

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

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| <b>D.M., Appellant</b>                 | ) |                                 |
|  | ) |                                 |
| <b>and</b>                             | ) | <b>Docket No. 17-1052</b>       |
|  | ) | <b>Issued: January 24, 2019</b> |
| <b>DEPARTMENT OF VETERANS AFFAIRS,</b> | ) |                                 |
| <b>VETERANS HEALTH ADMINISTRATION,</b> | ) |                                 |
| <b>Augusta, GA, Employer</b>           | ) |                                 |
| <hr/>                                  | ) |                                 |

*Appearances:*  
*Paul H. Felser, Esq., for the appellant*<sup>1</sup>  
*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 April 21, 2017 appellant, through counsel, filed a timely appeal from an October 25, 2016 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUES**

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective December 1, 2011; and (2) whether appellant has met her burden of proof to establish continuing disability after December 1, 2011 causally related to the January 7, 1987 employment injury.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>3</sup> The facts and circumstances set forth in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On January 7, 1987 appellant, then a 38-year-old nursing assistant, filed a traumatic injury claim (Form CA-1) alleging that, on that date, a patient struck her in the left side of her chest while in the performance of duty. OWCP accepted the claim for lumbar sprain and bulging discs at L3-4 and L4-5 and paid appellant compensation benefits on the periodic rolls.

In a September 13, 1998 report, Dr. Louis J. Maganiello, a neurosurgeon and treating physician, diagnosed herniated lumbar disc and nerve damage in the left arm. He advised that appellant was totally disabled from performing any type of work due to her severe pain.

By development letter dated October 28, 2010, OWCP requested that appellant provide comprehensive medical reports from her treating physician regarding the current status of her condition. It afforded her 30 days to provide the requested evidence.

On December 7, 2010 OWCP referred appellant, along with a statement of accepted facts, a set of questions, and the medical record to Dr. James Bethea, a Board-certified orthopedic surgeon, for a second opinion regarding the status of her work-related conditions.

In a December 29, 2010 report, Dr. Bethea noted appellant's history of injury and treatment and detailed the findings of the physical examination he conducted on that date. He observed that she had difficulty standing and used a cane to assist with ambulation. Appellant presented with reduced range of motion in the lumbar spine with uncomfortable extension and lateral bending on the left. Dr. Bethea reported that appellant was able to stand on her toes and heels, but that she was limited in squatting due to knee and lower back pain. He found some numbness in the left lower extremity, but there were no neurological findings or atrophy of either limb.

Dr. Bethea explained that the only objective evidence of record was a computerized tomography (CT) scan performed in 1987 and there was no evidence of any imaging study performed since then. He opined that appellant continued to suffer injury-related residuals as evidenced by her continuing, injury-related pain. Dr. Bethea did not believe that she could return to her previous occupation as a nursing assistant; however, she was capable of working in different position. He completed a work capacity evaluation (Form OWCP-5c) providing permanent

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<sup>3</sup> Docket No. 15-0504 (issued June 21, 2016).

restrictions for sitting, walking, standing, and over the shoulder reaching. Dr. Bethea also restricted pushing, pulling, and lifting to no more than 10 to 15 pounds.

On January 4, 2011 OWCP received a work capacity evaluation (Form OWCP-5c) from Dr. Leslie Pollard, Jr., a Board-certified family practitioner, dated December 14, 2010. Dr. Pollard opined that appellant was permanently disabled and had reached maximum medical improvement and would “not get any better.” He indicated “no” in response to whether she was capable of working her date-of-injury job or performing alternative work with restrictions. Dr. Pollard opined that appellant is permanently restricted from bending, twisting, standing, or lifting and she could not sustain work activity.

On April 15, 2011 OWCP determined that a conflict in medical opinion existed between Dr. Pollard and Dr. Bethea, regarding whether the claimant remained totally disabled from work or if she was able to perform other work with restrictions. It referred appellant to Dr. Thomas R. Cadier, a Board-certified orthopedic surgeon, for an impartial medical opinion.

In a June 27, 2011 report, Dr. Cadier noted appellant’s prior work responsibilities and history of injury. He noted that, on physical examination, appellant was found to have some difficulty completing heel-to-toe walk; marked loss of mobility in her back and diffused tenderness in the lower back. However, appellant was able to rise from a seated position without difficulty, she evidenced no gross deformity in the upper and lower extremities, except for her surgical scars, and her reflexes were intact at the elbow, wrist, knee, and ankle. Dr. Cadier determined that although appellant complained of having ongoing pain, the accepted injuries should have resolved by now. He opined that she could not perform her date-of-injury job as a nursing assistant, but that she was capable of working in a sedentary-type job.

On August 5, 2011 OWCP requested clarification from Dr. Cadier with regard to whether her accepted conditions of lumbar sprain and bulging discs at L3-4 and L4-5 had completely resolved in relation to the January 7, 1987 work-related injury.

In an August 8, 2011 response, Dr. Cadier explained that the lumbar strain suffered by appellant was “certainly resolved by now, 24 years post injury.” He further noted that “bulging discs are a manifestation that the disc has lost some of its resilience and this is a normal degenerative finding in our discs as we age. Bulging discs are not necessarily symptomatic or an indication of pathology.”

In a letter dated September 8, 2011, OWCP again requested clarification with regard to the bulging discs and whether they were related to the work-related injury and whether or not they had resolved. It also requested an opinion as to whether there were any work restrictions related to the accepted condition of bulging discs.

In a September 26, 2011 response, Dr. Cadier opined that bulging discs were a product of normal degenerative change over time and there were no objective findings in appellant’s case to suggest they were related to the accepted work injury. He opined that any symptoms she had at that time were more likely related to a lumbar musculoligamentous strain and sprain. Dr. Cadier indicated that he did not expect the bulging discs to “resolve” since they were simply a radiographic finding and not a cause of ongoing pain. He noted that he would not place any work

restrictions on appellant simply due to the bulging discs and any work restrictions would be due to her multiple preexisting medical problems instead.

In an October 21, 2011 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she no longer had residuals of her January 7, 1987 employment injury. It afforded her 30 days to submit additional evidence and argument if she disagreed with the proposed termination.

Appellant submitted two reports dated November 3 and 8, 2011 from Dr. Alex D. Collins, a Board-certified orthopedic surgeon and an osteopath, wherein he noted that appellant's pain had been constant and a result of her January 7, 1987 employment injury.

By decision dated December 1, 2011, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, finding that the medical evidence of record was insufficient to support continued residuals causally related to the work injury of January 7, 1987. It relied upon the report of the IME, Dr. Cadier, who concluded that there were no objective findings to support continuing disability due to the accepted claim for bulging discs.

On December 12, 2011 counsel requested an oral hearing, which was held before an OWCP hearing representative on March 12, 2012. During the hearing, he contended that appellant remained disabled and questioned the validity of the IME. Counsel argued that Dr. Cadier did not examine appellant or perform any radiographic studies. He also noted that Dr. Cadier's medical report was the only contradictory report. In a separate letter, also dated December 12, 2011, counsel argued that there was never a conflict in the medical opinions and therefore, OWCP failed to follow its procedures.

By decision dated May 14, 2012, OWCP's hearing representative affirmed the December 1, 2011 decision. He found that the report from Dr. Cadier was sufficient to carry the special weight of the medical evidence and affirmed the termination.

In a letter dated June 21, 2012, received by OWCP on June 22, 2012, appellant, through counsel, requested reconsideration of the May 14, 2012, decision. Counsel argued that appellant was permanently disabled and unable to work. He enclosed a report dated June 1, 2012 from Dr. Collins, where he opined that appellant was permanently disabled and unable to work.

On August 30, 2012 OWCP denied modification of its prior decision, finding that Dr. Collins' opinion was based on an inaccurate history and was insufficient to overcome the special weight of Dr. Cadier's report and findings.

On February 13, 2013 appellant requested reconsideration. In a December 11, 2012 statement, she noted that she continued to receive treatment after her work injury, but her condition had not resolved. Appellant argued that all of her physicians found that she was unable to work and that Dr. Cadier's opinion should not be given special weight, as he did not perform any tests or provide treatment.

Appellant also provided an October 17, 2012 report from Dr. Collins, where he concluded that appellant was permanently disabled and unable to work due to bulging discs and back pain that limited her ability to walk and get up and down from a chair.

By decision dated April 1, 2013, OWCP denied modification of its prior decision as Dr. Collins had simply restated his opinion, which was insufficient to overcome the special weight of the evidence provided by Dr. Cadier.

By letter dated March 31, 2014, appellant, through counsel, requested reconsideration. Counsel argued that Dr. Cadier had not provided a conclusive opinion to resolve the conflict and his report was not rationalized and did not explain how appellant's accepted conditions resolved. Furthermore, he argued that she had developed additional conditions resulting from the work injury which were not addressed. Counsel requested that the acceptance of the claim be expanded to include additional identified conditions and that appellant be referred to a new IME.

In a report dated January 14, 2014, Dr. Jason Bundy, a Board-certified orthopedic surgeon, opined that appellant had never recovered from her injury and explained that appellant's condition had progressed "likely due to age and degenerative changes."

By decision dated September 24, 2014, OWCP denied appellant's request for reconsideration, finding that the evidence submitted was insufficient to warrant review of its prior decision.

On January 5, 2015 appellant, through counsel, appealed to the Board. The Board found that OWCP improperly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a). The Board, therefore, set aside the September 24, 2014 decision and remanded the case for a merit review.

On remand OWCP conducted a merit review and, by decision dated October 25, 2016, denied modification of its prior decision. It specifically found that the January 14, 2014 report from Dr. Bundy was insufficient to modify its prior decision because the treating physician had not provided a well-rationalized medical opinion explaining why appellant never recovered.<sup>4</sup>

### **LEGAL PRECEDENT -- ISSUE I**

Once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.<sup>5</sup> It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>6</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based

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<sup>4</sup> Although OWCP indicated that the prior decision was September 24, 2014, that decision was set aside and remanded by the Board. The last merit decision was dated April 1, 2013.

<sup>5</sup> *Curtis Hall*, 45 ECAB 316 (1994).

<sup>6</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

on a proper factual and medical background.<sup>7</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.<sup>8</sup> 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.<sup>9</sup>

Section 8123(a) of FECA<sup>10</sup> provides that if there is disagreement between the physician making the examination for OWCP and the employee's physician, the Secretary shall appoint a third physician, known as a referee physician or impartial medical specialist, who shall make an examination.<sup>11</sup> 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.<sup>12</sup> Where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial specialist for the purpose of resolving conflict, the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.<sup>13</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective December 1, 2011.

OWCP properly referred appellant to Dr. Cadier, an IME, to resolve the conflict in medical opinion between Drs. Pollard and Bethea. Dr. Cadier provided an extensive review of appellant's medical history and determined that there were no objective findings to correspond with appellant's subjective complaints. He explained that previous films revealed only generalized disc disease and the CT scan of the lumbar spine from March 27, 1987 revealed "minimal central bulging of the discs at L3-4 and L4-5," which he believed was within normal limits. Dr. Cadier advised that there was no evident disc herniation and no other abnormality identified. He opined that, while appellant could not perform her date-of-injury job as a nursing assistant, she was capable of working in another type of job with restrictions. The Board finds that Dr. Cadier's June 27, 2011 report and subsequent clarifications are sufficiently well rationalized and based upon a proper factual background such that his opinion is entitled to special weight in establishing that residuals of appellant's employment injury had ceased.<sup>14</sup>

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<sup>7</sup> See *Del K. Rykert*, 40 ECAB 294, 295-96 (1988).

<sup>8</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

<sup>9</sup> *Calvin S. Mays*, 39 ECAB 993 (1988).

<sup>10</sup> 5 U.S.C. §§ 8101-8193, 8123(a).

<sup>11</sup> *Id.* at 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>12</sup> 20 C.F.R. § 10.321.

<sup>13</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

<sup>14</sup> See *supra* note 10; see *supra* note 14.

After receiving OWCP's notice of proposed termination, appellant submitted reports dated November 3 and 8, 2011 from Dr. Collins where he opined that appellant's pain had been constant since her January 7, 1987 injury. However, he did not explain how he arrived at this opinion and the Board has generally held that pain is a symptom, rather than a medical diagnosis.<sup>15</sup> In another report from October 2012, Dr. Collins explained that appellant's work injury led to spondylosis of the back, which in turn led to chronic changes, including the bulging discs. He concluded that appellant was permanently disabled and unable to work due to bulging discs. However, Dr. Collins did not address whether appellant's conditions and continued disability from work were causally related to the accepted January 7, 1987 employment injury. The Board has held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.<sup>16</sup>

The Board, therefore, finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective December 1, 2011.

### **LEGAL PRECEDENT -- ISSUE 2**

Once OWCP properly terminates compensation benefits, the burden shifts to appellant to establish that he or she has continuing disability causally related to the accepted employment injury.<sup>17</sup> To establish causal relationship between the disability claimed and the employment injury, appellant must submit rationalized medical evidence or opinion based on a complete medical and factual background supporting causal relationship.<sup>18</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant has not met her burden of proof to establish continuing disability after December 1, 2011.

In a June 1, 2012 report, Dr. Collins indicated that appellant was receiving injections for her conditions and opined that she was permanently disabled and unable to work. However, he provided no rationale for this opinion. A mere conclusion without the necessary rationale is insufficient to meet the employee's burden of proof.<sup>19</sup>

In an October 17, 2012 report, Dr. Collins again indicated that appellant's low back pain began with her January 7, 1987 work injury and afterwards, she developed spondylosis of the back, which led to the bulging discs that appellant now had. He opined that she was unable to work specifically due to the bulging discs and back pain that limited her ability to walk and get up and down from a chair. The Board finds that Dr. Collins did not provide a rationalized explanation regarding the causal relationship of appellant's condition and her accepted work injury. Therefore,

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<sup>15</sup> *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

<sup>16</sup> *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

<sup>17</sup> *See J.R.*, Docket No. 17-1352 (issued August 13, 2018).

<sup>18</sup> *See A.C.*, Docket No. 16-1670 (issued April 6, 2018); *R.D.*, Docket No. 16-0892 (issued December 20, 2016).

<sup>19</sup> *See D.P.*, Docket No. 17-0148 (issued May 18, 2017).

the Board finds that his opinion is of limited probative value in establishing that she has continuing residuals or disability causally related to the accepted January 7, 1987 work injury.<sup>20</sup>

In a report dated January 14, 2014, Dr. Bundy diagnosed appellant with lumbar degenerative disc disease. He opined that she never recovered from her work injury and her condition had progressed “likely due to age and degenerative changes.” The Board notes that this opinion does not support appellant’s contention that she has a continued disability causally related to her January 7, 1987 work injury. Additionally, Dr. Bundy did not provide a well-rationalized opinion that clearly demonstrates that the disability alleged was due to the accepted January 7, 1987 work injury and, thus is of limited probative value on the issue of causal relationship.<sup>21</sup> The Board therefore finds that the reports received subsequent to the termination of appellant’s wage-loss compensation and medical benefits are insufficient to establish continuing residuals or disability causally related to the January 7, 1987 work injury.

On appeal appellant argues that she continued to suffer from her employment-related conditions and that Dr. Cadier’s opinion was insufficient to meet OWCP’s burden of proof to terminate her wage-loss compensation and medical benefits, as he did not perform any tests or provide treatment. However, his report of June 27, 2011 is replete with physical examination findings. As explained above, Dr. Cadier provided a detailed examination and explanation in support of his opinion and therefore, is entitled to the special weight of the medical evidence.

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 OWCP properly terminated appellant’s wage-loss compensation and medical benefits, effective December 1, 2011, as she no longer had residuals of her January 7, 1987 employment injury. The Board further finds that appellant has not established continuing employment-related disability or residuals after December 1, 2011.

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<sup>20</sup> See *J.F.*, Docket No. 09-1061 (issued November 17, 2009); *A.D.*, 58 ECAB 149 (2006).

<sup>21</sup> *Id.*

**ORDER**

**IT IS HEREBY ORDERED THAT** the October 25, 2016 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 24, 2019  
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