

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

L.J., Appellant)

and)

**DEPARTMENT OF JUSTICE, U.S. TRUSTEE
PROGRAM, Washington, DC, Employer**)

**Docket No. 16-1852
Issued: March 22, 2018**

Appearances:

Capp P. Taylor, Esq., for the appellant¹

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 September 19, 2016 appellant, through counsel, filed a timely appeal from an April 21, 2016 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.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 record provided to the Board includes evidence received after OWCP issued its April 21, 2016 decision. The Board's jurisdiction is limited to the evidence that was in the case record at the time of OWCP's final decision. Therefore, the Board is precluded from reviewing this additional evidence for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective May 27, 2015.

FACTUAL HISTORY

On August 7, 2012 appellant, then a 56-year-old information technology specialist, filed a traumatic injury claim (Form CA-1) alleging a lower back injury that reportedly occurred on July 16, 2012 due to "packing and lifting over 140 boxes" while in the performance of duty. She indicated that she felt bad and left work early, but she did not stop work entirely at that time.

On December 10, 2012 OWCP accepted appellant's claim for sciatica. Additionally, it paid her for periods of intermittent wage loss dating back to October 3, 2012.

A December 19, 2012 magnetic resonance imaging (MRI) scan of appellant's lumbar spine revealed levoscoliosis of the lumbar spine. It further revealed spondylolisthesis at L3-4, and mild discogenic disease, spondylosis, left lateral herniated nucleus pulposus at L3, and a mild degree of facet joint arthropathy, bilaterally. At L5-S1 there was evidence of mild discogenic disease, spondylosis, a diffuse posterior bulge, and mild facet joint arthropathy, bilaterally.

In a February 25, 2013 follow-up report, Dr. Maria A. Martin, a Board-certified family practitioner, noted that appellant's recent lumbar MRI scan detected a herniated disc, spondylosis, and arthritis. She recommended that appellant see an orthopedist for further evaluation. Appellant continued to experience lower extremity muscle spasms, as well as pain, numbness, and tingling radiating from her low back to her buttocks and down her right leg to her toes. Dr. Martin advised that appellant should work only half days and limit repetitive twisting, turning, and bending.

Dr. Don Nicholson, a Board-certified anesthesiologist, examined appellant on March 28, 2013. Appellant complained of low back pain and bilateral radicular symptoms, right greater than left. Dr. Nicholson noted a July 16, 2012 history of injury "lifting some boxes at work" followed by the development of sciatica-like symptoms. He examined appellant and reviewed her December 19, 2012 lumbar MRI scan. Dr. Nicholson's differential diagnoses included right L4-5 lumbar radiculitis, lumbar facet arthropathy -- spondylosis, lumbar degenerative disc disease, and myofascial pain. He noted that appellant had undergone physical therapy and was currently taking pain medication, a nonsteroidal anti-inflammatory drug, and a muscle relaxant. Dr. Nicholson prescribed additional pain medications (Lidoderm and gabapentin) and recommended right-sided selective nerve root injections at L4-5 and L5-S1. He later prescribed a transcutaneous electrical nerve stimulation (TENS) unit.

Appellant worked part-time (four hours/day) limited duty until September 10, 2014 when she stopped worked based on the advice of her physician.

In a September 10, 2014 note, Dr. Neil Rosenman, a Board-certified family practitioner, opined that appellant should remain off work until she is reassessed in one month. Appellant's diagnoses included spondylosis, left eye swelling, and stress. In an October 10, 2014 treatment

note, Dr. Rosenman repeated that she should remain off work until he reassessed her in one month. He also submitted a work capacity evaluation (OWCP 5-c).

OWCP paid appellant wage-loss compensation for temporary total disability (TTD) for the period September 11 through October 31, 2014.

In a November 7, 2014 report, Dr. Rosenman opined that appellant should remain off work for an additional two months until he reassessed her situation. He noted that she had a history of a work-related injury in July 2012 and was subsequently diagnosed with sciatica, spondylosis of her back, and bulging discs. Dr. Rosenman advised that appellant was working under a reduced schedule, but had to stop working as her medications caused adverse side effects, with a flare-up of pain that was at a level such that she was unable to work. He recommended that she cease work effective September 11, 2014. Dr. Rosenman added that appellant had undergone physical therapy which worsened her condition and she could not tolerate the chlorine in aqua therapy. He explained that she was reluctant to undergo surgery due to the significant risk of adverse side effects. Dr. Rosenman found that appellant was making progress, but it was slow and she was unable to work at that time.

OWCP referred appellant, along with a statement of accepted facts (SOAF), a set of questions, and the medical record to Dr. Mohammad H. Zamani, a Board-certified orthopedic surgeon for a second opinion examination, to assess whether she had any remaining residuals of, or any continuing disability stemming from her work-related injury or illness.

In a January 6, 2015 report, Dr. Zamani noted appellant's history of injury and treatment, which included that she was working on July 16, 2012 when she was moving many boxes and developed back pain. He indicated that she was placed on physical therapy for two and a half to three months and it was unsuccessful. Dr. Zamani examined appellant and found that her back revealed: a normal trunk alignment, pain on any superficial touch in the lumbar area, no spasm or tightness, no tenderness in the thoracic area, and no tenderness along the ribcage. He found that she was able to take deep breaths and cough without pain, and that she was able to walk with a normal gait, and on tip toe and heel. Dr. Zamani determined that appellant had full range of motion of both hips, knees, foot, and ankle and they were bilaterally identical. He indicated that the work injury of sciatica was a temporary aggravation of a previous condition and spondylolisthesis of the back. Dr. Zamani explained that appellant had some back pain, some buttocks pain, some cramping, and noted that she had preexisting arthritis and spondylolisthesis. He explained that her prognosis was good because her job was a sitting job and the recommendation for medical treatment was stretching exercises and arthritis medication.

Regarding the period of total disability, Dr. Zamani explained that, typically, there was an aggravation of arthritis, and total disability should not be more than four weeks. He opined that appellant had recovered from the injury and was now capable of working and resuming all other activities as usual. With regard to appellant's preexisting condition, it was moderate arthritis and required home exercises, arthritic medication, and restrictions with which she should not do heavy lifting, pulling, pushing, repetitious twisting, and no working in a confined space. Dr. Zamani also advised that he had read the job description and that she was capable of working and doing all of the activities without any limitation whatsoever. He determined that appellant's prognosis was good as her job was not heavy and she needed no further or future treatment and there was no

indication for rehabilitation or reemployment services in the future. Furthermore, Dr. Zamani opined that she was capable of doing all activities as usual.

In a January 7, 2015 report, Dr. Rosenman repeated his opinion that appellant remained disabled from work. OWCP subsequently paid her wage-loss compensation for TTD for the period December 29, 2014 through January 9, 2015, January 12 through 23, 2015, and January 26 through February 6, 2015.⁴

On February 9, 2015 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Zamani's January 6, 2015 opinion. It informed her of the type of evidence needed to support her claim for continuing compensation and afforded her 30 days to submit such evidence.

In response OWCP received a March 3, 2015 report from Dr. Rosenman who noted that appellant presented on July 31, 2012 for back pain which started after she had done a lot of heavy lifting for a project at work earlier in the month. Dr. Zamani indicated that she was given a prescription muscle relaxer (Flexeril) and advised that she continued with an over-the-counter anti-inflammatory. He indicated that, prior to the injury, appellant was in the habit of doing yoga and aerobic exercises and did not have any back pain or radicular symptoms. Dr. Rosenman advised that she tried the Flexeril, but it was "too sedating, so [appellant] was switched to a different muscle relaxer, metaxalone." He indicated that a follow-up visit on August 24, 2012 revealed that appellant's pain had progressed. Dr. Rosenman also noted that she reported right-sided leg and buttocks pain with numbness and tingling and shooting down the right leg, which interfered with her sleep and was rated 8 out of 10 with characteristics of aching, stabbing, shooting, and burning. He advised that it occurred intermittently throughout the day with muscle spasms as well.

Dr. Rosenman related that, at the time, appellant was thought to have sciatica. He indicated that she was referred for physical therapy and he reduced her weekly schedule to address her pain and allow for her physical therapy visits. Dr. Rosenman noted that on December 6, 2012 appellant's physical therapy visits were no longer covered, so she stopped. He also noted that appellant indicated that her workload had not decreased despite her work hours being reduced, so she did her job in less time.

Dr. Rosenman advised that a lumbar spine MRI scan conducted in December 2012 revealed spondylosis, a herniated disc, and arthritis in appellant's lumbar spine.⁵ He noted her complaints and explained that, since July 2012, she periodically reported significant stressors at work and feeling sometimes anxious or overwhelmed while there. Dr. Rosenman explained that appellant started seeing a therapist for counseling and was diagnosed with depression. He noted that she continued with cognitive therapy and she hoped that she could return to work in the near future. Dr. Rosenman advised that appellant continued to have significant pain in her back and considerable difficulty completing simple tasks like vacuuming. He indicated that she required multiple doses of her medication each day and time to lay down, apply heat and ice, and use her TENS unit "just to function at a basic level." Dr. Rosenman explained that, for these reasons, he

⁴ OWCP also paid wage-loss compensation for the period February 9 through 20, 2015.

⁵ A copy of the December 19, 2012 MRI scan was included.

did not believe that appellant was capable of a return to work at this time. He also noted that her condition was further exacerbated by mental duress, more acute in the last six months.

In a March 4, 2015 report, Dr. Oren G. Blam, a Board-certified orthopedic surgeon, diagnosed mild lumbar degenerative disc disease and minimal spondylolisthesis.

In a March 8, 2015 report, Dr. Rosenman discussed appellant's stressors at work causing anxiety and depression. He also noted high blood pressure and continuing back pain.

In a May 14, 2015 report, Dr. Rosenman opined that appellant should remain off work until she is reassessed in two months. He explained that she had a work-related injury in July 2012 and was diagnosed with sciatica, spondylosis of her back, and bulging discs. Dr. Rosenman noted that appellant was working under a reduced schedule for several months, but in July and August 2014, she had to stop taking her medications since they were causing adverse side effects. As a result, this caused the flare up of her pain to the level that she could no longer continue work. Dr. Rosenman advised appellant to cease all work, effective September 11, 2014. He explained that, since her last visit on February 24, 2015, she had 12 sessions of physical therapy and was making some progress. Dr. Rosenman related that appellant felt about 10 percent better than when she started physical therapy. He explained that the physical therapy helped with increased strength and muscle tone and decreased tenderness in many of the affected areas. Dr. Rosenman advised that appellant was approved for an additional seven sessions of physical therapy to further facilitate healing. He explained that they were implementing many strategies to alleviate her pain -- traction, dry needle stimulation, myofascial release, as well as strengthening and conditioning exercises, and gait/coordination training. Dr. Rosenman also explained that appellant's medications left her feeling groggy and with difficulty concentrating and completing tasks. He related that he would reassess her in two months to determine her suitability for returning to work. Dr. Rosenman noted that, until that time, he advised appellant not to return to work.

By decision dated May 27, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective May 27, 2015, based on Dr. Zamani's January 6, 2015 report which found that she no longer had any employment-related residuals or disability.

In a June 5, 2015 report, Dr. Timothy Yoon, a Board-certified psychiatrist, diagnosed lumbar spine disc herniation without myelopathy and lumbar radiculopathy.

On June 25, 2015 appellant requested a telephonic hearing, which was held before an OWCP hearing representative on February 16, 2016. Counsel challenged OWCP's reliance on Dr. Zamani's opinion, arguing, *inter alia*, that he rejected the SOAF in regard to sciatica being an accepted condition.

In a February 19, 2016 report, Dr. Rosenman noted that he was providing an opinion with regard to whether appellant's accepted condition of sciatica had resolved. He explained that, in her case, the sciatica would be pain in the back caused by compression of spinal nerve cord root in the lower back. Dr. Rosenman explained that sometimes sciatica was attributable to degeneration in an intervertebral disc. He opined that the sciatica had not resolved based upon his clinical examination of muscle spasm, symptoms of aching, stabbing, shooting and burning pain,

which correlated to the MRI scan study consistent with the diagnosed and accepted condition of sciatica. Dr. Rosenman opined that there was no indication that the sciatica had resolved.

By decision dated April 21, 2016, OWCP's hearing representative affirmed the May 27, 2015 decision terminating appellant's wage-loss compensation and medical benefits.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.⁶ Having determined that, an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁷

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

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective May 27, 2015.

OWCP accepted that appellant sustained the condition of sciatica due to her accepted July 16, 2012 work injury. Following a return to work after her injury, appellant worked part-time (four hours/day) limited duty until September 10, 2014 when she stopped worked based on the advice of her physician, Dr. Rosenman. She was paid wage-loss compensation for temporary total disability for periods including September 11 through October 31, 2014 and commencing December 29, 2014.

On December 22, 2014 appellant was referred to Dr. Zamani for a second opinion examination. In a January 6, 2015 report, Dr. Zamani noted her history of injury and treatment, which included that she was working on July 16, 2012 when she was moving many boxes and developed back pain. He indicated that she was placed into physical therapy for two and a half to three months and it was unsuccessful. Dr. Zamani examined appellant's back and provided objective examination findings which included: a normal trunk alignment, pain on any superficial touch in lumbar area, no spasm or tightness, no tenderness in the thoracic area, and no tenderness along the ribcage. He found that she was able to take a deep breath and cough without pain, and that she was able to walk with a normal gait, and on tip toes and heels. Dr. Zamani determined

⁶ *Curtis Hall*, 45 ECAB 316 (1994).

⁷ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁸ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁹ *Calvin S. Mays*, 39 ECAB 993 (1988).

that appellant had full range of motion of both hips, knees, feet, and ankles and they were bilaterally identical.

Dr. Zamani was asked to respond to a series of questions regarding appellant's accepted condition of sciatica and whether she had an ongoing condition requiring additional medical treatment. In response he first noted that the work injury of sciatica was a temporary aggravation of the previous condition of spondylolisthesis of the back, despite the acceptance of the condition and its inclusion in the SOAF. Dr. Zamani later opined that appellant "never had any sign of sciatica." He explained that she had some back pain, some buttocks pain, some cramping, and noted that she had preexisting arthritis and spondylolisthesis. Dr. Zamani explained that appellant's prognosis was good because her job was a sitting job and the recommendation for medical treatment was stretching exercises and arthritis medication. When asked whether her condition was either a temporary or permanent aggravation of a preexisting condition, he was specifically instructed to give detailed reasoning for his conclusion. In response Dr. Zamani answered "This was temporary," with no additional medical rationale in support of his answer.

Regarding the period of total disability, Dr. Zamani explained that, typically, there was an aggravation of arthritis, and total disability should not be more than four weeks. He opined that appellant had recovered from the injury and was now capable of working and resuming all other activities as usual. Again, Dr. Zamani's conclusion lacked any supporting explanation specifically related to appellant. Based on this report, OWCP terminated appellant's wage-loss compensation and medical benefits effective May 27, 2015.

The Board finds, however, that Dr. Zamani's report was conclusory in nature and lacks sufficient medical rationale, and is therefore insufficient rationale to support termination of wage-loss compensation and medical benefits.¹⁰ While the November 13, 2014 SOAF listed sciatica as an accepted condition in the claim, Dr. Zamani found that she "never had any sign of sciatica." As he failed to use the SOAF as the framework in forming his opinion, the probative value of his opinion is diminished.¹¹ Furthermore, Dr. Zamani was specifically instructed to provide "detailed reasoning" for his medical conclusion on the issue of whether an aggravation of appellant's conditions was temporary or permanent, but his response was without any reasoning in support of his conclusion.¹² Because his second opinion report failed to follow the instructions of the SOAF and failed to provide medical rationale in support of his findings, his opinion is of diminished probative value and is insufficient for the office to meet its burden of proof to justify the termination of ongoing wage-loss compensation and medical benefits.

The Board, therefore, finds that OWCP erred in terminating appellant's wage-loss compensation and medical benefits effective May 27, 2015 based on Dr. Zamani's second opinion

¹⁰ See *C.L.*, Docket No. 14-1585 (issued December 16, 2014); *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

¹¹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

¹² *A.R.*, Docket No. 12-0443 (issued October 9, 2012); see also *P.F.*, Docket No. 13-0728 (issued September 9, 2014); *T.M.*, Docket No. 08-0975 (issued February 6, 2009) (a medical report consisting solely of conclusory statements without supporting rationale is of little probative value).

report. The Board will reverse OWCP's determination terminating her wage-loss compensation and medical benefits.

On appeal counsel argues that the opinion of Dr. Zamani was flawed as he did not accept sciatica as an accepted condition. As explained above, the Board finds that Dr. Zamani's report was insufficient to terminate appellant's wage-loss compensation and medical benefits.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 27, 2015.

ORDER

IT IS HEREBY ORDERED THAT the April 21, 2016 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 22, 2018
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