United States Department of Labor
Employees' Compensation Appeals Board

M.S., Appellant	)	
and	)	**Docket No. 17-0539**
	)	**Issued: July 13, 2017**
U.S. POSTAL SERVICE, POST OFFICE, Spring, TX, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 10, 2017 appellant, through counsel, filed a timely appeal from a November 16, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.[3]

[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] 5 U.S.C. § 8101 *et seq.*

[3] The Board notes that, following the November 16, 2016 decision, appellant submitted additional evidence to OWCP. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. Thus, the Board is precluded from reviewing this evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

ISSUE

The issue is whether appellant met her burden of proof to establish any continuing work-related disability on and after November 5, 2014 causally related to a March 18, 2013 employment injury.

On appeal appellant, through counsel, argues that the decision is contrary to fact and law.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts as set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to this appeal are set forth below.

On March 20, 2013 appellant, then a 40-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on March 18, 2013, she sustained insect bites on the right side of her neck while delivering mail. She alleged that, when she opened a mailbox, a swarm of wasps flew out of the mailbox and into her truck. Appellant began to fan them away. She then parked the vehicle and got out, moving around to avoid being stung. As appellant continued to work, she felt a pull from her neck to her right shoulder when she raised her right arm. OWCP accepted the claim for right neck sprain, sprain of the right upper arm, shoulder, and other unspecified sites, and cervical spondylosis. By letter dated May 30, 2013, it placed appellant on the periodic rolls for temporary total disability.

Appellant continued to seek medical treatment with Dr. Yusuf A. Mosuro, a Board-certified anesthesiologist and pain specialist. In a report dated May 23, 2013, Dr. Mosuro diagnosed right neck, and right upper arm and shoulder sprains. He reviewed a magnetic resonance imaging (MRI) scan which he interpreted as revealing C4-5 disc protrusion, C5-6 bulging disc, right shoulder tendinitis, and less than grade 1 partial rotator cuff tear. Dr. Mosuro opined that appellant was totally disabled from work as she was unable to lift more than 10 pounds.

OWCP referred appellant for a second opinion evaluation with Dr. James E. Butler, III, a Board-certified orthopedic surgeon, to determine appellant's disability status. In a report dated July 8, 2013, Dr. Butler related that a functional capacity evaluation (FCE) had been performed to determine appellant's work capacity. He concluded that appellant's physical capacity was determined to be at a medium level and that she could perform sedentary job duties.

Appellant was then referred to Dr. James Hood, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Drs. Mosuro and Butler regarding appellant's ability to return to work. In a report dated January 29, 2014, Dr. Hood opined that appellant was disabled from her date-of-injury position, but was capable of working an eight-hour day with right upper extremity restrictions. OWCP thereafter received a January 3, 2014 investigative report and video, which was forwarded to Dr. Hood for review. In an August 5, 2014 addendum, Dr. Hood noted that he had reviewed the transcript and video provided by

[4] Docket No. 15-1064 (issued June 15, 2016).

OWCP. He concluded that it appeared that appellant no longer had any significant residuals from her accepted employment injuries and was able to return to the city carrier position, with no restrictions.

OWCP terminated appellant's wage-loss compensation benefits by decision dated October 22, 2014, effective November 5, 2014, finding that the opinion of the impartial medical examiner, Dr. Hood, constituted the special weight of the medical opinion.

Appellant submitted additional evidence and, on November 25, 2014, requested reconsideration. In a March 24, 2015 decision, OWCP denied modification of its prior decision.

Appellant appealed to the Board on April 15, 2015. By decision dated June 15, 2016, the Board affirmed OWCP's termination of appellant's wage-loss compensation benefits effective November 4, 2015. The Board found that the report from Dr. Hood, the impartial medical examiner, constituted the weight of the medical evidence and established that appellant had no residuals from her accepted employment-related injuries for right neck sprain and sprain of the right upper arm, shoulder, and other unspecified sites.[5] The Board also found that the new evidence submitted by appellant on reconsideration was insufficient to establish continuing employment-related residuals or disability on or after November 5, 2014.

Subsequent to the issuance of its March 24, 2015 decision, but prior to the issuance of the Board's decision on June 15, 2016, OWCP received additional medical evidence.

On March 3 and 17, 2015 Dr. James A. Cain, III, an examining Board-certified diagnostic radiologist, performed range of motion muscle testing to determine appellant's functional ability. In the March 3, 2017 test, Dr. Cain noted significant loss of range of motion in the left side of the neck, cervical, and upper extremity muscle areas. He reported significant right shoulder range of motion deficits on March 17, 2015.

In reports dated March 3 and April 3, 2015, Dr. Novarro C. Stafford, an examining physician, noted appellant's subjective complaints and history, reviewed objective tests, performed a physical examination, and diagnosed compensable injuries of right neck strain, right shoulder/arm sprain, and right rotator cuff syndrome. Physical examination findings included tenderness in the right and left trapezius, right deltoid, and right cervical areas, no change in her neck range of motion, marked decrease in right shoulder active range of motion, significant pain on right shoulder girdle passive motion, and significant anterior and posterior deltoid point tenderness. Dr. Stafford opined that appellant's right neck and shoulder conditions were employment-related based on her lengthy medical history. A review of a January 21, 2015 MRI scan revealed acromioclavicular joint arthrosis, mild subdeltoid bursitis, and mild-to-moderate interstitial partial supraspinatus tendon tear. Dr. Stafford determined that appellant was disabled from work due to neck sprain, right shoulder strain, partial supraspinatus tendon tear, and bilateral carpal tunnel syndrome.

[5] *Id*.

In duty status reports (Form CA-17) dated March 3, April 3, June 19, and July 30, 2015, Dr. Stafford indicated that appellant was able to work with restrictions for her right shoulder and arm.

OWCP received reports dated February 28 and April 1, 2015 from Dr. Ian J. Reynolds, an examining Board-certified orthopedic surgeon. In the February 28, 2015 report, Dr. Reynolds related that appellant had been referred by Dr. Louis Train, a family physician, for evaluation of her neck, upper shoulder, and upper arm pain. Diagnoses included cervical herniated nucleus pulposus, ancillary diagnosis of right finger and thumb trigger fingers, and carpal tunnel syndrome. Dr. Reynolds, in the April 1, 2015 report, noted appellant's subjective complaints and diagnosed probable rotator cuff tendinitis and cervical disc disease.

On April 7, 2015 Dr. Train described appellant's March 18, 2013 employment injury and reviewed MRI scans. He opined, based on review of MRI scan cervical findings, physical examination, and employment injury history, that appellant's accepted conditions should be expanded to include internal right shoulder derangement and right carpal tunnel syndrome. Dr. Train explained that appellant sustained internal right shoulder derangement from violently waving her right arm while defending herself from the wasp attack. Diagnoses included neck sprain with thoracic outlet syndrome complication, right shoulder internal derangement, and right carpal tunnel syndrome. Appellant was released to return to work with restrictions.

Dr. Cain provided range of motion/muscle test reports dated April 14, May 20, and June 2, 2015, which reiterated conclusions and findings from prior reports.

Dr. Stafford, in reports dated May 19, June 19, and August 4, 2015, provided an unchanged history, diagnoses, and physical examination findings. He reiterated his opinion that appellant was to remain off work due to the diagnosed conditions.

In a July 31, 2015 report, Dr. Train noted appellant was seen for a follow-up visit. He described the history of injury and provided physical examination findings. Dr. Train diagnosed fibromyalgia based upon severe reaction on palpation to areas of tenderness and 11 classic tender fibromyalgia trigger spots.

In a January 6, 2016 report, Dr. James Key, a Board-certified orthopedic surgeon, noted appellant's employment history. He reviewed appellant's April 22, 2014 MRI scan and related that it showed tendinopathy of the right shoulder, small undersurface partial tear in the right supraspinatus tendon, and mild subacute deltoid bursitis. Dr. Key also noted that the MRI scan revealed C4-5 disc protrusion, and stenosis at C5-6. He related that appellant had progressive symptoms of the thumb and ring finger of the right hand, and that appellant had bilateral carpal tunnel syndrome. Dr. Key explained that appellant would not have full function of her right shoulder until she underwent surgical repair of the posterior tear of the rotator cuff. He concluded that appellant could not currently work, due to her restrictions.

On April 4, 2016 Dr. Key provided medical and injury histories, noted an injury date of June 18, 2013, and provided examination findings. He diagnosed right shoulder sprain, neck disc disease, partial supraspinatus tendon tear of the right shoulder, bilateral carpal tunnel

syndrome, right hand parasthesia, and left hand olecranon parasthesia. Dr. Key recommended further diagnostic testing.

Subsequent to the issuance of the Board's June 15, 2016 decision OWCP received additional evidence.

In a May 18, 2016 report, Dr. Charles Reinhardt, a treating osteopath, noted accepted diagnoses were right neck sprain, right shoulder sprain, and right rotator cuff syndrome. He reviewed medical reports and objective tests, and provided a medical history. Appellant's physical examination revealed a moderate decrease in her neck range of motion, 120 degrees right shoulder flexion, 100 degrees right shoulder abduction, right shoulder scapular and trapezius area spasm, and positive right wrist Tinel's sign. Based upon his review and physical examination, he diagnosed cervical disease, right shoulder tear, right wrist carpal tunnel syndrome, and right elbow pain.

On August 19, 2016 appellant, through counsel, requested reconsideration.

On September 12, 2016 OWCP authorized right shoulder arthroscopic surgery, which was performed on September 8, 2016. It paid appellant wage-loss compensation for the period September 6 to October 15, 2016.

By decision dated November 16, 2016, OWCP denied modification of its prior decision. It found that the evidence of record was insufficient to establish that appellant had any residuals or disability for the period November 5, 2014 to September 5, 2016 due to her accepted employment injuries. OWCP further noted that medical reports dated January 6 and April 4, 2016 from Dr. Key and the May 18, 2016 report from Dr. Reinhardt were duplicative copies of their reports and had been considered in prior decisions.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.[6] It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[7] The burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[8]

ANALYSIS

OWCP accepted that appellant sustained right neck sprain and sprain of the right upper arm, shoulder, and other unspecified sites. The accepted conditions were subsequently expanded to include cervical spondylosis due to the accepted March 18, 2013 work injury. Due to a

[6] *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

[7] *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

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

conflict in medical opinion as to the extent of any injury-related residuals and disability, OWCP referred appellant and the case record to Dr. Hood, for an impartial medical examination. It terminated appellant's compensation by decision dated October 22, 2014, effective November 5, 2014. Appellant requested reconsideration and appealed to the Board. In the prior appeal, the Board affirmed the termination of wage-loss compensation benefits finding that the weight of the medical evidence, as represented by Dr. Hood's January 29, 2014 opinion, established that the injury-related condition had resolved without residuals. The Board also found that appellant failed to establish any continuing residuals or disability on or after November 5, 2014.

As the Board has previously affirmed the termination of appellant's wage-loss and medical compensation benefits as of November 5, 2014, absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is res judicata.[9] Appellant continued to submit evidence in support of her claim for continuing disability. By decision dated November 16, 2016, OWCP found that the medical evidence of record was insufficient to establish that appellant had any residuals or disability due to the accepted conditions. The issue currently before the Board is whether appellant has met her burden of proof to establish any continuing residuals on and after November 5, 2014.

The Board finds that OWCP, in its decision dated November 16, 2016, failed to review all the evidence submitted as it mischaracterized the January 6 and April 4, 2016 reports from Dr. Key and the May 18, 2016 report from Dr. Reinhardt as duplicative and previously reviewed. The Board notes in this regard that OWCP's last merit review of the case, prior to the November 16, 2016 decision, had been carried out on March 24, 2015. Therefore these three medical reports had not been considered by OWCP as they were submitted while appellant's case was on appeal to the Board and immediately following issuance of the Board's decision on June 15, 2016. Thus, this evidence has not been considered or reviewed by OWCP in deciding whether appellant has continuing residuals for the period November 5, 2014 to September 5, 2016. As the Board has held, OWCP is obligated to consider all evidence properly submitted by the claimant and received by OWCP before the final decision was issued.[10] Hence, OWCP was required to review the reports from Drs. Key and Reinhardt in its November 16, 2016 decision and determine whether appellant established any continuing residuals or disability on and after November 5, 2014 causally related to her accepted March 18, 2013 employment injury. The Board finds that it failed to do so. This case will, therefore, be remanded to OWCP for a proper evaluation of whether the medical evidence established any continuing residuals on and after November 5, 2014. Following any necessary further development, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for a decision.

[9] *A.B.*, Docket No. 16-0864 (issued November 16, 2016).

[10] *See J.C.*, Docket No. 15-1666 (issued October 29, 2015); *William A. Couch*, 41 ECAB 548 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 16, 2016 is set aside and the case is remanded for further proceedings consistent with the above opinion.

Issued: July 13, 2017
Washington, DC

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

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

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