

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

L.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL
CENTER, Lexington, KY, Employer**

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**Docket No. 17-1561
Issued: April 6, 2018**

Appearances:
*Michael Welsh, for the appellant*¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 10, 2017 appellant, through a representative, filed a timely appeal from a June 15, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider 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 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 15, 2017.

On appeal appellant's representative contends that OWCP incorrectly relied on an OWCP referral physician's opinion.

FACTUAL HISTORY

On January 23, 2001 appellant, then a 51-year-old payroll technician, filed an occupational disease claim (Form CA-2) attributing her thoracic outlet compression syndrome to her federal employment duties. On the back of the form the employing establishment noted that appellant stopped work on August 11, 2000 and had not returned. OWCP accepted the claim for aggravation of right thoracic outlet syndrome based on the opinion of appellant's treating physician, Dr. J. Martin Favetto.³ It paid wage-loss compensation on the periodic rolls for temporary total disability commencing April 22, 2001.⁴

Appellant continued to receive medical treatment from Dr. Favetto, Dr. Frank Burke, a Board-certified orthopedic surgeon, Dr. Dirk Franzen, a Board-certified neurological surgeon, Dr. W. Ben Kibler, a Board-certified orthopedic surgeon, and Dr. Erdogan Atasoy, a Board-certified general surgeon. She was also seen for a series of second opinion evaluations with Dr. Stanley W. Collis a Board-certified orthopedic surgeon, Dr. S. Pearson Auerbach, a Board-certified orthopedic surgeon, Dr. Robert T. Sheridan, a Board-certified orthopedic surgeon, and Dr. Edward Gregory Fisher, a Board-certified orthopedic surgeon.

In a December 17, 2015 report, Dr. Kibler briefly noted appellant's prior medical history. He related that he was unable to treat appellant for all of her medical conditions and that his treatment was restricted to her shoulder condition. With respect to her shoulder condition, Dr. Kibler reported chronic weakness and weakness due to shoulder pain with impingement.

On September 8, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF) and the medical record, to Dr. Collis, for a second opinion examination for an updated assessment of her accepted work conditions and disability status. In a report dated October 25, 2016, Dr. Collis reviewed appellant's medical records for the master and subcase files, including the SOAF. He noted appellant's accepted conditions, and her complaints and observed no obvious physical or pain problems. Appellant's physical examination revealed fairly normal neck motion,

³ OWCP assigned File No. xxxxxx675. It combined this case with File No. xxxxxx152, which was designated as the master file. OWCP accepted the conditions of right carpal tunnel syndrome, right medial epicondylitis, right lateral epicondylitis, right carpal tunnel wrist sprain, right radial styloid tenosynovitis, right brachial plexus lesions, and osteomyelitis of the forearm due to a January 1, 1999 employment injury. On September 30, 2002 appellant filed another Form CA-2. OWCP assigned File No. xxxxxx605 and accepted the claim for left carpal tunnel syndrome, left radial tunnel compression, left epicondylitis, thoracic outlet compression, myofascitis, myalgia and myositis, classical migraine, and pronator teres compression. This case record has also been combined under OWCP File No. xxxxxx152.

⁴ Appellant retired from the employing establishment effective April 1, 2011.

good bilateral shoulder range of motion with no atrophy or tenderness, negative right wrist Tinel's sign, and essentially negative bilateral upper extremity findings. Dr. Collis did find slight bilateral shoulder abduction and flexion. He opined that appellant no longer had any residuals or disability due to the accepted conditions. Dr. Collis opined that appellant's accepted bilateral upper extremity conditions had resolved based on the lack of objective findings on examination. With respect to her migraine headaches, he noted that he could not offer an opinion as to whether appellant continued to suffer from this accepted condition as it was outside his specialty. Dr. Collis concluded that appellant was capable of performing her usual work duties without restrictions.

In a progress note dated December 22, 2016, Dr. Kibler reported that appellant was seen, after a long absence, for a follow up of her right shoulder condition. Appellant reported increased soreness and tenderness. A physical examination revealed slight scapula protraction, abduction and external rotation weakness, upper trap tightness, soreness along the minor and major pectoralis, no instability, and a normal neurologic examination. Dr. Kibler diagnosed right scapulalgia.

On March 21, 2017 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits based on Dr. Collis' opinion that appellant's accepted conditions, except for the accepted classical migraine condition, had resolved without residuals or disability.

In an April 7, 2017 letter, appellant's representative disagreed with the proposal to terminate appellant's wage-loss compensation and medical benefits. He noted that appellant was scheduled for a functional capacity evaluation (FCE) on April 21, 2017.

In progress notes dated April 7 and May 5, 2017, Dr. Kibler provided examination findings and diagnosed right shoulder pain. In the April 7, 2017 progress notes, he noted that appellant was scheduled for an FCE on April 21, 2017 to determine her work capacity. Dr. Kibler, in the May 5, 2017 progress notes, reviewed the April 21, 2017 FCE and indicated that appellant was capable of performing light-duty or sedentary work with restrictions.

By decision dated June 15, 2017, OWCP finalized the termination of her wage-loss compensation. It also found that medical benefits would be terminated, effective that day, except for the accepted condition of classical migraine. It found that the opinion of Dr. Collis represented the weight of the evidence.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to

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

the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ 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.⁹

ANALYSIS

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

OWCP accepted the conditions of bilateral carpal tunnel syndrome, right medial epicondylitis, right radial styloid tenosynovitis, right lateral epicondylitis, right carpal tunnel wrist sprain right brachial plexus lesions, right osteomyelitis of the arm, left radial tunnel compression, left epicondylitis, thoracic outlet compression, myofascitis, aggravation of right thoracic outlet syndrome, malagia and myositis, classical migraine, and left pronator teres compression. It paid wage-loss compensation for total disability beginning April 22, 2001.

On October 25, 2016 Dr. Collis, an OWCP referral physician, recounted appellant's employment injuries, discussed his medical history, and noted the accepted conditions under each claim. On examination he found fairly normal neck range of motion, good bilateral shoulder range of motion, negative right wrist Tinel's sign, and essentially negative bilateral upper extremity findings. Dr. Collis also reported unremarkable examination findings for the left wrist, hand, and elbow. He also found no evidence of carpal tunnel syndrome, right elbow problems, radial or ulna styloid problems, myofascitis, right radial plexus lesion, no right arm osteomyelitis, and resolved right ganglion. Dr. Collis also opined that appellant's left pronator teres and left epicondylitis had resolved due to the negative examination findings. He advised that she could resume work without restrictions and did not require additional medical treatment for her upper extremity employment injuries. With respect to the accepted classical migraine, Dr. Collis declined to offer an opinion as he was not a specialist in that field. He thoroughly reviewed the factual and medical background and accurately summarized the relevant medical evidence. Moreover, Dr. Collis provided detailed findings on examination and reached conclusions regarding appellant's conditions which comported with his findings.¹⁰ Consequently, the opinion of Dr. Collis represents the weight of the evidence and establishes that appellant was no longer disabled as of June 15, 2017. His opinion

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

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

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

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

¹⁰ *D.O.*, Docket No. 16-1726 (issued October 26, 2017); *Pamela K. Guesford*, 53 ECAB 727 (2002)

also supports the finding that appellant did not require further medical treatment due to her accepted employment conditions, except for classical migraine, as of June 15, 2017.¹¹

The remaining evidence of record submitted prior to OWCP's termination of compensation is insufficient to show that appellant had further disability or residuals of her accepted employment conditions, except for classical migraine. Dr. Kibler, in a progress report dated December 22, 2016, noted that appellant was seen for a follow-up visit for her right shoulder after a long absence. He provided examination findings, and diagnosed right scapulargia. In progress notes dated April 7, May 5, 2017, Dr. Kibler diagnosed right shoulder pain. On May 5 and 6, 2017 he indicated that appellant was capable of returning to work with restrictions based on an April 21, 2017 FCE. The Board finds that Dr. Kibler failed to provide medical rationale supporting his opinion that she was unable to work due to her accepted conditions.¹² Medical conclusions unsupported by rationale are of diminished probative value.¹³ In addition, the Board notes that scapulargia and shoulder pain are mere symptoms not diagnoses. The Board has consistently held that pain is not a compensable medical diagnosis.¹⁴ Dr. Kibler did not report that appellant still had disability or residuals due to her accepted conditions. Thus, his reports are insufficient to create a conflict with the opinion of Dr. Collis.

In an October 26, 2012 progress report, Dr. Burke discussed appellant's history of a March 27, 2012 work injury, provided examination findings, and diagnosed lumbar radiculopathy, degenerative disc disease, and myalgia. He did not, however, address disability or residuals due to the accepted conditions; consequently, his report is of little probative value.¹³

On appeal counsel contends that the "impartial" opinion of Dr. Collis is unsupported by the objective evidence. The Board notes that Dr. Collis was not selected to resolve a conflict in the medical opinion evidence, but was scheduled by OWCP for a second opinion evaluation. As discussed above, however, Dr. Collis provided detailed findings on examination and supported his conclusion with medical rationale. His report represents the weight of the evidence regarding the termination of appellant's compensation and medical benefits, effective June 15, 2017.¹⁵

The Board therefore finds that OWCP met its burden of proof in this matter to terminate appellant's wage-loss compensation and authorization for medical benefits effective June 15, 2017.

¹¹ See *C.C.*, Docket No. 16-0318 (issued May 2, 2016).

¹² See *S.C.*, Docket No. 16-0284 (issued June 27, 2016); *Dean E. Pierce*, 40 ECAB 1249 (1989).

¹³ *Richard A. Neidert*, 57 ECAB 474 (, 2006)

¹⁴ *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹⁵ Appellant continues to be entitled to medical benefits for her accepted migraine condition.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, except for medical treatment for classical migraine, effective June 15, 2017.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 15, 2017 is affirmed.

Issued: April 6, 2018
Washington, DC

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

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

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