

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

K.C., Appellant	)	
	)	
and	)	<b>Docket No. 21-0260</b>
	)	<b>Issued: September 7, 2021</b>
<b>SECURITIES &amp; EXCHANGE COMMISSION, BENEFITS BRANCH, New York, NY, Employer</b>	)	
	)	

*Appearances:*  
Thomas S. Harkins, 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 December 16, 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 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, following the June 23, 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.*

## ISSUE

The issue is whether appellant has met her burden of proof to establish a recurrence of disability commencing November 29, 2005 causally related to her accepted employment injuries.

## FACTUAL HISTORY

This case has previously been before the Board.<sup>4</sup> The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

Appellant, now a 64-year-old securities compliance examiner, has an accepted occupational disease claim (Form CA-2) for thoracic and lumbosacral neuritis/radiculitis, aggravation of degenerative thoracic and lumbar disc disease, and aggravation of thoracic and lumbar herniated disc(s), which arose on or about November 1, 2005, due to factors of her federal employment.<sup>5</sup> She submitted claims for wage-loss compensation (Form CA-7) for intermittent periods of disability beginning November 29, 2005. Beginning in June 2009, OWCP issued several decisions denying appellant's claim for intermittent wage-loss compensation for disability from work commencing November 29, 2005.

By decision dated August 8, 2014,<sup>6</sup> the Board set aside a September 4, 2013 decision of OWCP as the opinion of Dr. Ronald A. Ripps, a Board-certified orthopedic surgeon and the impartial medical examiner (IME), had not adequately resolved the conflict in the medical opinion evidence. The Board ordered OWCP to obtain a supplemental opinion from the IME.

By decision dated August 24, 2015,<sup>7</sup> the Board set aside OWCP's October 23, 2014 decision denying wage-loss compensation and remanded the case for further development of the medical evidence. The Board found that a September 3, 2014 supplemental report from Dr. Ripps, had still not adequately addressed the Board's concerns raised in its August 8, 2014 decision. The Board noted that, while OWCP provided Dr. Ripps a new statement of accepted facts (SOAF), which included all of appellant's accepted conditions, it remained unclear from his September 3, 2014 supplemental report whether he acknowledged that appellant had sustained all of the accepted thoracic and lumbar conditions. Consequently, the Board directed OWCP to refer appellant to a different IME for purpose of resolving the conflict in medical opinion regarding whether appellant's claimed disability on or after November 29, 2005 was employment related.

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<sup>4</sup> Docket No. 11-0225 (issued September 8, 2011); Docket No. 12-1386 (issued May 2, 2013); Docket No. 14-0791 (issued August 8, 2014); Docket No. 15-1086 (issued August 24, 2015); Docket No. 17-0851 (issued January 3, 2018).

<sup>5</sup> Appellant attributed her middle and lower back conditions to lifting heavy boxes of documents on many occasions. She filed claims for wage loss for intermittent periods beginning November 29, 2005.

<sup>6</sup> *Supra* note 4. By decision dated September 8, 2011, the Board had remanded the case to OWCP, finding that an August 14, 2008 report of Dr. William Healy, a Board-certified orthopedic surgeon, who previously served as an IME, required clarification regarding appellant's work-related disability on or after November 29, 2005. By decision dated May 2, 2013, the Board found that Dr. Healy's November 28, 2011 supplemental report did not adequately clarify his earlier report and it remanded the case to OWCP in order to refer appellant to a new IME. *Id.*

<sup>7</sup> *Id.*

On remand OWCP referred appellant to Dr. James M. Kipnis, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion regarding whether appellant had disability for intermittent periods on or after November 29, 2005 due to her accepted work injuries. It provided Dr. Kipnis with a March 30, 2016 SOAF, which identified appellant's accepted conditions as thoracic and lumbosacral neuritis/radiculitis, aggravation of degenerative disc disease, thoracic and lumbar; and aggravation of herniated disc, thoracic and lumbar. In an August 9, 2016 report, Dr. Kipnis noted that he was unable to provide a well-reasoned medical explanation, with supporting objective findings, as to how a November 1, 2005 work-related injury directly caused, aggravated, precipitated, or accelerated the accepted conditions of thoracic and lumbosacral neuritis/radiculitis, as well as the accepted conditions of aggravation of herniated lumbar and thoracic discs.

By decision dated September 30, 2016, OWCP found that appellant failed to establish disability for intermittent periods commencing November 29, 2005 due to her accepted employment injuries. It determined that the special weight of the medical opinion evidence regarding this matter rested with the August 9, 2016 report of Dr. Kipnis, the IME.

Appellant appealed to the Board and, by decision dated January 3, 2018,<sup>8</sup> the Board set aside OWCP's September 30, 2016 decision and remanded the case to OWCP for further development of the medical evidence. The Board found that there remained an outstanding conflict in the medical opinion evidence regarding appellant's disability claim because Dr. Kipnis' August 9, 2016 report was not sufficiently well rationalized to constitute the special weight of the medical opinion evidence regarding whether appellant had disability for intermittent periods commencing November 29, 2005 due to her accepted employment injuries. The Board determined that Dr. Kipnis' August 9, 2016 report was in need of clarification because Dr. Kipnis disregarded several accepted conditions listed in the SOAF when providing an opinion regarding whether appellant's accepted conditions caused disability for intermittent periods on or after November 29, 2005. The Board remanded the case to OWCP for referral of the case record, a current detailed SOAF and, if necessary, appellant, to Dr. Kipnis for a supplemental report regarding the claimed periods of work-related disability. The Board indicated that, if Dr. Kipnis was unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must refer appellant, along with the case record and a detailed SOAF, to another IME for the purpose of obtaining a rationalized medical opinion on the issue.

On remand, OWCP requested on May 10, 2018 that Dr. Kipnis provide a supplemental report to address the concerns raised by the Board regarding his August 9, 2016 report. On January 29, 2019 Dr. Kipnis' office contacted OWCP and advised that Dr. Kipnis would not be able to provide a supplemental report.

On January 31, 2019 OWCP referred appellant for an impartial medical examination with Dr. Alan M. Crystal, a Board-certified orthopedic surgeon. It provided Dr. Crystal a copy of the case record, including a SOAF, which delineated the accepted employment conditions, and requested that he evaluate whether appellant sustained a recurrence of disability commencing November 29, 2005 causally related to her accepted employment injury.

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<sup>8</sup> *Id.*

In a February 19, 2019 report, Dr. Crystal discussed appellant's factual and medical history and reported the findings of the physical examination he conducted on that date. He noted that appellant exhibited limited motion of the back upon range of motion testing and that the Lasegues/straight leg test for both legs was negative. Appellant had equal calf and thigh circumferences. Dr. Crystal noted that the medical records clearly indicated that significant nonwork-related traumatic injuries, including multiple spine and rib fractures, occurred "at the time of the alleged [November 1, 2005] work injury of carrying packages." He asserted that, after the repeated nonwork-related traumas in the form of "falls," the carrying of heavy packages at work would have minimally aggravated the preexisting degenerative disc disease. Dr. Crystal advised that the natural history of when spine degenerative changes progress or when they become symptomatic cannot be accurately predicted. He noted, "[c]laimant's work condition had nil to very minimal affect [sic] on her preexisting condition of spine degeneration and that the nil to minimal aggravation was temporary and ceased when the claimant stopped carrying packages." Dr. Crystal also indicated in another portion of his report, "[w]hile aggravation of degenerative disc disease is an accepted condition, it is my strong opinion that [99 percent to 100 percent] aggravation was from nonwork trauma which had vastly larger forces (a spine fracture and posterior rib fractures) than carrying packages."

Dr. Crystal also opined that appellant "never had and does not now have" objective evidence of a thoracic or lumbar neuritis. Moreover, he asserted that appellant "never had and does not now have" objective evidence of a herniated disc as there were no objective findings consistent with nerve root impingement causing symptoms. Dr. Crystal opined that there were no objective medical findings showing that appellant's accepted conditions were still active, noting that patients bend, extend, and rotate their backs "only so far as they want to." He noted that the aggravation of degenerative disc disease, lumbar and thoracic, only continued due to the nonwork-related conditions of "fractures and other various traumas." Dr. Crystal asserted that appellant had ongoing subjective complaints from her nonwork-related spinal degeneration. He further opined that appellant did not have any objective findings from the accepted conditions that would preclude her from performing her regular duties. Dr. Crystal asserted that she would have been able to perform her regular job duties three months after her reported onset of back pain in 2005. He noted, "[h]owever, due to multiple fractures she sustained, not related to her employment, this is a moot question."

By decision dated April 19, 2019, OWCP denied appellant's recurrence of disability claim, finding that she had not met her burden of proof to establish a recurrence of disability commencing November 29, 2005 causally related to her accepted employment injuries. It found that the special weight of the medical opinion evidence with respect to the matter rested with the February 19, 2019 report of Dr. Crystal, the IME.

On March 31, 2020 appellant, through counsel, requested reconsideration of the April 19, 2019 decision. Counsel argued that the opinion of Dr. Crystal was not sufficiently rationalized to represent the special weight of the medical opinion evidence with respect to appellant's recurrence claim. Appellant submitted additional medical evidence, including progress reports, dated between March 7, 2019 and February 5, 2020, from Dr. Neal Frauwirth, a Board-certified orthopedic surgeon who noted his treatment for bilateral lumbosacral radicular symptoms.

By decision dated June 23, 2020, OWCP denied modification of its April 19, 2019 decision, finding that the special weight of the medical opinion evidence with respect to appellant's recurrence claim continued to rest with the February 19, 2019 report of Dr. Crystal.

### **LEGAL PRECEDENT**

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."<sup>9</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>10</sup>

The IME's report must actually fulfill the purpose for which it was intended. It must resolve the conflict in medical opinion.<sup>11</sup> OWCP should ensure that the IME's report is comprehensive, clear, and definite, and that it is based on current information and supported by substantial medical reasoning, as well as a review of the case file.<sup>12</sup> If the report is vague, speculative, incomplete, or not rationalized, it is OWCP's responsibility to secure a supplemental report from the IME to correct any defects.<sup>13</sup>

### **ANALYSIS**

The Board finds that this case is not in posture for decision.

By decision dated January 3, 2018, the Board remanded the case to OWCP for further development of the medical evidence. The Board found that there was an outstanding conflict in the medical opinion evidence regarding appellant's recurrence of disability claim, noting that Dr. Kipnis' August 9, 2016 report was in need of clarification because Dr. Kipnis disregarded several accepted conditions listed in the SOAF. After Dr. Kipnis advised OWCP on remand that he would not be able to provide a supplemental report, OWCP referred appellant for an impartial medical examination with Dr. Crystal. It provided Dr. Crystal a copy of the case record, including a SOAF, which delineated the accepted employment conditions, and requested that he evaluate whether appellant sustained a recurrence of disability commencing November 29, 2005 causally related to her accepted employment injuries.

In his February 19, 2019 report, Dr. Crystal opined that there were no objective medical findings showing that appellant's accepted conditions were still active, noting that patients bend, extend, and rotate their backs "only so far as they want to." He indicated that the aggravation of

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<sup>9</sup> 5 U.S.C. § 8123(a).

<sup>10</sup> *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>11</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Developing and Evaluating Medical Evidence*, Chapter 2.810.11d(2) (September 2010). *See also M.A.*, Docket No. 18-1671 (issued June 13, 2019).

<sup>12</sup> *Id.*

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

appellant's degenerative disc disease, lumbar and thoracic, only continued due to the nonwork-related conditions of "fractures and other various traumas." Dr. Crystal asserted that appellant had ongoing subjective complaints from her nonwork-related spinal degeneration. He further opined that appellant did not have any objective findings from the accepted conditions that would preclude her from performing her regular duties. Dr. Crystal found that she would have been able to perform her regular job duties three months after her reported onset of back pain in 2005.

The Board finds, however, that Dr. Crystal's opinion is not sufficiently well rationalized to constitute the special weight of the medical opinion evidence regarding whether appellant had disability for intermittent periods commencing November 29, 2005 due to her accepted employment injuries. As noted, OWCP accepted appellant's claim for lumbosacral and thoracic neuritis or radiculitis, aggravation of degenerative thoracic and lumbar disc disease, and aggravation of thoracic and lumbar herniated disc(s). Contrary to the SOAF, Dr. Crystal opined in his February 19, 2019 report that he did not believe that several of appellant's accepted thoracic and lumbar conditions were employment related. Dr. Crystal asserted that appellant "never had and does not now have" objective evidence of a thoracic or lumbar neuritis. Moreover, he opined that appellant "never had and does not now have" objective evidence of a herniated disc as there were no objective findings consistent with nerve root impingement causing symptoms. Dr. Crystal also effectively denied that appellant sustained other accepted conditions by allowing for the possibility that appellant suffered no work-related aggravation of her degenerative thoracic and lumbar disc disease. He noted, "[c]laimant's work condition had nil to very minimal affect [sic] on her preexisting condition of spine degeneration and that the nil to minimal aggravation was temporary and ceased when the claimant stopped carrying packages." Dr. Crystal also indicated in another portion of his report, "While aggravation of degenerative disc disease is an accepted condition, it is my strong opinion that [99 percent to 100 percent] aggravation was from nonwork trauma which had vastly larger forces (a spine fracture and posterior rib fractures) than carrying packages."

In *L.A.*,<sup>14</sup> the Board reversed OWCP's determination terminating the claimant's wage-loss compensation and medical benefits because the IME noted that the claimant merely sustained a lumbar sprain and he did not acknowledge OWCP's accepted conditions of lumbosacral neuritis or radiculitis listed in the SOAF. OWCP had terminated benefits based on the IME's opinion that the lumbar sprain had resolved. In *N.C.*,<sup>15</sup> the Board reversed OWCP's determination terminating the claimant's wage-loss compensation and medical benefits because OWCP relied on the opinion of the IME who determined that the claimant merely sustained soft tissue injuries as a result of two employment incidents, instead of the accepted conditions of lumbosacral radiculitis of the lower extremities, lumbar acquired spondylolisthesis, and L5 spondylosis listed in the SOAF. The Board has held that it is well established that medical reports must be based on a complete and accurate factual and medical background; medical opinions based on an incomplete or inaccurate history are of diminished probative value.<sup>16</sup>

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<sup>14</sup> Docket No. 14-1138 (issued September 9, 2014).

<sup>15</sup> Docket No. 15-1855 (issued June 3, 2016).

<sup>16</sup> See *L.A.*, *supra* note 14, and *N.C.*, *id.*

In the present case, OWCP erred in relying on a report from a physician who disregarded several accepted conditions listed in the SOAF when providing an opinion regarding whether appellant's accepted conditions caused disability for intermittent periods on or after November 29, 2005.<sup>17</sup> Because Dr. Crystal's February 19, 2019 report was not based on an accurate history, his opinion was not well rationalized and should not be given the special weight of evidence.<sup>18</sup>

For the above-described reasons, the opinion of Dr. Crystal is in need of clarification and elaboration. Therefore, in order to resolve the continuing conflict in the medical opinion, the Board will remand the case to OWCP for referral of the case record, a current detailed SOAF, and, if necessary, appellant, to Dr. Crystal for a supplemental report regarding whether appellant sustained a recurrence of disability commencing November 29, 2005 causally related to her accepted employment injury. OWCP should clearly advise Dr. Crystal of all of appellant's accepted conditions and provide him with a detailed description of the accepted work factors that caused appellant's accepted thoracic and lumbar conditions. If Dr. Crystal is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative, or lacking in rationale, OWCP must submit the case record and a detailed SOAF to a new IME for the purpose of obtaining his or her rationalized medical opinion on the issue.<sup>19</sup> After this and such other further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's recurrence claim.

### CONCLUSION

The Board finds that this case is not in posture for decision.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* The Board notes that Dr. Crystal's report is of limited probative value regarding appellant's recurrence of disability claim for the further reason that Dr. Crystal rendered an equivocal opinion regarding the timing of appellant's ability to work. He opined that appellant would have been able to perform her regular job duties three months after her reported onset of back pain in 2005. However, Dr. Crystal did not clearly identify the date of the onset of appellant's back pain and therefore left open the possibility that appellant would have been unable to perform her regular work at some point after November 29, 2005, *i.e.*, the date she claimed her recurrence of disability had commenced. The Board has held that an opinion which is equivocal in nature is of limited probative value regarding a given medical matter. *See E.B.*, Docket No. 18-1060 (issued November 1, 2018); *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962).

<sup>19</sup> *Harold Travis*, 30 ECAB 1071, 1078 (1979).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 23, 2020 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded to OWCP for further proceedings consistent with this decision.

Issued: September 7, 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