

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

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E.S., Appellant)	
)	
and)	Docket No. 20-0673
)	Issued: January 11, 2021
DEPARTMENT OF THE ARMY, MILITARY)	
ENTRANCE PROCESSING STATION,)	
Miami, FL, Employer)	
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Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 5, 2020 appellant, through counsel, filed a timely appeal from a December 31, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

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.*

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 June 6, 2019, as she no longer had residuals or disability causally related to her accepted August 17, 2017 employment injury.

FACTUAL HISTORY

On August 21, 2017 appellant, then a 54-year-old medical technician, filed a traumatic injury claim (Form CA-1) alleging that on August 17, 2017 she injured her left hip and lower back when she fell off a right leg scooter that she was riding due to a nonwork-related right ankle injury while in the performance of duty. She stopped work on the date of injury.

By decision dated October 2, 2017, OWCP accepted appellant's claim for sprain/strain of the thoracic spine, lateral epicondylitis of the right elbow, sprain of the right elbow, lumbar spine, and pelvis, unspecified sprain of the left hip, and strain of the muscle of the fascia and tendon of the left hip. On January 11, 2018 it expanded the acceptance of her claim to include other sprain of the left shoulder joint. Appellant received wage-loss compensation on the periodic rolls beginning April 29, 2018.

Appellant returned to part-time limited-duty work on July 31, 2018. She stopped work again on August 8, 2018 when the employing establishment withdrew her limited-duty work assignment because it was unable to accommodate her work restrictions.

In letters dated January 7 and 8, 2019, OWCP requested that Dr. Yukhanan Benjamin, appellant's attending family practitioner, provide an opinion as to whether, she had any continuing residuals or continuing disability resulting from her August 17, 2017 employment injury. It afforded him 30 days to respond. No response was received.

On January 30, 2019 OWCP referred appellant, together with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of her August 17, 2017 employment injury.

In a February 12, 2019 medical report, Dr. Millheiser noted his review of the SOAF and the medical evidence of record. He described the August 17, 2017 employment injury and noted that appellant's claim was accepted for thoracic, right elbow, lumbar, left hip, and left shoulder sprains, and right lateral epicondylitis. Dr. Millheiser noted her current complaints of right elbow, left hip, back, left shoulder, and right lower extremity pain. Upon examination of the thoracic spine, he noted moderate restriction of motion. There were no spasms, tenderness, or trigger points. Upon examination of the lumbar spine, Dr. Millheiser reported moderate restriction of motion. There was no tenderness, spasms, or trigger points. Lumbar lordosis was normal. Dr. Millheiser indicated that appellant was using a back support which was removed for the purpose of his examination. Appellant had normal ability to get on and off the examining table. She limped slightly on the right. There was no atrophy in the lower extremities. Motor and sensory examinations in the lower extremities were normal. Knee and ankle reflexes were intact. Straight leg raising was negative sitting and positive at 10 degrees bilaterally when appellant was supine

and asked if there was pain. Various Waddell findings were positive, including a Patrick's sign, axial rotation, and log rolling of the legs with appellant supine on the bed and asked if this caused pain.

Upon examination of appellant's left shoulder, Dr. Millheiser found significantly restricted motion compared to what was found by her treating physician. He reported range of motion measurements, observing 70 degrees of abduction, 60 degrees of flexion, 60 degrees of external rotation, 40 degrees of internal rotation, 10 degrees of adduction, and 20 degrees of extension. There was pain with any motion of the shoulder so impingement testing and O'Brien testing were positive. There was no atrophy in the upper extremities. There was no shoulder tenderness, crepitus, or instability. The right shoulder had full range of motion and no tenderness or crepitus. Appellant complained about severe left hip pain and groaned with any motion of the left hip. She had restricted motion of the hip, observing 90 degrees of flexion, 0 degrees of extension, 20 degrees of abduction, and 10 degrees of adduction. Appellant was vaguely tender about the hip. There were no localizing signs. Any motion of the hip caused pain and this included impingement testing. Dr. Millheiser indicated that x-rays of the lumbar spine showed slight narrowing of the L5-S1 disc space. X-rays of the hips and left shoulder were negative.

Dr. Millheiser diagnosed left shoulder tendinopathy, lumbar sprain, right elbow sprain with prior lateral epicondylitis, and left hip degenerative arthritis. In response to questions posed by OWCP, he reported that appellant had no significant objective findings of residuals of her accepted conditions. Dr. Millheiser explained that range of motion was under her voluntary control and that while there was apparently a small anterior labral tear noted on a magnetic resonance imaging (MRI) scan of the hip and appellant apparently was being treated for preexisting degenerative arthritis of the hip, there was no significant arthritis seen on x-rays performed during his examination and the hip MRI scan showed no significant arthritis and trochanteric bursitis. He noted that there was considerable evidence of an over-exaggeration of complaints. Dr. Millheiser also noted that, although appellant exhibited marked restriction of left shoulder motion, this was certainly far different than what she exhibited to her physicians. He noted that she may have sprained her left shoulder, but the sprain had resolved. Dr. Millheiser indicated that, by history, appellant may have had a right elbow sprain and that various examiners found tenderness of the lateral epicondyle, but there was no tenderness found on his examination. He maintained that she may have had a lateral epicondylitis that had apparently cleared. Dr. Millheiser advised that appellant had numerous findings of over-exaggeration regarding her lumbar spine condition. He maintained that her back sprain would have cleared relatively shortly after her work accident. Regarding appellant's left hip sprain, Dr. Millheiser noted that she had limited motion, but there was no significant limp on the left side. He would have expected a Duchenne limp if she had any significant arthritis and no arthritis was shown either on x-rays or MRI scans. Dr. Millheiser noted that appellant's thoracic spine condition had returned to baseline. He determined that she had previously reached maximum medical improvement (MMI) related to her August 17, 2017 employment injury. Dr. Millheiser opined that appellant had no residuals of her accepted conditions and that she was capable of performing her full work duties with no restrictions, eight hours per day. He further opined that no further medical treatment was needed. In a February 12, 2019 work capacity evaluation (Form OWCP-5c), Dr. Millheiser reiterated his opinion regarding appellant's work capacity.

By notice dated April 12, 2019, OWCP advised appellant that it proposed to terminate her entitlement to wage-loss compensation and medical benefits based on Dr. Millheiser's opinion that the August 17, 2017 accepted conditions had ceased without residuals or disability. It afforded her 30 days to submit additional evidence or argument challenging the proposed termination.

In a May 8, 2019 report, Dr. Benjamin noted a history of the accepted August 17, 2017 employment injury. He reported findings on physical examination and reviewed diagnostic test results. Dr. Benjamin noted that appellant's accepted conditions of left shoulder joint sprain, thoracic spine sprain/strain, unspecified right elbow and left hip sprains, lumbar-pelvis sprain, and strain of the muscle of the fascia and tendon of the left hip. He advised that she also sustained left shoulder supraspinatus tendinitis, right hand spontaneous rupture of the extensor tendon in multiple sites, sacroiliitis, anxiety, and depression as a result of her August 17, 2017 employment injury. Dr. Benjamin determined that appellant had reached MMI as of the date of his examination. He opined that she had residuals of her accepted work injury. Dr. Benjamin noted that appellant may have an exacerbation of her symptoms with activities of daily living which at that time may need to be reassessed. He indicated that she should continue psychiatric treatment for her depression and pain management.³ In a May 13, 2019 Form OWCP-5c, Dr. Benjamin indicated that appellant was unable to perform her usual job.

A May 15, 2019 Notification of Personnel Action (Standard Form 50) indicated that appellant resigned from the employing establishment effective that date as she sought medical disability retirement benefits.

OWCP, by decision dated June 5, 2019, finalized the termination of appellant's entitlement to wage-loss compensation and medical benefits, effective June 6, 2019, finding that the medical evidence submitted was insufficient to outweigh Dr. Millheiser's second opinion.

On June 19, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated December 31, 2019, an OWCP hearing representative affirmed the June 5, 2019 termination decision.

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

³ Additionally, in his May 8, 2019 report, Dr. Benjamin utilized the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) and determined that appellant had five percent permanent impairment of the left shoulder, two percent permanent impairment of the left hip, three percent permanent impairment of the right elbow, and three percent permanent impairment of the lumbar spine. A.M.A., *Guides* (6th ed. 2009).

⁴ See *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).

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

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁸

ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's entitlement to wage-loss compensation and medical benefits, effective June 6, 2019, as she no longer had residuals or disability causally related to her accepted August 17, 2017 employment injury.

OWCP referred appellant to Dr. Millheiser for a second opinion evaluation to determine the status of appellant's accepted conditions and work capacity. In his February 12, 2019 report, Dr. Millheiser described her August 17, 2017 employment injury and noted that her claim was accepted for thoracic, right elbow, lumbar, left hip, and left shoulder sprains, and right lateral epicondylitis. He indicated that appellant's physical examination revealed no objective findings of the accepted conditions. Dr. Millheiser opined that the accepted work-related conditions had resolved, that she could return to full-time full-duty work, and that there was no need for further medical treatment.

The Board finds that OWCP properly accorded the weight of the medical evidence to Dr. Millheiser. Dr. Millheiser based his opinion on a proper factual and medical history and physical examination findings and provided medical rationale for his opinion. He provided a well-rationalized opinion based on medical evidence regarding the accepted conditions causally related to appellant's August 17, 2017 employment injury. Accordingly, OWCP properly relied on Dr. Millheiser's second opinion report in terminating her entitlement to wage-loss compensation and medical benefits.⁹

The remaining evidence submitted is insufficient to overcome the weight afforded to Dr. Millheiser as the second opinion physician. Appellant submitted a May 8, 2019 report from Dr. Benjamin describing the accepted August 17, 2017 employment injury, noting her accepted

⁵ 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).

⁶ *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).

⁷ *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

⁸ *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

⁹ See *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).

conditions, providing examination findings, and reviewing diagnostic test results. Dr. Benjamin diagnosed left shoulder supraspinatus tendinitis, right hand spontaneous rupture of the extensor tendon in multiple sites, sacroiliitis, anxiety, and depression causally related to the August 17, 2017 employment injury. Additionally, he opined that appellant had residuals of her accepted injury, she was unable to perform her usual job, and continued medical treatment was needed. However, Dr. Benjamin did not provide medical rationale explaining the basis of his conclusory opinion and thus his opinion is insufficient to overcome the weight accorded to Dr. Millheiser. The Board finds, therefore, that OWCP properly terminated appellant's entitlement to wage-loss compensation and medical benefits, effective June 6, 2019.

On appeal counsel contends that OWCP failed to give due deference to the findings of the attending physician. However, Dr. Benjamin did not provide a rationalized opinion sufficient to establish that appellant continued to have residuals or disability causally related to the August 17, 2017 employment injury.

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 entitlement to wage-loss compensation and medical benefits, effective June 6, 2019, as she no longer had residuals or disability causally related to her accepted August 17, 2017 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the December 31, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 11, 2021
Washington, DC

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

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

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