

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

_____)
D.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Absecon, NJ, Employer)
_____)

**Docket No. 21-1129
Issued: April 19, 2022**

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, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 20, 2021 appellant filed a timely appeal from a May 7, 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.²

_____)
¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the May 7, 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.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 4, 2016, as he had no further disability or residuals of his accepted employment injuries.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision and order are incorporated herein by reference. The relevant facts are as follows.

On December 6, 2007 appellant, then a 40-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date he injured his back, neck, and right shoulder when he slipped and fell while in the performance of duty. OWCP accepted the claim, assigned OWCP File No. xxxxxx062, for lumbar sprain and a sprain of the right acromioclavicular (AC) joint of the right shoulder and upper arm. It subsequently expanded the acceptance of the claim to include right shoulder tendinitis. OWCP paid appellant wage-loss compensation on the supplemental rolls, effective January 20, 2008, and on the periodic rolls effective April 12, 2009.⁴

By decision dated May 11, 2012, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, as he no longer had disability or residuals due to his accepted December 6, 2007 employment injury.⁵

Appellant appealed to the Board. By decision dated July 12, 2013, the Board affirmed in part and reversed in part OWCP's May 11, 2012 termination decision.⁶ The Board found that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits for the accepted conditions of right shoulder and lumbar sprains, but it did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits for the accepted condition of right shoulder tendinitis.

On January 6, 2015 appellant received treatment at the emergency room for pain in his neck, right shoulder, and lumbar spine after a nonemployment-related motor vehicle accident (MVA).

³ Docket No. 13-0228 (issued July 12, 2013); *Order Remanding Case*, Docket No. 19-0279 (issued March 20, 2020).

⁴ OWCP had previously accepted that on May 22, 2003 appellant sustained a lumbosacral sprain, assigned OWCP File No. xxxxxx445.

⁵ By decision dated September 14, 2012, OWCP denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

⁶ *Supra* note 3.

By decision dated March 4, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, after finding that he had no further disability or residuals causally related to either the May 22, 2003 or December 7, 2007 accepted employment injuries.

On April 1, 2016 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 13, 2016. By decision dated September 2, 2016, OWCP's hearing representative affirmed the March 4, 2016 termination decision.

Appellant requested reconsideration. By decisions dated December 16, 2016 and March 20, June 30, and November 21, 2017, OWCP denied modification of its prior decisions.

On March 27, 2018 appellant underwent a right L4-5 and L5-S1 laminotomy, foraminotomy, and partial facetectomy. OWCP authorized the procedures under OWCP File No. xxxxxx445.

On June 5, 2018 appellant again requested reconsideration.

By decision dated November 9, 2018, OWCP denied modification of its November 21, 2017 decision.

Appellant appealed the November 9, 2018 decision to the Board.

Under OWCP File No. xxxxxx445, OWCP determined that a conflict existed between Dr. John T. Bannon, a Board-certified orthopedic surgeon and OWCP referral physician, and Dr. Abhijeet Rastogi, an anesthesiologist, regarding whether appellant's claim should be expanded in OWCP File No. xxxxxx445 to include additional conditions and whether a proposed lumbar facet joint surgery was medically necessary. It referred him to Dr. Ian B. Fries, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated January 17, 2020, provided under OWCP File No. xxxxxx445, Dr. Fries discussed appellant's history of injury and provided his review of the medical evidence. He diagnosed chronic low back pain with radiation to the right lower extremity consistent with degenerative spondylosis, right laminectomies and decompressions at L4-5 and L5-S1, a right rotator cuff repair and AC resection, a partial synovectomy of the right wrist, and symptom magnification and non-physiological findings. Dr. Fries advised that the additional diagnoses were not causally related to his accepted employment injury. He opined that OWCP should not expand the acceptance of the claim to include additional conditions and further found that surgery was not indicated. Dr. Fries determined the objective findings were insufficient to support that appellant was disabled from employment.

By order dated March 20, 2020, the Board set aside the November 9, 2018 decision.⁷ The Board noted that the record before the Board did not contain OWCP File No. xxxxxx445. The Board remanded the case for OWCP to administratively combine the current case, OWCP File

⁷ *Id.*

No. xxxxxx062, with OWCP File No. xxxxxx445 and determine appellant's disability status and entitlement to medical benefits under both claims.

OWCP administratively combined OWCP File No. xxxxx062 with OWCP File No. xxxxxx445, with the latter serving as the master file.

On March 31, 2021 OWCP requested that Dr. Fries address whether appellant's May 22, 2003 and December 6, 2007 employment injuries had resolved. It asked that Dr. Fries clarify the effect of the January 16, 2015 MVA on his condition. The accompanying SOAF of even date indicated that it superseded all prior versions. It described the May 22, 2003 employment injury and indicated that it had been accepted for lumbosacral sprain. The SOAF further noted that it had accepted lumbar sprain and right shoulder and upper arm AC joint sprain due to a December 6, 2007 employment injury.

On April 1, 2021 Dr. Fries reviewed the updated SOAF and noted that the only accepted condition was lumbosacral sprain. He opined that appellant had no residuals or need for further medical treatment due to the accepted May 22, 2003 and December 6, 2007 employment injuries. Dr. Fries asserted that the updated SOAF did not mention the December 6, 2007 employment injury and accepted conditions of lumbar, right shoulder, and upper arm sprains and, thus, concluded that "those injuries are no longer of issue." He indicated that at the time of his January 8, 2020 examination he had found that appellant's disability was "exaggerated and did not match objective findings." Dr. Fries found "insufficient objective findings to consider [appellant] incapable of duty as a rural carrier associate."

By decision dated May 7, 2021, under OWCP File No. xxxxxx062, OWCP terminated appellant's wage-loss compensation and medical benefits, effective March 4, 2016. It accorded Dr. Fries' opinion the special weight of the evidence as the IME and established that appellant had no further disability or residuals of his accepted December 6, 2007 employment injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁸ 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.⁹ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.¹¹ To terminate authorization for medical treatment, OWCP must

⁸ *R.H.*, Docket No. 19-1064 (issued October 9, 2020); *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

⁹ *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

¹⁰ *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

¹¹ *E.J.*, Docket No. 20-0013 (issued November 19, 2020); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.¹²

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 4, 2016.

On prior appeal the Board set aside OWCP's November 9, 2018 decision denying modification of its termination of appellant's wage-loss compensation and medical benefits. The Board remanded the case for OWCP to administratively combine OWCP File No. xxxxxx445 with the current claim, OWCP File No. xxxxxx062, and to reconsider whether appellant was disabled or had residuals of his accepted employment injuries.

Following the Board's remand, on March 31, 2021 OWCP prepared an updated SOAF and referred appellant to Dr. Fries for an opinion on whether appellant's employment-related injuries had resolved. The SOAF primarily set forth the May 22, 2003 employment injury under OWCP File No. xxxxxx445. Regarding the December 6, 2007 employment injury, it indicated that it had accepted lumbar sprain and right shoulder and upper arm AC sprain. OWCP did not include the accepted condition of right shoulder tendinitis.

Initially, the Board notes that Dr. Fries provided a second opinion evaluation rather than an impartial medical examination on the issue of whether appellant had any further employment-related disability or residuals of his accepted employment injuries. While OWCP had previously referred appellant to Dr. Fries to resolve a conflict in medical opinion regarding whether the acceptance of appellant's claim should be expanded in OWCP File No. xxxxxx445 to include additional conditions and on the issue of surgical authorization, there was no conflict in medical opinion on the issue of disability and continuing residuals at the time of OWCP's referral of appellant to Dr. Fries. Consequently, Dr. Fries' opinion is that of a second opinion physician rather than an IME.¹³

The Board finds that Dr. Fries' opinion is of diminished probative value as he relied upon a SOAF that was incomplete. On prior appeal the Board instructed OWCP to administratively combine OWCP File Nos. xxxxxx445 and xxxxxx062 and to reconsider whether appellant was disabled or had residuals of his accepted employment injuries. OWCP provided Dr. Fries with a SOAF dated March 31, 2021 that primarily discussed the May 22, 2003 employment injury in OWCP File No. xxxxxx445. Later in the SOAF it indicated that it had also accepted lumbar sprain and a sprain of the right AC shoulder joint due to a December 6, 2007 employment injury. It did not include the accepted condition of right shoulder tendinitis.

OWCP's procedures and Board precedent dictate that when an OWCP medical adviser, second opinion specialist, or impartial medical specialist renders a medical opinion based on a SOAF, which is incomplete or inaccurate or does not use the SOAF as the framework in forming

¹² *A.J.*, Docket No. 18-1230 (issued June 8, 2020); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹³ *See T.C.*, Docket No. 17-1741 (issued October 9, 2018); *R.H.*, Docket No. 17-1477 (issued March 14, 2018).

his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁴ The March 31, 2021 SOAF provided to Dr. Fries did not include all of the conditions accepted by OWCP due to his December 6, 2007 employment injury, an essential element of the SOAF according to OWCP's procedures.¹⁵ As Dr. Fries relied upon a SOAF that was incomplete, his opinion is of diminished probative value.¹⁶ Accordingly, the Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation effective March 4, 2016.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 4, 2016.

ORDER

IT IS HEREBY ORDERED THAT the May 7, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 19, 2022
Washington, DC

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

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

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

¹⁴ 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).

¹⁵ *Id.* at Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.5(f)(g) (September 2009).

¹⁶ *See supra* note 14; *D.C.*, Docket No. 21-0780 (issued December 22, 2021).