United States Department of Labor
Employees' Compensation Appeals Board

M.T., Appellant	)	
and	)	**Docket No. 20-0677**
	)	**Issued: December 31, 2020**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Lancaster, TX, Employer	)	

Appearances:
Charles Westmoreland, for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge

JURISDICTION

On February 6, 2020 appellant, through her representative, filed a timely appeal from a December 9, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (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 OWCP received additional evidence following the December 9, 2019 decision. 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 met its burden of proof to terminate appellant's wage-loss compensation, effective January 5, 2020.

FACTUAL HISTORY

On June 17, 2013 appellant, then a 51-year-old pharmacy technician, filed an occupational disease claim (Form CA-2) alleging that she developed a swollen wrist and forearm pain due to "constantly opening medication bottles" in a repetitive motion, eight hours per day, while in the performance of duty. She noted that she first became aware of the condition on August 1, 2012, and first attributed it to factors of her federal employment on January 4, 2013. Appellant did not initially stop work.

On August 21, 2013 OWCP accepted the claim for right wrist sprain, radial styloid tenosynovitis on the right. It subsequently expanded acceptance of the claim to include: accepted bilateral, carpal tunnel syndrome, injury of radial nerve at upper arm level, right arm, initial encounter; lateral epicondylitis, left elbow; lesion of ulnar nerve, left upper limb; other synovitis and tenosynovitis, right forearm; other synovitis and tenosynovitis, right forearm; other tenosynovitis of hand and wrist, right; trigger finger, right ring finger; unspecified sprain of right elbow, initial encounter; unspecified sprain of right wrist, initial encounter; and wrist sprain, right. OWCP paid appellant intermittent wage-loss compensation on the supplemental rolls as of September 9, 2013 and on the periodic rolls as of November 17, 2013.[4]

In a December 28, 2017 report, Dr. Rory Allen, an osteopath specializing in family medicine, noted that appellant had undergone right hand surgery on November 30, 2017 and was not cleared for postoperative rehabilitation. He explained that she also was recovering from her surgery to the left hand in July 2017. Dr. Allen opined that appellant's accepted employment-related conditions had not resolved and she was medically unable to return to work on a full-time or part-time basis with or without restrictions.

On May 21, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. George Wharton, a Board-certified orthopedic spine surgeon, for a second opinion evaluation to determine whether appellant had any continuing disability arising from the accepted employment injuries.

In an April 26, 2018 report, Dr. Wharton noted appellant's history of injury and medical treatment. He noted her accepted conditions and her current physical examination findings and

[4] On December 20, 2013 appellant underwent a right carpal tunnel release and a left tenosynovectomy of the abductor pollicis longus and extensor pollicis brevis. On March 23, 2017 she underwent right carpal tunnel release, right lateral epicondyle debridement, and tenolysis of the extensor carpi radialis longus and brevis tendon. On July 6, 2017 appellant underwent additional surgery including a left carpal tunnel release, left neuroplasty of the ulnar nerve at the elbow, left lateral epicondyle debridement and debridement and tendon repair, tenolysis of abducture pollicis longus tendon and extensor pollicis brevis tendon and tendon sheath incision. On November 30, 2017 she underwent flexor digitorum profundus, tenosynovectomy and superficialis tendolysis of the right ring finger, right ring finger incision of the tendon sheath, and excision of deep mass from right ring finger/palm. On June 21, 2018 appellant underwent right intersection release, right wrist synovectomy and tenosynovectomy. On March 8, 2019 she underwent right wrist tenolysis and synovectomy of extensor pollicis brevis, abductor pollicis longus, extensor carpi radialis brevis, and longus with removal of abundant scar tissue.

thereafter related that she continued to have some residuals related to her accepted conditions. Dr. Wharton opined that appellant could return to work for eight hours per day, in her pharmacy technician position, with permanent restrictions including no lifting, pushing, and pulling over 20 pounds, occasional reaching activities, and no repetitive movements of wrists and elbows more than two hours per day.

On January 24, 2019 OWCP determined that a conflict of medical opinion existed between the treating physician, Dr. Allen, who indicated that appellant remained totally disabled from work due to the accepted conditions, and the second opinion physician, Dr. Wharton, who advised that appellant could return to work with restrictions.

On May 23, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF) and appellant's complete case file for an impartial medical examination with Dr. James F. Hood, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion between Drs. Allen and Wharton regarding appellant's continuing employment-related residuals and disability.

In a July 31, 2019 report, Dr. Hood, the impartial medical examiner (IME), noted appellant's history of injury and medical treatment. He examined her and provided physical findings. Dr. Hood found that appellant's examination of the right hand revealed full flexion and extension of the right elbow, tenderness on palpitation, a positive Finkelstein's test and tenderness over the carpometacarpal joint and radial styloid, positive Tinel's, positive median compression, and decreased sensation in both the median and ulnar nerve distribution to light touch. He found that, regarding the left side, appellant had full range of motion of the wrist and elbow, minimal tenderness, no thenar atrophy bilaterally, and normal thumb-to-finger pinch bilaterally. Dr. Hood opined, "it does not appear that the work-related conditions have resolved. [Appellant] still has positive physical findings, more on the right than the left, and continued positive nerve conduction studies." He noted that he suspected appellant's underlying diabetes was a major cause of continued findings of neuropathy and also noted findings of carpometacarpal arthritis at the base of the thumbs. Dr. Hood advised that pharmacological management was appropriate, but condemned the use of opioids and recommended that appellant be weaned from them. He noted that appellant had decreased strength in opening bottles. Dr. Hood opined, "I doubt that opening bottles would be a continued non-ending part of her job-requirements." He further advised that there were "many ways that one can open bottles, and these can be part of her retraining to return to work." Dr. Hood opined that appellant was capable of returning to full-duty work as a pharmacy technician. He found that appellant had reached maximum improvement (MMI).

On September 25, 2019 OWCP issued a notice of proposed termination of appellant's wage-loss compensation finding the special weight of the medical evidence rested with the report of Dr. Hood. It afforded her 30 days to respond in writing if she disagreed with the proposed termination.

On October 24, 2019 appellant's representative challenged the proposed termination.

OWCP subsequently received an October 23, 2019 report, wherein Dr. Allen argued that the report of the IME was invalid because Dr. Hood did not appear to be aware of appellant's job requirements, which clearly included repetitive use of her upper extremities. He opined that she could not return to work with or without restrictions and advised that she should continue her postoperative rehabilitation with a transition to a potential work-hardening program.

By decision dated December 9, 2019, OWCP terminated appellant's wage-loss compensation, effective January 5, 2020, based on the special weight accorded to the report of Dr. Hood as the IME.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.[5] Alter 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.[6] OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[7]

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.[8] When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.[9]

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective January 5, 2020.

OWCP properly identified a conflict of medical opinion between Drs. Allen and Wharton regarding appellant's ability to return to work and referred her for an impartial medical examination with Dr. Hood. Dr. Hood was provided with appellant's complete case file, which included her position description. In his July 31, 2019 report, he reviewed her history of injury, medical records, and the SOAF. Dr. Hood performed diagnostic testing and reviewed the diagnosed conditions. In answers to questions posed by OWCP, he found that appellant's work-related conditions had not resolved. Dr. Hood noted "positive physical findings, more on the right than the left, and continued positive nerve conduction studies." However, he opined that appellant was capable of returning to full duty as a pharmacy technician. Dr. Hood noted that she had decreased strength in opening bottles, and opined, "I doubt that opening bottles would be a continued non-ending part of her job-requirements." The Board finds that Dr. Hood's opinion regarding appellant's job duties was based upon an incorrect factual history, as her position description clearly identified opening bottles as a job duty, which she performed as part of the

[5] *See D.B.*, 19-0663 (issued August 27, 2020); *D.W.*, Docket No. 18-0123 (issued October 4, 2081); *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. 19-0220 (issued August 1, 2019); *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

[7] *G.H.*, Docket No. 18-0414 (issued November 14, 2018); *Del K. Rykert*, 40 ECAB 294, 295-96 (1988).

[8] 5 U.S.C. § 8123(a); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[9] *D.W.*, *supra* note 5.

prepacking process for four to five hours a day. Furthermore, Dr. Hood's opinion that there were "many ways that one can open bottles, and these can be part of her retraining to return to work" is conclusory and does not explain how appellant could be trained to do so. The Board has held that a medical opinion is of limited probative value if it is conclusory in nature.[10]

The Board therefore finds that Dr. Hood's opinion is of limited value on the relevant issue in this case, and that his report is not entitled to the special weight accorded an impartial medical examiner. OWCP therefore did not meet its burden of proof to terminate appellant's wage-loss compensation.[11]

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective January 5, 2020.

[10] *C.M.*, Docket No. 19-0360 (issued February 25, 2020).

[11] *C.R.*, Docket No. 19-1132 (issued October 1, 2020).

ORDER

IT IS HEREBY ORDERED THAT the December 19, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 31, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board