

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

J.S., Appellant

and

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

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**Docket No. 17-0937
Issued: December 14, 2017**

Appearances:

*Aumiller Lomax, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 27, 2017² appellant, through counsel, filed a timely appeal from a September 27, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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 Under the *Board's Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from September 27, 2016, the date of OWCP's last decision was March 26, 2017, a Sunday; consequently, the period for filing the appeal ran to the next business, Monday, March 27, 2017, rendering the appeal timely filed.

³ 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective February 1, 2016.

FACTUAL HISTORY

On February 9, 2010 appellant, then a 33-year-old transitional city carrier, filed a traumatic injury claim (Form CA-1) alleging that on February 8, 2010 she was injured in an employment-related motor vehicle accident. She indicated that, during the performance of her federal duties, she was in a long-life vehicle sitting on the passenger side delivering mail when her truck was struck on the driver's side by a commercial taxi cab. Appellant alleged that, as a result of this accident, she suffered a contusion of her knee and shoulder. She stopped work on February 8, 2010. On March 18, 2010 OWCP accepted appellant's claim for sprain of shoulder and upper arm, left, contusion of knee and lower leg, left, sprain of neck, and sprain of back, lumbar region. Appellant received wage-loss compensation and medical benefits on the supplemental roll as of March 26, 2010 and on the periodic roll as of November 21, 2010.

In a March 20, 2012 report, Dr. Rahul V. Shah, appellant's treating Board-certified orthopedic surgeon, diagnosed cervical spinal stenosis, herniated nucleus pulposus from C5 to C6, and worsening cervical radiculopathy causally related to the work injury of February 8, 2010. He opined that appellant would benefit from surgical intervention, although he noted that other medical opinions were contrary to his recommendation for surgery.

In a January 31, 2011 report, Dr. Lawrence I. Barr, a Board-certified osteopathic orthopedic surgeon and serving as a second opinion physician, opined that appellant had plateaued medically and had reached maximum medical improvement. He did not believe that appellant would benefit from surgical intervention. Dr. Barr noted no clinical signs of radiculopathy. He did not find any ongoing signs of orthopedic pathology with regard to the knee, and no signs of instability or labral pathology with regard to the left shoulder examination. Dr. Barr stated that appellant's lumbar spine injury had resolved as well. He noted that appellant was capable of working with restrictions, which would be permanent. Dr. Barr indicated that no other treatment was needed except that appellant should be on a home-based exercise program and take anti-inflammatory medicine as tolerated.

In an October 7, 2014 report, Dr. Shah diagnosed brachial neuritis or radiculitis, cervicgia, neck sprain and strain, displacement of cervical intervertebral disc without myelopathy, and lumbago. He noted that appellant's cervical spinal stenosis, herniated nucleus pulposus from C5 to C7, and cervical radiculopathy were causally related to the work-related injury of February 8, 2010. Dr. Shah noted that he had tried nonoperative interventions and that appellant could be a candidate for surgical intervention, specifically an anterior cervical decompression and fusion. He requested approval of this procedure.

In a December 3, 2014 progress note, Dr. Chiara Mariani, a Board-certified physiatrist, diagnosed displacement of cervical intervertebral disc without myelopathy and lumbago. She noted that appellant continued to experience neck pain radiating to her left upper extremity with weakness in the left arm. Dr. Mariani noted that appellant was awaiting approval for cervical surgery.

On December 12, 2014 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion to determine the status of appellant's accepted conditions. In a January 2, 2015 report, Dr. Askin opined that there were no objective findings of any lingering residuals from the reported injury. He noted that the accepted diagnoses were just sprains as opposed to disc herniations or other more significant diagnoses. Dr. Askin noted that the magnetic resonance imaging (MRI) scan did not show consequence of trauma and that there was nothing described in MRI scans other than degenerative changes. He noted that, even though appellant was only in her mid-30s, she was sufficiently skeletally mature to have experienced degenerative changes independent of the employment injury. Dr. Askin noted that the fact that appellant stated that her condition was worse now than when the injury was most acute indicated that she had a disease rather than an injury. He opined that there was no work-related reason why she would not be able to resume her full-duty position as a letter carrier. Dr. Askin further opined that appellant had no neurological deficiency that would be corrected by the proposed surgery. He opined that surgery would not address any identified consequence of the work injury, but merely degenerative changes that would have been present independent of the work injury and which were not yet proven to be explanatory for her complaints. Dr. Askin stated that there was zero likelihood that appellant's condition would be enhanced by further interaction with healthcare providers. He noted that there was no justification for prescription narcotic analgesics at the present time based on the reported work injury.

On February 5, 2015 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits. By decision dated March 12, 2015, it terminated appellant's medical benefits and wage-loss compensation effective that date. OWCP noted that the weight of the medical evidence remained with Dr. Askin as his report constituted rationalized medical opinion.

On March 30, 2015 appellant requested an oral hearing before an OWCP hearing representative. By decision dated October 6, 2015, the hearing representative conducted a preliminary review of appellant's case, and reversed the March 12, 2015 decision. He found that there was an unresolved conflict in medical opinion between Dr. Askin, the second opinion physician, and the treating physician, Dr. Shah, with regard to whether appellant was still disabled from work and still required medical treatment as a result of the accepted work injury. The hearing representative directed OWCP to refer appellant for an impartial medical examination. He noted that, as OWCP failed to meet its burden when it terminated appellant's compensation and medical benefits, these benefits must be retroactively reinstated back to the date of termination. The hearing representative advised that appellant should be invited to submit Form CA-7 to claim retroactive wage-loss compensation during this period.

On November 4, 2015 appellant was returned to the periodic roll, and her benefits were reinstated retroactively to March 13, 2015.

By letter dated December 7, 2015, OWCP referred appellant to Dr. Edward Krisiloff, a Board-certified orthopedic surgeon, for an impartial medical examination. In a January 7, 2016 report, Dr. Krisiloff noted that appellant did have degenerative disc disease of the cervical spine, but that it was not related to the employment injury. He opined that appellant did suffer a cervical sprain at the time of the accident, but that the sprain resolved, and that her current issues were related to underlying degenerative changes. Dr. Krisiloff opined that appellant did not suffer from cervical spinal stenosis. He noted that this was confirmed by both physical

examination and the electromyogram/nerve conduction studies. Dr. Krisiloff opined that Dr. Shah erred in his diagnosis and that it would be inappropriate to perform a cervical fusion. He further opined that there were no medical findings to indicate that the medical conditions of cervical and lumbar strain, left shoulder strain, and left knee contusion were still active, noting that objective findings on physical examination revealed no residuals of these conditions. Dr. Krisiloff further opined that appellant did not have any current disability. He stated that, in his medical opinion, appellant was able to perform her regular work duties and was capable of performing these duties as of the current date, January 7, 2016. Dr. Krisiloff further indicated that, while appellant did have underlying degenerative cervical disc disease, this condition did not prevent her from returning to work full-time full-duty. He also recommended that surgical intervention be denied as there was no clinical evidence that appellant was suffering from cervical stenosis in her neck. In fact, Dr. Krisiloff believed that a two-level fusion would leave appellant in worse condition and would have significant impact for the remainder of her life.

By decision dated February 1, 2016, OWCP determined that appellant's accepted employment-related medical conditions had ceased and terminated appellant's medical benefits and wage-loss compensation effective that date.

On February 5, 2016 appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

By letter dated August 5, 2016, OWCP informed appellant that her telephonic hearing would be held on September 6, 2015. As appellant failed to appear at the oral hearing, OWCP treated her request as a request for review of written record.

By decision dated September 27, 2016, OWCP's hearing representative affirmed the February 1, 2016 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits. After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁵ 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.⁶

⁴ *Kenneth R. Burrow*, 55 ECAB 157 (2003); *see also T.D.*, Docket No. 15-1938 (issued July 11, 2016).

⁵ *See T.P.*, 58 ECAB 524 (2007).

⁶ *See I.J.*, 59 ECAB 408 (2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

OWCP procedures provide that notice is required prior to termination in all cases where benefits are being paid on the periodic roll and in the case of termination of medical benefits.⁷ Pretermination notice is not required when the claimant dies, returns to work, is convicted of defrauding FECA program, or forfeits compensation by failing to report earnings.⁸ The Board has held that OWCP must follow its procedures and provide notice and opportunity to respond prior to the termination of compensation benefits.⁹

ANALYSIS

OWCP accepted appellant's claim for sprain of the left shoulder and upper arm, left, contusion of the left knee and lower leg, sprain of the neck, and sprain of the back, lumbar region. Appellant received wage-loss compensation and medical benefits.

On February 5, 2015 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits, and on March 12, 2015 it finalized the proposed termination. However, in an October 6, 2015 decision, the hearing representative reversed the termination of benefits as she determined that there was an unresolved conflict in the medical evidence. She directed OWCP to refer appellant for an impartial medical examination. The hearing representative concluded that OWCP had failed to meet its burden of proof when it terminated appellant's compensation and medical benefits, and ordered that these benefits be retroactively reinstated to the date of the termination.

On November 4, 2015 OWCP placed appellant back on the periodic rolls and her benefits were reinstated effective March 13, 2015.

OWCP referred appellant to Dr. Krisiloff for an impartial medical examination, and on January 25, 2016, it received a copy of his January 7, 2016 impartial medical examination report. Without issuing a new notice of proposed termination, it issued a decision terminating appellant's wage-loss compensation and medical benefits on February 1, 2016.

Pursuant to the FECA procedure manual, before terminating benefits, the claims examiner is responsible for advising the claimant of the proposed termination or reduction, including the reasons for the proposed action, and provide claimant an opportunity to response in writing.¹⁰ Pretermination notices are required in cases in which compensation is being paid on the periodic roll.¹¹ The Board has held that OWCP must follow its procedures and provide notice and opportunity to respond prior to the termination of compensation benefits.¹²

⁷ See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances, Pretermination Notices*, Chapter 2.1400.4b (February 2013); see also *Winton A. Miller*, 52 ECAB 405 (2001).

⁸ *Id.* at 2.1400.4a.

⁹ *K.S.*, Docket No. 11-2021 (issued August 21, 2012).

¹⁰ *Supra* note 7 at Chapter 2.1400.2(b) (February 1995).

¹¹ *Id.* at Chapter 2.1400.2(b)(1).

¹² *K.S.*, *supra* note 9.

As appellant was receiving compensation on the periodic roll at the time of the termination of her compensation benefits, she should have received proper pretermination notification. OWCP should have provided appellant with notice that it intended to terminate her compensation and an opportunity to submit evidence supporting a continuing employment-related disability.¹³

Due process and elemental fairness require that a claimant under the circumstances presented have notice and an opportunity to respond to the termination of benefits.¹⁴ The Board finds that the termination was improper and will be reversed.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits effective February 1, 2016.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated September 27, 2016 is reversed.¹⁵

Issued: December 14, 2017
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹³ *Id.*

¹⁴ *D.R.*, Docket No. 14-1688 (issued April 8, 2015).

¹⁵ Colleen Duffy Kiko, Judge, participated in the original decision, but was no longer a member of the Board effective December 11, 2017.