

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

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G.P., Appellant)

and)

DEFENSE AGENCIES, FORT LEWIS)
DEFENSE AUTOMATED PRINTING)
SERVICE, Tacoma, WA, Employer)
-----)

Docket No. 24-0763
Issued: October 11, 2024

Appearances:

Thomas R. Pierce, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 9, 2024 appellant, through her representative, filed a timely appeal from a January 29, 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.³

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.*

³ The Board notes that following the January 29, 2024 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.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation effective October 21, 2022, as she no longer had disability causally related to her accepted June 2, 1997 employment injury; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability on or after October 21, 2022, causally related to her accepted June 2, 1997 employment injury.

FACTUAL HISTORY

On June 4, 1997 appellant, then a 33-year-old electronic duplicating system technician, filed a traumatic injury claim (Form CA-1) alleging that on June 2, 1997 she sustained a lower back muscle strain when she tripped over a loose and exposed telephone wire and fell while in the performance of duty. She stopped work on June 2, 1997. OWCP accepted the claim for lumbar sprain with subluxation, herniated L5-S1 lumbar disc, lumbar intervertebral disc disorder with myelopathy, and temporary aggravation of preexisting depression (resolved). It authorized anterior lumbar body L5-S1 fusion with iliac bone graft which was performed on September 30, 1998. OWCP paid appellant wage-loss compensation on the supplemental rolls as of July 21, 1997 and on the periodic rolls as of January 27, 1998.

In an April 21, 2021 Attending Physician's Report (Form CA-20), Dr. Michael J. Martin, a Board-certified orthopedic surgeon, noted a June 2, 1997 injury date and diagnosed lumbar degenerative disc disease and status post lumbar fusion. He related that appellant last worked in 1997 and opined that she was permanently disabled from work.

On October 4, 2021 OWCP referred appellant, together with a statement of accepted facts (SOAF), medical record, and series of questions, for a second opinion evaluation with Dr. Robin G. Simon-Mark, an osteopathic physician specializing in orthopedic surgery, regarding whether appellant had any continuing disability and residuals due to her accepted employment injury.

In a report dated November 11, 2021, Dr. Simon-Mark, based upon a review of the medical evidence, the SOAF, and appellant's examination findings diagnosed lumbar strain, L5-S1 lumbar herniated disc, and status post L5-S1 lumbar fusion with cage. She determined the accepted lumbar conditions had resolved, and that appellant had reached maximum medical improvement (MMI). Dr. Simon-Mark observed that appellant's subjective complaints did not correspond with her objective findings. She concluded that appellant could return to her date-of-injury job with restrictions including no heavy lifting, pushing, pulling, or carrying more than 25 pounds.

In a December 15, 2021 encounter note, Dr. Martin reported appellant was seen in follow-up for her lumbar issues. On physical examination, he reported 5/5 strength and decreased L2, L3, L5, and S1 nerve distribution sensation, positive bilateral straight leg raising, no clonus, and midline tenderness. Dr. Martin diagnosed apparently solid L5-S1 fusion and lumbar spondylosis without evidence of instability.

On December 20, 2021 OWCP requested that Dr. Simon-Mark provide supporting rationale regarding her conclusion that appellant's accepted conditions had resolved. It also requested clarification as to whether appellant's disability was a result of the accepted work-related conditions.

In a January 26, 2022 supplemental report, Dr. Simon-Mark, explained that her opinion had been based on review of diagnostic and medical records and appellant's physical examination findings which indicated that the accepted lumbar conditions had resolved. She related that appellant could return to work without restrictions. In support of her opinion, Dr. Simon-Mark explained that her prior finding that restrictions were required had been an error because the accepted lumbar conditions had resolved.

In a March 10, 2022 notice of proposed termination, OWCP found that Dr. Simon-Mark's opinion that appellant's accepted lumbar conditions no longer caused disability constituted the weight of the medical opinion evidence. It afforded appellant 30 days to submit additional evidence.

In a letter dated March 21, 2022, appellant's representative disagreed with the proposal to terminate appellant's compensation benefits.

Dr. Martin, in a May 15, 2022 Form CA-20, noted a 1997 work injury and reported post lumbar fusion surgical findings on a magnetic resonance imaging (MRI) scan. He related that appellant had chronic pain. Dr. Martin opined that appellant had been totally disabled since 1997.

In a report dated May 25, 2022, Dr. Martin opined that appellant was permanently disabled from work which he attributed to her accepted lumbar conditions.

On July 12, 2002 OWCP referred appellant to Dr. Duane F. Hopp, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Martin, appellant's treating physician, and Dr. Simon-Mark, a second opinion physician, regarding whether appellant's accepted conditions had resolved, and whether she had any continuing disability.

In a report dated September 1, 2022, Dr. Hopp, based upon a review of the medical evidence, SOAF, and appellant's physical examination diagnosed lumbar sprain with subluxation, L5-S1 herniated disc, lumbar intervertebral disc disorder with myelopathy, and status post L5-S1 bilateral arthrodesis. On physical examination, he reported a normal nonantalgic gait, negative bilateral Trendelenburg sign, negative bilateral sitting straight leg testing, positive bilateral supine straight leg testing at 60 degrees, negative Patrick's maneuver and log rolling, intact bilateral lower extremities neurologic sensation, normal strength testing, and tenderness on palpation in the S1-2 distal region scar, in the sacroiliac joint, and bilateral trochanteric. Range of motion findings of the thoracolumbar spine were 80 degrees flexion, 30 degrees extension, 45 degrees bilateral flexion, and 45 degrees bilateral rotation. Dr. Hopp opined that all the accepted conditions had resolved, with no further treatment required. In support of this conclusion, he referenced her basically normal physical examination and diagnostic studies showing a solid L5-S1 fusion with no evidence of spinal or foraminal stenosis. Dr. Hopp concluded that appellant was capable of returning to her date-of-injury job. He further opined that "the only interfering condition would be her disability conviction."

By decision dated October 21, 2022, OWCP terminated appellant's wage-loss compensation effective that date finding the special weight of the medical opinion evidence rested with Dr. Hopp, the IME.

On January 4, 2023 appellant, through her representative, requested reconsideration and submitted additional evidence.

In a report dated October 16, 2001, Dr. Martin noted appellant's June 2, 1997 work injury and her medical treatment. He diagnosed status post L5-S1 anterior lumbar interbody fusion, thoracic sprain, cervical radiculitis, cervicothoracic sprain, chronic pain syndrome, myofascial type pain syndrome, and intermittent depression. Dr. Martin opined that appellant's condition was fixed and stable and he therefore did not anticipate any further recovery. He doubted that she would be able to return to gainful employment given her permanent restrictions.

In a note dated August 20, 2019, Dr. Valentin Laticevschi, a Board-certified neurologist, reported appellant had episodic myoclonic lower extremity jerks when sitting for an extended period of time. He requested accommodations to prevent this condition.

In an August 25, 2022 report, Emma Ferguson, an acupuncturist, attributed appellant's pain to the accepted 1997 work injury, surgery and subsequent infection. She concurred with Dr. Martin's opinion that appellant was permanently disabled from work in any capacity.

By decision dated March 8, 2023, OWCP denied modification.

In progress notes dated May 15, 2023, Dr. Martin detailed appellant's examination findings and diagnosed chronic pain syndrome, status post lumbar fusion, lumbar radiculopathy, and lumbar spondylosis. Appellant complained of lumbosacral back pain. On physical examination Dr. Martin reported that appellant had 5/5 strength, decreased left leg sensation, negative straight leg testing. He observed that the area where she was hurting was very non-specific, and she had a hypersensitive pain system. Dr. Martin concluded that appellant had insignificant examination findings.

On January 25, 2024 appellant, through her representative, requested reconsideration. He asserted that Dr. Martin's opinion should constitute the weight of the medical opinion evidence based on his expertise and his treatment of appellant since June 1997. Appellant's representative asserted that Dr. Martin's opinion had been unequivocal and consistent over the years that she was permanently disabled from performing any work. The representative further asserted that Dr. Ferguson's August 25, 2022 report supported continuing residuals. Additionally, her representative argued that OWCP erred in finding a conflict in the medical opinion evidence and in relying on the opinion of Dr. Hopp, the IME.

By decision dated January 29, 2024, OWCP denied modification finding the evidence submitted was insufficient to support appellant's inability to work or continuing residuals.

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.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 See *D.D.*, Docket No. 24-0201 (issued April 23, 2024); *T.C.*, Docket No. 19-1383 (issued March 27, 2020); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

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

Section 8123(a) 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.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss benefits effective October 21, 2022, as she no longer had disability causally related to her accepted June 2, 1997 employment injury.

OWCP properly determined that there was a conflict in the medical opinion between Dr. Martin, appellant's treating physician, and Dr. Simon-Mark, an OWCP second opinion physician, regarding whether appellant continued to have disability causally related to the accepted employment injury. In order to resolve the conflict, it referred her, pursuant to 5 U.S.C. § 8123(a), to Dr. Hopp, for an impartial medical examination and an opinion on the issue.⁹ Based on his September 1, 2022 report, OWCP terminated appellant's wage-loss compensation effective October 21, 2022.

In a September 1, 2022 report, Dr. Hopp diagnosed lumbar sprain with subluxation, L5-S1 herniated disc, lumbar intervertebral disc disorder with myelopathy, and status post L5-S1 bilateral arthrodesis. He opined that all of appellant's accepted conditions had resolved based on normal physical examination findings and diagnostic testing showing a solid L5-S1 fusion with no evidence of spinal or foraminal stenosis. Dr. Hopp opined that appellant was capable of returning to her date-of-injury job. He concluded that appellant's impression that she was disabled was the only interfering condition.

Dr. Hopp based his opinion on a prior factual and medical history of detailed findings on prior examination.¹⁰ He further provided a well-rationalized opinion that appellant was no longer disabled as she had no further residuals causally related to her accepted employment injury,

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

⁶ *D.D., id.*; *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 5 U.S.C. § 8123(a); see *D.D., id.*; *L.S.*, Docket No. 23-0730 (issued October 4, 2023); *B.T.*, Docket No. 21-0388 (issued October 14, 2021); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

⁸ 20 C.F.R. § 10.321; *D.D., id.*; *B.M.*, Docket No. 21-0101 (issued December 15, 2021); *T.D.*, Docket No. 17-1011 (issued January 17, 2018); *James P. Roberts*, 31 ECAB 1010 (1980).

⁹ See *M.R.*, Docket No. 23-1052 (issued March 5, 2024); *J.P.*, Docket No. 23-0075 (issued March 26, 2023); *C.M.*, Docket No. 20-1647 (issued October 5, 2021); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁰ *M.R., id.*; *S.V.*, Docket No. 23-0474 (issued August 1, 2023); *J.S.*, Docket No. 20-1409 (issued September 1, 2021).

explaining that findings on examination and objective studies demonstrated no continued employment-related condition.¹¹ The Board, therefore, finds that Dr. Hopp's opinion, as the IME, is accorded the special weight of the medical evidence and establishes that appellant no longer had disability causally related to the accepted June 2, 1997 employment injury. Accordingly, OWCP met its burden of proof to terminate her wage-loss benefits, effective October 21, 2022.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminates a claimant's compensation benefits, the burden shifts to appellant to establish continuing disability after that date causally related to the accepted injury.¹² To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such causal relationship.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish continuing disability on or after October 21, 2022.

Following the termination of her wage-loss compensation benefits, appellant submitted reports from Dr. Martin dated October 16, 2001 and May 15, 2023. However, Dr. Martin was on one side of the conflict that was resolved by the IME, Dr. Hopp. A medical report from a physician on one side of a conflict resolved by an IME is generally insufficient to overcome the special weight accorded the report of an IME or to create a new conflict.¹⁴ As such, the Board finds that the additional reports from Dr. Martin are insufficient to overcome the special weight accorded to the opinion of the IME, or to create a new conflict in medical opinion regarding appellant's alleged continuing disability from work.¹⁵

OWCP also received an August 20, 2019 note from Dr. Laticevschi which noted episodic myoclonic lower extremity jerks when appellant sat for an extended period of time. Dr. Laticevschi, however, did not address the relevant issue of whether appellant was disabled on or after October 21, 2022 due to her accepted employment injury, and thus his opinion is of limited probative value.¹⁶

¹¹ *J.P.*, *supra* note 9; *J.S.*, *id.*

¹² *See D.D.*, *supra* note 4; *S.G.*, Docket No. 23-0652 (issued October 11, 2023); *V.W.*, Docket No. 20-0693 (issued June 2, 2021); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *J.R.*, Docket No. 17-1352 (issued August 13, 2018); *Manuel Gill*, 52 ECAB 282 (2001).

¹³ *Id.*

¹⁴ *See M.G.*, Docket No. 23-0674 (issued October 3, 2023); *P.T.*, Docket No. 22-0841 (issued January 26, 2023); *N.U.*, Docket No. 20-1022 (issued January 25, 2022).

¹⁵ *Id.*

¹⁶ *L.K.*, Docket No. 20-0443 (issued August 8, 2023); *R.R.*, Docket No. 19-0173 (issued May 2, 2019).

OWCP also received a report from an acupuncturist, Ms. Ferguson. This report is of no probative value, however, because an acupuncturist is not considered a physician as defined by FECA.¹⁷

As the medical evidence of record is insufficient to establish that appellant had continuing disability on or after October 21, 2022, causally related to her accepted June 2, 1997 employment injury, the Board finds that she has not met her burden of proof.¹⁸

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.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation effective October 21, 2022 as she no longer had disability causally related to her accepted June 2, 1997 employment injury. The Board further finds that appellant has not met her burden of proof to establish continuing employment-related disability on or after October 21, 2022, causally related to her accepted June 2, 1997 employment injury.

¹⁷ 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also David P. Sawchuk*, 57 ECAB 316, 322 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA). 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *George H. Clark*, 56 ECAB 162 (2004) (physician assistant); *James A. White*, 34 ECAB 515, 518 (1983) (physical therapist); *Nemat M. Amer*, Docket No. 03-338 (issued April 7, 2005) (acupuncturist).

¹⁸ *See M.R.*, *supra* note 9; *R.G.*, Docket No. 22-0165 (issued August 11, 2022).

ORDER

IT IS HEREBY ORDERED THAT the January 29, 2024 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 11, 2024
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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