

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

_____)	
T.H., Appellant)	
)	
and)	Docket No. 20-0312
)	Issued: July 6, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Parkville, MD, Employer)	
_____)	

Appearances: *Case Submitted on the Record*
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

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

JURISDICTION

On November 22, 2019 appellant, through counsel, filed a timely appeal from an October 29, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).²

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 Counsel did not appeal from the November 4, 2019 hearing representative's decision affirming a June 11, 2019 decision denying appellant's claim for wage-loss compensation on March 6, 14, and 12, 2019. He identified only the nonmerit decision dated November 22, 2019 on the application for review (Form AB-1). Therefore, the Board will not consider the November 4, 2019 OWCP decision on appeal. *See* 20 C.F.R. § 501.3; *see also L.J.*, Docket No. 19-0211 (issued July 10, 2019).

Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.⁴

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 23, 2019, as she no longer had residuals or disability causally related to her accepted August 3, 2017 employment injury; and (2) whether appellant has established continuing employment-related disability after April 23, 2019.

FACTUAL HISTORY

On August 3, 2017 appellant, then a 40-year-old city letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained neck, back and left shoulder injuries in the performance of duty when a speeding truck struck the driver side of her postal vehicle. She stopped work that day. On November 20, 2017 OWCP accepted the claim for other muscle spasm and neck muscle strain. It paid appellant on the supplemental rolls for temporary total disability through August 2, 2018. OWCP paid appellant for partial disability on the supplemental rolls following appellant's return to limited-duty part-time work on August 3, 2018.

In a report dated August 14, 2017, Dr. Michael A. Randolph, a Board-certified internist, related that appellant had been under his care since August 4, 2017, following a motor vehicle accident. He diagnosed cervicalgia, other dorsalgia, and other muscle spasm and found her disabled from work. In reports dated September 18 and December 11, 2017 and March 14, 2018, Dr. Randolph advised OWCP that appellant was currently under the care of Dr. Mark Coleman, a Board-certified anesthesiologist and pain medicine physician. He informed OWCP that Dr. Coleman would make the final determination regarding appellant's ability to return to work.

On April 2, 2018 OWCP referred appellant, together with a statement of accepted facts (SOAF), medical record, and list of questions, for a second opinion evaluation with Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, for a determination of whether appellant's work-related conditions had resolved and whether appellant could return full time to her date-of-injury job. The SOAF noted other muscle spasm and neck muscle strain as the accepted conditions.

In an April 20, 2018 report, Dr. Smith reviewed the SOAF, as well as appellant's history of injury and medical history. He related that the SOAF only contained the condition of cervical strain and he provided cervical range of motion findings, and related that appellant had a normal neurologic examination. Dr. Smith reported that appellant had subjective complaints of pain,

³ 5 U.S.C. § 8101 *et seq.*

⁴ The Board notes that, following the October 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.*

which restricted her cervical motion; however, he was unable to palpate any paraspinal rigidity of soft tissue spasm, which would preclude appellant from normal neck movement. He opined that appellant was capable of returning to her date-of-injury job without restrictions. Dr. Smith also concluded that the accepted cervical muscle strain and spasm had resolved without residuals based on his clinical finding and there was no need for further medical treatment.

Appellant began care with Dr. Cheryl Kalb, a chiropractor. Dr. Kalb, in a July 9, 2018 report, diagnosed cervical and thoracic sprain/strain, paravertebral muscle spasm and myositis, lower extremity dysfunction, lumbago, and lumbar, cervical, and thoracic segmental joint dysfunction. She noted that appellant had been involved in a work-related motor vehicle accident and provided examination findings. A review of a July 11, 2018 magnetic resonance imaging scan of the cervical and thoracic spine revealed mild C5-6, C6-7 disc bulging and no evidence of spinal stenosis, foraminal stenosis, or disc herniation. Dr. Kalb noted that appellant had been off work since August 3, 2017, the date of the motor vehicle accident, and anticipated resolution of the injury with six to eight weeks contingent based upon the therapy she proposed. She concluded that appellant's July 9, 2017 accident was the cause of her physical symptoms.

In duty status reports (Form CA-17) dated August 17, October 17, November 12, and December 7, 2018, Dr. Randolph released appellant to return to work for five hours per day with restrictions. In each of these reports, he related clinical findings of neck and back muscle spasm.

In a November 21, 2018 report, Dr. Randolph placed appellant totally off work for the period October 13 to 20, 2018 due to muscle spasms arising from her accepted August 3, 2017 employment injury. He explained that the muscle relaxant therapy could cause lethargy and attached information regarding side effects of the prescribed medication, Skelazin.

Dr. Randolph, in progress reports dated November 12 and December 6, 2018, related that appellant was seen in follow-up for recurrent back and neck spasms. He provided appellant's physical examination findings including cervical and lumbar muscle spasm, on range of motion testing. Dr. Randolph related diagnoses of neck and lower back muscle, fascia, and tendon strain, back muscle spasm, cervicgia, and thoracic ligament sprain. In his December 6, 2018 report, in addition to noting cervical and lumbar spasm on examination, he also noted thoracic spasms. Dr. Randolph opined that recent weather changes contributed to the spasms and that her prescribed medication has caused some lethargy.

On January 18, 2019 the employing establishment offered appellant a modified assignment working three hours per day, which appellant accepted under protest.

In a January 28, 2019 return-to-duty letter, the employing establishment noted that appellant had last reported to work in her modified position on January 22, 2019. It instructed her to return to duty or provide medical evidence of incapacity to work.

On March 22, 2019 OWCP advised appellant of its proposed termination of her wage-loss compensation and medical benefits. It found that Dr. Smith's opinion represented the weight of the evidence and established that she had no further injury-related conditions or disability. Appellant was advised that she had 30 days to submit additional evidence.

By decision dated April 23, 2019, OWCP terminated appellant's wage-loss compensation and authorization for medical benefits, effective that day, finding that she had no further disability or condition causally related to her accepted August 3, 2017 employment injury. It found that the opinion of Dr. Smith constituted the weight of the evidence and established that she had no further residuals of her accepted conditions.

On April 30, 2019 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review, which was held on August 15, 2019.

Subsequent to appellant's request for a telephonic hearing, OWCP received a March 22, 2019 report from Dr. Randolph, which noted a normal cervical examination, summarized the treatment provided, and diagnosed back muscle spasm, lower back fascia strain, neck muscle, fascia, and tendon strain and back wall of thorax muscle and tendon strain. In an April 26, 2019 report, Dr. Randolph noted that appellant was seen for upper back pain and spasm. He related findings on physical examination of neck spasm and tenderness. In a disability note dated April 26, 2019, Dr. Randolph released her to return to work that day, for five hours a day, pursuant to the restrictions that had been in place since August 2018.

OWCP also received Form CA-17s dated August 17, March 22, April 24, May 24, June 21, and July 19, 2019 from Dr. Randolph relating appellant able to work a five-hour day with restrictions. In each of these form reports, Dr. Randolph related clinical findings of neck and back muscle spasms.

In a May 23, 2019 report, Dr. Randolph noted his disagreement with Dr. Smith's opinion and asserted that Dr. Smith's opinion was based on review of an incomplete medical record.

In a report dated June 21, 2019, Dr. Randolph related that appellant complained of left side cervical pain. He noted physical examination findings including cervical and thoracic muscle spasm. Dr. Randolph diagnosed thorax wall muscle and tendon strain, low back strain, neck fascia and tendon muscle strain.

In notes dated June 21, July 19, and September 24, 2019, Dr. Randolph noted that appellant remained under his care and that she was capable of working a five-hour day with restrictions, which were unchanged since August 2018.

Dr. Randolph, in July 19 and August 20, 2019 progress notes, noted that appellant was currently working and had been cleared to work five hours per day. Examination findings were detailed including continued findings of cervical, thoracic, and lumbar spine spasm. Appellant's diagnoses were unchanged.

By decision dated October 29, 2019, the hearing representative affirmed the April 23, 2019 decision, terminating her wage-loss compensation and medical benefits, effective April 23, 2019. She also found that appellant had no continuing disability after April 23, 2019 causally related to the accepted conditions.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, it 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

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁹

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.¹⁰

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 April 23, 2019.

The evidence of record establishes that there remains a conflict between Dr. Smith, the second opinion physician, and Dr. Randolph, appellant's treating physician, as to whether appellant had residuals from her accepted conditions as of April 23, 2019. In his April 20, 2018 report, Dr. Smith described the August 3, 2017 employment injury and noted review of the SOAF and that the claim had been accepted for cervical muscle strain and spasm. He indicated that appellant's physical examination revealed no objective findings of the accepted conditions. Dr. Smith found that appellant had no evidence of cervical spasm, atrophy, trigger points, or any deformity and a normal neurological examination. He opined that the accepted conditions had

⁵ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁶ *A.C.*, Docket No. 19-1522 (issued July 27, 2020); *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *T.L.*, Docket No. 18-0536 (issued November 27, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁸ *S.P.*, Docket No. 20-0196 (issued June 24, 2020); *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

⁹ *S.P.*, *id.*; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹⁰ 5 U.S.C. § 8123(a). *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016) (OWCP improperly terminated the claimant's wage-loss compensation and medical benefits as there was an unresolved conflict of medical opinion between her treating physician and a second opinion specialist).

resolved, that she could return to work without restrictions, and there was no need for further medical treatment.

Appellant's treating physician, Dr. Randolph, however, submitted reports relating appellant's physical examinations as of August 4, 2017. In his progress reports through the date of the termination of appellant's wage-loss compensation and medical benefits, he continued to relate that on physical examination appellant had continued neck and back spasms, clinical findings of appellant's accepted muscle spasm condition. Dr. Randolph also continued to indicate that he was treating appellant for back muscle spasm, lower back fascia strain, neck muscle, fascia, and tendon strain, and back wall of thorax muscle and tendon strain. He also continued to relate that appellant was only capable of working with restrictions for five hours a day. The two physicians, thus, disagreed as to whether appellant's accepted muscle spasm, and neck strain had resolved.¹¹ The Board finds that an unresolved conflict of medical evidence remains between the opinions of Dr. Smith and Dr. Randolph as to whether appellant had residuals and disability from the accepted conditions.

As a conflict remains in the medical opinion evidence prior to April 23, 2019 as to whether appellant's accepted conditions had resolved and no longer caused disability, the Board finds that OWCP has not met its burden of proof to terminate her wage-loss compensation and medical benefits.

CONCLUSION

The Board further finds that OWCP has not met its burden of proof to terminate her wage-loss compensation and medical benefits, effective April 23, 2019.¹²

¹¹ *Id.*

¹² In light of the disposition of this case, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the October 29, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 6, 2021
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