

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

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| S.S., Appellant |) | |
| |) | |
| and |) | Docket No. 19-1516 |
| |) | Issued: October 21, 2021 |
| U.S. POSTAL SERVICE, POST OFFICE, Stanhope, NJ, Employer |) | |
| |) | |

Appearances:
James D. Muirhead, Esq., 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 July 8, 2019 appellant, through counsel, filed a timely appeal from a January 30, 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.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 January 30, 2019 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.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits as she no longer had residuals or disability causally related to her accepted December 27, 2012 employment injury.

FACTUAL HISTORY

On December 27, 2012 appellant, then a 32-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained a neck injury as a result of a motor vehicle accident while in the performance of duty. She stopped work on the date of injury and was treated at a hospital emergency room. OWCP initially accepted appellant's claim for cervical, thoracic, and lumbar sprains. On June 20, 2013 it expanded the acceptance of the claim to include post-concussion syndrome. OWCP paid appellant wage-loss compensation on the supplemental rolls as of February 11, 2013, and on the periodic rolls as of June 30, 2013.

Appellant sought medical treatment from Dr. Avery Katz, a Board-certified neurologist. In a February 25, 2015 report, Dr. Katz noted appellant's history of a December 27, 2012 motor vehicle accident and assessed post-concussion syndrome, memory loss, migraine, and anxiety.

In an August 4, 2015 report, Dr. Timothy Henderson, a Board-certified orthopedic surgeon, noted that appellant reported that she lost consciousness as a result of the December 27, 2012 incident. He diagnosed lumbar sprain and cervical radiculopathy causally related to the December 27, 2012 incident and opined that she could work full time with restrictions.

On August 24, 2017 Dr. Katz noted that appellant had been seen for several years with dysfunctional headaches, fluctuating left-sided weakness and cognitive complaints after an employment-related accident. He indicated that she frequently decompensated from minimal emotional or physical stressors and that there were additional issues at home due to separation from her husband. Dr. Katz reported essentially normal general examination and neurological examination, with minimal give-way left weakness. He noted that appellant had a "longstanding history of headaches worsened by prior accident and history of fluctuating left-sided weakness and actually has been having more psychologic issues than other neurologic events." Dr. Katz diagnosed: (there is no list of items so no colon is necessary).chronic PTSD, for which he recommended a psychologist; migraine without aura; and cognitive deficit in attention.

In April 2018, OWCP referred appellant, along with an updated statement of accepted facts (SOAF), the medical record and a list of questions, to Dr. Jeffrey Lakin, a Board-certified orthopedic surgeon, and Dr. Melvin P. Vigman, a Board-certified neurologist, for second opinion evaluations. The SOAF indicated that on February 27, 2012 appellant was involved in a motor vehicle accident and that she reported injury to the neck. It noted: the accepted conditions were sprain of neck; sprain of back, thoracic region; sprain of back, lumbar region; and post-concussion syndrome. OWCP requested that the physicians use the SOAF as a framework for their opinions and evaluate whether appellant continued to have residuals/disability causally related to her accepted December 27, 2012 employment injury.

In an April 24, 2018 report, Dr. Lakin reviewed the SOAF and appellant's medical history and records. He noted that she reported a loss of consciousness when describing the December 27,

2012 incident. Dr. Lakin opined that appellant's cervical, thoracic, and lumbar spine sprains were directly caused by the December 27, 2012 employment injury, but were no longer active. He found no objective findings on physical examination with regard to the accepted orthopedic conditions, reporting that the examination revealed minimal tenderness with excellent function of the cervical spine, upper extremities, thoracolumbar spine, and the lower extremities. Dr. Lakin opined that appellant had reached maximum medical improvement (MMI) as of April 24, 2018 and that she was able to return to full-time, full-duty work without restrictions.

In an April 30, 2018 report, Dr. Vigman provided a second opinion neurological evaluation with regard to appellant's accepted post-concussion syndrome. He reviewed appellant's neurologically relevant medical records along with the SOAF and indicated that she had no history of head injury and no loss of consciousness from the December 27, 2012 incident.⁴ Dr. Vigman also performed a detailed neurological examination, noting decreased cutaneous sensation in the entire left side of the face and entire left upper and lower extremity areas, which he indicated was outside any standard neurological boundary and was considered a factitious sensory loss. He provided an impression of no neurological disease, damage, or dysfunction. Dr. Vigman opined that since there was no head injury or loss of consciousness, appellant's neurological diagnoses related to cerebral functioning, including neuropsychological, and various headaches were not due to the December 27, 2012 employment injury. He indicated that the headaches were migraine type by history and that her mental dysfunction could not be considered due to the December 27, 2012 employment injury since there was no head injury. Dr. Vigman also noted that there was no evidence of cervical radiculopathy on examination. He indicated that he saw evidence of factitious sensory loss, a diagnosis that implied exaggerated symptom magnification. Dr. Vigman opined that appellant had reached MMI with no neurological problems. He further opined that there was no need for further testing or treatment and that she could return to her date-of-injury position. Dr. Vigman indicated that the treatment of appellant's migraines should continue, but it should not be considered related to the December 27, 2012 employment injury. He completed a work capacity evaluation (Form OWCP-5c), noting that she could perform full-time medium-type work with no restrictions.

In a May 10, 2018 letter, 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 December 27, 2012 employment injury. It advised her that the proposed action was based on the opinions of its second opinion physicians, Drs. Lakin and Vigman, and afforded her 30 days to submit additional evidence or argument challenging the proposed action.

OWCP subsequently received additional evidence, including an April 13, 2015 x-ray report, an April 13, 2015 state Range of Motion chart, and an April 14, 2016 blood work report.

In an April 17, 2016 narrative report, Dr. Changaramk Sivadas, an internal medicine specialist, indicated that appellant reported suffering a head injury in a December 2013 automobile accident while driving her mail vehicle with complaints of headaches, anxiety, insomnia, and memory problems since the accident. He indicated that her physical examination was

⁴ Dr. Vigman noted that December 27, 2012 hospital report indicated a history of motor vehicle accident with neck pain and no serious injury. Appellant also denied any head injury and there was no visual change of paresthesia reported at the time. Dr. Vigman further explained that there was no contemporaneous record of a head injury associated with the December 27, 2012 employment injury.

unremarkable and provided a diagnosis of post-concussion syndrome. Dr. Sivadas also diagnosed blindness in the right eye and anemia.

In a June 29, 2017 attending physician's report (Form CA-20), Dr. Katz diagnosed PTSD, cervical radiculopathy and headache caused or aggravated by the December 27, 2012 employment-related motor vehicle accident. He opined that she could return to part-time, light-duty work, and gradually work her way to full-time work.

In a May 18, 2018 mental residual functional capacity assessment Judith Hancox, a licensed clinical social worker, diagnosed PTSD and post-concussion syndrome. She opined that appellant was totally disabled from work.

By decision dated July 18, 2018, OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 22, 2018. It found that the weight of the medical evidence was represented by the well-rationalized medical opinions of Drs. Lakin and Vigman.

On July 24, 2018 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. A hearing was held on December 12, 2018, during which appellant testified about the December 27, 2012 employment injury and her treatment by various physicians. She noted that she had been awarded social security disability benefits. Appellant testified that Dr. Vigman did not listen when she described the history of the December 27, 2012 employment injury.

Additional evidence was received. In a February 1, 2018 report, Dr. Jerry Weber, a chiropractor, noted that appellant had significant injuries from a 2012 motor vehicle accident. He indicated that radiological findings were normal and diagnosed cervical radiculopathy and post-concussive syndrome.

In a March 5, 2018 report, Dr. Katz provided findings of vision loss, left-sided numbness, and weakness that seemed to stem from an employment-related accident when appellant was driving her mail truck in 2012. He indicated that no definitive abnormalities were seen on prior testing and that she has had various medication trials in the past. Dr. Katz noted increased symptoms and increased stressors. He diagnosed major depressive disorder, PTSD, tinnitus, vision loss, and insomnia.

In a July 25, 2018 note, Dr. Katz opined that all of appellant's symptoms were the direct result of the December 27, 2012 employment incident and that her ongoing stressors continued to cause her condition to fluctuate. He opined that she could work four hours per day with restrictions.

In a December 12, 2017 report, Dr. Katz indicated that appellant had severe stressors. He diagnosed complicated migraine, major depressive disorder, psychologic conversion disorder, and chronic PTSD.

By decision dated January 30, 2019, an OWCP hearing representative affirmed OWCP's July 18, 2018 termination decision. The hearing representative amended the accepted conditions to include cervical radiculopathy, based on Dr. Henderson's 2015 second opinion examination, but found it resolved as of April 30, 2018, the date of Dr. Vigman's second opinion evaluation.

LEGAL PRECEDENT

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 the employment.⁶ OWCP's 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

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits for the accepted conditions of cervical sprain, thoracic sprain, lumbar sprain, and cervical radiculopathy as she no longer had residuals or disability causally related to her accepted December 27, 2012 employment injury.

OWCP accepted the conditions of cervical sprain, thoracic sprain, lumbar sprain, and post-concussion syndrome. In his January 30, 2019 decision, OWCP's hearing representative expanded the accepted conditions to include a cervical radiculopathy, resolved as of April 30, 2018. The hearing representative also affirmed the termination of appellant's wage-loss compensation and medical benefits effective July 22, 2018 for the accepted conditions of cervical sprain, thoracic sprain, lumbar sprain, and post-concussion syndrome based on the opinions of second opinion examiners, Drs. Lakin and Vigman.

On April 24, 2018 appellant underwent a second opinion examination with Dr. Lakin with respect to the accepted orthopedic conditions of cervical sprain, thoracic sprain, and lumbar sprain.¹⁰ In his report, Dr. Lakin reviewed her medical history and presented findings on physical examination. He opined that appellant's employment-related conditions were no longer active because of a normal physical examination with minimal tenderness on examination. Dr. Lakin opined that she had no need for additional treatment as she reached MMI and she was capable of

⁵ *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).

⁶ *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).

⁷ *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *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 and 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).

¹⁰ *See* 20 C.F.R. § 10.320.

performing her usual job without restrictions. The Board has reviewed his opinion and finds that it has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue in the present case.¹¹ Dr. Lakin's opinion is based on a proper factual and medical history and he thoroughly reviewed the SOAF and medical records.¹² He also provided medical rationale explaining that appellant no longer had residuals or disability caused by the accepted sprain conditions. The Board thus finds that OWCP properly relied on Dr. Lakin's second opinion report in terminating her wage-loss compensation and medical benefits for the accepted orthopedic conditions of cervical sprain, thoracic sprain, and lumbar sprain.¹³

As noted, OWCP's hearing representative amended the accepted conditions to include cervical radiculopathy, based upon appellant's 2015 second opinion examination. The hearing representative, however, found that appellant's cervical radiculopathy had resolved as of April 30, 2018, as Dr. Vigman did not find evidence of cervical radiculopathy. The Board notes that the record contains 2018 treatment notes from Dr. Weber, a chiropractor, who diagnosed cervical radiculopathy. Dr. Weber is only considered to be a qualified physician under FECA to the extent he diagnoses a subluxation demonstrated by x-ray.¹⁴ Consequently, he is not considered a physician under FECA and his opinions do not constitute probative medical evidence.¹⁵ Thus, there is no current objective medical examination finding or diagnostic testing which establishes evidence of a cervical radiculopathy. The Board accordingly finds that OWCP properly determined that the accepted cervical radiculopathy condition had resolved.

The Board further finds that OWCP has not met its burden of proof to terminate her wage-loss compensation and medical benefits for the accepted condition of post-concussion syndrome.

OWCP referred appellant for a second opinion neurological evaluation with Dr. Vigman to determine whether she had ongoing residuals or disability with regards to the accepted post-concussion syndrome. It noted that it provided him with a SOAF, the medical record, and a list of questions, which he acknowledged. In his April 30, 2018 report, Dr. Vigman noted the history of the employment injury, reviewed the medical records and the SOAF and found that there was no evidence of a head injury or loss of consciousness. He opined that since appellant had not experienced a head injury or loss of consciousness, her neurological diagnoses related to cerebral functioning, including neuropsychological and various headaches, were not due to the

¹¹ *C.E.*, Docket No. 19-0661 (issued October 1, 2019); *see also R.W.*, Docket No. 12-0375 (issued October 28, 2013).

¹² *See M.H.*, Docket No. 17-0210 (issued July 3, 2018); *Melvina Jackson*, 38 ECAB 443 (1987).

¹³ *K.W.*, Docket No. 19-1224 (issued November 15, 2019).

¹⁴ Section 8101(2) of FECA provides that physician "includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law." 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *B.K.*, Docket No. 19-0829 (issued September 25, 2019); *T.C.*, Docket No. 19-0227 (issued July 11, 2019); *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (under FECA the term physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by the applicable state law).

¹⁵ *R.D.*, Docket No. 19-1528 (issued January 17, 2020); *see Jay K. Tomokiyo*, 51 ECAB 361 (2000).

December 27, 2012 employment injury. Dr. Vigman concluded that she had reached MMI from a neurological standpoint with no permanency and that she could return to her usual job without any restrictions. OWCP's hearing representative found that Dr. Vigman's examination showed that the accepted post-concussion syndrome condition, even if correctly diagnosed, was no longer active.

The Board notes that the list of questions sent to Dr. Vigman directed him to refer to the SOAF and to use the SOAFs as the framework for his answers. OWCP's procedures dictate that when an OWCP 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 his or her opinion, the probative value of the opinion is seriously diminished or negated altogether.¹⁶ Dr. Vigman did not use the SOAF as the framework in forming his opinion. Rather, as counsel properly alleged on appeal, Dr. Vigman based his opinion that appellant no longer had residuals or disability from the accepted post-concussion syndrome as he had concluded that since she did not suffer a head injury or loss of consciousness. As he did not accept findings provided in the SOAF, which specifically noted the acceptance of the post-concussion syndrome condition, the probative value of his opinion is diminished and insufficient to be afforded the weight of the medical evidence.¹⁷ The Board therefore finds that OWCP failed to meet its burden of proof in terminating appellant's wage-loss compensation and medical benefits, effective July 22, 2018, for the accepted condition of post-concussion syndrome.

On appeal, counsel contends that OWCP's decisions did not refer to the psychological injuries that appellant also suffered as a result of the employment injury. For conditions not accepted as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relationship.¹⁸

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits for the accepted conditions of cervical sprain, thoracic sprain, lumbar sprain, and cervical radiculopathy. However, the Board finds that OWCP did not meet its

¹⁶ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see J.T.*, Docket No. 18-1300 (issued March 22, 2019); *L.J.*, Docket No. 14-1682 (issued December 11, 2015).

¹⁷ *See J.T., id.; L.J.*, Docket No. 16-1852 (March 22, 2018).

¹⁸ *See L.B.*, Docket No. 19-1380 (issued February 11, 2020); *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

burden of proof to terminate her wage-loss compensation and medical benefits for the accepted condition of post-concussion syndrome.

ORDER

IT IS HEREBY ORDERED THAT the January 30, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: October 21, 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