

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

S.R., Appellant)	
)	
and)	Docket No. 19-1229
)	Issued: May 15, 2020
)	
U.S. POSTAL SERVICE, HELLGATE)	
STATION, New York, NY, Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 13, 2019 appellant, through counsel, filed a timely appeal from a March 26, 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 to consider 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 issuance of the March 29, 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 July 23, 2018, as she no longer had residuals or disability causally related to her accepted April 15, 2015 employment injury; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals, on or after July 23, 2018.

FACTUAL HISTORY

On April 15, 2015 appellant, then a 47-year-old carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a concussion and shoulder and back spasms when a bulletin board encased in glass fell on her head while in the performance of duty. On the reverse side of the claim form, the employing establishment indicated that she stopped work on the date of injury and had not returned. By decision dated October 20, 2016, OWCP accepted appellant's claim for concussion without loss of consciousness, scalp contusion, left shoulder contusion, left shoulder sprain, left shoulder superior glenoid labrum lesion, cervical disc herniation at C2-3, C3-4, C4-5, C5-6, C6-7, and cervical radiculopathy. By separate decision of even date, it denied her claim for segmental dysfunction of the cervical spine, cervicgia/neck pain, hypertext/hyperflex shoulder pain, headaches, cervical spasm, left temporomandibular joint (TMJ), bursitis, joint effusion, post-traumatic thoracic sprain, post-traumatic lumbar sprain, lumbar radiculopathy, cervicgia, lumbago, and post-traumatic stress disorder causally related to the accepted April 15, 2015 employment injury.⁴ OWCP placed appellant on the supplemental rolls commencing June 1, 2015 and later on the periodic rolls commencing April 2, 2017.

OWCP received several letters and an attending physician reports (Form CA-20) dated July 11, 2016 to September 6, 2017 from Dr. Mark S. McMahon, an attending Board-certified orthopedic surgeon, who diagnosed a head injury, left TMJ, a cervical herniated disc, and a left shoulder posterior labrum tear due to the accepted April 15, 2015 employment injury, and found that appellant remained totally disabled from work. Dr. McMahon requested authorization to perform a left shoulder arthroscopy.

On August 29, 2017 OWCP referred appellant, a statement of accepted facts (SOAF), a set of questions, and the medical record, to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether she continued to suffer residuals or disability from her accepted April 15, 2015 employment injury. In a report dated September 13, 2017, Dr. Sultan opined that appellant had no residuals of her accepted employment conditions and that she was able return to her date-of-injury job as a letter carrier with no restrictions. He further opined that the requested left shoulder surgery was not medically necessary or causally related to the accepted April 15, 2015 employment conditions. Dr. Sultan explained that there were no abnormal findings, and that the requested surgery was not clinically sympathetic and did not correlate with appellant's subjective complaints.

OWCP, in a letter dated February 23, 2018, informed appellant that there was a conflict in medical opinion between Dr. McMahon and Dr. Sultan regarding whether she had continued disability from work due to her accepted employment injury. It referred her to Dr. Allen M.

⁴ By decision dated January 12, 2018, OWCP denied modification of its October 20, 2016 denial decision.

Crystal, a Board-certified orthopedic surgeon serving as the impartial medical examiner (IME). OWCP provided Dr. Crystal with an updated SOAF, the medical record, and a series of questions. The February 15, 2018 SOAF indicated that appellant's claim had been accepted for cervical disc herniation at C2-3, C3-4, C4-5, C5-6, and C6-7, concussion without loss of consciousness, cervical radiculopathy, left shoulder contusion, scalp contusion, left shoulder superior glenoid labrum lesion, and left shoulder sprain.

In a March 15, 2018 report, Dr. Crystal noted that he had reviewed the SOAF and the medical record. He set forth findings upon physical examination and opined that appellant had no residuals of her accepted April 15, 2015 employment injury and that she could return her date-of-injury job with no restrictions. Dr. Crystal indicated that the medical record established the diagnoses of scalp contusion, concussion without loss of consciousness, cervical radiculopathy, left shoulder contusion, and left shoulder sprain. However, he indicated that the mechanism of injury did not support the diagnosis of left shoulder superior glenoid labrum lesion because this type of condition required direct contact to the back and a July 10, 2015 left shoulder magnetic resonance imaging (MRI) scan did not identify this condition, but rather revealed nontraumatic hypertrophic changes with impingement in the left shoulder that represented nontraumatic arthritis which was not causally related to appellant's work injury. Dr. Crystal also indicated that there was a lack of objective findings to support that the diagnosis of cervical disc herniation at C2-3, C3-4, C4-5, C5-6, and C6-7 was traumatic in nature. He advised that the accepted cervical herniations revealed on MRI scan testing were nontraumatic findings and thus, they were not causally related to the April 15, 2015 employment injury. In addition, Dr. Crystal advised that appellant was presently suffering from "inappropriate illness behavior" as described in the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*).⁵ He noted that this behavior was causing symptom magnification. Dr. Crystal noted that appellant also had preexisting, nonemployment-related cervical disc degeneration which was aggravated when she was struck by the bulletin board. He noted that the aggravation was a temporary condition which should have resolved a few months after the injury. Dr. Crystal explained that he agreed with Dr. Sultan's opinion regarding appellant's work capacity as there were no objective findings to preclude her return to work. Further, he noted that her inappropriate illness behavior did not have any objective findings that correlated with her subjective complaints. Dr. Crystal concluded that appellant did not require additional medical treatment for her accepted conditions. He completed a work capacity evaluation (Form OWCP-5c) and reiterated that she was capable of returning to her usual job without restrictions.

By notice dated June 13, 2018, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on the report of the IME, Dr. Crystal. It found that the special weight of the medical opinion evidence rested with his opinion and afforded appellant 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

OWCP received additional Form CA-20 reports and letters dated June 4 and July 2, 2018 from Dr. McMahon who continued to diagnose a head injury, left TMJ, a cervical herniated disc, and a left shoulder posterior labrum tear due to the accepted April 15, 2015 employment injury, and to opine that appellant was unable to work.

⁵ A.M.A., *Guides* (6th ed. 2009).

By decision dated July 20, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 23, 2018. It found that the opinion of Dr. Crystal, the IME, represented the special weight of the evidence and established that she had no further residuals or disability due to her accepted April 15, 2015 employment injuries.

On August 13, 2018 appellant, through counsel, requested a telephonic hearing before an OWCP hearing representative.

OWCP thereafter received additional medical evidence.

In a July 24, 2018 report, Dr. Mitchell L. Kaphan, an orthopedic surgeon, noted appellant's history of injury on April 15, 2015 and provided impressions of left shoulder contusion, cervical disc herniation at C3-4, C4-5, C5-6, and C6-7, left shoulder sprain, and concussion. He advised that left shoulder arthroscopic surgery was unnecessary and that she should continue with symptomatic adjustments for her cervical spine injury. Dr. Kaphan indicated that appellant had left TMJ problems. He opined that, based on his review of her history of injury and findings on clinical examination, the above-noted injuries were work related. Dr. Kaphan advised that she had a moderate impairment from her usual occupation, but could return to work with restrictions.

OWCP also received additional Form CA-20 reports and letters dated August 6, 2018 through January 9, 2019 from Dr. McMahon who reiterated his prior diagnoses and continued to keep appellant off work.

During the telephonic hearing held on January 15, 2019, counsel contended that Dr. Crystal's report was of diminished probative value as he rejected the conditions accepted by OWCP and cited Board precedent in support of his contention.

Following the hearing, OWCP continued to receive Form CA-20 reports and letters dated February 6 and March 6, 2019 from Dr. McMahon who reiterated his prior diagnoses and continued to keep appellant off work.

By decision dated March 26, 2019, OWCP's hearing representative affirmed the July 20, 2018 decision. She found that the special weight of the medical opinion evidence rested with the well-rationalized opinion of Dr. Crystal, the IME, that appellant no longer had any residuals or disability causally related to her accepted April 15, 2015 employment injuries. The hearing representative further found that the medical evidence submitted by appellant was insufficient to outweigh the special weight accorded to Dr. Crystal's impartial medical opinion in order to establish continuing employment-related disability after July 23, 2018.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁶ After 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

⁶ *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

the employment.⁷ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁹ 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.¹⁰

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.¹¹ In situations where there exist opposing medical 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 opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹²

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 July 23, 2018.

Appellant's attending physician, Dr. McMahon, continued to find that appellant was totally disabled from work and had ongoing residuals requiring medical treatment due to accepted conditions resulting from the April 15, 2015 employment injury. OWCP referred appellant for a second opinion evaluation with Dr. Sultan. In his September 13, 2017 report, Dr. Sultan found that appellant had no residuals of her accepted April 15, 2015 employment injuries and that she could return to her date-of-injury job as a letter carrier with no restrictions. He further found that the requested left shoulder surgery was not medically necessary or causally related to the accepted work injuries. Due to the conflict between Dr. McMahon and Dr. Sultan, OWCP properly referred appellant for an impartial medical examination with Dr. Crystal to resolve the conflict of medical opinion evidence, pursuant to 5 U.S.C. § 8123(a).

In a March 15, 2018 report, Dr. Crystal noted that he had reviewed the SOAF and the medical record and opined that appellant had no residuals of the accepted April 15, 2015 employment conditions, that she could return to her date-of-injury job with no restrictions, and

⁷ See *D.G., id.*; *R.P., id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁸ *K.W.*, Docket No. 19-1224 (issued November 15, 2019); see *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

¹⁰ *K.W.*, *supra* note 8; see *A.G., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake, id.*

¹¹ 5 U.S.C. § 8123(a); *L.T.*, Docket No. 18-0797 (issued March 14, 2019).

¹² *D.W.*, Docket No. 18-0123 (issued October 4, 2018).

that no further medical treatment was required for her accepted conditions. Dr. Crystal found that the medical record established that appellant's diagnoses of scalp contusion, concussion without loss of consciousness, cervical radiculopathy, left shoulder contusion, and left shoulder sprain were caused by the mechanism of injury on April 15, 2015. He further found, however, that her accepted condition of left shoulder superior glenoid labrum lesion was not consistent with her mechanism of injury as this condition required direct contact. Dr. Crystal also found that appellant's accepted condition of cervical disc herniation at C2-3, C3-4, C4-5, C5-6, and C6-7 was not supported by diagnostic test findings, including a July 10, 2015 left shoulder MRI scan which revealed nontraumatic hypertrophic changes with impingement that represented nontraumatic arthritis not causally related to April 15, 2015 work injury. He indicated that she was currently suffering from "inappropriate illness behavior" that caused symptom magnification and enabled her complaint of ongoing pain. In addition, Dr. Crystal indicated that appellant had preexisting, nonwork-related cervical disc degeneration that was temporarily aggravated by the April 15, 2015 employment injury and should have resolved after a few months. Based on this report, OWCP terminated her wage-loss compensation and medical benefits, effective July 23, 2018.

The Board finds, however, that Dr. Crystal's report is not entitled to the special weight of the medical evidence accorded an IME as it is not based on an accurate factual background. The February 15, 2018 SOAF provided to Dr. Crystal properly indicated that OWCP had accepted appellant's April 15, 2015 traumatic injury claim for cervical disc herniation at C2-3, C3-4, C4-5, C5-6, and C6-7, concussion without loss of consciousness, cervical radiculopathy, left shoulder contusion, scalp contusion, superior glenoid labrum lesion of the left shoulder, and left shoulder sprain. However, Dr. Crystal did not follow this acceptance in rendering his medical opinion.

The Board has held that the report of an IME who disregards a critical element of the SOAF and disagrees with the medical basis for acceptance of a condition is defective and insufficient to resolve the existing conflict of medical opinion evidence.¹³ The Board finds that Dr. Crystal's report is, therefore, not entitled to the special weight as an IME and is insufficient to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits. Accordingly, the Board finds that OWCP erred in relying on Dr. Crystal's impartial medical opinion as the basis to terminate appellant's wage-loss compensation and medical benefits, effective July 23, 2018, and therefore, has not met its burden of proof.¹⁴

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 23, 2018.

¹³ See *W.F.*, Docket No. 18-0653 (issued September 26, 2019); *B.B.*, Docket No. 18-1121 (issued January 8, 2019); *V.C.*, Docket No. 14-1912 (issued September 22, 2015).

¹⁴ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 26, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 15, 2020
Washington, DC

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

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

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