

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

S.S., Appellant)	
)	
and)	Docket No. 24-0773
)	Issued: September 16, 2024
U.S. POSTAL SERVICE, OZONE PARK)	
CARRIER ANNEX, Brooklyn, NY, Employer)	
)	

Appearances:
Paul Kalker, Esq., for the appellant¹
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 July 18, 2024 appellant, through counsel, filed a timely appeal from a June 27, 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 November 17, 2023, as she no longer had

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.*

disability or residuals causally related to her accepted December 18, 2009 employment injury; and (2) whether appellant has established that she had continuing disability or residuals on or after November 17, 2023, causally related to her accepted December 18, 2009 employment injury.

FACTUAL HISTORY

On December 26, 2009 appellant, then a 23-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on December 18, 2009 she sustained neck and left shoulder injuries while in the performance of duty. She explained that when driving a postal vehicle, a tire blew, she lost control of the vehicle, and she struck an obstacle. Appellant stopped work on December 18, 2009 and did not return. OWCP accepted the claim for cervical sprain; sprain of shoulder and upper arm, acromioclavicular left; and other affections of shoulder region, not elsewhere classified, left (shoulder impingement). It paid appellant wage-loss compensation on the supplemental rolls, effective February 2, 2010 and on the periodic rolls, effective April 11, 2010.

On May 27, 2010 appellant underwent an OWCP-authorized surgical debridement and chondroplasty of the left glenohumeral joint, with removal of loose cartilaginous fragments; partial acromionectomy of the subacromial joint, with resection of the subacromial and coracoacromial bursae; and debridement of the acromioclavicular joint. She remained under medical treatment.

A September 5, 2014 magnetic resonance imaging (MRI) scan of the cervical spine revealed posterocentral disc herniation at C6-7 with ventral impingement on the thecal sac, posterior bulging discs at C4-5 and C5-6, and mild scoliosis.

A February 13, 2018 electromyogram/nerve conduction velocity (EMG/NCV) study of the left upper extremity revealed evidence of chronic left C5, C6, and C7 radiculopathy.

In a January 31, 2023 report, Dr. Steven Horowitz, a Board-certified physiatrist, recounted a history of injury and treatment. He noted that appellant was also under treatment for a brain cyst. On examination, Dr. Horowitz observed bilateral cervical paravertebral spasm, positive Spurling and stretch root tests, bilaterally positive facet loading tests, and pain with rotation of the cervical spine. He diagnosed cervicalgia, cervical radiculopathy, and other myositis of unspecified site. Dr. Horowitz opined that appellant's disability and need for medical treatment were directly causally related to the accepted December 18, 2009 employment injury. He found appellant totally disabled from work.

On May 8, 2023 OWCP referred appellant, the case record, and a statement of accepted facts (SOAF) to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination.

In a June 28, 2023 report, Dr. Sultan reviewed the medical record and SOAF. On examination, he found no paravertebral cervical spasm, no trigger points over the trapezial muscles bilaterally, normal range of cervical spine motion in all planes, and no neurologic abnormalities of either upper extremity. Regarding the left shoulder, Dr. Sultan observed multiple well-healed arthroscopic puncture scars, no tenderness to palpation, no atrophy, normal range of motion in all planes, and negative impingement, Hawkins, and drop arm testing. He opined that the accepted

conditions were no longer causing objective findings and opined that appellant could return to her usual employment without restrictions. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Sultan found that appellant had reached maximum medical improvement (MMI) and had no work restrictions.

On July 14, 2023 OWCP proposed to terminate wage-loss compensation and medical benefits as the evidence established that she no longer had any residuals or disability due to her accepted December 18, 2009 employment injury. It accorded the weight of the medical evidence to Dr. Sultan's second opinion report. OWCP afforded appellant 30 days to submit additional evidence or argument if she disagreed with the proposed termination of benefits.

In response, appellant submitted a July 18, 2023 statement in which she contended that her physician opined that the accepted employment injury remained active and disabling, and that diagnostic studies revealed cervical disc bulges and herniations with anterior thecal sac impingement. She alleged that Dr. Sultan did not perform a thorough examination.

OWCP received a June 8, 2022 report of a magnetic resonance imaging (MRI) scan of the cervical spine, which revealed disc bulges at C3-4 and C5-6 with anterior thecal sac impingement, and central disc herniations at C4-5 and C6-7 with anterior thecal sac impingement.

In a June 2, 2023 report, Dr. Ranga C. Krishna, a Board-certified psychiatrist and neurologist, recounted a history of injury and treatment. On examination, he observed restricted motion throughout the spine and left shoulder in all planes, and muscular atrophy in all extremities. Dr. Krishna diagnosed cervical radiculopathy, lumbosacral radiculopathy, and joint derangement of the right shoulder. He opined that appellant was totally disabled from work and that the accepted employment injury was the competent cause of her impairment and disability.

In a July 19, 2023 Form OWCP-5c, Dr. Krishna diagnosed cervical and lumbar radiculopathy and left shoulder pain. He opined that appellant was totally disabled from work.

In a July 26, 2023 report, Dr. Horowitz observed 4/5 strength with finger flexion and shoulder abduction in the left upper extremity, decreased sensation in the left lateral forearm, bilateral paracervical muscle spasm, bilaterally positive Spurling and root stretch tests, significantly worse on the left, and restricted cervical and lumbar spine motion. He administered intra-articular injections into the cervical paravertebral musculature and bilateral trapezius muscles. Dr. Horowitz opined that appellant's "current disability, and need for treatment are causally and directly related to the work-related accident on [December 18, 2009]." He found appellant totally disabled from work.

OWCP received an August 6, 2023 cervical MRI scan, which listed midline posterior disc herniations at C4-5 and C6-7 deforming the thecal sac, and straightening of the cervical lordosis possibly related to muscle spasm.

By decision dated November 17, 2023, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date.

On April 3, 2024 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a February 20, 2024 report, Dr. Krishna recounted a history of injury and treatment and reviewed medical records. On examination, he observed restricted motion throughout the spine and the left shoulder, 4/5 weakness in the bilateral upper extremities, decreased sensation in the C5-6 and L5-S1 dermatomes bilaterally, and sensory, motor, and reflex deficits at the C5, C6, C7, L4, L5, and S1 levels. Dr. Krishna opined that appellant remained totally disabled from work due to the accepted December 18, 2009 employment injury and required additional medical treatment.

On April 4, 2024 OWCP identified a conflict of medical opinion between Dr. Horowitz and Dr. Sultan regarding the nature and extent of the accepted conditions and appellant's work capacity.

On April 9, 2024 OWCP referred appellant, the case record, a SOAF, and a series of questions to Dr. Frank J. Corrigan, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a May 23, 2024 report, Dr. Corrigan, serving as the impartial medical examiner (IME), reviewed the medical record and SOAF. On examination, he observed limited cervical rotation, limited range of motion of the bilateral shoulders, and healed arthroscopic scars on the left shoulder. Dr. Corrigan opined that the accepted December 18, 2009 employment injury had resolved without residuals or need for further treatment. He explained that appellant's cervical radiculopathy was caused solely by the natural progression of cervical degenerative disc disease as demonstrated by MRI scan studies of record. In a Form OWCP-5c of even date, Dr. Corrigan returned appellant to her date-of-injury job with no restrictions.

By decision dated June 27, 2024, OWCP denied modification of the November 17, 2023 termination decision. It accorded the special weight of the medical evidence to Dr. Corrigan as the IME.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.³ 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.⁴ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶

³ See *LM.*, Docket No. 22-0342 (issued August 25, 2023); *T.C.*, Docket No. 20-1163 (issued July 13, 2021); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁴ *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁵ *M.B.*, Docket No. 24-0697 (issued July 25, 2024); *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

⁶ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁷

Section 8123(a) of FECA provides in pertinent part: “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.”⁸ The implementing regulation states 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 examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹

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 November 17, 2023.

The Board finds that a conflict existed in the medical opinion evidence as to whether appellant’s accepted conditions had resolved and whether she remained disabled from work due to the accepted conditions. In his January 31, 2023 report, Dr. Horowitz opined that appellant continued to suffer from residuals of her accepted December 18, 2009 employment injury, which totally disabled her from work. He diagnosed cervicgia, cervical radiculopathy, and other myositis of unspecified site. However, Dr. Sultan, in his report dated June 28, 2023, opined that appellant no longer had residuals of the accepted cervical sprain and left shoulder sprain. He returned appellant to full-duty work with no restrictions.

It is well established that, when there exist opposing medical reports of virtually equal weight and rationale, the case should be referred to an IME for the purpose of resolving the conflict.¹⁰ Therefore, OWCP has not met its burden of proof to terminate appellant’s wage-loss compensation and medical benefits effective November 17, 2023 as it should have referred her to an impartial medical evaluation, pursuant to 5 U.S.C. § 8123(a), to resolve the conflict prior to a termination of wage-loss compensation and medical benefits.¹¹

⁷ *R.V.*, Docket No. 23-1151 (issued April 9, 2024); *K.J.*, Docket No. 20-0572 (issued July 12, 2023); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

⁸ 5 U.S.C. § 8123(a).

⁹ 20 C.F.R. § 10.321.

¹⁰ *A.E.*, Docket No. 23-0756 (issued December 14, 2023); *D.P.*, Docket No. 21-0534 (issued December 2, 2021); *N.A.*, Docket No. 21-0542 (issued November 8, 2021); *G.B.*, Docket No. 16-0996 (issued September 14, 2016) (where the Board held that OWCP improperly terminated the claimant’s wage-loss compensation and medical benefits as there was an unresolved conflict of medical opinion between her treating physician and a second opinion physician).

¹¹ *Id.*

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 17, 2023.¹²

ORDER

IT IS HEREBY ORDERED THAT the June 27, 2024 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 16, 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

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