

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

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D.M., Appellant)	
)	Docket No. 18-0746
and)	Issued: November 26, 2018
)	
DEPARTMENT OF JUSTICE, FORT DIX)	
FEDERAL CORRECTIONAL INSTITUTION,)	
Fort Dix, NJ, Employer)	
_____)	

Appearances:
*Thomas R. Uliase, Esq., for the appellant*¹
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 February 23, 2018 appellant, through counsel, filed a timely appeal from an October 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.

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 a continuing employment-related condition or disability after May 15, 2013.

FACTUAL HISTORY

This case has previously been before Board.³ The facts and circumstances as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are set forth below.

On October 5, 2011 appellant, then a 47-year-old correctional officer, filed a traumatic injury claim (Form CA-1), assigned OWCP File No. xxxxxx466, alleging that, on September 28, 2011, she sustained left elbow and shoulder injuries as a result of shooting firearms in the performance of duty.⁴ She stopped work on September 29, 2011.

After initial development of the claim, by decision dated December 1, 2011, OWCP denied appellant's traumatic injury claim, finding that the medical evidence of record did not contain a rationalized medical opinion explaining how her diagnosed medical condition was causally related to the accepted September 28, 2011 employment incident.

In a December 7, 2011 letter, appellant, through counsel, requested a telephone hearing before an OWCP hearing representative. The hearing was held on March 13, 2012. The hearing representative noted that an emergency room report established a left elbow strain causally related to the September 28, 2011 employment incident. By decision dated May 10, 2012, she reversed the December 1, 2011 decision which denied appellant's claim. Appellant received wage-loss compensation retroactively to November 14, 2011.

Effective April 8, 2012, appellant began full-time limited-duty work as a legal assistant at the employing establishment. She continued to receive compensation for wage loss, adjusted to reflect her actual earnings.⁵

In a report dated July 6, 2012, Dr. Laura Ross, and osteopathic physician, provided results on examination and diagnosed status post left elbow sprain with ulnar neuritis. In a form report dated July 19, 2012, she diagnosed left lateral epicondylitis/ulnar neuritis and checked a box marked "yes" indicating that the condition was causally related to using firearms. On

³ Docket No. 14-0472 (issued August 17, 2015).

⁴ Appellant has prior claims involving the left arm. She filed an occupational disease claim (Form CA-2) on September 1, 2010 in which OWCP accepted that she sustained left shoulder bursae and tendon disorder and left elbow enthesopathy due to continuous use of the left arm for lifting items such as files and mail buckets. OWCP assigned that claim OWCP File No. xxxxxx526. Appellant filed a notice of recurrence (Form CA-2a) claiming disability on September 8, 2010 due to lifting files and mail bins for five years. OWCP developed this incident as a separate occupational claim, and on February 22, 2011 accepted the claim for left shoulder impingement syndrome, left lateral epicondylitis, left lateral extensor tendon tear, and left elbow tendinitis. It assigned that claim OWCP File No. xxxxxx608. OWCP File Nos. xxxxxx526 and xxxxxx608 have been administratively combined with the present claim, with File No. xxxxxx608 serving as the master file.

⁵ The Board notes that OWCP did not issue a formal loss of wage-earning capacity determination.

September 10, 2012 Dr. Ross reported regarding her treatment of appellant's condition. She then opined that the trauma and force of the use of appellant's firearm, while qualifying for a firearms test at work on September 28, 2011 directly caused the exacerbation of her underlying lateral epicondylitis of her left elbow, as well as left elbow ulnar neuropathy. Dr. Ross stated that her findings were based on multiple physical examinations and diagnostic testing.

OWCP prepared a statement of accepted facts (SOAF) and referred appellant for a second opinion examination with Dr. Stanley Askin, a Board-certified orthopedic surgeon, to determine the status of appellant's accepted condition. In a report dated December 21, 2012, Dr. Askin provided examination findings. With respect to appellant's accepted left elbow condition, he stated that a sprain was a partial tear of the ligament and he opined that appellant's clinical presentation did not suggest that she continued to have a partial tear of a ligament at the left elbow. As to a left lateral epicondylitis, Dr. Askin stated that appellant did not find any anatomic condition consequential to her work activities. He concluded that there was no work-related reason to prevent her from performing her regular duties as a correctional officer.

By decision dated March 4, 2013, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date, finding that she no longer had any condition or disability causally related to her September 28, 2011 employment injury. It found that the weight of the medical evidence rested with the December 21, 2012 medical opinion of Dr. Askin, who opined that appellant no longer had any residuals of her accepted employment-related left elbow strain, that she did not sustain an additional left elbow condition as a consequence of her accepted condition, and that she could perform her regular duties as a correctional officer.

In a letter received by OWCP on March 12, 2013, appellant, through counsel, requested an oral hearing before an OWCP hearing representative.

In a report dated May 15, 2013, Dr. Ross disagreed with Dr. Askin's opinion and opined that the September 28, 2011 employment injury caused an exacerbation of appellant's underlying left elbow lateral epicondylitis and caused her left ulnar neuropathy based on examination, electromyogram and other test results.

By decision dated September 18, 2013, a second OWCP hearing representative affirmed the March 4, 2013 termination decision. She found that the medical evidence submitted by appellant was insufficient to outweigh the weight accorded to Dr. Askin's medical opinion.

On December 26, 2013 appellant, through counsel, appealed to the Board. By decision dated August 17, 2015, the Board affirmed in part and set aside in part the September 18, 2013 decision.⁶ The Board found that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 4, 2013, as Dr. Askin's opinion represented the weight of the medical evidence. The Board determined, however, that a conflict existed in the medical opinion evidence between Dr. Askin and Dr. Ross with respect to whether appellant had established a continuing condition, left lateral epicondylitis or left ulnar neuritis, or disability as causally related to the September 28, 2011 employment injury. Thus, the Board

⁶ Docket No. 14-0472 (issued August 17, 2015).

remanded the case to OWCP for resolution of the conflict in the medical opinion evidence in accordance with 5 U.S.C. § 8123(a).

Following the issuance of the Board's August 17, 2015 decision, OWCP, on March 17, 2017, referred appellant, together with a SOAF, the medical record, and a list of questions, to Dr. Robert W. Elkins, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In an April 26, 2017 report, Dr. Elkins related a history of the September 28, 2011 employment injury, appellant's medical treatment and employment background.⁷ He noted her current complaints of left shoulder, left arm, and left elbow, fourth and fifth finger pain, discomfort, numbness, tingling, and pins and needles sensation. Appellant rated her left elbow pain as 4 out of 10. She experienced increased pain when moving in bed and up/down in a chair, sitting, driving a car, lifting from below the waist and at the waist to shoulder height, lifting above the shoulders, carrying, and pushing/pulling. Appellant also had increased pain when pressure was applied and in cold weather conditions. She further complained of pain in her central neck, left shoulder, arm, and forearm, and numbness, tingling, and pins and needles which she rated as 5 out of 10 in intensity. Dr. Elkins reviewed the medical record and SOAF. He provided detailed physical examination findings. Dr. Elkins reported negative impingement testing of the shoulder. There was minimal tenderness over the medial and lateral epicondyle of the left elbow and a negative Tinel's sign. There was no particular tenderness in the neck, shoulder, scapula, or arm area. A neurologic examination was equal with +2 equal reflexes in the biceps, triceps, and brachioradialis. There was 5/5 strength in the shoulders, biceps, grip and pinch and equal sensation. Dr. Elkins indicated that appellant had a score within physiologic limits on a pain diagram. Appellant had a score of 54 on a pain questionnaire.

Dr. Elkins diagnosed resolved lateral epicondylitis, possible subjective complaints of ulnar nerve neuropathy at the elbow, chronic left arm, shoulder, and elbow pain, and lateral epicondylectomy performed on March 16, 2011. He noted appellant's accepted conditions contained in the SOAF, including the accepted impingement of the left shoulder, lateral epicondylitis on the left, lateral extensor tear on the left, and tendinitis of the left elbow under OWCP File No. xxxxxx608. In response to OWCP's questions regarding appellant's left elbow, Dr. Elkins noted that at the present time there was no evidence of ulnar neuritis as there was a negative Tinel's sign at the elbow, unremarkable sensation in the hand, and full ROM and good strength in the hand. He further noted that the accepted September 28, 2011 employment injury had resolved. Dr. Elkins related that the accepted injury temporarily exacerbated appellant's left lateral epicondylitis and ulnar nerve neuritis for a limited time period which ceased on May 15, 2013, resulting in no permanent aggravation. He explained that appellant had minimal symptomatology and a negative examination with no objective findings. Dr. Elkins advised that, based on the left upper extremity appellant had no disability and she could perform her date-of-injury correctional officer position with no restrictions. Regarding whether appellant had any disability after March 4, 2013, he advised that she had no disability after May 15, 2013.

⁷ Dr. Elkins noted that appellant currently worked at the Department of Veterans Affairs in Florida.

By decision dated May 24, 2017, OWCP found that, based on Dr. Elkins' report, appellant's employment-related injury had resolved, the temporary aggravation of her lateral epicondylitis had ceased as of May 15, 2013,⁸ and she had no disability as of that date.

In a letter received by OWCP on June 2, 2017, appellant's current counsel requested an oral hearing before an OWCP hearing representative. The hearing was held on August 29, 2017.

By decision dated October 13, 2017, a third OWCP hearing representative affirmed the May 24, 2017 decision. He found that the weight of medical evidence rested with Dr. Elkins' impartial medical opinion that appellant no longer had any residuals, additional left elbow conditions, or disability as a result of her September 28, 2011 work injury. The hearing representative noted that since Dr. Elkins identified May 15, 2013 as the date that the work-related aggravation of appellant's left lateral epicondylitis ulnar neuritis conditions ceased, compensation for a loss of wage-earning capacity was payable through that date.

LEGAL PRECEDENT

Once OWCP properly terminates a claimant's compensation benefits, the burden of proof shifts to the claimant to establish that he or she has continuing disability after that date related to his or her accepted injury.⁹ To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, a claimant must submit rationalized medical evidence based on a complete medical and factual background, supporting such causal relationship.¹⁰ Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹¹

Section 8123 (a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.¹² The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. 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.¹³ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving

⁸ In its May 24, 2017 decision, OWCP incorrectly identified May 15, 2015 as the date on which appellant no longer any disability or continuing work-related medical conditions.

⁹ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁰ *Id.*

¹¹ *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

¹² 5 U.S.C. § 8123(a).

¹³ 20 C.F.R. § 10.321.

the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish continuing employment-related residuals or disability after May 15, 2013.

As noted, in a prior appeal, the Board affirmed OWCP's termination of appellant's compensation, effective March 4, 2013. However, the Board set aside OWCP's hearing representative's September 18, 2013 decision as to whether appellant had established continuing residuals or disability after March 4, 2013 causally related to the accepted September 28, 2011 employment injury of left elbow strain. The Board found that an unresolved conflict existed between Dr. Askin, an OWCP referral Board-certified orthopedic surgeon, and Dr. Ross, an attending osteopath, as to whether appellant had established that the accepted work injury caused her left lateral epicondylitis, ulnar neuritis, or disability. The Board's previous review of evidence regarding the termination of appellant's compensation benefits is *res judicata*.¹⁵

Following the Board's decision, on March 17, 2017 OWCP referred appellant to Dr. Elkins for an impartial medical examination. The Board finds that Dr. Elkins' impartial medical opinion is entitled to special weight and establishes that appellant had no continuing conditions or disability due to the accepted employment injury.¹⁶ In an April 26, 2017 report, Dr. Elkins reviewed the SOAF and the medical file and noted essentially normal findings on physical examination. He opined that the accepted employment injury had resolved, that the temporary aggravation of appellant's left elbow lateral epicondylitis and ulnar nerve neuritis had ceased as of May 15, 2013 and that appellant could perform her regular duties as a correctional officer without restrictions as of that date. Dr. Elkins reasoned that there were no objective findings consistent with her subjective complaints.

The Board finds that Dr. Elkins provided a comprehensive, well-rationalized opinion in which he clearly found that appellant could return to her preinjury job. Dr. Elkins had full knowledge of the relevant facts and the course of appellant's conditions. His opinions were based on the SOAF and an accurate factual and medical history. Dr. Elkins' report contained a detailed summary of the history of the claim.¹⁷ Additionally, he addressed the medical records, examined appellant, and reached a reasoned conclusion regarding appellant's conditions.¹⁸ Dr. Elkins' opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight

¹⁴ See *M.W.*, Docket No. 16-0959 (issued October 6, 2016); *James P. Roberts*, 31 ECAB 1010 (1980).

¹⁵ Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA. *A.C.*, Docket No. 18-0484 (issued September 7, 2018).

¹⁶ See *D.P.*, Docket No. 17-1097 (issued January 4, 2018); *L.G.*, Docket No. 15-1334 (issued January 28, 2016).

¹⁷ See *R.G.*, Docket No. 16-0271 (issued May 18, 2017).

¹⁸ *Michael S. Mina*, 57 ECAB 379 (2006) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

of the medical evidence.¹⁹ Thus, appellant has not met her burden of proof to establish a continuing employment-related condition or disability due to the accepted injury.

On appeal counsel contends that OWCP improperly denied appellant's entitlement to ongoing benefits. As stated above, the special weight of the medical evidence, as accorded to Dr. Elkins' opinion, establishes that appellant had no continuing residuals or disability due to her accepted September 28, 2011 employment injury and can return to her preinjury position. Appellant failed to submit rationalized medical evidence sufficient to establish a medical condition or disability after May 15, 2013 causally related to her September 28, 2011 accepted left elbow condition. She, therefore, failed to meet her burden of proof.

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 a continuing employment-related condition or disability after May 15, 2013.

ORDER

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

Issued: November 26, 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

¹⁹ See *Melvina Jackson*, 38 ECAB 443 (1987).