United States Department of Labor
Employees' Compensation Appeals Board

A.T., Appellant	)	
and	)	**Docket No. 17-1454**
	)	**Issued: January 7, 2019**
U.S. POSTAL SERVICE, POST OFFICE, Gaithersburg, MD, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 16, 2017 appellant, through counsel, filed a timely appeal from a May 12, 2017 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 appellant submitted additional evidence on appeal. 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 on appeal is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective May 28, 2017, as she had no residuals of her work-related injury.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances as set forth in the prior decision are incorporated herein by reference. The relevant facts follow.

On December 23, 2001 appellant, then a 34-year-old markup clerk, filed a traumatic injury claim (Form CA-1) alleging that, on December 14, 2001, she developed pain in her arm, elbow, the back of her neck, and that her hand started swelling rapidly while keying in the performance of duty. She stopped work on December 14, 2001.[5]

OWCP accepted appellant's claim for the conditions of: sprain of the right shoulder and right upper arm; enthesopathy of wrist and carpus, on the right; lateral epicondylitis, on the right; other tenosynovitis of the hand and wrist, on the right; and impingement syndrome of the right shoulder. In File No. xxxxxx242, it accepted the claim for right shoulder strain/sprain. Under File No. xxxxxx646, OWCP accepted the claim for carpal tunnel syndrome on the right. It paid appellant appropriate compensation benefits and placed her on the periodic rolls.

On January 7, 2016 OWCP referred appellant for a second opinion examination, along with a statement of accepted facts (SOAF),[6] a set of questions, and the medical record to Dr. Burke Haskins, a Board-certified orthopedic surgeon, to determine whether appellant continued with residuals of her accepted conditions and her ability to return to work.

In a January 26, 2016 report, Dr. Haskins noted appellant's history of injury and treatment. He examined her and advised that her right shoulder sprain had resolved and appellant was capable of returning to normal-duty work with her right elbow complaints. Dr. Haskins indicated that there was no evidence at the time based on objective findings or history of right lateral epicondylitis. He also noted that appellant's de Quervain's syndrome which was work related had resolved.

[4] Docket No. 05-0589 (issued September 8, 2005).

[5] The record reflects that appellant has a previous claim which was accepted for an injury to her right shoulder on June 29, 1999. OWCP File No. xxxxxx242. The accepted condition was right shoulder strain/sprain. However, the record before the Board does not contain a copy of that claim. OWCP administratively combined File No. xxxxxx242 and File No. xxxxxx646 into master File No. xxxxxx042.

[6] The December 29, 2015 SOAF noted that appellant had three upper extremity claims that were administratively combined by OWCP under File Nos. xxxxxx242, xxxxxx646 and xxxxxx042, with the master File No. xxxxxx042. OWCP noted that the accepted conditions included a right shoulder strain, right lateral epicondylitis, tendinitis of the right wrist and a right shoulder strain. It also noted that under File No. xxxxxx646, the claim was accepted for right carpal tunnel syndrome. Additionally, the conditions of right rotator cuff tear and cervical spine conditions were listed as not being accepted by OWCP. OWCP also listed appellant's authorized surgeries to include: decompression of the right carpal tunnel syndrome, excisional biopsy of synovium; flexor tendons; right wrist and hand and tenosynovectomy on January 27, 2005. Additionally, appellant underwent a release first dorsal compartment on the right wrist, with tenolyses; diagnostic therapeutic arthroscopy, right shoulder and decompression of impingement syndrome, shaving right acromioclavicular joint, and lyses of adhesions, right shoulder on June 10, 2010.

Dr. Haskins noted that she was not precluded from returning to normal work and that she did not need any further medical treatment. He opined that appellant was at maximum medical improvement (MMI), that there was evidence based upon objective findings or history of right lateral epicondylitis, and the following conditions of carpal tunnel syndrome, de Quervains syndrome, extensor origin syndrome (tennis elbow) and right shoulder sprain had all resolved. Dr. Haskins indicated that he had completed the work restriction form and the limitations noted were secondary to unrelated conditions of cervical disc disease, acromioclavicular arthritis, and rotator cuff pathology.

Dr. Rida Azer, a Board-certified orthopedic surgeon, continued to treat appellant. In his December 9, 2016 report, he opined that appellant continued with residuals of her work injury of December 14, 2001 and that she had permanent residuals from the injury. Dr. Azer recommended that appellant avoid strenuous use of the right hand, repetitive movements of the right hand, overhead use of the right hand, pushing, pulling, and lifting of the right hand, and repetitive movements. He repeated that the limitations were permanent and caused by her injury of December 14, 2001.

On February 3, 2017 OWCP issued a notice of proposed termination of compensation. It proposed to terminate appellant's compensation as the weight of the medical evidence, as represented by the report of Dr. Haskins, established that the residuals of the work injury had ceased. OWCP also found that she no longer had continued disability from work as a result of her work injury or illness. It afforded 30 days to submit additional evidence or argument if appellant disagreed with the notice of proposed termination.

In a February 3, 2017 report, Dr. Azer noted that the accepted conditions were: right sprain shoulder/arm not otherwise specified; right enthesopathy of wrist; right lateral epicondylitis; and right tenosynovitis hand/wrist and neck. He explained that appellant continued with pain in the right shoulder and the right elbow and was tender over the greater tuberosity of the right humerus. Dr. Azer advised that active abduction was 0 to 45 degrees and passively 0 to 70 degrees. He found the right elbow showed tenderness over the lateral epicondyle of the right humerus and there was pain on resisted supination. Dr. Azer found that appellant's incisions were healed and sensation over the right median nerve and over the superficial branch of the right radial nerve was normal. He found that the Finkelstein's sign was negative. Dr. Azer indicated that appellant would have a magnetic resonance imaging (MRI) scan of the right shoulder. He noted that she had not worked for several years. Dr. Azer opined that appellant could not perform the duties of appellant's position as a "mark-up clerk" which involved lifting trays, using both hands, and handling. He continued to keep appellant off work. Dr. Azer also noted that the patient should avoid activities that involved: pushing, pulling, and lifting heavy objects; overhead use of the right hand; repetitive movements of the right hand; strenuous use of the right hand; having her hands close to machinery; and hazardous situations. He opined that the restrictions applied to the whole right upper extremity and noted that appellant was predominantly right handed.

Dr. Azer also included objective findings and clinical examination conditions. He opined that appellant's conditions were caused by the December 14, 2001 injury. Dr. Azer noted that at present, the right elbow and the right shoulder were being treated by conservative measures trying to avoid surgery. He explained that, if a right shoulder MRI scan showed impingement syndrome, she might need surgical intervention. Dr. Azer advised that the MRI scan had been scheduled. He reiterated that appellant was unable to perform her duties.

Appellant provided February 26, 2017 personal statements. She noted errors in Dr. Haskins' reports. Appellant noted that Dr. Haskins did not include full information regarding her work-related injuries. She referenced a June 29, 1999 report, which noted neck spasms. Appellant requested that her work-related neck injury be included. She referenced a December 16, 2001 emergency room report and included a copy. Appellant noted that his report contained an incorrect date, as she was not working in 2004. She also noted that he had the wrong date of when she was seen in the emergency room and advised that it was 2001 and not 2002. Appellant also discussed medical evidence and argued that her conditions had worsened and were ongoing.

OWCP received a May 23, 2005 attending physician's report (Form CA-20) and duty status reports (CA-17 forms) from Dr. Azer. Additionally, it received a February 13, 1989 prescription note and another Form CA-17 dated March 14, 1989.

A February 17, 2017 x-ray of the right elbow read by Dr. Sherwin Pollock, a Board-certified diagnostic radiologist, revealed a moderate degree of tendinosis of the distal supraspinatus tendon. He also found that no rotator cuff tear was identified. Dr. Pollock found mild medial arch outlet stenosis and that the overall appearance of the right shoulder was stable from the prior examination.

OWCP determined that a conflict existed in the medical opinions between Dr. Azer and Dr. Haskins regarding appellant's residuals of her accepted medical conditions and ability to return to employment. On March 13, 2017 OWCP referred appellant along with a SOAF,[7] a set of seven questions, and the medical record to Dr. Sanakar Kothakota, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in opinion.

The March 13, 2017 SOAF noted that all three of appellant's cases had been combined into a master case File No. xxxxxx042. Her accepted conditions were: shoulder strain/sprain, on the right; sprain of shoulder and upper arm, on the right; enthesopathy of the wrist and carpus on the right; lateral epicondylitis, on the right; other tenosynovitis of the hand and wrist, on the right; and impingement syndrome of the right shoulder, along with carpal tunnel syndrome on the right. OWCP noted that appellant had not returned to work.

In an April 24, 2017 report, Dr. Kothakota noted appellant's history of injury and treatment. He initially noted that appellant was employed as a postal clerk and sustained a work-related injury on June 29, 1999, while keying and labeling. Dr. Kothakota also indicated that appellant claimed a second injury on December 14, 2001, and the accepted condition was right lateral epicondylitis of the right elbow and continued problem with right wrist and right shoulder strength. He also noted that appellant claimed an injury to the right wrist because of her repetitive keying, and noted that this happened on December 14, 2004. Dr. Kothakota examined appellant and noted that he had reviewed several thousand pages of records.

Dr. Kothakota performed a physical examination and indicated that appellant had full range of motion of the right shoulder. He also noted well-healed arthroscopic scars and no atrophy.

[7] The March 13, 2017 SOAF did not list appellant's job or duties. It also noted that she had not returned to work, but did not specify a specific date that she had stopped work. Appellant's accepted conditions were listed as: shoulder strain/sprain, on the right; sprain of shoulder and upper arm, on the right; enthesopathy of the wrist and carpus on the right; lateral epicondylitis, on the right; other tenosynovitis of the hand and wrist, on the right; and impingement syndrome of the right shoulder, along with carpal tunnel syndrome on the right.

Dr. Kothakota determined that she had full active and passive range of motion. He indicated that appellant had strength in the right shoulder of a grade 4, grade 5 in all groups of muscles. Dr. Kothakota observed that there was no atrophy of the muscles. He also noted that the right elbow and right hand did not show any obvious signs of any atrophy or loss of sensation. Dr. Kothakota found that appellant's grip strength was within normal limits. He advised that her peripheral pulses were felt and her history was suggestive of carpal tunnel surgery performed on January 27, 2005, and de Quervains release of the right wrist. Dr. Kothakota also noted that subacromial decompression combined with lysis of adhesions of the right shoulder was performed by Dr. Azer on June 10, 2010. He also noted that he had reviewed the operative reports including the relevant medical records.

Dr. Kothakota opined that appellant reached MMI. He advised that all of the accepted conditions from the combined cases had completely resolved and noted that he did not see any signs of worsening problems at the time of his clinical examination or with his review of the medical records including the MRI scan reports. Dr. Kothakota opined that appellant did not have and does not suffer from residuals from the work-related injury. He further found that appellant did not have continuing conditions which caused her to remain off work. Dr. Kothakota opined that appellant could return to full-duty status based upon his clinical examination and review of the medical records. He explained that she was capable of returning to preinjury work status without the need for restrictions. Dr. Kothakota completed the work restriction form noting his opinion that she could return to her preinjury work.

By decision dated May 12, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits effective May 28, 2017. It found that the report of Dr. Kothakota was sufficiently well rationalized and based upon a proper factual background and was therefore afforded the special weight. OWCP found that Dr. Kothakota supported that appellant no longer had residuals of the accepted work-related conditions.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[8] Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[9] Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[10]

Furthermore, FECA[11] 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 who shall make an examination.[12] The implementing regulation provides that, if a

[8] *Curtis Hall*, 45 ECAB 316 (1994).

[9] *Jason C. Armstrong*, 40 ECAB 907 (1989).

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

[11] 5 U.S.C. §§ 8101-8193, 8123(a).

[12] *Id*. at § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

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.[13] 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.[14]

In cases where OWCP has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[15]

ANALYSIS

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective May 28, 2017, as she had no residuals of her work-related injury.

OWCP accepted appellant's claim for the conditions of: sprain of the right shoulder and right upper arm; enthesopathy of wrist and carpus, on the right; lateral epicondylitis, on the right; other tenosynovitis of the hand and wrist, on the right; and impingement syndrome of the right shoulder. In File No. xxxxxx242, it accepted the claim for right shoulder strain/sprain. Under File No. xxxxxx646, OWCP accepted the claim for carpal tunnel syndrome on the right. The claims were administratively combined by OWCP and appellant received wage-loss compensation and medical benefits and was placed on the periodic rolls on May 6, 2012. OWCP properly determined that a conflict in medical opinion arose between Dr. Azer, appellant's attending physician, and Dr. Haskins, an OWCP referral physician, regarding the current condition and ongoing residuals, if any, due to her employment injury. OWCP properly referred appellant to Dr. Kothakota, a Board-certified orthopedic surgeon, for an impartial medical examination.

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 the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[16] The Board finds that the opinion of Dr. Kothakota is well rationalized and based on a proper factual and medical history. Dr. Kothakota accurately summarized the relevant history of appellant's medical health and treatment, provided detailed findings on physical examination, and reached conclusions about appellant's conditions which were well rationalized and comported with his physical findings.[17] OWCP provided him with a SOAF dated March 13, 2017 which noted the three combined files and the accepted medical conditions in the claim. It also provided him with a series of seven questions regarding her current physical status, her preexisting conditions, her ability to return to work, and whether she required further medical treatment.

[13] 20 C.F.R. § 10.321.

[14] *Id*.

[15] *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[16] *J.M.*, *supra* note 10; *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[17] *See Manuel Gill*, 52 ECAB 282 (2001).

In his report, Dr. Kothakota noted the significant medical record he had reviewed, along with the SOAF and series of seven questions. The Board notes that he conducted and reported findings from his physical examination, noting her most significant complaints were related to her neck and right shoulder. Upon examination Dr. Kothakota noted full range of motion of the right shoulder with no atrophy and right shoulder strength of grade 4, and grade 5 in all muscle groups. As to appellant's elbow and right hand he again noted no signs of atrophy or loss of sensation and he found her grip strength was normal. As to her carpal tunnel and de Quervain's Dr. Kothakota noted her history of injury and acknowledged normal findings of the wrist and hands. Following his physical examination he reviewed the findings contained in the medical records, specifically those of Drs. Haskins, Smith, and Ignacio, along with reviewing the results of her diagnostic testing. In his report Dr. Kothakota specifically determined that, following his physical examination, appellant does not have residuals from any of her accepted conditions. He completed a full bilateral upper extremity evaluation noting completely normal findings, which he noted in his responses. Based upon his physical findings, Dr. Kothakota opined that appellant had no conditions which would cause her to be unable to return to work, indicating that she can return to full-duty status based on the clinical examination and the medical records. He concluded that it was his opinion that she was capable of returning to her preinjury work status without restrictions. The Board notes that Dr. Kothakota did not respond to the final two questions posed by the claims examiner. However, based upon the completely normal physical findings and his opinion that she could return to work without the need for restrictions, those two remaining questions regarding preexisting disability and further medical treatment options are irrelevant to the question of whether appellant has ongoing residuals of her accepted conditions. Furthermore, the SOAF as presented to the IME is found to present the necessary claim information to premise an examination on the sole question of whether there are continuing residuals. Additional information, as counsel has asserted should have been included in the SOAF, is found to be unnecessary as it is irrelevant to the question of continuing residuals of the accepted conditions. As his report is detailed, well rationalized, based upon a contemporaneous medical examination, and based on a proper factual background, his opinion is entitled to the special weight accorded an IME.[18]

The remaining evidence submitted prior to OWCP's termination of appellant's wage-loss compensation and medical benefits is insufficient to overcome the special weight afforded to Dr. Kothakota as the IME. In a series of medical reports, Dr. Azer opined that appellant continued to exhibit residuals of her accepted employment-related conditions. He assigned permanent work restrictions based upon his conclusion that there remained continuing residuals in her upper extremities. Dr. Azer documented ongoing complaints of pain. Further, he noted continued treatment by conservative measures. Dr. Azer, however, was on one side of the conflict resolved by Dr. Kothakota. Medical reports from a physician on one side of a conflict resolved by an IME are generally insufficient to overcome the special weight accorded the report of an IME or to create a new conflict.[19]

[18] *C.S.*, Docket No. 18-0952 (issued October 23, 2018).

[19] *See Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael Hughes*, 52 ECAB 387 (2001).

The Board, therefore, finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective May 28, 2017, as she had no residuals of her work-related injury, as found by Dr. Kothakota.[20]

On appeal counsel submitted numerous arguments with regard to the SOAF and the reliability of the opinion of Dr. Kothakota. The Board has found, however, that the IME report noted completely normal physical finding based upon a comprehensive bilateral upper extremity physical examination, a comprehensive review of the significant medical history, and consideration of diagnostic testing results and the most recent SOAF. For the reasons set forth herein, the report of Dr. Kothakota is afforded the special weight and OWCP properly terminated appellant's wage-loss compensation and medical benefits.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits effective May 28, 2017, as she had no residuals of her work-related injury.

ORDER

IT IS HEREBY ORDERED THAT the May 12, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 7, 2019
Washington, DC

Christopher J. Godfrey, 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

[20] *See G.T.*, Docket No. 17-1959 (issued June 22, 2018); *D.G.*, Docket No. 17-0608 (issued March 19, 2018).