

its burden of proof to terminate appellant's compensation benefits effective June 29, 2013.² The findings and facts as set forth in the prior decision are herein incorporated by reference. The relevant facts are set forth below.

OWCP has accepted that on November 28, 2011 appellant, then a 43-year-old rural carrier associate, sustained multiple injuries after she was delivering mail and was involved in a motor vehicle accident (MVA) when the front of her long life vehicle (LLV) hit a vehicle on the right hand side. By decisions dated January 18 and April 9, 2012, it accepted the claim for contusion of the right knee and lower leg, sprain of back thoracic region, sprain of back lumbar region, and sprain of neck.

Appellant sought treatment with Dr. Brad Prybis, a Board-certified orthopedic surgeon. By letter dated September 19, 2012, OWCP requested that he provide an updated report on her continued treatment, as it had been 10 months since the injury and strains typically resolved within 6 to 8 weeks. No response was received.

On October 29, 2012 OWCP referred appellant, the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. Alexander Doman, a Board-certified orthopedic surgeon, for a second opinion examination.

In a December 10, 2012 report, Dr. Doman reviewed the SOAF and medical record. He noted that appellant was in an MVA on November 28, 2011 and also had a history of a 2009 work-related MVA. Dr. Doman reported that she complained of continued neck and low back pain. X-rays of the lumbar and cervical spine were taken, as well as nerve conduction studies of the upper right extremity. Diagnostic testing revealed cervical and lumbar degenerative disc disease. Dr. Doman stated that the thoracic sprain had resolved and appellant had subjective complaints of cervical and lumbar pain consistent with a condition of degenerative disc disease of the cervical and lumbar spine. He reported that she no longer suffered from a strain of the cervical, thoracic, and lumbar areas. Dr. Doman further stated that the degenerative disc disease had developed over many years and was not related to the November 28, 2011 MVA. He concluded that appellant's mild degenerative disc disease of the cervical spine may have been aggravated by the MVA but was temporary in nature and would have ceased within three months.

OWCP notified appellant on December 17, 2012 that it proposed to terminate her compensation benefits based on Dr. Doman's opinion that she no longer had any residuals or disability connected to her November 28, 2011 employment injury. It further noted that her current diagnosis of degenerative disc disease was not related to her November 28, 2011 injury. Appellant was provided 30 days to submit additional information.

Medical reports were submitted dated September 17, 2012 to May 9, 2013 from Dr. Prybis. In a November 9, 2012 medical report, Dr. Prybis reported that appellant's current diagnoses were cervical spondylotic pain, myofascitis, and radiculitis with objective findings. He reported that her current symptoms were related to the November 28, 2011 injury because she did not experience these symptoms prior to her injury. Dr. Prybis further noted that appellant's

² Docket No. 13-1960 (issued February 18, 2014).

acute strain had resolved but she continued to have chronic myofascitis involving the cervicothoracic region. In a February 6, 2013 report, he opined that her cervical strain and disc degeneration with neck and shoulder pain were due to cervical radiculitis. In a May 1, 2013 medical report, Dr. Prybis provided diagnoses of cervical sprain, cervical radiculopathy, cervical intervertebral disc degeneration, lumbar strain, and lumbosacral spondylosis. He noted that appellant's symptoms were aggravated with lifting, twisting, sitting, and neck movements.

OWCP found a conflict in medical opinion between Dr. Prybis and Dr. Doman. The record contains a March 5, 2013 ME023, appointment schedule notification, and bypass history report documenting the selection of Dr. Howard Krone, a Board-certified orthopedic surgeon, for an impartial referee medical examination to resolve the conflict between Dr. Prybis and Dr. Doman.

By letter dated March 12, 2013, OWCP informed Dr. Krone that appellant was being referred for a referee examination due to a conflict in medical evidence. It explained that Dr. Doman found that her accepted work-related conditions had ceased while Dr. Prybis opined that she continued to suffer from cervical conditions related to the November 28, 2011 MVA.

OWCP referred appellant, a SOAF, the case file, a medical conflict statement, and a series of questions to Dr. Krone for his April 10, 2013 evaluation. The SOAF stated that her claim was accepted for contusion of the left knee and a thoracic, cervical, and lumbar strain.

The questions provided to Dr. Krone for the referee examination were as follows:

“(1) Is [appellant] currently suffering from a cervical condition? If yes what is her diagnosis and what objective findings support this diagnosis?”

“(2) Is her current condition related to the car accident on November 28, 2011? Please explain why you feel it is or is not related.

“(3) [Appellant's] claim was originally accepted for a cervical, thoracic, and lumbar strain. It has been over a year since her accident. Does [appellant] continue to suffer from a strain to any of these areas? If yes, can you explain why she would continue to have a strain since it has been over a year since this injury occurred.

“(4) It is noted that [appellant] had underlying conditions of mild degeneration from C4 to C7, moderate spondylosis at C6-7 with moderate foraminal stenosis bilaterally. If you feel the accident on November 28, 2011, aggravated these preexisting conditions, was it a temporary or permanent aggravation? If temporary when would the aggravation cease and [appellant] return to her baseline condition.

“(5) In your opinion does [appellant] suffer from headaches related to her cervical condition?”

“(6) When do you feel [appellant] will reach maximum medical improvement?”

In his April 10, 2013 medical report, Dr. Krone provided a summary of appellant's past medical reports, reviewed previous diagnostic studies, and provided findings on physical examination. He noted that she was involved in a November 28, 2011 MVA when she T-boned another vehicle. Appellant struck her right knee at the time and complained of pain in her neck, thoracic, and lower back regions. She had a prior work-related MVA in 2009 for which she had mild low back pain and responded well to physical therapy. Dr. Krone noted that examination of the knees and neurologic examination of the upper left and lower extremities was normal. He noted preexisting degenerative osteoarthritic changes of the cervical spine, primarily at C6-7, and of the lumbar spine at L5-S1 which predated her work-related accident. Dr. Krone agreed with the opinion of Dr. Doman and found no objective findings of any disability related to the November 28, 2011 MVA. He opined that appellant did not continue to suffer from a strain to the cervical, thoracic, or lumbar spine and that her symptoms should have resolved with treatment after six to eight weeks. Dr. Krone further concluded that the November 28, 2011 incident did not aggravate the preexisting degenerative disc disease at C6-7.

By decision dated June 19, 2013, OWCP terminated appellant's wage-loss and medical compensation benefits effective June 29, 2013 as the weight of the medical evidence rested with Dr. Krone who found that she did not continue to experience residuals of her work-related injury. It noted that her current conditions were preexisting and not related to the November 28, 2011 work injury.

Appellant requested reconsideration of OWCP's decision on July 29, 2013. In support of her request, she submitted a July 30, 2013 report from Dr. Prybis.

In his July 30, 2013 medical report, Dr. Prybis reported that appellant's current condition was right C7 radiculopathy and that her current symptoms and condition were related to the November 28, 2011 work injury. He noted that she had this condition since November 28, 2011 with no preexisting symptoms of radiculopathy including no pain, numbness, or weakness in her neck or arm. Dr. Prybis stated that appellant had stenosis which was degenerative at C6-7. Despite her degenerative magnetic resonance imaging scan findings, appellant had no symptoms prior to her injury and continued to experience pain, numbness, and weakness in the neck and arm and right C7 radiculopathy. Dr. Prybis concluded that her current conditions and symptoms were secondary to the November 28, 2011 work injury.

By decision dated August 14 2013, OWCP affirmed its June 19, 2013 decision terminating compensation benefits. It noted that the weight of the medical evidence rested with Dr. Krone's report which established that the injury and related residuals had resolved.³

On August 28, 2013 appellant requested an appeal before the Board. The appeal was docketed as 13-1960.⁴

³ The Board notes that OWCP initially issued a decision affirming the June 19, 2013 decision terminating benefits on August 9, 2013. Because Dr. Prybis' July 30, 2013 report was not reviewed in the August 9, 2013 decision, OWCP reissued a decision on August 14, 2013 affirming the June 19, 2013 decision after review of the medical report.

⁴ *Supra* note 2.

During the pendency of appellant's appeal before the Board, on December 3, 2013 Martin Kaplan, Esquire entered his appearance as appellant's counsel.

By letter dated January 15, 2014, counsel for appellant requested that OWCP reconsider its June 19 and August 14, 2013 decisions and provided arguments in support of his reconsideration request. He alleged that Dr. Krone had been asked leading questions, that he had been provided factually incorrect information *via* the questions he was asked, and that Dr. Krone had been improperly provided a copy of the proposed notice of termination dated December 17, 2012. Counsel also noted that Dr. Krone's report was unsigned.

By letter dated January 28, 2015, OWCP informed counsel that no action could be taken as to the request for reconsideration as the case was on appeal before the Board.

As previously noted, in a February 18, 2014 decision, the Board affirmed OWCP's June 19 and August 14, 2013 merit decisions finding that OWCP met its burden of proof to terminate appellant's compensation benefits effective June 29, 2013.⁵ The Board found that Dr. Krone's opinion was entitled to the special weight of an impartial medical examiner and established that appellant no longer had residuals or disability related to her accepted work-related injuries. The Board stated that Dr. Krone had provided a rationalized medical explanation, based upon objective findings, that the residuals of appellant's accepted neck, thoracic, and lumbar sprains, had ceased, and appellant had not established that her preexisting degenerative disc disease was causally related to the accepted injury.

By letter dated March 7, 2014, counsel for appellant filed a petition for reconsideration with the Board. He argued that the Board's February 18, 2014 decision improperly relied on the report from Dr. Krone, the impartial medical specialist. Counsel raised the same issues regarding the questions asked of Dr. Krone and the notice of proposed termination of compensation that he had raised before OWCP in his January 15, 2014 reconsideration request to OWCP. He also again noted that Dr. Krone's report was unsigned.

By order dated July 1, 2014, the Board denied appellant's petition for reconsideration.⁶ The Board affirmed its prior decision finding that the opinion of Dr. Krone was entitled to special weight, as that of the impartial medical specialist, and was sufficiently rationalized to establish that appellant's work-related conditions had ceased. The Board did not address the new legal arguments counsel had made in his petition for reconsideration regarding the alleged improper leading questions, the notice of proposed termination of compensation, or the lack of signature on Dr. Krone's April 10, 2013 report.

On August 25, 2014 appellant, through counsel, requested reconsideration of OWCP's termination of benefits decision. He again alleged the new legal arguments he had made in his January 15, 2015 request for reconsideration to OWCP and in his March 7, 2014 petition for reconsideration to the Board. Counsel argued that Dr. Krone's referee report could not be used as the basis for termination of compensation. He argued that Dr. Krone's report was unsigned

⁵ *Id.*

⁶ Docket No. 13-1960 (issued July 1, 2014).

and thus, was of no probative value. Counsel further argued that the questions provided to Dr. Krone were leading and factually incorrect, citing *Brenda C. McQuiston*⁷ and *Carl D. Johnson*⁸ for support. Finally, he argued that Dr. Krone's report revealed that he was provided the December 17, 2012 notice of proposed termination. Counsel argued that this was prejudicial because it implied that Dr. Krone should reach a conclusion in line with terminating appellant's benefits. No new medical evidence was submitted in support of appellant's claim.

By decision dated September 25, 2014, OWCP affirmed the termination of appellant's compensation benefits effective June 29, 2013. It issued a merit decision noting that counsel's request contained new legal arguments not previously considered. However, OWCP found counsel's arguments to be without merit and insufficient to modify the Board's prior termination decision.⁹

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹⁰ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the residual have ceased or that they are no longer related to the employment.¹¹

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.¹² In situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.¹³

ANALYSIS

OWCP accepted that appellant sustained a right knee and leg contusion, thoracic back sprain, lumbar back sprain, and neck sprain as a result of the November 28, 2011 work-related

⁷ Docket No. 03-1725 (issued September 22, 2003).

⁸ Docket No. 94-404 (issued May 31, 1995).

⁹ OWCP improperly stated that it was affirming the Board's February 18, 2014 decision. The Board's *Rules of Procedure* provide that the decisions and orders of the Board are final as to the subject matter appealed, and such decisions and orders are not subject to review, except by the Board. 20 C.F.R. § 501.6(d).

¹⁰ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

¹¹ *Id.*

¹² 5 U.S.C. § 8123(a).

¹³ *Nathan L. Harrell*, 41 ECAB 402 (1990).

injury. The issue is whether it properly terminated her wage-loss and medical benefits effective June 29, 2013, as she no longer had residuals of the November 28, 2011 injury. The Board finds that OWCP properly terminated appellant's compensation benefits.

The Board's February 18, 2014 decision affirmed OWCP's June 19 and August 14, 2013 decisions terminating appellant's wage-loss compensation and medical benefits effective June 29, 2013 as she had no further residuals causally related to her November 28, 2011 employment injury. The Board issued its decision on the basis of the evidence of record at the time.

On March 7, 2014 counsel for appellant filed a petition for reconsideration of the Board's February 18, 2014 decision and the Board duly issued an order denying appellant's petition for reconsideration on July 1, 2014.¹⁴ With respect to the findings made in the Board's February 18, 2014 decision, those matters are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁵

The Board's February 18, 2014 decision, however, did not review the new legal arguments made by appellant's counsel regarding the leading nature of questions presented to Dr. Krone by OWCP, Dr. Krone's access to the notice of proposed termination, or the lack of signature on Dr. Krone's report. These arguments had not been presented to OWCP prior to its June 19 or August 14, 2013 decisions, and were not considered by the Board on appeal. The Board denied counsel's March 7, 2014 petition for reconsideration, which did raise these arguments, as these arguments had not been made to OWCP prior to its February 18, 2014 termination decision and they did not establish an error of fact or law in the Board's February 18, 2014 decision.

On August 25, 2014 counsel for appellant again requested reconsideration by OWCP of its termination decision and resubmitted the new legal arguments. No new medical evidence was submitted.¹⁶ As the Board's February 18, 2014 decision and July 1, 2014 order denying petition for reconsideration reviewed these arguments, and as OWCP had now reviewed this new arguments and issued a new merit decision on them, the matters are not barred for review by the Board under *res judicata*.¹⁷ As the legal arguments offered by appellant's counsel have now been reviewed by OWCP they are properly before the Board on appeal.

¹⁴ *Supra* note 6.

¹⁵ *Hugo A. Mentink*, 9 ECAB 628 (1958); *see also Robert G. Burns*, 57 ECAB 657 (2006).

¹⁶ "A right to reconsideration within one year accompanies any subsequent merit decision. This includes any decision issued by the Branch of Hearings and Review (H&R) after a hearing or review of the written record, any denial of modification following a reconsideration, any merit decision by the Employees' Compensation Appeals Board (ECAB)...." *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(a) (October 2011).

¹⁷ *Hugo A. Mentink*, 9 ECAB 628 (1958).

By decision dated September 25, 2014, OWCP granted merit review of the claim based on the submission of new legal arguments not previously considered.¹⁸ The September 25, 2014 OWCP decision affirmed the termination of compensation benefits effective June 29, 2013.

Thus, the only decision before the Board on this appeal is whether OWCP properly affirmed its termination of appellant's compensation and medical benefits effective June 29, 2013. The Board finds that counsel's new legal arguments were insufficient to require modification of the termination. The Board will therefore affirm OWCP's September 25, 2014 decision.¹⁹

Counsel argued that Dr. Krone's August 10, 2013 report was unsigned and thus, of no probative value. While the report was not signed, the Board finds that the report contains proper identification such that it is sufficiently probative and entitled to the weight of the medical opinion evidence.²⁰ The record contains a properly executed ME023 and bypass history report documenting the selection of Dr. Krone as the referee physician. The record further establishes that appellant was referred to Dr. Krone for examination on April 10, 2013, the date of his report. The Board notes that Dr. Krone's August 10, 2013 report was printed on his office letterhead and contained a signature line with his name. While the report may be unsigned, the Board finds that there are sufficient indicia of identification concerning its author and authorship can be ascertained.²¹ Thus, the report is probative medical evidence.²²

Counsel argues that the questions provided to the referee physician were leading and thus, prejudicial to appellant's claim.²³ He specifically references question three, stating that the question indicates that some explanation is needed if the referee examiner agrees with the treating physician, and no explanation is needed if the referee examiner agrees with the second opinion physician.²⁴ The Board notes that OWCP asked Dr. Krone to provide support for his opinion if he found that appellant continued to suffer from the cervical, thoracic, or lumbar strain. This question does not suggest or imply an answer and rather, would provide greater

¹⁸ 20 C.F.R. § 10.610 provides that an award for or against payment of compensation may be reviewed at any time on the Director's own motion. The decision of whether or not to review an award under this section is solely within the discretion of the Director. The Director's exercise of this discretion is not subject to review by ECAB. Jurisdiction on review or appeal to ECAB is limited to review of the merits of the decision. The Director's determination to review the award is not reviewable.

¹⁹ *Therese J. Sannar*, Docket No. 02-2237 (issued May 12, 2003).

²⁰ *C.f. T.B.*, Docket No. 09-1428 (issued January 25, 2010); *P.C.*, Docket No. 08-2363 (issued May 5, 2009).

²¹ *See D.D.*, 57 ECAB 734 (2006); *Merton J. Sills*, 39 ECAB 572, 575 (1988) (unsigned medical evidence with no adequate indication that it was completed by a physician is not considered probative medical evidence).

²² *Id.*

²³ *Supra* notes 7 and 8.

²⁴ Question 3: "[Appellant's] claim was originally accepted for a cervical, thoracic and lumbar stain. It has been over a year since her accident. Does [appellant] continue to suffer from a strain to any of these areas? If yes, can you explain why she would continue to have a strain since it has been over a year since this injury occurred."

support for her claim if the referee physician found that she continued to suffer from the work-related strain.²⁵

Counsel asserts that Dr. Krone was not required to provide justification if he agreed with the second opinion physician that appellant's strain had ceased. Dr. Krone, however, provided a sufficiently rationalized explanation that she was no longer suffering from a work-related strain. He opined that the cervical, thoracic, and lumbar strain had ceased, explaining that appellant would have had resolution of her symptoms, given the treatment she was provided, six to eight weeks after the initial injury. Dr. Krone further stated that there were no objective findings of any disability related to the November 28, 2011 MVA. The Board notes that the question did not suggest an answer. It simply requested an explanation as to why a strain would continue longer than a year, which would suggest more serious condition than a strain. The Board finds that the questions provided to the referee physician were not leading and did not suggest or imply an answer to the questions posed.²⁶

Counsel further argues that the first question²⁷ was factually incorrect and in conflict with the SOAF because it asked the referee physician if appellant was suffering from a cervical condition when the SOAF establishes that the claim was accepted for a thoracic, cervical, and lumbar strain. The Board does not find this question to be factually incorrect. OWCP was requesting further insight as to whether appellant was currently suffering from a cervical condition based on findings made in prior medical reports. The question cannot be construed to suggest that Dr. Krone should not consider the SOAF and the accepted conditions. Not only was the cervical, thoracic, and lumbar strain documented in the SOAF as having been accepted, question three requested Dr. Krone provide further information pertaining to all three conditions. The Board finds this argument without merit.²⁸

Counsel argues that question four²⁹ was incorrect because it only asked about an aggravation of a preexisting cervical condition. He stated that OWCP should have asked if the MVA accelerated appellant's underlying condition and without this explanation, the conflict was not resolved. The Board is not persuaded by counsel's argument. There was no evidence in the record at the time to suggest there were any other diagnosed preexisting condition, but the

²⁵ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion. *James Mack*, 43 ECAB 321 (1991).

²⁶ See *Carl D. Johnson*, Docket No. 94-404 (issued May 31, 1995). Compare *Stanislaw M. Lech*, 35 ECAB 857 (1984) (finding that OWCP posed a leading question to the impartial medical specialist by asking him to "Give date when aggravated disability ceased," implying that it had ceased).

²⁷ Question 1: "Is [appellant] currently suffering from a cervical condition? If yes what is her diagnosis and what objective findings support this diagnosis?"

²⁸ *Id.*

²⁹ Question 4: "It is noted that [appellant] had underlying conditions of mild degeneration from C4 to C7, moderate spondylosis at C6-7 with moderate foraminal stenosis bilaterally. If you feel the accident on November 28, 2011, aggravated these preexisting conditions, was it a temporary or permanent aggravation? If temporary when would the aggravation cease and she return to her baseline condition."

general question: “Is [appellant’s] current condition related to the car accident on November 28, 2011? Please explain why you feel it is or is not related,” provided Dr. Krone every opportunity to determine any residuals or disability due to the work-related injury, based on his review of the record and his examination findings.

Finally, counsel contends that Dr. Krone’s report indicates review of the December 17, 2012 notice of proposed termination. He argues that providing the proposed termination to Dr. Krone was prejudicial and the physician could not have reached any other conclusion than one which provided an opinion in support of termination of benefits. The Board finds this argument to be without merit.

OWCP procedures provide that the referee physician should be provided with a SOAF and a list of pertinent questions or issues to be addressed, which should include a statement outlining the conflict(s) for resolution in the case. The referee physician should also receive a copy of the entire case record.³⁰ OWCP properly followed its procedures and provided Dr. Krone a copy of the case record, which included the notice of proposed termination, as well as a statement outlining the conflict for resolution.

Dr. Krone’s opinion that appellant no longer suffers from residuals and disability of her work-related injury is of reliable and probative value.³¹ Counsel’s argument that her treating physician’s report established continued disability was previously addressed in the Board’s February 18, 2014 decision and is covered by *res judicata* and will not be reviewed by the Board a second time.³²

Thus, the Board finds that Dr. Krone’s opinion constitutes the weight of the medical evidence and is sufficient to meet OWCP’s burden of proof to terminate appellant’s compensation and medical benefits.³³ The arguments made on appeal fail to establish that a conflict in medical opinion remain because of alleged deficiencies. Therefore, OWCP properly terminated appellant’s compensation benefits.³⁴

Appellant may submit additional evidence, together with a written request for reconsideration, to OWCP within one year of the Board’s merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.606 and 10.607.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant’s compensation benefits effective June 29, 2013.

³⁰ *Supra* note 27 at Chapter 2.810.11(b).

³¹ *V.G.*, Docket No. 07-1549 (issued April 24, 2008).

³² As there was no new relevant medical evidence submitted since OWCP’s August 14, 2013 decision which was affirmed by the Board on February 18, 2014, the Board will not reevaluate the medical evidence.

³³ *D.R.*, Docket No. 12-1697 (issued January 29, 2013).

³⁴ *D.M.*, Docket No. 11-386 (February 2, 2012); *Marshall E. White*, 33 ECAB 1666 (1982).

ORDER

IT IS HEREBY ORDERED THAT the September 25, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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