

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

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D.P., Appellant)

and)

U.S. POSTAL SERVICE, MOORESVILLE)
POST OFFICE, NORTHLAKE STATION,)
 Mooresville, NC, Employer)

) Docket No. 21-0534
) Issued: December 2, 2021
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Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 23, 2021 appellant filed a timely appeal from a February 18, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

¹ The Board notes that, following the February 18, 2021 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.*

² 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's entitlement to wage-loss compensation and medical benefits, effective February 28, 2021, as she no longer had residuals or disability causally related to her accepted April 30, 2018 employment injury.

FACTUAL HISTORY

On May 10, 2018 appellant, then a 42-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on April 30, 2018 she sustained a concussion with dizziness, nausea, blurry vision, cognitive and mental issues, sprained right wrist, sprained left knee, and sprained and bruised right ribs when a caster loaded with 12 trays fell onto her while she was loading her vehicle in the performance of duty. She stopped work on April 30, 2018. On August 30, 2019 OWCP accepted the claim for post-concussion syndrome and concussion without loss of consciousness. It paid appellant wage-loss compensation on the supplemental rolls as of June 13, 2018. Appellant returned to full-duty work on October 20, 2018.

On October 7, 2019 appellant filed a notice of recurrence (Form CA-2a) alleging a recurrence of total disability beginning October 1, 2019. She described continuing post-concussion syndrome with migraines and triangular fibrocartilage complex tear of the right wrist due to her accepted April 30, 2018 employment injuries. Appellant provided hospital records from October 10 through 11, 2019 noting treatment for speech difficulty and possible transient ischemic attack (TIA).

On October 29, 2019 OWCP accepted appellant's recurrence claim for the conditions of sprain of the right wrist, post-concussion syndrome, and concussion without loss of consciousness. It paid her wage-loss compensation on the supplemental rolls as of October 1, 2019 and on the periodic rolls as of October 20, 2020.

On November 5, 2019 Dr. Mark R. McGinnis, a Board-certified orthopedic surgeon, released appellant to return to light-duty work with restrictions of no lifting, pushing, or pulling more than five pounds due to her accepted right arm condition. He diagnosed diffuse pain in the right upper extremity and right wrist injury. Dr. McGinnis found that appellant's upper extremity dysfunction and symptoms did not have any clear anatomic or physiologic explanation.

In a November 27, 2019 note, Dr. Krzysztof Romanowski, neurologist, reported appellant's history of injury on April 30, 2018 and noted that she believed that she had lost consciousness. He examined her due to post-concussion syndrome with migraines as well as new symptoms of a pounding headache on the left side with difficulty speaking and a jerking movement in her upper body. Dr. Romanowski diagnosed migraine syndrome, episode of change in speech, and unspecified abnormal involuntary movements. On November 25, 2019 he limited appellant to working 6.5 hours per day 6 days a week.

On February 18, 2020 Dr. McGinnis completed a work capacity evaluation (Form OWCP-5c) and found that appellant could perform sedentary work with restrictions of lifting, pushing, and pulling, no more than five pounds on the right.

On February 24, 2020 Dr. Dawn Quashie, a Board-certified family practitioner, opined that appellant could perform sedentary work four hours per day due to her post-concussion syndrome. She provided a treatment note of even date and diagnosed post-concussion syndrome with dizziness and nausea.

On November 20, 2019 appellant accepted a light-duty position working four hours per day with restrictions.

On March 16, 2020 Dr. Quashie completed an OWCP-5c and found that appellant could perform sedentary work 8 hours per day with 5-minute breaks every 30 minutes.

On June 12, 2020 Dr. William Meadows, a physician Board-certified in family medicine, completed a Form OWCP-5c and advised that appellant was totally disabled due to right wrist sprain and post-concussion syndrome. In a treatment note dated July 15, 2020, he described her history of injury. Dr. Meadows reported worsening paresthesia left lower leg and foot, bowel/bladder incontinence, lower back pain, neck pain, headaches, memory loss, and diplopia. He listed that appellant's accepted conditions of sprain of the right wrist and post-concussion syndrome. On physical examination, Dr. Meadows noted that she denied vertigo or gait disturbance. He found poor convergence in appellant's eyes and that she was unable to focus for extraocular movement. Dr. Meadows also reported that she was unable to complete finger to nose, heel to shin or Romberg tests, and that she was unable to walk on her heels or toes. During his psychological evaluation, he observed that while being questioned appellant exhibited pressured speech, stuttering responses, and nonlinear thought progression. Dr. Meadows also noted that she made poor eye contact, was unable to remember three key words, and was unable to calculate 101-5. He determined that appellant had abnormal neurological and psychological examinations.

On November 20, 2020 OWCP referred appellant, a statement of accepted facts, and a list of questions to Dr. Gerard M. Gerling, a Board-certified neurologist, for a second opinion evaluation.

In a December 14, 2020 report, Dr. Gerling described appellant's April 30, 2018 employment injury and her description of continuing symptoms of widespread pain, headaches, cognitive impairment, memory impairment, light sensitivity, double vision, right wrist pain, disequilibrium, difficulty concentrating, falls, and lack of coordination. He reviewed imaging studies and found no cerebral injury or post-traumatic change involving the head or spine. Dr. Gerling performed a physical examination and found no cervical or lumbar spasms, no focal weakness, normal reflexes, no facial asymmetry, and normal speech, hearing, and eye movements. He found no evidence of a neurological or spinal injury and no evidence of any condition caused by the incident that required neurological investigation or intervention. Dr. Gerling opined that appellant had no work restrictions and that she had reached maximum medical improvement. He completed a Form OWCP-5c and indicated that she was capable of performing her usual job without restrictions.

On January 13, 2021 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Gerling's opinion that the April 30, 2018 accepted conditions had ceased without residuals or disability. It afforded her 30 days to submit additional evidence or argument challenging the proposed termination.

Appellant resubmitted the October 10 through 11, 2019 hospital records regarding her speech difficulties and possible TIA.

By decision dated February 18, 2021, OWCP terminated appellant's entitlement to wage-loss compensation and medical benefits effective February 28, 2021 based on Dr. Gerling's second opinion report.

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.³ 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.⁴ Its 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

Section 8123(a) 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.⁸ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.⁹

³ See *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).

⁴ 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).

⁵ See *R.P.*, *id.*; *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ See *R.P.*, *id.*; 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁷ See *R.P.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake*, *id.*

⁸ 5 U.S.C. § 8123(a); *G.F.*, 20-0497 (issued May 20, 2021); *B.S.*, Docket No. 19-0711 (issued October 17, 2019); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994); see also *G.B.*, Docket No. 16-0996 (issued September 14, 2016) (where the Board held that OWCP improperly terminated the claimant's wage-loss compensation and medical benefits as there was an unresolved conflict of medical opinion between her treating physician and a second opinion specialist).

⁹ *S.S.*, Docket No. 19-1658 (issued November 12, 2020); *C.W.*, Docket No. 18-1536 (issued June 24, 2019).

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's entitlement to wage-loss compensation and medical benefits, effective February 28, 2021.

In his July 15, 2020 note, Dr. Meadows described appellant's accepted employment incident and accepted conditions. On physical examination he found poor convergence in her eyes and that she was unable to focus for extraocular movement. Dr. Meadows also reported that appellant was unable to complete finger to nose, heel to shin or Romberg tests and that she was unable to walk on her heels or toes. During his psychological evaluation, he observed that she exhibited pressured speech, stuttering responses, and nonlinear thought progression while being questioned. Dr. Meadows also noted that appellant made poor eye contact, was unable to remember three key words, and was unable to calculate 101-5. He determined that she had abnormal neurological and psychological examinations and found that she was totally disabled from work.

In his December 14, 2020 report, Dr. Gerling described the April 30, 2018 employment injury and reported that findings on examination were normal. He opined that the accepted work-related conditions had resolved, that appellant could return to regular-duty work without restrictions, and that there was no need for further medical treatment.

The Board finds that there is an unresolved conflict of medical evidence between the findings and opinions of Dr. Meadows and Dr. Gerling as to whether appellant continued to experience disability and medical residuals as a result of her April 30, 2018 accepted employment injuries. As OWCP should have referred her for an impartial medical evaluation to resolve the conflict prior to a termination of wage-loss compensation and medical benefits, OWCP did not meet its burden of proof.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's entitlement to wage-loss compensation and medical benefits, effective February 28, 2021.

ORDER

IT IS HEREBY ORDERED THAT the February 18, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 2, 2021
Washington, DC

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

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

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