

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

L.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Princeton, NJ, Employer**

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**Docket No. 14-0559
Issued: July 24, 2015**

Appearances:

*Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 14, 2014 appellant, through counsel, filed a timely appeal from an October 17, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 properly terminated appellant's wage-loss compensation effective January 5, 2012 as he had no further disability due to his July 27, 2011 work injury; (2) whether appellant has established that he had continuing employment-related disability after January 5, 2012; and (3) whether he sustained a cervical disc herniation or cervical radiculopathy due to his July 27, 2011 employment injury.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On July 29, 2011 appellant, then a 57-year-old letter carrier, filed a traumatic injury claim alleging that on July 27, 2011 he injured the left side of his head when he fell in the performance of duty. He stopped work on July 28, 2011. OWCP accepted the claim for postconcussion syndrome, neck sprain, and contusion of the eyelids and periorcular area on the left. It paid appellant compensation for total disability on the short-term rolls beginning September 24, 2011.

In a report dated August 10, 2011, Dr. Hillard C. Sharf, an attending Board-certified internist and neurologist, obtained a history of appellant falling at work hitting the left side of his face after he experienced pain in his right foot. He complained of left head pain and neck pain radiating into the left shoulder. Dr. Sharf diagnosed mild postconcussion syndrome, cervical strain, and a possible temporomandibular joint condition. He recommended a magnetic resonance imaging (MRI) scan study of the brain. Dr. Sharf indicated that appellant should “remain out of work.”

A September 1, 2011 MRI scan study of the brain yielded unremarkable findings.

In a report dated September 8, 2011, Dr. Craig Kimmel, Board-certified in family practice, discussed appellant’s prior history of a fall at work in 2007 which resulted in tarsal tunnel syndrome of the right foot. He noted that he saw appellant on July 29, 2011 for a fall he had when his right foot gave out and he hit his head on a mailbox. Dr. Kimmel related that appellant “continues to have postconcussion symptoms of headache and stiff neck and memory loss.” He further diagnosed possible reflex sympathetic dystrophy or complex regional pain syndrome due to the “original work-related right foot trauma.” Dr. Kimmel opined that appellant’s right foot condition would cause permanent disability without “aggressive intervention.”

In a report dated October 11, 2011, Dr. Sharf discussed appellant’s complaints of neck pain radiating into the right upper extremity, low back pain and right foot pain from a prior injury and noted appellant’s continuing “complaints referable to a postconcussion syndrome. Appellant does complain of some inability to concentrate. He also gets headaches and some vertigo. In addition, appellant has a number of musculoskeletal/orthopedic complaints.” Dr. Sharf found that he was disabled from his usual employment and referred him for an orthopedic evaluation.

On November 30, 2011 OWCP referred appellant to Dr. Saeid Alemo, a Board-certified neurosurgeon, for a second opinion examination. In the accompanying statement of accepted facts, it noted that he had a prior injury to his right foot, assigned under file number xxxxxx878, and accepted tarsal tunnel syndrome, a closed fracture of the calcaneus, and plantar fibromatosis. Appellant returned to his usual employment on April 13, 2009; under file number xxxxxx878.

In a report dated December 17, 2011, Dr. Alemo discussed appellant’s complaints of pain in his neck, back, right arm, and the right side of his head. On examination he found normal motion of the upper extremities, symmetrical lower extremity reflexes, and no sensory deficits. Dr. Alemo advised that appellant’s symptoms of right-sided neck pain radiating into the right arm were not consistent with the accepted conditions. He found that appellant had recovered

from his prior work injury of tarsal tunnel syndrome, a closed calcaneus fracture, and plantar fibromatosis. Dr. Alemo noted that at the time of Dr. Sharf's August 10, 2011 evaluation, appellant complained of left head and arm pain rather than right head and arm pain. He stated:

“[Appellant] fell on July 27, 2011 accidentally when he was on duty and sustained postconcussion syndrome, sprain of the neck, and contusion of the eyelids and periocular area on the left side.”

“[Appellant's] preexisting injury to the right foot had nothing to do with this accident because [he] had a full recovery from the right foot injury and had returned to work on April 13, 2009 without any restrictions.”

Dr. Alemo advised that appellant had no “objective evidence of postconcussion syndrome, strain of the neck or contusion of the eyelids and periocular area on the left side.” He concluded that there was “no medical evidence of any residual disability or deficit secondary to the fall of July 27, 2011 and [appellant] has had a full recovery from the fall of July 27, 2011.” Dr. Alemo advised that appellant could resume his usual employment.

By decision dated January 5, 2012, OWCP terminated appellant's wage-loss compensation effective that date. On January 5, 2012 it also issued a proposed termination of medical benefits.

On January 10, 2012 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

A November 17, 2011 electrodiagnostic study, received by OWCP on January 17, 2012, revealed “modest carpal tunnel syndrome on the right.” A January 11, 2012 MRI scan study showed “[s]mall disc herniations at C3-4 and C5-6 without narrowing of the spinal canal and neural foramina” and cervical spine straightening.

In a report dated January 26, 2012, Dr. Laura E. Ross, an osteopath, diagnosed cervical and lumbar sprain/strain and right leg pain. On examination, she found muscle spasms in the cervical spine and right lumbar spine with a positive straight leg test. Dr. Ross related that MRI scan studies showed C3-4 and C5-6 disc herniations. She stated, “It does not appear that Dr. Alemo reviewed the MRI scan [study] of the cervical spine in coming to his conclusions. There is definitely medical evidence of residuals disability secondary to appellant's fall on July 27, 2011, as noted on his clinical examination as well as on his objective testing.”

In a report dated January 26, 2012, Dr. Kimmel evaluated appellant for complex regional pain syndrome of the right foot and ankle. He noted that appellant was “also getting chronic neck pain radiating down his right arm after a fall at work causing right cervical radiculopathy.” Dr. Kimmel stated, “[Appellant] has complex regional pain syndrome with severe pain causing secondary depression and cognitive problems. This is worsened by his lack of strength and balance in that right leg. [Appellant] is not safe to work or drive in any capacity.”

In a report dated February 1, 2012, Dr. Kimmel diagnosed complex regional pain syndrome of the right foot and ankle due to a prior work injury and 2007 surgery. He further diagnosed progressive hyperesthesia causing loss of judgment, loss of balance, anxiety, and

depression. Dr. Kimmel stated, “It is my opinion that this condition has completely and totally made him permanently disabled.”

Following a preliminary review, on March 15, 2012, an OWCP hearing representative issued a decision finding that the evidence supported OWCP’s termination of wage-loss compensation benefits but noted that OWCP had not issued a decision regarding the termination of medical benefits. She found, however, that subsequent to the termination, appellant had submitted evidence sufficient to warrant further development on the issue of whether he sustained cervical disc herniations and cervical radiculopathy causally related to the July 27, 2011 work injury.

An April 19, 2012 MRI scan study of the cervical spine showed disc desiccation and a central protrusion at C5-6 with moderate degenerative changes at C4-5 and a disc bulge at C4-5 and C3-4 without stenosis and a normal cord.

On May 10, 2012 Dr. Alemo reviewed the April 19, 2012 cervical MRI scan study.² He stated, “This MRI scan [study] shows that [appellant] has cervical spondylosis that is due to a degenerative and aging process, unrelated to the injury of July 27, 2011.” In an accompanying work restriction evaluation, Dr. Alemo indicated that appellant could perform his usual employment without restrictions.

On May 24, 2012 OWCP requested that Dr. Alemo review the reports of Dr. Ross and Dr. Kimmel and advise whether appellant sustained cervical disc herniations and radiculopathy due to his accepted work injury and whether he had any disability from employment.

In a supplemental report dated June 13, 2012, Dr. Alemo summarized the January 11, 2012 MRI scan study and the January 26, 2012 reports from Dr. Ross and Dr. Kimmel. He opined that his finding that appellant had no further residuals of his postconcussion syndrome, neck sprain, and eyelid and periocular area contusion remained unchanged.

By decision dated July 12, 2012, OWCP found that appellant had not established cervical disc herniations or radiculopathy due to his July 27, 2011 work injury.

On July 19, 2012 appellant, through counsel, requested an oral hearing. At the hearing, held on November 28, 2012, he related that he had pain in both extremities, right more than left. Counsel argued that the record contained a conflict in medical opinion between Dr. Ross and Dr. Alemo and that Dr. Alemo’s opinion was insufficiently rationalized to constitute the weight of the evidence.

In a decision dated February 19, 2013, the hearing representative affirmed the July 12, 2012 decision. She found that appellant had not established any employment-related continuing disability or cervical radiculopathy or that he sustained a disc condition due to his work injury.

² In a report dated May 1, 2012, Dr. Gary Buck, a Board-certified anesthesiologist, diagnosed lumbar radiculopathy, cervical radiculopathy, and possible reflex sympathetic dystrophy.

On May 14, 2013 counsel requested reconsideration. He submitted a January 5, 2013 report from Dr. Ross. Dr. Ross reviewed Dr. Alemo's report and noted that a January 11, 2012 MRI scan study showed disc herniations at C3-4 and C5-6 rather than degenerative changes. She stated:

"In addition, the MRI scan [study] dated April 20, 2012 of the cervical spine shows some slight disc desiccation and the normal sequelae of the disc herniations in that they resemble disc bulges later on.

"It is clear to me that [appellant] sustained injury to his neck, including disc herniations at C3-4 and C5-6 with straightening of the normal lordotic curvature as a direct result of his injury that occurred on July 27, 2011."

By decision dated May 28, 2013, OWCP denied appellant's request for reconsideration after finding that he did not submit evidence or raise an argument sufficient to warrant reopening the case for further merit review under section 8128.

On August 9, 2013 appellant, through counsel, requested reconsideration based on the April 17, 2013 report of Dr. Shailen Jalali, a Board-certified anesthesiologist. Dr. Jalali related that appellant had a history of pain in his neck and right upper extremity due to a 2011 employment injury. He diagnosed cervical radiculitis, cervical disc displacement, cervical facet disease, and cervical disc degeneration and determined that the pain seemed "radicular in nature."

In a report dated August 1, 2013, Dr. Michael R. Plumeri, a clinical psychologist, noted that appellant injured his neck and shoulder in July 2011 which caused severe pain in his arm. He related that appellant's symptoms of depression seemed due to his "inability to work, the financial stress it has caused and the inability to find relief from the pain."

By decision dated October 17, 2013, OWCP denied modification of its February 19, 2013 decision. It found that appellant had not submitted sufficient medical evidence to establish a cervical disc herniation or radiculopathy due to the accepted employment injury. OWCP further noted that the medical evidence was insufficient to show an emotional condition.

On appeal, counsel argues that OWCP improperly terminated appellant's compensation by issuing a proposed termination of compensation and a final decision terminating compensation on the same date. He further contends that Dr. Alemo's opinion is not well reasoned and that a conflict exists between Dr. Alemo and appellant's physicians. Counsel additionally maintains that OWCP should develop whether he sustained depression as a result of his work injury.

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. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³

³ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained neck sprain, postconcussion syndrome, and contusion of the eyelids and periocular area on the left as a result of a July 27, 2011 employment injury. Appellant stopped work on July 28, 2011 and received compensation on the short-term rolls beginning September 24, 2011.

On August 10, 2011 Dr. Sharf discussed appellant's complaints of left-sided head and neck pain radiating into the left upper extremity. He diagnosed mild postconcussion syndrome, cervical strain, and a possible temporomandibular joint condition. Dr. Sharf found that appellant should stay off work. He did not, however, provide any rationale for appellant's disability finding. A physician's opinion on causal relationship between a claimant's disability and an employment injury is not dispositive simply because it is rendered by a physician. To be of probative value, Dr. Sharf must provide rationale for the opinion reached. Where no such rationale is present, the medical opinion is of diminished probative value.⁵

In a report dated September 8, 2011, Dr. Kimmel discussed appellant's history of tarsal tunnel syndrome after a fall at work in 2007. He diagnosed postconcussion headaches with neck stiffness and memory loss after a July 2011 work injury. Dr. Kimmel also diagnosed potential reflex sympathetic dystrophy or complex regional pain syndrome due to a prior right foot injury. He found that appellant would be disabled due to his right foot condition without medical intervention. Dr. Kimmel, however, did not address whether appellant sustained disability as a result of the July 27, 2011 employment injury, accepted for left postconcussion syndrome, neck sprain, and a left eyelid contusion. Consequently, his opinion is of little probative value.⁶

On October 11, 2011 Dr. Sharf discussed appellant's complaints of neck pain radiating into the right upper extremity, low back pain, and right foot pain from a prior injury. He found that appellant had continued symptoms of postconcussion syndrome, including vertigo and headaches, and also orthopedic complaints. Dr. Sharf opined that appellant was disabled from employment. He did not, however, provide any rationale for appellant's finding. Medical conclusions unsupported by rationale are of diminished probative value.⁷

On November 30, 2011 OWCP referred appellant to Dr. Alemo for a second opinion examination. In a report dated December 17, 2011, Dr. Alemo noted that appellant had symptoms of pain in his neck, back, right arm, and the right side of his head, which he found was not consistent with the accepted conditions. On examination he measured full upper extremity

⁴ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁵ *See Jean Culliton*, 337 ECAB 728 (1996).

⁶ *See Carol A. Lyles*, 57 ECAB 265 (2005) (whether a particular injury caused an employee's disability from employment is a medical issue which must be resolved by competent medical evidence).

⁷ *Jacquelyn L. Oliver*, 48 ECAB 232 (1996).

motion with no loss of sensation. Dr. Alemo found that there was no objective evidence of postconcussion syndrome, neck strain, or an eyelid contusion. He opined that appellant had made a complete recovery and could resume work without restrictions.

The Board finds that OWCP met its burden of proof to terminate his compensation through the opinion of Dr. Alemo, who determined that he had no further disability causally related to his accepted employment injury. Dr. Alemo reviewed the history of injury and the evidence of record and further provided detailed findings on physical examination. He explained that the objective findings on examination did not support appellant's subjective complaints. Dr. Alemo provided a thorough review of the factual and medical background and accurately summarized the relevant medical evidence. Moreover, he provided detailed findings on examination and reached conclusions regarding appellant's condition which comported with his findings.⁸

The remaining evidence of record submitted prior to OWCP's termination of compensation is insufficient to show that appellant had further disability due to his employment injury. On January 26, 2012 Dr. Ross diagnosed cervical and lumbar sprain/strain and right leg pain. She noted that it did not appear that Dr. Alemo had reviewed the cervical MRI scan study showing disc herniations and advised that appellant had residuals of his work injury. Dr. Ross did not address, however, whether appellant had any further disability due to his left postconcussion syndrome, neck sprain, or a contusion of the eyelids and periocular area; consequently, her report is of little probative value on this issue.⁹

In a report dated January 26, 2012, Dr. Kimmel diagnosed complex regional pain syndrome causing depression and a loss of cognition. He opined that appellant was totally disabled. On February 1, 2012 Dr. Kimmel diagnosed complex regional pain syndrome of the right ankle and foot from a 2007 injury. As Dr. Kimmel did not specifically relate any disability to the July 27, 2011 employment injury, his report is of diminished probative value.

The Board thus finds that the weight of the evidence establishes that appellant had no employment-related disability effective January 5, 2012, the date that OWCP terminated his compensation.

On appeal counsel argues that OWCP improperly terminated appellant's compensation by issuing a proposed termination of compensation and a final decision terminating compensation on the same date. OWCP, however, issued a proposed termination of medical benefits on January 5, 2012 and a decision terminating wage-loss compensation on January 5, 2012. As appellant was not receiving compensation on the periodic rolls and had not received compensation for over one year, it did not need to issue a pretermination notice before issuing its termination decision.¹⁰

⁸ See *Pamela K. Guesford*, 53 ECAB 727 (2002).

⁹ See *D.G.*, Docket No. 07-316 (issued October 10, 2007).

¹⁰ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4 (February 2013); see also *H.F.*, Docket No. 14-1407 (issued April 16, 2015).

LEGAL PRECEDENT -- ISSUE 2

Once OWCP terminates appellant's compensation benefits, the burden shifts to appellant to establish that he has continuing disability after that date related to his accepted injury.¹¹ To establish a 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 a causal relationship.¹² Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.¹³

ANALYSIS -- ISSUE 2

Appellant has not submitted any evidence supporting that he was disabled after January 5, 2012 as a result of his employment-related left postconcussion syndrome, neck sprain, or contusion of the eyelids and periocular area. In a report dated January 5, 2013, Dr. Ross found that he had continued problems due to disc herniations as a result of his July 27, 2011 injury. On April 17, 2013 Dr. Jalali diagnosed cervical radiculitis, cervical disc displacement, cervical facet disease, and cervical disc degeneration. Neither physician addressed whether appellant had any further disability due to his left postconcussion syndrome, neck sprain or a contusion of the eyelids and periocular area. As appellant has not submitted medical evidence supporting that he had any disability after January 5, 2012 as a result of the accepted conditions, he has not met his burden of proof to establish continuing disability.¹⁴

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP on this issue within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 3

Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.¹⁵ The opinion of the physician must be based on a complete factual and medical background of the claimant¹⁶ and must be one of reasonable medical certainty explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.¹⁷

¹¹ *Manual Gill*, 52 ECAB 282 (2001).

¹² *Id.*

¹³ *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹⁴ *See J.B.*, Docket No. 13-2098 (issued August 19, 2014).

¹⁵ *John J. Montoya*, 54 ECAB 306 (2003).

¹⁶ *Tomas Martinez*, 54 ECAB 623 (2003); *Gary J. Watling*, 52 ECAB 278 (2001).

¹⁷ *Judy C. Rogers*, 54 ECAB 693 (2003).

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.¹⁸ The implementing regulations state 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.¹⁹

ANALYSIS -- ISSUE 3

The Board finds that a conflict exists between Dr. Alemo and Dr. Ross regarding whether appellant sustained herniated cervical discs and radiculopathy as a result of his July 27, 2011 employment injury. In a report dated January 26, 2012, Dr. Ross found that an MRI scan study revealed disc herniations at C3-4 and C5-6. She noted that Dr. Alemo did not review the MRI scan study in determining that appellant had no residuals of his work injury. In a decision dated March 15, 2012, the hearing representative determined that OWCP had properly terminated appellant's compensation benefits but remanded the case for further development of the evidence to determine whether he established cervical herniated discs and cervical radiculopathy as a result of his July 27, 2011 work injury. On May 10, 2012 Dr. Alemo discussed an April 19, 2012 MRI scan study of the cervical spine. He diagnosed spondylosis due to aging and degeneration unrelated to the July 27, 2011 work injury. On June 13, 2012 Dr. Alemo reviewed the reports from Dr. Ross and Dr. Kimmel and the January 11, 2011 MRI scan study. He again found that appellant had no further residuals of his accepted employment injury.

In a report dated January 5, 2013, Dr. Ross disagreed with Dr. Alemo's finding that appellant's condition resulted from degeneration and aging rather than the July 27, 2011 employment injury. She opined that appellant sustained disc herniations at C3-4 and C5-6 and straightening of the lordotic curvature due to his July 27, 2011 work injury. Dr. Ross advised that the January 11, 2012 cervical MRI scan study showed disc herniations and that the April 20, 2012 cervical MRI scan study showed some disc desiccation and the sequelae of disc herniations.

The Board finds that a conflict exists between Dr. Alemo, OWCP referral physician, and Dr. Ross, appellant's attending physician, regarding whether appellant sustained cervical radiculopathy and cervical disc herniations as a result of his July 27, 2011 work injury necessitating a referral to an impartial medical examiner pursuant to 5 U.S.C. § 8123(a). 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.²⁰ On remand, OWCP should refer appellant to an appropriate specialist for an impartial medical evaluation. After such further development as it deems

¹⁸ 5 U.S.C. § 8123(a).

¹⁹ 20 C.F.R. § 10.321.

²⁰ *Supra* note 18.

necessary, it should issue a *de novo* decision regarding whether he sustained cervical disc herniations and cervical radiculopathy due to his July 27, 2011 employment injury

On appeal, counsel contends that OWCP should develop whether appellant sustained an emotional condition due to his employment injury. Where a claimant alleges that a condition not accepted or approved by OWCP was due to his employment injury, he bears the burden of proof to establish that the condition is causally related to the employment injury through the submission of rationalized medical evidence.²¹ Dr. Plumeri's opinion that appellant's depression might be due to pain is speculative in nature and unsupported by rationale and consequently of little probative value.²²

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation effective January 5, 2012 and that he has not established that he had continuing employment-related disability after January 5, 2012 due to his accepted work injury. The Board further finds that the case is not in posture for decision regarding whether appellant sustained a cervical disc herniation or cervical radiculopathy due to his July 27, 2011 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the October 17, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part and the case is remanded for further proceedings consistent with this opinion of the Board.²³

Issued: July 24, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

²¹ See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

²² See *D.D.*, 57 ECAB 710 (2006); *Willa M. Frazier*, 55 ECAB 379 (2004).

²³ Michael E. Groom, Alternate Judge, participated in the preparation of this decision but was no longer a member of the Board effective December 27, 2014.