

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

_____)	
E.W., Appellant)	
)	
and)	Docket No. 21-0072
)	Issued: December 2, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Aurora, CO, Employer)	
_____)	

Appearances:

John S. Evangelisti, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On October 22, 2020 appellant, through counsel, filed a timely appeal from a May 28, 2020 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 over 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 met its burden of proof to terminate wage-loss compensation and medical benefits, effective January 2, 2020, as she no longer had disability or residuals causally related to her July 21, 2001 employment injury.

FACTUAL HISTORY

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

On July 21, 2001 appellant, then a 32-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she strained her back when lifting a heavy parcel from a vehicle while in the performance of duty. OWCP accepted the claim for cervical and thoracic strains, and subsequently expanded acceptance of the claim to include temporary aggravation of major depressive disorder, and temporary aggravation of panic disorder. It initially paid appellant intermittent wage-loss compensation on the supplemental rolls, as of June 19, 2002, and then on the periodic rolls, effective March 21, 2004.⁴

On April 22, 2004 Dr. Bert S. Furmansky, a Board-certified psychiatrist, evaluated appellant as an impartial medical specialist to resolve the conflict in medical evidence regarding the status of appellant's accepted temporary aggravation of major depressive disorder and temporary aggravation of panic disorder. He opined that she could return to work for four hours a day, but that she was overly sensitive to stress and needed to work in a low-stress environment that was not complex, or fast paced, and that she required duties with minimal interaction with others.

By decision dated May 7, 2007, OWCP issued a formal loss of wage-earning capacity (LWEC) determination. It found that appellant's receptionist position for Nobel Truss Colorado Inc., effective August 14, 2006, with wages of \$321.08 per week, fairly and reasonably represented her wage-earning capacity.

On January 27, 2012 OWCP referred appellant to Dr. John D. Douthit, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of appellant's accepted conditions, and the nature of her current conditions. In a February 27, 2012 report, Dr. Douthit, based on a statement of accepted facts (SOAF), review of the medical record, and physical examination, diagnosed chronic pain syndrome of the cervical and thoracic spine and shoulders and history of anxiety, depression and probable post-traumatic disorder (PTSD). He attributed

³ Docket No. 07-2260 (issued October 8, 2008).

⁴ Appellant accepted a temporary modified position with the employing establishment and returned to work on September 3, 2005. OWCP accepted appellant's claim for a recurrence of disability beginning February 16, 2006 as it found the modified job was unsuitable.

appellant's neck, shoulder, and low back pain symptoms to the accepted July 21, 2001 employment injury.

On April 24, 2012 OWCP referred appellant to Dr. George Kalousek, a Board-certified psychiatrist for second opinion evaluation of appellant's work-related conditions. In a May 10, 2012 report, Dr. Kalousek, based on a review of a SOAF, list of questions, and medical record and examination, diagnosed major mood disturbance, PTSD, and anxiety disorder. He noted that appellant had preexisting severe problems prior to the employment injury. Dr. Kalousek concluded that her employment injury was an aggravation of her underlying disorders.

In a July 25, 2012 report, Dr. Christopher B. Ryan, a Board-certified psychiatrist, reviewed Dr. Douthit's report and concurred with his diagnosis of chronic pain syndrome due to the accepted July 21, 2001 employment injury. He requested that OWCP expand the acceptance of appellant's claim to include the condition of chronic pain syndrome as causally related to the July 21, 2001 employment injury. Dr. Ryan also opined that appellant's cervical degenerative disc disease and cervical degenerative arthritis had likely been aggravated by the July 21, 2001 employment injury.

In a July 30, 2012 supplemental report, Dr. Kalousek noted that appellant had many preexisting conditions prior to the employment injury and that any stressor was sufficient aggravate these conditions. He explained that the employment-related injury resulted in a permanent aggravation of her underlying multiple psychopathologies.

On February 26, 2018 OWCP referred appellant, together with medical records, a SOAF and list of questions, to Dr. Doris Gunderson, a Board-certified psychiatrist, for a second opinion evaluation to determine the status of her accepted psychiatric conditions.

In a March 10, 2018 report, Dr. Steven Dworetzky, a Board-certified psychiatrist, noted that he had treated appellant since May 2015 for her psychiatric injury. He opined that she was totally disabled from work due to her work-related psychiatric conditions and that she was unable to tolerate any life stress without decompensating.

In a report dated May 20, 2018, Dr. Gunderson related appellant's history of employment and nonemployment injuries and detailed her medical history. She diagnosed chronic and severe PTSD and recurrent major depression, in partial remission. Dr. Gunderson opined that appellant's preexisting major depression was likely aggravated by the July 21, 2001 employment injury. She opined that it was highly unlikely that appellant's chronic depression was currently due to the accepted employment injury as the injury occurred at a remote time. In support of this conclusion, Dr. Gunderson explained that appellant's chronic and serious nonemployment stressors including adverse childhood events and chronic and severe adult trauma perpetuated her depression and preexisting PTSD symptoms. According to Dr. Gunderson, appellant had no residuals of her July 21, 2001 employment injury based on her ability to obtain employment following her departure from the employing establishment.

In an October 15, 2018 report, Dr. Dworetzky reviewed and disagreed with Dr. Gunderson's opinion. He noted appellant's condition had considerably worsened following Dr. Gunderson's evaluation. Appellant reported experiencing increased sleep issues, nightmares, worsened energy and motivation, appetite issues, increased crying, and lower self-esteem.

Dr. Dworetzky opined that appellant's PTSD symptoms had become more noticeable, which he attributed actions taken by OWCP and the employing establishment. He diagnosed moderate major depressive disorder, PTSD, and generalized anxiety disorder. Dr. Dworetzky noted that appellant had a complicated psychiatric history, which included medical, personal, and employment stressors. He opined that the diagnosed psychiatric conditions had been aggravated by her employment injuries and were compensable.

In a report dated January 25, 2019, Dr. Ryan found appellant functionally compromised due her employment-related injuries. According to him, appellant's functional deficits included muscular rigidity, loss of cervical and thoracic range of motion (ROM). Dr. Ryan requested continuation of massage therapy for treatment of the accepted cervical and thoracic strains.

In a report dated January 28, 2019, Dr. Dworetzky diagnosed moderate major depressive disorder, PTSD, and generalized anxiety disorder. He reported that appellant could not tolerate any stress without physical and psychological decompensation. Dr. Dworetzky opined that her preexisting PTSD and major depression had been permanently aggravated by her physical injuries and treatment by the employing establishment. He found appellant totally disabled due to her psychiatric conditions.

On January 31, 2019 OWCP requested Dr. Gunderson provide a supplemental report as it had not forwarded an April 22, 2004 report from Dr. Bert S. Furmansky, a Board-certified psychiatrist, for his review.

In a February 22, 2019 supplemental report, Dr. Gunderson reviewed Dr. Furmansky's April 22, 2004 report and advised that it did not change her opinion. She noted many of their findings were similar including that appellant's preexisting mental health conditions might have been temporarily aggravated, but not caused by employment stressors.

On April 4, 2019 OWCP found that a conflict of medical opinion existed between Drs. Dworetzky and Gunderson regarding appellant's accepted panic disorder without agoraphobia and major depressive disorder and current work restrictions/total disability, and referred her, an August 8, 2006 SOAF and addendum SOAFs dated January 24, 2012, April 3, 2017, January 24, 2018, and March 15, 2019, and a list of questions to Dr. Stephen A. Moe, a Board-certified psychiatrist, for an impartial medical examination.

In a report dated May 13, 2019, Dr. Moe, based upon a review of the SOAFs, the medical record, and appellant's evaluation, diagnosed unspecified depressive disorder, unspecified personality disorder with histrionic traits, somatic symptom disorder, and PTSD, which were all unrelated to appellant's accepted July 21, 2001 employment injury.

Dr. Moe opined that appellant's psychiatric symptoms and treatment were unrelated to her accepted employment injury since Dr. Furmansky's April 22, 2004 evaluation. He related that it may be that her claims about the emotional harm she suffered at the employing establishment were valid, but it may be that her claims were significantly distorted, and neither Dr. Dworetzky nor other psychiatrists associated with her claim, including himself, were in the position to make that judgment. Dr. Moe further explained that "the workplace experiences to which [appellant] attributed her symptoms, and which prompted Dr. Ewing, Dr. Kalousek, Dr. Krause and

Dr. Dworetzky to conclude that they were injury related, did not occur because of her injury. Not only was the injury mild ... but there is nothing to suggest any of the mistreatment appellant alleges at the employing establishment, if valid, occurred because of her work injury.” Dr. Moe concluded that none of her current psychiatric diagnoses were caused, precipitated, aggravated, or accelerated by the July 21, 2001 work injury. While appellant continued to suffer from psychiatric impairment and symptoms, he reiterated that her impairment and symptoms are unrelated to the July 21, 2001 work injury. In support of his conclusion, Dr. Moe explained that appellant’s depressive symptoms would be work related if her current physical complaints were attributable to the July 21, 2001 mild strain. Based on his review of the medical records, he concluded that her current physical complaints were probably unrelated to the July 21, 2001 work injury or at most there was an attenuated link. Lastly, Dr. Moe attributed appellant’s current physical complaints to psychological factors through a process termed “somatization.”

On May 24, 2019 OWCP referred appellant together with medical records, a SOAF and list of questions, to Dr. Douglas Porter, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the status of her accepted orthopedic conditions and disability. In a report dated June 13, 2019, Dr. Porter diagnosed resolved neck and thoracic strains, nonwork-related multilevel degenerative disc disease, nonwork-related cervical spondylosis, and pain behavior and symptom exaggeration of undetermined etiology and unrelated to accepted July 21, 2001 employment injury. Physical examination finding demonstrated increased thoracic kyphosis and cervical lordosis with no other objective physical findings. Dr. Porter reported decreased active cervical ROM, which he found voluntary and invalid. He concluded that appellant’s subjective complaints did not correlate with her objective findings. Dr. Porter opined that she suffered from disability conviction and severe pain behavior. Lastly, he opined that appellant had no residuals from the July 21, 2001 employment injury. According to Dr. Porter, her current problems were due to the natural progression of her cervical and thoracic degenerative disc disease, which were unrelated to the July 21, 2001 employment injury.

On August 6, 2019 OWCP informed appellant of a conflict of medical opinion between Drs. Ryan and Porter, and referred her, a SOAF, and a list of questions to Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon, for an impartial medical examination. In a report dated October 31, 2019, Dr. Sabin noted appellant’s belief that she has significant permanent impairment. On physical examination Dr. Sabin noted decreased shoulder ROM, multiple trigger points event to light palpation in the occipital, trapezius, anterior pectoralis, elbows, and thoracic spine, which he opined supported a diagnosis of fibromyalgia. Appellant also had decreased cervical ROM, which was self-limited by pain complaints and positive Waddell sign. Based on his examination findings and review of diagnostic tests, he opined there was no objective evidence supporting the continued presence of the accepted thoracic and cervical sprains. Dr. Sabin agreed with Dr. Porter’s opinion that appellant’s cervical disc disease and thoracic degenerative disease were unrelated to the accepted July 21, 2001 employment injury and that the accepted thoracic and cervical strains had resolved without residuals. He also concurred with Dr. Porter that appellant was capable of performing her date-of-injury job without restrictions.

Dr. Sabin, in an addendum dated November 12, 2019, reiterated his agreement with Dr. Porter. He also noted that, while the record noted a January 25, 2019 report from Dr. Ryan, that the actual record had not been included for his review.

In a second addendum dated November 20, 2019, Dr. Sabin reviewed Dr. Ryan's January 25, 2019 report, which he advised did not change his opinion. He reiterated his opinion that appellant no longer had residuals or disability due to the accepted cervical and thoracic strains due to the lack of any supporting objective findings.

On December 2, 2019 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits, based on the findings of the impartial medical specialists that she had no residuals or disability due to the accepted July 21, 2001 employment injury. It afforded her 30 days to submit additional evidence or argument, if she disagreed with the proposed termination.

On January 2, 2020 appellant, through counsel, responded to the notice of proposed termination asserting that Dr. Sabin's report was unrationalized and not based on the entire medical record. He further asserted that Dr. Moe's opinion could not constitute the weight of the medical opinion evidence as he based his opinion that accepted psychiatric conditions had resolved based on his opinion that appellant's physical injuries had resolved, which was outside his area of expertise.

By decision dated January 2, 2020, OWCP finalized its notice of proposed termination of appellant's wage-loss compensation and medical benefits, effective that day.

On January 14, 2020 appellant, through counsel, requested modification of the May 7, 2007 LWEC determination, due to a change in her medical condition. In a second letter of even date, counsel requested that OWCP expand acceptance of appellant's claim to include chronic pain syndrome in accordance with Dr. Ryan's July 25, 2012 report and Dr. Douthit's February 27, 2012 report.

In a letter dated January 17, 2020, OWCP informed counsel it had not received a claim for compensation (Form CA-7) for the period claimed and no further action would be taken on her request for modification of the May 7, 2007 LWEC determination, which was modified on August 13, 2008 and corrected on May 4, 2009. In a second letter of even date, it advised that no changes would be made to appellant's accepted conditions. OWCP noted that neither Dr. Sabin nor Dr. Moe diagnosed chronic pain syndrome. It also indicated that it was enclosing a copy of appellant's final termination decision with appeal rights

On January 25, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review of the January 2, 2020 decision. The hearing was held on April 22, 2020.

In a February 6, 2020 letter, OWCP noted that it had received a formal request to modify her LWEC determination and related that the evidence of record was insufficient to warrant modification. This letter was not accompanied by appeal rights.

On February 15, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review regarding the January 17, 2020 letter decision.

In a letter dated February 29, 2020, appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review of the February 6, 2020 decision.

In a letter dated March 2, 2020, OWCP informed appellant that it was denying her request for an oral hearing regarding its correspondence dated January 17 and February 6, 2020, which were informational letters and not final decisions with appeal rights. It concluded that "the case is not in posture for decision for a second hearing at this time because there is only one formal decision issued on the case dated January 2, 2020."

In a letter dated March 21, 2020, counsel requested OWCP to issue formal decisions with appeal rights regarding the issues addressed in the January 17 and February 6, 2020 informational letters.

A telephonic hearing before an OWCP hearing representative was held on April 22, 2020.

By decision dated May 28, 2020, OWCP's hearing representative affirmed the January 2, 2020 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ 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.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ 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.⁹

⁵ *C.S.*, Docket No. 21-0363 (issued August 30, 2021); *A.M.*, Docket No. 18-1243 (issued October 7, 2019); *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001); *Alice J. Tysinger*, 51 ECAB 638, 645 (2000).

⁶ *M.R.*, Docket No. 20-0993 (issued August 27, 2021); *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁷ *M.R.*, *id.*; *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

⁸ *M.R.*, *id.*; *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

⁹ *M.R.*, *id.*; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

FECA provides that, if there is a 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 the examination.¹⁰ The implementing regulations provide that if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee or impartial examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹¹

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 2, 2020.

OWCP terminated appellant's wage-loss compensation and medical benefits based on reports from the impartial medical specialists, Dr. Moe and Dr. Sabin, who concluded that appellant had no further disability or need for medical treatment due to her accepted cervical and thoracic strains, temporary aggravation of major depressive disorder and temporary aggravation of panic disorder.

OWCP, however, had previously referred appellant to Dr. Douthit for a second opinion examination to determine whether appellant had continued disability or residuals of her accepted cervical and lumbar strain and whether appellant had sustained any additional conditions as a result of her July 21, 2001 employment injury. In a February 22, 2012 report, Dr. Douthit found that appellant developed chronic pain syndrome due her accepted employment injury. Additionally, appellant's treating physician, Dr. Ryan, requested expansion of the acceptance of appellant's claim to include chronic pain syndrome on July 25, 2012. Following receipt of the reports from Dr. Douthit and Dr. Ryan's request for expansion of appellant's claim, OWCP failed to either expand acceptance of the claim or further develop the evidence regarding the claimed chronic pain syndrome.

OWCP determined that a conflict in medical opinion arose between Dr. Porter, an OWCP referral physician, and Dr. Ryan, appellant's physician, regarding appellant's current orthopedic employment-related disability. It referred appellant to Dr. Sabin for an impartial medical examination on the orthopedic issue. OWCP did not, however, resolve the issue of claim expansion prior to terminating appellant's compensation benefits.

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹² It failed to fully develop the issue of claim expansion to determine whether it should expand acceptance of the claim to include the additional conditions diagnosed by its referral physician, Drs. Douthit, and by appellant's

¹⁰ 5 U.S.C. § 8123(a).

¹¹ 20 C.F.R. § 10.321.

¹² See *R.S.*, Docket No. 20-1448 (issued (April 12, 2021); *R.B.*, Docket No. 20-0109 (issued June 25, 2020); *B.W.*, Docket No. 19-0965 (issued December 3, 2019).

treating physician, Dr. Ryan, and whether, if established, this condition resulted in continuing disability from employment or the need for medical treatment.¹³

The Board further finds that OWCP based the termination of appellant's compensation benefits for her accepted psychiatric conditions on the second opinion report of Dr. Moe. The Board finds that Dr. Moe's opinion that appellant no longer had disability or residuals from her accepted psychiatric conditions was equivocal in nature, and based upon an opinion that appellant's physical conditions had been the source of her psychiatric conditions, and that her physical conditions had resolved. The Board has held that medical opinions that are speculative or equivocal in nature are of diminished probative value.¹⁴ As OWCP did not meet its burden of proof to establish that appellant no longer had disability or residuals based upon her physical conditions, it also did not meet its burden of proof to terminate appellant's compensation benefits for her accepted psychiatric conditions.

For the above-stated reasons, OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.¹⁵

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective January 2, 2020.

¹³ See *B. W.*, Docket No. 20-1033 (issued November 30, 2020); *J. T.*, Docket No. 19-1723 (issued August 24, 2020).

¹⁴ See *N. W.*, Docket No. 21-0653 (issued September 30, 2021).

¹⁵ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the May 28, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 2, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board