

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

R.K., Appellant)	
)	
and)	Docket No. 19-1980
)	Issued: May 7, 2020
DEPARTMENT OF THE ARMY, ARMY)	
BENEFITS CENTER -- CIVILIAN,)	
Fort Riley, KS, Employer)	
)	

Appearances:
Appellant, pro se
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 September 30, 2019 appellant filed a timely appeal from an August 28, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the August 28, 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.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits, effective August 29, 2019, as he was no longer disabled due to his accepted August 8, 2017 employment injury.

FACTUAL HISTORY

On August 15, 2017 appellant, then a 53-year-old contract specialist, filed a traumatic injury claim (Form CA-1) alleging that on August 8, 2017 he injured both his knees, left front and back of head, lower back, shoulder, and neck when he fell down stairs while in the performance of duty. He stopped work on August 9, 2017.

Appellant was initially treated in the hospital emergency department on August 9, 2017 by Dr. Robert S. Orosz, who specializes in emergency medicine. Dr. Orosz described that appellant fell on stairs at work and experienced pain in both knees, back, and right shoulder. He reviewed diagnostic imaging, provided physical examination findings, and diagnosed osteoarthritis of the right knee, degenerative changes of the right shoulder, and spondylosis at L3-S1 and C6-7. Dr. Orosz provided an initial impression of headache/concussion.

In a treatment noted dated September 21, 2017, Dr. Joseph W. Farina, a neurologist specializing in headache treatment, noted that appellant presented with a headache and dizziness. He explained that appellant had a migraine due to falling down stairs at work.

On October 25, 2017 OWCP accepted appellant's claim for concussion without loss of consciousness. On October 27, 2017 it subsequently expanded acceptance of his claim to include the conditions of postconcussional syndrome and aggravation of bilateral primary osteoarthritis of the knee. OWCP placed appellant on the periodic rolls effective January 7, 2018.

In a December 21, 2017 report, Dr. Donald Baker, a Board-certified orthopedic surgeon, noted that appellant was seen for follow up of left knee pain. Upon examination of appellant's left knee, he observed a stable knee in flexion and extension. Dr. Baker reported that appellant was doing better and, as such, allowed him to return to his regular job. He diagnosed bilateral primary osteoarthritis of the knee and internal prosthetic device causing pain and noted appellant's prescriptions for various medications, including one for vascular headaches.

On August 7, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions to Dr. Eric K. Undesser, a Board-certified neurologist, for a second-opinion evaluation regarding the status of appellant's accepted August 8, 2017 employment injury. In a December 4, 2018 report, Dr. Undesser noted his review of the SOAF and the medical evidence of record. He described the August 8, 2017 employment injury and noted appellant's accepted conditions of postconcussional syndrome and aggravation of bilateral knee arthritis. Dr. Undesser indicated that appellant complained of daily headaches, difficulty with speech and finding words, trouble with depth perception and balance, and difficulty remembering recent events. Upon examination, he observed that appellant was oriented to person, place, time, and that coordination and dexterity were normal. Neurological examination was normal except for cognition with no evidence of focal neurologic deficit. Dr. Undesser opined

that appellant had no neurologic deficits that would prevent working in any occupation. He indicated that, while appellant's employment position was sedentary in nature, it required "cognitive ability to navigate the complex pathways of government contracting." Dr. Undesser noted that appellant had preexisting migraines that appeared to have been aggravated by the fall and indicated that he had frequent headaches that may require accommodation for poor performance or work absence during a headache. He recommended neuropsychological testing to assess the extent of cognitive deficit and whether the pattern was consistent with mild concussion.

Appellant submitted medical reports dated November 19, 2018 to January 21, 2019 from Dr. Zaineb Daud, a neurologist. Dr. Daud recounted appellant's complaints of chronic headaches and short-term memory problems. He discussed appellant's history and reported that neurological and sensory examinations were both normal. Dr. Daud diagnosed headache and postconcussional syndrome. In a January 21, 2019 progress report, he explained that appellant was still experiencing short-term memory problems and headaches and was unable to function properly to get to his job.

On March 18, 2019 OWCP referred appellant to Dr. Garrett W. Andrews, a Board-certified neuropsychologist, for a second-opinion evaluation regarding the status of appellant's accepted August 8, 2017 employment injury. In an April 8, 2019 report, Dr. Andrews reviewed appellant's history. He reported that mental status examination demonstrated that appellant's speech was fluent, but slurred and that he was awake, alert, and oriented to all spheres. Dr. Andrews explained that the current examination was deemed invalid as appellant failed multiple stand-alone and embedded measures of performance validity. He assessed that appellant "possibly suffered" a mild concussion because of a fall. Dr. Andrews related that evidence and research suggested that recovery for concussion was typically within two weeks to three months status postinjury. He reported that appellant's current presentation revealed invalid neurocognitive data and elevated symptoms, which suggested a willful attempt to underperform and exaggerate symptoms. Dr. Andrews, however, also indicated that appellant's subjective difficulties may also be a result of his medications since appellant was on a number of medication that could affect cognition.

On July 17, 2019 OWCP received an addendum note by Dr. Undesser who indicated that a neuropsychological evaluation was performed on April 8, 2019 by Dr. Andrews. Dr. Undesser related that results of the examination were deemed invalid due to failure at multiple stand-alone and embedded measures of performance validity suggesting a willful attempt to underperform. He reiterated that appellant had no neurologic deficits that would prevent working in any occupation. Dr. Undesser explained that, although neuropsychological testing did not support cognitive deficits due to traumatic brain injury, there was the possibility of mild cognitive impairment due to side effects of medication. He completed a work capacity evaluation (Form OWCP-5c), which indicated that appellant could return to work "from a neurological perspective."

On July 25, 2019 OWCP proposed to terminate appellant's wage-loss compensation benefits because he was no longer disabled due to his August 8, 2017 employment injury. It afforded him 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

In an August 21, 2019 statement, appellant asserted that both Dr. Andrews and Dr. Undesser agreed that appellant had memory loss and that adding stress would cause problems.

He related that he was looking for employment opportunities at the employing establishment that were less stressful.

By decision dated August 28, 2019, OWCP finalized the termination of appellant's wage-loss compensation benefits, effective August 29, 2019, as it found that he had no disability due to his accepted August 8, 2017 employment injury. It found that the weight of medical evidence rested with Dr. Baker, who indicated in a December 21, 2017 report that appellant was no longer disabled due to his accepted orthopedic condition, and Dr. Undesser and Dr. Andrews, OWCP second-opinion examiners, who indicated in reports dated December 4, 2018 and April 8, 2019, that appellant could work full duty from a neurological perspective.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify termination or modification of benefits.³ It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

ANALYSIS

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective August 29, 2019.

OWCP terminated appellant's wage-loss compensation benefits for his neurological conditions based on the reports of Dr. Undesser and Dr. Andrews, OWCP second-opinion examiners. In a December 4, 2018 report, Dr. Undesser noted that appellant's claim was accepted for postconcussional syndrome and aggravation of bilateral knee arthritis causally related to an August 8, 2017 fall at work. He reported that neurological examination was normal aside from cognition with no evidence of focal neurologic deficit. Dr. Undesser opined that appellant had no neurologic deficits that would prevent working in any occupation, but that appellant had frequent headaches that may require accommodation. He recommended neuropsychological testing to assess the extent of cognitive deficit.

In a March 18, 2019 report, Dr. Andrews explained that his examination was deemed invalid as appellant failed multiple stand-alone and embedded measures of performance validity. He assessed that appellant "possibly suffered" a mild concussion because of a fall and related that recovery for concussion was typically within two weeks to three months status postinjury. Dr. Andrews noted that the subjective cognitive difficulties could be the result of appellant's

³ *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁴ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

medications and noted he presented with slurred speech. He indicated that the medications could impact cognition and could affect every day memory.

In a July 16, 2019 addendum note, Dr. Undesser related that results of the April 8, 2019 neuropsychological evaluation by Dr. Andrews were deemed invalid. He reiterated that appellant had no neurologic deficits that would prevent working in any occupation. Dr. Undesser also explained that, although neuropsychological testing did not support cognitive deficits due to traumatic brain injury, there was the possibility of mild cognitive impairment due to side effects of medication.

The Board finds that Dr. Undesser's opinion was inconsistent and conclusory in nature and did not contain sufficient medical reasoning to establish that appellant was no longer disabled due to his accepted August 8, 2017 employment injury.⁶ 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.⁷ 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.⁸

Although Dr. Undesser opined in his December 4, 2018 report that appellant had no neurologic deficits that, would prevent him from working, he also noted that appellant had frequent headaches that may require accommodation. He further indicated in his July 16, 2019 addendum that, while neuropsychological testing did not support cognitive deficits due to traumatic brain injury, there was the possibility of mild cognitive impairment due to side effects of medication. The Board finds that Dr. Undesser did not definitively conclude that appellant was able to return to work. Dr. Undesser did not provide sufficient medical reasoning or explanation for how appellant was no longer disabled due to his accepted neurological injury, but may still require accommodations due to mild impairment. Furthermore, he did not adequately explain how he concluded that appellant had cognitive deficits from neuropsychological testing when Dr. Andrews determined that his examination was invalid. Considering the internal inconsistencies in his report, Dr. Undesser's report is speculative at best.⁹ Likewise, Dr. Andrews also did not conclusively opine that appellant was no longer disabled due to his August 8, 2017 employment injury, but merely noted that appellant's examination was deemed invalid and that mild concussions typically resolve in a few weeks.¹⁰ While Dr. Andrews noted that the subjective cognitive difficulties could be the result of appellant's medications and noted he presented with

⁶ See *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.B.*, Docket No. 18-0700 (issued January 9, 2019); *S.J.*, Docket No. 17-0543 (issued August 1, 2017).

⁷ *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Nicolette R. Kelstrom*, 54 ECAB 570 (2003).

⁸ *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *James T. Johnson*, 39 ECAB 1252 (1988).

⁹ Medical opinions that are speculative or equivocal in character are of diminished probative value. *D.B.*, Docket No. 18-1359 (issued May 14, 2019).

¹⁰ See *S.J.*, Docket No. 17-0543 (issued August 1, 2017).

slurred speech. He indicated that the medications could impact cognition and could affect everyday memory. Because the reports of Dr. Undesser and Dr. Andrews lack probative value, the Board finds that OWCP erred in relying on his opinion as the basis to terminate appellant's wage-loss compensation benefits.

The Board further finds that OWCP erred in relying on Dr. Baker's December 21, 2017 examination note as the basis in determining that appellant was no longer disabled due to his accepted bilateral knee injury. In a December 21, 2017 report, Dr. Baker noted that left knee examination findings revealed a stable knee in flexion and extension. He reported that appellant would be allowed to return to his regular job. Dr. Baker, however, did not address whether appellant was no longer disabled from work due to his right knee osteoarthritic injury. The Board notes that appellant's claim was accepted for aggravation of bilateral knee osteoarthritis. Although Dr. Baker discussed appellant's left knee injury, he failed to provide any objective findings regarding appellant's right knee and did not opine on whether appellant's disability due to his right knee osteoarthritic injury had resolved.¹¹ Accordingly, this report is of no probative value to establish termination of appellant's wage-loss compensation benefits.¹²

The Board therefore finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective August 29, 2019, as the medical evidence of record is insufficient to establish that he no longer has disability causally related to his accepted August 8, 2017 employment injury.¹³

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective August 29, 2019.

¹¹ See *S.T.*, Docket No. 18-1144 (issued August 9, 2019).

¹² See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹³ See *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Willa M. Frazier*, 55 ECAB 379 (2004).

ORDER

IT IS HEREBY ORDERED THAT the August 28, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: May 7, 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