United States Department of Labor
Employees' Compensation Appeals Board

G.H., Appellant	)	
and	)	**Docket No. 20-1214**
	)	**Issued: December 16, 2022**
DEPARTMENT OF VETERANS AFFAIRS, W.G. (BILL) HEFNER VA MEDICAL CENTER Salisbury, NC, Employer	)	

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 May 12, 2020 appellant filed a timely appeal from January 22 and 27, 2020, and December 18, 2019 merit decisions of the Office of Workers' Compensation Programs (OWCP).[1]

[1] During the pendency of this appeal, OWCP issued two decisions, dated June 30 and November 24, 2020, which denied appellant's claims for an increased schedule award. It also issued four decisions, dated July 21 and December 14, 2020, July 15, 2021 and January 18, 2022, which denied modification of its January 27, 2020 wage-loss compensation claim decision. The Board and OWCP may not exercise simultaneous jurisdiction over the same issue(s). 20 C.F.R. §§ 501.2(c)(3), 10.626; *see J.W.*, Docket No. 19-1688, n.1 (issued March 18, 2020); *J.A.*, Docket No. 19-0981, n.2 (issued December 30, 2019); *Douglas E. Billings*, 41 ECAB 880 (1990). Consequently, OWCP's June 30 and November 24, 2020 decisions pertaining to appellant's schedule award claim and OWCP's July 21 and December 14, 2020, July 15, 2021, and January 18, 2022 decisions pertaining to wage-loss compensation claim are set aside as null and void.

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.[3]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish total disability from work for the period September 3, 2014 through October 11, 2017 causally related to her accepted employment conditions; (2) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits and medical benefits, effective October 13, 2019, as she no longer had disability or residuals causally related to her accepted February 3, 2013 employment injury; (3) whether appellant met her burden of proof to establish continuing disability or residuals on or after October 13, 2019 causally related to her accepted February 3, 2013 employment injury; and (4) whether appellant has met her burden of proof to establish more than seven percent permanent impairment of her left upper extremity and more than zero percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

FACTUAL HISTORY -- ISSUE 1

This case has previously been before the Board.[4] The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On February 3, 2013 appellant, then a 43-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained pain on the left side of her neck and left arm when she helped reposition a patient in a chair while in the performance of duty. She stopped work on February 4, 2013.[5] Appellant returned to limited-duty work on February 12, 2013 and resumed regular duty on June 6, 2013. OWCP initially accepted the claim for left shoulder acromioclavicular sprain. On January 31, 2014 it expanded the acceptance of the claim to include cervical herniated disc at C4-5. However, OWCP subsequently rescinded its acceptance of the cervical herniated disc condition by decision dated October 21, 2014.

[2] 5 U.S.C. § 8101 *et seq*.

[3] The Board notes that following the December 18, 2019 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*.

[4] Docket No. 16-0876 (issued May 2, 2017).

[5] The record reflects that appellant has other traumatic injury claims. This includes OWCP File No. xxxxxx924 for a traumatic injury of April 4, 2011; OWCP File No. xxxxxx292 for a traumatic injury date of May 5, 2012; and OWCP File No. xxxxxx968, for a traumatic injury date of March 9, 2015. Appellant's claims have not been administratively combined by OWCP.

On March 23, 2016 appellant, through counsel, appealed to the Board. By decision dated May 2, 2017, the Board reversed in part and affirmed in part OWCP's decisions.[6] The Board reversed OWCP's rescission of its acceptance of a cervical herniated disc at C4-5 and instructed that OWCP reopen the case for that condition. The Board also affirmed OWCP's termination of appellant's wage-loss compensation and medical benefits effective September 4, 2014 for the accepted left shoulder condition, and affirmed that appellant had not established continuing disability after September 4, 2014 due to her February 3, 2013 employment injury. The Board based its decision on the June 7, 2014 report of Dr. Alexander N. Doman, a Board-certified orthopedic surgeon serving as an OWCP second opinion physician. In his report, Dr. Doman had also opined that appellant's present condition represented the natural history of her underlying congenital and degenerative condition of the cervical spine for which she would have work restrictions. The Board noted that appellant had returned to work and on March 9, 2015 had alleged that she had reinjured her shoulder and neck, for which she filed a traumatic injury claim (Form CA-1) under OWCP File No. xxxxxx968. However, by decision dated May 7, 2015, OWCP denied that claim.

On October 12, 2017 appellant stopped work and underwent OWCP-authorized C4-5, C5-6, and C6-7 discectomy, bilateral foraminotomy, and fusion. OWCP paid appellant wage-loss compensation on its supplemental rolls commencing October 12, 2017 and on its periodic compensation rolls as of November 12, 2017. On August 6, 2019 it expanded the acceptance of appellant's claim to include displacement of cervical intervertebral disc without myelopathy at C4-C5, C5-6, and C6-7.

On December 10, 2018 appellant filed a claim for wage-loss compensation (Form CA-7) for disability from work for the period January 1, 2014 to November 1, 2017. In a December 11, 2018 letter, OWCP explained that her wage-loss compensation claim would only be considered for the period September 3, 2014 through October 11, 2017.[7] It noted that appellant was presently in receipt of compensation, which had commenced on October 12, 2017, and that it had previously denied wage-loss compensation for the period November 7, 2013 through January 9, 2014, as well as for the period January 27 through September 2, 2014 in its respective decisions of February 4, 2014 and August 2, 2017. OWCP requested that appellant provide contemporaneous medical evidence for the accepted conditions which supported disability from work for the period claimed.

Evidence received from November 7, 2013 through October 29, 2018 included medical treatment notes and records and medical authorization requests from various physicians and diagnostic tests, including July 23, 2014 and March 2, 2017 magnetic resonance imaging (MRI) reports of the cervical spine.

In a July 28, 2014 letter, Dr. Murray D. Robinson, a Board-certified orthopedic surgeon, opined that appellant's C4-5 disc herniation and her need for surgery was secondary to the February 3, 2013 work injury.

[6] *Supra* note 4.

[7] It noted that as she was in receipt of compensation from October 12, 2017 to present, she could not claim compensation for overlapping periods of October 12 through November 1, 2017.

In a July 30, 2014 report, Dr. Tamara Greene, a Board-certified neurologist, noted the history of appellant's February 3, 2013 work injury and that appellant had been working but was avoiding lifting. Appellant's physical examination was notable for giveaway weakness and limited volitional effort.

In an April 22, 2015 treatment note and work excuse note of even date, Dr. Mark W. Freeman, an osteopath and Board-certified orthopedic surgeon, held appellant off work due to cervical pain from degenerative disc disease (DDD) with radiculopathy. His history of the injury noted the March 9, 2015 incident.

In an October 3, 2016 report, Dr. John Rhee, a Board-certified orthopedic surgeon, noted the history of appellant's work injuries of February 3, 2013 and March 9, 2015. He recommended a cervical anterior fusion.

March 15, 2017 and August 29, 2017 treatment notes from Dr. Michele Johnson, a Board-certified neurosurgeon, were also received. In the August 29, 2017 treatment note, Dr. Johnson diagnosed severe cervical spinal stenosis, cervical myelopathy and weakness and dysfunction of appellant's left arm, and she recommended C4-7 fusion. A September 6, 2017 FCE noted inconsistencies due to submaximal effort on appellant's part, but indicated that she demonstrated sufficient strength to perform various tasks in the medium strength category.

By decision dated January 17, 2019, OWCP denied appellant's claim for wage-loss compensation for the period September 3, 2014 through October 11, 2017. It found that the evidence of record did not support disability for work due to the accepted injury of February 3, 2013 during the claimed period.

Appellant requested reconsideration on August 6, 2019. Medical reports from various physicians during the claimed period were received along with diagnostic reports.

In a February 14, 2019 report, Dr. Freeman opined that appellant had not been able to work since March 2015 due to her work-related cervical disc displacements and cervical radiculopathy. He noted that she underwent an anterior cervical discectomy and fusion (ACDF) surgery in October 2017. In pertinent part, Dr. Freeman explained that the disc herniation appellant sustained in 2013 as a result of her work injury caused her cervical radiculopathy as it compressed the nerve root which in turn damaged the nerve. As appellant was unable to have surgery to remove the disc until 2017 her herniated disc compressed the nerve roots in her neck and led to permanent nerve damage.

By decision dated August 16, 2019, OWCP denied modification of its January 17, 2019 decision.

On January 17, 2020 appellant requested reconsideration. Evidence received in support of the reconsideration request included MRI scan reports of cervical spine dated April 28, 2013, July 23, 2014, September 29, 2015 and March 3, 2017 and an electromyogram (EMG) dated March 19, 2013.

By decision dated January 27, 2020, OWCP denied modification of its prior decision.

FACTUAL HISTORY -- ISSUES 2 & 3

Regarding the termination of appellant's wage-loss compensation and entitlement to medical benefits after October 13, 2019, OWCP received a July 25, 2018 report from Dr. Raju Vanapalli, a Board-certified orthopedic surgeon serving as an OWCP second opinion physician. Dr. Vanapalli related that appellant's left shoulder condition had resolved and her cervical disc herniations had resolved with the October 12, 2017 C4-5, C5-6, and C6-7 discectomy, bilateral foraminotomy, and fusion. On the attached work capacity evaluation (Form OWCP-5c), he opined that appellant could not perform her regular job as a nursing assistant without restrictions but was capable of performing work in a limited-duty capacity on a full-time basis. Dr. Vanapalli provided work restrictions for six months.

As previously noted, Dr. Freeman, in a February 14, 2019 report, opined that appellant had not been able to return to work since March 2015 due to her accepted work-related cervical disc displacements and cervical radiculopathy and that she remained totally disabled. He also indicated that Dr. Vanapalli's July 25, 2018 second opinion was not based on the recent medical evidence.

On April 26, 2019 OWCP referred appellant, the medical record, and a January 17, 2019 statement of accepted facts (SOAF) and a series of questions to Dr. Doman, who had served as a second opinion physician in 2014, to serve as an impartial medical examiner (IME) and resolve the conflict of medical opinion between Dr. Vanapalli, the second opinion physician, and Dr. Mark Freeman, an osteopath and treating physician, regarding the nature and extent of the employment-related conditions. The January 17, 2019 SOAF noted appellant's other claims, including the March 9, 2015 injury, and that preexisting or concurrent medical conditions included left hand and wrist conditions. There was no mention of appellant's preexisting or congenital cervical conditions.

In a May 14, 2019 report, Dr. Doman noted the SOAF and he reviewed the medical records provided to him. He determined that there were no objective findings to support any disability because of appellant's compensable injuries which resolved long ago. Dr. Doman further opined that appellant could perform her regular job as a nursing assistant full-time without restrictions. On physical examination, he found no objective evidence of any neurologic deficits and noted appellant had no shoulder instability, her rotator cuff strength was excellent, and pulses were intact. Dr. Doman further found no clinical objective findings to support residuals from the February 3, 2013 work injury and indicated that he agreed with Dr. Vanapalli's conclusions. He opined that appellant's cervical disc conditions that have been accepted had fully resolved with her anterior cervical fusion and that the left shoulder strain had resolved long ago. Dr. Doman reiterated that there are no objective findings with respect to the left shoulder or the cervical spine based on physical examination.

On June 20, 2019 OWCP advised appellant of its notice of proposed termination of her wage-loss compensation and medical benefits based on Dr. Doman's May 14, 2019 opinion that there were no objective findings to support any disability as a result of the compensable injuries, which resolved long ago. It classified Dr. Doman as a second opinion physician, noting that Dr. Freeman was not considered as the treating physician of record. OWCP indicated "although your attending physician of record, Dr. Michelle Johnson along with Dr. Freeman submitted medical evidence indicating that [appellant] had ongoing work-related disability and/or remaining

residuals of her accepted work-related condition(s), it has been determined that the weight of the medical evidence rests with the second opinion physician, Dr. Doman, because his second opinion report is the only current rationalized medical evidence based on [appellant's] current condition." It afforded her 30 days to submit evidence or argument if she disagreed with the proposed termination.

In response, OWCP received cervical spine MRI scan reports dated September 28, 2015 and October 22, 2018, an MRI cervical spine addendum report dated October 25, 2018, which noted the status of appellant's cervical surgeries as well as her degenerative conditions. It also received medical treatment notes from various providers dated September 24 and December 19, 2018 and January 29, February 14, March 14, July 3, 8, 9, and 11, 2019, which noted appellant's neck pain and cervical radiculopathy and which discussed her treatment opinions, including a C3 to T1 posterior cervical fusion with decompression.

In a July 8, 2019 report, Dr. Kevin Park, a Board-certified orthopedic surgeon, noted appellant's history of injury and that appellant had undergone an ACDF at C4-7 with continued radicular and myelopathic symptoms, and prior recommendations for posterior laminectomy and fusion including C3-7. He recommended posterior laminectomy and fusion including C3-7 given appellant's age and progression of myelopathic symptoms.

In light of the proposed posterior fusion of the cervical spine, OWCP determined that further development was warranted. On July 22, 2019 it requested that Dr. Doman provide a supplemental opinion as to whether the new evidence changed his previous opinion and whether the proposed posterior fusion of the cervical spine was warranted and causally related to the accepted work injury.

As noted on August 6, 2019, OWCP expanded the acceptance of appellant's claim to include displacement of cervical intervertebral disc without myelopathy at C4-5, C5-6, and C6-7.

In an August 27, 2019 supplemental report, Dr. Doman indicated that he did not agree that the requested posterior laminectomy and fusion from C3-7 or the posterior fusion from C3-T1 were medically necessary. He explained that there was no objective evidence on Dr. Park's physical examination that would indicate the need for surgery. Dr. Doman noted that there was no objective evidence of a cervical myelopathy and Dr. Park's neurologic examination, including reflex and muscle testing, revealed no objective evidence of myelopathy. He concluded that his rationale that the accepted cervical condition had resolved had not changed. In addition, Dr. Doman opined that there was no mechanism from the description of the March 9, 2015 incident, during which appellant was helping a patient move, that would have resulted in any significant cervical spine condition. Thus, he indicated that his previous opinion that appellant was capable of performing her regular-duty job as a nursing assistant without restrictions had not changed.

By decision dated October 11, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits effective October 13, 2019. It accorded the weight of the medical evidence to the second opinion of Dr. Doman, who opined, in reports dated May 14 and August 27, 2019, that appellant no longer had residuals related to the February 3, 2013 work

injury, the accepted conditions of February 3, 2013 had resolved, and appellant was capable of performing her nursing assistant duties with no restrictions.

On November 4, 2019 appellant requested reconsideration. Multiple MRI scan reports dated April 23, 2013, July 23, 2014, September 28, 2015 and October 22, 2018 were submitted. OWCP also received the October 12, 2017 operative report which documented that appellant had undergone C4-7 discectomy and bilateral foraminotomy, C4-7 three-level interbody fusion, and placement of a C4-7 medtronic plate.

Medical reports from various providers from July 8, 2019 through October 17, 2019 were provided, which noted appellant's medical history and which provided medical findings on examination.

By decision dated January 22, 2020, OWCP denied modification of the October 11, 2019 termination decision, finding that appellant had not established continuing disability or medical residuals due to her February 3, 2013 work injury.

FACTUAL HISTORY -- ISSUE 4

On September 6, 2019 appellant filed a claim for compensation (Form CA-7) for a schedule award.

In a September 10, 2019 development letter, OWCP informed appellant that additional medical evidence was necessary for consideration of her schedule award claim. It advised that she should provide a permanent impairment rating which was completed under the applicable criteria and tables in the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).[8] OWCP afforded appellant 30 days to submit the necessary evidence.

In a September 30, 2019 report, Brandee Keiss, a registered and licensed occupational therapist, prepared an impairment rating using the sixth edition of the A.M.A., *Guides* and *The Guides Newsletter, Rating Spinal Nerve Extremity Impairment Using the Sixth Edition* (July/August 2009) (*The Guides Newsletter*) in conjunction with the medical records provided and testing performed on September 30, 2019. She concluded that appellant had seven percent permanent impairment of her left upper extremity for ongoing sensory and motor deficits and zero percent permanent impairment of her right upper extremity for no residual sensory or motor deficits. Ms. Keiss noted that appellant scored herself as 70 on the *Quick*DASH Outcome Measure which indicated a severe problem or grade modifier 3 under the A.M.A., *Guides*. However, on page 406 of A.M.A., *Guides*, it was explained that if the grade modifiers differed by two or more points between the grade modifier for functional history (GMFH) and the grade modifier for physical examination (GMPE), then the GMFH was considered unreliable. Accordingly, Ms. Keiss indicated that the GMFH was unreliable and not used in calculating appellant's impairment. On October 21, 2019 Dr. John Min Rhee, a Board-certified orthopedic surgeon,

[8] A.M.A., *Guides* (6th ed. 2009).

signed the September 30, 2019 impairment report, noting his agreement with the impairment rating.[9]

On November 5, 2019 OWCP referred the case record to Dr. Michael M. Katz, a Board-certified orthopedic surgeon, serving as an OWCP district medical adviser (DMA). It requested that the DMA review the January 17, 2019 statement of accepted facts (SOAF) and the medical record, including Dr. Rhee's September 30, 2019 report, and provide an opinion regarding appellant's upper extremity permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*.[10]

In a November 12, 2019 report, the DMA reviewed the medical evidence of record and determined that appellant had reached maximum medical improvement (MMI) on September 30, 2019, the date of her permanent impairment examination. He concurred with Dr. Rhee's September 30, 2019 permanent impairment findings for the accepted spinal conditions, but noted that Dr. Rhee did not address appellant's shoulder condition. Utilizing *The Guides Newsletter*, Proposed Table 1: Spinal Nerve Impairment, Upper Extremity Impairment, the DMA found that appellant had seven percent permanent impairment of the left upper extremity. For the left C5 nerve root, he found a class of diagnosis (CDX) of 1 for mild sensory deficit, with one percent default value. The DMA found the GMFH not applicable as it was invalid per Dr. Rhee; GMPE not applicable as it was used to rate the diagnosis; and grade modifier for clinical studies (GMCS) of 1. Using the net adjustment formula, he found a net adjustment of 0, resulting in a 1 percent final impairment rating for left C5 nerve root. The DMA also found a mild motor deficit of the left C5 nerve, with a default value of four percent permanent impairment. He found that the GMFH was not applicable as it was invalid and GMPE was not applicable as it was used to rate the diagnosis. He noted a GMCS of 1. Using the net adjustment formula, the DMA found a net adjustment of 0, resulting in four percent motor impairment of left L5 nerve root. Thus, the sensory and motor deficits for the left L5 nerve root totaled five percent permanent impairment.

For the left C6 nerve root, the DMA found a CDX of 1 for mild sensory deficit, with one percent default value. He found that the GMFH was not applicable as it was invalid, and the GMPE was not applicable as it was used to rate the diagnosis. The DMA noted a GMCS of 1. Using the net adjustment formula, he found a net adjustment of 0, resulting in one percent sensory impairment for left C6 nerve root. The DMA related that no motor deficit of the left C6 nerve root was reported.

For the left C7 nerve root, the DMA found a CDX of 1 for mild sensory deficit, with one percent default value. He found that the GMFH was not applicable as it was invalid and the GMPE was not applicable as it was used to rate the diagnosis. The DMA noted a GMCS of 1. Using the net adjustment formula, he found a net adjustment of 0, resulting in one percent final sensory impairment for left C7 nerve root. The DMA again noted that a no motor deficit of the left C7 nerve root was reported.

[9] In an October 2, 2019 report, Dr. Rhee indicated that he could approve the impairment rating as he did not have the expertise to evaluate her impairment in that manner. He also discussed a revision posterior cervical fusion.

[10] *Supra* note 5.

For appellant's right upper extremity, the DMA again utilized *The Guides Newsletter*, Proposed Table 1: Spinal Nerve Impairment, Upper Extremity Impairment. He found no sensory deficit and no motor deficits for spinal nerves C5, C6, C7, C8, and T1. Thus, the result was a class 0 or zero percent impairment.

The DMA indicated that the accepted spinal conditions were not eligible for an alternative range of motion (ROM) impairment calculation based on the A.M.A., *Guides*. He also indicated that there were no discrepancies between his and Dr. Rhee's impairment evaluations. The DMA recommended a schedule award for seven percent permanent impairment of the left upper extremity and seven percent permanent impairment of the right upper extremity.

On November 27, 2019 OWCP requested that its DMA clarify his November 21, 2019 report regarding the degree of right upper extremity permanent impairment. In a December 3, 2019 report, the DMA indicated that the permanent impairment rating for appellant's right upper extremity was zero percent. He explained that his earlier recommendation of seven percent permanent impairment was a typographical error.

By decision dated December 18, 2019, OWCP granted appellant a schedule award for seven percent permanent impairment of her left upper extremity. It also found that she had zero percent permanent impairment of her right upper extremity. The award ran for 21.84 weeks for the period October 13, 2019 to March 13, 2020.[11]

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim,[12] including that any disability or specific condition for which compensation is claimed is causally related to the accepted employment injury.[13] Whether a particular injury causes an employee to become disabled from work, and the duration of that disability, are medical issues that must be proven by a preponderance of probative and reliable medical opinion evidence.[14]

Under FECA the term "disability" means the incapacity, because of an employment injury, to earn the wages that the employee was receiving at the time of injury.[15] The question of whether an employee is disabled from work is an issue that must be resolved by competent medical

[11] The starting date of the schedule award was adjusted to October 13, 2019 because OWCP paid appellant wage-loss compensation for disability through October 12, 2019.

[12] *Supra* note 2.

[13] *See C.B.*, Docket No. 20-0629 (issued May 26, 2021); *B.O.*, Docket No. 19-0392 (issued July 12, 2019); *D.W.*, Docket No. 18-0644 (issued November 15, 2018); *Kathryn Haggerty*, 45 ECAB 383 (1994); *Elaine Pendleton*, 40 ECAB 1143 (1989).

[14] 20 C.F.R. § 10.5(f); *C.B.*, *id.*; *N.M.*, Docket No. 18-0939 (issued December 6, 2018); *R.C.*, 59 ECAB 546, 551 (2008).

[15] *Id.*; *T.A.*, Docket No. 18-0431 (issued November 7, 2018); *Amelia S. Jefferson*, 57 ECAB 183 (2005).

evidence.[16] The employee is responsible for providing sufficient medical evidence to justify payment of any compensation sought. For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work as a result of the accepted employment injury.[17]

To establish causal relationship between the disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such causal relationship.[18] The opinion of the physician must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[19]

The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify his or her disability and entitlement to compensation.[20]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish total disability from work for the period September 3, 2014 through October 11, 2017 causally related to her accepted employment conditions.

During the claimed period, appellant provided multiple reports from several physicians which noted the history of the February 3, 2015 work injury, as well as the March 9, 2015 employment incident. In reports from 2017, ACDF surgery at C4-5, C5-6, and C6-7 was recommended, for which appellant ultimately underwent on October 12, 2017, and following which she received wage-loss benefits. To the extent in which the physicians attributed appellant's cervical conditions to her accepted work injury, they failed to address whether she had disability from work during the period claimed. Evidence that does not address appellant's dates of disability is of no probative value and insufficient to establish her claim.[21]

[16] *S.A.*, Docket No. 18-0399 (issued October 16, 2018); *R.C., supra* note 14.

[17] *S.M.*, Docket No. 17-1557 (issued September 4, 2018); *William A. Archer*, 55 ECAB 674, 679 (2004); *Fereidoon Kharabi*, 52 ECAB 291, 293 (2001).

[18] *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

[19] *C.B.*, Docket No. 18-0633 (issued November 16, 2018); *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[20] *T.L.*, Docket No. 18-0934 (issued May 8, 2019); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

[21] *See T.G.*, Docket No. 20-0121 (issued May 17, 2022); *M.L.*, Docket Nos. 18-1058 & 18-1224 (issued November 21, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

OWCP received reports from Dr. Freeman who did address appellant's claim that she was totally disabled, during the time periods in question. In an April 22, 2015 treatment note and work excuse note of even date, Dr. Freeman placed appellant off work due to cervical pain from DDD with radiculopathy. He failed to provide any medical rationale explaining how appellant's accepted cervical conditions from her accepted employment injury caused disability during the alleged time periods. Dr. Freeman failed to explain how appellant's inability to work was causally related to her accepted employment conditions and injury.[22] Thus, this report is of limited probative value and insufficient to establish appellant's disability claim.

In a February 14, 2019 report, Dr. Freeman opined that appellant had not been able to work due to her work-related cervical disc displacements and cervical radiculopathy. In pertinent part, he explained that the disc herniation she suffered in 2013 as a result of her work injury caused her cervical radiculopathy as it compressed the nerve roots in her neck. Dr. Freeman also opined that the compressed nerve roots led to permanent nerve damage as appellant was unable to have surgery to remove the disc until 2017. However, while he offered a medical explanation on how the accepted conditions led to permanent nerve damage, his report is conclusory in nature.[23] Thus this report is of limited probative value and insufficient to establish appellant's disability claim.

Appellant also submitted several diagnostic tests during the claimed period. The Board has held, however, that diagnostic studies, standing alone, lack probative value as they do not address whether the employment injury caused appellant to be disabled during the claimed period.[24] These reports are, therefore, insufficient to establish the claim.

For each period of disability claimed, the employee has the burden of proof to establish that he or she was disabled from work during the claimed period as a result of the accepted employment injury.[25] Because appellant has not submitted rationalized medical opinion evidence to establish employment-related total disability for the period September 3, 2014 through October 11, 2017 as a result of her accepted conditions, the Board finds that she has not met her burden of proof.

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

[22] *T.G., id.*; *M.M.*, Docket No. 18-0817 (issued May 17, 2019); *Beverly A. Spencer*, 55 ECAB 501 (2004).

[23] *J.W.*, Docket No. 19-1688 (issued March 18, 2020); *S.J.*, Docket No. 17-0828 (issued December 20, 2017); *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

[24] *See A.P.*, Docket No. 21-0300 (issued April 6, 2022); *A.D.*, Docket No. 21-0143 (issued November 15, 2021); *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

[25] *T.G., supra* note 21; *S.J., supra* note 23.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.[26] 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.[27] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[28]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.[29] 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.[30]

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.[31] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[32] When OWCP has referred the case to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.[33]

ANALYSIS -- ISSUE 2

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 13, 2019.

OWCP initially indicated that Dr. Doman was selected as an IME to resolve the conflict of medical opinion evidence between Dr. Vanapalli, the second opinion physician, and Dr. Freeman,

[26] *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[27] *See R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

[28] *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

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

[31] 5 U.S.C. § 8123(a); *Y.J.*, Docket No. 20-1337 (issued February 7, 2022); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

[32] *H.B.*, Docket No. 19-0926 (issued September 10, 2020); *C.H.*, Docket No. 18-1065 (issued November 29, 2018); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

[33] *S.S.*, Docket No. 19-0766 (issued December 13, 2019); *W.M.*, Docket No. 18-0957 (issued October 15, 2018); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

an osteopath, regarding the nature and extent of the employment-related conditions. However, in its June 20, 2019 notice of proposed termination of her wage-loss compensation and medical benefits, OWCP classified Dr. Doman as a second opinion physician, finding that Dr. Freeman was not considered the treating physician of record. The Board notes that as Dr. Doman had previously served as a second opinion physician in 2014, he cannot serve as an IME. The referral to Dr. Doman is therefore considered to be a second opinion evaluation.[34]

OWCP indicated, in its June 20, 2019 notice of proposed termination, that appellant's physician of record Dr. Johnson had, along with Dr. Freeman, submitted medical evidence indicating that appellant had ongoing work-related disability and/or remaining residuals of her accepted work-related condition(s). In light of OWCP's admission, the Board finds that an unresolved conflict in medical opinion now exists between Dr. Doman and Dr. Johnson regarding whether appellant's accepted work-related conditions had resolved. It is well established that when there exist opposing medical reports of virtually equal weight and rationale, the case should be referred to an IME for the purpose of resolving the conflict.[35] Therefore, OWCP has not met its burden of proof to terminate her wage-loss compensation and medical benefits effective October 13, 2019 as it should have referred her to an impartial medical evaluation, pursuant to 5 U.S.C. § 8123(a), to resolve the conflict prior to a termination of wage-loss compensation and medical benefits.[36]

On remand OWCP shall refer appellant, along with an updated SOAF and the complete case record to a physician in the appropriate field of medicine for an impartial medical examination in accordance with section 8123(a) of FECA and the implementing regulations.[37] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.[38]

LEGAL PRECEDENT -- ISSUE 4

The schedule award provisions of FECA[39] and its implementing regulations[40] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not

[34] *See Y.J., supra* note 31; *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *S.M.*, Docket No. 19-0397 (issued August 7, 2019) (the Board found that at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

[35] *Y.J., supra* note 31.

[36] *D.P.*, Docket No. 21-0534 (issued December 2, 2021); *N.A.*, Docket No. 21-0542 (issued November 8, 2021); *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).

[37] 5 U.S.C. § 8123(a).

[38] In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

[39] 5 U.S.C. § 8107.

[40] 20 C.F.R. § 10.404.

specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[41] As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.[42]

Neither FECA nor its implementing regulations provide for the payment of a schedule award for the permanent loss of use of the back/spine or the body as a whole.[43] However, a schedule award is permissible where the employment-related spinal condition affects the upper and/or lower extremities.[44] The sixth edition of the A.M.A., *Guides* (2009) provides a specific methodology for rating spinal nerve extremity impairment in *The Guides Newsletter*. It was designed for situations where a particular jurisdiction, such as FECA, mandated ratings for extremities and precluded ratings for the spine. FECA-approved methodology is premised on evidence of radiculopathy affecting the upper and/or lower extremities. The appropriate tables for rating spinal nerve extremity impairment are incorporated in the Federal (FECA) Procedure Manual.[45]

In determining impairment for the upper extremities under the sixth edition of the A.M.A., *Guides*, an evaluator must establish the appropriate diagnosis for each part of the upper extremity to be rated. After the CDX is determined from the appropriate table (including identification of a default grade value), the net adjustment formula is applied using the GMFH, GMPE, and GMCS. The net adjustment formula is (GMFH - CDX) + (GMPE - CDX) + (GMCS - CDX).

ANALYSIS -- ISSUE 4

The Board finds that appellant has not met her burden of proof to establish more than seven percent permanent impairment of her left upper extremity and zero percent permanent impairment of her right upper extremity, for which she previously received a schedule award.

In his November 21, 2019 report, the DMA noted that he reviewed Dr. Rhee's September 30, 2019 report and indicated that, utilizing *The Guides Newsletter*, appellant had mild sensory deficit of one percent impairment at left C5 nerve root, mild motor deficit of four percent impairment at left C5 nerve root; mild sensory impairment of one percent each for the left C6 and left C7 nerve roots. He found that the GMFH was not applicable as it was invalid per Dr. Rhee and the GMPE was not applicable as it was used to classify the diagnosis for each nerve root. The DMA found GMCS of 1 and properly utilized the net adjustment formula and found a net adjustment of 0 for each left nerve root. This resulted in left upper extremity impairment ratings

[41] *Id*. *See also P.J.*, Docket No. 20-0549 (issued December 18, 2020); *T.T.*, Docket No. 18-1622 (issued May 14, 2019).

[42] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (March 2017); *see also* Chapter 3.700.2 and Exhibit 1 (January 2010).

[43] 5 U.S.C. § 8107(c); 20 C.F.R. § 10.404(a) and (b); *see A.G.*, Docket No. 18-0815 (issued January 24, 2019); *Jay K. Tomokiyo*, 51 ECAB 361, 367 (2000).

[44] *Supra* note 42 at Chapter 2.808.5c(3) (March 2017).

[45] *Supra* note 42 at Chapter 3.700, Exhibit 4 (January 2010).

of one percent sensory impairment for the left C5 nerve root, four percent motor impairment for the left C5 nerve root, one percent sensory impairment for the left C6 nerve root, and one percent sensory impairment for the left C7 nerve root. The DMA concluded that appellant had seven percent permanent impairment of the left upper extremity.

For the right upper extremity, the DMA again utilized *The Guides Newsletter* and noted that appellant had no sensory or motor deficits for spinal nerves C5, C6, C7, C8, and T1, therefore he properly concluded that appellant had zero percent permanent impairment of the right upper extremity. He also clarified, in his December 3, 2019 report, that his earlier recommendation of seven percent permanent right upper extremity impairment was a typographical error. The DMA also indicated that the accepted spinal conditions were not eligible for an alternative impairment calculation using the range of motion methodology based on A.M.A., *Guides* criteria. There is no medical evidence of record to establish a greater permanent impairment than that awarded. The Board thus finds that appellant has not established greater than the seven percent of the left upper extremity or zero percent of the right upper extremity previously awarded.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased permanent impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish total disability from work for the period September 3, 2014 through October 11, 2017 causally related to her accepted employment conditions. The Board also finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 13, 2019. The Board additionally finds that appellant has not met her burden of proof to establish greater than seven percent permanent impairment to her left upper extremity and zero percent permanent impairment to her right upper extremity, for which she previously received a schedule award.

ORDER

IT IS HEREBY ORDERED THAT the December 18, 2019 and January 27, 2020 decisions of the Office of Workers' Compensation Programs are affirmed and the January 22, 2020 decision of Office of Workers' Compensation Programs is reversed.

Issued: December 16, 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