

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

D.A., Appellant)	
)	
and)	Docket No. 18-0476
)	Issued: October 10, 2018
DEPARTMENT OF HOMELAND SECURITY,)	
CUSTOMS & BORDER PROTECTION,)	
Jamaica, NY, Employer)	
)	

Appearances:
Paul Kalker, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On January 8, 2018 appellant, through counsel, filed a timely appeal from a December 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 the claim.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 December 13, 2017 decision. The Board's jurisdiction is limited to the evidence that was before OWCP at the time of its 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 met its burden of proof to terminate appellant's wage-loss compensation benefits, effective December 13, 2017.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances outlined in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On April 11, 1994 appellant, then a 38-year-old import specialist, filed a traumatic injury claim (Form CA-1) alleging that, on March 28, 1994, she sustained injuries while lifting heavy stereo equipment while in the performance of duty. She stopped work on the date of injury. OWCP accepted the claim for cervical herniated disc at C5-6 and C6-7. It paid appellant compensation for total disability on the periodic compensation rolls. Appellant underwent a cervical discectomy with C5-6 and C6-7 fusion on May 10, 1994.

On May 14, 2012 OWCP expanded acceptance of the claim to include a right cervical radiculopathy with C7 nerve involvement.

Based on the evidence of record, on May 18, 2012, an OWCP rehabilitation specialist determined that vocational rehabilitation was appropriate. Appellant was then referred to a vocational rehabilitation counselor to develop a rehabilitation plan.⁵

By decision dated September 25, 2012, OWCP found that appellant had failed, without good cause, to continue participation in vocational rehabilitation. It reduced her compensation based on the ability to earn \$400.00 per week as a receptionist, until she participated in vocational rehabilitation.

On July 8, 2013 appellant requested reconsideration of the September 25, 2012 decision. By decision dated October 1, 2013, OWCP reviewed the merits of the claim, but denied modification of its September 25, 2012 decision.

Appellant subsequently appealed to the Board. By decision dated May 28, 2014, the Board reversed OWCP's October 1, 2013 merit decision pertaining to appellant's participation in vocational rehabilitation.⁶ The Board found that OWCP had not met its burden of proof to reduce appellant's compensation pursuant to 5 U.S.C. § 8113(b) as there remained an unresolved conflict as to whether appellant was physically capable of performing the proposed training course.

⁴ Docket No. 14-377 (issued May 7, 2014); Docket No. 14-375 (issued May 28, 2014).

⁵ By decision dated July 17, 2012, OWCP terminated appellant's compensation for the accepted condition of herniated cervical disc at C5-6 and C6-7, finding that the condition had resolved. It noted that appellant continued to be partially disabled due to cervical radiculopathy. On July 8, 2013 appellant requested reconsideration of the July 17, 2012 termination decision. OWCP denied merit review on October 7, 2013. Appellant subsequently appealed to the Board and, by decision dated May 7, 2014, the Board affirmed OWCP's October 7, 2013 nonmerit decision. *See* Docket No. 14-377, *id.*

⁶ Docket No. 14-375, *supra* note 4.

On September 23, 2014 Dr. Robert Reppy, an osteopath specializing in family practice, reported that he evaluated appellant for neck pain. He diagnosed cervical disc herniation with myelopathy, cervical radiculopathy, degenerative disc disease of the cervical spine, and cervical stenosis.

In a September 21, 2015 report, Dr. William Dinenberg, a Board-certified orthopedic surgeon and OWCP second opinion physician, reviewed appellant's medical record along with a statement of accepted facts (SOAF), and presented his examination findings of September 16, 2015. He provided an impression of cervical herniated nucleus pulposus at C5-6 and C6-7, status post anterior cervical discectomy and fusion with persistent right greater than left upper extremity radiculopathy, adjacent segment degenerative change with diffuse circumferential disc bulge, and large paracentral disc herniation causing foraminal and central stenosis. Dr. Dinenberg opined that appellant continued to suffer residuals of the work-related injury, her prognosis was poor and no further curative treatment was recommended. He opined that appellant was capable of employment with restrictions. Dr. Dinenberg indicated that she was a poor candidate for vocational rehabilitation and reemployment in the future. He completed an October 6, 2015 work capacity evaluation (Form OWCP-5c) indicating that appellant was medically capable of performing full-time sedentary work with permanent restrictions of pushing, pulling, and lifting no more than 10 pounds for three hours per day. Dr. Dinenberg also permanently restricted appellant from reaching above the shoulder, overhead work, and engaging in repetitive cervical flexion, extension or rotation.

In an April 26, 2016 report, Dr. Reppy noted the history of injury, reviewed diagnostic tests, and provided examination findings. He provided an impression of status post C5-6 and C6-7 disc herniations with cervical fusion; new C4-5 disc herniation per July 14, 2014 magnetic resonance imaging (MRI) scan; and C7 on T1 anterolisthesis. Dr. Reppy requested copies of the last nerve conduction velocity (NCV) studies and the second opinion report.

In a May 12, 2016 letter, Dr. Reppy indicated that the diagnosed conditions of cervical stenosis, degenerative disc disease of the cervical spine, cervical radiculopathy, and cervical disc herniation with myelopathy were pathomechanically related to the work injury and required surgery. He opined that appellant could not return to her date-of-injury position, but she could perform modified work that required less than 20 pounds lifting and no carrying.

In a March 13, 2017 work capacity evaluation form (OWCP-5c), Dr. Reppy indicated that appellant's herniated discs and stenosis were permanent. He opined that appellant was unable to perform her usual job, but she could possibly work four hours a day in a sedentary position with restrictions.

In a March 16, 2017 report, Dr. James A. Caviness, a medical review physician Board-certified in occupational medicine, reviewed the case record on behalf of the employing establishment. He indicated that Dr. Reppy's March 13, 2017 OWCP-5c was severely restrictive for work capacity and did not correlate with either his April 26, 2016 physical examination or his May 12, 2016 letter, which supported more work capacity. Dr. Caviness recommended that OWCP obtain a second opinion evaluation to address return to work goals.

In an April 12, 2017 report, Dr. Reppy provided examination findings. He indicated that appellant had radiculopathy based on recent NCV study, which showed decreased amplitude and

conduction velocity in the left and right ulnar nerves and decreased velocity in the right median nerve. Dr. Reppy opined that appellant's cervical stenosis, degenerative disc disease of the cervical spine, cervical radiculopathy, by recent NCV study, and cervical disc herniation with myelopathy were causally related to the work injury.

OWCP again referred appellant, along with a SOAF and the medical record, to Dr. Dinenberg for a second opinion examination for an updated assessment of appellant's accepted work conditions and disability status. In a May 9, 2017 report, Dr. Dinenberg reviewed appellant's medical records, including the SOAF. He diagnosed cervical herniated nucleus pulposus at C5-6 and C6-7, status post anterior cervical discectomy and fusion with persistent right-sided radiculopathy, and adjacent segment degenerative change at C4-5 with a large paracentral disc herniation causing foraminal and central stenosis. Dr. Dinenberg opined that appellant continued to suffer residuals from the injury, her prognosis was poor, and no further curative treatment was recommended. He further opined that appellant was capable of primarily sedentary employment with restrictions. Dr. Dinenberg indicated that the enclosed date-of-injury job description included repetitive flexion, extension of the cervical spine, and no specific lifting requirements. He opined that appellant could perform the duties that were noted to be primarily sitting at a desk and indicated that she would have restrictions with no lifting, pushing, or pulling greater than 10 pounds and no repetitive flexion, extension, or rotation of her cervical spine. Dr. Dinenberg noted that appellant had a poor prognosis for improvement and that she had poor potential for vocational rehabilitation and reemployment in the future.

In a May 9, 2017 work capacity evaluation (Form OWCP-5c), Dr. Dinenberg advised that appellant was unable to perform her usual job. He indicated that she reached maximum medical improvement and that she was medically capable of performing full-time work with permanent restrictions of pushing, pulling, and lifting no more than 10 pounds for three hours per day. Appellant was also permanently restricted from reaching above the shoulder or engaging in repetitive cervical flexion, extension, or rotation.

Dr. Reppy continued to report on appellant's neck pain. In a September 21, 2017 report, he indicated that appellant's cervical range of motion was reduced in all axes, her shoulder abduction was unchanged, her trapezius strength was poor bilaterally, and her measured bilateral grip and pinch strength were 10 pounds.

An October 1, 2006 position description of import specialist indicated that the work was primarily sedentary. Some walking, standing, lifting up to 30 pounds, and climbing may be necessary for relatively short periods during merchandise examinations; manufacturing plant and business tours, and post importation importer premises visits. Work was performed in an office setting with required visits to industrial, agricultural, commercial, or other commodity sites, in both the United States and foreign countries, with occasional overnight travel required for training, commodity seminars, and other meetings.

On October 11, 2017 OWCP issued a notice proposing to terminate appellant's wage-loss compensation based on Dr. Dinenberg's opinion that appellant was medically capable of

performing her date-of-injury position with restrictions. Appellant was afforded 30 days to submit additional evidence or argument.⁷

In an October 23, 2017 letter, counsel argued that he had not been provided appellant's position description.⁸ He further argued that a referee examination was necessary as Dr. Dinenberg's current opinion regarding appellant's work capacity was inconsistent from his prior reports in which he opined that appellant would never be able to work more than part time. No additional medical evidence was received.

By decision dated December 13, 2017, OWCP finalized the termination of appellant's wage-loss compensation, effective that date. It found that the opinion of Dr. Dinenberg represented the weight of the evidence. OWCP noted that there was no new medical evidence which created a conflict of medical opinion.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁹ 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 the employment.¹⁰ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹¹

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation, effective December 13, 2017.

OWCP accepted the claim for a right cervical radiculopathy with C7 nerve involvement. Appellant stopped work on the date of injury and was in receipt of compensation for total disability on the periodic compensation rolls. By decision dated July 17, 2012, OWCP terminated compensation for the accepted herniated cervical disc conditions. Compensation for the accepted cervical radiculopathy continued. By decision dated December 13, 2017, OWCP terminated appellant's wage-loss compensation, effective that date, finding that the weight of the medical evidence rested with the second opinion physician, Dr. Dinenberg.

Appellant was twice referred to Dr. Dinenberg for a second opinion examination. In the most current May 9, 2017 report, Dr. Dinenberg reviewed appellant's medical records, including the SOAF. He diagnosed cervical herniated nucleus pulposus at C5-6 and C6-7, status post

⁷ The decision indicated that appellant's medical benefits remained open for treatment of her accepted condition.

⁸ On November 6, 2017 OWCP sent counsel a copy of the job description.

⁹ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

¹⁰ *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

¹¹ *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

anterior cervical discectomy and fusion with persistent right-sided radiculopathy and adjacent segment degenerative change at C4-5 with a large paracentral disc herniation causing foraminal and central stenosis. Dr. Dinenberg opined that while appellant continued to suffer residuals from the injury, she was medically capable of primarily sedentary employment with restrictions. He indicated that an enclosed job description included repetitive flexion, extension of the cervical spine and no specific lifting requirements. While Dr. Dinenberg opined that appellant could perform the duties that were noted to be primarily sitting at a desk, he also indicated in both his narrative report and on the May 9, 2017 OWCP-5c form that appellant was not to engage in repetitive flexion, extension, or rotation of her cervical spine, and lifting over 10 pounds. He specifically indicated that the job description he reviewed included repetitive flexion, extension of the cervical spine. The Board notes that the only job description of record was dated October 2006 and was received by OWCP on September 28, 2017 which included a lifting requirement of up to 30 pounds.

Dr. Dinenberg's May 9, 2017 report opined that appellant remained restricted from performing work that required lifting, pushing, and pulling greater than 10 pounds, and repetitive flexion, extension, or rotation of her cervical spine. The Board therefore finds it is unclear from the record which job description Dr. Dinenberg reviewed and thus the Board cannot determine what restrictions would allow appellant to return to modified work. As such, OWCP has not met its burden of proof to establish that appellant was no longer disabled from her date-of-injury position.

The Board, therefore, finds that OWCP erred in terminating appellant's wage-loss compensation, effective December 13, 2017 based on Dr. Dinenberg's second opinion report. The Board will reverse OWCP's December 13, 2017 termination decision.¹²

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective December 13, 2017.

¹² See *S.W.*, Docket No. 18-0005 (issued May 24, 2018).

ORDER

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

Issued: October 10, 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