

United States Department of Labor
Employees' Compensation Appeals Board

L.K., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Homewood, IL, Employer)

Docket No. 19-0313
Issued: January 15, 2020

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of the 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 November 28, 2018 appellant, through counsel, filed a timely appeal from a September 26, 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 September 26, 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.*

ISSUE

The issue is whether appellant has met her burden of proof to establish continuing disability on or after July 3, 2010 causally related to her November 7 and December 19, 1989 employment injuries.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances of the case as set forth in the Board's prior decisions and orders are incorporated herein by reference. The relevant facts are as follows.

Appellant, then a 29-year-old flexible letter carrier, filed two traumatic injury claims in 1989 that have since been administratively combined. She filed the initial traumatic claim (Form CA-1) on November 7, 1989, alleging that she sustained a back injury that day when she stumbled while walking up steps. OWCP adjudicated the November 1989 claim under OWCP File No. xxxxxx943. Appellant filed the second traumatic injury claim (Form CA-1) on December 26, 1989, alleging that she injured her back on December 19, 1989 while delivering parcels. The December 1989 claim was assigned OWCP File No. xxxxxx838. OWCP accepted that claim for lumbosacral strain and a herniated L4-5 disc with subsequent urinary incontinence. Appellant underwent lumbar surgery on February 3, 1992, and returned to modified duty in January 1993. She continued modified-duty work until December 11, 2003, when she stopped work and was paid wage-loss compensation on the supplemental rolls. OWCP paid appellant wage-loss compensation on the periodic compensation rolls effective May 14, 2006.

By decision dated June 30, 2010, OWCP terminated appellant's wage-loss compensation, effective July 3, 2010. Appellant thereafter submitted multiple requests for reconsideration. By decisions dated January 13 and June 2, 2011, July 9, 2012, and October 16, 2013, OWCP denied modification of its prior decisions. On January 3, 2014 appellant appealed to the Board from the October 16, 2013 decision.

By decision dated July 7, 2014, the Board affirmed the October 16, 2013 decision.⁵ The Board found that the weight of the medical evidence rested with the opinion of Dr. Mukund Komanduri, a Board-certified orthopedic surgeon, in a capacity as an OWCP second opinion physician, who advised that appellant could return to full-time modified duty. The Board concluded that OWCP had met its burden of proof to terminate appellant's wage-loss compensation, effective July 3, 2010, and further found that she had not met her burden of proof to establish continuing employment-related disability on or after that date.

On July 21, 2014 appellant, through counsel, requested reconsideration. In an attached brief, counsel contended that OWCP had not followed its procedures, and that the case required

⁴ Docket No. 14-0526 (issued July 7, 2014); Docket No. 15-0659 (issued September 15, 2016); *Order Remanding Case*, Docket No. 19-0313 (issued September 4, 2019); *Order Setting Aside Board Order and Reinstating Appeal*, Docket No. 19-0313 (issued January 3, 2020).

⁵ Docket No. 14-0526, *id.*

further development.⁶ By decision dated October 15, 2014, OWCP denied appellant's reconsideration request.

The record contains copious medical evidence submitted following OWCP's October 16, 2013 decision.⁷

An October 6, 2013 magnetic resonance imaging (MRI) scan of appellant's lumbar spine demonstrated a stable surgical fusion. An August 14, 2014 computerized tomography (CT) scan of the lumbar spine showed stable postoperative changes and multilevel degenerative disc disease. A February 24, 2015 right hip x-ray and September 18, 2015 MRI scan of the pelvis were negative.

Dr. Konstantin Slavin, a Board-certified neurosurgeon, provided treatment notes dated March 3, 2014 to May 14, 2018. In a March 3, 2014 report, he advised that appellant had not been able to return to normal duties for medical reasons. Dr. Slavin noted complaints of chronic back and leg pain and advised that she needed to have her spinal cord stimulator replaced. He diagnosed multilevel lumbar spondylosis and lumbar stenosis with persistent lumbar radiculopathy and failed back syndrome. Dr. Slavin opined that these were related to her federal employment, and advised that she should avoid any kind of activity that worsened her pain, particularly heavy lifting, carrying heavy objects, and standing for long periods and, therefore, could not perform letter carrier duties. By report dated November 27, 2017, he described appellant's difficulties with spinal cord stimulators and advised that since November 2015, when a spinal cord stimulator was removed, her pain had not been addressed properly. Dr. Slavin advised that her activity remained very limited due to chronic pain and asked for authorization of a new spinal cord stimulator. On May 14, 2018 he advised that appellant's pain remained her major issue and she needed a spinal cord stimulator.

A number of anesthesiologists practicing pain management saw appellant from May 15, 2014 to May 19, 2015.

In treatment notes dated October 1, 2013 to February 14, 2015, Dr. Ervin Kocjancic, a urologist, noted a history of mixed incontinence and a urethral lesion that had been resected. On August 27, 2014 he noted diagnoses of neurogenic bladder status post spinal fusion surgery, treated with Botox, and advised that appellant had an unspecified urethral stricture. Appellant had urethroplasty for hypospadiac urethra on October 9, 2014.

Appellant, through counsel, appealed to the Board on January 30, 2015. By decision dated September 15, 2016, the Board found that the brief submitted on reconsideration contained relevant legal arguments, not previously considered by OWCP, as to whether it had properly terminated appellant's wage-loss compensation and whether she had continuing disability. The Board concluded that appellant was entitled to a review of the merits of her claim and remanded the case to OWCP for an appropriate decision.⁸

⁶ The brief had previously been submitted to the Board.

⁷ Docket No. 14-0526, *supra* note 4.

⁸ Docket No. 15-0659, *supra* note 4. During the pendency of this appeal, by decision dated May 21, 2015, OWCP granted appellant a schedule award for nine percent permanent impairment of the left lower extremity.

By decision dated September 26, 2018, OWCP reviewed the merits of appellant's claim, but denied modification of its October 16, 2013 decision finding that Dr. Komanduri had clearly indicated that he had reviewed the DVDs.

LEGAL PRECEDENT

Once OWCP meets its burden of proof to terminate a claimant's compensation benefits, the burden shifts to the claimant to establish that he or she has continuing disability causally related to the accepted employment injury.⁹ 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 a causal relationship.¹⁰ A claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had employment-related disability which continued after termination of compensation benefits.¹¹

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish continuing disability on or after July 3, 2010 causally related to her November and December 1989 employment injuries.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's October 16, 2013 decision because the Board considered that evidence in its July 7, 2014 decision. Findings made in prior Board decisions are res judicata absent any further review by OWCP under section 8128 of FECA.¹²

Neither appellant's pain management anesthesiologists nor Dr. Kocjancic, her attending urologist, provided an opinion regarding whether she could perform modified duties. They did not reference appellant's ability to return to work or note a period of disability. As these physicians have not provided an opinion on causal relationship between appellant's continuing disability from work and her accepted employment injuries, their opinions are of no probative value and are insufficient to establish the claim.¹³

Only Dr. Slavin voiced an opinion regarding appellant's work capacity and advised that she had not been able to return to normal duties for medical reasons. The Board, however, finds that his opinion does not contain sufficient medical rationale to establish that appellant had continuing disability on or after July 13, 2010, causally related to the accepted November and December 1989 employment injuries, accepted for lumbosacral strain and a herniated L4-5 disc with subsequent urinary incontinence. While Dr. Slavin diagnosed multilevel lumbar spondylosis and lumbar stenosis with persistent lumbar radiculopathy and failed back syndrome, and opined

⁹ *T.W.*, Docket No. 18-1573 (issued July 19, 2019).

¹⁰ *Id.*

¹¹ *O.W.*, Docket No. 19-0316 (issued June 25, 2019).

¹² *See A.L.*, Docket No. 19-0285 (issued September 24, 2019).

¹³ *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

that these were related to her federal employment, none of these conditions have been accepted as due to the 1989 employment injuries.¹⁴ As Dr. Slavin provided no rationale explaining how physiologically the November and December 1989 incidents caused or contributed to the above-noted diagnosed conditions, his opinion is insufficient to meet appellant's burden of proof.¹⁵ Moreover, while he advised that appellant should avoid any kind of activity that worsened her pain, particularly heavy lifting, carrying heavy objects, and standing for long periods such that she could not perform letter carrier duties, appellant had been working modified duty when she stopped work. On May 14, 2018 Dr. Slavin advised that appellant's pain remained her major issue and that she needed a spinal cord stimulator. In essence, he only provided a conclusory opinion in which he opined that appellant could not work, primarily due to pain. Dr. Slavin failed to explain how this opinion was supported by objective findings of record.¹⁶ The Board finds that his opinion is of limited probative value because he has not provided medical rationale in support of his opinion on continuing work-related disability.¹⁷ A medical opinion not fortified by medical rationale is of diminished probative value.¹⁸

The record also includes lumbar spine MRI and CT scans, an MRI scan of the pelvis, and a right hip x-ray. The Board has previously held that diagnostic studies lack probative value as they do not address causal relationship.¹⁹

The Board finds that the record lacks rationalized medical evidence sufficient to meet appellant's burden of proof to establish that she has continuing disability on or after July 3, 2010 causally related to the accepted 1989 injuries.²⁰ Appellant, therefore, has not met her burden of proof.²¹

On appeal counsel argues that in its September 26, 2018 decision, OWCP simply restated its prior analysis and ignored the Board's prior directive in its September 15, 2016 decision. By that decision, the Board remanded the case for consideration of the merits followed by an appropriate merit decision. OWCP subsequently issued its September 26, 2018 merit decision which denied modification of its prior decision. As explained above, the Board finds that OWCP properly evaluated the evidence of record and found that appellant had not met her burden of proof to establish continuing disability on or after July 3, 2010 causally related to her accepted employment injuries.

¹⁴ *L.S.*, Docket No. 19-0959 (issued September 24, 2019).

¹⁵ *Id.*

¹⁶ *L.G.*, Docket No. 19-0142 (issued August 8, 2019).

¹⁷ *See T.W.*, *supra* note 9.

¹⁸ *C.T.*, Docket No. 19-0508 (issued September 5, 2019).

¹⁹ *F.H.*, Docket No. 18-0160 (issued August 23, 2019).

²⁰ *T.W.*, *supra* note 9.

²¹ *L.S.*, *supra* note 14.

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 appellant has not met her burden of proof to establish continuing disability on or after July 3, 2010 causally related to her November 7 and December 19, 1989 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 15, 2020
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