

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

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<b>S.S., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 24-0247</b>
	)	<b>Issued: May 20, 2024</b>
<b>U.S. POSTAL SERVICE, PARKHILL POST OFFICE, Little Rock, AR, Employer</b>	)	
_____	)	

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On January 8, 2024 appellant filed a timely appeal from a July 11, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> Pursuant to the Board's *Rules of Procedure*, an appeal is considered filed when received by the Clerk of the Appellate Boards. 20 C.F.R. § 501.3(e)-(f). However, when the date of receipt would result in a loss of appeal rights, the appeal will be considered to have been filed as of the date of the U.S. Postal Service postmark or other carriers date markings. *Id.* at § 501.3(f)(1). The 180th day following OWCP's July 11, 2023 decision was Sunday, January 7, 2024. As this fell on a Sunday, appellant had until the close of the next business day, Monday, January 8, 2024, to timely file an appeal. *Id.* at § 501.3(f)(3). Because using January 11, 2024, the date the appeal was received by the Clerk of the Appellate Boards, would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is January 8, 2024, rendering the appeal timely filed.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the July 11, 2023 decision, appellant submitted additional evidence to OWCP and on appeal to the Board. 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.*

## **ISSUES**

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective February 21, 2023, as she no longer had disability causally related to the accepted February 11, 2021 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability, on or after February 21, 2023, causally related to the accepted February 11, 2021 employment injury.

## **FACTUAL HISTORY**

On March 8, 2021 appellant, then a 51-year-old sales and service distribution associate, filed a traumatic injury claim (Form CA-1) alleging that on February 11, 2021 she sustained a right finger fracture when she slipped and fell on the ice-covered sidewalk landing on her hand while in the performance of duty. OWCP accepted her claim for fracture of the fifth metacarpal of the right hand. It paid appellant wage-loss compensation on the supplemental rolls, effective April 19, 2021, and on the periodic rolls, effective July 18, 2021.

In medical reports dated March 15 through September 20, 2021, Dr. Kenneth M. Rosenzweig, a Board-certified orthopedic surgeon, reported that appellant sustained a crush injury and closed fracture of the right small finger on February 11, 2021 after she slipped and fell on some ice outside of her work. In a report dated March 15, 2021, he noted that she was in a short arm ulnar gutter cast, which was removed during his March 29, 2021 evaluation. On examination, Dr. Rosenzweig noted that appellant's joints appeared swollen and stiff, and that the metacarpophalangeal (MP) joint was immobilized in extension. In a report dated March 29, 2021, he reported that the interphalangeal (IP) joints were immobilized in flexion. On examination on May 21 and July 21, 2021, Dr. Rosenzweig explained that appellant still had discomfort in the hand with very stiff MP and IP joints, which were tender to touch. He recommended occupational therapy to restore range of motion before returning to work with the hand unrestricted, explaining that her work status was compromised due to the stiffness, pain, and swelling from immobilization and inactivity.

On October 29, 2021 appellant underwent a magnetic resonance imaging (MRI) scan of the right hand, which revealed an impression of a healed fracture of the distal aspect of the proximal phalanx of the fifth digit with volar angulation. She underwent additional diagnostic studies including an x-ray of the right hand on November 4, 2021, which revealed no acute fracture.

In a November 1, 2021 duty status report (Form CA-17) containing an illegible signature, appellant was released to limited-duty work with restrictions of no use of the right hand.

In a November 4, 2021 medical note, Dr. John Bracey, a Board-certified orthopedic surgeon, reported that appellant could return to light-duty work with restrictions of no use of the right upper extremity.

In a report dated November 21, 2021, Dr. Bracey discussed examination findings of the right hand, which revealed stiffness, pain, and decreased motion indicative of complex regional pain syndrome. He recommended a nerve conduction velocity (NCV) study for further evaluation. On January 20, 2022 appellant underwent the NCV study, which revealed mild right carpal tunnel syndrome.

On October 6, 2022 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Jason G. Stewart, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding whether she had any disability, or residuals causally related to the accepted February 11, 2021 employment injury.

In a report dated October 17, 2022, Dr. Stewart evaluated appellant for the purposes of a second opinion evaluation. He noted her history of injury and medical treatment, and provided physical examination findings. Dr. Stewart discussed appellant's diagnosis of fracture of the fifth metacarpal bone of the right hand. He related that the right hand revealed stiffness based on the positioning throughout the examination, and the range of motion (ROM) demonstrated poor motion. Dr. Stewart reported that the SOAF incorrectly noted the accepted diagnosis as fracture of the fifth metacarpal bone of the right hand as the actual diagnosis, whereas the claim should have been accepted for nondisplaced fracture of the proximal phalanx of the right little finger. He discussed examination findings, noting limited ROM, explaining that the limited ROM in the right hand and fingers was an objective finding of incomplete resolution of the above diagnosis. Dr. Stewart opined that with additional treatment, he would anticipate further recovery because appellant had not reached maximum medical improvement (MMI). He opined that appellant's prognosis for full recovery was poor, and noted that she was prescribed occupational therapy, but refused to participate due to discomfort. Dr. Stewart recommended further treatment with an orthopedic hand surgeon as well as occupational therapy. He opined that the fracture of the finger had healed completely. Dr. Stewart noted that while there was residual stiffness to the small finger it would not preclude any use, and there were no restrictions as to the amount of weight that could be lifted. As the fracture of her finger had completely healed, he concluded that appellant could return to work without restrictions. In a work capacity evaluation (Form OWCP-5c) dated October 31, 2022, Dr. Stewart determined that appellant was capable of performing medium-duty work without restrictions.

In a notice dated November 18, 2022, OWCP proposed to terminate appellant's wage-loss compensation, because she no longer had disability causally related to the accepted February 11, 2021 employment injury. It based its proposed termination on Dr. Stewart's opinion that appellant was no longer disabled and could return to work. OWCP afforded appellant 30 days to submit additional evidence or argument challenging the proposed termination.

By decision dated February 21, 2023, OWCP finalized the termination of appellant's wage-loss compensation benefits, effective that same date. It found that the weight of the medical evidence rested with Dr. Stewart, the second opinion physician, who opined in his October 17, 2022 report that appellant's accepted work-related condition had resolved, and she no longer had any disability causally related to the accepted February 11, 2021 employment injury.

On April 16, 2023 appellant requested reconsideration and submitted additional medical evidence.

In a February 24, 2023 note, Dr. Brian Norton, a Board-certified orthopedic surgeon, reported that appellant was evaluated on January 9, 2023 and was unable to return to work until medically cleared by him.

In a March 2, 2023 report, Dr. Norton evaluated appellant and noted significant decreased ROM of the fingers, including the ring and small finger, as well as findings consistent with complex regional pain syndrome. He reviewed an x-ray of the right small finger, which revealed a healed proximal phalanx fracture with some mild malunion. Dr. Norton diagnosed healed right

small finger proximal phalanx fracture and likely right complex regional pain syndrome. He recommended a functional capacity evaluation prior to determining appellant's impairment rating.

In a May 25, 2023 note, Dr. Norton reported that appellant was evaluated on that date and was to remain off work.

By decision dated July 11, 2023, OWCP denied modification of its February 21, 2023 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.<sup>4</sup> It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective February 21, 2023.

OWCP referred appellant to Dr. Stewart for a second opinion evaluation to determine the status of her accepted conditions and work capacity. In his November 14, 2022 second opinion report, Dr. Stewart noted his review of appellant's medical history, and indicated that appellant's physical examination revealed objective findings of stiffness based on the positioning throughout the examination and the ROM demonstrated poor motion. He noted the accepted diagnosis for fracture of the fifth metacarpal bone of the right hand was incorrect as the actual diagnosis was nondisplaced fracture of the proximal phalanx of the right little finger.<sup>7</sup> Dr. Stewart explained that the limited ROM in the right hand and fingers was an objective finding of incomplete resolution of appellant's diagnosis and opined that her prognosis for recovery was poor, but also reported that appellant could return to work without restrictions.

The Board finds that Dr. Stewart's opinion is contradictory and does not contain sufficient medical reasoning to establish that appellant no longer had disability due to her accepted employment injury.<sup>8</sup> The factors that determine probative medical evidence include the opportunity for and thoroughness of examination performed by the physician, the accuracy or completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed by the physician on the issue addressed to him by

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<sup>4</sup> *Z.D.*, Docket No. 19-0662 (issued December 5, 2019); *see R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> *See R.P., id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>6</sup> *See P.T.*, Docket No. 21-0328 (issued May 2, 2022); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>7</sup> *K.C.*, Docket No. 23-0128 (issued July 18, 2023).

<sup>8</sup> *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *A.G.*, Docket No. 20-0187 (issued December 31, 2020); *see J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.W.*, Docket No. 18-0005 (issued May 24, 2018).

OWCP.<sup>9</sup> Therefore, Dr. Stewart's second opinion report is of diminished probative value.<sup>10</sup> Accordingly, the Board finds that OWCP failed to meet its burden of proof.<sup>11</sup>

**CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective February 21, 2023.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 11, 2023 decision of the Office of Workers' Compensation Programs is reversed.<sup>12</sup>

Issued: May 20, 2024  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>9</sup> See *B.L.*, Docket No. 22-0812 (issued December 29, 2022); *James T. Johnson*, 39 ECAB 1252 (1988).

<sup>10</sup> *Id.*

<sup>11</sup> *J.J.*, Docket No. 22-1125 (issued September 12, 2023).

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