

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

M.D., Appellant)

and)

DEPARTMENT OF THE NAVY, CHILD)
DEVELOPMENT CENTER, NAVAL STATION)
ROOSEVELT ROADS, Ceiba, PR, Employer)

Docket No. 21-0080
Issued: August 16, 2022

Appearances:

Alan J. Shapiro, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

JANICE B. ASKIN, Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 26, 2020 appellant, through counsel, filed a timely appeal from an August 25, 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.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 August 25, 2020 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.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective April 2, 2020, as she no longer had disability causally related to her accepted May 7, 2001 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability on or after April 2, 2020 causally related to her accepted May 7, 2001 employment injury.

FACTUAL HISTORY

On May 7, 2001 appellant, then a 26-year-old educational technician, filed a traumatic injury claim (Form CA-1) alleging that on that date she injured her back when she picked up a child while changing diapers in the performance of duty. She indicated that when she picked up the child, she felt a sharp pain in her back and pain on the left side of her back and left leg. OWCP accepted the claim for lumbosacral sprain and displacement of the lumbar intervertebral disc without myelopathy. Appellant returned to a light-duty position, which she worked for approximately one year before stopping work completely on November 20, 2002. On January 2, 2003 she underwent an OWCP-approved lumbosacral fusion at L5-S1. OWCP paid appellant wage-loss compensation on its supplement rolls from November 26, 2002 through January 25, 2003 and on its periodic rolls as of January 26, 2003.

On June 10, 2019 OWCP referred appellant to Dr. Victoria M. Langa, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of appellant's accepted conditions. In her July 1, 2019 report, Dr. Langa reviewed the medical record along with a statement of accepted facts (SOAF). She found no objective findings on physical examination as appellant had no atrophy and no muscles spasms, as well as no evidence of radiculopathy.⁴ Dr. Langa opined that the work-related conditions had not resolved as appellant has postlaminectomy syndrome following the L5-S1 discectomy and fusion surgery with no evidence of residual radiculopathy. She opined that appellant most likely reached maximum medical improvement (MMI) 1 to 2 years post surgery and that no further treatment was required. Based on the job description provided in the SOAF, Dr. Langa further opined that appellant was physically capable of returning to the duties of an education technician. In a work capacity evaluation (Form OWCP-5c), she opined that appellant reached MMI and could return to her usual job without restriction.

On July 26, 2019 OWCP requested that appellant's treating physician, Dr. Michael Engle, a Board-certified physiatrist, review the SOAF and Dr. Langa's report, and provide a rationalized medical opinion as to whether he agreed or disagreed with the Dr. Langa's opinion as to appellant's work tolerances and whether appellant required further medical treatment. In a July 31, 2019 report, Dr. Engle disagreed with Dr. Langa's opinion. He opined that appellant was developing

⁴ Dr. Langa noted that appellant had a waddling, but non antalgic gait pattern and had some difficulty attempting to walk on her heels/toes. Examination of her back revealed a well-healed midline surgical scar with no signs of infection. Dr. Langa indicated that appellant had tenderness across both posterior iliac crests and diffusely across both buttocks with tenderness over both greater trochanters. No muscle spasm was palpable. Dr. Langa reported that active range of motion of the lumbar spine revealed that appellant flexed forward with her fingertips at the level of her knees. She extended to 10 degrees and exhibited 10 to 15 degrees of lateral flexion bilaterally. Examination of her lower extremities revealed no swelling or atrophy. Appellant had bilaterally symmetric range of motion of her knees and ankles, but reflexes could not be elicited at either of the patellar tendons or Achilles tendons bilaterally. There was no localized motor or sensory deficits in either lower extremity. Pulses were palpable distally.

adjacent level degeneration or postlaminectomy syndrome, which is likely to require further medical treatment. Dr. Engle noted that she had just completed radiofrequency ablation (RFA) of the lumbar medical branches with good response. He further opined that he did not think appellant could return to her prior employment without restrictions and recommended a full functional capacity evaluation (FCE).

In an August 15, 2019 progress report, Dr. Engle provided an assessment of lumbar disc displacement and postlaminectomy syndrome, improved. He noted that appellant was six weeks out of her RFA and felt about 40 percent better.

In a September 10, 2019 report, Dr. John L. Dunne, a family medical specialist, provided an assessment of chronic mechanical back pain with intervertebral disc displacement. He noted that appellant remained morbidly obese, that the RFA's lessened her back pain by 40 to 50 percent, and that Dr. Engle had referred her to aquatic physical therapy. Dr. Dunne opined that she had not reached MMI and explained that the goal of the therapeutic injections and physical therapy in an aquatic environment was to set her up for some functional improvement.

In an October 15, 2019 report, Dr. Dunne reported that appellant had completed her aquatic therapy. He indicated that her back pain pressure was relieved when she was in the water, but returned when she was on land. Examination findings were noted to be unchanged from previous examinations. This included painful limited range of motion, tandem leg extension increases low back and bilateral leg pain, dampened reflexes at the bilateral Achilles and patella, and diminished sensory examination to pin wheel in both the L4 and L5 distribution. Dr. Dunne noted that appellant had gained over 100 pounds since her 2002 back fusion. He opined that her pain levels were debilitating and that she had evidence of lower extremity neurologic impairment. Dr. Dunne indicated that a magnetic resonance imaging (MRI) scan of the lumbar spine would be scheduled. He recommended that Dr. Engle obtain an electromyography and nerve conduction velocity (EMG/NCV) study of the lower extremities.

On October 31, 2019 OWCP proposed to terminate appellant's wage-loss compensation because her May 7, 2001 employment injury no longer caused disability. It found that weight of the medical evidence rested with the July 1, 2019 second opinion of Dr. Langa, who found that appellant no longer had continuing disability from work and was capable of returning to her date-of-injury position as an educational technician with no restrictions. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

In a November 4, 2019 report, Dr. Dunne indicated that appellant's 2013 and 2017 MRI scans of the lumbar spine revealed the presence of a right lumbar herniated disc. He indicated that she had a L5-S1 laminectomy, but still suffered from painful limited range of motion of the lumbar spine and positive neural tension signs. Dr. Dunne indicated that appellant's October 23, 2019 MRI scan showed canal stenosis at L4-5 with right lateral recess stenosis and effacement of the descending L5 nerve root in the face of post-surgical changes at L5-S1. He noted that he was awaiting the results of a scheduled EMG/NCV study. Dr. Dunne opined that appellant was unable to return to work and remained symptomatic from the initial injury.

On November 11, 2019 appellant underwent an EMG/NCV study.

In his December 3, 2019 progress report, Dr. Engle indicated that appellant's updated MRI scan revealed adjacent level degeneration above her fusion at L5-S1 with significant lateral recess stenosis, particularly on the right side affecting the L5 nerve root. There was also significant foraminal stenosis on the right side, affecting the L4 nerve root on that level. Examination findings revealed diminished range of motion of the lumbar spine and altered sensation in the right leg. Dr. Engle provided an assessment of lumbar disc displacement status post fusion at L5-S1. He additionally diagnosed adjacent level degeneration with lateral recess and foraminal stenosis, which he opined that was a direct consequence of the fusion at L5-S1. Dr. Engle explained that, as the levels above, at L3-4, L2-3, and L1-2, looked normal, the preponderance of the evidence suggested that the adjacent level degeneration was secondary to appellant's prior fusion, and not degenerative in nature. He requested that this additional diagnosis be added to her claim.

In a November 21, 2019 report, Dr. Dunne indicated that the MRI scan showed abnormalities at the L4-5 level. He opined that, as the previous fusion was done in 2003, it was not unusual for progression at the adjacent levels 10 years later to become symptomatic and this was the case with appellant. Dr. Dunne also noted that her morbid obesity was a contributing factor. He opined that the repetitive bending and lifting of children and doing diaper changes more likely than not was the inciting event superimposed on the slow degradation of the adjacent L4-5 disc deterioration which resulted in the current lumbar radiculopathy of the right lower extremity.

On January 17, 2020 OWCP requested that Dr. Langa clarify her report in light of the additional medical documentation from appellant's treating physicians, which indicated that appellant developed the additional condition of lumbar disc displacement status post fusion at L5/S1. A January 27, 2020 updated SOAF was provided which listed the physical requirements of appellant's educational technician position.

In a January 21, 2020 report, Dr. Dunne requested that the acceptance of appellant's claim be expanded to include degenerative joint and disc disease at L4-5 with resulting stenosis. In his January 21, 2020 progress report, he noted that the MRI scan noted significant abnormalities at the L4-5 disc level adjacent to her L5-S1 lumbar fusion. Dr. Dunne reported that the EMG demonstrated no evidence of radiculopathy, but appellant's response to the anesthetic period of the epidural confirmed that she has progression to the adjacent level of her fusion and has developed foraminal stenosis and severe degenerative joint and disc disease which effaces the right L5 nerve root.

In a February 24, 2020 addendum report, Dr. Langa reviewed the updated SOAF and the recent diagnostic tests and medical reports from appellant's treating physicians. She indicated that appellant's work-related conditions had not resolved as appellant has a chronic lumbar postlaminectomy syndrome following the L5-S1 disc surgery of January 2003. Dr. Langa opined that the acceptance of appellant's claim should be expanded to include the diagnosis of a chronic lumbar postlaminectomy syndrome and provided a medical explanation as to why the fusion at L5-S1 was a contributing factor to the progressive degenerative changes at the adjacent L4-5 space. She reviewed the physical requirements of appellant's date-of-injury position and opined that, based on her July 1, 2019 examination of appellant, it continued to be her opinion that appellant was physically capable of returning to that position. Dr. Langa explained why appellant's chronic lumbar postlaminectomy syndrome and adjacent level disease at L4-5, residuals from a physical injury, did not necessarily result in disability requiring work restrictions/limitations. She also noted that her examination of appellant indicated that appellant was capable of performing her previous work duties as an educational technician.

By decision dated April 1, 2020, OWCP expanded the acceptance of the claim to include chronic lumbar postlaminectomy syndrome adjacent level disease at L4-5.

By decision dated April 2, 2020, OWCP terminated appellant's wage-loss compensation, effective that date. It accorded the weight of the medical evidence to Dr. Langa, its second opinion examiner, who opined that appellant was capable of returning to her date-of-injury position. This was based on her examination findings and the fact that the additional conditions of postlaminectomy syndrome and adjacent level disc disease did not affect appellant's ability to work her date-of-injury position as an educational technician.

On April 10, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP received physical therapy records dated from March 13 to June 24, 2020 and copies of December 23, 2019 diagnostic tests. It also received a December 23, 2019 procedure note from Dr. Engle for a transforaminal nerve block, and a February 11, 2020 report wherein Dr. Engle reviewed findings from appellant's December 3, 2019 MRI scan.

A telephonic hearing was held on June 23, 2020.

By decision dated August 25, 2020, OWCP's hearing representative affirmed the April 2, 2020 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden of proof to justify modification or termination of benefits.⁵ Having determined that, an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to 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 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.⁸

⁵ See *N.P.*, Docket No. 19-0296 (issued July 25, 2019); *H.P.*, Docket No. 18-0851 (issued December 11, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *J.D.*, Docket No. 18-0958 (issued January 8, 2019); *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁷ See *D.P.*, Docket No. 18-0038 (issued January 4, 2019); *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

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

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective April 2, 2020, as she no longer had disability causally related to her accepted May 7, 2001 employment injury.

OWCP referred appellant to Dr. Langa for a second opinion evaluation to determine the status of appellant's accepted conditions and work capacity. In her July 1, 2019 report, Dr. Langa reviewed the SOAF and presented examination findings. She reported that there were no purely objective findings on physical examination as there was no atrophy and no muscle spasm. Dr. Langa opined that there was no evidence of residual radiculopathy. Based on the SOAF, she opined that appellant was capable of returning to her date-of-injury position as an educational technician. In a February 24, 2020 addendum report, Dr. Langa clarified that appellant had residuals from the accepted condition and agreed with appellant's physicians that the claim could be expanded to include additional conditions of postlaminectomy syndrome and adjacent level disc disease for medical treatment, which OWCP accepted on April 1, 2020. She also reviewed an updated SOAF, which contained a description of appellant's date-of-injury job duties and opined that the additional diagnoses would not affect appellant's ability to return to her date-of-injury position. Dr. Langa confirmed that, based on her previous medical findings, appellant was still capable of returning to her date-of-injury position as an educational technician.

The Board finds that OWCP properly accorded the weight of the medical evidence to Dr. Langa in terminating appellant's wage-loss compensation, effective April 2, 2020. Dr. Langa based her opinion on a proper factual and medical history and physical examination findings and provided medical rationale for her opinion. Her opinion that appellant could return to her date-of-injury position that, was based on an accurate description of appellant's date-of-injury job duties, the medical evidence of record, and her examination findings regarding appellant's disability status causally related to the May 7, 2001 accepted conditions, which included the most recent accepted condition of chronic lumbar postlaminectomy syndrome and adjacent level disease at L4-5.

Dr. Engle opined that appellant was developing adjacent level degeneration or postlaminectomy syndrome, which is likely to require further medical treatment. He noted that she had just completed RFA of the lumbar medical branches with good response. Dr. Engle further opined that he did not think appellant could return to her prior employment without restrictions and recommended an FCE. The Board has held that medical opinions, which are equivocal or speculative are of diminished probative value.⁹ Dr. Engle's report is, therefore, insufficient to create a conflict of medical opinion with Dr. Langa.

Dr. Dunne related in his November 4, 2019 report that appellant remained symptomatic and unable to return to work. However, he failed to offer an opinion addressing why she continued to have disability for work due to her objective residuals of her accepted conditions, rather than from her symptoms. The Board finds that Dr. Dunne's conclusory opinion was insufficient to

⁹ *R.B.*, Docket No. 19-0204 (issued September 6, 2019); *see N.B.*, Docket No. 19-0221 (issued July 15, 2019).

establish that appellant still had disability causally related to her accepted employment injury.¹⁰ Accordingly, OWCP met its burden of proof.¹¹

LEGAL PRECEDENT -- ISSUE 2

When OWCP properly terminates compensation benefits, the burden shifts to appellant to establish continuing disability after that date, causally related to the accepted employment injury.¹² To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such causal relationship.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish continuing disability causally related to her accepted May 7, 2001 employment injury after April 2, 2020.

Appellant submitted evidence in the form of physical therapy reports, diagnostic tests and reports regarding medical procedures which pertained to her medical treatment due to the work-related injury. This evidence did not address appellant's disability from work. This evidence is, therefore, not relevant to the issue of whether appellant has met her burden of proof to establish continuing disability causally related to her accepted May 7, 2001 employment injury on or after April 2, 2020. As previously noted, to establish causal relationship between any attendant disability claimed and the employment injury, rationalized medical evidence must be submitted, which based on a complete medical and factual background, supports such causal relationship.¹⁴

As appellant has not submitted rationalized medical evidence establishing that she had continuing employment-related disability on or after April 2, 2020 causally related to the accepted May 7, 2001 employment injury, she has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective April 2, 2020, as she no longer had disability causally related to her accepted May 7, 2001 employment injury. The Board further finds that appellant has not met her

¹⁰ See *E.S.*, Docket No. 20-0673 (issued January 11, 2021).

¹¹ *Id.*; *K.W.*, Docket No. 19-1224 (issued November 15, 2019).

¹² See *C.P.*, Docket No. 21-0173 (issued March 23, 2022); *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *C.S.*, Docket No. 18-0952 (issued October 23, 2018); *Manuel Gill*, 52 ECAB 282 (2001).

¹³ *Id.*

¹⁴ *Id.*

burden of proof to establish continuing disability on or after April 2, 2020 causally related to her accepted May 7, 2001 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the August 25, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 16, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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