

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

J.S., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
BOSTON HCS, Brockton, MA, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 17-1932
Issued: January 16, 2019**

Appearances:

*John L. Whitehouse, Esq., for the appellant¹
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 September 13, 2017 appellant, through counsel, filed a timely appeal from an August 7, 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 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 on January 23, 2018 the Director filed a Motion to Affirm in part and Remand in part. The motion requested that the Board remand the case with regard to the termination of the medical benefits as she acknowledged that OWCP had failed to provide proper pretermination notification. The motion further requested that the Board affirm the termination of wage-loss compensation benefits contending that no pretermination notice was required and that the medical evidence of record was sufficient to terminate wage-loss compensation. The Clerk of the Appellate Boards served counsel with a copy of the motion and allotted him time to file a response. However, no response was received. The Board has considered the motion and has proceeded with a decision on the merits.

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 17, 2015, because he no longer had residuals or disability due to his accepted March 17, 2015 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On March 18, 2015 appellant, then a 47-year-old investigator, filed a traumatic injury claim (Form CA-1) alleging that on March 17, 2015 he sustained injuries to his neck, back, and left eye, as well as experienced a severe concussion, dizziness, and confusion when boxes fell on his head and neck at work and caused him to fall forward onto his face. He stopped work on that date.

Appellant initially received treatment from his employee health unit. In a March 17, 2015 progress note, Dr. Andrea Ohldin, a staff physician, related that appellant fell onto the floor and landed on the left side of his head after several books from a bookshelf fell on him. Appellant noted feeling nauseated, dizziness, having difficulty standing, and feeling confused. Upon physical examination, Dr. Ohldin observed a pink oval around 15 millimeters and a contusion above appellant's left eyebrow. She diagnosed "head trauma with fall and elevated blood pressure." Appellant was transported to urgent care for further evaluation.

In a March 17, 2015 urgent care record, Dr. Joan Cheng, a Board-certified diagnostic radiologist, indicated that appellant was treated for confusion and nausea after a bookshelf fell on his head. She reported that neurological examination showed clear speech and slightly slow movements. Dr. Cheng diagnosed concussion.

A March 17, 2015 computerized tomography (CT) scan report of appellant's head showed mild soft tissue swelling overlying the left supraorbital, but no acute intracranial abnormality.

Appellant submitted various reports and letters dated March 19 to April 23, 2015 by Dr. Glenn Tucker, a Board-certified internist. Dr. Tucker described that on March 17, 2015 appellant experienced vomiting, nausea, and dizziness at work when boxes fell on his head and back. He discussed appellant's history and provided physical examination findings. In reports dated April 7 and 14, 2015, Dr. Tucker diagnosed other and unspecified cerebral laceration and contusion, without mention of open intracranial wound, with concussion. He indicated that appellant continued to experience symptoms relating to his March 17, 2015 head injury and had impaired cognition after sustaining a severe concussion at work. Dr. Tucker advised that appellant not return to work.

OWCP denied appellant's claim in a decision dated May 15, 2015. It accepted that the March 17, 2015 incident occurred as alleged, but denied appellant's claim because the medical evidence of record failed to establish a diagnosed condition causally related to the accepted incident.

⁴ Docket No. 16-0777 (issued January 3, 2017).

Appellant timely requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on November 20, 2015. OWCP received additional medical evidence, including reports from Dr. Tucker dated May 12 and June 23, 2015.

By decision dated February 4, 2016, an OWCP hearing representative affirmed the May 15, 2015 decision in part and revised it in part. She remanded the case for OWCP to accept appellant's claim for contusion of the left forehead because the evidence of record was sufficient to establish a causal relationship between appellant's diagnosed forehead contusion and the March 17, 2015 employment incident. The hearing representative also found that the evidence of record failed to establish that appellant's concussion was causally related to the accepted incident.

In a decision dated March 9, 2016, OWCP accepted appellant's claim for left forehead contusion.

Appellant, through counsel, filed an appeal to the Board.

By decision dated January 3, 2017, the Board set aside and remanded the February 4, 2016 decision. It determined that Dr. Tucker's reports raised an uncontroverted inference between appellant's diagnosed head concussion and the accepted March 17, 2015 employment incident. The Board remanded the case for OWCP to further develop the medical evidence regarding whether appellant's head condition was causally related to the accepted incident.

OWCP referred appellant's case, along with a statement of accepted facts (SOAF) and a copy of the record, to Dr. Jacob Kogan, a Board-certified neurologist and second-opinion examiner, to determine whether appellant's diagnosed concussion was causally related to the March 17, 2015 employment incident and whether he sustained any other diagnosed conditions as a result of the accepted incident. In a June 2, 2017 report, Dr. Kogan accurately described the March 17, 2015 employment incident and reviewed the record, including appellant's medical reports and the SOAF. He related that, although appellant's symptoms of blurred vision, dizziness, and nausea had resolved, appellant still complained of headaches and memory and concentration difficulties. Upon physical examination, Dr. Kogan reported no tenderness or swelling and full range of motion at appellant's cervical and lumbar spine. He indicated that neurological examination demonstrated that appellant was alert and oriented. Dr. Kogan related that appellant had very good memory for recent and distal elements of his medical history, no pressured speech, and organized thought process.

Dr. Kogan opined that appellant sustained a concussion and post concussive syndrome as a result of the March 17, 2015 employment incident. He explained that contemporaneous medical reports showed that appellant experienced typical symptoms of concussion and post concussive syndrome, including cognitive impairment, mood changes, headache, nausea, and disequilibrium, following the March 17, 2015 incident. Dr. Kogan indicated that appellant's concussion was mild in severity and further opined that appellant's concussion and post concussive syndrome conditions had resolved. He explained that the natural history of post concussive syndrome following a mild concussion was that the symptoms resolved over the next months and were completely resolved by three months. Dr. Kogan noted that appellant was currently more than two years post injury, so residual symptoms of post concussive syndrome at this time would be atypical. He reported that appellant's current headaches were "likely" the result of a preexisting chronic headache condition as appellant admitted that he had headaches of similar severity before the March 17, 2015 employment incident. Dr. Kogan further indicated that appellant's cognitive

or mood changes were “more likely” the result of his conditions of depression, anxiety, and post-traumatic stress disorder (PTSD). He recommended that appellant be referred to an appropriate expert in psychiatry and neuropsychology. In a work capacity evaluation form (OWCP-5c), Dr. Kogan indicated that appellant could return to his usual job without restrictions.

On June 2, 2017 OWCP requested an addendum from Dr. Kogan to address whether appellant suffers any residuals of cognitive impairment, and, if not, when those residuals resolved.

In a June 8, 2017 addendum report, Dr. Kogan indicated that it was “more likely than not” that appellant’s current cognitive complaints were due to his co-morbid diagnoses of depression, anxiety, and PTSD rather than concussion or post concussive syndrome. He explained, however, that a definitive opinion regarding this matter would require a psychiatric assessment. Dr. Kogan also noted that it was difficult to establish a definitive date of resolution of appellant’s mild concussion and post concussive syndrome because patients recover at variable rates. He related that, based on the natural history of mild concussion and post concussive syndrome, the vast majority of patients were completely recovered by three months. Dr. Kogan opined that appellant’s residuals of mild concussion and post concussive syndrome “likely resolved” by June 17, 2015.

By decision dated June 9, 2017, OWCP expanded the acceptance of appellant’s claim to include mild concussion without loss of consciousness and post-concussion syndrome.

OWCP referred appellant’s case, along with an updated SOAF and a copy of the record, to Dr. Maureen O’Connor, a clinical psychologist and second-opinion examiner, for a neuropsychological evaluation in order to determine whether appellant continued to suffer residual cognitive dysfunction causally related to his accepted concussion and post-concussion syndrome conditions and whether he sustained any other neuropsychological conditions as a result of the accepted incident. In a June 30, 2017 report, Dr. O’Connor reviewed appellant’s medical records and documented a clinical interview where she recounted this history of the March 17, 2015 employment incident. She noted that appellant has a prior history of depression, anxiety, and PTSD and reported that appellant believed that the March 17, 2015 employment incident triggered his PTSD.

Dr. O’Connor provided examination findings from validity testing, cognitive testing, and emotional/psychological testing. She related that current findings suggested some minor inefficiency in cognitive domains of attention, problem solving, and recall of complex visual material. Dr. O’Connor indicated that appellant’s interview suggested current depression and anxiety. She further noted that it was difficult to interpret psychological testing due to an inconsistency in appellant’s responses. Dr. O’Connor responded “No” indicating that appellant did not suffer objective residual cognitive impairment causally related to his diagnosed mild concussion and post concussive syndrome. She explained that appellant’s current “minor cognitive inefficiencies ... are thought to be better explained by preexisting psychological conditions of depression, anxiety, and PTSD, and current additional stressors.” Dr. O’Connor further reported that appellant suffered a concussion or mild traumatic brain injury and explained that the expected course of recovery in mild traumatic brain injury was up to three months. She opined: “I would expect that [appellant’s] post concussive symptoms would have resolved by approximately June 17, 2015 given this literature.” In a work capacity evaluation form (OWCP-5c), Dr. O’Connor indicated that appellant could return to work without restrictions

By decision dated August 7, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective June 17, 2015. It found that the weight of medical opinion evidence rested with the opinions of Dr. Kogan and Dr. O'Connor, OWCP second-opinion examiners, who had determined in reports dated June 2, 8, and 30, 2017 that appellant no longer had any residuals or disability causally related to the March 17, 2015 employment injury. OWCP noted that both Dr. Kogan and Dr. O'Connor opined that appellant's work-related injury resolved no later than June 17, 2015.⁵

LEGAL PRECEDENT

Under FECA,⁶ once OWCP has accepted a claim and paid compensation, it has the burden of justifying termination or modification of compensation benefits.⁷ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁸ Its 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

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits because the second opinion physicians failed to address whether all of appellant's accepted conditions had resolved. In reports dated June 2 and 8, 2017, Dr. Kogan opined that appellant's concussion and post concussive syndrome conditions had likely resolved by June 17, 2015 and noted that appellant could return to his usual job without restrictions. He did not, however, address whether appellant's accepted left forehead contusion had resolved. The April 21 and June 9, 2017 SOAFs provided to Dr. Kogan noted that appellant's claim was accepted for left forehead contusion. In his June 2 and 8, 2017 reports, however, he failed to opine on whether appellant still suffered residuals or remained disabled as a result of his accepted forehead contusion. In addition, Dr. O'Connor, in her June 30, 2017 report addressed only whether

⁵ The evidence of record indicates that a pretermination notice was not issued.

⁶ *Supra* note 2.

⁷ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁸ *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁹ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁰ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹¹ *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

appellant continued to suffer residual cognitive dysfunction causally related to appellant's post-concussion syndrome conditions and whether he sustained any other neuropsychological conditions.

It is well established that medical reports must be based on a complete and accurate factual and medical background and that medical opinions not based on an accurate history and background are of limited probative value.¹² Because both second opinion physicians failed to address all of appellant's accepted conditions resulting from the March 17, 2015 employment injury, OWCP erred in terminating appellant's wage-loss compensation and medical benefits, effective June 17, 2015, based on these reports.¹³ The Board finds, therefore, that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 17, 2015.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 17, 2015.

¹² *J.R.*, Docket No. 12-1099 (issued November 7, 2012); *Douglas M. McQuaid*, 52 ECAB 382 (2001).

¹³ *See R.P.*, Docket No. 17-1133 (issued January 18, 2018) (the Board reversed OWCP's decision terminating appellant's wage-loss compensation and medical benefits where the referee medical examiner did not address all of the claimant's accepted conditions); *see also L.A.*, Docket No. 14-1138 (issued September 9, 2014).

ORDER

IT IS HEREBY ORDERED THAT the August 7, 2017 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 16, 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