

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

D.M., Appellant)	
)	
and)	Docket No. 19-0749
)	Issued: August 19, 2019
SMITHSONIAN INSTITUTION, NATIONAL)	
ZOOLOGICAL PARK, Washington, DC,)	
Employer)	
)	

Appearances: *Case Submitted on the Record*
Jeffrey P. Zeelander, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On February 11, 2019 appellant, through counsel, filed a timely appeal from an August 30, 2018 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 Board notes that following the August 30, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 16, 2018, as she no longer had residuals or disability causally related to her June 5, 1996 employment injury.

FACTUAL HISTORY

On June 6, 1996 appellant, then a 34-year-old animal caretaker, filed a traumatic injury claim (Form CA-1) alleging that on June 5, 1996 she sustained injuries to her left shoulder and neck when she used the shift doors (overhead pulley) to move and shift animals at the zoo while in the performance of duty. She stopped work on June 7, 1996. OWCP assigned the claim File No. xxxxxx035 and accepted "other affections of the left shoulder region."⁴ It commenced wage-loss compensation benefit payments on the supplemental rolls, effective August 6, 1996.

On November 12, 1996 appellant underwent OWCP-approved left shoulder acromioplasty, subacromial decompression, and resection of the distal clavicle with Dr. Sheldon Mandel, a Board-certified orthopedic surgeon.

After completing vocational rehabilitation services, appellant returned to work full time on February 2, 2004 as a customer service representative/clerk at a tack shop.⁵

On December 22, 2004 OWCP found that appellant was no longer totally disabled and finalized the reduction of her wage-loss compensation based upon her capacity to earn wages of \$280.00 per week as a customer service representative/clerk. The loss of wage-earning capacity (LWEC) determination found that the position fairly and reasonably represented her wage-earning capacity and was vocationally suitable since she had performed the duties of the job for the past two months.

On March 19, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case file, and a set of questions, to Dr. Robert Moore, a Board-certified orthopedic surgeon, for a second opinion examination regarding the status of her June 5, 1996 employment injury. The SOAF, dated December 2, 2014, noted that appellant's claim was accepted for other affections of the left shoulder region. It indicated that she had been employed as a plant and animal worker, but currently worked as a hostess/server.

In a May 10, 2018 report, Dr. Moore noted his review of the SOAF and indicated that there were limited medical records regarding appellant's initial medical treatment for her June 5, 1996 employment injury. He reported that appellant's claim was accepted for left shoulder impingement syndrome and related her current complaints of occasional left shoulder pain. Upon physical examination, Dr. Moore observed mild tenderness over the anterior aspect of the left shoulder and no atrophy. He provided range of motion (ROM) measurements and related appellant's complaints of mild discomfort at the end ranges of abduction and internal rotation. Impingement sign was

⁴ Under OWCP File No. xxxxxx128, appellant has an accepted traumatic injury claim for bilateral shoulder impingement syndrome, which arose in the performance of duty on November 24, 1995. OWCP combined File Nos. xxxxxx128 and xxxxxx035 and designated the latter claim as the master file.

⁵ OWCP adjusted her wage-loss compensation benefits to reflect her actual earnings of \$280.00 per week.

negative. Dr. Moore diagnosed a history of subacromial impingement and partial rotator cuff tear of the left shoulder, improved following arthroscopic subacromial decompression and distal clavicle excision.

In response to OWCP's questions, Dr. Moore opined that appellant's accepted left shoulder subacromial impingement had completely resolved. He explained that there were no objective findings to support that her work-related conditions were still active. Dr. Moore noted that appellant had full ROM and negative impingement signs. He reported that appellant currently had no work restrictions due to her accepted left shoulder condition and was capable of returning to her date-of-injury job as an animal caretaker.

On July 18, 2018 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because she no longer had residuals or disability due to her June 5, 1996 employment injury. It found that the weight of medical evidence rested with Dr. Moore's May 10, 2018 second opinion report, which noted that appellant's work-related condition and disability causally related to the June 5, 1996 employment injury had ceased. OWCP explained that the medical evidence of record was sufficient to meet its burden of proof to terminate benefits and was also sufficient to negate an LWEC determination due to a material change in her medical condition. It provided appellant 30 days to submit additional evidence and argument if she disagreed with the proposed termination.

In an August 9, 2018 letter, appellant related that her June 5, 1996 injury was accepted for other affections of both shoulders. She claimed that she was diagnosed with bilateral impingement syndrome. Appellant discussed the medical treatment she received for both shoulders and indicated that, after extensive physical therapy, her physician had informed her that her injury was "career ending" due to the 100-pound lifting requirement for an animal caretaker. She alleged that if she were to work as an animal caretaker, the injury would eventually return in a more severe state.

By decision dated August 30, 2018, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective September 16, 2018, finding that the weight of the medical opinion evidence rested with Dr. Moore, the second opinion examiner, who concluded in a May 10, 2018 report that appellant ceased to have residuals or disability due to her accepted June 5, 1996 employment injury.⁶

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of compensation benefits.⁷ It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁸

⁶ OWCP further found that, since it determined that she no longer had residuals of her accepted work-related injury and was no longer disabled from work as a result of the accepted injury, formal modification of her LWEC determination was unnecessary.

⁷ *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁸ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹⁰ 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.¹¹

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF.¹² Its procedures provide that the claims examiner is responsible for ensuring that the SOAF is correct, complete, unequivocal, and specific. When an OWCP medical adviser, second opinion specialist, or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate, or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹³

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 16, 2018.

In his May 10, 2018 report, Dr. Moore, an OWCP second opinion examiner, reviewed the SOAF provided by OWCP and noted that appellant's claim had been accepted for left shoulder impingement syndrome. He provided examination findings and opined that appellant's work-related left shoulder condition had completely resolved. Dr. Moore reported that appellant was capable of returning to her date-of-injury position as an animal caretaker.

The Board finds, however, that OWCP improperly terminated appellant's compensation based on Dr. Moore's report because his opinion on her disability status was based on a deficient SOAF. In securing the opinion of a medical specialist, OWCP provided information through the preparation of the SOAF in order to ensure that the report was based on a proper factual background.¹⁴ Its procedures require that the SOAF include appellant's accepted conditions.¹⁵ In this case, however, the December 2, 2014 SOAF did not note that appellant had a previously accepted claim under OWCP File No. xxxxxx128 for bilateral impingement syndrome or that previous claim and current claim had been combined. As the SOAF was deficient, Dr. Moore's

⁹ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹¹ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹² *N.W.*, Docket No. 16-1890 (issued June 5, 2017); *K.V.*, Docket No. 15-0960 (issued March 9, 2016).

¹³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see also R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹⁴ FECA Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.4(a)(4) (September 2009); *M.C.*, Docket No. 18-1199 (issued April 5, 2019).

¹⁵ *Id.*

opinion was not based on a proper history or background because the SOAF failed to address all of appellant's accepted conditions under her previous claim.¹⁶

The Board finds, therefore, that OWCP erred in terminating appellant's wage-loss compensation and medical benefits, effective September 16, 2018, based on Dr. Moore's May 10, 2018 second opinion report.¹⁷

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 16, 2018.

ORDER

IT IS HEREBY ORDERED THAT the August 30, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 19, 2019
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 See *N.G.*, Docket No. 15-0567 (issued April 27, 2015).

¹⁷ *S.B.*, Docket No. 18-0700 (issued January 9, 2019).