0462 (issued June 19, 2018); *Robert F. Hart,* 36 ECAB 186 (1984).

[27] After OWCP's October 2, 2017 determination, appellant submitted a medical report relating to her emotional condition and, by decision dated May 23, 2018, OWCP found that she did not meet her burden of proof to receive wage-loss compensation or medical benefits on or after October 2, 2017. Given the Board's reversal of OWCP's termination action with respect to the accepted single episode of major depression, the second issue of the case is moot.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's medical benefits, effective October 2, 2017, with respect to her accepted bilateral cubital tunnel syndrome and bilateral de Quervain's tenosynovitis, but not with respect to her accepted bilateral carpal tunnel syndrome and enthesopathy of the right wrist/carpus. The Board further finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective the same date, with respect to her accepted upper extremity injuries, but has not met its burden of proof to terminate her wage-loss compensation and medical benefits with respect to her accepted single episode of major depression.

ORDER

IT IS HEREBY ORDERED THAT the May 23, 2018 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: October 22, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board