

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

K.L., Appellant	)	
	)	
and	)	<b>Docket No. 19-0729</b>
	)	<b>Issued: November 6, 2019</b>
<b>DEPARTMENT OF HOMELAND SECURITY,</b>	)	
<b>TRANSPORTATION SECURITY</b>	)	
<b>ADMINISTRATION, Spokane, WA, Employer</b>	)	
	)	

*Appearances:*  
Lonnie Boylan, for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
CHRISTOPHER J. GODFREY, Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On February 20, 2019 appellant, through her representative, filed a timely appeal from a November 26, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## ISSUE

The issues is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 26, 2018, as she no longer had residuals or disability causally related to her accepted employment injuries.

## FACTUAL HISTORY

On May 3, 2017 appellant, then a 54-year-old cargo inspector, filed a traumatic injury claim (Form CA-1) alleging that on May 1, 2017, she injured her lower back, neck, and left shoulder when lifting a security dog down a roller dolly while in the performance of duty. She stopped work on May 1, 2017 and has not returned to work. OWCP accepted the claim for a left shoulder strain, a lumbar strain, and a cervical spine strain on May 19, 2017,<sup>3</sup> and paid wage-loss compensation on the supplemental rolls beginning June 16, 2017.

The record contains reports and disability notes from Dr. Janet M. Walker, a treating Board-certified family practitioner. In reports dated throughout May, June, and July 2017, Dr. Walker diagnosed a lumbar strain and a trapezius strain, and found appellant totally disabled from work. She noted appellant's condition was gradually improving. Dr. Walker referred appellant to Northwest Orthopaedic Specialists, where she was treated by Robert Bazzano, a physician assistant, who recommended lumbar injections.

A June 8, 2017 magnetic resonance imaging (MRI) scan taken on appellant's spine revealed: (1) L4-5 new mild anterolisthesis of L3 on L4, diffuse disc bulge, severe hypertrophic facet osteoarthritis, which had markedly progressed since the prior study, and mild-to-moderate neural foraminal stenosis on the left and mild on the right; (2) the L5-S1 disc was moderately narrowed and dehydrated, unchanged mild retrolisthesis of L5 on S1, a diffuse degenerative disc bulge which contacted the S1 nerve roots, moderate hypertrophic facet osteoarthritis, right greater than left, mild bilateral subarticular narrowing, moderate bilateral neural foraminal stenosis; and (3) L3-4 minimal retrolisthesis of L3 on L4, and mild diffuse disc bulge; and (4) 4.5 cm right ovarian cyst.

In a July 7, 2017 letter addressed to Dr. Walker, OWCP requested that she provide an updated narrative report, and inquired as to her opinion of when appellant would be able to perform light-duty work, when appellant would be able to return to full duty, and the course of treatment for the following one to two months.

In a July 13, 2017 report, Dr. Walker noted that appellant's condition was gradually worsening. She continued to recommend physical therapy, prescribed pain killers, and considered injections as a possible mode of future treatment.

In a July 14, 2017 response to OWCP, Dr. Walker explained that she could not give an anticipated date of return to any type of duty, and that appellant was to continue to undergo

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<sup>3</sup> Appellant has a prior accepted traumatic injury claim for a lumbar sprain and a displacement of a lumbar intervertebral disc without myelopathy in connection with an incident occurring on September 11, 2003 under OWCP File No. xxxxxx154.

physical therapy and possibly receive injections into her back. She noted that appellant had a history of work-related back injuries, including a bulging L4-5 disc and intermittent sciatica, but that this injury “seems to be different.” Dr. Walker concluded by indicating that a functional capacity evaluation (FCE) would be premature as appellant had not completed sufficient conservative therapy.

In reports dated from August 2017 through January 2018, Dr. Walker noted that appellant’s condition had not changed. She continued to recommend physical therapy and steroidal injections into appellant’s back, and kept her off work. Dr. Walker noted that appellant refused oral steroids and injections for fear of adverse effects and of needles.

In a February 6, 2018 FCE, Holly David, a physical therapist, found that appellant’s safe functional abilities did not meet job demands. She noted that appellant was unable to complete her FCE due to severely limited abilities, significant pain reports and behaviors, and decreased activity/cardiovascular tolerance. Ms. David noted that appellant may not be capable of performing competitive employment unless she was frequently permitted to be in a reclining position. Finally, she reported that appellant showed consistent performance and was fully cooperative in the FCE, that the subjective input matched objective data, and that appellant demonstrated consistency of effort.

In a letter dated February 22, 2018, Dr. Walker noted that appellant declined facet joint injections because she was “so deathly afraid of needles” and declined a facet joint injection with steroids under sedation because she was afraid of possible palpitations or cardiac arrhythmia from the steroids. She wrote that appellant had not been returned to any work, opined that she would never return to full-duty work, indicated that no further treatment was planned, and noted that her condition had plateaued because she had declined all possible forms of treatment. A subsequent April 17, 2018 letter and May 3, 2018 report from Dr. Walker reiterated the conclusions set forth in the February 22, 2018 letter.

On May 2, 2018 appellant was separated from the employing establishment.

In a May 3, 2018 follow-up report, Dr. Walker opined that appellant would reach maximum medical improvement (MMI) at the next visit. She noted that appellant spent most of her time in a recliner and that her condition was gradually improving. Dr. Walker opined that appellant would never be able to return to full duty, and indicated that appellant should continue a home exercise program.

In a June 7, 2018 follow-up report, Dr. Walker wrote that appellant’s condition was unchanged and that she had reached MMI. She noted that appellant had permanent physical limitations on spending time on her feet and must rest in a recliner for the majority of the day. Dr. Walker opined that appellant would never be able to return to full-duty work. In an accompanying duty status report (Form CA-17), she indicated that appellant was unable to return to work. Dr. Walker closed her practice subsequent to this visit.

On June 15, 2018 OWCP referred appellant for a second opinion evaluation with an orthopedic specialist for an opinion regarding the status of her work-related conditions and work capacity.

In a July 9, 2018 report, Dr. Clarence Fossier, a Board-certified orthopedic surgeon, reviewed a statement of accepted facts (SOAF), and extensively described the medical evidence of record. He noted the findings from the June 7, 2017 MRI scan and noted the accepted employment-related conditions. Dr. Fossier also noted that appellant had a prior employment injury on September 3, 2003, when she sustained a herniated disc at L5-S1. Physical examination revealed that appellant could march in place with normal muscle recruitment and relaxation, and that she was able to stand on each leg independently with a negative Trendelenburg sign. Using the long-arm goniometer, appellant had a combined thoracolumbar lateral flexion to her right of thirteen degrees and to her left of eighteen degrees. From the side, she stood with a five-degree forward list. Appellant could forward flex to 30 degrees, and extended only to neutral. Deep tendon reflexes were +2 and brisk and symmetric, and manual motor testing scored 5/5 in all muscle groups tested. Seated straight leg raising reproduced low back pain on the right at 80 degrees, and on the left at 60 degrees.

Dr. Fossier diagnosed a history of a cervical spine sprain, resolved; a strain of the left shoulder and upper arm, accepted, resolved; and strain of muscle, fascia, and tendon of the lower back, not resolved. He opined that there were no objective findings to support appellant's continuing work-related condition, and that the changes noted on her magnetic resonance imaging (MRI) scan had progressed typical with her age. Dr. Fossier reported that she was incapable of performing the duties of her former position. He reviewed the FCE, noted that appellant's perception of her disability was significant and found the FCE results were consistent with her perception. Dr. Fossier indicated that her perceived disability could not be explained on an objective basis. He also opined that appellant was valid during the FCE, but had acted within the level of her perceived disability. In Dr. Fossier's opinion, however, she could work eight hours per day, five days per week, in some capacity within limitations.

Dr. Fossier opined that her disability was causally related to the accepted work injury and that he believed her perceived disability could not be causally related to her work injury. He explained that appellant may have had an "inferred diagnosis" of a lumbar strain/sprain, which was superimposed on preexisting degenerative changes, and that he could not prove the existence of the strain/sprain through objective methods. Dr. Fossier opined that she had reached MMI. He concluded that appellant's perception was that she was incapable of working, and therefore, he recommended against vocational rehabilitation because he doubted it would be effective. In an accompanying work capacity evaluation form (Form OWCP-5c), Dr. Fossier indicated that she could work full time in a sedentary position.

On August 29, 2018 OWCP issued a letter to Dr. Fossier requesting clarification of his report. Specifically, it asked whether there were objective measures of appellant's physical limitations from the work-related disability, and which restrictions, if any, were due solely to the original injury based on objective findings.

In a response letter dated September 7, 2018, Dr. Fossier opined that the changes in her MRI scan were from preexisting degenerative conditions, and were unrelated to the employment injury. He opined that, on a strictly objective basis, there was no reason to limit her work capability, and there were no restrictions based on her work-related injury. In an accompanying work capacity evaluation form (Form OWCP-5c), Dr. Fossier indicated that appellant could work full time without restrictions.

On October 23, 2018 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits based on Dr. Fossier's July 9 and September 7, 2018 reports.

Following the notice, appellant submitted a statement containing her disagreements with Dr. Fossier's report.

By decision dated November 26, 2018, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective that day. It found that Dr. Fossier's opinion as to her disability status and work capabilities constituted the weight of the medical opinion evidence.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim and pays compensation, it has the burden to justify modification or termination of an employee's benefits.<sup>4</sup> After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>5</sup>

OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>7</sup> 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.<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup> 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

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<sup>4</sup> 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).

<sup>5</sup> *J.K.*, Docket No. 18-1250 (issued June 25, 2019); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>6</sup> See *id.*; *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>7</sup> *J.K.*, *supra* note 5; *Kathryn E. DeMarsh*, 56 ECAB 677 (2005).

<sup>8</sup> *Id.*; *James F. Weikel*, 54 ECAB 660 (2003).

<sup>9</sup> 5 U.S.C. § 8123(a); *A.E.*, Docket No. 18-0891 (issued January 22, 2019); *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).

<sup>10</sup> 20 C.F.R. § 10.321; *I.L.*, Docket No. 18-1399 (issued April 1, 2019); *R.C.*, 58 ECAB 238 (2006).

opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>11</sup>

### **ANALYSIS**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 26, 2018.

In support of her claim, appellant submitted a series of medical notes from her attending physician, Dr. Walker. In medical reports dated February 22 and April 11, 2018, Dr. Walker opined that based upon valid and consistent FCE results appellant was permanently not released to any work and that she would never be able to return to full duty. She also explain that she may not be capable of competitive employment unless she was allowed a frequent reclining position.

In a report dated July 9, 2018, Dr. Fossier noted appellant's history of injury and the accepted conditions. He explained that she had reached MMI and that her subjective belief regarding her disability was the cause of her disability, as the objective methods did not support the proposition that her work-related injuries were the cause of disability. Dr. Fossier also explained that the objective diagnostic findings did not show a cause for appellant's complaints of ongoing pain, and that if she had sprain/strain-type injuries, there were no objective findings to support the existence of these injuries.

In an addendum report dated September 7, 2018, Dr. Fossier clarified his opinion there was no reason to limit her work capability, and there were no restrictions solely based on her work-related injury. In an accompanying work capacity evaluation form (Form OWCP-5c), he indicated that appellant was capable of working full duty, as she required no restrictions as a result of any work-related condition.

Appellant's treating physician and OWCP's second opinion physician disagreed regarding her ongoing medical conditions and her ability to return to full-duty work. As such, the Board finds that a conflict of medical opinion exists relative to these issues. OWCP should have resolved the conflict of medical opinion evidence before terminating compensation.<sup>12</sup> As OWCP failed to resolve the conflict of medical opinion evidence, the Board finds that it failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

### **CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 26, 2018.

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<sup>11</sup> See *A.E.*, *supra* note 9; *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>12</sup> *P.P.*, Docket No. 17-0023 (issued June 4, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 26, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 6, 2019  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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