

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

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**P.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
New Orleans, LA, Employer**

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**Docket No. 16-0350  
Issued: August 9, 2016**

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant*<sup>1</sup>  
*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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 18, 2015 appellant, through counsel, filed a timely appeal from a September 9, 2015 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that appellant submitted additional evidence following the September 9, 2015 decision. Since the Board's jurisdiction is limited to evidence that was before OWCP at the time it issued its final decision, the Board may not consider this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *Sandra D. Pruitt*, 57 ECAB 126 (2005).

## **ISSUE**

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits effective June 2, 2013 as she was no longer disabled due to the accepted August 26, 2010 employment injury.

## **FACTUAL HISTORY**

On September 16, 2010 appellant, then a 42-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 26, 2010 she sustained an injury to her lower back and buttocks as a result of falling down onto her back when a pet iguana attacked her in the performance of duty. She stopped work on September 17, 2010. OWCP accepted appellant's claim for lumbar sprain, lumbosacral spondylosis without myelopathy, displacement of cervical intervertebral disc without myelopathy, and left shoulder sprain. It paid compensation benefits and placed her on the periodic rolls.

Appellant was initially treated by Dr. Gary C. Dennis, a Board-certified neurosurgeon, who related in a September 17, 2010 report that on August 26, 2010 she sustained injuries to her neck, low back, and left shoulder at work when an escaped iguana lunged towards her and caused her to fall backwards. Dr. Dennis discussed appellant's history and provided findings on examination. He diagnosed left shoulder contusion, cervical and lumbar strains, and radiculopathy. Dr. Dennis indicated that appellant was 100 percent disabled.

In an October 11, 2011 report, Dr. Dennis related that a magnetic resonance imaging (MRI) scan examination of the left shoulder revealed some tendinosis and MRI scan of the cervical spine showed C3-4 disc with protrusion causing narrowing canal and herniations at various levels. He provided findings on examination and diagnosed left shoulder spasms with cervical radiculopathy and carpal tunnel syndrome. Dr. Dennis reported that appellant remained disabled from work.

Dr. Horace Mitchell, a Board-certified neurological surgeon, began to treat appellant on February 9, 2012 and indicated in his report that she complained of neck and low back pain that radiated into her left buttock area. Upon examination of her neck, he observed severe spasm in the left trapezius muscle and tenderness over the brachial plexus on the left. Examination of the pectoralis muscle showed weakness and depressed deep tendon reflexes. Dr. Mitchell pointed out that appellant had failed conservative treatment and recommended anterior cervical discectomy and fusion surgery. In an April 23, 2012 progress note, he noted that she had cervical disc herniation at C5-6, and to a lesser degree at C6-7, and severe radiculopathy with spasm and torticollis in the neck on the left side. Dr. Mitchell recommended that appellant undergo an anterior cervical discectomy and fusion at C4-5 and C5-6. He indicated that he was awaiting authorization for surgery.

Appellant was referred to Dr. John Loupe, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether she continued to suffer residuals of her August 26, 2010 employment injury and whether she required further medical treatment. In a September 24, 2012 report, Dr. Loupe described the August 26, 2010 employment incident and reviewed appellant's history. He conducted a physical examination and diagnosed lumbosacral

spondylosis, cervical disc displacement, and left shoulder sprain, resolved. Dr. Loupe concluded that appellant no longer suffered residuals of the work-related injury and that she no longer needed further medical treatment for her accepted conditions. He advised that she was able to return to work without restrictions.

OWCP determined that a conflict in the medical evidence existed between Drs. Dennis and Mitchell, appellant's treating physicians, and Dr. Loupe, the OWCP referral physician, with respect to her employment-related conditions and her disability. It referred appellant to Dr. Christopher Cenac, Sr., a Board-certified orthopedic surgeon, to resolve the conflict in medical evidence.

In a January 14, 2013 report, Dr. Cenac described the August 26, 2010 employment injury and noted that OWCP had accepted lumbar sprain, lumbosacral spondylosis without myelopathy, displacement of cervical intervertebral disc, and left shoulder sprain. He reviewed her medical records and noted that various diagnostic examinations of the lumbar and cervical spine revealed degenerative changes. Dr. Cenac further mentioned that appellant had been on continuous controlled substances from June 20, 2008 to November 21, 2012 for pain management. He related her current complaints of pain in the lower lumbar spine with radicular pain into the left leg and numbness in the left foot, radiating pain into the left shoulder with muscle spasm, and pain to the left medial scapula with numbness in her left hand and fingers.

Upon physical examination, Dr. Cenac reported that grip strength testing was not valid as appellant gave no effort with the use of the dynamometer involving the left upper extremity. He noted that Waddell tests were multiple and positive consistent with symptom magnification and illness behavior. Dr. Cenac indicated that he attempted to examine appellant's cervical and lumbosacral spines, but her rigidity limited the examination. He reported that palpation of her cervical spine, lower thoracic spine, and upper lumbar spine revealed nonphysiologic complaints. Dr. Cenac related that appellant had normal reflexes in the upper extremity, but diminished heel reflexes bilaterally and diminished sensation in the S1 distribution bilaterally. He noted that she had no active motion of the cervical spine and was unable to forward flex or extend. Tinel's testing at the elbows was positive. Dr. Cenac reported that he observed appellant when she arrived and left his office and related that she did not demonstrate any difficulty in ambulating. He agreed with Dr. Loupe that she was no longer in need of further treatment for her accepted injuries and was able to return to work.

On March 13, 2013 OWCP proposed to terminate appellant's wage-loss compensation benefits based on Dr. Cenac's January 14, 2013 referee medical report. It determined that the special weight of the medical evidence rested with Dr. Cenac, who determined that she was no longer disabled from work. Appellant was advised that she had 30 days to submit evidence or argument if she disagreed with the decision.

In a letter dated March 22, 2013, appellant requested that her treating physician be changed to Dr. Darryl W. Peterson, a Board-certified orthopedic surgeon, who specializes in hand surgery. She alleged that Dr. Cenac's examination was incomplete and inaccurate because he did not understand her job duties or work requirements. Appellant asserted that she had not recovered from the August 26, 2010 employment injury and still suffered severe muscle spasms in her left shoulder, neck pain, and limited use of her hands.

OWCP finalized the termination of appellant's wage-loss compensation benefits in a decision dated May 31, 2013. It found that Dr. Cenac's January 14, 2013 referee medical report represented the special weight of the medical evidence and established that she was no longer disabled due to her accepted work-related conditions. OWCP noted that the claim remained open for medical benefits.

On June 11, 2013 OWCP received appellant's request, through counsel, for a hearing before an OWCP hearing representative. The hearing was held on November 19, 2013. Appellant's counsel asserted that new medical evidence demonstrated that appellant continued to have symptoms in her left shoulder and lumbar and cervical spines and remained disabled due to her August 26, 2010 employment injury. Appellant described her work duties as a letter carrier, which required walking 7 to 12 miles a day and carrying a mailbag that weighed up to 70 pounds, and the August 26, 2010 employment incident. She discussed the conservative treatment that she had received and asserted that she had never fully recovered from her injuries. Counsel asserted that her statements and the new medical proof demonstrated that she still needed further medical treatment for her accepted conditions and was unable to work.

Appellant provided new reports dated July 24 and October 22, 2013 by Dr. Kenneth A. Gaddis, a Board-certified neurologist. Dr. Gaddis indicated that she had sustained a work-related injury on August 26, 2010 and that she continued to experience severe pain in her neck and shoulder, persistent muscle spasm, and limitation of motion of the left shoulder and neck. He reviewed appellant's diagnostic reports and noted cervical spondylosis at C4-5 and C5-6 with apparent effacement and impingement of the nerve root on the left side.

Upon examination of appellant's neck, Dr. Gaddis observed intense palpable and painful muscle spasm in the left trapezius and cervical paraspinous muscles and obvious hypertrophy of the left trapezius muscle. He also noted decreased range of motion of the left shoulder joint in flexion, abduction, and extension, and limited rotation internally and externally. Dr. Gaddis diagnosed cervical injury resulting in cervical dystonia, post-traumatic segmental dystonia secondary to the work injury, bilateral carpal tunnel syndrome, ulnar neuropathy of the left shoulder, and cervical spondylosis. He indicated that appellant was totally unable to perform her duties as a mail carrier due to limitations with her left arm and neck.

Dr. Man Q. Le, Board-certified in anesthesiology and pain medicine, also treated appellant and in progress notes dated August 26, 2013 to January 7, 2014 related her complaints of pain in the neck, left shoulder, and lower back. He provided a history of the August 26, 2010 employment injury and the medical treatment she received. Upon examination of appellant's cervical spine, Dr. Le observed tenderness in the midline throughout the entire cervical spine and tenderness off midline only on the left and moderate-severe in the trapezius. Sensation was normal. Upon examination of appellant's left shoulder, Dr. Le reported swelling and tenderness and moderately limited range of motion. Muscle strength and sensation was normal. Dr. Le diagnosed shoulder joint pain, cervical radiculopathy, cervicgia, cervical spondylosis without myelopathy, and low back pain.

By decision dated February 3, 2014, the OWCP hearing representative affirmed in part and remanded in part the May 31, 2013 termination decision. She found that, at the time of the May 31, 2013 decision, OWCP properly determined that appellant's work-related disability had

ceased based on Dr. Cenac's January 14, 2013 referee medical report. The hearing representative further noted that, subsequent to the decision, appellant provided additional medical evidence which required further development. On remand, the district office was instructed to provide Dr. Cenac with the new medical reports from Dr. Gaddis and Dr. Le and to request a supplemental report from Dr. Cenac on whether the new medical reports changed his prior opinion concerning appellant's August 26, 2010 work-related injury.

In a February 25, 2014 supplemental report, Dr. Cenac indicated that he reviewed Dr. Gaddis' two reports and found "no evidence ... that there was any objective evidence of a cervical or shoulder injury." He explained that all of Dr. Gaddis' findings of pain to palpation and limitation of motion were subjective. Dr. Cenac further reported that there was no evidence in Dr. Le's records of any identifiable objective findings, but only "continued subjective complaints." He noted that his opinion remained the same, specifically that appellant had "bizarre complaints not substantiated by objective physical findings."

Dr. Le continued to treat appellant and in progress notes dated February 4 to May 27, 2014 related her complaints of bilateral shoulder and low back pain. He reviewed her history and conducted an examination. Dr. Le reported tenderness and muscle spasms in the cervical spine and passive range of motion. Examination of appellant's left shoulder revealed tenderness over the rotator cuffs and muscle spasm in the trapezius. Muscle strength and sensation were normal. Dr. Le diagnosed cervical radiculopathy, cervicalgia, cervical spondylosis without myelopathy, and shoulder joint pain.

Appellant provided February 21 and July 28, 2014 reports by Dr. Gaddis. Dr. Gaddis indicated that she had suffered a neck injury on the job in August 2010 and had since suffered from persistent pain and muscle spasm on the left side of her neck extending into the top of the left shoulder. He reported that diagnostic studies revealed the presence of cervical disc disease. Upon examination of appellant's neck, Dr. Gaddis observed hypertrophy and bony hard spasm of the left trapezius and cervical paraspinal muscles and tenderness to palpation. Examination of appellant's left shoulder revealed that she was unable to bring the left shoulder in abduction or flexion above shoulder level. Dr. Gaddis diagnosed segmental dystonia of the left neck, secondary to work-related injury and fall, and persistent muscle spasm and pain with cervicalgia and cervical disc disease.

Dr. Samir Patel, Board-certified in anesthesiology and pain management, also treated appellant and in September 15 and October 15, 2014 narrative reports, described the August 26, 2010 employment injury and subsequent medical treatment. He noted her complaints of neck pain radiating down her left shoulder and left upper extremity to the fingers and low back pain. Upon examination, Dr. Patel reported severe muscle spasm in the left deltoid, left trapezoid, and left paracervical spinal muscles. Strength and tone were normal. Dr. Patel diagnosed dystonia, cervical radiculopathy, cervical spondylosis without myelopathy, and lumbar spondylosis.

By *de novo* decision dated October 31, 2014, OWCP reaffirmed the termination of appellant's wage-loss compensation benefits effective June 2, 2013. It found that the special weight of the medical evidence was represented by Dr. Cenac, who determined that her work-related disability had ceased.

Appellant requested a hearing before an OWCP hearing representative. She submitted a November 6, 2014 progress note by Dr. Gaddis, who provided examination findings of obvious palpable tender muscle spasms extending into the left trapezius and left cervical paraspinal muscles. Dr. Gaddis diagnosed cervical disc disease and cervicgia with persistent muscle pain and spasm.

In a January 20, 2015 narrative report, Dr. Patel noted that appellant had been under his care since September 15, 2014 for treatment of an August 26, 2010 work-related injury. He related that an updated MRI scan of the lumbar spine showed small bilateral posterolateral disc protrusions at L2-3 through L4-5 and facet arthritis most prominent at L4-5 and L5-S1. Dr. Patel further reported that a December 30, 2014 MRI scan of the cervical spine revealed reversal of lordosis C3 through C6 and spondylosis changes present predominantly at C4-5, greater than C3-4 and C5-6. He opined that appellant had not reached maximum degree of medical improvement. Dr. Patel provided progress notes dated November 13 and December 4, 2014.

On February 20, 2015 appellant requested authorization for neck spine fusion surgery.

OWCP referred appellant's claim, along with an updated statement of accepted facts (SOAF), to an OWCP medical adviser to determine whether surgery was medically necessary to treat her work-related conditions. In a March 9, 2015 report, the medical adviser noted appellant's history of ongoing neck pain and left cervical radiculopathy symptoms related to the August 26, 2010 employment injury. He reviewed her history and provided examination findings. The medical adviser reported that the requested surgery was within the realm of the accepted medical practice and was necessary to treat appellant's accepted conditions.

OWCP authorized cervical surgery for appellant's accepted conditions.

A hearing was held on June 18, 2015. Counsel noted that OWCP had authorized cervical surgery on April 30, 2015 for appellant's accepted conditions. He asserted that the fact that OWCP had now authorized cervical fusion surgery supported that OWCP's termination decision was premature and incorrect. Counsel alleged that the fact that appellant needed surgery demonstrated that she still suffered residuals of her condition and required further medical treatment. Appellant also described her work duties as a letter carrier and explained that due to her current symptoms in her neck, back, and left upper extremity she was not able to perform her job.

Appellant underwent cervical surgery on June 19, 2015. She requested wage-loss compensation while recovering from surgery. OWCP paid disability compensation beginning June 19, 2015 and returned appellant to the periodic rolls.

In a decision dated September 9, 2015, the OWCP hearing representative again affirmed in part and set aside in part the October 31, 2014 termination decision. He determined that at the time of the May 31, 2013 termination decision, OWCP made a correct determination based on the weight of medical evidence of record at the time. The hearing representative found, however, that the additional medical evidence appellant provided after the termination of appellant's wage-loss compensation benefits warranted additional development of the claim to determine whether her benefits should be reinstated. Appellant's case was remanded for OWCP

to provide Dr. Cenac with an updated SOAF and the new medical reports in order for him to provide a supplemental report addressing whether she remained disabled from work and whether she was entitled to wage-loss compensation for the period May 31, 2013 through June 18, 2015.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>4</sup> It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to his or her employment.<sup>5</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>6</sup> 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.<sup>7</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>9</sup> 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.<sup>10</sup> When there exists 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 upon a proper factual background, must be given special weight.<sup>11</sup>

### **ANALYSIS**

OWCP determined that a conflict in medical opinion evidence existed between appellant's treating physicians, Drs. Dennis and Mitchell, who continued to support appellant's need for medical treatment due to her August 26, 2010 employment injury and her resultant

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<sup>4</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>5</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>6</sup> *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>7</sup> *A.P.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

<sup>8</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>9</sup> 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>10</sup> 20 C.F.R. § 10.321.

<sup>11</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

disability for work, and the second opinion examiner, Dr. Loupe, who found that she was capable of returning to her regular-duty position. It referred appellant to Dr. Cenac for an impartial medical examination to resolve the conflict in medical opinion evidence regarding whether she continued to suffer residuals of her employment injury and was unable to work.

In a January 14, 2013 report, Dr. Cenac described that on August 26, 2010 appellant fell backwards when she was attacked by a pet iguana at work. He noted that she accepted conditions for lumbar sprain, lumbosacral spondylosis without myelopathy, displacement of cervical intervertebral disc, and left shoulder sprain. Dr. Cenac discussed appellant's medical treatment and related her current complaints of lower lumbar, left shoulder, and neck pain. Upon examination of appellant's cervical and lumbar spines, he reported that palpation revealed nonphysiologic complaints. Dr. Cenac noted that her rigidity limited the examination. Upon examination of her left shoulder, he observed normal reflexes, but diminished heel reflexes bilaterally and diminished sensation in the S1 distribution bilaterally. Dr. Cenac indicated that appellant's grip strength testing was not valid as she gave no effort with the use of the dynamometer involving the left upper extremity. He noted that Waddell tests were multiple and positive consistent with symptom magnification and illness behavior. Dr. Cenac agreed with Dr. Loupe's opinion that appellant was able to return to regular duty and that she was no longer in need of further medical treatment. In a February 25, 2014 supplemental report, he opined that upon review of new medical reports his opinion remained the same that there were no objective examination findings to substantiate any resultant work-related disability.

The Board finds that Dr. Cenac's January 14, 2013 and February 25, 2014 reports were entitled to the special weight of the medical opinion evidence and establish that appellant's employment-related disability had ceased as of June 2, 2013. Dr. Cenac provided an accurate history of injury about the August 26, 2010 employment injury and reviewed her medical records. He performed a thorough, clinical examination and provided findings on examination regarding appellant's cervical, lumbar, and left shoulder. Dr. Cenac opined that her complaints were mostly subjective in nature and that there were no objective findings to support that she remained disabled from work due to her August 26, 2010 employment injury. Accordingly, the Board finds that Dr. Cenac's medical opinion was sufficient for OWCP to justify the termination of appellant's wage-loss compensation effective June 2, 2013.

On appeal, counsel alleges that OWCP decision was wrong because compensation should have been paid. As noted above, however, Dr. Cenac's opinion was entitled to the special weight of the medical opinion evidence as an impartial medical examiner and established that appellant was not disabled as of June 2, 2013 as a result of the August 26, 2010 employment injury. Appellant has not submitted any objective rationalized medical evidence to establish that she had any work-related disability causally related to the August 26, 2010 employment injury effective June 2, 2013.

Because the Board's jurisdiction is limited to reviewing final, adverse decisions of OWCP and OWCP has not issued a final decision on the issue of appellant's continuing disability, this issue is not before the Board at this time.<sup>12</sup>

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<sup>12</sup> 20 C.F.R. §§ 501.2(c) and 501.3(a).



**CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits effective June 2, 2013.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 9, 2015 merit decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 9, 2016  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board