

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

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A.S., Appellant

and

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

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**Docket No. 17-1000  
Issued: October 25, 2017**

*Appearances:*

*Thomas R. Uliase, 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  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On April 7, 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<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.

**ISSUE**

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 12, 2016.

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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.*

## **FACTUAL HISTORY**

Appellant, then a 43-year-old letter carrier, filed occupational disease claims (CA-2 forms). In the first claim form, dated December 19, 2000, he described a November 6, 2000 incident when he pulled something in his back while loading his vehicle with trays of mail. Appellant described the nature of the injury as a C4-5 disc herniation with multilevel degenerative changes. In a second claim form, dated January 2, 2001, he alleged that the performance of repetitive duties had contributed to C4-5 disc herniations with multilevel degenerative changes. Both forms provided November 6, 2000 as the date appellant first became aware of an employment-related condition. Appellant stopped work on November 7, 2000. He returned to limited duty on January 9, 2001.

OWCP developed the claim as a traumatic injury based on the November 6, 2000 incident and accepted the claim for cervical and lumbosacral radiculopathy.<sup>3</sup> Appellant worked light duty and then filed a claim for a recurrence of disability (Form CA-2a) commencing May 18, 2001. OWCP accepted appellant's claim for a recurrence of disability on September 19, 2001. Appellant was placed on the periodic compensation rolls and received wage-loss compensation every 28 days commencing June 16, 2002.

In a report dated October 11, 2001, Dr. Tariq Siddiqi, a Board-certified neurosurgeon, noted that appellant had disc protrusions at C5-6 and cervical spondylosis at C5-7, but he did not require surgery. He opined that appellant had reached maximum medical improvement and the only recommendation was for a functional capacity evaluation (FCE).

The employing establishment referred appellant for a fitness-for-duty examination. In a report dated November 26, 2001, Dr. Steven Valentino, an osteopath, diagnosed resolved history of brachial and lumbosacral neuritis. He reported that he found no medical conditions currently contributing to total disability.

Appellant continued to receive wage-loss compensation. An attending osteopath, Dr. Michael Voyack, indicated in a March 5, 2006 work capacity evaluation (OWCP-5c) that appellant remained totally disabled.

OWCP referred appellant for a second opinion examination with Dr. Surendrapal Mac, a Board-certified orthopedic surgeon. In a report dated September 1, 2006, Dr. Mac provided a history and results on examination. He referred to appellant loading a vehicle with mail. Dr. Mac opined that cervical and lumbar radiculopathy had resolved. He indicated that appellant had limitations due to cervical spondylosis, lumbar degenerative arthritis, and lumbar degenerative disc disease.

OWCP referred appellant to Dr. Peter Spohn, a Board-certified orthopedic surgeon, for an impartial medical evaluation.<sup>4</sup> In a report dated March 15, 2007, Dr. Spohn provided a

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<sup>3</sup> A traumatic injury is a condition produced by events or incidents occurring within one workday or shift. 20 C.F.R. § 10.5(ee).

<sup>4</sup> 5 U.S.C. § 8123(a) provides that if there is a disagreement between an attending physician and a physician selected by OWCP, a third physician shall be appointed to make an examination.

history and results on examination. He indicated that on November 6, 2000 appellant was loading a vehicle with trays of mail. Dr. Spohn opined that appellant continued to have employment-related medical conditions, including aggravations of cervical and lumbar degenerative disc disease. He provided work restrictions that allowed no more than five pounds lifting.

OWCP prepared an updated statement of accepted facts (SOAF), dated July 15, 2010, which reported that accepted conditions now included: lumbosacral neuritis or radiculitis, brachial neuritis or radiculitis, aggravation of cervical spondylosis, aggravation of degenerative lumbar intervertebral disc, and displacement of cervical intervertebral disc.

OWCP referred appellant for a second opinion examination by Dr. William Lehman, a Board-certified orthopedic surgeon. In a report dated October 23, 2010, Dr. Lehman provided a history and results on examination. He opined that aggravations of cervical spondylosis and lumbar degenerative disc disease had not resolved. Dr. Lehman reported that there was no clinical evidence of brachial neuritis or displacement of cervical intervertebral disc. He noted that an FCE had not been performed.

The record indicates that appellant underwent an FCE on December 7, 2010. By report dated August 9, 2011, Dr. Lehman reported that bending, squatting, and reaching were not tolerated due to back pain, which would limit appellant's ability to perform light-duty work. He completed an OWCP-5c work capacity evaluation form, and provided work restrictions that included 15 pounds lifting and sitting one hour at a time.

In a report dated August 2, 2013, Dr. Voyack opined that appellant remained disabled due to chronic neck and back pain, with radiculopathy.

OWCP again referred appellant for a second opinion examination by Dr. Seth Jaffe, an osteopath. In a report dated November 25, 2014, Dr. Jaffe provided a history and results on examination. He found that cervical spinal motion was 90 percent of normal in flexion, extension, side bending, and rotation, with some cervicotrapezial spasm and tenderness. Neurological testing was negative. As to the lumbar spine, range of motion was 80 percent of normal, straight leg raising test and sciatic tension signs were negative. Dr. Jaffe noted that appellant could heel walk, toe walk, and tandem walk, with some mild tenderness in the sacroiliac joints. He diagnosed cervical spondylosis with history of C5-6 disc herniation, multilevel lumbar disc disease with history of herniated discs L4-5 and L5-S1, and chronic pain syndrome. Dr. Jaffe opined that appellant's current condition was causally related to the employment injury and that appellant could return to light-duty work. He also noted that appellant's inability to work full duty was not related to any medical conditions which related to his current orthopedic disability. Dr. Jaffe completed an OWCP-5c form indicating that appellant could work four to six hours per day, with restrictions that included a 20-pound lifting restriction and three hours sitting.

The record contains a memorandum from an OWCP claims examiner dated May 22, 2015, reviewing the findings of Dr. Jaffe. The claims examiner wrote that it was unclear why Dr. Jaffe limited appellant to part-time work, given the examination findings, and that an FCE was needed. Appellant underwent an FCE on July 28, 2015.

On September 23, 2015 OWCP determined that a conflict in the medical evidence existed as to whether appellant could return to work. It selected Dr. Timothy Wagner, a Board-certified orthopedic surgeon, as an impartial medical examiner. A SOAF dated October 15, 2015 noted the accepted conditions and indicated that appellant remained off work. It indicated that he had claimed an injury from loading a vehicle with trays of mail. The questions posed to Dr. Wagner included whether appellant was totally disabled solely due to residuals of accepted work conditions and whether appellant was disabled from the date of injury.

In a report dated November 24, 2015, Dr. Wagner provided a history and results on examination.<sup>5</sup> He reported that in his physical examination of the cervical spine, both upper extremities, lumbar spine, and both lower extremities, he found appellant to be neurologically normal. Dr. Wagner wrote that any loss of range of motion of the cervical spine and lumbar spine to be secondary to appellant's state of physical conditioning, for which appellant was responsible. He noted the 2001 reports from Dr. Siddiqui and Dr. Valentino. Dr. Wagner wrote that any changes in the lumbar spine noted at a later date were part of the normal aging process which would have progressed, and were not related to a strain injury to appellant's cervical spine and/or lumbar spine when lifting a tray of mail. He opined that appellant had none of the conditions listed on the SOAF which were active and he had no objective symptoms noted on physical examination, but a multitude of symptomatic complaints which were not corroborated by clinical examination. Dr. Wagner opined that appellant's only problem was that he was physically deconditioned. He also wrote that appellant had mental problems that had not been addressed, noting that a July 2003 report had indicated that appellant would benefit from a pain management program with psychological, and general reconditioning, but he had declined to enter the program.

By letter dated February 24, 2016, OWCP advised appellant that it proposed to terminate his wage-loss compensation and medical benefits. It found that the weight of the medical evidence was represented by Dr. Wagner and was sufficient to justify termination of compensation. Appellant was advised to submit any additional evidence or argument within 30 days.

Counsel submitted a March 9, 2016 letter asserting his belief that Dr. Wagner had not found that appellant had recovered from the work injury. He also asserted that Dr. Wagner had found appellant to be deconditioned and raised a psychological component.

On March 22, 2016 appellant submitted a March 11, 2016 report from Dr. Voyack, who provided results on examination. Dr. Voyack wrote that appellant had more pain than when he saw appellant in 2014.

By decision dated April 12, 2016, OWCP terminated wage-loss compensation and medical benefits. It found that the weight of the evidence was represented by Dr. Wagner.

On April 19, 2016 counsel requested a hearing before an OWCP hearing representative. A hearing was held on September 26, 2016. Counsel argued that Dr. Wagner's report was

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<sup>5</sup> The record also contains a November 6, 2015 review of the medical evidence of record by Dr. Wagner.

insufficient to terminate compensation. He also argued that asking Dr. Wagner whether appellant was totally disabled solely due to accepted work conditions was prejudicial.

By decision dated November 16, 2016, the hearing representative affirmed the April 12, 2016 termination decision, finding that the medical evidence of record was sufficient to justify termination of compensation benefits.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation. After it has been determined that an employee has disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>6</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. 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>

### **ANALYSIS**

In the present case, appellant had filed CA-2 forms dated December 19, 2000 and January 2, 2001. The December 19, 2001 Form CA-2 referred to loading trays of mail on November 6, 2000. While the January 2, 2001 Form CA-2 referred briefly to repetitive duties, appellant did not provide a description of the repetitive duties. OWCP developed the claim as a traumatic injury claim based on loading trays of mail on November 6, 2000.<sup>8</sup>

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits. OWCP properly found a conflict in the medical evidence as to appellant's continuing disability as Dr. Jaffe had indicated that appellant could return to light-duty work, while the attending physician, Dr. Voyack, found that appellant remained totally disabled. FECA provides that, if there is a 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 to resolve the conflict.<sup>9</sup>

OWCP selected Dr. Wagner to resolve the conflict. It is well established that, when a case is referred to an impartial medical examiner for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.<sup>10</sup> Dr. Wagner provided a complete history

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<sup>6</sup> *Elaine Sneed*, 56 ECAB 373 (2005); *Patricia A. Keller*, 45 ECAB 278 (1993); 20 C.F.R. § 10.503.

<sup>7</sup> *Furman G. Peake*, 41 ECAB 361 (1990).

<sup>8</sup> *Supra* note 3.

<sup>9</sup> 5 U.S.C. § 8123. *Id.* at § 10.321 indicates that the examination by the third physician is called a referee or impartial examination.

<sup>10</sup> See F.C., Docket No. 16-1523 (issued May 15, 2017); *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

and he reviewed in detail the medical evidence of record. He provided results on examination and based his opinion on a complete and accurate background. Dr. Wagner provided a well-reasoned medical opinion that appellant had no current employment-related medical conditions. He found that any changes in the spine were part of the normal aging process, not an employment-related condition, and he indicated that there were no objective findings on examination and no evidence of an active employment-related condition. Dr. Wagner indicated that appellant's only problems related to a physical deconditioning, unrelated to the employment injury. The Board, thus, finds that Dr. Wagner represents the weight of the medical evidence in this case.

On appeal counsel argues that Dr. Wagner's report was insufficient to meet OWCP's burden of proof. He argues that Dr. Wagner failed to acknowledge the full extent of appellant's accepted conditions, but Dr. Wagner provided a detailed history and review of the evidence, and the SOAF clearly reported the accepted conditions. A psychological condition has not been accepted as causally related to the accepted injury and appellant never filed a claim based on psychological conditions causally related to his accepted injury.<sup>11</sup> Counsel argues that Dr. Wagner reported that appellant was not totally disabled solely due to an employment injury, without considering whether there was a contribution from an employment injury. Dr. Wagner, as noted, found that there was no continuing active employment-related condition. Counsel also argues that the SOAF was improper as it contained information that biased Dr. Wagner, since it confirmed that appellant remained off work and received compensation every 28 days. The information as to appellant's continuing disability is relevant as the issue was whether he remained disabled due to an employment injury. OWCP procedures explain that the SOAF should provide the claimant's "employment history, including periods of wage loss and returns to full or light duty for the present claim -- helps put the employee's injury and work history in perspective. If the employee did not stop work, that should be reported."<sup>12</sup>

For the reasons discussed above, the Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 12, 2016.

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 and medical compensation benefits effective April 12, 2016.

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<sup>11</sup> See C.D., Docket No. 09-1152 (issued February 23, 2010).

<sup>12</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.809.5 (September 2009).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated November 16, 2016 is affirmed.

Issued: October 25, 2017  
Washington, DC

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

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board