

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

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<b>Q.S., Appellant</b> )		
)		
<b>and</b> )		<b>Docket No. 20-0701</b>
)		<b>Issued: November 10, 2021</b>
<b>DEPARTMENT OF DEFENSE, DEFENSE</b> )		
<b>FINANCE &amp; ACCOUNTING SERVICE,</b> )		
<b>Cleveland, OH, 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:  
ALEC J. KOROMILAS, Chief Judge  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge

**JURISDICTION**

On February 10, 2020 appellant, through counsel, filed a timely appeal from a November 6, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

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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.

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

<sup>3</sup> The Board notes that appellant submitted additional evidence to OWCP following the November 6, 2019 decision. 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 OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective January 30, 2018; and (2) whether appellant has met her burden of proof to establish continuing disability on or after January 30, 2018.

## **FACTUAL HISTORY**

On October 12, 2011 appellant, then a 31-year-old contact representative, filed a traumatic injury claim (Form CA-1) alleging that on October 5, 2011 she sustained injuries to her left upper extremity, left lower extremity, and low back when she slipped and fell on a wet floor while in the performance of duty. She stopped work on October 5, 2011. OWCP assigned the claim File No. xxxxxx756 and accepted it for left ankle sprain, left hip sprain, left shoulder sprain, left knee sprain, and lumbar strain. On May 10, 2012 it expanded its acceptance of the claim to include left acromioclavicular and upper arm sprain, left lateral collateral ligament sprain, left-sided neck sprain, left medial meniscus tear, cervical disc herniation at C6-7 without myelopathy, and lumbar disc herniation at L4-5 without myelopathy. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing December 5, 2011.

On July 6, 2012 appellant underwent authorized left knee arthroscopy with excision of medial plica, performed by Dr. John Howard Wilber, a Board-certified orthopedic surgeon. She remained off work.

On January 16, 2013 OWCP expanded its acceptance of the claim to include adhesive capsulitis of the left shoulder, biceps tendinitis of the left shoulder, and left shoulder impingement.

On February 26, 2013 appellant underwent authorized left shoulder arthroscopy to address adhesive capsulitis, biceps tendinitis, and impingement, performed by Dr. Reuben Gobezie, a Board-certified orthopedic surgeon.

In April 23, 2013 reports, Dr. Todd S. Hochman, a Board-certified internist, provided a history of injury and treatment. On examination, he noted a positive right straight leg raising test, point tenderness to midline palpation in the cervical spine, and painful range of motion of the left shoulder. Dr. Hochman returned appellant to modified-duty work for four hours per day, with kneeling, bending, stooping, twisting, pulling, pushing, and reaching above shoulder level limited to one hour a day; standing and walking limited to three hours a day; and lifting and carrying limited to 25 pounds.

On May 6, 2013 appellant returned to modified-duty work for four hours per day as a contact representative, pursuant to the restrictions provided by Dr. Hochman. OWCP paid wage-loss compensation on the supplemental rolls for the remaining four hours a day. Appellant continued to work four hours per day with intermittent absences from October 2013 through July 2014.

On August 4, 2014 appellant filed a traumatic injury claim (Form CA-1) alleging that she sustained left knee, foot, and ankle injuries on July 31, 2014 when the heel of her shoe caught in her pant leg and she tripped over the bottom portion of a cubicle while in the performance of duty. OWCP assigned the claim File No. xxxxxx802. On September 2, 2014 it accepted the claim for a right ankle sprain, left knee contusion, and right-sided lumbar sprain. On September 12, 2014

OWCP administratively combined OWCP File No. xxxxxx802 and the current claim under OWCP File No. xxxxxx756, with the latter serving as the master file.

OWCP subsequently expanded its acceptance of the claim under File No. xxxxxx802 to include left knee arthrofibrosis and left knee synovitis with synovial cyst.

OWCP paid appellant wage-loss compensation on the supplemental rolls commencing September 15, 2014. She resigned from the employing establishment, effective September 18, 2014. OWCP placed appellant on the periodic rolls.

Dr. Hochman provided reports dated from January 14, 2015 through May 23, 2017 noting continued left shoulder pain, cervical spine pain, lumbar pain, left knee pain, and left foot and ankle pain.<sup>4</sup>

On September 25, 2015 appellant underwent authorized left knee arthroscopy with partial synovectomy and excision of synovial mass, performed by Dr. Louis Keppler, a Board-certified orthopedic surgeon.

On February 28, 2017 under File No. xxxxxx802, OWCP referred appellant, the medical record, a December 2, 2015 statement of accepted facts (SOAF), and a series of questions for a second opinion by Dr. William L. Bohl, a Board-certified orthopedic surgeon, regarding her work capacity and the status of the accepted conditions. In his April 12, 2017 report, Dr. Bohl reviewed the medical record and SOAF. He noted that the 2014 employment injury reinjured appellant's left knee and exacerbated the lumbar injury. On examination, Dr. Bohl observed limited range of cervical spine motion, weakness of the left biceps and triceps, a left-sided list in the lumbar spine, tenderness to palpation of the lumbar and sacroiliac paraspinals, medial patellar facet of the left knee, and left shoulder, limited range of left shoulder motion, active dorsiflexion of the left ankle limited to zero degrees, and active dorsiflexion in the right ankle limited to five degrees. He noted that the operative reports of both left knee surgeries did not document meniscal tears. As such, Dr. Bohl concluded that appellant never had a left medial meniscal tear. He diagnosed degenerative cervical disc disease at C5-6 or C6-7 with intermittent left-sided radiculopathy, a protruded degenerative lumbar disc, possible sacroiliitis, and a mild chronic left ankle sprain. Dr. Bohl opined that the accepted adhesive capsulitis, cervical and lumbar disc herniations, and chronic left ankle sprain remained present and symptomatic. He commented that, while appellant had mild tenderness of the left ankle from a chronic sprain, the SOAF listed only a July 31, 2014 right ankle sprain. Dr. Bohl noted that her limitation from the accepted conditions would not prevent her from performing the duties of a contact representative, with 2- to 3-minute breaks after 30 minutes of sitting or standing.

In a May 23, 2017 report, Dr. Hochman reviewed Dr. Bohl's opinion and disagreed that appellant could return to work without difficulty. He explained that she had difficulty with prolonged sitting and standing and required narcotic analgesic medications. Dr. Hochman reiterated prior diagnoses in reports through September 12, 2017.

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<sup>4</sup> From October 2015 through September 2018, appellant was also followed for pain management by Dr. Sami Moufawad, Board-certified in psychiatry and pain medicine.

On September 28, 2017 OWCP referred appellant, the medical record, and SOAF to Dr. Dennis Glazer, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion evidence between Dr. Bohl, an OWCP referral physician, and Dr. Hochman, appellant's treating physician, to determine whether appellant had continuing disability causally related to her federal employment, the degree of disability associated with the work-related conditions, and any physical limitations/restrictions imposed by work-related residuals.

In reports dated September 29 and October 23, 2017, Dr. Michael Canales, a podiatrist, opined that the accepted left ankle injury caused left ankle instability with an osteochondral defect. He recommended a modified Brostrom procedure and curettage of the osteochondral defect.

In an October 24, 2017 report, Dr. Hochman noted midline cervical spine discomfort with paraspinal muscle tightness, tenderness over the medial and lateral malleoli of the left ankle, pain with stressing of the left ankle, tenderness over the anteromedial aspect of the left knee, and a mildly positive Spurling's maneuver.

In an October 31, 2017 report, Dr. Glazer reviewed the medical record and statement of accepted facts (SOAF). The SOAF, dated October 9, 2014, characterized the accepted July 31, 2014 injuries as a right ankle sprain, left knee contusion, and right lumbar sprain. On examination, Dr. Glazer noted restricted lumbar motion, tenderness to palpation over the medial joint line of the left knee, mild left patellar crepitus, normal range of inversion and eversion of the left ankle, no lateral instability of the left ankle, limited range of cervical spine motion, subjective numbness of the fingertips of the left hand, diffuse tenderness over the left shoulder, and positive provocative tests of the left shoulder. He opined that the C5-6 and lumbar disc herniation, left hip sprain, and left knee contusion had resolved without residuals. Dr. Glazer diagnosed residual adhesive capsulitis of the left shoulder with limited motion. He returned appellant to full, unrestricted duty in her date-of-injury position as a contact representative. Dr. Glazer opined that appellant did not require left ankle surgery as she had only minimal tenderness "consistent with residuals from the injury." He recommended physical therapy to improve range of motion in the left shoulder.

In a December 7, 2017 supplemental report, Dr. Glazer reviewed Dr. Hochman's October 24, 2017 report and indicated that it did not alter his previous opinion.

In a December 14, 2017 report, Dr. Hochman noted that appellant had midline cervical spine discomfort, a positive Spurling's test, tenderness throughout the left shoulder, discomfort about the anteromedial aspect of the left knee, and tenderness over the anterolateral and medial aspect of the left ankle.

On December 19, 2017 OWCP proposed to terminate appellant's wage-loss compensation because her accepted October 5, 2011 and July 31, 2014 injuries had resolved with no disabling residuals. It afforded her 30 days to submit additional evidence or argument.

In response, appellant submitted a January 18, 2018 statement contending that Dr. Canales' opinion was sufficient to warrant expansion of the acceptance of her claim to include lateral left ankle instability and osteochondral lesion of the left ankle. She submitted additional medical evidence.

In reports dated September 11, 2017 and January 15, 2018, Dr. Canales opined that the accepted 2011 employment injury caused an osteochondral defect of the left medial ankle joint,

with progressive scarring and thickening of the anterior talofibular ligament visible on imaging studies. He opined that as appellant had failed conservative measures, she required a lateral ankle stabilization (modified Brostrom procedure) with curettage of the osteochondral defect.

In a December 29, 2017 report, Dr. Hochman noted his review of Dr. Glazer's opinion. He summarized previous findings and reiterated that appellant was unable to return to her date-of-injury position while awaiting authorization for left ankle surgery.

By decision dated January 30, 2018, OWCP terminated appellant's wage-loss compensation effective that date, finding that the special weight of the medical evidence rested with Dr. Glazer. It noted that appellant's claim remained open for medical benefits.

On February 6, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

Appellant submitted additional evidence. In April 5 and July 10, 2018 reports, Dr. Hochman noted continued left shoulder and left knee symptoms.

In a May 7, 2018 report, Dr. Keppler opined that the accepted left ankle inversion injury caused an osteochondral injury of the medial joint and persistent lateral ligamentous instability requiring surgical reconstruction and repair.

A hearing was held on July 5, 2018. By decision dated August 30, 2018, an OWCP hearing representative affirmed the January 30, 2018 termination, finding that Dr. Glazer's opinion continued to represent the special weight of the medical evidence.

On August 6, 2019 appellant, through counsel, requested reconsideration and submitted additional evidence.

In September 24, 2018 and March 4, 2019 reports, Dr. Canales opined that appellant required surgery for left ankle instability caused by the 2011 employment injury. He diagnosed lateral ankle instability, left anterior talofibular ligament sprain and osteochondral defect. Dr. Canales opined that appellant's current symptoms were correlated with her left ankle employment injury as well as chronic rupture of the anterior talofibular ligament. He reiterated that appellant required surgery.

In June 6 and September 5, 2019 reports, Dr. Hochman reiterated that appellant's ongoing left ankle, cervical spine, lumbar spine, and left shoulder problems remained directly related to the accepted 2011 and 2014 employment injuries. He concurred with Dr. Canales and Dr. Keppler that appellant required surgical stabilization of the left ankle.

An August 22, 2019 MRI scan of the left ankle demonstrated no osteochondral abnormality, mild posterior tibialis tenosynovitis, and bowing of the thin anterior talofibular ligament related to a prior sprain and history of instability.

In reports from August 27 through September 19, 2019, Dr. Keppler opined that the left ankle instability was caused by both the 2011 and 2014 injuries, but that the osteochondral defect needed to be assessed during planned stabilization surgery. He disagreed with Dr. Glazer's

opinion that appellant could return to full duty as she required left ankle stabilization and curettage of the osteochondral defect.

By decision dated November 6, 2019, OWCP denied modification of its August 30, 2018 decision, finding that the evidence of record was insufficient to establish continuing disability due to the accepted employment injuries. It accorded the special weight of the medical evidence to Dr. Glazer.

### **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>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>

The term disability is defined as the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of the injury.<sup>8</sup>

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, OWCP shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>9</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>10</sup>

OWCP's procedures provide as follows:

“The [claims examiner] is responsible for ensuring that the SOAF is correct, complete, unequivocal, and specific. When the [medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming

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<sup>5</sup> *R.V.*, Docket No. 20-0005 (issued December 8, 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).

<sup>6</sup> *P.J.*, Docket No. 20-0550 (issued April 26, 2021); *V.P.*, Docket No. 19-0645 (issued February 22, 2021); *see 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).

<sup>7</sup> *V.P.*, *id.*; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>8</sup> 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

<sup>9</sup> 5 U.S.C. § 8123(a); *C.C.*, Docket No. 19-1948 (issued January 8, 2021); *F.R.*, Docket No. 20-0789 (issued December 1, 2020); *M.S.*, 58 ECAB 328 (2007).

<sup>10</sup> 20 C.F.R. § 10.321; *C.C.*, *id.*

his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.<sup>11</sup>

### ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective January 30, 2018.

OWCP found a conflict in the medical opinion evidence between appellant's treating physician, Dr. Hochman, and OWCP's second opinion physician, Dr. Bohl, as to whether appellant's disability had ceased. The Board finds, however, that Dr. Bohl did not base his April 12, 2017 opinion on the SOAF provided for his review. Dr. Bohl concluded that appellant had not sustained a left meniscal tear, a condition accepted by OWCP and listed in the SOAF. OWCP's procedures dictate that, when an OWCP medical adviser, second opinion specialist, or referee physician does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.<sup>12</sup> As Dr. Bohl did not base his report on the SOAF, the Board finds that the probative value of his opinion is diminished and not of equal weight sufficient to create a conflict in medical opinion with Dr. Hochman.<sup>13</sup>

OWCP had referred appellant to Dr. Glazer for an impartial medical evaluation; however, as no true conflict existed in the medical evidence at the time of the referral to Dr. Glazer, the Board finds that his reports may not be afforded the special weight of an IME and should instead be considered for its own intrinsic value.<sup>14</sup> The referral to Dr. Glazer is therefore considered to be that of a second opinion evaluation.<sup>15</sup> His opinion, therefore, is insufficient to resolve the conflict of medical opinion between Dr. Hochman and Dr. Bohl.<sup>16</sup>

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective January 30, 2018, as there remains an unresolved conflict in medical evidence.<sup>17</sup> Specifically, a conflict of medical opinion exists between Dr. Hochman and

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<sup>11</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see also D.F.*, Docket No. 20-1286 (issued June 17, 2021).

<sup>12</sup> *D.F.*, *id.*

<sup>13</sup> *Id.*

<sup>14</sup> *See F.R.*, Docket No. 17-1711 (issued September 6, 2018).

<sup>15</sup> *L.G.*, Docket No. 20-0611 (issued February 16, 2021). *See also M.G.*, Docket No. 19-1627 (issued April 17, 2020); *S.M.*, Docket No. 19-0397 (issued August 7, 2019) (the Board found that at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *see also Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996) (the Board found that, as there was no conflict in medical opinion evidence, the report of the physician designated as the IME was not afforded the special weight of the evidence, but instead considered for its own intrinsic value as he was a second opinion specialist).

<sup>16</sup> *Id.*

<sup>17</sup> *R.M.*, Docket No. 20-0452 (issued March 4, 2021); *see C.R.*, Docket No. 19-1132 (issued October 1, 2020).

Dr. Glazer with regard to the residuals of disability of appellant's accepted conditions.<sup>18</sup> As there remains an unresolved conflict in the medical evidence regarding the residuals and disability with respect to the accepted conditions, OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation for the accepted conditions.<sup>19</sup>

**CONCLUSION**

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation, effective January 30, 2018.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 6, 2019 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 10, 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

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<sup>18</sup> *G.F.*, Docket No. 20-0497 (issued May 20, 2021).

<sup>19</sup> In light of the Board's finding with regard to Issue 1, Issue 2 is moot.