

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

S.S., Appellant)	
)	
and)	Docket No. 19-1091
)	Issued: December 3, 2019
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Pittsburgh, PA, Employer)	
)	

Appearances:
Alan J. Shapiro, 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
JANICE B. ASKIN, Judge

JURISDICTION

On April 18, 2019 appellant, through counsel, filed a timely appeal from a March 19, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 The Board notes that appellant subsequently filed an appeal from a May 3, 2019 schedule award decision. That appeal is not presently before the Board.

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 6, 2018, as he no longer had residuals or disability causally related to his accepted right upper extremity condition.

FACTUAL HISTORY

On December 14, 2015 appellant, then a 32-year-old casual mail handler, filed a traumatic injury claim (Form CA-1) alleging that he injured his right index finger that same day while in the performance of duty. He was assembling a two-shelf all-purpose container (APC) when one of the shelves dislodged and slammed down on his finger. On the reverse side of the claim form, the employing establishment indicated that appellant stopped work on December 14, 2015.

On February 18, 2016 OWCP accepted appellant's claim for traumatic rupture of the right ulnar collateral ligament. Effective January 9, 2016, it paid him wage-loss compensation for temporary total disability on the supplemental rolls.

In a report dated March 1, 2016, Dr. Bradley Palmer, a Board-certified orthopedic surgeon followed up with appellant for his right index finger crush condition. He noted that appellant continued to have significant hypersensitivity to palpation of the middle and left index finger. Dr. Palmer noted that appellant had clinical symptoms that did not correlate with his areas of pain and had pain out of proportion to the injury that he sustained. He diagnosed traumatic rupture of the right ulnar collateral ligament.

In a report dated June 9, 2016, Dr. Till Conermann, Board-certified in anesthesiology and pain medicine, initially examined appellant for chronic right hand pain status post-traumatic rupture of the right ulnar collateral ligament in a work-related crush injury in 2015. On examination of the right upper extremity, he observed burning pain in the index and middle fingers and difficulty eliciting a motor examination at the index and middle finger joints due to pain. Dr. Conermann diagnosed chronic right hand pain with a possible component of sympathetically-mediated and complex regional pain syndrome, traumatic rupture of the right ulnar collateral ligament, and mild right cubital tunnel syndrome.

In a work capabilities report dated June 21, 2016, Dr. Palmer recommended sedentary work restrictions of no lifting over five pounds and no repetitive use of the right hand.

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that following the March 19, 2019 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.*

On August 22, 2016 OWCP referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a list of questions, to Dr. Victoria A. Langa, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether he continued to have residuals and disability due to the accepted employment injury. In a September 8, 2016 report, Dr. Langa reviewed the medical record and examined appellant, noting tenderness over the ulnar borders of the PIP joints of the index and middle digits. He could not fully flex his index and middle digits into his palm to form a fist. Dr. Langa observed that appellant's ligaments were entirely stable to stress testing. She diagnosed persistent discomfort of the right index/middle digits with questionable etiology, possible type 2 complex regional pain syndrome, and possible type 1 atypical complex regional pain syndrome. Dr. Langa noted that he had an unusual degree of ongoing discomfort involving his index and middle digits, with none of the typical findings for type 1 complex regional pain syndrome. She further noted that appellant was scheduled to undergo a stellate ganglion block the next week, which would help to confirm a diagnosis of type 1 regional pain syndrome if it significantly relieved his symptoms. Dr. Langa opined that his ongoing complaints were ultimately related to the incident of December 14, 2015 and that he continued to suffer residuals of the work-related injury. She recommended light-duty work restrictions of no pushing, pulling, or lifting over 25 pounds.

On February 2, 2017 appellant underwent an OWCP-approved right stellate ganglion block at the C6 level with local anesthetic.

In a report dated February 16, 2017, Dr. Conermann noted that the right stellate ganglion block had helped appellant's pain for one day, after which the pain returned fully to baseline with no significant or lasting improvement. He diagnosed chronic right hand pain and suspected type 1 complex regional pain syndrome.

In a progress note dated February 28, 2017, Dr. Peter Tang, a Board-certified orthopedic hand surgeon, examined appellant's right upper extremity. He observed no tenderness to palpation of his fingers or palm, no swelling, no obvious deformities, and well-perfused fingers. Appellant reported pain of 10 on a scale of 10. Dr. Tang reported that he looked comfortable and suspected that appellant may be malingering. He diagnosed a right hand crush injury about a year prior and noted that this may be a secondary gain issue. Dr. Tang recommended a functional capacity evaluation (FCE) and independent medical evaluation.

An FCE was performed on April 6, 2017. Appellant demonstrated deficits including decreased right hand motion, decreased right upper extremity strength, decreased repetitive grasping, hypersensitivity to touch and movement on the right hand palmar surface, decreased dexterity of the right upper extremity, and self-limiting pain. The evaluator noted that appellant demonstrated overall inconsistent performance with testing and decreased effort with the right hand. He indicated that muscle recruitment patterns were inconsistent with pain levels reported when aware and unaware of observation.

On May 15, 2017 Dr. Conermann responded to the FCE and opined that appellant had not reached maximum medical improvement (MMI) and that he would likely benefit from a trial of spinal cord stimulation.

On May 9, 2017 Dr. Palmer responded to the FCE, noting that he agreed with the results and that appellant was at MMI, but may not be at MMI from a pain management standpoint.

On June 16, 2017 OWCP referred appellant to Dr. Michael J. Rytel, a Board-certified orthopedic surgeon.⁵ In a report dated July 13, 2017, Dr. Rytel examined appellant's right upper extremity and observed tenderness over the second and third digits from the tips of his fingers to the palm, exclusively on the palmar side of the fingers and hand. Appellant's active range of motion of the second and third fingers was diminished about 50 percent due to pain, with 20 percent of passive flexion diminished due to pain. The right upper extremity was otherwise normal. Dr. Rytel noted that while the accepted condition under this claim was a traumatic rupture of the right hand index finger ulnar collateral ligament, appellant had not ruptured the ligament nor any tendons as indicated on the initial examination, as that diagnosis was based on tenderness to palpation and reported pain to stress of the ulnar collateral ligament. He noted that nonetheless, traumatic rupture of the right hand index finger ulnar collateral ligament was the only diagnosis falling within the statement of accepted facts. In answering the questions posed by OWCP, Dr. Rytel found that there were no objective residuals of appellant's accepted condition and no objective findings supporting a diagnosis of type 1 complex regional pain syndrome. He indicated that appellant's position at the employing establishment was a supervisory information technology (IT) specialist. Dr. Rytel noted that as appellant's physical limitations were related limited to subjective complaints, he was capable of performing the position he had held at the time of injury. He listed current diagnoses related to the work injury as finger contusion, ulnar collateral ligament sprain, and chronic pain.

On September 21, 2017 OWCP provided appellant with a notice of proposed termination of his wage-loss compensation and medical benefits because the medical evidence of record established that he no longer had residuals or continuing disability from work. It determined that the weight of the medical evidence rested with the July 13, 2017 report of Dr. Rytel. OWCP afforded appellant 30 days to submit additional evidence or argument.

In a letter dated September 21, 2017, appellant, through counsel, requested expansion of his claim to include additional conditions of type 1 complex regional pain syndrome of the right upper extremity and limb, right hand pain, and chronic pain due to trauma. Attached to the letter was a report from Dr. Michael Franzen, a psychologist, dated July 5, 2017. Dr. Franzen noted that appellant was a candidate for a spinal cord stimulator study and noted that review of the medical records indicated diagnoses of type 1 complex regional pain syndrome of the right upper extremity and limb, right hand pain, and chronic pain due to trauma.

In a report dated September 25, 2017, Dr. Conermann noted that appellant had been cleared for a trial of spinal cord stimulation by a pain psychologist. He reported that appellant had experienced pain in his right hand for approximately two years, with the onset after a shelf fell on his hand in 2015 while working at the employing establishment. On examination, Dr. Conermann noted that appellant exhibited ongoing guarding of his right hand, but allowed examination. He also exhibited grimacing and flinching with cold can testing in his right palmar surface. Dr. Conermann observed diminished grip strength in his right hand and decreased range of motion

⁵ The Board notes that OWCP has inconsistently characterized Dr. Rytel as both a referee physician and a second opinion examiner. The record reflects that he was a second opinion physician.

with his index finger. He noted that appellant was unable to fully close his right index finger, but with encouragement was able to exhibit some weakened grip strength in the right hand involving the middle and index fingers. Dr. Conermann observed that range of motion maneuvers testing was limited due to reported discomfort and reluctance due to the apparent discomfort. He diagnosed chronic post-traumatic right hand pain and neuropathic pain involving the right hand with appellant's symptoms not meeting the criteria for type 1 complex regional pain syndrome. Dr. Conermann reported that appellant continued to have neuropathic pain in his fingers and was willing to undergo additional treatments.

In a letter dated September 18, 2017, Dr. Palmer opined that appellant should be on light-duty work secondary to the FCE findings, and that his work restrictions would be in place indefinitely.

By decision dated November 2, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the weight of the medical evidence rested with Dr. Rytel, who reported that appellant no longer had residuals or disability stemming from the accepted employment injury. OWCP stated that Dr. Rytel's reference to appellant as a supervisory IT specialist was inadvertent and did not diminish the probative value of his report.

On November 8, 2017 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative regarding the November 2, 2017 termination decision. The hearing was held on April 9, 2018.

By decision dated June 5, 2018, the hearing representative vacated the November 2, 2017 decision and remanded the case file to obtain a supplementary report from Dr. Rytel, noting that appellant was performing the duties of a mail handler at the time of injury rather than supervisory IT specialist. He further directed that OWCP should inquire as to whether appellant was able to return to such duties effective November 2, 2017 and whether appellant had developed a chronic pain condition causally related to the incident of December 14, 2015.

On July 10, 2018 OWCP requested additional information from Dr. Rytel. In an addendum report dated August 22, 2018, Dr. Rytel reviewed appellant's job description as a mail handler, a SOAF, and the case record. He opined that appellant would have been able to return to his preinjury job as a mail handler on November 2, 2017, noting that based on the lack of objective medical symptoms and diagnostic findings, he likely would have been able to return to work in a full-duty capacity much sooner than November 2, 2017. Dr. Rytel observed that appellant's chronic pain condition was subjective in nature and did not present objective symptoms, and that as such, it could not be attributed to the incident of December 14, 2015.

By decision dated September 6, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that the weight of the medical evidence rested with Dr. Rytel's July 30, 2017 and August 22, 2018 reports, which opined that appellant no longer had residuals or disability stemming from the accepted employment injury.

On September 14, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative regarding the September 6, 2018 termination decision.

Appellant subsequently submitted physical therapy notes and referral notes dated from March 8 through November 29, 2016.

The hearing was held on February 1, 2019. During the hearing, appellant stated that he was not working and that the last time he worked was at the employing establishment. He explained that he still had symptoms of the right hand including tingling and inability to lift heavy objects. The record was held open for at least 30 days for the submission of additional evidence. No further evidence was received.

By decision dated March 19, 2019, the hearing representative affirmed the September 6, 2018 decision.

LEGAL PRECEDENT

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

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁷ 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.⁸

OWCP's procedures provide that notice is required prior to termination in all cases where benefits are being paid on the periodic rolls and in the case of termination of medical benefits.⁹ Pretermination notice is not required when the claimant dies, returns to work, is convicted of defrauding FECA program, or forfeits compensation by failing to report earnings.¹⁰ The Board has held that OWCP must follow its procedures and provide notice and opportunity to respond prior to the termination of compensation benefits.¹¹

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 6, 2018.

⁶ *Kenneth R. Burrow*, 55 ECAB 157 (2003); *see also T.D.*, Docket No. 15-1938 (issued July 11, 2016).

⁷ *See T.P.*, 58 ECAB 524 (2007).

⁸ *See I.J.*, 59 ECAB 408 (2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4b (February 2013); *see also Winton A. Miller*, 52 ECAB 405 (2001).

¹⁰ *Id.* at 2.1400.4a.

¹¹ *K.S.*, Docket No. 11-2021 (issued August 21, 2012).

OWCP accepted appellant's claim for traumatic rupture of the right ulnar collateral ligament. Appellant received wage-loss compensation and medical benefits.

On September 21, 2017 OWCP provided appellant with a notice of proposed termination of his wage-loss compensation and medical benefits because the medical evidence then of record established that he no longer had residuals or continuing disability from work. On November 2, 2017 it terminated appellant's wage-loss compensation and medical benefits effective on that date. However, by decision dated June 5, 2018, an OWCP hearing representative vacated the decision of November 2, 2017 and remanded the case file to obtain a supplementary report from Dr. Rytel, noting that appellant was performing the duties of a mail handler at the time of injury rather than supervisory IT specialist. A supplementary report from Dr. Rytel dated August 22, 2018 was obtained. Subsequently, by decision dated September 6, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits effective on that date, based in part on the August 22, 2018 supplementary report of Dr. Rytel.

Pursuant to OWCP's procedures, before terminating appellant's wage-loss compensation and medical benefits, the claims examiner was responsible for advising him of the proposed termination or reduction, the reasons for the proposed action, and to provide an opportunity to respond in writing.¹² Pretermination notices are required in cases where all medical benefits are being terminated based on the medical opinion of a referee or second opinion physician.¹³ The Board has held that OWCP must follow its procedures and provide notice and opportunity to respond prior to the termination of compensation benefits.¹⁴

In *J.S.*, following the reversal of a prior termination and receipt of an impartial medical examiner's report, OWCP again terminated appellant's compensation benefits. However, as the claimant was receiving compensation on the periodic rolls at the time of the termination, the Board found that she should have received proper pretermination notification and therefore the case was reversed.

Here, as in *J.S.*, a hearing representative reversed the prior termination decision and OWCP subsequently issued a final termination decision without issuing another pretermination notice. Dr. Rytel's opinion was the opinion of a second opinion examiner, and as such, OWCP was required to issue another pretermination notice before its final termination decision of September 6, 2018.

The Board finds that because the decision of September 6, 2018 terminated appellant's medical benefits, he should have received proper pretermination notification. OWCP should have provided appellant with notice that it intended to terminate his compensation and an opportunity to submit evidence supporting a continuing employment-related disability.¹⁵

¹² *Supra* note 8.

¹³ *Id.*

¹⁴ *J.S.*, Docket No. 17-0937 (issued December 14, 2017).

¹⁵ *Id.*; *K.S.*, *supra* note 10.

Due process and elemental fairness require that a claimant under the circumstances presented have notice and an opportunity to respond to the termination of benefits.¹⁶ The Board finds that the termination was improper and will be reversed.

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 6, 2018.

ORDER

IT IS HEREBY ORDERED THAT the March 19, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 3, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁶ *D.R.*, Docket No. 14-1688 (issued April 8, 2015).