

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

_____)	
L.C., Appellant)	
)	
and)	Docket No. 18-1759
)	Issued: June 26, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Philadelphia, PA, Employer)	
_____)	

Appearances:
Thomas R. Uliase, 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
JANICE B. ASKIN, Judge

JURISDICTION

On September 20, 2018 appellant, through counsel, filed a timely appeal from a June 11, 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, following the June 11, 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 additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective October 15, 2017; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals after October 15, 2017.

FACTUAL HISTORY

On October 9, 2014 appellant, then a 39-year-old customer service supervisor, filed a traumatic injury claim (Form CA-1) alleging that on that date she fell on an uneven floorboard and landed on her front side while in the performance of duty. She stopped work on the date of injury and returned to work for four hours per day with restrictions on January 29, 2015. OWCP initially accepted the claim for chest wall contusion, abdominal wall contusion, and contusions of multiple sites.

Appellant stopped work again on March 24, 2015. OWCP subsequently accepted a recurrence of total disability beginning March 24, 2015 and expanded acceptance of the claim to include left ankle sprain, lumbosacral sprain, left shoulder sprain, bilateral wrist sprain, left thigh contusion, left hip and thigh sprain, left knee contusion, left knee sprain, left arm contusion, aggravation of degeneration thoracic or thoracolumbar intervertebral disc, and aggravation of degeneration lumbar or lumbosacral intervertebral disc. It paid appellant wage-loss compensation on the periodic rolls commencing July 16, 2015.

Dr. Onyeama Obidi Anakwe, an osteopath and family practitioner, and Dr. Mark D. Avart, an osteopath and Board-certified orthopedic surgeon, treated appellant following her October 9, 2014 employment injury. In a January 9, 2017 report, Dr. Avart indicated that appellant continued to have pain in her low back, left hip, and left shoulder related to the October 9, 2014 trauma. In a January 19, 2017 report, Dr. Anakwe provided impressions of lumbosacral strain/sprain/contusion with levoscoliosis of the lumbar spine; left paracentral disc herniation T11-12; biforaminal disc bulging L4-5; broad-based disc herniation L5-S1 with mild left subacute radiculopathy plus mild right L4 radiculopathy and radicular symptoms; left shoulder strain/sprain/contusion with mild productive change at the acromioclavicular (AC) joint; supraspinatus tendinosis; and left hip strain/sprain/contusion with bursitis. He opined that appellant was disabled secondary to her employment injury.

In a February 1, 2017 report, Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon and OWCP second opinion physician, reviewed a statement of accepted facts (SOAF) and a copy of the medical record provided by OWCP. He reported examination findings and noted that there were no other additional diagnoses. Dr. Didizian opined that appellant no longer had residuals of the original injury, noting that the diagnostic studies were not compatible with traumatic pathology. He indicated that physical examination of her lower back, left hip, left shoulder, and the upper and lower extremities did not provide any objective orthopedic findings or neurologic deficits to substantiate appellant's subjective complaints. Dr. Didizian opined that appellant had reached maximum medical improvement and that she could return to work without restrictions. He further opined that further medical treatment related to the employment injury was no longer necessary.

OWCP found that a conflict of medical opinion between Drs. Anakwe and Avart, appellant's attending physicians, and Dr. Didizian, an OWCP second opinion physician, as to whether she had any residuals of the accepted employment injury, whether she could return to work, and whether additional medical care was necessary. To resolve the conflict, it selected Dr. Menachem Meller, a Board-certified orthopedic surgeon, to perform an impartial medical examination.

In a May 23, 2017 report, Dr. Meller reviewed the medical record, diagnostic studies, and the SOAF. Based upon appellant's physical examination, he determined that she had normal cervical and lumbar lordosis, normal fluid body movements, normal thoracic kyphosis, level shoulders, and a level pelvis. Appellant had no bruising or tenderness to suggest ongoing conditions related to the accepted contusions or left shoulder sprain. She also had normal contour to the shoulder, the shoulder girdle, the arm, the forearm, and the hand. Both wrists had normal symmetric appearance, range of motion testing was conducted, and Watson's, Shuck's, Finklestein, and basal joint grind tests were negative. There was no tenderness at the scaphoid tubercle, the snuff box, or the remaining carpals. Dr. Meller concluded that he found no objective evidence of bilateral wrist sprain residuals. In regard to the accepted lumbar conditions, he related that appellant's lumbar symptoms were at the beltline, primarily at the posterior superior iliac spine trigger point, which was a common ubiquitous trigger site in the absence of injury. As there were no reproducible tenderness or guarding on palpation, Dr. Meller opined that her complaints were subjective in nature. Range of motion testing of the lumbar spine revealed forward flexion to the tibial tubercle with a soft end point, which was inconsistent with the seated trunk relative to the thigh and was consistent with a positive Waddell's distraction sign. Extension was minimal, and left and right lateral bending was to the lateral femoral condyle. There were no objective residuals regarding aggravation of degeneration thoracic or thoracolumbar intervertebral disc or aggravation of degeneration lumbar or lumbosacral intervertebral disc. Examination findings of the knee, hindfoot, midfoot and forefoot, and ankle were negative for any evidence of ongoing left knee contusion, left knee sprain, or left ankle sprain.

Based on appellant's extensive workup, Dr. Meller opined that appellant's findings were normal for her age. He opined that the residuals relating to the accepted employment-related conditions had ceased. Dr. Meller opined that appellant was capable of returning to her preinjury occupation without any restrictions, noting that her only limitations were those one would expect to occur in middle age in the absence of injury or illness. He indicated that the accepted conditions were not structural in nature, but rather bumps and bruises. Additionally, the mechanism of injury, a fall from a standing position, was inherently low energy. Dr. Meller indicated that appellant had no permanent conditions and all injuries had completely resolved. In the accompanying June 1, 2017 work capacity evaluation (Form OWCP-5c), he indicated that she was capable of performing her usual job without restrictions.

On July 7, 2017 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on Dr. Meller's May 23, 2017 report. It afforded her 30 days to submit additional evidence or argument.

In a July 12, 2017 letter, counsel argued that Dr. Meller should not have been selected as the impartial medical examiner (IME) as he had documented bias. He cited to the Board's decision in *J.S.*, Docket No. 10-2198 (issued July 26, 2011). Counsel further argued that Dr. Meller's opinion should not be accorded the special weight as an IME. In a May 23, 2017 statement,

appellant described her examination with Dr. Meller. She also provided written comments on a copy of his May 23, 2017 report.

Additional progress reports from Dr. Avart and Dr. Anakwe were received along with physical therapy notes documenting appellant's progress. Dr. Anakwe continued to opine that she was disabled secondary to her employment injury.

In a July 17, 2017 report, Dr. Avart reported examination findings, reviewed Dr. Meller's report and disagreed with his examination findings. He related that appellant claimed that she did not receive many of the tests Dr. Meller indicated that he had performed. Dr. Avart opined that she had ongoing sequelae in her back and hip related to the October 9, 2014 employment injury and that she was not capable of returning to work without restrictions. In an October 2, 2017 report, he indicated that appellant had a herniated disc at L5-S1 that was part of the injury complex in addition to a pinched nerve with lumbar radiculopathy and post-traumatic left hip sprain with meralgia paresthetica and bursitis. Dr. Avart opined that she was disabled because of those conditions.

By decision dated October 12, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits, effective October 15, 2017. It accorded special weight of the medical evidence to Dr. Meller's May 23, 2017 IME report.

On October 23, 2017 appellant, through counsel, requested a hearing, which was held by video on March 28, 2018. Appellant noted that she had retired from the employing establishment on November 13, 2017. She described her employment history and duties as well as her October 9, 2014 employment injury, medical care, and current symptoms. Appellant alleged that Dr. Meller had failed to provide a proper examination. She indicated that he did not perform the tests that were listed in his report, noting that he only touched her forearms and leg. Appellant indicated that her clothes were on the entire time and that Dr. Meller could not see her bruises or her knees. Counsel alleged that Dr. Meller performed a deficient examination, that he ignored objective evidence, and that he had documented bias that had been found in other venues. He noted that, in his objection to the proposed termination, he had previously cited to the Board's decision in *J.S.*, Docket No. 10-2198 (issued July 26, 2011).

Prior to and after the hearing, OWCP received physical therapy notes setting forth appellant's progress. It also continued to receive progress reports from Dr. Anakwe wherein he continued to diagnose lumbosacral strain/sprain/contusion, levoscoliosis of the lumbar spine, left paracentral disc herniation T11-12; biforaminal disc bulging L4-5; broad-based disc herniation L5-S1; mild left subacute radiculopathy, mild right L4 radiculopathy; left shoulder strain/sprain/contusion, mild productive change at the AC joint; suprapinatus tendinosis; left hip strain/sprain/contusion, plus bursitis; and left knee strain/sprain/contusion. Dr. Anakwe also continued to opine that appellant was disabled secondary to the employment injury.

In an October 30, 2017 report, Dr. Avert maintained that appellant was disabled from work because of her back and hip injuries and ongoing sequelae. He noted that she had been seen on a monthly basis and received treatment since April 27, 2015.

By decision dated June 11, 2018, an OWCP hearing representative affirmed OWCP's October 12, 2017 decision. She concluded that OWCP had met its burden of proof to terminate

appellant's wage-loss and medical benefits, effective October 15, 2017, and that appellant had not established continuing disability. The hearing representative found that there was no evidence that Dr. Meller was unqualified to render an impartial opinion at the time he examined appellant or that his opinion was biased. She further found that appellant presented no evidence "that a duly appointed physician with proper credentials did not perform at least the minimally required components of a medical examination."

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁴ After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁸

Section 8123(a) 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 who shall make an examination.⁹ The implementing regulations provides that, if a 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. 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.¹⁰ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME 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.¹¹

⁴ A.G., Docket No. 18-0749 (issued November 7, 2018); C.S., Docket No. 18-0952 (October 23, 2018); *see S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁵ A.G., *id.*; C.S., *id.*; *see I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁶ R.R., Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284 (1988).

⁷ L.W., Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ R.P., Docket No. 18-0900 (issued February 5, 2009); *James F. Weikel*, 54 ECAB 660 (2003).

⁹ 5 U.S.C. § 8123(a).

¹⁰ 20 C.F.R. § 10.321.

¹¹ A.G., *supra* note 4; C.S., *supra* note 4; R.C., 58 ECAB 238 (2006).

Under the Federal (FECA) Procedure Manual, the Director has exercised discretion to implement practices pertaining to the selection of the IME. Unlike second opinion physicians, the selection of referee physicians is made from a strict rotational system. OWCP will select a physician who is qualified in the appropriate medical specialty and who has no prior connection with the case.¹²

Additionally, a claimant may request to participate in the selection of the referee physician or may object to the physician selected under the medical management application (MMA). In such instances, the claimant must provide valid reasons for any request or objection to the claims examiner. The right of the claimant to participate in the selection of the medical referee is not unqualified. He or she must provide a valid reason, not limited to: (a) documented bias by the selected physician; (b) documented unprofessional conduct by the selected physician; (c) a female claimant who requests a female physician when gynecological examination is required; or (d) a claimant with a medically documented inability to travel to the arranged appointment when an appropriate specialist may be located closer. When the reasons are considered acceptable, the claimant will be provided with a list of three specialists available through the MMA. If the reason offered is determined to be invalid, a formal denial will issue if requested.¹³

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective October 15, 2017.

OWCP accepted that appellant sustained chest wall contusion, abdominal wall contusion, contusions of multiple sites, left ankle sprain, lumbosacral sprain, left shoulder sprain, bilateral wrist sprain, left thigh contusion, left hip and thigh sprain, left knee contusion, left knee sprain, left arm contusion, aggravation of degeneration thoracic or thoracolumbar intervertebral disc, and aggravation of degeneration lumbar or lumbosacral intervertebral disc as a result of her October 9, 2014 employment injury. It determined that a conflict in medical opinion evidence arose between her attending physicians Drs. Anakwe and Avart and Dr. Didizan, an OWCP second opinion physician, as to whether she continued to have residuals or disability due to the accepted conditions.

OWCP referred appellant to Dr. Meller for an impartial medical examination. Appellant was notified of the selection and attended the scheduled examination. At that time she did not raise any objection to the selection of Dr. Meller. The first time that appellant raised this issue was after OWCP proposed to terminate her benefits, well after her impartial medical examination. As to the timeliness of an objection the selection of an IME, the Board has held that objections

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (July 2011).

¹³ *Id.* at Chapter 3.500.4(f).

raised after the examination by the referee physician are insufficient to establish improper selection.¹⁴ Thus, the Board finds that OWCP properly selected Dr. Meller as the IME.¹⁵

In his May 23, 2017 report, Dr. Meller noted appellant's history, reviewed the medical record, and noted examination findings. He described her examination in great detail regarding all affected body parts. Dr. Meller indicated that appellant's findings were normal for her age and that there were no objective residuals of the employment injury based upon physical examination or diagnostic tests. He opined that she was capable of returning to her preinjury occupation without restrictions, noting that her only limitations were those one would expect to occur in middle age in the absence of injury or illness. Dr. Meller concluded that all of appellant's accepted employment-related conditions had completely resolved.

The Board finds that Dr. Meller's opinion is entitled to special weight as an IME. Dr. Meller's report was sufficiently well-rationalized and based upon a proper factual background.¹⁶ OWCP properly relied upon his report in finding that appellant's employment-related conditions had resolved. Dr. Meller examined her, reviewed her medical records, and reported an accurate history. He indicated that appellant's accepted conditions had resolved and that her current findings and limitations were those one would expect to occur in middle age in the absence of injury or illness. Because Dr. Meller's report established that appellant no longer had residuals or disability related to her accepted employment-related conditions, the Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.¹⁷

After receiving OWCP's notice of proposed termination, appellant submitted additional reports from Dr. Anakwe and Dr. Avart. However, both physicians were on one side of the conflict which Dr. Meller had resolved. The Board has held that reports from a physician who was on one side of a medical conflict are insufficient to overcome the special weight accorded to the IME, or to create a new conflict.¹⁸

The Board, therefore, finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective October 15, 2017.

LEGAL PRECEDENT -- ISSUE 2

When OWCP properly terminates compensation benefits, the burden shifts to appellant to establish continuing residuals or disability after that date, causally related to the accepted

¹⁴ See *J.C.*, Docket No. 08-1464 (issued September 29, 2009) (objecting after the scheduled examination, after the referee physician's medical opinion, and after OWCP issued a decision based on that opinion was clearly too late to object to the selection); *M.S.*, Docket No. 09-0727 (issued July 23, 2009).

¹⁵ As appellant did not timely object to the IME's selection, her allegation that Dr. Meller is biased will not be addressed.

¹⁶ See *D.M.*, Docket No. 17-1052 (issued January 24, 2019).

¹⁷ See *D.M.*, *id.*; *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹⁸ See *C.L.*, Docket No., 18-1379 (issued February 5, 2019); *I.J.*, 59 ECAB 408 (2008).

employment injury.¹⁹ To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such causal relationship.²⁰

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established continuing residuals or disability on or after October 15, 2017 causally related to her accepted October 9, 2014 employment injury.

Dr. Anakwe continued to submit progress reports and opine that appellant was disabled secondary to the employment injury. Dr. Avert also maintained, in an October 30, 2017 report, that she was disabled from her job because of the back and hip injuries sustained and ongoing sequelae. However, neither physician provided medical rationale and their opinions are, therefore, of diminished probative value.²¹ Also, as previously noted, both Dr. Anakwe and Dr. Avert had been on one side of the conflict which Dr. Meller had resolved.²² The Board has held that reports from a physician who was on one side of a medical conflict are insufficient to overcome the special weight accorded to the IME, or to create a new conflict.²³ Appellant, therefore, has not met her burden of proof to establish continuing residuals or disability after October 15, 2017.

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 October 15, 2017. The Board further finds that she has not met her burden of proof to establish continuing employment-related disability or residuals after October 15, 2017.

¹⁹ See *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *C.S.*, Docket No. 18-0952 (issued October 23, 2018); *Manuel Gill*, 52 ECAB 282 (2001).

²⁰ *Id.*

²¹ See *C.S.*, *supra* note 19.

²² See *R.B.*, Docket No. 16-1481 (issued May 2, 2017).

²³ See *C.L.*, *supra* note 18; *I.J.*, 59 ECAB 408 (2008).

ORDER

IT IS HEREBY ORDERED THAT the June 11, 2018 decision of the Office Workers' Compensation Programs is affirmed.

Issued: June 26, 2019
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board