

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

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**T.H., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Temple, GA, Employer**

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**Docket No. 16-1314  
Issued: September 18, 2017**

*Appearances:*  
*Martin Kaplan, 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  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 9, 2016 appellant, through counsel, filed a timely appeal from a March 24, 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 to consider 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, following the March 24, 2016 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. Thus, OWCP 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. 09-0176 (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 OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective March 24, 2016.

## FACTUAL HISTORY

On December 19, 2014 appellant, then a 46-year-old temporary rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on December 13, 2014 she sustained a lower back and neck injury when she fell. She stopped work on December 13, 2014. OWCP accepted the claim for an L4-5 herniated disc/displacement of lumbar disc without myelopathy and paid supplemental wage-loss compensation for intermittent periods.

In a July 16, 2015 status report, Dr. Eric I. Francke, a treating Board-certified orthopedic surgeon, indicated that appellant was capable of performing full-duty work and diagnosed pseudoarthrosis. He diagnosed cervical pain/cervicalgia, coccyx pain, low back pain/lumbago, lumbar radiculopathy, unspecified thoracic or lumbosacral neuritis or radiculitis, and pseudoarthrosis. Physical examination findings were unchanged and he noted that in prior visits that appellant's presentation was somewhat dramatic.

In an August 13, 2015 report, Dr. Francke reported that appellant was seen for a follow up examination. He reported normal electromyogram and nerve conduction velocity (EMG/NCV) scan studies.

Dr. Francke, in a September 3, 2015 report, noted an injury date of December 13, 2014 and that appellant's physical examination was unchanged. A review of a magnetic resonance imaging (MRI) scan showed L5-S1 spondylosis with left-sided L4-5 protrusion and bilateral L4-5 foraminal stenosis. He reported cervical, coccyx, and low back pain, lumbar radiculopathy, and pseudoarthrosis. Diagnoses included cervicalgia and cervical pain. In a September 3, 2015 form report, Dr. Francke indicated that appellant was capable of performing full-duty work.

In a September 30, 2015 report, Dr. Yong S. Lee, a Board-certified physiatrist, noted an injury date of December 13, 2015<sup>4</sup> and that appellant was seen in follow-up for her lumbar radiculopathy. He provided physical examination and neurological findings and diagnosed cervicalgia and cervical pain. In an attached form report, Dr. Lee indicated that appellant was capable of performing full-duty work.

On October 26, 2015 appellant was referred by OWCP for a second opinion evaluation with Dr. Alexander N. Doman, a Board-certified orthopedic surgeon, to determine her work restrictions, and the status of her accepted L4-5 herniated disc condition. The attached statement of accepted facts (SOAF) noted that appellant's claim was accepted for an L4-5 herniated nucleus pulposus and provided a description of her job duties.

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<sup>4</sup> Dr. Lee's report incorrected lists the date of injury as December 13, 2015, when the correct date is December 13, 2014.

In a November 30, 2015 report, Dr. Doman reported that appellant was examined on November 19, 2015. He noted her medical history, reviewed the SOAF, and performed a physical examination. Appellant related complaints of mild headaches and some low back pain radiating into her left leg. A physical examination revealed no acute distress, negative straight leg testing, and no signs of muscular atrophy. Dr. Doman related that x-rays of her lumbar spine showed mild L5-S1 disc space narrowing, but appellant's nerve conduction studies were normal. A review of a March 16, 2015 MRI scan of the lumbar spine showed evidence of a lumbar herniated disc and age-related degenerative changes of the lumbar and thoracic spines. Dr. Doman diagnosed age-related lumbar degenerative disc disease based on x-ray and MRI scan interpretations. Next, he opined that appellant's cervical condition had not been caused or aggravated by the accepted December 13, 2014 work injury. Dr. Doman related that it was his firm belief that appellant's subjective complaints were unsupported by the objective evidence. He also opined that he believed appellant had symptom magnification in her subjective complaints. Dr. Doman concluded that appellant had no disability due to her accepted employment injury and that he had no recommendations for further treatment.

In reports dated December 10 and 18, 2015, Dr. Francke reported that appellant was seen for a follow-up visit for her December 13, 2014 employment injury and that her physical examination was unchanged. He reported that appellant continued to work her usual job and complained of low back pain. Dr. Francke reported normal EMG/NCV studies of the bilateral upper and lower extremities while an MRI scan suggested L4-S1 spondylosis with L4-5 left-sided protrusion and bilateral L5-S1 foraminal stenosis. He recommended physical therapy for her low back pain and provided a prescription. Diagnoses included low back pain and lumbar radiculopathy. An attached form report indicated that appellant was capable of performing full-duty work and ordered four weeks of physical therapy.

On February 4, 2016 OWCP issued a notice proposing to terminate her wage-loss compensation and medical benefits. It advised appellant that its proposal to terminate her benefits was based on the opinion of Dr. Doman, the second opinion physician, who concluded that her accepted condition had resolved with no residuals or disability. Appellant was afforded 30 days to respond.

Dr. Francke, in a February 4, 2016 report, noted that appellant continued to complain of low back pain radiating into her right posterior thigh. He reported EMG/NCV testing did not support a finding of lumbar radiculopathy while her March 16, 2015 MRI scan showed intervertebral disc degeneration with mild stenosis caused by mild disc protrusions. Dr. Francke reported that appellant complained of low back pain with bilateral leg raising and lumbar range of motion and noted that she had difficulty ambulating. He diagnosed low back pain, lumbar radiculopathy, cervicalgia, coccyx pain, and pseudoarthrosis and recommended physical therapy. In an attached form report, Dr. Francke indicated that appellant was capable of full-duty work, but recommended four weeks of physical therapy.

In a letter dated February 19, 2016, counsel disagreed with OWCP's proposal to terminate appellant's compensation benefits based upon Dr. Doman's opinion. He noted that the SOAF provided Dr. Doman was flawed as it failed to accurately state the accepted condition. Counsel also argued that Dr. Doman went outside the framework of the SOAF when rendering his opinion.

On a March 10, 2016 visit status report, Dr. Francke indicated that appellant was capable of performing full-duty work.

By decision dated March 24, 2016, OWCP finalized the termination of appellant's compensation benefits for her accepted lumbar condition effective March 24, 2016. It found the report of Dr. Doman constituted the weight of the evidence establishing that her lumbar condition had resolved with no continuing residuals or disability. OWCP found the argument that Dr. Doman had deviated from the SOAF to be invalid and explained that Dr. Doman had based his opinion on a review of the entire medical record and appellant's examination findings. OWCP also noted that medical evidence from her treating physician reported normal EMG findings and a diagnosis of mild lumbar degenerative disc disease.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying the modification or termination of an employee's benefits.<sup>5</sup> After it has determined that an employee has disability causally related to her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>6</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>8</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>9</sup>

### **ANALYSIS**

OWCP accepted appellant's claim for L4-5 herniated disc/displacement of lumbar disc without myelopathy. By decision dated March 24, 2016, it terminated her wage-loss compensation and medical benefits for her accepted lumbar condition as it found she no longer had any disability or required further medical treatment due to this condition. The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits.

Appellant's treating physician, Dr. Francke, continually noted in his reports dated July 16, 2015 through March 10, 2016 that appellant was able to perform full-duty work. Dr. Lee, appellant's physiatrist, also noted in his September 30, 2015 report that appellant was capable of performing full-duty work.

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<sup>5</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>6</sup> *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>7</sup> *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>8</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>9</sup> *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

OWCP referred appellant to Dr. Doman for a second opinion evaluation. In a report dated November 30, 2012, Dr. Doman noted that appellant was evaluated on November 19, 2015 to determine whether she had any disability due to her accepted L4-5 herniated disc. He noted normal nerve conduction studies, x-rays showed mild L5-S1 disc space narrowing, and a March 16, 2015 MRI scan showed age-related lumbar and thoracic degenerative changes and a lumbar herniated disc. Dr. Doman opined that there was no disability due to the accepted employment injury. He provided detailed findings on examination and reached conclusions regarding appellant's condition which comported with his physical examination findings.<sup>10</sup> Dr. Doman pointed to findings of malingering during his physical examination to support his opinion that appellant's accepted lumbar condition was no longer disabling.

Dr. Doman's opinion is based on a proper factual and medical history and a review of medical records. He provided medical rationale for his opinion that the work-related condition no longer disabled appellant.<sup>11</sup> Thus, the medical opinion of record from Drs. Francke, Lee, and Doman concur in the conclusion that appellant was no longer disabled due to the accepted work-related condition. The Board therefore finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation benefits.

As previously noted, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>12</sup> OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>13</sup>

5 U.S.C. § 8103 provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances, and supplies prescribed or recommended by a qualified physician, which OWCP considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.

The accepted condition in this case was L4-5 herniated disc/displacement of disc without myelopathy. Appellant's treating physician, Dr. Francke, and OWCP's second opinion physician, Dr. Doman, both continued to report that appellant's March 16, 2015 MRI scan showed continued evidence of the herniated lumbar disc. Dr. Francke continued to recommend physical therapy, while Dr. Doman related that no treatment recommendations were necessary. Dr. Doman, however, offered no rationalization to support his finding that "the additional medical treatment was warranted in this case, as recommended by Dr. Francke. Prognosis is excellent and no treatment recommendations are necessary," other than to attribute all of her complaints to be symptom magnification.<sup>14</sup> In light of the contrary findings of the treating physician who recommended further physical therapy and the lack of rationalization for the

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<sup>10</sup> See *Michael S. Mina*, 57 ECAB 379 (2006).

<sup>11</sup> See *L.G.*, Docket No. 15-1334 (issued January 28, 2016).

<sup>12</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, *supra* note 8.

<sup>13</sup> *Kathryn E. Demarsh*, *supra* note 8; *James F. Weikel*, *supra* note 9.

<sup>14</sup> See *T.F.*, 58 ECAB 128 (2006).

finding of no residuals, the Board finds that OWCP has failed to meet its burden of proof to terminate medical benefits.<sup>15</sup>

It is OWCP's burden of proof to establish with well-rationalized medical opinion evidence that appellant's accepted conditions had resolved without residuals requiring further medical treatment.<sup>16</sup> A medical opinion that is conclusory and unrationalized on the issue of whether further treatment or therapy is warranted is not dispositive.<sup>17</sup>

The Board, therefore, finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation as of March 24, 2016. It further finds that OWCP did not meet its burden of proof to terminate appellant's medical benefits.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation effective March 24, 2016. OWCP did not meet its burden of proof to terminate appellant's medical benefits

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<sup>15</sup> As there is no clear, well-rationalized medical opinion evidence establishing that appellant's accepted conditions had resolved without residuals requiring further medical treatment, OWCP has not met its burden of proof to terminate appellant's medical benefits. *J.J.*, Docket No. 16-0984 (issued November 17, 2016); *see also J.S.*, Docket No. 15-0872 (issued September 28, 2016). *See also Mark P. Parkes*, Docket No. 04-1546 (issued December 3, 2004) (wherein the Board found that OWCP had met its burden of proof to terminate medical benefits as the impartial medical examiner determined within a reasonable degree of medical probability that no further treatment was necessary in relation to the accepted employment injury. Enough time had passed and enough treatment was given).

<sup>16</sup> *See J.J., id.*

<sup>17</sup> *See I.V.*, Docket No. 10-1026 (issued April 22, 2011).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 24, 2016 is affirmed in part and reversed in part.

Issued: September 18, 2017  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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