

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

Z.K., Appellant)	
)	
and)	Docket No. 19-1113
)	Issued: March 17, 2021
U.S. POSTAL SERVICE, ROSEBANK)	
STATION, Staten Island, NY, Employer)	
)	

Appearances:
Paul Kalker, Esq., for the appellant¹
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 16, 2019 appellant, through counsel, filed a timely appeal from a March 20, 2019 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.

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.*

ISSUE

The issue is whether OWCP properly determined that appellant did not meet her burden of proof to establish entitlement to wage-loss compensation effective July 13, 2013.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are set forth below.

On November 22, 1995 appellant, then a 29-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on November 15, 1995 she injured her back when her postal vehicle jerked forward after she applied the brakes. She stopped work on November 16, 1995. OWCP accepted the claim for displacement of lumbar herniated disc. Appellant received wage-loss compensation on the daily rolls until November 16, 1996 and then began receiving compensation on the periodic compensation rolls.

By decision dated December 24, 1996, OWCP terminated appellant's wage-loss compensation and medical benefits, effective December 25, 1996. In a December 15, 1997 decision, OWCP denied modification of the December 24, 1996 decision.

On March 9, 1998 appellant appealed to the Board. By decision dated February 16, 2000, the Board reversed the December 15, 1997 OWCP decision. The Board found that OWCP had not met its burden of proof to terminate appellant's compensation benefits due to an unresolved conflict in medical evidence as to whether appellant's employment injury had resolved as of December 25, 1996.⁴ OWCP subsequently paid retroactive compensation to the date of termination.

In October 2012 OWCP referred appellant to Dr. Kenneth P. Heist, a Board-certified osteopath specializing in orthopedic surgery, to determine the status of her accepted conditions. In a November 28, 2012 report, Dr. Heist noted his review of the medical record and described appellant's physical examination findings. He diagnosed resolved lumbar sprain and advised that appellant could return to work eight hours a day without restriction.

By decision dated July 8, 2013, OWCP again terminated appellant's wage-loss compensation and medical benefits effective that day. It found the weight of the medical evidence rested with the opinion of Dr. Heist. The electronic record reflects that appellant had received wage-loss compensation on the periodic rolls from June 16, 2002 until July 7, 2013.

On November 1, 2013 appellant, through counsel, requested reconsideration. In a January 30, 2014 decision, OWCP found that it had not met its burden of proof to terminate appellant's compensation benefits and it vacated the July 8, 2013 termination decision. It advised

³ Docket No. 98-1265 (issued February 16, 2000).

⁴ *Id.*

appellant that in order to receive wage-loss compensation, she had to file a claim for compensation (Form CA-7).

On February 21, 2014 appellant filed a Form CA-7, claiming wage-loss compensation beginning July 8, 2013. She submitted a February 19, 2014 attending physician's report (Form CA-20) in which Dr. Placido A. Menezes, a treating Board-certified orthopedic surgeon, described the employment injury. Dr. Menezes diagnosed traumatic lumbar spondylosis and advised that appellant could not work.

The Form CA-7 was not forwarded to OWCP until October 19, 2017. By letter dated October 31, 2017, the employing establishment acknowledged that due to its oversight, it had only recently completed the employer portion of appellant's claim and had thereafter submitted the claim to OWCP.

A January 3, 2018 report received from Dr. Menezes who related that appellant had sustained a severe injury to her lumbar spine, which had been progressive in nature, and which caused severe spinal stenosis at L2-5, with herniated disc. He explained that appellant's current findings were causally related to the November 15, 1995 injury as appellant sustained progressive deterioration of her lumbar spine due to the lack of medical treatment, as she had no health insurance, and due to her lack of physical activity. Dr. Menezes also completed a work capacity evaluation (Form OWCP-5c) on January 3, 2018 wherein he related that appellant's condition was permanent and that she could not perform any work activity.

In January 2018 OWCP referred appellant to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second-opinion evaluation. In a February 16, 2018 report, Dr. Askin noted appellant's history of injury and appellant's accepted condition of herniated disc of lumbar spine. He described his review of the medical record including diagnostic studies, and appellant's complaints of radiating low back pain. Following physical examination, Dr. Askin opined that appellant had no objective findings or disability related to the employment injury, and needed no further treatment for her employment-related condition.

By decision dated May 1, 2018, OWCP denied appellant's claim for compensation beginning July 8, 2013. It related that appellant was responsible for submitting sufficient evidence to justify payment of wage-loss compensation and found that the weight of the medical evidence rested with the opinion of Dr. Askin, OWCP's referral physician.

In a July 18, 2018 report, Dr. Menezes advised that appellant's low back symptoms had progressed. He described physical examination findings and diagnosed lumbar spinal stenosis with radiculopathy. Dr. Menezes recommended a repeat magnetic resonance imaging (MRI) scan and electrodiagnostic studies.

On December 28, 2018 appellant, through counsel, requested reconsideration. Counsel maintained that OWCP retained the burden of proof to terminate appellant's compensation benefits, and that she was entitled to retroactive reinstatement of wage-loss compensation dating back to the termination on July 8, 2013. He further maintained that a conflict in medical evidence existed between Dr. Askin and Dr. Menezes. Counsel attached a November 2, 2018 report in which Dr. Menezes noted treating appellant since 2001 and last evaluated appellant that day. He

described the history of injury and her worsening radiating low back pain. Dr. Menezes noted that a June 2, 2016 lumbar MRI scan demonstrated a herniated disc at L5-S1 impinging on the right S1 nerve root, with additional herniations at L2-3, L3-4, and L4-5 and he related that he totally disagreed with Dr. Askin's conclusions as he did not mention appellant's positive neurologic findings. He described physical examination findings, noting tenderness and spasm of the lumbar spine with limitation of range of motion, positive straight leg raising, and diminished sensation of the right lower extremity. Dr. Menezes advised that appellant had been unable to return to work since the employment injury.

By decision dated March 20, 2019, OWCP denied modification of the May 1, 2018 decision. It again found the weight of the medical evidence rested with the opinion of Dr. Askin.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify termination or modification of benefits.⁵ If it has not met its burden of proof to terminate benefits, compensation must be continued at the previously determined rate until medical evidence is adduced supporting a termination or change in the compensation rate.⁶ OWCP must reinstate benefits and pay retroactive compensation on the periodic roll if the claimant was on the periodic roll at the time OWCP terminated benefits. If the claimant was not receiving wage-loss compensation at the time OWCP terminated benefits, OWCP is not required to pay appellant retroactively and the claimant should submit CA-7 forms for periods of claimed disability.⁷

ANALYSIS

The Board finds that OWCP improperly found that appellant had not met her burden of proof to establish entitlement to wage-loss compensation effective July 13, 2013.

By its January 30, 2014 decision, OWCP reversed the July 8, 2013 termination of appellant's wage-loss compensation. At the time it terminated appellant's compensation on July 8, 2013, she had been on the periodic compensation rolls for a number of years. OWCP was therefore required to reinstate benefits and pay retroactive compensation on the periodic rolls at the previously determined rate until medical evidence was adduced supporting a termination or

⁵ *A.R.*, Docket No. 20-0335 (issued August 7, 2020); *R.C.*, Docket No. 08-1641 (issued January 12, 2009); *Kelly Y. Simpson*, 57 ECAB 197 (2005).

⁶ Federal (FECA) Procedure Manual, Part 2 -- Appeals, Chapter 2.1603.6(b) (September 1995). If OWCP did not meet its burden of proof before reducing or terminating benefits, OWCP should promptly reinstate benefits to the claimant at the previous level, including retroactive payment to the date of reduction or termination.; *see E.A.*, Docket No. 16-1030 (issued September 1, 2016); *J.C.*, Docket No. 15-1295 (issued November 24, 2015); *see also Erby L. Chambers*, 10 ECAB 27 (1958).

⁷ *Id.*; *see also Lori J. Sennett*, Docket No. 04-0507 (issued July 7, 2004).

reduction of benefits.⁸ Appellant was not required to submit Forms CA-7 to claim wage-loss compensation.⁹

As OWCP retained the burden of proof to terminate appellant's wage-loss compensation, it was required by regulation to continue payment of compensation until it provided appellant with written notice of reduction or termination of compensation and a 30-day opportunity to submit relevant evidence or argument to support entitlement to continued payment of compensation, followed by an appropriate decision based upon the evidence or argument presented.¹⁰ It did not follow this due process procedure in this case. As OWCP did not properly reinstate appellant's wage-loss compensation and as it did not follow its procedures in disallowing compensation benefits following the reinstatement of appellant's compensation, the March 20, 2019 decision must therefore be reversed. Upon return of the case record, it should reinstate payment of appellant's wage-loss compensation on the periodic roll commencing July 8, 2013.

CONCLUSION

The Board finds that OWCP improperly determined that appellant has not met her burden of proof to establish entitlement to wage-loss compensation effective July 13, 2013.

⁸ *Supra* note 8 and 9.

⁹ *Supra* note 9.

¹⁰ 20 C.F.R. § 10.540; *see also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.4(b) (February 2013); *J.T.*, Docket No. 19-1723 (issued August 24, 2020).

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: March 17, 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