

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

J.R., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland, OH, Employer**

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**Docket No. 17-1352
Issued: August 13, 2018**

Appearances:

*Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 8, 2017 appellant, through counsel, filed a timely appeal from an April 13, 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 over the merits of this case.

ISSUE

The issues are: (1) whether OWCP met its burden of proof to justify termination of appellant's wage-loss compensation and medical benefits, effective May 13, 2016, as she no

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.*

longer had residuals or disability causally related to the June 5, 1989 employment injury; and (2) whether appellant established continuing residuals or employment-related disability after May 13, 2016 due to her accepted employment injury.

FACTUAL HISTORY

On June 5, 1989 appellant, then a 29-year-old casual clerk term employee,³ filed a traumatic injury claim (Form CA-1) alleging that, on that same date, she experienced pain in her back, arm, and shoulder when she bent down to pick up a tray of mail at work. She stopped work on that date. OWCP accepted appellant's claim for cervical, thoracic, lumbar, and right shoulder strains. It paid wage-loss compensation and medical benefits and placed appellant on the periodic rolls, effective December 18, 1989.

OWCP referred appellant for vocational rehabilitation. On August 27, 1991 she returned to modified duty as a part-time mail sorter at a private company. Appellant received compensation for partial disability.

By decision dated October 3, 1991, OWCP issued a loss of wage-earning capacity (LWEC) determination reducing appellant's wage-loss compensation based on her actual earnings in the position of part-time mail sorter.⁴

On December 23, 1991 appellant sustained a right hand injury at work. She stopped work. Appellant continued to receive wage-loss compensation and medical benefits for disability associated with her June 5, 1989 employment injury.

The record reflects that on June 17, 2003 appellant sustained a nonwork-related right forearm injury. On September 10, 2003 appellant sustained additional nonwork-related injuries to her bilateral hands and knees, lumbar spine, and cervical spine.

Appellant received medical treatment from Dr. Louis J. DeMicco, an osteopath specializing in emergency medicine. In progress notes dated March 24 to May 27, 2014, Dr. DeMicco related appellant's history of right shoulder and back pain. Upon physical examination, he reported limited extension of the cervical and lumbar spines. Straight leg raise testing revealed guarding bilaterally. Examination of appellant's shoulder showed superior shoulder joint pain with abduction. Dr. DeMicco diagnosed cervical spine strain, lumbar strain, and shoulder strain.

OWCP referred appellant's case, along with a statement of accepted facts (SOAF) and a copy of the record, to Dr. Richard Deerhake, a Board-certified orthopedic surgeon and second-opinion examiner, to determine whether she still suffered residuals of her June 5, 1989 employment injury and remained disabled due to her work-related injury. In a June 23, 2014 report, Dr. Deerhake discussed appellant's history of injury and provided physical examination

³ Appellant's term appointment with the employing establishment ended on June 7, 1989.

⁴ OWCP rated appellant as having 72 percent LWEC as a mail sorter. It reduced her compensation to \$178.00 every four weeks.

findings. He concluded that appellant's accepted right shoulder, cervical, thoracic, and lumbar conditions had resolved and that her current complaints were not related to her June 5, 1989 employment injury. Dr. Deerhake reported that appellant could return to work with restrictions of no lifting, pushing, or pulling over five pounds.

In progress notes dated June 24, 2014 to November 11, 2015, Dr. DeMicco reiterated appellant's complaints of right shoulder and lower back pain. Upon physical examination of appellant's cervical spine, he observed pain on palpation and decreased range of motion. Examination of appellant's lumbar spine showed limited range of motion and pain. Dr. DeMicco diagnosed cervical, lumbar, and right shoulder strains.

In a November 11, 2015 note, Dr. DeMicco indicated that appellant had reached maximum medical improvement. He related that she was not in need of any treatment that would produce a cure for her work-related condition.

OWCP determined that a conflict in medical opinion existed between Dr. DeMicco, appellant's treating physician, and Dr. Deerhake, the second-opinion physician, regarding whether appellant had any continuing employment-related conditions and disability. It referred her to Dr. Mark Berkowitz, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

In a February 3, 2016 report, Dr. Berkowitz reviewed appellant's medical records, including the SOAF, and noted the accepted conditions of cervical, thoracic, lumbar, and right shoulder sprains. He discussed the history of the June 5, 1989 work injury and her subsequent nonwork-related injuries. Dr. Berkowitz related that appellant continued to complain of back and neck pain. Upon physical examination of appellant's cervical and lumbar spine, he observed mild tenderness to palpation and no spasms. Sensation was intact. Dr. Berkowitz reported that examination of appellant's thoracic spine showed no tenderness, spasms, or guarding. He indicated that examination of appellant's bilateral shoulders showed no tenderness to palpation, muscle spasms, crepitus or guarding. Tinel's sign was negative bilaterally.

Dr. Berkowitz opined that, based on his physical examination, there were no objective findings to support that appellant still had residuals of her accepted cervical, thoracic, lumbar, and right shoulder sprains. He explained that it had been over 25 years since the June 5, 1989 injury and noted that, according to the *Official Disability Guidelines*, the accepted conditions of cervical, thoracic, lumbar, and right shoulder sprains would resolve within 8 to 12 weeks of injury. Dr. Berkowitz indicated that appellant had many subjective findings which were "more likely due to her several subsequent injuries which occurred well after her last employment with [the employing establishment] on [June 7, 1989]." He reported that appellant was incapable of performing her regular work duties. Dr. Berkowitz indicated, however, that her work restrictions resulted from her other subsequent injuries and the natural degenerative changes which occur over time.

OWCP received progress notes dated January 29 and March 25, 2016 by Dr. DeMicco. Dr. DeMicco related appellant's complaints of continued neck, back, and shoulder pain, conducted an examination, and reported diagnoses of cervical spine sprain, lumbar spine sprain, and left shoulder sprain.

On April 8, 2016 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because her June 5, 1989 work-related injury had resolved. It found that the special weight of medical evidence rested with the February 3, 2016 medical report of Dr. Berkowitz, the impartial medical examiner, who determined that appellant's accepted injuries had ceased and that she was no longer totally disabled as a result of her accepted injury. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination. Appellant did not submit any additional evidence.

By decision dated May 13, 2016, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that same date. It found that the special weight of medical evidence rested with Dr. Berkowitz, the impartial medical examiner, who had determined, in a February 3, 2016 medical report, that appellant no longer had any residuals or disability causally related to the June 5, 1989 employment injury.

On May 23, 2016 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

OWCP received progress notes dated March 25 and May 25, 2016 from Dr. DeMicco. Dr. DeMicco related appellant's complaints of continued neck and lower back pain. He reported physical examination findings of pain with range of motion of her cervical spine, cervical muscle spasm, decreased range of motion of the lumbar spine, and decreased reflexes in the lower extremities.

Appellant submitted a June 13, 2016 impairment rating report from Dr. Catherine Watkins Campbell, Board-certified in occupational and family medicine.

On February 13, 2017 a telephone hearing was held. Appellant was represented by counsel. Counsel outlined the criteria for modifying a formal LWEC determination and asserted that OWCP did not establish any of the criteria, but instead preemptively found that appellant's disability had ended. He alleged that OWCP did not have the authority to develop the medical evidence and modify the previous October 3, 1991 LWEC decision.

Following the hearing, OWCP received hospital surgical instructions for appellant dated January 26, 2017.

By decision dated April 13, 2017, OWCP's hearing representative affirmed the May 13, 2016 termination decision. She found that the evidence submitted was insufficient to overcome the special weight of medical evidence accorded Dr. Berkowitz as the impartial medical examiner, who opined in his February 3, 2016 report that appellant no longer had residuals or disability due to her June 5, 1989 employment injury.

LEGAL PRECEDENT -- ISSUE 1

Under FECA,⁵ once OWCP has accepted a claim and paid compensation, it has the burden of justifying termination or modification of compensation benefits.⁶ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁹ 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.¹⁰

Section 8123(a) of FECA 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.¹¹ 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.¹² When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

ANALYSIS -- ISSUE 1

OWCP found that a conflict in medical opinion existed between Dr. DeMicco, appellant's treating physician, who opined that she continued to suffer residuals of her June 5, 1989 employment injury, and Dr. Deerhake, an OWCP second-opinion physician who determined that appellant's work-related conditions had resolved and that she was able to work limited duty. It referred appellant to an impartial medical examiner, Dr. Berkowitz, to resolve the conflict.

⁵ *Supra* note 2.

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).

⁹ A.P., Docket No. 08-1822 (issued August 5, 2009); T.P., 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁰ *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); A.P., *id.*

¹¹ 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).

¹² 20 C.F.R. § 10.321.

¹³ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

In a February 3, 2016 report, Dr. Berkowitz reviewed appellant's history, including the SOAF, and noted her claim had been accepted for cervical, thoracic, lumbar, and right shoulder strains. He related that appellant continued to complain of back and neck pain and conducted an examination. Upon physical examination, Dr. Berkowitz reported mild tenderness to palpation, but no spasms, of appellant's cervical and lumbar spines. Sensation was intact. Examination of appellant's thoracic spine and bilateral shoulders showed no tenderness to palpation, muscle spasms, crepitus or guarding. Dr. Berkowitz opined that there were no objective findings to support that appellant had residuals of her accepted cervical, thoracic, lumbar, and right shoulder sprains. He explained that sprains usually resolved within 8 to 12 weeks of injury and noted that it had been over 25 years since appellant's June 5, 1989 employment injury. Dr. Berkowitz indicated that appellant was incapable of working her regular duty, but related that her work restrictions were a result of her subsequent injuries and natural degenerative changes.

The Board finds that OWCP properly determined that Dr. Berkowitz's February 3, 2016 report was entitled to the special weight of the medical opinion evidence to establish that appellant no longer had residuals of her June 5, 1989 employment injury and was able to return to modified duty. Dr. Berkowitz accurately described appellant's history and reviewed her medical records. He performed a thorough, clinical examination and provided findings on examination. Dr. Berkowitz opined that there were no objective findings to support that appellant still suffered residuals of her accepted conditions. He further noted that appellant's subjective complaints were more likely due to her subsequent nonwork-related injuries. Dr. Berkowitz indicated that appellant could work with restrictions and explained that these restrictions resulted from her subsequent nonwork-related injuries. The Board finds that Dr. Berkowitz's opinion was based on a proper factual and medical history and he had thoroughly reviewed the relevant factual and medical evidence.¹⁴ Accordingly, the Board finds that Dr. Berkowitz's medical opinion is entitled to special weight as the impartial medical examiner and was sufficient for OWCP to justify the termination of appellant's wage-loss compensation and medical benefits effective May 13, 2016.¹⁵

The remaining contemporaneous medical evidence submitted prior to the termination is insufficient to overcome the special weight afforded to the opinion of Dr. Berkowitz. Reports dated January 29 and March 25, 2016 from Dr. DeMicco, appellant's treating physician, noted appellant's complaints of continued neck, back, and shoulder pain. Dr. DeMicco conducted an examination and diagnosed cervical spine, lumbar spine, and left shoulder sprains. The Board has held, however, that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the special weight accorded to the report of the impartial medical examiner, or to create a new conflict.¹⁶

On appeal counsel alleges that OWCP did not properly analyze his legal arguments. During the February 13, 2017 telephone hearing, he asserted that OWCP did not establish any criteria to modify the October 3, 1991 LWEC decision and determine that appellant's disability

¹⁴ The opinion of an impartial medical examiner, if sufficiently well rationalized and based upon a proper factual background, must be given special weight. *Id; see also D.T.*, Docket No. 10-2258 (issued August 1, 2011); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁵ See A.W., Docket No. 16-1606 (issued January 18, 2017).

¹⁶ I.J., 59 ECAB 408 (2008).

had ended. The Board has held that, once an LWEC is determined, it remains in place unless modified.¹⁷ A modification of such a determination is not warranted unless there is a material change in the nature and extent of the employment-related condition, the employee has been retrained or otherwise vocationally rehabilitated, or the original determination was, in fact, erroneous.¹⁸ In certain situations, however, if the medical evidence is sufficient to meet OWCP's burden of proof to terminate benefits, the same evidence may also negate an LWEC such that a separate evaluation of the existing wage-earning capacity determination is unnecessary.¹⁹ OWCP's burden to demonstrate no further disability is effectively the same, irrespective of whether there is an existing determination in place finding loss of earning capacity.²⁰ In this case, as the Board finds that OWCP properly terminated benefits, no further analysis on the modification of the wage-earning capacity is necessary.²¹

As of the May 13, 2016 termination decision, appellant had not submitted objective, rationalized medical evidence sufficient to establish that she continued to suffer from residuals or disability causally related to her accepted employment conditions. OWCP, therefore, properly terminated her compensation benefits on May 13, 2016.²²

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation, the burden shifted to her to establish that she had any continuing disability causally related to the accepted employment injury.²³ Causal relationship is a medical issue and the medical evidence generally required to establish causal relationship is rationalized medical opinion evidence.²⁴ 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.²⁵

¹⁷ A wage-earning capacity determination remains in effect until it is properly modified. See *Katherine T. Kreger*, 55 ECAB 633 (2004); see *P.Y.*, Docket No. 09-2293 (issued September 1, 2010) and *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹⁸ *George W. Coleman*, 38 ECAB 782 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503 (1984).

¹⁹ *A.P.*, *supra* note 17.

²⁰ *G.L.*, Docket No. 15-1487 (issued October 13, 2015).

²¹ *Id.*

²² *Manuel Gill*, 52 ECAB 282 (2001).

²³ *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, *id.*; *George Servetas*, 43 ECAB 424, 430 (1992).

²⁴ *I.R.*, Docket No. 09-1229 (issued February 24, 2010); *W.D.*, Docket No. 09-0658 (issued October 22, 2009); *D.I.*, 59 ECAB 158 (2007);.

²⁵ *B.B.*, 59 ECAB 234 (2007); *D.S.*, Docket No. 09-0860 (issued November 2, 2009); *Solomon Polen*, 51 ECAB 341 (2000).

ANALYSIS -- ISSUE 2

The Board finds that the medical evidence submitted following the May 13, 2016 termination decision is insufficient to establish that appellant required further medical care or remained disabled due to her accepted June 5, 1989 employment injury.

Appellant submitted reports dated March 25 and May 25, 2016 by Dr. DeMicco, appellant's treating physician, who was on one side of the conflict resolved by Dr. Berkowitz. As previously noted, the Board has held that reports from a physician who was on one side of a medical conflict are generally insufficient to overcome the weight accorded to the impartial medical examiner, or to create a new conflict.²⁶

Dr. Campbell also examined appellant and provided a June 13, 2016 impairment rating report. However, she did not address appellant's accepted conditions nor provide any opinion on whether appellant continued to suffer residuals or remained disabled due to her June 5, 1989 employment injury. Accordingly, Dr. Campbell's report is of diminished probative value to establish that appellant had any continuing disability or need for medical care due to her June 5, 1989 employment injury after May 13, 2016.

The Board finds that the medical evidence of record is insufficient to establish that appellant's current cervical, back, or right shoulder symptoms caused continuing disability due to the accepted employment injury. Appellant, therefore, has failed to establish continuing residuals or disability causally related to the June 5, 1989 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 properly terminated appellant's wage-loss compensation and medical benefits, effective May 13, 2016, as she no longer had any residuals or disability causally related to the June 5, 1989 employment injury. The Board also finds that appellant has not met her burden of proof to establish continuing disability after May 13, 2016 causally related to the accepted employment injury.

²⁶ *Supra* note 16.

ORDER

IT IS HEREBY ORDERED THAT the April 13, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 13, 2018
Washington, DC

Patricia H. Fitzgerald, Deputy 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