

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

R.E., Appellant)	
)	
and)	Docket No. 19-0404
)	Issued: July 5, 2019
DEPARTMENT OF AGRICULTURE, U.S.)	
FOREST SERVICE, Washington, DC, Employer)	
)	

Appearances:
Sally L. LaMacchia, 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
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 14, 2018 appellant, through counsel, filed a timely appeal from a November 19, 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 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 is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 9, 2018.

FACTUAL HISTORY

On May 17, 2016 appellant, then a 57-year-old branch chief, filed a traumatic injury claim (Form CA-1) alleging that on April 28, 2016 he sustained injuries to his head and left shoulder when he fell while in the performance of duty. He noted that he is paraplegic, and fell while transferring from his wheelchair to the toilet. On the reverse side of the claim form the employing establishment indicated that appellant stopped work on April 28, 2016 and returned to work on May 9, 2016.

On August 8, 2016 OWCP accepted appellant's claim for laceration without foreign body of other part of head, and postconcussional syndrome. Appellant received continuation of pay, beginning April 29, 2016, and OWCP placed him on the periodic compensation rolls effective June 16, 2016.

In a letter dated December 12, 2017, Dr. Syed Ahmed, a physical medicine and rehabilitation specialist, reported that, beginning December 12, 2017, appellant would be able to telework four hours per day, two days per week, and would remain disabled from work for the remaining three days a week. He noted that these restrictions were effective until appellant's follow-up evaluation on January 16, 2018.

On February 26, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and his medical record, to Dr. Stuart J. Gordon, a Board-certified orthopedic surgeon, for a second-opinion evaluation. Contemporaneously, OWCP referred appellant, along with a SOAF and medical record, to Dr. Taghi Kimyai-Asadi, a Board-certified neurologist, for a second-opinion evaluation.

In a March 20, 2018 report, Dr. Kimyai-Asadi reviewed the SOAF and medical record and performed an examination. He indicated that appellant had been diagnosed with cerebral concussion and scalp laceration. Dr. Kimyai-Asadi related that on evaluation appellant showed overt exaggeration and fictitious type of higher cortical dysfunctions, by answering questions close, but not to the point of accuracy. He noted that such pattern was highly suggestive of malingering, and there was no evidence of significant objective findings to suggest any lingering effect of the accepted employment incident and concussion. Dr. Kimyai-Asadi opined that all employment-related conditions had resolved, and that appellant's clinical examination, and his demeanor, are highly characteristic of malingering and fictitious disorder. He further opined that appellant did not require any additional medical treatment of his accepted employment-related injuries, and related that he was able to perform his federal employment duties without restrictions.

In a March 29, 2018 report, Dr. Gordon reviewed the SOAF and medical record and performed an examination. He related that there were no orthopedic issues stated in the SOAF, but he was still able to evaluate appellant regarding his case. Dr. Gordon indicated that appellant had a computerized tomography (CT) scan of his head on September 21, 2016, which was negative. He noted that on October 11, 2016 appellant was seen by Dr. Jesse Sadikman, a Board-

certified family practitioner, for an unrelated shoulder issue. Dr. Gordon indicated that appellant had prior complaints involving his alleged shoulder issues. He diagnosed degenerative disease of the shoulders, also noted appellant's preexisting paraplegia, childhood polio, and indicated no further orthopedic diagnosis.

In a report dated May 7, 2018, Dr. Ahmed indicated that appellant had persistent symptoms of traumatic head injury, and that he was unable to return to work due to memory loss. He further noted that appellant was unable to complete the cognitive tasks which were required to perform his federal employment duties, and related post-concussion subjective symptoms including brain fog, dizziness, headaches, and confusion. Dr. Ahmed diagnosed traumatic brain injury, headache, myofascial pain, cervicgia, chronic pain syndrome, and complete rotator cuff tear, and indicated that appellant's accepted employment-related injuries had not resolved.

On June 21, 2018 OWCP requested that Dr. Gordon provide a supplemental report addressing whether appellant had any orthopedic conditions that were caused or aggravated by the accepted April 28, 2016 employment incident. It also requested that, if he determined that an orthopedic condition was caused or aggravated by the accepted employment incident, he opine whether there continued to be residuals of the orthopedic conditions.

In a letter dated July 29, 2018, Dr. Gordon responded to OWCP's request indicating that appellant did not have orthopedic conditions that had been caused or aggravated by the accepted April 28, 2016 employment injury. In an accompanying work capacity evaluation (Form OWCP-5a), he checked the box marked "yes" when asked whether appellant was capable of performing his usual employment duties and also when asked whether appellant had reached maximum medical improvement (MMI).

On October 9, 2018 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on the weight of the medical evidence establishing that he no longer had any residuals of his accepted employment-related medical condition or continued disability from work as a result of the accepted April 28, 2016 employment incident. It afforded appellant 30 days to submit additional evidence or argument to contest the termination of his benefits.

In a statement dated November 8, 2018, counsel disagreed with the findings of both Drs. Kimyai-Asadi and Gordon.

By decision dated November 19, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective December 9, 2018. It found that the weight of medical evidence rested with Drs. Kimyai-Asadi and Gordon, and supported that appellant no longer had residuals of or disability from the accepted April 28, 2016 employment injury.

LEGAL PRECEDENT

According to FECA,⁴ once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.⁵ 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.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁸ To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.⁹

ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 9, 2018.

In his March 20, 2018 report, Dr. Kimyai-Asadi noted appellant's accepted conditions, but related that his evaluation showed overt exaggeration and fictitious type of higher cortical dysfunctions, which was highly suggestive of malingering. He explained that there was no evidence of objective findings to suggest lingering effects of the accepted employment-related conditions. Dr. Kimyai-Asadi opined that all employment-related conditions had resolved, and that appellant's clinical examination, and his demeanor, are highly characteristic of malingering and fictitious disorder. He further opined that appellant did not need further medical treatment of his accepted employment-related injuries, and related that he was able to perform his federal employment duties without restrictions.

While OWCP did not accept that appellant sustained an orthopedic condition as a result of his April 28, 2016 employment injury, it referred appellant to Dr. Gordon for evaluation of his orthopedic status. In his March 29, 2018 report, Dr. Gordon indicated that appellant had a CT scan of his head on September 21, 2016, which came back negative. He noted that on October 11, 2016 appellant was seen by Dr. Jesse Sadikman, a Board-certified family practitioner, for an unrelated shoulder issue. Dr. Gordon indicated that appellant had degenerative disease of the shoulders, but

⁴ *Supra* note 2.

⁵ *N.G.*, Docket No. 18-1340 (issued March 6, 2019); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *S.B.*, Docket No. 18-0700 (issued January 9, 2019); *see R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989).

⁷ *N.G.*, *supra* note 5; *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *N.G.*, *id.*; *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ *S.B.*, *supra* note 6; *see R.P.*, *supra* note 6; *James F. Weikel*, 54 ECAB 660 (2003).

that his shoulder issues were unrelated to the accepted April 28, 2016 employment incident. In his supplemental report, he indicated that appellant did not have any orthopedic conditions that were caused or aggravated by the accepted April 28, 2016 employment incident. In an accompanying work capacity evaluation (Form OWCP-5a), Dr. Gordon checked the box marked “yes” when asked whether appellant was capable of performing his usual employment duties and also when asked whether appellant had reached MMI.

The Board finds that OWCP properly accorded the weight of medical opinion with Drs. Kimyai-Asadi and Gordon who reported that appellant no longer had residuals or disability as a result of the April 28, 2016 employment injury. Drs. Kimyai-Asadi and Gordon based their opinions on a proper factual and medical history and physical examination findings and provided medical rationale for their opinion that appellant did not have a current residual injury or work limitations. They opined that appellant’s current symptoms were either malingering or fictitious, or unrelated to the April 28, 2016 employment incident. The Board finds that Drs. Kimyai-Asadi and Gordon provided well-rationalized opinions based on their examinations and the medical evidence of record that appellant’s accepted conditions had resolved and he was no longer disabled from his April 28, 2016 employment injury. Accordingly, OWCP properly relied on their March 20 and 29, 2018 second-opinion reports in terminating appellant’s wage-loss compensation and medical benefits for the April 28, 2016 employment injury.¹⁰

In his May 7, 2018 report, Dr. Ahmed indicated that appellant had persistent symptoms of traumatic head injury, and that he was unable to return to work due to memory loss. He further noted that appellant was unable to complete the cognitive tasks that he needed in his federal employment capacity, and related post-concussion subjective symptoms including brain fog, dizziness, headaches, and confusion. Dr. Ahmed diagnosed traumatic brain injury, headache, myofascial pain, cervicgia, chronic pain syndrome, and complete rotator cuff tear, and indicated that his accepted employment-related incident had not resolved. However, he did not opine through rationalized medical opinion evidence, that appellant continued to have residuals or disability due to his accepted April 28, 2016 employment injury. Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.¹¹ Dr. Ahmed’s opinion regarding causation is conclusory in nature as he failed to explain how the April 28, 2016 employment injury resulted in additional diagnosed conditions.¹² The Board finds, therefore, that this medical evidence is insufficient to overcome the weight of the medical evidence given to the second-opinion evaluations in terminating appellant’s wage-loss compensation and medical benefits for the April 28, 2016 employment injury.¹³

¹⁰ *N.G.*, *supra* note 5; *see A.F.*, Docket No. 16-0393 (issued June 24, 2016).

¹¹ *D.H.*, Docket No. 18-1159 (issued February 15, 2019).

¹² *K.K.*, Docket No. 18-1209 (issued March 7, 2019).

¹³ *See N.G.*, *supra* note 5; *see also J.P.*, Docket No. 16-1103 (issued November 25, 2016).

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 9, 2018.

ORDER

IT IS HEREBY ORDERED THAT the November 19, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 5, 2019
Washington, DC

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

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

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board