

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

_____)	
B.S., Appellant)	
)	
and)	Docket No. 19-0711
)	Issued: October 17, 2019
U.S. POSTAL SERVICE, POST OFFICE, Albany, OR, Employer)	
_____)	

Appearances:
Howard L. Graham, 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 February 19, 2019 appellant, through counsel, filed a timely appeal from a January 11, 2019 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 January 11, 2019 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 has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective February 15, 2018, as she no longer had residuals or disability causally related to her accepted April 11, 2017 employment injury; and (2) whether appellant has met her burden of proof to establish employment-related continuing residuals or disability on or after February 15, 2018.

FACTUAL HISTORY

On April 24, 2017 appellant, then a 50-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 11, 2017 she sustained a left shoulder and upper arm injury when she lifted a heavy parcel from her delivery vehicle while in the performance of duty. She experienced the immediate onset of severe left shoulder pain, but continued working through April 14, 2017, when she stopped work and did not return. Appellant received continuation of pay (COP) through May 26, 2017.

On August 31, 2017 OWCP accepted the claim for strain of muscle, fascia, and tendon at neck level, initial encounter.

In reports dated August 31, 2017, Dr. Jeffrey Johnson, a Board-certified neurosurgeon, provided a history of injury and treatment. He noted an impression of left upper extremity pain and nonspecific degenerative changes. Dr. Johnson held appellant off work.

In a September 13, 2017 report, Dr. Johnson opined that a May 21, 2017 magnetic resonance imaging (MRI) scan of the cervical spine showed "chronic-appearing degenerative changes at C5-6, including spondylosis," retrolisthesis, and pronounced bilateral foraminal narrowing with possible C6 nerve root impingement. He recommended a C5-6 epidural steroid injection to clarify how the April 11, 2017 employment injury had contributed to appellant's degenerative disc disease and foraminal stenosis. Dr. Johnson held appellant off work through October 31, 2017.

A September 20, 2017 MRI scan of the left shoulder demonstrated a partial thickness undersurface tear versus tendinopathy of the anterior fibers of the supraspinatus tendon without retraction of muscle atrophy, subscapularis tendinopathy, and possible subdeltoid bursitis.

In a report dated October 2, 2017, Dr. Richard W. Tobin, a Board-certified orthopedic surgeon, opined that the partial thickness supraspinatus tear demonstrated on a September 20, 2017 MRI scan and possible underlying impingement of the left shoulder may have been exacerbated by the April 11, 2017 employment injury. He restricted appellant to light duty.

In an October 3, 2017 report, Dr. Joseph Stapleton, Board-certified in anesthesia and pain management, diagnosed a cervical disc disorder with radiculopathy, and "cervical strain of muscle, fascia, tendon, initial encounter."

On November 1, 2017 OWCP referred appellant for a second opinion to Dr. Mary Cunningham, a Board-certified orthopedic surgeon. It requested that Dr. Cunningham provide an opinion regarding whether appellant continued to have residuals or disability due to her accepted April 11, 2017 employment injury.

In a November 11, 2017 report, Dr. Cunningham detailed appellant's factual and medical history and described her current complaints, including bilateral biceps and triceps pain, worse on the left; stabbing and burning sensations in the left triceps; tingling in the dorsum of the middle finger, left greater than right; pain radiating from her neck into the left triceps and left hand in a C7 nerve distribution; and a pulling sensation in the left trapezial region. She reported the findings of the physical examination noting limited cervical and bilateral shoulder motion, decreased sensation in the left C7 and C8 dermatomes, a positive Spurling's sign on the left, and negative Hawkins', Neer's, and O'Brien's signs on the left for shoulder symptomatology. Dr. Cunningham diagnosed possible cervical radiculopathy, significant cervical degenerative disc disease, and degenerative changes in the left shoulder. She opined that these conditions were unrelated to the April 11, 2017 employment injury. Dr. Cunningham noted that she had been followed by a chiropractor for neck pain prior to the accepted injury. She opined that appellant's idiopathic spinal conditions had progressed to radiculopathy in accordance with the anticipated course of the disease, unrelated to the April 11, 2017 cervical sprain which should have resolved without residuals within six weeks. Dr. Cunningham returned appellant to full-time, light-duty work with restrictions necessitated by her nonoccupational conditions.

In a report dated December 26, 2017, Dr. Johnson diagnosed C5-6 cervical radiculopathy and cervicalgia.

By decision dated December 4, 2017, OWCP denied expansion of the claim to include bilateral shoulder impingement syndrome and cervical disc disease as the medical evidence of record had not demonstrated that the diagnosed conditions were causally related to the accepted April 11, 2017 cervical strain.

Appellant filed claims for wage-loss compensation (Form CA-7) for periods of total disability commencing June 7, 2017. OWCP denied the claims in a series of decisions commencing December 5, 2017 finding the medical evidence of record had not established total disability due to the accepted April 11, 2017 injury, based on Dr. Cunningham's opinion as the weight of the medical evidence.⁴

In a January 9, 2018 letter, OWCP advised appellant of its proposed termination of her medical benefits, finding that she ceased to have residuals of her April 11, 2017 employment injury. It informed her that the termination was justified by the opinion of Dr. Cunningham. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed action. In response, counsel submitted a February 2, 2018 statement contending that OWCP failed to develop the medical evidence and noted its authorization for a cervical injection.

In a February 5, 2018 work slip, Dr. Johnson held appellant off work through March 18, 2018. Dr. Stapleton performed an authorized left C5-6 transforaminal epidural steroid injection on February 6, 2018.

⁴ OWCP issued decisions on the following dates: January 30, 2018 for the periods June 7 to 16, 2017; October 13, 2017 for the period June 24 to August 6, 2017; September 4 to 17, and October 2 to November 26, 2017; December 5, 2017 for the period August 7 to September 3, 2017; December 6, 2017 for the period August 7 to 20, 2017; January 5, 2018 for the period September 18 to October 1, 2017; March 22, 2018 for the period December 25, 2017 to January 21, 2018; July 20, 2018 for the period November 27 to December 24, 2017.

By decision dated February 20, 2018, OWCP terminated appellant's entitlement to wage-loss compensation and medical benefits, effective February 15, 2018. It determined that its termination was justified by the opinion of Dr. Cunningham.

On July 10, 2018 appellant, through counsel, requested reconsideration. In letters dated June 26, and July 16 and 26, 2018, counsel contended that the opinions of appellant's physicians established ongoing disability causally related to the April 11, 2017 employment injury. Counsel submitted additional medical evidence.

In a February 1, 2018 report, Dr. Johnson held appellant off work and recommended a C5-6 epidural steroid injection, performed on February 21, 2018 by Dr. Stapleton. In a report dated May 17, 2018, he recommended a C5-6 anterior discectomy and fusion. In a May 21, 2018 report and July 11, 2018 addendum, Dr. Johnson opined that the accepted April 11, 2017 employment injury contributed to C6 radiculopathy and foraminal stenosis, disabling her for work through July 2018.

On June 5, 2018 Dr. Johnson performed a C5-6 discectomy and decompression with placement of interbody cage and fixation plates.

By decision dated January 11, 2019, OWCP denied modification of its February 20, 2018 decision. It determined that the February 20, 2018 termination action was proper and found that, since the time of termination, appellant had not established continuing residuals or disability causally related to her accepted employment injury. OWCP determined that the additional medical evidence submitted on reconsideration was of limited probative value with respect to continuing employment-related disability/residuals.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of proof to justify termination or modification of compensation benefits.⁵ OWCP may not terminate compensation without establishing that the disability ceased or that it was 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

⁵ *L.G.*, Docket No. 19-0142 (issued August 8, 2019); *C.C.*, Docket No. 17-1158 (issued November 20, 2018); *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁶ *A.D.*, Docket No. 18-0497 (issued July 25, 2018). In general the term disability under FECA means incapacity because of injury in employment to earn the wages which the employee was receiving at the time of such injury. *See* 20 C.F.R. § 10.5(f).

⁷ *L.G.*, *supra* note 5; *R.P.*, Docket No. 17-1133 (issued January 18, 2018).

Section 8123(a) of FECA 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective February 15, 2018.

The evidence of record establishes that there is disagreement between Dr. Cunningham, the second opinion physician, and Dr. Johnson, appellant's treating physician, as to whether appellant had residuals or disability from her accepted April 11, 2017 cervical strain as of February 15, 2018. Dr. Cunningham found in her November 11, 2017 report that appellant's symptoms from the accepted injury should have ceased within six weeks, and that any subsequent complaints were related only to preexisting, idiopathic degenerative disc disease. In contrast, Dr. Johnson opined that the employment injury had exacerbated appellant's preexisting cervical degenerative disc disease and foraminal stenosis and that additional studies were required to fully evaluate that causal relationship. He held appellant off work from August 31, 2017 onward due to C5-6 radiculopathy and cervicalgia with the onset of severe symptoms following the April 11, 2017 employment injury. The two physicians thus disagree on the nature and extent of a period of disability caused by the accepted injury.

The Board finds that an unresolved conflict of medical evidence remains between the opinions of Dr. Cunningham and Dr. Johnson on whether appellant had continuing residuals or disability from the accepted condition. The reports are based on a proper history of injury, provide physical findings, and address the issue of causal relationship between the April 11, 2017 employment injury and her diagnosed conditions.

Thus, the Board finds that OWCP did not meet its burden of proof in terminating appellant's compensation benefits.⁹

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 15, 2018.

⁸ 5 U.S.C. § 8123(a). *See also G.B.*, Docket No. 16-0996 (issued September 14, 2016) (where the Board held that OWCP improperly terminated the claimant's wage-loss compensation and medical benefits as there was an unresolved conflict of medical opinion between her treating physician and a second opinion specialist).

⁹ In light of the Board's disposition in issue one, issue two is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the January 11, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 17, 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