

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

B.B., Appellant

and

**DEPARTMENT OF JUSTICE, FEDERAL
CORRECTIONAL INSTITUTION,
Greenville, IL, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 18-1121
Issued: January 8, 2019**

Appearances:

*Daniel M. Goodkin, 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
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 14, 2018 appellant, through counsel, filed a timely appeal from a February 23, 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 to consider the merits of the 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 February 23, 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 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 February 23, 2018.

FACTUAL HISTORY

On December 18, 2008 appellant, then a 43-year-old sports specialist, filed a traumatic injury claim (Form CA-1) alleging that, on November 28, 2008, a soccer ball struck her on the left side of her face while she was supervising a soccer tournament while in the performance of duty. She experienced headaches and ear and neck pain. Appellant stopped work and returned to light-duty work on January 12, 2009. On May 11, 2009 OWCP accepted appellant's claim for aggravation of cervical disc disease at C4-5, headache, and unspecified head injury. It paid appellant wage-loss compensation on the periodic rolls commencing February 16, 2010.⁴

OWCP proposed to terminate appellant's wage-loss compensation and medical benefits on September 25, 2012. It afforded appellant 30 days to respond.

On November 12, 2012 appellant provided additional medical evidence. In a report dated February 8, 2011, Dr. Naseer diagnosed C4-5 disc protrusion and radiculopathy, hearing loss, and postconcussive syndrome as causally related to the November 28, 2008 employment injury. He also indicated that the November 28, 2008 employment injury had aggravated appellant's underlying depression. Dr. Naseer found that appellant was totally disabled due to her work-related injuries.

By decision dated November 14, 2012, OWCP terminated appellant's wage-loss compensation and medical benefits as she no longer had residuals from her November 28, 2008 employment injury.

On December 11, 2012 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In a letter dated March 11, 2012, she asked that the request for an oral hearing be amended to a review of the written record. By decision dated May 30, 2013, OWCP's hearing representative found that OWCP had not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

⁴ In a report dated November 25, 2009, appellant's physician, Dr. Riaz A. Naseer, a Board-certified neurologist, opined that appellant had developed a new bulging disc in her neck at C4-5 based on a cervical spine magnetic resonance imaging (MRI) scan, and diagnosed cervical radiculopathy and subjective tinnitus. He recommended permanent light-duty restrictions.

On May 18, 2012 OWCP referred appellant for a second opinion evaluation with Dr. Patrick A. Hogan, neurologist. In his June 12, 2012 report, Dr. Hogan concluded that appellant could return to her date-of-injury position without restrictions. In a letter dated August 9, 2012, OWCP informed appellant that there was a conflict of medical opinion evidence between Drs. Naseer and Hogan. It referred her for an impartial medical examination with Dr. Panduranga Kini, a Board-certified neurologist. In his September 14, 2012 report, Dr. Kini diagnosed degenerative disc disease and found that this was not related to her November 28, 2008 employment injury. He opined that appellant could return to her date-of-injury position without restrictions.

On August 15, 2013 OWCP reentered appellant on the periodic rolls for wage-loss compensation, effective June 30, 2013.⁵

In reports dated January 23 and February 19, 2014, Dr. Naseer opined that appellant's diagnosed conditions of cervical radiculopathy, headache, tinnitus, hearing loss in the left ear, left ear pain, and postconcussion syndrome were medically connected to the employment injury on November 28, 2008. He also found that the work injury aggravated her preexisting injuries which involved the back, neck, and head. Dr. Naseer opined that appellant was totally disabled due to the November 28, 2008 employment injury.

In notes dated May 12 and December 2, 2015 as well as October 24, 2016, Dr. Naseer, reviewed electrodiagnostic testing and found that disc protrusion was attributed to head jerk when she sustained trauma to her head with the soccer ball on November 28, 2008. He again opined that appellant was totally disabled. Dr. Naseer completed a report on March 1, 2017 and diagnosed cervical radiculopathy, headache, tinnitus, hearing loss in the left ear, left ear pain, and postconcussion syndrome. He opined that these conditions were all medically connected to the November 28, 2008 employment injury by direct cause. Dr. Naseer also found that the employment injury aggravated her concentration issues, memory problems, and cognitive abilities. He found that appellant was totally disabled due to her November 28, 2008 employment injury.

On June 8, 2017 OWCP referred appellant for a second opinion evaluation with Dr. Charles Mannis, a Board-certified orthopedic surgeon. In his July 3, 2017 report, Dr. Mannis reviewed appellant's 2008 and 2012 MRI scans. He noted appellant's history of injury on November 28, 2008 and reported that, during his physical evaluation, appellant would not perform range-of-motion exercises as she was afraid of resulting pain. Dr. Mannis found sensory examination of the left hand was diffusely diminished to pinprick in all dermatomal spheres. He diagnosed chronic cervical syndrome with degenerative arthritis. Dr. Mannis noted that appellant had no objective findings and that symptoms were markedly disproportionate to the objective complaints. He concluded that being struck by the soccer ball on November 28, 2008 may have caused some cervical myositis, but was not responsible for any of the radiographic findings. Dr. Mannis determined that appellant had recovered from the injury with no work restrictions.

OWCP found a conflict of medical opinion evidence between Drs. Naseer and Mannis regarding appellant's ongoing work-related disability and residuals. In a letter dated October 2, 2017, it referred appellant, a SOAF, and a list of questions for an impartial medical examination with Dr. R. Peter Mirkin, a Board-certified orthopedic surgeon.

In a report dated October 23, 2017, Dr. Mirkin described appellant's November 28, 2008 employment injury of being struck in the face with a soccer ball. He reviewed appellant's diagnostic studies and medical treatment. Dr. Mirkin reported that on physical examination

⁵ Following the hearing representative's directives, OWCP referred appellant to Dr. Hogan on August 9, 2013. Dr. Hogan completed a supplemental report dated August 26, 2013. He opined that appellant had no evidence of a neurological disorder, that she might have sustained a mild facial contusion on November 28, 2008, and that no permanent conditions were involved. On November 13, 2013 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Hogan's report. On March 11, 2015 it referred appellant, a statement of accepted facts (SOAF), and list of questions to Dr. Anthony Collins, a Board-certified neurologist, for an impartial medical examination. Dr. Collins completed a report on April 17, 2015 and found that appellant's current symptoms were not related to her November 28, 2008 employment injury and that she had no residuals of her accepted employment injury and required no treatment for any of the accepted conditions.

appellant walked with an exaggerated antalgic gait and complained of pain when he lightly touched her head or neck, both of which are Waddell signs. He also found that she exhibited only five percent of normal cervical range of motion, that deep tendon reflexes were intact, and that motor and sensory examinations revealed no deficits. Dr. Mirkin diagnosed multilevel spondylitic disease based on x-rays. He opined that appellant's November 28, 2008 employment injury resulted in a strain injury to her cervical spine. Dr. Mirkin further noted that she developed degenerative disease "over the years" which was not related to her employment injury. He found no indication that appellant had disability as a result of her accepted employment injury and determined that she could return to work in her date-of-injury position without restrictions.

On December 21, 2017 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Mirkin's report. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

Counsel responded on January 2, 2018 and contended that Dr. Mirkin's report was not based on an accurate factual history as he did not rely on OWCP's acceptance of aggravation of cervical disc disease at C4-5, headache, and unspecified head injury, instead finding that she sustained a cervical strain. He further contended that Dr. Mirkin did not provide medical rationale in support of his opinion that appellant had no continuing disability or medical residuals as a result of her accepted November 28, 2008 employment injury.

By decision dated February 23, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective February 23, 2018. It found that Dr. Mirkin's report was entitled to the special weight of the medical evidence and established that appellant had no medical residuals or disability for work causally related to her November 28, 2008 employment injury.

LEGAL PRECEDENT

According to FECA, once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁶ OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁷ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁹ To terminate authorization for medical treatment, OWCP must establish that

⁶ See *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁷ See *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁸ See *R.P.*, *id.*; *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ See *R.P.*, *id.*; *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

appellant no longer has residuals of an employment-related condition which require further medical treatment.¹⁰

Section 8123(a) of FECA which provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.¹¹ 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.¹² When there exists opposing 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.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 February 23, 2018.

Appellant's attending physician, Dr. Naseer, continued to support her disability for work and ongoing medical treatment due to her accepted employment injuries and additional conditions. OWCP referred appellant for a second opinion evaluation with Dr. Mannis. In his July 3, 2017 report, Dr. Mannis found that appellant had no ongoing medical residuals or disability due to her November 28, 2008 employment injury. The Board finds that, due to the disagreement between Drs. Naseer and Mannis, OWCP properly referred appellant for an impartial medical examination with Dr. Mirkin to resolve the conflict of medical opinion evidence.

On October 23, 2017 Dr. Mirkin described appellant's November 28, 2008 employment injury and reviewed her medical history. He provided findings on physical examination and diagnosed multilevel spondylitic disease based on x-rays. Dr. Mirkin concluded that appellant's November 28, 2008 employment injury resulted only in a strain injury to her cervical spine. He further noted that she developed degenerative disease "over the years" which was not related to her employment injury. Dr. Mirkin found that appellant had no disability as a result of her accepted employment injury and that she could return to work in her date-of-injury position without restrictions.

The Board finds, however, that Dr. Mirkin's report is not entitled to the special weight of the medical evidence as it is not based on an accurate factual background and does not contain medical reasoning supporting the conclusions made in the report. He noted a diagnosis of cervical strain as a result of the accepted November 28, 2008 employment injury. However, as noted above, OWCP accepted appellant's claim for aggravation of cervical disc disease at C4-5,

¹⁰ See *R.P., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake, id.*

¹¹ 5 U.S.C. § 8123(a); see *R.P., id.*; *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009); *M.S.*, 58 ECAB 328 (2007).

¹² 20 C.F.R. § 10.321; *R.C.*, 58 ECAB 238 (2006).

¹³ See *R.P., supra* note 6; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

headache, and unspecified head injury. Dr. Mirkin did not explain why or how he believed that appellant's accepted conditions had resolved or were no longer related to the accepted employment injury. He did not accept the facts as presented in the SOAF in rendering his medical opinion. OWCP's procedures and Board precedent dictate that 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.¹⁴ As such, Dr. Mirkin's opinion is of insufficient probative value to carry the special weight of the medical evidence as an impartial medical examiner.¹⁵

The Board thus finds that OWCP erred in relying on his opinion as the basis to terminate wage-loss compensation and medical benefits for the accepted employment conditions.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective February 23, 2018.

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 8, 2019
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ See *M.D.*, Docket No. 18-0468 (issued September 4, 2018).

¹⁵ *R.D.*, Docket No. 17-0415 (issued April 13, 2018).