

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

L.T., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Louisville, KY, Employer**

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**Docket No. 20-1473
Issued: November 2, 2021**

Appearances:

*Alan J. Shapiro, 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

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On August 3, 2020 appellant, through counsel, filed a timely appeal from a June 23, 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.

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 29, 2018, finding that she no

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.*

longer had disability or residuals causally related to her accepted March 24, 1986 employment injury; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals, on or after November 29, 2018, due to the accepted March 24, 1986 employment injury.

FACTUAL HISTORY

On March 25, 1986 appellant, then a 26-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on March 24, 1986 she injured the left side of her neck when she lifted three trays of mail from a tub while in the performance of duty. She stopped work on May 8, 1986 and did not return. OWCP accepted the claim for cervical strain and torticollis and paid appellant wage-loss compensation on the daily rolls commencing May 9, 1986 and on the periodic rolls commencing September 28, 1986.

Dr. Charles E. Oates, a Board-certified psychiatrist and neurologist, performed OWCP-authorized botulinum toxin injections on March 24, 1994 that did not improve appellant's head-turning or pain symptoms. He submitted periodic reports through November 20, 1995 recommending that she elect disability retirement benefits as she was unable to tolerate sedentary work.

In reports from October 21, 1996 through April 10, 2000, Dr. Stephen S. Kirzinger, a Board-certified neurologist, noted that appellant's torticollis remained unchanged, with a constant head tilt toward the right, mild decreased sensitivity to pinprick in the left median nerve distribution, and tightness of the left trapezius. He recommended that she pursue disability benefits as she was unable to work.

In an August 3, 2000 report, Dr. Joseph Jankovic, a Board-certified psychiatrist and neurologist specializing in movement disorders, summarized a history of injury and treatment. He noted that botulinum toxin, a cervical collar, and a tricyclic antidepressant were not effective in managing appellant's symptoms. On examination, Dr. Jankovic noted head tilt, stiffness in the right scalenus, capitus, and trapezius, the inability to straighten her neck when she walked, and approximately two inches of shoulder elevation of the right side compared with the left. He diagnosed post-traumatic dystonia with possible somatoform embellishment.

From December 3, 2001 through 2008, appellant was followed by Dr. Walter L. Olson, Jr., a Board-certified neurologist, who diagnosed spasmodic torticollis caused by the accepted employment injury, unresponsive to medication and botulinum injections.³ Dr. Olson found her totally and permanently disabled for work.⁴

³ From January 9 through July 10, 2002 and in February 2003, a appellant underwent a series of OWCP-authorized botulinum injections.

⁴ In a sworn statement dated February 10, 2010, Dr. Olson noted that his review of surveillance videos obtained by the employing establishment's Office of Inspector General (OIG), demonstrating appellant driving and shopping on January 12, 2010. He opined that her carriage and head and neck movements in the video were quite different than those displayed in his office during physical examinations.

On August 21, 2008 OWCP received a November 16, 1988 report by Dr. Robert F. Sexton, a neurosurgeon, noting that, an electromyography study (EMG) confirmed the diagnosis of spasmodic torticollis, a disease similar to reflex dystrophy caused by the March 24, 1986 employment injury.

On August 25, 2008 OWCP amended acceptance of the claim to include a neck sprain and spasmodic torticollis.

Dr. Olson submitted additional reports through September 25, 2012 finding appellant's condition unchanged.

In reports from September 16, 2013 through June 7, 2016, Dr. Kathrin Lafaver, a Board-certified psychiatrist and neurologist, diagnosed post-traumatic dystonia musculorum deformans and spasmodic torticollis. She opined that appellant's dystonia was in a nearly fixed position and not expected to improve.

On March 3, 2017 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. Thomas E. Menke, a Board-certified orthopedic surgeon, to provide an opinion regarding the nature and extent of any disability, work restrictions, and treatment due to the accepted conditions.

In a report dated April 24, 2017, Dr. Menke reviewed the medical record and SOAF. On examination, he noted that appellant held her neck with right lateral bend of 50 degrees and rotation to the right of 30 degrees. Dr. Menke noted restricted range of cervical spine motion in all planes, tenderness to palpation over the posterior region of the neck and cervical paraspinal musculature, with no correlating palpable cords. He also reviewed surveillance videos obtained by the employing establishment's OIG, collected from December 30, 2009 through February 18, 2010. The videos showed appellant holding her head in a neutral position, rotating her head in both directions, and entering and exiting small cars without difficulty. Dr. Menke diagnosed a resolved cervical strain with no signs of spastic torticollis. He returned appellant to full, unrestricted-duty work.

On May 25, 2017 OWCP issued appellant a notice advising of its proposed termination of her wage-loss compensation and medical benefits, based on the second opinion physician finding that she had no residuals or disability due to the March 24, 1986 employment injury. It afforded her 30 days to submit additional evidence or argument, if she disagreed with the proposed termination, and enclosed the April 24, 2017 report from Dr. Menke.

In response, appellant submitted a June 10, 2017 statement contending that Dr. Lafaver continued to find appellant's totally disabled for work. She also provided an excerpt from an April 6, 2011 grievance settlement agreement.

By decision dated July 17, 2017, OWCP finalized its proposed termination of wage-loss compensation and medical benefits, effective July 23, 2017.

On July 25, 2017 appellant, through counsel, requested a telephonic hearing with a representative of OWCP's Branch of Hearings and Review, held January 17, 2018.

Appellant submitted reports from Dr. Angela M. Hardwick, a Board-certified neurologist, dated from January 31, 2017 through January 4, 2018 diagnosing continued spasmodic torticollis secondary to the employment injury, and cervical radiculopathy at C3-4 and C6-7 as sequelae of long-term cervical dystonia.

By decision dated April 3, 2018, an OWCP hearing representative reversed the July 17, 2017 decision, finding that Dr. Menke did not provide an adequate explanation as to why the objective findings on examination were no longer related to the employment injury. She directed OWCP to further develop the issue and request a supplemental report from Dr. Menke.

On June 27, 2018 OWCP referred appellant, a SOAF, and a new series of questions for a second opinion evaluation with Dr. Menke, to clarify his opinion regarding the nature and extent of any disability, work restrictions, and treatment due to the accepted conditions. The SOAF provided to his noted that OWCP had accepted cervical spasmodic torticollis as work related. OWCP instructed Dr. Menke that he must use the SOAF as the only factual framework for his opinion.

In a July 30, 2018 report, Dr. Menke noted that appellant had recently developed left shoulder symptoms in addition to her continuing neck symptoms. On examination, he observed that she held her head with a right lateral bend of the neck of 40 to 50 degrees and rotated approximately 20 degrees to the right, 4/5 strength throughout both upper extremities except for 3+/5 in the left deltoid and bicep. Dr. Menke noted that although appellant held her head rotated and tilted to the right, she had “no palpable cords in the strap muscles or evidence of muscle spasm on examination. He opined that the only clinical finding consistent with spasmodic torticollis was her neck position, although she had no evidence of fibrosis within the muscles as would be expected in a patient with long-term spasmodic torticollis. Dr. Menke concluded that the March 24, 1986 employment injury had caused a cervical strain, long resolved, but that appellant “did not fit the diagnosis of spasmodic torticollis.” He returned her to full, unrestricted duty.

On October 10, 2018 OWCP issued appellant a notice advising of its proposed termination of her wage-loss compensation and medical benefits, based on the second opinion physician finding that she had no residuals or disability due to the March 24, 1986 employment injury. It afforded her 30 days to submit additional evidence or argument, if she disagreed with the proposed termination, and enclosed the July 30, 2018 report from Dr. Menke.

In response, appellant submitted an October 17, 2018 statement, contending that Dr. Menke, an orthopedist, was not qualified to render an opinion on torticollis, a neurological condition.

By decision dated November 30, 2018, OWCP finalized the termination of appellant’s wage-loss compensation and medical benefits, effective November 29, 2018. It found that the weight of the medical evidence rested with Dr. Menke, the second opinion physician.

On December 13, 2018 appellant requested a hearing with a representative of OWCP’s Branch of Hearings and Review, later modified to a request for a telephonic hearing. At the hearing, held April 16, 2019, she contended that she remained permanently and totally disabled

due to the accepted cervical torticollis. Appellant provided September 24, 2018 reports from Dr. Hardwick finding appellant's condition unchanged.

By decision dated June 28, 2019, an OWCP hearing representative affirmed the November 30, 2018 decision, finding that Dr. Menke's opinion continued to represent the weight of the medical evidence.

On July 31, 2019 appellant, through counsel, requested reconsideration. Appellant submitted a July 23, 2019 report by Dr. Hardwick finding appellant's condition unchanged.

In a September 6, 2019 statement, appellant contended that OWCP had not properly developed the medical evidence of record as it had not sent Dr. Hardwick a questionnaire.

By decision dated October 18, 2019, OWCP denied modification of the June 28, 2019 decision.

On November 21, 2019 appellant requested reconsideration. She submitted copies of evidence previously of record.

By decision dated December 17, 2019, OWCP denied reconsideration.

On March 25, 2020 appellant, through counsel, requested reconsideration of OWCP's December 17, 2019 decision. Counsel submitted a February 6, 2020 report by Dr. Hardwick, finding that numerous medical specialists had confirmed that appellant had spasmodic torticollis, including Dr. Jankovic, a world expert on movement disorders and former president of an international movement disorder society. Dr. Hardwick contended that Dr. Menke, an orthopedist, erred by equating a lack of muscular fibrosis with the absence of torticollis. She explained that "[f]ibrosis of the muscle ha[d] nothing to do with spasmodic torticollis evaluation or treatment," which was performed by neurologists and not by orthopedists. Dr. Hardwick concluded that appellant's documented spasmodic torticollis remained active and disabling.

By decision dated June 23, 2020, OWCP denied modification of the October 18, 2019 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.⁵ 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

⁵ *D.B.*, Docket No. 19-0663 (issued August 27, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

the employment.⁶ Its 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 compensation.⁸ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 29, 2018.

OWCP accepted that appellant sustained a cervical sprain and spasmodic torticollis. To obtain an updated report on the nature and extent of the accepted conditions, it referred her to Dr. Menke for a second opinion examination. The SOAF provided to him clearly noted that OWCP had accepted spasmodic torticollis as employment related. Furthermore, OWCP instructed Dr. Menke to use the SOAF as the only factual basis for his opinion.

The Board finds, however, that Dr. Menke did not base his July 30, 2018 report on the SOAF provided for his review. Dr. Menke opined that appellant "did not fit the diagnosis of spasmodic torticollis," 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 render a medical opinion based on a SOAF which is incomplete or inaccurate, or 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.¹⁰ As Dr. Menke did not base his report on

⁶ *A.R.*, Docket No. 20-0335 (issued August 7, 2020); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Mimmis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁷ *V.S.*, Docket No. 19-1792 (issued August 4, 2020); *K.W.*, Docket No. 19-1224 (issued November 15, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁹ *See A.G., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake, id.*

¹⁰ 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).

the SOAF, the Board finds that the probative value of his opinion is diminished and not of sufficient weight to represent the weight of the medical evidence.¹¹

The Board finds, therefore, that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 29, 2018.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective November 29, 2018.¹²

ORDER

IT IS HEREBY ORDERED THAT the June 23, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 2, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

¹¹ *Id.*

¹² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.