

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

_____)	
D.E., Appellant)	
)	
and)	Docket No. 20-0936
)	Issued: June 24, 2021
U.S. POSTAL SERVICE, POST OFFICE,)	
Indianapolis, IN, Employer)	
_____)	

Appearances:
Anita Lewallen, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 25, 2020 appellant, through her representative, filed a timely appeal from a February 25, 2020 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 February 25, 2020 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 appellant has established that the acceptance of her claim should be expanded to include additional or consequential conditions of fibromyalgia, depression/anxiety, insomnia, and cervical enthesopathy as a result of her accepted September 14, 2017 employment injury; (2) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 4, 2019; and (3) whether appellant has met her burden of proof to establish continuing employment-related residuals or disability on or after April 4, 2019 due to her accepted September 14, 2017 employment injury.

FACTUAL HISTORY

On September 16, 2017 appellant, then a 30-year-old carrier technician, filed a traumatic injury claim (Form CA-1) alleging that on September 14, 2017 she sustained neck, shoulder, back, left hip, and knee injuries when her vehicle was rear-ended by a truck, in the performance of duty. She stopped work on September 15, 2017. OWCP accepted appellant's claim for neck sprain, back wall of thorax strain, back strain, and head contusion. It paid appellant wage-loss compensation on the supplemental rolls as of November 11, 2017 and on the periodic rolls as of January 7, 2018.

On June 8, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a list of questions, to Dr. Norman Mindrebo, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he evaluate whether she continued to have residuals/disability causally related to her accepted September 14, 2017 employment injury.

In a July 30, 2018 report, Dr. Mindrebo reported a benign physical examination. He opined that the accepted conditions had fully resolved as there was no muscular atrophy in appellant's neck, shoulders, or upper extremities. Dr. Mindrebo thus opined that she no longer had any employment-related residuals or disability resulting from the employment injury and she could return to her date-of-injury position.

In an August 7, 2018 letter, OWCP requested that appellant's treating physician Dr. Kris Homb, a Board-certified physiatrist, review Dr. Mindrebo's report and either state agreement or provide rationalized medical opinion supported by clinical findings refuting Dr. Mindrebo's report. A copy of Dr. Mindrebo's report was provided.

In a September 6, 2018 progress report, Dr. Homb opined that appellant continued to progress in range of motion (ROM) concerning her cervical/thoracic/lumbar strain, that she should continue with physical therapy, and that she would likely benefit from work conditioning prior to return to work. He also assessed insomnia related to pain.

In an October 15, 2018 progress report, Dr. Homb related that appellant presented with cervical/thoracic/lumbar spine pain. He noted that she still had limitations regarding cervical ROM, and that she was to continue off work until her next follow-up visit. Dr. Homb noted that appellant had pain-related insomnia, and depression.

OWCP also received disability slips from Dr. Homb dated September 6 and October 15, 2018, which continued to hold her off work and indicated that physical therapy should continue.

On October 31, 2018 OWCP revised the SOAF to include a more detailed description of the physical requirements of appellant's carrier technician position. A copy of the October 31, 2018 SOAF was sent to Dr. Mindrebo for a supplemental opinion regarding whether the findings and opinions stated in his July 30, 2018 report had changed.

In a November 12, 2018 addendum report, Dr. Mindrebo reviewed the October 31, 2018 SOAF. He opined that appellant was able to perform her date-of-injury position as a carrier technician without restrictions based on her benign July 30, 2018 examination.

OWCP subsequently received a November 12, 2018 progress report, wherein Dr. Homb opined that appellant should remain off work due to cervical, thoracic, and lumbar strains and cervical enthesopathy as she continued to have ROM cervical limitations. He also diagnosed insomnia related to pain and depression.

In his December 10, 2018 progress report, Dr. Homb reported that appellant was status post significant physical therapy and medications, without significant improvement in pain. He noted that she had exhausted all conservative treatments that she was willing to pursue and there was no need for surgical intervention. Dr. Homb held appellant off work and ordered a functional capacity examination (FCE) to determine her long-term restrictions. He also continued to diagnose insomnia related to pain and depression.

Appellant underwent an FCE on January 21, 2019. In a January 28, 2018 work capacity evaluation (Form OWCP-5c), Dr. Homb indicated, based on the FCE results, that she reached maximum medical improvement (MMI) and had permanent restrictions which rendered her only able to perform a desk job with limited lifting.

In a February 11, 2019 notice, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits because she ceased to have residuals/disability causally related to her accepted September 14, 2017 employment injury. It advised her that the proposed action was based on Dr. Mindrebo's reports of July 30 and November 12, 2018 and afforded her 30 days to submit additional evidence or argument challenging the proposed termination of her benefits.

Subsequently, in a February 5, 2019 letter, Dr. Homb noted his disagreement with Dr. Mindrebo's findings and medical opinions. He agreed with Dr. Mindrebo's examination findings that appellant had full strength, normal muscle stretch reflexes, and sensation. However, Dr. Homb indicated that, at each of her visits (eight total), her examinations revealed diffuse tenderness over her cervical paraspinals, trapezius, posterior scalenes, intrascapular muscles, anterior scalenes, pectoralis muscles, and lumbar paraspinals. Also, during three of appellant's visits, trigger points were noted with palpation, for which she underwent trigger point injections on November 12, 2018. Dr. Homb indicated that her ROM was decreased with neck rotation and side bending, which the January 21, 2019 FCE examination confirmed. He opined that appellant continued to suffer residuals of her cervical, thoracic and lumbar strains. Dr. Homb noted that it was unusual for a patient to have chronic symptoms relating to muscle strains, and that he believed that her prolonged symptoms converted into a fibromyalgia-like picture with related anxiety and depression, difficulty sleeping, and overall stress over work which explained her ongoing pain and limitation despite significant treatment and lack of significant findings on examination and imaging. Based on his examination findings and the January 21, 2019 FCE, he opined that

appellant could not perform her carrier technician position, as the FCE revealed limitations on lifting, walking, carrying activities, and cervical rotation. Dr. Homb opined that she could perform a desk job with limited lifting.

Dr. Homb also submitted additional progress reports and OWCP-5c forms. In an updated February 25, 2019 report, he opined that appellant's severe pain, which was out of the typical time frame and degree of pain expected with muscle strains, was consistent with a conversion into a fibromyalgia-like picture, with anxiety/depression, difficulty sleeping, and stress over work, all contributing. Dr. Homb explained that fibromyalgia often starts after a traumatic event which, in this case, was the motor vehicle accident. He also reported that the FCE was deemed reliable and appellant had provided "near maximal effort."

By decision dated April 4, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that the weight of the medical evidence was represented by the opinions of Dr. Mindrebo.

Appellant requested reconsideration on April 29, 2019.

In an April 24, 2019 report, Dr. Homb indicated that on September 14, 2017 appellant had just removed her seat belt when a truck rear-ended her vehicle and she struck her head and back on metal plates within the vehicle. He indicated that she presented to his clinic seven months after her injury and was diagnosed with cervical, thoracic, and lumbar strains, consistent with the accepted conditions, and insomnia due to her related pain. Dr. Homb indicated that appellant continued to have tenderness on palpation and ROM, which the January 21, 2019 FCE confirmed. He indicated that the January 21, 2019 FCE was deemed reliable and that she gave near maximal effort during the testing. Dr. Homb stated that the FCE found that appellant was able to meet some of her necessary job tasks with the exception of lifting, walking, carrying activities, and positional/postural tolerances of cervical rotation. Thus, based on her job description and her capabilities as noted on the FCE, he opined that she could not return to her previous position and that she had ongoing residuals/disability related to her work injury. Dr. Homb further opined that, while appellant was officially diagnosed with fibromyalgia, she appears to have developed a fibromyalgia-like picture as she has ongoing cervical, thoracic and lumbar pain from her accepted sprains/strains despite significant treatment. He indicated that fibromyalgia is a diagnosis of widespread musculoskeletal pain with related sleep disturbance and psychiatric disturbances, which is often preceded by a trauma or major life altering event. Dr. Homb explained that appellant had a motor vehicle accident while at work and has since developed diffuse myofascial pain in her cervical and lumbar spine regions, impaired sleep/insomnia, and, over the past six months, depression and anxiety with a related increase in stress from not being able to work. He indicated that this was consistent with fibromyalgia and her injury was likely the preceding trauma/major life altering event that helped trigger her fibromyalgia-like syndrome. Dr. Homb indicated that his suggestion of appellant having a fibromyalgia-like syndrome occurred on January 28, 2019 approximately one week after her FCE, and was an effort to explain her ongoing symptoms despite significant treatment with the addition of new developing symptoms.

By decision dated May 31, 2019, OWCP denied modification of the April 4, 2019 termination decision. It found that the weight of the medical evidence established that there were no continuing residuals or disability due to the accepted employment injury.

On September 11, 2019 appellant, through her representative, requested that her claim be expanded to include the additional diagnosed conditions of fibromyalgia, cervical enthesopathy, and insomnia. In support of her request, appellant submitted progress reports from Dr. Homb dated April 19 and August 19, 2019 which noted her pain from cervical/thoracic/lumbar strains, cervical enthesopathy/fibromyalgia, insomnia related to pain, and depression.

In an August 30, 2019 letter, Dr. Homb also requested that OWCP expand the acceptance of the claim to include the conditions of fibromyalgia, cervical enthesopathy, and insomnia to appellant's claim. He provided definitions of each diagnosis and how such diagnosis was based on her history and/or examination findings. With regard to causation, Dr. Homb opined that fibromyalgia often starts after a traumatic event, such as the motor vehicle accident in this case, and the pain fails to improve in a timely manner. He noted that appellant started physical therapy following the injury, but she continued to experience ongoing increasing symptoms, including diffuse pain with related depression/anxiety, impaired sleep, and increase stress, all consistent with fibromyalgia. Dr. Homb indicated that her cervical enthesopathy symptoms were present throughout her treatment. He also indicated that he had previously requested that this become an accepted diagnosis. With regard to the insomnia diagnosis, Dr. Homb indicated that appellant had impaired sleep since the onset of injury, and that this was also consistent with her fibromyalgia diagnosis.

In an October 30, 2019 letter, OWCP explained that it would treat appellant's September 11, 2019 letter as a request for reconsideration. It noted the deficiencies in Dr. Homb's August 30, 2019 letter with regard to causation and advised her of the type of evidence needed to establish the claimed additional or consequential conditions. OWCP afforded appellant 30 days to submit the necessary evidence.

In a November 29, 2019 report, Dr. Homb related that appellant developed fibromyalgia after the claimed incident and that "this is the typical manner that one develops fibromyalgia, especially after a trauma without any prior history of pain." He then opined that she denied any other major injuries that may have provoked these symptoms, therefore, the only logical explanation was that it was directly related to the work injury. With regard to cervical enthesopathy diagnosis, Dr. Homb indicated that the diagnosis was essentially the same diagnosis of cervical sprain/strain. He opined that since appellant did not suffer from cervical enthesopathy or sprain prior to her injury, this was a direct result of her motor vehicle accident. Finally, Dr. Homb noted that the insomnia was directly related to the accepted conditions as she did not suffer from impaired sleep prior to her injury. He indicated that pain from the accepted conditions prevented appellant from sleeping appropriately and that her head contusion could also directly be related to her impaired sleep.

By decision dated December 10, 2019, OWCP denied modification of its prior decision. OWCP also denied expansion of the acceptance of the claim to include additional diagnosed conditions.

On February 12, 2020 appellant, through her representative, requested reconsideration and submitted additional evidence.

In a December 19, 2019 Form OWCP-5c, Dr. Homb diagnosed cervical, thoracic, and lumbar strains. He opined that appellant was totally disabled and that her symptoms had increased

due to the termination of workers' compensation benefits. Dr. Homb requested review of his previous narrative reports.

By decision dated February 25, 2020, OWCP denied modification of its prior decision.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁴

To establish causal relationship between a condition and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁵ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶

ANALYSIS -- ISSUE 1

The Board finds that appellant has not established that the acceptance of her claim should be expanded to include additional or consequential conditions of fibromyalgia, depression/anxiety, insomnia, and cervical enthesopathy as a result of her accepted employment injury.

In his February 5, 24, and April 24 2019 reports, Dr. Homb noted that appellant's prolonged symptoms converted into a fibromyalgia-like picture with related anxiety, depression, and difficulty sleeping. However, he did not offer a firm diagnosis of fibromyalgia. Instead, he opined that appellant appeared to have developed a fibromyalgia-like picture or syndrome following the motor vehicle accident. As these reports are equivocal in nature, they are of limited probative value and insufficient to establish the claim.⁷

In his August 30, 2019 report, Dr. Homb diagnosed fibromyalgia. He explained that fibromyalgia often starts after a traumatic event, such as the motor vehicle accident in this case, and the pain fails to improve in a timely manner. Dr. Homb noted that appellant started physical therapy following the injury, but she continued with ongoing symptoms including diffuse pain with related depression/anxiety, impaired sleep, and increase stress, all consistent with fibromyalgia. However, he again did not provide the necessary medical rationale to explain how

⁴ See *S.L.*, Docket No. 19-0603 (issued January 28, 2020); *T.E.*, Docket No. 18-1595 (issued March 13, 2019); *T.F.*, Docket No. 17-0645 (issued August 15, 2018); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁵ See *S.L.*, *id.*; *T.E.*, *id.*; *S.A.*, Docket No. 18-0399 (issued October 16, 2018).

⁶ See *S.L.*, *id.*; *M.M.*, Docket No. 19-0061 (issued November 21, 2019); *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

⁷ See *E.B.*, Docket No. 18-1060 (issued November 1, 2018); *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962).

fibromyalgia or her other additional diagnosed conditions were physiologically caused by the accepted injury.⁸

Similarly, in his November 29, 2019 report, Dr. Homb also indicated that appellant developed fibromyalgia after the claimed incident, and that “this is the typical manner that one develops fibromyalgia, especially after a trauma without any prior history of pain.” He then opined that she denied any other major injuries that, may have provoked these symptoms, therefore, the only logical explanation was that it was directly related to the work injury. The Board has held that an opinion that a condition is causally related to an employment injury because the employee was asymptomatic before the injury is insufficient, without adequate rationale, to establish causal relationship.⁹

With regard to his cervical enthesopathy and insomnia diagnoses, Dr. Homb indicated, in his August 30, 2019 report, that appellant’s cervical enthesopathy symptoms were present throughout his time treating her. He also indicated, with regard to the insomnia diagnosis, that she has had impaired sleep since the onset of injury and that this was also consistent with her fibromyalgia diagnosis. However, Dr. Homb did not provide an unequivocal and rationalized opinion explaining whether and how such conditions are related to the accepted conditions or the claimed incident.¹⁰

In his November 29, 2019 report, he further opined that, since appellant did not suffer from either cervical enthesopathy or sprain or insomnia prior to her injury, this was a direct result of her motor vehicle accident. Dr. Homb also opined that the accepted contusion to the head could also directly be related to her impaired sleep. However, the Board has held that the mere fact that symptoms arise during a period of employment or produce symptoms revelatory of an underlying condition does not establish a causal relationship between a diagnosed condition and employment factors.¹¹ A medical opinion must provide an explanation of how the specific employment incident or employment factors physiologically caused or aggravated the diagnosed conditions.¹² Thus, Dr. Homb’s reports are insufficient to establish cervical enthesopathy and insomnia diagnoses as causally related to the accepted conditions or the claimed incident.

As Dr. Homb’s opinions regarding causal relationship between the accepted injury and the additional claimed conditions of fibromyalgia, depression/anxiety, insomnia, and cervical enthesopathy were conclusory and unrationalized, the Board finds that they are insufficient to meet appellant’s burden of proof to establish that the additional conditions should be accepted in her claim.¹³

⁸ *Id.*

⁹ *See F.H.*, Docket No. 18-1238 (issued January 18, 2019); *J.R.*, Docket No. 18-0206 (issued October 15, 2018).

¹⁰ *Id.*

¹¹ *A.S.*, Docket No. 19-1955 (issued April 9, 2020).

¹² *G.L.*, Docket No. 18-1057 (issued April 14, 2020).

¹³ *P.A.*, Docket No. 18-0559 (issued January 29, 2020).

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.¹⁴ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment injury.¹⁵ OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.¹⁷ To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.¹⁸

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.¹⁹

ANALYSIS -- ISSUE 2

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective April 4, 2019.

OWCP accepted appellant's claim for neck sprain, back wall of thorax strain, back strain, and head contusion. The Board finds that Dr. Mindrebo did not address whether her accepted head contusion had resolved. Therefore, OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits with regard to that accepted condition.

The evidence of record further establishes that, a conflict of medical evidence exists between Dr. Mindrebo, the second opinion physician, and Dr. Homb, appellant's treating physician, as to whether she had residuals from her accepted neck sprain, thorax strain, and back

¹⁴ *S.P.*, Docket No. 19-0196 (issued June 24, 2020); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

¹⁵ See *S.P.*, *id.*; *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

¹⁶ *D.G.*, *supra* note 17; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹⁷ *S.P.*, *supra* note 14; *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

¹⁸ *D.G.*, *supra* note 14; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

¹⁹ 5 U.S.C. § 8123(a). See *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *B.S.*, Docket No. 19-0711 (issued October 17, 2019); *G.B.*, Docket No. 16-0996 (issued September 14, 2016) (where the Board held that 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).

strain conditions as of April 4, 2019. In his July 30, 2018 report and November 12, 2018 addendum report, Dr. Mindrebo reviewed the SOAF. He found, based on his examination, that there were no objective findings to support ongoing residuals from appellant's employment-related conditions. Dr. Mindrebo opined that she was able to perform her date-of-injury position as a carrier technician without restrictions based on her benign July 30, 2018 examination.

Appellant's treating physician, Dr. Homb, however, submitted progress reports which noted ROM limitations in appellant's neck and back. He also indicated that, based on the January 21, 2019 FCE, she had reached MMI and had permanent restrictions which rendered her only able to perform a desk job with limited lifting. In his February 5, 2019 letter, Dr. Homb agreed that, while appellant had full strength, normal muscle stretch reflexes, and sensation, she continued to exhibit diffuse tenderness over her cervical paraspinals, trapezius, posterior scalenes, intrascapular muscles, anterior scalenes, pectoralis muscles, and lumbar paraspinals and her ROM was decreased with neck rotation and side bending, which the January 21, 2019 FCE examination confirmed. Thus, he opined that she continued to suffer residuals of her cervical, thoracic and lumbar strains. Based on his examination findings and the January 21, 2019 FCE, Dr. Homb also opined that appellant could not perform her carrier technician position as the FCE revealed limitations on lifting, walking, carrying activities, and cervical rotation. He thus opined that she could perform a desk job with limited lifting.

As Dr. Mindrebo and Dr. Homb disagreed as to whether appellant's accepted neck sprain, back wall of thorax strain, and back strain had resolved, there is an unresolved conflict of medical evidence as to whether she has residuals or disability due to the accepted employment injury. The Board, thus, finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.²⁰

CONCLUSION

The Board finds that appellant has not established that the acceptance of her claim should be expanded to include additional or consequential conditions of fibromyalgia, depression/anxiety, insomnia, and cervical enthesopathy as a result of her accepted employment injury. The Board further finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective April 4, 2019.²¹

²⁰ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

²¹ *Id.*

ORDER

IT IS HEREBY ORDERED THAT the February 25, 2020 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: June 24, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

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