

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

_____)	
D.F., Appellant)	
)	
and)	Docket No. 24-0559
)	Issued: July 9, 2024
U.S. POSTAL SERVICE, CLEVELAND)	
PROCESSING & DISTRIBUTION CENTER,)	
Cleveland, OH, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
*Alan J. Shapiro, Esq., for the appellant*¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 1, 2024 appellant, through counsel, filed a timely appeal from an April 10, 2024 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.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 26, 2023, as she no longer had disability

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.*

or residuals causally related to her accepted March 27, 2010 employment injury; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals, on or after January 6, 2023, causally related to her accepted March 27, 2010 employment injury.

FACTUAL HISTORY

On April 3, 2010 appellant, then a 41-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on March 27, 2010 she developed lower back pain while dispatching equipment filled with mail to the end of an aisle. OWCP accepted the claim for lumbar strain/spasm. It paid appellant wage-loss compensation on the supplemental rolls commencing July 26, 2010, and on the periodic rolls commencing December 18, 2011.³

By decision dated December 9, 2011, OWCP expanded the acceptance of appellant's claim to include L4-5 and L5-S1 herniated lumbar discs.

By decision dated January 11, 2019, OWCP reduced appellant's wage-loss compensation, effective January 13, 2019, as she had the capacity to earn wages in the constructed position of Freight Clerk.

On October 31, 2022 OWCP referred appellant, together with the case record, and a statement of accepted facts (SOAF) to Dr. Gerald M. Rosenberg, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that Dr. Rosenberg provide an opinion regarding whether appellant continued to have residuals or disability causally related to her accepted March 27, 2010 employment injury.

In a report dated November 28, 2022, Dr. Rosenberg noted his review of appellant's history of injury, medical record, and SOAF. He recounted appellant's statements that she worked in a job in the private sector that she began in August 2020, and that she had been involved in an automobile accident in August 2022, following which she experienced lumbar pain. On examination, Dr. Rosenberg reported normal lumbar spine appearance, no spasm, diffuse mild tenderness, negative straight leg raised, 5/5 bilateral lower extremity motor strength, and normal sensory. He reported that appellant had chronic lumbar pain for many years with an increase of symptoms following a recent automobile accident. Dr. Rosenberg noted that she had documented severe lumbar facet joint arthritis and chronic L5-S1 herniated nucleus pulposus (HNP), and that her current diagnoses attributable to her accepted employment injury were lumbar sprain and L4-5 and L5-S1 herniated lumbar discs. He opined that appellant's prognosis was poor as her symptoms had been static for 12 years, and her magnetic resonance imaging (MRI) scans revealed facet joint arthritis that resulted in foraminal stenosis and chronic herniation of the L5-S1 disc, with unchanged findings comparing the MRI scans from 2016 and 2018. Dr. Rosenberg opined that appellant was capable of returning to her date-of-injury job based on her objective physical examination findings. He explained that sprains heal within a matter of several weeks and conservative treatment for HNP is approximately 5 months or 154 days.

On December 23, 2022 OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she ceased to have residuals or disability causally

³ Appellant was approved for disability retirement effective May 7, 2012.

related to her accepted March 27, 2010 employment injury. It informed her that the weight of the medical opinion evidence with respect to work-related residuals and disability rested with Dr. Rosenberg's November 28, 2022 report. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed termination action. No response was received.

By decision dated January 26, 2023, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, because she no longer had residuals or disability causally related to her accepted March 27, 2010 employment injury as of that date. It found that the weight of the medical opinion evidence rested with Dr. Rosenberg's November 28, 2022 report.

On January 31, 2023 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on July 14, 2023.

Following the hearing, OWCP received July 27, 2022 discharge instructions from Dr. Robert T. Faflik, an osteopath Board-certified in emergency medicine, diagnosing cervical and lumbar strain following an automobile accident. It also received an emergency department nursing triage note of even date from Nydrea Zubar, a personal care assistant, who noted that appellant sought care for injuries sustained in an automobile accident two days prior.

By decision dated September 27, 2023, OWCP's hearing representative affirmed the January 26, 2023 termination decision.

OWCP subsequently received a July 27, 2022 lumbar spine x-ray, which indicated findings of lumbar spondylosis and spondylolisthesis. It noted that appellant had been involved in a motor vehicle accident two days prior.

In a report dated February 29, 2024, Dr. Talha M. Khan, a physician specializing in family medicine, summarized appellant's medical history. On physical examination he reported mild midline lumbar tenderness on palpation and negative straight left raising. Dr. Khan diagnosed lumbar spondylosis and spondylolisthesis. He, in a March 1, 2024 note, summarized physical examination findings and 2022 lumbar x-ray findings. Dr. Khan advised that appellant was to avoid lifting more than 15 pounds.

On April 9, 2024 appellant, through counsel, requested reconsideration.

By decision dated April 10, 2024, OWCP denied modification.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination 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

⁴ *S.G.*, Docket No. 23-0652 (issued October 11, 2023); *B.M.*, Docket No. 21-1150 (issued April 5, 2022); *R.H.*, Docket No. 19-1064 (issued October 9, 2020); *M.M.*, Docket No. 17-1264 (issued December 4, 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 -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 26, 2023.

OWCP accorded the weight of the evidence to Dr. Rosenberg, who conducted a second opinion examination on November 28, 2022. Dr. Rosenberg discussed appellant's history of injury and related appellant's physical examination findings, which were essentially normal. He related that appellant's current diagnoses related to the March 27, 2010 employment injury were lumbar sprain and L4-5 and L5-S1 herniated lumbar discs. Dr. Rosenberg opined that appellant's prognosis was poor as her symptoms had been static for 12 years, and her MRI scans revealed facet joint arthritis that resulted in foraminal stenosis and chronic herniation of the L5-S1 disc, with unchanged findings comparing the MRI scans from 2016 and 2018. He thereafter related that sprains heal within a matter of several weeks and conservative treatment for HNP is approximately five months or 154 days. Dr. Rosenberg concluded that appellant required no further medical treatment and could return to her usual employment. However, his report was internally inconsistent as he found that appellant still had symptoms and diagnoses causally related to the accepted employment injury, but also opined that appellant had no residuals of the accepted injury, based on her physical examination.

Proceedings under FECA are not adversarial in nature, nor is OWCP a disinterested arbiter.⁹ While the claimant has the responsibility to establish entitlement to compensation, OWCP shares responsibility in the development of the evidence to see that justice is done.¹⁰ Once OWCP undertakes development of the record, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹¹

⁵ *S.G., id.; B.M., id.; A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁶ *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *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 *E.J.*, Docket No. 20-0013 (issued November 19, 2020); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

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

⁹ *See M.T.*, Docket No. 19-0373 (issued August 22, 2019).

¹⁰ *See S.S.*, Docket No. 18-0397 (issued January 15, 2019).

¹¹ *See T.C.*, Docket No. 17-1906 (issued January 10, 2018).

OWCP should have requested that he clarify his opinion prior to terminating appellant's wage-loss compensation and medical benefits. As the November 28, 2022 report of Dr. Rosenberg is, therefore, insufficiently rationalized to justify the termination of appellant's wage-loss compensation and medical benefits, effective January 26, 2023, the Board finds that OWCP failed to meet its burden of proof.¹²

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 26, 2023.

ORDER

IT IS HEREBY ORDERED THAT the April 10, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 9, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.