

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

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**S.S., Appellant**

**and**

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

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**Docket No. 16-1409  
Issued: February 6, 2017**

*Appearances:*  
*Donald J. Millman, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On June 27, 2016 appellant, through counsel, filed a timely appeal from a January 4, 2016 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.

**ISSUES**

The issues are: (1) whether OWCP met its burden of proof to justify termination of appellant's wage-loss compensation and medical benefits effective February 11, 2015 as she no longer suffered residuals or disability due to the accepted June 6, 2013 employment injury; and

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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.*

(2) whether appellant has established any continuing residuals or disability due to the June 6, 2013 employment injury after February 11, 2015.

### **FACTUAL HISTORY**

On June 6, 2013 appellant, then a 47-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on June 6, 2013 she injured her right foot, toe, ankle, leg, and lower back when she fell while descending stairs due to a staircase collapse. She stopped work. OWCP accepted appellant's claim for right ankle sprain.<sup>3</sup> It paid compensation benefits and placed appellant on the periodic rolls.

Appellant received medical treatment from Dr. Burgess L. Berlin, a Board-certified orthopedic surgeon. In narrative reports dated June 11 and 13, 2013, he indicated that appellant was under his care for injuries sustained to her neck, middle, and low back, right shoulder, right hip, right ankle, and right foot as a result of a June 6, 2013 employment injury. Upon examination of her neck, Dr. Berlin observed decreased sensation in the C6 through T1 dermatomes bilaterally and marked tenderness over the thoracic paravertebral muscles with marked limitation of thoracic range of motion. Lumbar examination revealed lumbar paravertebral muscle spasm and moderate limitation of lumbosacral range of motion in all ranges. Dr. Berlin reported that straight leg raise testing was positive at 30 degrees with a positive Lasegue sign. Upon examination of appellant's right ankle, he noted a collateral ligament sprain grade 1 to 2. Examination of appellant's right shoulder demonstrated tenderness over the anterolateral aspect with limitation in active forward flexion and abduction to 80 degrees. Dr. Berlin diagnosed post-traumatic cervical, thoracic, lumbosacral myositis with radiculitis, post-traumatic right shoulder bursitis tendinitis, post-traumatic right hip bursitis tendinitis, and post-traumatic right ankle and foot sprain. He explained that appellant's injuries had an adverse effect on appellant's ability to engage in normal and customary activities of daily living, especially her job duties, which included prolonged standing and walking and repeated lifting and bending. Dr. Berlin recommended that appellant remain off work.

An October 14, 2013 magnetic resonance imaging (MRI) scan report of the right foot by Dr. Michael Yuz, a Board-certified diagnostic radiologist, revealed evidence of cystic changes within the navicular bone likely to be chronic in nature. Dr. Yuz reported chronic tendinosis of the Achilles tendon, tenosynovitis of the flexor hallucis tendon, and focal cystic changes within the navicular bone likely to be chronic in nature.

OWCP subsequently referred appellant to Dr. William Oppenheim, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether she continued to have residuals and remained disabled due to her June 6, 2013 employment injury and whether she sustained other medical conditions as a result of the June 6, 2013 incident. In a December 10, 2013, report, Dr. Oppenheim described the June 6, 2013 employment incident and reviewed appellant's history. He conducted a physical examination and found no objective findings to support that appellant continued to have residuals of her accepted right ankle injury or that she needed further medical treatment. Dr. Oppenheim advised that she was able to return

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<sup>3</sup> In its decision, OWCP noted that the conditions of post-traumatic cervical, thoracic, lumbosacral myositis with radiculitis, post-traumatic right shoulder bursitis tendinitis, and post-traumatic right hip bursitis tendinitis had not been accepted under this claim because the medical evidence was insufficient to establish these conditions.

to work. With regard to Dr. Berlin's opinion that appellant sustained additional injuries to her cervical spine, lumbar spine, and right shoulder, he reported that he found no objective findings to establish these diagnosed conditions at the time of his examination.

OWCP proposed to terminate appellant's wage-loss compensation and medical benefits in a decision dated January 21, 2014. It found that the weight of the medical evidence rested with the opinion of the second opinion examiner, Dr. Oppenheim, who determined in a December 10, 2013 report that there were no objective findings to demonstrate that appellant continued to have residuals of her June 6, 2013 employment injury. Appellant was afforded 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

In a letter dated February 18, 2014, appellant, through counsel, indicated that she was submitting a new narrative report from Dr. Berlin in support of her claim for continued benefits.

In a February 11, 2014 narrative report, Dr. Berlin described the June 6, 2013 employment incident and noted that appellant was immediately treated in the emergency room for a right ankle sprain. He related that appellant then presented to his office for complaints of neck, right shoulder, middle, low back pain and stiffness, right ankle pain, and right hip pain. Dr. Berlin discussed his examination findings from appellant's initial evaluation and noted that repeat evaluations revealed a neurologic deficit in appellant's upper and lower extremities and a positive impingement sign with an equivocal drop arm sign of the right shoulder. He opined that there was a "direct causal relationship between the accident in question and the resultant injuries this patient sustained." Dr. Berlin explained:

"The axial loading force was of sufficient magnitude when she fell into a seated position to cause injuries to her cervical, thoracic, and lumbar spine. Also, when she struck her body against the steps, in twisting it, she so injured her right shoulder, right hip, and right ankle. I feel there is a direct correlation physically between the history of the trauma and the resultant pathologies."

Appellant underwent a right shoulder MRI scan by Dr. Joel Swartz, a Board-certified diagnostic radiologist, revealed moderate productive change at the acromioclavicular joint, which was encroaching on the supraspinatus muscle tendon complex, fluid in the subacromial/subdeltoid bursa compatible with shoulder impingement, and partial thickness tear of the supraspinatus and infraspinatus tendon. A lumbar spine MRI scan by Dr. Swartz revealed straightening of normal lordotic curvature, compatible with muscle spasm and broad-based disc bulges at L4-5 and L5-S1. In a June 7, 2014 MRI scan of the cervical spine, Dr. Swartz reported disc degeneration with mild-to-moderate disc protrusion and left greater than right neuroforaminal narrowing at C5-6, mild disc protrusion to left at C6-7 and C7-T1, and moderate disc degeneration with mild disc protrusion on the left at C4-5, mild-to-moderate disc protrusion eccentric toward the left neuroforamen at C3-4 as described, and mild disc bulging to left at C2-3.

On June 6, 2014 appellant returned to part-time duty.

OWCP determined that a conflict in the medical evidence existed between Dr. Berlin, appellant's treating physician, and Dr. Oppenheim, OWCP's second opinion physician, with respect to her employment-related conditions and her disability. It referred appellant, along with

a statement of accepted facts and a copy of the record, to Dr. Howard M. Pecker, a Board-certified orthopedic surgeon, to resolve the conflict.

In a July 31, 2014 report, Dr. Pecker described the June 6, 2013 employment injury and noted that OWCP accepted appellant's claim for right ankle sprain. He related that appellant was initially examined in the emergency room (ER) for complaints of right foot and ankle pain and returned to the emergency room two days later for complaints of pain in her neck and back which radiated to her right trapezius and arm. Relative to the accepted condition of right ankle sprain, he explained that x-ray examination of appellant's right ankle showed normal bone, with no evidence of fracture or dislocation. Dr. Pecker indicated that appellant continued to complain of low back pain and neck pain radiating to the right trapezius and shoulder. He reviewed appellant's medical records and noted that various diagnostic examinations of the cervical spine and upper extremity revealed degenerative changes. Upon physical examination, Dr. Pecker reported no tenderness or crepitation of the cervical spine. Range of motion exhibited extension and flexion to 45 degrees and forward flexion on casual observation. Right and left rotation was to 50 degrees. Upon examination of appellant's upper extremities, Dr. Pecker observed 2+ deep tendon reflexes and sensation to pinprick in the right hand. Examination of the right shoulder revealed complaints of tenderness with light palpation of the clavicle and tenderness of the right trapezius. Dr. Pecker noted forceful resistance to motion after forward elevation to 120 degrees and resisted downward pressure on the shoulder forcefully at the top of the range. Upon examination of the lumbar spine, he observed intact sensation to pin prick throughout and diffuse tenderness with moderate palpation of the right Achilles. Strength was 5+ and deep tendon reflexes were 2+.

Dr. Pecker opined that there was no objective evidence of traumatic injury to the shoulder, lumbar spine, or the lower extremities related to the accident on examination. He explained that variable sensation reporting in the right upper extremity was inconsistent with the MRI scan findings or with radiculopathy of the cervical spine. Dr. Pecker also related that tenderness with light palpation of the clavicle and forceful resistance to motion at variable forward elevation angle was not consistent with internal derangement of the shoulder. He further indicated that variable reporting and findings of different ER visits were inconsistent with the findings on MRI scan and with the mechanism of injury. Dr. Pecker noted that MRI scan findings of the cervical spine were consistent with mild degenerative disc changes and were consistent with the claimant's age. He reported that the only current diagnosed condition was degenerative disc disease of the cervical spine, which was not causally related to the work accident. Dr. Pecker concluded that there were no objective findings causally related to the June 6, 2013 employment injury. He reported that further medical treatment for her June 6, 2013 injury was not needed and appellant could continue to work.

Appellant continued to be treated by Dr. Berlin for complaints of pain and stiffness in her neck, back, right hip, and right upper and lower extremity. He provided physical examination findings similar to his previous examinations and recommended physical therapy and isometric and isotonic exercises to help relieve her symptoms. In an October 17, 2014 letter, Dr. Berlin opined that appellant's injuries currently comprised of post-traumatic right shoulder torn rotator cuff with impingement syndrome, post-traumatic right foot tendinitis, and a cervical and lumbosacral myositis with radiculopathy. He noted that because appellant's symptoms had flared up, he recommended that appellant remain out of work for the next four weeks.

OWCP finalized the termination of appellant's wage-loss and medical benefits in a decision dated February 11, 2015. It found that Dr. Pecker's July 31, 2014 impartial medical report represented the special weight of the medical evidence and established that she no longer suffered residuals or disability due to her June 6, 2013 employment injury.

On March 10, 2015 OWCP received appellant's request, through counsel, for a hearing before an OWCP hearing representative.

A hearing was held on October 15, 2015. Counsel asserted that Dr. Pecker only addressed the accepted condition of appellant's right ankle, but appellant had sustained other multiple injuries in the accepted fall. Appellant described the June 6, 2013 employment incident and the symptoms she experienced after her injury. She noted that she was initially treated for only right foot and ankle pain. Appellant related that the next morning she woke up with extreme pain on her entire right side. The pain continued to worsen over the next few days so appellant went back to the ER again and was treated for musculoskeletal contusions. Appellant indicated that she was seen by Dr. Berlin on June 11, 2013 for pain and stiffness in the neck, arm, low back, and right ankle. She noted that Dr. Berlin diagnosed post-traumatic cervical thoracic and lumbosacral myositis with radiculitis, post-traumatic right shoulder bursitis, and post-traumatic right hip bursitis with tendinitis, and post-traumatic right ankle and right foot sprain. Appellant described the medical treatment she continued to receive, including physical therapy, nerve block injections, and surgery on July 29, 2015. She noted that she returned to part-time light duty until October 13, 2014 when she was pulled out of work due to a worsening of her conditions.

Following the hearing, appellant submitted a November 10, 2015 narrative letter by Dr. Berlin. He described the June 6, 2013 employment injury and related that when appellant fell as the stairs collapsed, her entire body was jolted and she fell into a seated position, striking her buttocks and twisting her right ankle. Dr. Berlin noted that as a result of the impact appellant put a forceful axial load on her spine. He discussed in detail the medical treatment he provided for appellant beginning on June 11, 2013, including his examination findings, diagnoses, and recommendations. Dr. Berlin opined that the injuries for which he was treating appellant involved her neck, low back, right shoulder, right hip, and right ankle comprising the diagnoses of traumatic cervical and lumbosacral myositis with radiculopathy, right shoulder bursitis tendinitis, right hip bursitis, and right ankle and foot Achilles, and flexor and extensor tendinitis were directly and causally related to the work injury of June 6, 2013. He reported: "that the axial loading force was of sufficient magnitude when she fell into a seated position to cause injuries to her cervical, thoracic, and lumbar spine. Also, when she struck her body against the steps, in twisting it, she injured her right shoulder, right hip, and right foot." Dr. Berlin opined that appellant was still in need of medical treatment and continued to be disabled from work.

By decision dated January 4, 2016, OWCP's hearing representative affirmed the February 11, 2015 termination decision. She determined that the special weight of evidence rested with the opinion of the referee medical examiner, Dr. Pecker, who determined in a July 31, 2014 report that appellant no longer had any residuals or disability causally related to her June 6, 2013 employment injury.

## **LEGAL PRECEDENT -- ISSUE 1**

According to FECA, once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.<sup>4</sup> OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>5</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>7</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>8</sup>

When there are opposing reports of virtually equal weight and rationale, the case will be referred to an impartial medical specialist pursuant to section 8123(a) of FECA which 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 and resolve the conflict of medical evidence.<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> 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 -- ISSUE 1**

OWCP determined that a conflict in medical opinion evidence existed between Dr. Berlin, appellant's treating physician, who continued to opine that appellant had residuals of her accepted right ankle sprain as well as cervical, lumbar, and right shoulder conditions resulting from the June 6, 2013 employment injury, and Dr. Oppenheim, OWCP's referral physician, who found that appellant no longer suffered residuals of her June 6, 2013 employment injury. Appellant was referred to Dr. Pecker for an impartial medical examination to resolve the conflict in medical evidence regarding whether she continued to have residuals or disability causally related to the June 6, 2013 employment injury.

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

<sup>7</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

<sup>8</sup> *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *A.P.*, *id.*

<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).

In a July 31, 2014 report, Dr. Pecker described that on June 6, 2013 appellant fell down, striking her right side and twisting her right ankle, when the staircase she was walking on collapsed while working. He noted her accepted condition for right ankle sprain. Dr. Pecker discussed appellant's medical treatment and related her continued complaints of low back pain and neck pain radiating to the right trapezius and shoulder. Regarding her accepted right ankle sprain condition, Dr. Pecker related that x-ray of the right ankle showed normal findings, with no fracture or dislocation.

Regarding appellant's other alleged conditions, he related that upon physical examination, appellant had no tenderness or crepitation of the cervical spine. Examination of appellant's right shoulder revealed complaints of tenderness with light palpation of the clavicle and tenderness of the right trapezius with forceful resistance to motion after forward elevation to 120 degrees and resisted downward pressure on the shoulder forcefully at the top of the range. Dr. Pecker observed intact sensation to pin prick throughout the lumbar spine and diffuse tenderness with moderate palpation of the right Achilles.

Dr. Pecker opined that there was no objective evidence of traumatic injury to the shoulder, lumbar spine, or the lower extremities related to the accident on examination. He explained that appellant's complaints on examination and her results were inconsistent with MRI scan findings or with the mechanism of injury. Dr. Pecker noted that the only current diagnosed condition was degenerative disc disease of the cervical spine, which was not causally related to the work accident. He concluded that there were no objective findings on examination to support that appellant continued to suffer from the accepted right ankle sprain or from any other medical conditions causally related to the June 6, 2013 employment injury. Dr. Pecker reported that appellant was able to continue working and that she was no longer in need of further medical treatment.

The Board finds that Dr. Pecker's July 31, 2014 report is entitled to the special weight of the medical opinion evidence and establishes that appellant no longer had residuals of her employment injury and was able to continue to work. Dr. Pecker's specifically noted that x-ray evaluation of appellant's right ankle showed normal findings. He provided an accurate history of the June 6, 2013 employment injury and reviewed her medical records. Dr. Pecker performed a thorough, clinical examination and provided findings on examination. He opined that there were no objective findings to support appellant's subjective complaints that she suffered from any medical conditions or was unable to work due to her June 6, 2013 employment injury. Accordingly, the Board finds that Dr. Pecker's medical opinion was sufficient for OWCP to justify the termination of appellant's wage-loss and medical benefits effective February 11, 2015 as she no longer had residuals of and remained disabled due to her June 6, 2013 employment injury.<sup>12</sup>

On appeal, counsel disagrees with the findings of Dr. Oppenheim and Dr. Pecker that there was no objective evidence of traumatic injury to the shoulder, lumbar spine, or lower extremities. He alleges that the medical reports of Dr. Berlin and appellant's testimony supported a causal relationship between injuries to appellant's shoulder, lumbar spine, and lower extremities and the June 6, 2013 work-related incident. As noted above, however, Dr. Pecker's

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<sup>12</sup> *Id.*

opinion was entitled to the special weight of the medical opinion evidence as an impartial medical examiner and established that appellant no longer had any residuals or disability causally related to the accepted employment-related injury.

### **LEGAL PRECEDENT -- ISSUE 2**

When OWCP meets its burden of proof to terminate appellant's compensation benefits on February 11, 2015, the burden shifts to appellant to establish continuing disability causally related to the accepted employment injury.<sup>13</sup>

Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that the evidence submitted following the February 11, 2015 termination decision was insufficient to establish that appellant continued to be disabled after that date due to the June 6, 2013 employment injury.

Appellant submitted a November 10, 2015 narrative letter by Dr. Berlin. He described the June 6, 2013 employment injury and noted that, as a result of the impact of falling on the stairs, appellant put a forceful axial load on her spine. Dr. Berlin discussed the medical treatment that appellant received and provided physical examination findings. He opined that the injuries for which he was treating appellant involving her neck, low back, right shoulder, right hip, and right ankle comprising the diagnoses of traumatic cervical and lumbosacral myositis with radiculopathy, right shoulder bursitis tendinitis, right hip bursitis, and right ankle and foot Achilles and flexor and extensor tendinitis were directly and causally related to the work injury of June 6, 2013. Dr. Berlin opined that appellant was still in need of medical treatment and continued to be disabled from work. The Board notes that while Dr. Berlin provided an affirmative opinion on causation, he did not provide any medical rationale explaining how appellant continued to be disabled as a result of the June 6, 2013 employment injury. A medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.<sup>15</sup> Furthermore, Dr. Berlin was on one side of the conflict resolved by Dr. Pecker and the Board has held that reports from a physician who was on one side of a medical conflict that an impartial medical specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner, or to create a new conflict.<sup>16</sup> His report, therefore, has failed to establish appellant's continued disability as a result of the June 6, 2013 employment injury.

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<sup>13</sup> See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).

<sup>14</sup> *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

<sup>15</sup> *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *T.M.*, Docket No. 08-975 (issued February 6, 2009).

<sup>16</sup> *I.J.*, 59 ECAB 408 (2008).

Appellant has not submitted sufficient medical evidence to demonstrate that she has any continuing disability causally related to the June 6, 2013 employment injury.

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

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits effective February 11, 2015. The Board further finds that appellant has failed to establish continuing employment-related residuals or disability after February 11, 2015 causally related to the June 6, 2013 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 4, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 6, 2017  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

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

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