

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

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<b>J.B., Appellant</b>	)	
	)	
<b>and</b>	)	<b>Docket No. 20-1529</b>
	)	<b>Issued: June 30, 2021</b>
<b>DEPARTMENT OF JUSTICE, BUREAU OF</b>	)	
<b>PRISONS, FEDERAL CORRECTIONAL</b>	)	
<b>COMPLEX, Yazoo City, MS, Employer</b>	)	
_____	)	

*Appearances:*  
*Alan J. Shapiro, Esq., for the appellant<sup>1</sup>*  
*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 August 20, 2020 appellant, through counsel, filed a timely appeal from a June 24, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

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<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.

Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.<sup>3</sup>

### **ISSUES**

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 19, 2019, as she no longer had residuals or disability causally related to her accepted April 9, 2019 employment injury; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals on or after November 19, 2019 causally related to the April 9, 2019 employment injury.

### **FACTUAL HISTORY**

On April 10, 2019 appellant, then a 38-year-old dental hygienist, filed a traumatic injury claim (Form CA-1) alleging that on April 9, 2019 she slipped on water and injured the right side of her body while in the performance of duty. She indicated that she was pregnant at the time of the accident. OWCP accepted the claim for sprain of the ligaments of the cervical spine and thoracic spine, subsequent encounter and contracture of the muscle of the right shoulder. Appellant stopped work on April 9, 2019 and OWCP paid her wage-loss compensation on the supplemental rolls beginning May 27, 2019 and on the periodic rolls beginning June 23, 2019.

Appellant was treated by Dr. A. Alfred Norville, a chiropractor, from April 9 through May 24, 2019, for injuries sustained at work when she slipped and fell in a puddle of water and landed on her right side.<sup>4</sup> Dr. Norville diagnosed sprain of the ligaments of the cervical and thoracic spine, initial encounter, pain in the right shoulder, contracture of muscle of the right shoulder, and low back pain. He indicated that chiropractic manipulative procedures were administered, electrical muscle stimulation was applied, and myofascial release was administered. In a work capacity evaluation (Form OWCP-5c) dated April 29, 2019, Dr. Norville diagnosed sprain of the ligaments of the cervical spine and thoracic spine, right shoulder pain, contracture of the muscle right shoulder, and strain of the muscle, fascia, and tendon of the low back. He noted that appellant was unable to perform any work duties until reexamined on May 20, 2019.

Appellant was treated by Dr. Paul W. Pierce, III, a Board-certified internist, on May 14, 2019 for an injury that occurred at work on April 9, 2019, when she slipped on water and fell onto her right side, using her left hand to catch herself. She reported that she was pregnant and presented with muscle ache, joint and back pain, and myalgia. Dr. Pierce diagnosed shoulder joint painful

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the June 24, 2020 decision, appellant submitted additional evidence to OWCP. 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.*

<sup>4</sup> Appellant was initially treated in the emergency room on April 9, 2019 and underwent an x-ray of the right hip and pelvis, which revealed no fracture, dislocation, or any significant bony pathology.

on movement, neck, hip, and back pain, and falls. He referred appellant to an orthopedist. In a Form OWCP-5c dated May 14, 2019, Dr. Pierce diagnosed right shoulder, wrist, hip, back, left wrist, back, and right neck injury and noted that appellant was unable to work until seen by an orthopedist.<sup>5</sup>

On May 16, 2019 Dr. William Porter, a Board-certified orthopedist, treated appellant for injuries sustained to her right hip, low back, right shoulder, neck, elbow, and left wrist at work when she slipped on water on the floor and fell. Appellant reported being pregnant at the time of the fall. Examination of the right shoulder revealed limited active and passive range of motion. Dr. Porter diagnosed fall and referred appellant for physical therapy.

Appellant attended physical therapy treatment from May 24 through June 13, 2019.

OWCP received additional medical evidence. Dr. Norville continued to treat appellant from May 24 through July 19, 2019 using chiropractic manipulative procedure, electrical muscle stimulation, and myofascial release.

In a June 14, 2019 follow-up visit, Dr. Pierce treated appellant for persistent severe pain to the right shoulder, wrist, hip, groin, back, neck and left wrist after the April 9, 2019 work injury. Findings on examination revealed muscle aches, joint pain, back pain, abdominal tenderness, and right groin pain. Dr. Pierce diagnosed inguinal hernia, “falls,” back, elbow, neck, and hip pain, shoulder joint pain with movement, and wrist pain. He recommended an abdominal ultrasound. In an attending physician’s report (Form CA-20) dated June 14, 2019, Dr. Pierce indicated that appellant was injured at work on April 9, 2019 when she slipped and fell on water on the floor. He diagnosed right low back, neck, shoulder, bilateral wrist, and pelvic pain and checked a box marked “Yes,” indicating that appellant’s condition had been caused or aggravated by an employment activity, noting appellant “Fell.” Dr. Pierce advised that appellant was totally disabled from work beginning April 9, 2019. In an accompanying duty status report (Form CA-17) of even date, he noted that appellant was totally disabled from work. Dr. Pierce related in a June 21, 2019 progress note that appellant’s medical work up was limited because she was pregnant. Appellant continued to report significant pain in the right shoulder, right hip, right knee, pelvis, back, neck, and left wrist. Dr. Pierce diagnosed back and elbow pain, falls, hip, neck, and wrist pain, and painful shoulder joint. He recommended physical therapy.

Appellant was treated by Dr. Robert Moore, a Board-certified family physician, on June 28, 2019 for shoulder, hip, and knee pain after a fall at work. He noted findings of decreased range of motion of the right shoulder secondary to pain and tenderness to the pelvic area with palpation. Dr. Moore diagnosed joint pain. He examined appellant on July 29, 2019 and related no change in physical findings. Dr. Moore diagnosed shoulder pain. In notes dated June 28 and July 29, 2019 he advised that appellant was five and six months pregnant, respectively and sustained injuries on April 9, 2019 after a fall at work. Appellant reported that physical therapy exacerbated her symptoms. Dr. Moore indicated that appellant required a magnetic resonance imaging (MRI) scan for further evaluation, but was unable to have one until after her pregnancy.

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<sup>5</sup> Appellant filed claims for compensation (Form CA-7) for leave without pay for the period May 27 through June 10, 2019, June 10 through 24, 2019, and June 24 through July 8, 2019.

On a Form OWCP-5c dated July 31, 2019, Dr. Pierce noted that appellant was unable to work due to pain in the shoulder, hip, pelvis, wrist, neck, and low back and would be reevaluated in 30 days.

Appellant was treated on July 31, 2019 by Baleigh Ford, a physician assistant, in follow-up status post fall at work with pain to the right knee, back, pelvis, neck, and left wrist. She presented in a wheelchair. Ms. Ford diagnosed: back, elbow, hip, neck and wrist pain; “falls”; and shoulder joint painful on movement.

On a Form OWCP-5c dated August 8, 2019, Dr. Porter noted appellant’s accepted conditions were contracture of muscle, right shoulder, and sprain of the ligaments of the cervical and thoracic spine, subsequent encounter. He noted with a checkmark “Yes” that appellant was able to perform her usual job without restrictions. Dr. Porter released appellant from his care. In response to the claims examiner’s request for an updated work status, he indicated that appellant was released to work without restrictions on August 8, 2019.

Dr. Norville continued to treat appellant from August 9 through 23, 2019, using chiropractic manipulative procedure, electrical muscle stimulation, and myofascial release.

Ms. Ford evaluated appellant on August 28, 2019 and reported pressure on her abdominal lymph node from pregnancy and right shoulder pain like “something is stuck in there.” She diagnosed back and elbow pain, falls, hip, neck and wrist pain, and shoulder joint pain of movement and continued the current regimen. On an August 28, 2019 Form OWCP-5c, Dr. Pierce indicated that appellant was unable to return to work due to pain in the shoulder, hip, pelvis, neck, low back, and right groin.

In an August 30, 2019 office visit, Dr. Moore related that appellant was pregnant and sustained injuries in an April 9, 2019 fall at work. Findings on examination revealed right shoulder pain with limited range of motion, right neck pain, and lower pelvic/hip pain. Dr. Moore noted physical therapy exacerbated her symptoms and further diagnostic studies would occur after the pregnancy.

On September 19, 2019 OWCP advised appellant of its notice of proposed termination of her wage-loss compensation and medical benefits based on Dr. Porter’s report, finding that she had no further employment-related residuals or disability due to her April 9, 2019 employment injury. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination. OWCP indicated that it was enclosing the August 8, 2019 reports from Dr. Porter.

OWCP continued to receive evidence. A June 14, 2019 ultrasound of the right inguinal canal revealed multiple benign-appearing lymph nodes with no suspicious characteristics.

Dr. Norville continued to treat appellant from August 30 through September 13, 2019, using chiropractic manipulative procedure, electrical muscle stimulation, and myofascial release. In a report dated October 7, 2019, he diagnosed sprain of the ligaments of the cervical and thoracic spine, initial encounter, pain in the right shoulder, contracture of muscle right shoulder, and low back pain. Dr. Norville recommended continued chiropractic treatments.

In a report dated September 19, 2019, Dr. Michael G. Dulske, a Board-certified orthopedist, treated appellant for diffuse right shoulder pain, limited range of motion, instability, and popping and catching, which began after she slipped on a wet floor at work on April 9, 2019. Appellant reported pain in the right pelvis, neck, right upper arm, right hip, upper and lower back, right bilateral elbow, right thigh, mid-back, bilateral forearms, right knee, right wrist, buttocks, right hand, and coccyx. Findings on examination revealed that appellant was pregnant, there was tenderness over the acromioclavicular joint, diffuse tenderness to palpation throughout the shoulder, limited active and passive range of motion, negative anterior and drawer sign, positive Neer's and Hawkins impingement sign. Dr. Dulske diagnosed pain in the right shoulder and possible right rotator cuff syndrome versus labral tear and performed a steroid injection into the subacromial space. In another note dated September 19, 2019, he released appellant to work with restrictions of no reaching overhead, no lifting, carrying, pushing, or pulling over five pounds. On October 2, 2019 Dr. Dulske noted that an MRI scan of the right shoulder revealed a tear, but the radiologist suggested an MRI arthrogram to further evaluate and confirm. He opined that evaluation of appellant in the clinic confirmed a present labral tear for which she would need surgical intervention after her pregnancy. In another note dated October 2, 2019, Dr. Dulske indicated that she could not work until her next appointment. In status progress reports of illness/injury dated September 19 and October 2, 2019, he advised that appellant was totally disabled from work.

Appellant was treated by Dr. Pierce on October 9, 2019 for multiple joint pain after a fall at work. Dr. Pierce noted findings on examination of muscle ache, muscle weakness, joint pain, back pain, and myalgia. He diagnosed: rotator cuff tear; falls; hip pain; shoulder joint pain on movement; and neck, wrist, and back pain.

In an October 9, 2019 note, Dr. Moore indicated that appellant was pregnant and sustained injuries after an April 9, 2019 fall at work. Findings on examination revealed right shoulder pain with limited range of motion, right neck pain, and lower pelvic/hip pain. Dr. Moore noted that an MRI scan indicated a possible tear of the shoulder labrum and she required an MRI arthrogram which could not be performed until after her pregnancy.

In an October 11, 2019 statement, appellant disagreed with the proposed termination. She asserted that OWCP improperly proposed to terminate her compensation based on the reports provided by Dr. Porter. Appellant provided a history of injury on April 9, 2019 and subsequent treatment. She explained that she sought to terminate Dr. Porter as her treating physician because the physical therapy he prescribed was "barbaric" and aggravated her symptoms and he improperly released her back to work without restrictions. Appellant related that she continued to suffer residuals of her work injury of April 9, 2019.

By decision dated November 18, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective November 19, 2019.

An MRI scan of the right shoulder dated October 2, 2019 revealed nonspecific intermediate signal in the posterior labrum, which may or may not represent true pathology, if there was clinical concern for labral injury an MRI arthrogram could be obtained, increased T2 signal in the posterior deltoid musculature suggestive of muscle injury or strain.

Dr. Dulske evaluated appellant on December 6, 2019 for her work-related injury to her right shoulder that occurred on April 9, 2019. Appellant reported worsening symptoms, noting that her shoulder gets “stuck” and was clicking and popping. Findings on examination of the right shoulder revealed no gross deformity, ecchymosis or erythema, no palpable effusion, AC joint tenderness, diffuse tenderness to palpation throughout the shoulder, decreased range of motion, decreased strength, negative anterior and posterior drawer signs, and positive Neer’s and Hawkins impingement signs. Dr. Dulske diagnosed other sprain of the right shoulder joint, subsequent encounter and posterior labral tear of the right shoulder. He opined that it was clear that appellant’s right shoulder pain did not begin until she fell at work on April 9, 2019. Dr. Dulske stated that, within a reasonable degree of medical probability, appellant’s shoulder injury, the posterior labral tear, was a direct result of the fall she sustained at work on April 9, 2019. In status progress reports of illness/injury dated December 6, 2019 and January 24, 2020, he noted that appellant could not work. In a Form OWCP-5c dated December 13, 2019, Dr. Dulske related that appellant was unable to use her right arm due to a labral tear and, therefore, could not work. He noted right arm pain, decreased range of motion, decreased strength, low back pain, and pelvic pain. Dr. Dulske further noted that appellant required right shoulder arthroscopy to repair a labral tear. In a Form CA-17 report dated December 13, 2019, he noted examining appellant on December 6, 2019 and advised that she could not resume work.

On December 13, 2019 appellant requested reconsideration. She submitted an MRI scan of the right shoulder and reports from Dr. Dulske in support of her claim that she continued to have residuals of the April 9, 2019 work injury and was disabled from work.

By decision dated March 4, 2020, OWCP denied modification of the November 18, 2019 termination decision.

In a statement dated March 11, 2020, appellant requested reconsideration and resubmitted a copy of the MRI scan of the right shoulder. She requested authorization to undergo an MRI arthrogram.

By decision dated June 24, 2020, OWCP denied modification of the March 4, 2020 decision.

### **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.<sup>6</sup> After it has been determined that an employee has a disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to

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<sup>6</sup> *Z.D.*, Docket No. 19-0662 (issued December 5, 2019); *see R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

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

### **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 November 19, 2019.

OWCP based its termination of appellant's wage-loss compensation and medical benefits on the August 8, 2019 reports of Dr. Porter, appellant's treating physician. However, the Board finds that these reports do not contain adequate medical rationale in support of its opinion that she ceased to have disability and residuals of her accepted employment conditions and, therefore, are insufficient to serve as the basis for OWCP's termination action.<sup>9</sup>

On a Form OWCP-5c dated August 8, 2019, Dr. Porter noted appellant's accepted conditions were contracture of muscle, right shoulder, and sprain of the ligaments of the cervical and thoracic spine, subsequent encounter. He noted with a checkmark "Yes" that appellant was able to perform her usual job without restrictions. Dr. Porter released appellant from his care. In response to OWCP's request for an updated work status, he indicated that appellant was released to work without restrictions on August 8, 2019. The Board finds that Dr. Porter failed to provide adequate medical rationale for the opinion expressed in his August 8, 2019 report that appellant ceased to have residuals of her accepted employment-related conditions.<sup>10</sup> He did not specifically address whether the accepted conditions of contracture of muscle, right shoulder, and sprain of the ligaments of the cervical and thoracic spine had resolved. The absence of medical rationale on the crucial issue of continuing residuals/disability from work significantly diminishes the probative value of Dr. Porter's opinion.<sup>11</sup>

As Dr. Porter did not provide a well-rationalized, unequivocal opinion that appellant had no residuals or disability related to the accepted April 9, 2019 employment injury on or after November 19, 2019,<sup>12</sup> OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective November 19, 2019.

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

<sup>8</sup> See *R.P., id.*; *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>9</sup> *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert, id.*

<sup>10</sup> See *T.F.*, Docket No. 11-0763 (issued November 7, 2011); *Leon Harris Ford*, 31 ECAB 514, 518 (1980) (a medical report is of limited probative value if it contains an opinion on a medical matter which is unsupported by medical rationale).

<sup>11</sup> *M.R.*, Docket No. 20-0707 (issued November 30, 2020).

<sup>12</sup> See *R.P., supra* note 6; *Del K. Rykert, supra* note 8.

**CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 19, 2019.<sup>13</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 24, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 30, 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

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<sup>13</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.