United States Department of Labor
Employees' Compensation Appeals Board

K.A., Appellant	)	
and	)	**Docket No. 23-0773**
	)	**Issued: November 1, 2024**
DEPARTMENT OF THE TREASURY, OFFICE OF THE COMPTROLLER OF THE CURRENCY, Downers Grove, IL, Employer	)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On April 30, 2023 appellant filed a timely appeal from November 3, 2022 and January 25, 2023 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant has met her burden of proof to expand the acceptance of her claim to include the additional conditions of complex regional pain syndrome (CRPS) and

[1] 5 U.S.C. § 8101 *et seq*.

[2] The Board notes that, following the January 25, 2023 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*.

central sensitization of the nervous system as causally related to the accepted May 7, 2013 employment injury; and (2) whether OWCP has met its burden of proof to rescind the prior authorization of ketamine infusions.

FACTUAL HISTORY

On November 18, 2013 appellant, then a 32-year-old bank examiner, filed a traumatic injury claim (Form CA-1) alleging that on May 7, 2013 she sustained injuries to her neck, back, and left hip due to a motor vehicle accident while in the performance of duty. On May 22, 2014 OWCP accepted the claim for sprain of neck and sprain of back lumbar region. It subsequently expanded the acceptance of the claim to include aggravation of cervical spondylosis at C5-7, cervical radiculopathy, lumbosacral radiculopathy, displacement of cervical intervertebral disc without myelopathy and cervical spinal stenosis. On September 15, 2015 appellant underwent an anterior cervical discectomy and fusion (ACDF) procedure. OWCP paid her wage-loss compensation benefits on the supplemental rolls as of August 25, 2013, and on the periodic compensation rolls effective July 26, 2015.

On May 18, 2016 appellant injured her right foot dismounting a treatment table during a physical therapy session. On November 22, 2016 OWCP expanded acceptance of the claim to include a right foot contusion.

In a report dated December 4, 2017, Dr. Jay Joshi, a Board-certified anesthesiologist and specialist in interventional spine and pain management, recommended intravenous (IV) ketamine infusion treatments to manage appellant's pain. He also opined that appellant's foot injury resulted in CRPS and central sensitization.

On June 8, 2018, without prior authorization from OWCP, Dr. Joshi began performing rounds of ketamine infusion treatments.

In progress reports, Dr. Joshi continued to opine that appellant's foot injury resulted in CRPS and central sensitization and that she was totally disabled.

On October 1, 2018 OWCP referred appellant, along with a September 28, 2018 statement of accepted facts (SOAF), the medical record, and a series of questions, to Dr. Allan Brecher, a Board-certified orthopedic surgeon, for a second opinion regarding the nature and extent of her employment-related conditions.

In a November 14, 2018 report, Dr. Brecher reviewed the medical record and SOAF, and related appellant's physical examination findings. He opined that appellant's cervical and lumbar spine sprains, and foot contusion had resolved and that her nonwork-related psychiatric and paratibial swelling conditions prevented her from working. Dr. Brecher noted that, although the etiology was unclear, the swelling and pain along the tibias and feet could be related to CRPS and/or vascular issues, which he considered unrelated to her work injury and/or accepted conditions.

OWCP continued to receive reports from Dr. Joshi. In an October 29, 2018 report, Dr. Joshi related with regard to appellant's consequential right foot injury of May 6, 2016, that instead of resolving, the pain worsened in the right foot, moved up into the lower leg, and spread

to the opposite limb. He opined that appellant's CRPS, central sensitization, and opiate dependence were directly related to the May 7, 2013 employment injury as the cervical stenosis led to the neck surgery with subsequent additional injury and development of chronic pain that led to the need for ketamine infusion. Dr. Joshi explained that the spread of CRPS was likely due to OWCP's delays in identification and treatment. He further opined that the ketamine infusion therapy was the least invasive and most appropriate treatment and that ketamine infusions were the most objective diagnostically-predictive tool for diagnosing central sensitization and CRPS. Dr. Joshi further opined that ketamine infusion treatment was to treat the CRPS, anxiety and depression and that appellant could not return to work without the ketamine infusions, stability of pain, decrease in medication and increase in strength from physical therapy. He also opined that the cervical spinal cord compression resolved after the ACDF surgery, but the lumbar radiculopathy, CRPS, and central sensitization continued.

In a January 2, 2019 report, Dr. Kenechukwu Ugokwe, a Board-certified neurosurgeon serving as a district medical adviser (DMA), concurred with Dr. Joshi's October 29, 2018 opinion that the proposed ketamine infusion was causally related to and medically necessary to the accepted spinal stenosis cervical condition.

In a January 25, 2019 letter, OWCP advised appellant that it could not authorize the ketamine infusions as the DMA's opinion was insufficiently rationalized.

On January 31, 2019 OWCP referred appellant to Dr. Benjamin Gozon III, a Board certified physiatrist, for a second opinion evaluation. In a February 11, 2019 report, Dr. Gozon reviewed a September 28, 2018 SOAF and noted the history of her May 7, 2013 employment injury and her consequential May 2016 foot injury. Based upon his examination, he found that appellant's cervical degenerative disc was repaired successfully, and that her right foot contusion and lumbar degenerative disc disease had resolved. Dr. Gozon opined that her soft tissue injury remained persistent and continued to cause her symptoms. He related that appellant had chronic lumbosacral myofascial pain that stemmed from chronic multi-level lumbar spondylotic radiculopathy, a permanent injury, as a result of the trauma from the May 7, 2013 motor vehicle collision and that the ketamine infusions helped her neuropathic pain. Based on his examination findings, Dr. Gozon opined that the diagnosis of CRPS was unlikely given the mechanism of injury and the bilateral involvement of both feet, which he explained in detail.[3] He further opined that she would benefit from psychiatric support for anxiety and depression.

On March 8, 2019 OWCP expanded the acceptance of the claim to include aggravation of preexisting major depressive disorder, aggravation of preexisting generalized anxiety disorder, and chronic pain syndrome (arising from chronic multi-level lumbar spondylotic radiculopathy).

[3] Dr. Gozon noted that the mechanism of injury in 2016 was to the right lateral ankle area, which is subserved by the superficial and deep peroneal nerves. However, the localized peripheral nerve distribution that could be attributable to the pain pattern of both feet along the medial aspect of the ankle and foot was subserved by the distal ends of the saphenous nerve which came from the femoral nerve mainly supplied by L3 and L4 dermatomes. Dr. Gozon also explained that the involvement of the left foot two months after the onset of the right foot symptoms went against the diagnosis of CRPS. Thus, he opined that the diagnosis of CRPS was highly unlikely due to the bilateral involvement of both feet.

On March 8, 2019 OWCP also authorized ketamine infusions.

Dr. Joshi continued to prescribe and administer IV ketamine infusion treatments for appellant's neuropathic pain consistent with central sensitization, CRPS, hyperalgesia, anxiety, depression, allodynia, and peripheral neuropathy.

In a January 5, 2020 letter, appellant requested that the acceptance of her claim be expanded to include the additional diagnoses of CRPS and central sensitization of the nervous system.

On February 14, 2020 OWCP referred appellant to Dr. Gozan for a supplemental evaluation. No response was received.

By decision dated February 28, 2020, OWCP denied authorization for ketamine infusion treatment as the treatment was considered an off-label, Food and Drug Administration (FDA) – approved drug which did not meet OWCP's policy guidelines for approved use. It also noted that it was not authorized to approve and reimburse ketamine infusion exclusive of or unaffiliated with a surgical procedure.

In a March 9, 2020 report, Dr. Gozon reviewed the medical record and the amended September 10, 2019 SOAF. In pertinent part, he indicated that ketamine infusions were both diagnostic and therapeutic for patients with a CRPS diagnosis and that appellant had significant improvement with those infusions. Dr. Gozon opined that her outlook was optimistic as long as her current therapies, ketamine infusions, current medical pain management, and physical therapy treatments were continued.

Dr. Joshi continued to treat appellant and prescribe and administer IV ketamine infusion treatment at the ambulatory surgical center for neuropathic pain consistent with central sensitization, CRPS, hyperalgesia, anxiety, depression, allodynia, and peripheral neuropathy.

On March 21, 2020 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on July 16, 2020. OWCP subsequently received additional reports from Dr. Joshi regarding appellant's IV ketamine infusions.

By decision dated September 8, 2020, OWCP's hearing representative set aside the February 28, 2020 decision and remanded the case for OWCP to adjudicate whether the acceptance of the claim should be expanded to include the additional diagnosis of CRPS of the lower extremity or, if it determined that ketamine infusions were issued in error, to follow its procedures and rescind the authorization.

On October 28, 2020 OWCP found that, a conflict in medical opinion existed between Dr. Joshi, appellant's treating physician, and Dr. Gozon, OWCP's second opinion physician, as to the causal relationship of the diagnosed CRPS and central sensitization of the nervous system. It indicated that appellant would be referred to an impartial medical examiner (IME) to resolve the conflict in medical opinion.

OWCP received April 7 and June 2, 2021 reports from DMA, Dr. Nizar Souayah, a Board-certified psychiatrist and neurologist,[4] and numerous reports from Dr. Joshi, who continued to treat appellant, prescribe and administer IV ketamine infusion treatment at the ambulatory surgical center for the conditions of central sensitization, CRPS, hyperalgesia, anxiety, depression, and allodynia

In November 10, 2020 and August 11, 2021 reports, Dr. Joshi explained that ketamine infusions were FDA-approved for depression. He advised that the ketamine infusions were used for depression and central sensitization. OWCP also received reports from appellant's psychiatrist;[5] and a September 1, 2021 MRI scan cervical spine report.[6]

On March 8, 2022 OWCP determined that there was an unresolved conflict in medical opinion remained between Dr. Joshi, the attending physician, and the opinions of the second opinion physicians, Dr. Gozon dated February 11, 2019 and Dr. Brecher dated November 14, 2018, regarding the issues of whether CRPS and central sensitization of the nervous system were a consequence of appellant's May 18, 2016 injury, and whether any unusual/special circumstances necessitated the administration of appellant's ketamine infusions.

On April 4, 2022 OWCP referred appellant, together with a March 1, 2022 SOAF, medical record, and series of questions, to Dr. Arthur Itkin, a Board-certified neurologist, to resolve the conflict in medical opinion evidence.

In an April 27, 2022 report, Dr. Itkin, based upon a review of the March 1, 2022 SOAF, the medical reports of record, and appellant's physical examination findings, indicated that she had no evidence of objective neurologic deficit at any time. He indicated that the flexion extension injury of the May 7, 2013 motor vehicle accident and the May 18, 2016 injury did not involve any neurologic structures. Dr. Itkin indicated that appellant was never seen by a neurologist or had any electrodiagnostic studies performed and, without objective testing, including a triple bone scan, he was not completely sure if appellant had CRPS and/or central sensitization of the nervous system. He declined to comment on the appropriate administration of ketamine infusions as he

[4] DMA Souayah opined that the May 18, 2016 consequential injury at physical therapy caused CRPS and central sensitization of the nervous system as there was a plausible mechanism between the CRPS and focal trauma of her 2016 fall.

[5] In June 10 and August 23, 2021 reports, Dr. Michael Martin, a Board-certified psychiatrist, indicated that appellant had been under his psychiatric care for over nine years. He opined that her psychiatric deterioration, orthopedic and neurological injuries and pain syndrome were a direct result of her work-related injuries and that she was temporarily totally disabled from her accepted anxiety, depression, and pain conditions. Dr. Martin opined that ketamine therapy should be continued given her modest symptomatic and functional improvement.

[6] The September 1, 2021 cervical spine MRI scan noted spondylotic and degenerative disc changes superimposed on the congenitally-small spinal canal which resulted in mild bilateral foraminal stenosis greater on right C3-4, moderate left foraminal stenosis C5-6, and mild central canal with mild-to-moderate bilateral foraminal stenosis C6-7.

did not treat CRPS.[7] Following OWCP's June 1, 2022 request for an addendum report,[8] in a report dated June 13, 2022 Dr. Itkin indicated that he did not have access to a triple bone scan. Without access to a triple bone scan, he indicated that there was no evidence of CRPS and he had no opinion as to the appropriateness of the ketamine treatment or any causal relationship to the May 18, 2016 injury.

On August 11, 2022 OWCP requested that appellant undergo a triple bone scan which her treating physician could order. After the test was performed, it requested that a copy of the diagnostic report along with her physician's assessments of the findings be submitted. OWCP afforded appellant 30 days to submit the requested evidence.

In an October 8, 2022 response, Dr. Joshi opined that a triple bone scan was not medically necessary to diagnose CRPS. He stated that ketamine infusions are the diagnostic tool by which CRPS and central sensitization are properly diagnosed. In addition, Dr. Joshi stated that Dr. Itkin lacked the expertise to properly diagnose those conditions. He indicated that appellant was unable to undergo a triple bone scan because her "medical conditions, pain, and involuntary movement from muscle spasms preclude [appellant's] from lying still as required for the duration of imaging."

By decision dated November 3, 2022, OWCP denied the expansion of the acceptance of appellant's claim to include a consequential condition of CRPS or central sensitization. It accorded the special weight of the medical evidence to Dr. Itkin's reports.

On November 4, 2022 OWCP notified appellant of its proposed rescission of her benefit entitlement to ketamine infusions it originally accepted and/or authorized on March 8, 2019. It found that Dr. Itkin's IME reports constituted the special weight of the medical evidence that there was no objective evidence of CRPS. OWCP afforded appellant 30 days to respond to the proposed rescission with additional evidence or argument.

In a December 5, 2022 letter, Dr. Joshi indicated that he could order the triple bone scan, but appellant would not be successful in completing the test due to dystonia. He indicated that she met the Budapest criteria for the CRPS diagnosis. Dr. Joshi also maintained that an anesthesiologist was the proper specialist to diagnose and treat CRPS and central sensitization, a triple bone scan was not medically necessary to diagnosis such conditions, and that ketamine infusions were the most reliable diagnostic tool for diagnosing CRPS or central sensitization.

By decision dated January 25, 2023, OWCP finalized its rescission of its authorization of appellant's entitlement to ketamine infusions, finding that Dr. Itkin's IME reports constituted the special weight of the medical evidence that she did not develop CRPS and central sensitization.

[7] On June 1, 2022 OWCP authorized Dr. Itkin to perform all reasonable and necessary noninvasive diagnostic tests and to submit a supplemental report as to whether the CRPS and/or central sensitization of the central nervous system was related to the physical therapy incident on May 18, 2016 as described in the SOAF and whether the administration of appellant's ketamine infusions intravenously at an ambulatory surgical center, exclusive of or unaffiliated with a surgical procedure, was appropriate.

[8] *Id.*

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[9]

Causal relationship is a medical question that requires rationalized medical opinion evidence to resolve the issue.[10] A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.[11] Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's employment injury.[12]

Section 8123(a) of FECA provides that, if there is 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 an examination.[13] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an IME, pursuant to section 8123(a) of FECA (5 U.S.C. § 8123(a)), to resolve the conflict in the medical evidence.[14] Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[15]

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

OWCP properly determined that a conflict in medical opinion evidence arose between Dr. Joshi, appellant's treating physician, and OWCP's second opinion physicians Dr. Brecher and Dr. Gozon, as to whether appellant's CRPS was causally related to her accepted employment

[9] *J.R.*, Docket No. 20-0292 (issued June 26, 2020); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[10] *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

[11] *F.A.*, Docket No. 20-1652 (issued May 21, 2021); *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *Victor J. Woodhams*, 41 ECAB 345, 352 (1989).

[12] *Id.*

[13] 5 U.S.C. § 8123(a). *See R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

[14] *See D.C.*, Docket Nos. 22-0020 & 22-0297 (issued April 24, 2023); *M.R.*, Docket No. 19-0526 (issued July 24, 2019); *C.R.*, Docket No. 18-1285 (issued February 12, 2019).

[15] *V.H.*, Docket No. 20-0012 (issued November 5, 2020).

injuries of May 7, 2013 and May 18, 2016, and referred appellant to Dr. Itkin to resolve the conflict in medical opinion.

In his reports of April 27 and June 14, 2022, Dr. Itkin opined that, without objective testing, he was unable to determine whether appellant suffered from CRPS causally related to the accepted employment injuries. He suggested that she undergo a triple bone scan to affirmatively diagnose CRPS. Dr. Itkin also explained that without access to a triple bone scan, there was no evidence of CRPS on examination or in the medical records as no neurological testing had been performed.

To be entitled to special weight, Dr. Itkin's opinion must contain clear, persuasive rationale on the critical issue in the claim.[16] He was unsure of the CRPS diagnosis and requested objective testing in the form of a triple bone scan to secure the diagnosis. Dr. Itkin's subsequent opinion that, without the triple bone scan, appellant did not have CRPS is generalized and speculative in nature as the record failed to indicate that she had undergone the requested testing. The Board has held that medical opinions that are speculative or equivocal in character are of diminished probative value.[17] As such, the Board finds that Dr. Itkin did not provide adequate medical rationale to support his conclusion; therefore, his opinion is insufficient to resolve the conflict in medical evidence.[18]

Once OWCP undertakes development of the medical evidence, it must produce medical evidence that will resolve the relevant issues in the case.[19] While Dr. Itkin indicated that, further diagnostic testing was required before he could provide an opinion regarding appellant's CRPS condition and recommended that she undergo a triple bone scan to affirmatively indicate the diagnosis of CRPS, OWCP did not refer appellant for further testing, but rather relied on Dr. Joshi to obtain the testing. When OWCP obtains an opinion from an IME for the purpose of resolving a conflict in the medical evidence and the IME's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in the original report.[20]

On remand, OWCP shall refer appellant for the recommended diagnostic testing and a supplemental opinion by Dr. Itkin. Following this and any other further development as deemed necessary, OWCP shall issue a *de novo* decision on appellant's expansion claim.

[16] *C.E.*, Docket No. 19-1923 (issued March 30, 2021); *A.R.*, Docket No. 17-1358 (issued February 1, 2018).

[17] *L.F.*, Docket No. 20-1021 (issued July 30, 2021); *J.K.*, Docket No. 20-1313 (issued May 17, 2021); *D.B.*, Docket No. 18-1359 (issued May 14, 2019).

[18] *J.K.*, *id*.

[19] *L.F.*, *supra* note 17; *T.K.*, Docket No. 20-0150 (issued July 9, 2020); *T.C.*, Docket No. 17-1906 (issued January 10, 2018).

[20] *L.F.*, *id*.; *B.J.*, Docket No. 18-1186 (issued July 9, 2019); *Charles Feldman*, 28 ECAB 314 (1977).

LEGAL PRECEDENT -- ISSUE 2

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.[21] The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.[22]

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.[23] It bears the burden of proof to justify rescission of acceptance on the basis of new evidence, legal argument, and/or rationale.[24] Probative and substantial positive evidence or sufficient legal argument must establish that the original determination was erroneous. OWCP must also provide a clear explanation of the rationale for rescission.[25]

ANALYSIS -- ISSUE 2

The Board finds that OWCP failed to meet its burden of proof to rescind the prior authorization of ketamine infusions.

In its January 25, 2023 decision, OWCP rescinded the prior authorization of ketamine infusions based on the reports of Dr. Itkin, the IME, who opined that, since the objective medical evidence did not substantiate that she had CRPS, it was not necessary to determine whether the ketamine infusions were being administered properly. Dr. Itkin also indicated that he could not comment on the appropriateness of the administration of ketamine infusions as he did not treat CRPS. He did not provide an opinion as to whether the ketamine infusion treatments were reasonably medically necessary and causally related to the accepted May 7, 2013 employment injury.

Once OWCP undertakes development of the record, it must do a complete job in procuring medical evidence that will resolve the relevant issues in the case.[26] Thus, the Board finds that OWCP failed to meet its burden of proof in rescinding the prior authorization of ketamine infusions.

[21] 5 U.S.C. § 8128.

[22] *L.M.*, Docket No. 19-0705 (issued September 11, 2019); *John W. Graves*, 52 ECAB 160, 161 (2000). *See also* 20 C.F.R. § 10.610.

[23] *See C.F.*, Docket No. 20-0479 (issued August 2, 2022); *Thomas Meyers*, 35 ECAB 381, 386 (1983).

[24] *L.G.*, Docket No. 17-0124 (issued May 1, 2018); *Katherine A. Kirtos*, 42 ECAB 160, 165 (1990).

[25] *W.H.*, Docket No. 17-1390 (issued April 23, 2018).

[26] *See S.A.*, Docket No. 18-1024 (issued March 12, 2020); *L.B.*, Docket No. 19-0432 (issued July 23, 2019); *William J. Cantrell*, 34 ECAB 1223 (1983).

CONCLUSION

The Board finds that the case is not in posture for decision as to whether appellant's case should be expanded to include the additional conditions of CRPS and central sensitization of the nervous system as causally related to the accepted May 7, 2013 employment injury. The Board further finds that OWCP failed to meet its burden of proof in rescinding its prior authorization of ketamine infusions.

ORDER

IT IS HEREBY ORDERED THAT the November 3, 2022 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board. The January 25, 2023 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 1, 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