

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

P.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Baker, LA, Employer**

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Docket No. 17-1687
Issued: May 8, 2018

Appearances:

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

Case Submitted on the Record

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On August 1, 2017 appellant, through counsel, filed a timely appeal from a May 30, 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 appellant has met her burden of proof to establish continuing disability from June 2, 2013 to June 18, 2015 causally related to the accepted August 26, 2010 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On September 16, 2010 appellant, then a 42-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that, on August 26, 2010, a client's pet iguana "attacked" her while she was performing her employment duties, causing her to fall and injure her lower back and buttocks. She stopped work on September 17, 2010. OWCP accepted appellant's claim for lumbar sprain, lumbosacral spondylosis without myelopathy, cervical intervertebral disc displacement without myelopathy, and left shoulder sprain. It paid appellant wage-loss compensation on the supplemental rolls from November 1 to 20, 2010 and on the periodic rolls as of November 21, 2010.

On May 31, 2013 OWCP terminated appellant's wage-loss compensation benefits, effective June 2, 2013, finding that the January 14, 2013 report from the impartial medical examiner, Dr. Christopher Cenac, Sr., a Board-certified orthopedic surgeon, constituted the weight of the medical opinion evidence.

On June 11, 2013 appellant requested a hearing before an OWCP hearing representative.

OWCP subsequently received additional medical evidence. In reports dated July 24 and October 22, 2013, Kenneth A. Gaddis, a Board-certified neurologist, noted appellant's August 26, 2010 work injury, provided examination findings, and diagnosed work-related brief concussion, cervical injury resulting in cervical dystonia, bilateral carpal tunnel syndrome, left elbow ulnar neuropathy, cervical spondylosis, and persistent dystonia with neck and left shoulder pain. He observed cervical paraspinal and left trapezius painful and intense muscle spasm, and left trapezius muscle hypertrophy. Dr. Gaddis opined that she continued to experience severe neck and shoulder pain and muscle spasm and limited left shoulder and neck range of motion. He concluded that appellant was totally disabled from performing her duties as a mail carrier due to her neck and left arm limitations.

By decision dated February 3, 2014, an OWCP hearing representative found that OWCP properly determined that appellant's work-related disability had ceased at the time of the May 31, 2013 decision based on the report of the impartial medical examiner, Dr. Cenac. With respect to continuing disability, she noted that appellant provided additional medical evidence following the termination of wage-loss compensation benefits. The hearing representative found that the medical evidence of record required further development regarding the issue of continuing

³ Docket No. 16-0350 (issued August 9, 2016).

disability. Therefore, she remanded the case for referral to Dr. Cenac to determine whether appellant had established continuing disability after June 2, 2013.

Appellant was also treated by Dr. Man Q. Le, a physician Board-certified in anesthesiology and pain medicine, who provided progress notes covering the period February 26, 2013 to May 27, 2014. Histories of appellant's August 26, 2010 employment injury and subsequent medical treatment were noted by Dr. Le. Dr. Le also noted that appellant's physical examination findings included cervical spine tenderness, moderate-to-severe tenderness in the trapezius, left shoulder swelling and tenderness, and limited left shoulder range of motion. He diagnosed cervicalgia, low back pain, shoulder joint pain, cervical radiculopathy, and cervical spondylosis without myelopathy.

In a February 25, 2014 supplemental report, impartial medical examiner Dr. Cenac noted that he reviewed the forwarded medical reports of Dr. Le and Dr. Gaddis. He explained that neither physician provided any objective findings supportive of the accepted cervical or shoulder conditions.

OWCP subsequently received reports dated February 21 and July 28, 2014 from Dr. Gaddis who opined that appellant continued to suffer from left neck persistent pain and muscle spasm radiating into the her left shoulder due to the August 2010 work-related neck injury. Dr. Gaddis reviewed diagnostic studies which revealed cervical disc disease. Physical examination findings included left trapezius hypertrophy and bony hard spasms, reduced left shoulder range of motion, and tenderness on palpation of the cervical paraspinal muscles. Dr. Gaddis diagnosed left neck segmental dystonia, which he attributed to the accepted August 26, 2010 work injury as well as cervicalgia, cervical disc disease, and persistent pain and muscle spasm.

In reports dated September 15 and October 15, 2014, Dr. Samir Patel, a physician Board-certified in anesthesiology and pain management, noted appellant's medical history as well as her history of injury. He related that appellant complained of pain radiating from her neck into her left upper extremity, left shoulder, and fingers as well as low back pain. On physical examination, Dr. Patel observed left deltoid, left paracervical spinal muscles, and left trapezoid severe muscle spasm and normal strength and tone. Diagnoses included dystonia, cervical radiculopathy, lumbar spondylosis, and cervical spondylosis without myelopathy.

By *de novo* decision dated October 31, 2014, OWCP again terminated appellant's wage-loss compensation benefits, effective June 2, 2013. It also found appellant had no continuing disability.

Appellant requested a hearing before an OWCP hearing representative on November 10, 2014. She submitted a November 6, 2014 progress report, wherein Dr. Gaddis diagnosed cervical disc disease and cervicalgia with persistent muscle spasm and pain. Physical examination findings included palpable tender left trapezius and left cervical paraspinous muscle spasms.

OWCP received progress notes from Dr. Patel dated November 13 and December 4, 2014, as well as a January 20, 2015 narrative report. The November 13 and December 4, 2014 progress notes were repetitive of prior progress reports. In the January 20, 2015 report, Dr. Patel noted that

appellant had been under his care since September 15, 2014 for treatment of lumbar spondylosis, cervical radiculopathy, obvious trapezius spasm, and cervical dystonia, which he attributed to the accepted August 26, 2010 employment injury. He reviewed an October 14, 2014 lumbar magnetic resonance imaging (MRI) scan which revealed L2-3 and L4-5 small bilateral posterolateral disc protrusions and L4-5 and L5-S1 facet arthritis. A December 30, 2014 cervical MRI scan revealed reversal of C3 to C6 lordosis and spondylosis changes at C3-6, with predominate changes at C4-5. Dr. Patel opined that appellant had not reached maximum medical improvement.

In progress notes signed on January 12, 2015 and progress notes dated May 26, 2015, Dr. Charles R. Bowie, a neurologist, reviewed appellant's medical and employment injury histories and provided physical examination findings. In the January 2015 progress notes, he observed decreased neck range of motion, constant left trapezius muscle spasm, and decreased left C6 dermatome sensation. Dr. Bowie diagnosed cervical radiculopathy and recommended C4-5 anterior cervical discectomy and fusion surgery in the January 2015 progress notes.

On March 9, 2015 Dr. Michael M. Katz, an OWCP district medical adviser (DMA), reviewed appellant's left cervical radiculopathy symptoms and ongoing neck pain related to the accepted August 26, 2010 injury. He reviewed diagnostic tests and Dr. Bowie's January 12, 2015 examination findings. Dr. Katz advised that the cervical surgery Dr. Bowie recommended was within acceptable medical practice and necessary to treat her accepted conditions.

On March 19 and April 30, 2015 OWCP authorized C4-6 cervical discectomy, cervical interbody fusion, which occurred on June 19, 2015.

A hearing was held before an OWCP hearing representative on June 18, 2015. On July 14, 2015 OWCP placed appellant on the periodic rolls for temporary total disability, effective June 19, 2015.

By decision dated September 9, 2015, OWCP's hearing representative again affirmed in part and set aside in part the October 31, 2014 termination decision. He determined that at the time of the May 31, 2013 decision, OWCP made a correct determination based on the weight of the medical evidence of record at that time. However, the hearing representative found the evidence submitted subsequent to the termination was sufficient to remand the case for further development as to whether her benefits should be reinstated.

On December 18, 2015 OWCP requested that Dr. Cenac provide a supplemental opinion regarding Dr. Bowie's findings and whether appellant had any residuals or disability due to the accepted August 26, 2010 work injury. It provided updated SOAF and new medical evidence of record.

Appellant appealed to the Board on December 18, 2015. In a decision dated August 9, 2016, the Board affirmed the September 9, 2015 hearing representative's decision. The Board found that OWCP properly referred appellant to Dr. Cenac to resolve the conflict in the medical opinion evidence between appellant's treating physicians, and OWCP's second opinion physician as to whether appellant was disabled as of June 2, 2013. The Board further found that OWCP properly accorded the special weight of the evidence to the report of Dr. Cenac, who opined that appellant had no disability due to the accepted employment injury as of June 2, 2013. The Board

noted that it did not have jurisdiction over the issue of appellant's continuing disability on or after June 2, 2013 as no final, adverse decision had been issued.⁴

In an April 26, 2016 report, Dr. Cenac reviewed an updated SOAF, diagnostic tests performed in 2014 and 2016, and new medical records from Dr. Bowie. He observed an exaggerated pain response on light palpation of the left trapezius muscle, shoulder, and neck. Dr. Cenac noted that appellant resisted passive and active attempts of left upper extremity, shoulder, and neck motion. He noted that Dr. Bowie's findings were based on subjective sensory deficits observations and that appellant continued using controlled substances. Based on his examination findings, review of Dr. Bowie's reports, and updated SOAF, Dr. Cenac opined that appellant was malingering and "exhibited drug seeking behavior." He further opined that his opinion was unchanged. Dr. Cenac recommended a functional capacity evaluation to determine her work limitations, which he attributed to her surgery and not to her accepted work injury.

By decision dated September 23, 2016, OWCP found that appellant failed to establish that she had any residuals or disability for the period June 2, 2013 to June 18, 2015 causally related to the accepted August 26, 2010 work injury.⁵ It found that the weight of the evidence continued to rest with the opinion of Dr. Cenac that appellant had no residuals or disability due to the accepted August 26, 2010 work injury.

On October 7, 2016 appellant, through counsel, requested a hearing. The hearing was held on April 28, 2017.

By decision dated May 30, 2017, the hearing representative affirmed the September 23, 2016 decision. He found Dr. Cenac's opinion constituted the weight of the medical evidence regarding appellant's disability status during the period June 2, 2013 to June 18, 2015 and therefore found that appellant failed to meet her burden of proof to establish continuing disability.

LEGAL PRECEDENT

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to the employee to establish continuing disability after the date of termination causally related to his or her accepted injury.⁶ To establish causal relationship between the accepted conditions as well as any attendant disability claimed and the employment injury, the employee must submit rationalized medical evidence based on a complete medical and factual background supporting such causal relationship.⁷ Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.⁸

⁴ *Id.*

⁵ OWCP determined that this was a *de novo* decision.

⁶ *Manuel Gill*, 52 ECAB 282 (2001).

⁷ *R.D.*, Docket No. 16-0892 (issued December 20, 2016); *R.F.*, Docket No. 16-0845 (issued July 25, 2017).

⁸ *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish continuing disability from June 2, 2013 until June 18, 2015 causally related to the accepted August 26, 2010 employment injury.

In a prior appeal, the Board affirmed OWCP's termination of appellant's wage-loss compensation effective June 2, 2013. As the Board has previously affirmed the termination of appellant's wage-loss compensation benefits as of June 2, 2013, absent further merit review of this issue by OWCP pursuant to section 8128 of FECA, this issue is *res judicata*.⁹ However, the Board noted in that decision that it did not have jurisdiction to review the issue of appellant's continuing disability after June 2, 2013 as no final adverse decision had been issued regarding this issue.

Following the termination of her wage-loss compensation benefits appellant submitted reports dated July 24 and October 22, 2013, February 21, July 28 and November 14, 2014 from Dr. Gaddis. Dr. Gaddis reported visible muscle spasms and shoulder hypertrophy, which he opined established dystonia due to the accepted employment injury. Due to her neck and left shoulder conditions, Dr. Gaddis opined that appellant was disabled from work and required further medical treatment. In his February 21 and July 28, 2015, he diagnosed left neck segmental dystonia, cervicalgia, cervical disc disease, and persistent left neck pain and muscle spasm radiating into the her left shoulder, which he attributed to the accepted work-related injury. Dr. Gaddis again opined that appellant was totally disabled from work. The Board notes that Dr. Gaddis failed to provide any medical rationale in any of these reports explaining why appellant continued to be disabled due to the accepted employment injuries. The Board will not require OWCP to pay compensation for disability in the absence of medical evidence directly addressing the specific dates of disability for which compensation is claimed. To do so, would essentially allow an employee to self-certify their disability and entitlement to compensation.¹⁰ Moreover, the Board has long held that reports from a physician who was on one side of a medical conflict that an impartial medical specialist resolved, are generally insufficient to overcome the special weight accorded to the report of the impartial medical specialist, or to create a new conflict.¹¹ The Board finds that as Dr. Gaddis was on one side of the conflict resolved by Dr. Cenac, the additional reports from Dr. Gaddis are of insufficient weight to overcome the special weight accorded to Dr. Cenac's opinion or to create a new medical conflict.

In report a January 20, 2015 report, Dr. Patel noted that he had treated appellant since September 15, 2014 and that he had reviewed an October 14, 2014 MRI scan. He diagnosed lumbar spondylosis, cervical radiculopathy, obvious trapezius spasm, and cervical dystonia, which he opined were due to the accepted August 26, 2010 work injury. Dr. Patel, however, did not provide any rationale explaining how these conditions caused appellant disability during the period June 2, 2013 to June 18, 2015. Medical opinions which are not fortified by rationale are of diminished probative value.¹² Thus, this report from Dr. Patel is insufficient to create a new

⁹ M.S., Docket No. 17-0539 (issued July 13, 2017).

¹⁰ W.E., Docket No. 17-0451 (issued November 20, 2017).

¹¹ R.B., Docket No. 16-1481 (issued May 2, 2017); I.J., 59 ECAB 408 (2008).

¹² M.F., Docket No. 15-0081 (issued January 15, 2016).

conflict with the opinion of Dr. Cenac. The record also contains reports from reports dated September 15 and October 15, 2014 and progress notes dated November 13 and December 4, 2014 from Dr. Patel in which he provided examination findings and diagnosed dystonia, radiculopathy, lumbar spondylosis, and cervical spondylosis without myelopathy. However he again did not provide a rationalized medical opinion substantiating disability during the period in question.¹³

The record also contains reports from Dr. Le, Dr. Katz, and Dr. Bowie. Dr. Le, in various progress notes, provided examination findings and diagnosed cervicalgia, low back pain, shoulder joint pain, cervical radiculopathy, and cervical spondylosis without myelopathy. Dr. Katz, advised OWCP that cervical surgery was necessary to treat her accepted conditions. In January 12 and May 26, 2015 progress notes, Dr. Bowie recommended cervical surgery and diagnosed cervical radiculopathy. Again, however, none of these physicians offered any opinion regarding appellant's ability to work due to the accepted work conditions during the period June 2, 2013 to June 18, 2015. These reports are therefore of limited probative value.¹⁴

Following Dr. Cenac's initial February 14, 2013 report, OWCP asked him on two subsequent occasions to review the new medical evidence of record and offer an opinion regarding appellant's disability status.¹⁵ In a February 25, 2014 supplemental report, he reviewed the reports of Dr. Le and Dr. Gaddis. Dr. Cenac explained that neither Dr. Le nor Dr. Gaddis provided any objective findings supporting continuing disability due to the accepted cervical or shoulder injuries. He noted that the opinions of both physicians were based on subjective findings and was not substantiated by objective evidence. Thus, Dr. Cenac's opinion remained unchanged that appellant's accepted conditions had not caused continuing disability. On April 26, 2016 he conducted an updated physical examination and reviewed an updated SOAF, diagnostic tests performed in 2014 and 2016, and new medical records from Dr. Bowie. Dr. Cenac observed an exaggerated pain response on light palpation of the left trapezius muscle, shoulder, and neck. He noted that she resisted passive and active attempts of left upper extremity, shoulder, and neck motion. With regard to Dr. Bowie's findings, Dr. Cenac reported that they were based on subjective sensory deficits observations and that appellant continued using controlled substances. Based on his examination findings, review of Dr. Bowie's reports, and updated SOAF, he indicated his opinion was unchanged. Dr. Cenac also noted that appellant was malingering and "exhibited drug seeking behavior." He recommended a functional capacity evaluation to determine her work limitations, which he attributed to her surgery and not to her accepted work conditions.

The Board finds that Dr. Cenac's reports are well rationalized and based on a complete and accurate history, a complete SOAF, physical examination and review of the medical record. Dr. Cenac examined appellant thoroughly, reviewed the medical records, and reported accurate medical and employment histories. Thus, the Board finds that Dr. Cenac's opinion as expressed in his February 25, 2014 and April 26, 2016 reports are probative and reliable evidence and entitled

¹³ *Supra* note 9.

¹⁴ *Id.*

¹⁵ See *Guisepppe Aversa*, 55 ECAB 164 (2003) (where OWCP secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence and the opinion from such specialist requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original opinion).

to the special weight of the evidence accorded to an impartial medical examiner.¹⁶ Accordingly, Dr. Cenac's opinion constitutes the weight of the medical opinion establishing that appellant had no disability or continuing residuals during the period June 2, 2013 to June 18, 2015 causally related to the accepted August 26, 2010 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 appellant has not met her burden of proof to establish continuing disability from June 2, 2013 to June 18, 2015 causally related to the accepted August 26, 2010 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 30, 2017 is affirmed.

Issued: May 8, 2018
Washington, DC

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

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

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

¹⁶ G.A., Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (200); *Alice J. Tysinger*, 51 ECAB 638 (2000).