

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

_____)	
J.W., Appellant)	
)	
and)	Docket No. 19-1014
)	Issued: October 24, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Irmo, SC, Employer)	
_____)	

Appearances:

Sara Kincaid, 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 March 26, 2019 appellant, through counsel, filed a timely appeal from an October 4, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 Under the Board's *Rules of Procedure*, an appeal must be filed within 180 days from the date of issuance of an OWCP decision. An appeal is considered filed upon receipt by the Clerk of the Appellate Boards. *See* 20 C.F.R. § 501.3(e)-(f). One hundred and eighty days from October 4, 2018, the date of OWCP's last decision was April 2, 2019. Since using April 8, 2019, the date the appeal was received by the Clerk of the Appellate Boards would result in the loss of appeal rights, the date of the postmark is considered the date of filing. The date of the U.S. Postal Service postmark is March 26, 2019, rendering the appeal timely filed. *See* 20 C.F.R. § 501.3(f)(1).

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 8, 2017, as she no longer had residuals or disability causally related to her accepted July 28, 2014 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after August 8, 2017.

FACTUAL HISTORY

On July 30, 2014 appellant, then a 36-year-old rural carrier, filed a traumatic injury claim (Form CA-1) alleging that she experienced lower back pain on July 28, 2014 when she lifted a heavy package while in the performance of duty. She stopped work on July 28, 2014 and received continuation of pay from July 29 through September 11, 2014. On the reverse side of the claim form, the employing establishment indicated that appellant was in the performance of duty when injured and that she had received medical treatment on July 28, 2014. On September 17, 2014 OWCP accepted her claim for lumbar sprain. It paid appellant wage-loss compensation on the periodic rolls, effective April 5, 2015.

Appellant continued to receive medical treatment and physical therapy treatments from December 11, 2014 to March 9, 2015.

Appellant underwent several diagnostic tests. An August 29, 2015 pelvis magnetic resonance imaging (MRI) scan was unremarkable. On September 10, 2015 appellant underwent an electromyography (EMG) and nerve conduction velocity (NCV) study, which revealed essentially normal findings.

On March 14, 2016 OWCP referred appellant, along with a statement of accepted facts (SOAF), the case file, and a set of questions, to Dr. Jean Marc Guitton, a Board-certified neurological surgeon, for a second-opinion evaluation regarding the status of her July 28, 2014 employment injury and work capacity.

In a March 30, 2016 report, Dr. Guitton reviewed appellant's history and described the July 28, 2014 employment injury. Upon examination, he observed that she walked with a hesitant gait, had some lower back spasms, and exhibited a fair amount of tenderness to palpation. Dr. Guitton opined that appellant still had residuals of her work-related back injury and was unable to work her date-of-injury job. He explained that it was unclear what the mechanism of pain was and even more unclear what would achieve resolution. Dr. Guitton completed a work-capacity evaluation form (Form OWCP-5c), which indicated that appellant could work light, sedentary duty. He reported that she could "possibly" work eight hours per day.

³ 5 U.S.C. § 8101 *et seq.*

On February 16, 2017 OWCP offered appellant a full-time modified job as a modified rural carrier associate, which she refused on February 20, 2017. Appellant explained that she had no significant improvement in her condition since Dr. Guitton's examination and noted that he had not expressly authorized her to work eight hours per day.

On April 19, 2017 OWCP referred appellant to Dr. Seth Jaffe, a Board-certified orthopedic surgeon, for another second-opinion evaluation regarding the status of her work-related July 28, 2014 employment injury and work capacity and an opinion on whether the February 16, 2017 limited-duty job offer was suitable.

In a May 30, 2017 report, Dr. Jaffe reviewed the SOAF and the medical evidence of record. He described the July 28, 2014 employment incident and noted that appellant's claim was accepted for lumbar sprain. Dr. Jaffe recounted her complaints of pain, discomfort, and spasm in the left lower back. Upon examination of appellant's lumbar spine, he observed tenderness in the lower lumbar spine, paraspinal muscles, and in the left SI joint. Range of motion (ROM) was 50 percent normal actively. Dr. Jaffe reported mildly antalgic gait with appellant leaning to the right side. Straight leg raise testing was negative bilaterally with mild hamstring tightness bilateral. Examination of appellant's left hip showed tenderness in the SI joint. Dr. Jaffe noted that the October 1, 2014 lumbar spine MRI scan and August 29, 2015 pelvis MRI scan were normal. He also indicated that a May 3, 2016 lumbar spine MRI scan report showed some mild degenerative changes at L3-4. Dr. Jaffe diagnosed lumbar strain. He opined that appellant's subjective complaints outweighed the objective findings on examination.

Dr. Jaffe reported that appellant's current diagnosis causally related to the work injury was "lumbar sprain resolved." He explained that she currently had chronic myofascial pain syndrome and mechanical back pain as a "sequelae" to this. Dr. Jaffe reported that appellant's current findings on examination and subjective complaints were related to the chronicity of the problem, deconditioning, and lack of work and exercise over a two-year period of time. He explained that a simple lumbar strain would resolve with conservative care within three months. Dr. Jaffe also noted that all the diagnostic testing were unremarkable and had not shown a spinal disorder. He reported that appellant was unable to return to her date-of-injury job and was unable to work the offered modified-duty rural carrier position because of her inability to sit or stand for long periods of time and to lift the amount of weight required to perform this job function. Dr. Jaffe recommended a functional capacity evaluation and psychological evaluation. He provided a work capacity evaluation form, which indicated that appellant could work full time with restrictions of sitting, walking, and standing for 4 hours; pushing, pulling, and lifting up to 10 pounds for 4 hours; bending/stooping and operating a motor vehicle at work for 2 hours; squatting and kneeling for 1 hour; and no climbing.

On June 20, 2017 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because her July 28, 2014 employment injury had resolved. It found that the weight of medical evidence rested with the May 30, 2017 report of Dr. Jaffe, who found that her lumbar sprain injury had resolved and that she was no longer disabled from work. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

On July 20, 2017 appellant, through counsel, responded to OWCP's proposed termination letter. Counsel argued that Dr. Jaffe's May 30, 2017 second-opinion report should not represent the weight of medical evidence as he incorrectly noted July 20, 2014 as the date of injury and he had not provided a rationalized explanation for his conclusion that appellant's lumbar strain had resolved. She further alleged, in the alternative, that OWCP should refer appellant's case for an impartial medical examination because a conflict in medical evidence existed between Dr. Jaffe and appellant's treating physicians regarding the status of her July 28, 2014 employment injury. Appellant resubmitted medical reports from 2015 and 2016.

By decision dated August 7, 2017, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective August 8, 2017. It found that the weight of medical evidence rested with Dr. Jaffe, OWCP's second-opinion examiner, who concluded in a May 30, 2017 report that she had no residuals or disability due to her accepted July 28, 2014 employment injury.

On August 6, 2018 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

In a December 12, 2017 report, Tamara Harris, a certified physician assistant, recounted appellant's complaints of lower back pain radiating down the left lower extremity since 2014 when she injured her back at work. She provided examination findings and diagnosed low back pain, radiculopathy in the thoracolumbar region, sacroiliitis, and lower back strain. Ms. Harris opined that the 2014 employment incident "may have triggered or awakened a disease process that has not fully been evaluated." She recommended a more systematic approach from an internist for further evaluation.

In an August 6, 2018 report, Dr. Mark W. Feeman, Board-certified in physical medicine and rehabilitation, indicated that he examined appellant for complaints of lower back and left leg pain that started in 2014 after she picked up a package that weighed approximately 60 pounds. He reviewed her history and conducted an examination. Dr. Feeman noted 3/5 muscle strength in the left foot and hip abductors. Examination of appellant's lumbar spine demonstrated decreased ROM and tenderness on the left trigger points with palpation of the latissimus dorsi muscles, piriformis muscles, and SI ligament. Straight leg raise testing was positive. Dr. Feeman diagnosed low back pain, strain of lower back, and myofascial pain syndrome.

Dr. Feeman indicated that he had reviewed Dr. Jaffe's second-opinion report and expressed his disagreement with Dr. Jaffe's conclusion that appellant no longer suffered residuals from her July 28, 2014 work injury. He reported that he agreed with Dr. Jaffe's assessment that she had chronic myofascial pain syndrome as a consequence of the work-related lumbar strain injury. Dr. Feeman opined that appellant's chronic myofascial pain syndrome was an ongoing residual of her accepted July 28, 2014 employment injury. He explained that injury to a muscle, such as a muscle strain, can cause the formation of sensitive areas of tight muscle fibers or trigger points, leading to chronic muscle pain, and syndrome known as myofascial pain syndrome. Dr. Feeman reported that, as a result of the July 28, 2014 lumbar strain injury, appellant developed trigger points in her lumbar spine that led to chronic pain and inflammation otherwise known as myofascial pain syndrome. He related that the chronic myofascial pain syndrome caused her continuing leg pain and lower back pain, stiffness, muscle spasm, tenderness, and impaired ROM.

Dr. Feeman concluded that appellant continued to experience residuals of myofascial pain syndrome brought on by the accepted lumbar strain injury.

Appellant also submitted July 27 and August 16, 2018 psychological evaluation reports by Dr. Bonnie Cleveland, a neuropsychologist. Dr. Cleveland described the July 28, 2014 employment incident and the subsequent medical treatment that appellant had received. She diagnosed chronic back and neck pain due to work-related injury and depressive disorder due to chronic pain and loss of independence. Dr. Cleveland opined that appellant's depressive disorder was exacerbated by the chronic pain due to appellant's work-related lumbar strain injury.

By decision dated October 4, 2018, OWCP denied modification of the August 7, 2017 termination decision.

LEGAL PRECEDENT -- ISSUE 1

According to FECA,⁴ once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁵ OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁶ Its 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 for disability compensation.⁸ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁹

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 August 8, 2017.

OWCP terminated appellant's wage-loss compensation and medical benefits based on the May 30, 2017 report of Dr. Jaffe, an OWCP second-opinion examiner, who reviewed appellant's history and noted that her claim was accepted for lumbar sprain. Upon examination of her lumbar spine, Dr. Jaffe observed tenderness in the lower lumbar spine, paraspinal muscles, and in the left SI joint. He reported mildly antalgic gait and tenderness in the SI joint of the left hip. Dr. Jaffe reported that appellant's current work-related diagnosis was "lumbar sprain resolved" and

⁴ *Id.*

⁵ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284 (1988).

⁸ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

indicated that she currently had chronic myofascial pain syndrome and mechanical back pain as a “sequelae” to this. He explained that a simple lumbar strain would resolve with conservative care. Dr. Jaffe noted that diagnostic testing had not shown a spinal disorder. He opined that appellant was unable to return to her date-of-injury job and was unable to work the February 16, 2017 modified job position, but could work modified duty with restrictions.

The Board finds that Dr. Jaffe’s opinion was inconsistent and conclusory in nature and did not contain sufficient medical reasoning to establish that appellant no longer had residuals or disability due to her accepted July 28, 2014 employment injury.¹⁰ In assessing medical evidence, the number of physicians supporting one position or another is not controlling; the weight of such evidence is determined by its reliability, its probative value, and its convincing quality.¹¹ The factors that determine the probative value of medical evidence include the opportunity for and thoroughness of examination performed by the physician, the accuracy or completeness of the physician’s knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed by the physician on the issues addressed to him by OWCP.¹²

Although Dr. Jaffe reported that appellant had “lumbar sprain resolved,” he also indicated that she had chronic myofascial pain syndrome and mechanical back pain as a “sequelae” to this. He did not, however, provide any medical reasoning or explanation of how he could find both that her lumbar strain had resolved, but that she still had myofascial pain syndrome and mechanical back pain as a consequence of her accepted injury.¹³ Considering the internal inconsistencies in his report, Dr. Jaffe failed to explain which objective findings of record established that the accepted lumbar strain injury had resolved. He merely noted that lumbar strains typically resolve with conservative care within three months. Considering the fact that an OWCP second-opinion examiner had previously opined in a March 30, 2016 report that appellant still suffered from residuals of her accepted July 28, 2014 lumbar strain injury, Dr. Jaffe’s conclusion that her lumbar strain injury had resolved is conclusory at best.

Due to the lack of probative value of Dr. Jaffe’s report, the Board finds that OWCP erred in relying on his opinion as the basis to terminate appellant’s wage-loss compensation and medical benefits for the accepted lumbar strain. Dr. Jaffe provided conclusions not based on the objective evidence of record and without sufficient medical rationale to support his findings. The Board therefore finds that OWCP has not met its burden of proof.¹⁴

¹⁰ See *S.B.*, Docket No. 18-0700 (issued January 9, 2019); *S.W.*, Docket No. 18-0005 (issued May 24, 2018).

¹¹ *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Nicolette R. Kelstrom*, 54 ECAB 570 (2003).

¹² *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *James T. Johnson*, 39 ECAB 1252 (1988).

¹³ See *L.D.*, Docket No. 19-0308 (issued July 24, 2019).

¹⁴ See *D.W.*, *supra* note 11; *Willa M. Frazier*, 55 ECAB 379 (2004).

CONCLUSION

The Board finds that OWCP has not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective August 8, 2017.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the October 4, 2018 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 24, 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

¹⁵ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.