

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

_____	)	
<b>B.W., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1033</b>
	)	<b>Issued: November 30, 2020</b>
<b>DEPARTMENT OF THE NAVY, JOINT BASE</b>	)	
<b>PEARL HARBOR -- HICKAM, Honolulu, HI,</b>	)	
<b>Employer</b>	)	
_____	)	

*Appearances:*  
Sally F. LaMacchia, Esq., for the appellant<sup>1</sup>  
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 April 15, 2020 appellant, through counsel, filed a timely appeal from a December 3, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>2</sup> Pursuant to the

---

<sup>1</sup> 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.

<sup>2</sup> The Board notes that, following the December 3, 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.*

Federal Employees' Compensation Act<sup>3</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### **ISSUE**

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 3, 2019 as he no longer had residuals or disability causally related to his accepted October 1, 2014 employment injury.

### **FACTUAL HISTORY**

On October 14, 2014 appellant, then a 35-year-old pipefitter supervisor, filed a traumatic injury claim (Form CA-1) alleging that on October 1, 2014 he strained his lower back when lifting a rapper seal while in the performance of duty. OWCP accepted the claim for lumbar sprain. Appellant stopped work on October 3, 2014 and returned to full-time, limited-duty work on November 17, 2014. On February 9, 2015 he began working four hours per day, five days per week in a modified position. OWCP paid appellant wage-loss compensation on the supplemental rolls beginning February 9, 2015 and on the periodic rolls beginning April 5, 2015. On August 7, 2015 appellant resumed full-time modified work. OWCP paid him wage-loss compensation for lost night differential.

A magnetic resonance imaging (MRI) scan of the lumbar spine obtained on November 28, 2014 revealed right more than left facet arthropathy and minimal disc disease at L4-5 without significant neural foraminal or spinal canal stenosis.

An electromyogram (EMG) and nerve conduction velocity (NCV) study dated December 5, 2014 showed left sacral plexopathy and/or peripheral neuropathy of the left lower extremity.

In a report dated December 29, 2014, Dr. Man Kwan Wong, a Board-certified internist diagnosed lumbar radiculopathy and lumbar sprain.

In a report dated February 10, 2014, Dr. Jon F. Graham, a neurosurgeon, obtained a history of appellant injuring his back when lifting a box at work on October 1, 2014. He reviewed the results of a November 28, 2014 MRI scan and diagnosed multilevel degenerative disc disease with mild foraminal stenosis at L2-3, L3-4, and L4-5.

On July 9, 2015 OWCP referred appellant to Dr. David T. Brough, a Board-certified physiatrist, for a second opinion examination. It requested that Dr. Brough address whether appellant currently had continued residuals of his accepted employment injury and whether the employment injury had caused any additional conditions.

In a report dated July 9, 2015, Dr. Brough reviewed appellant's history of an October 1, 2014 employment injury, noting that appellant had experienced pain in his low back lifting industrial cloth from a box. He reviewed the evidence of record, including the results of diagnostic

---

<sup>3</sup> 5 U.S.C. § 8101 *et seq.*

testing. Dr. Brough opined that the accepted employment injury had caused lumbago, lumbar intervertebral disc derangement, and “likely secondary left lumbosacral radiculopathy, most likely at L5 given the decreased left hamstring reflex, weakness of the left extensor hallucis longus muscle, and weakness of the left ankle dorsiflexion.” He further noted that appellant likely had mild bilateral S1 joint pain and that lumbar radiculopathy had not been ruled out as a diagnosis. Dr. Brough provided work restrictions and treatment recommendations, including an EMG to evaluate the left lumbosacral paraspinal muscles.

An EMG and NCV testing performed October 16, 2015 revealed moderate chronic left radiculopathy at L4-5.

On February 11, 2016 Dr. Wong opined that the diagnosed conditions of lumbar sprain, lumbago, and lumbar radiculopathy were causally related to appellant’s employment injury. He advised that objective findings included the EMG test results and examination findings. Dr. Wong found that appellant could perform his current duties in a full-time capacity.<sup>4</sup>

On August 16, 2019 OWCP referred appellant to Dr. WeiChin Chen, a Board-certified orthopedic surgeon, for another second opinion examination to determine whether appellant had work restrictions or residuals of his October 1, 2014 back strain. It provided Dr. Chen with a statement of accepted facts (SOAF) setting forth the accepted condition as a lumbar sprain. The SOAF indicated that appellant had worked part-time limited-duty employment since February 9, 2015.

In a report dated September 26, 2019, Dr. Chen discussed appellant’s history of injury and appellant’s continued complaints of pain in his low back radiating into the bilateral hips and thighs and left leg numbness. On examination he found tenderness to palpation of the left paraspinal, midline, and S1 joint areas and decreased sensation at L5 and S1 on the left with a negative straight leg raise and positive Faber’s test bilaterally. Dr. Chen opined that appellant’s lumbar strain and sprain had resolved. He diagnosed degenerative changes of the lumbar spine and advised that there was “no objective evidence supporting continued existence of [appellant’s] accepted condition.” Dr. Chen related:

“At this time, [appellant] has subjective complaints of axial lumbar pain, objectively this could be due to his left paracentral disc extrusion and also facet joint arthrosis diffusely throughout his lumbar spine. [He] has on MRI [scan] revealing contact with the left S1 nerve root, for which [he] has subjective evidence for S1 distribution paresthesia to both light touch and sharp, which is concordant with the subjective complaints and his facet arthrosis consistent with subjective complaints of his axial lumbar pain. Again, the objective findings are not due to [appellant’s] traumatic strain. His traumatic strain at this time has resolved based on his MRI [scan] dated April 10, 2017.”

---

<sup>4</sup> Dr. Wong continued to submit progress reports describing his treatment of appellant. In a report dated April 4, 2017, he advised that appellant was unable to return to his regular employment due to continued pain and loss of range of motion.

Dr. Chen found that appellant required work restrictions and medical treatment due to his nonemployment-related conditions.

On October 31, 2019 OWCP advised appellant of its proposed termination of his wage-loss compensation and medical benefits as the weight of the evidence established that he no longer had any employment-related residuals or disability due to his October 1, 2014 employment injury. It afforded him 30 days to submit additional evidence or argument if he disagreed with the proposed termination.

Thereafter, OWCP received a September 17, 2019 emergency department report from Dr. David T. Fujiwara, Board-certified in emergency medicine. Dr. Fujiwara obtained a history of appellant injuring his back at work five years earlier. He diagnosed low back pain.

In a progress report dated November 5, 2019, Dr. Wong evaluated appellant for low back pain with spasms and diagnosed lumbar sprain.

In an undated report received by OWCP on November 26, 2019 Dr. Wong advised that appellant's initial diagnosis was lumbar sprain, but that electrodiagnostic testing had revealed radiculopathy at L4-5. He asserted that lumbar radiculopathy could result in symptoms last for years.

By decision dated December 3, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits effective December 3, 2019. It found that the opinion of Dr. Chen represented the weight of the evidence and established that appellant had no further residuals or disability due to his accepted employment injury.

### **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.<sup>5</sup> 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 the employment.<sup>6</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>7</sup>

### **ANALYSIS**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 3, 2019.

OWCP accepted that appellant sustained lumbar sprain on October 1, 2014. It indicated that it was terminating his wage-loss compensation and medical benefits as the September 26,

---

<sup>5</sup> *R.H.*, Docket No. 19-1064 (issued October 9, 2020); *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

<sup>6</sup> *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

<sup>7</sup> *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

2019 report from Dr. Chen, an OWCP referral physician, established that appellant had no further disability or need for medical treatment due to his lumbar sprain. OWCP provided Dr. Chen with a SOAF that indicated that it had only accepted a lumbar sprain due to appellant's October 1, 2014 employment injury.

OWCP, however, had previously referred appellant to Dr. Brough for a second opinion examination to determine whether appellant had continued disability or residuals of his accepted lumbar sprain and whether appellant had sustained any additional conditions as a result of his October 1, 2014 employment injury. In a July 9, 2015 report, Dr. Brough found that appellant had sustained lumbago, lumbar intervertebral disc derangement, and likely L5 left lumbar radiculopathy due to appellant's accepted employment injury. Following receipt of his report, OWCP failed to either expand acceptance of the claim or further develop the evidence.

Once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.<sup>8</sup> It failed to fully develop the issue of claim expansion to determine whether it should expand acceptance of the claim to include the additional conditions diagnosed by its referral physician, Dr. Brough, and whether, if established, these conditions resulted in continuing disability from employment or the need for medical treatment.<sup>9</sup>

Additionally, OWCP provided Dr. Chen with a SOAF that indicated that appellant had worked four hours per day from February 9, 2015 to the present. Appellant, however, returned to full-time employment on August 7, 2015. OWCP's procedures provide that a claimant's employment history is an essential element of the SOAF.<sup>10</sup> When a physician renders a medical opinion based on an incomplete or inaccurate SOAF, the probative value of the opinion is seriously diminished or negated altogether.<sup>11</sup>

For the above-stated reasons, OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.<sup>12</sup>

### **CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective December 3, 2019.

---

<sup>8</sup> See *R.B.*, Docket No. 20-0109 (issued June 25, 2020); *B.W.*, Docket No. 19-0965 (issued December 3, 2019).

<sup>9</sup> See *J.T.*, Docket No. 19-1723 (issued August 24, 2020).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.6(a)(2) (September 2009).

<sup>11</sup> *Id.* at Chapter 3.600(3) (October 1990). See *Y.D.*, Docket No. 17-0461 (issued July 11, 2017).

<sup>12</sup> *J.T.*, *supra* note 9.

**ORDER**

**IT IS HEREBY ORDERED THAT** the December 3, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 30, 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