

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

S.M., Appellant)	
)	
and)	Docket No. 21-0809
)	Issued: August 2, 2022
U.S. POSTAL SERVICE, POST OFFICE,)	
Johnstown, PA, Employer)	
)	

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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 4, 2021 appellant, through counsel, filed a timely appeal from a March 31, 2021 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 OWCP received additional evidence following the May 31, 2021 decision. However, the Board's *Rules of Procedures* 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 and medical benefits, effective October 11, 2020, as he no longer had disability or residuals due to his accepted July 13, 2017 employment injury; and (2) whether appellant has met his burden of proof to establish continuing employment-related disability or residuals on or after October 11, 2020, causally related to his accepted July 13, 2017 employment injury.

FACTUAL HISTORY

On July 19, 2017 appellant, then a 41-year-old city carrier assistant, filed an occupational disease claim (Form CA-2) alleging that he sustained a muscle tear of the rectus femoris muscle and tendons at thigh level on the right due to factors of his federal employment including delivering mail on foot, entering and exiting his mail truck several times daily, and walking on uneven ground. He noted that he first became aware of his condition on July 13, 2017 and realized its relation to his federal employment on July 18, 2017. Appellant stopped work on July 18, 2017.

On July 29, 2017 appellant underwent a right short cephalomedullary fixation of his right femoral fracture.

On September 21, 2017 OWCP accepted the claim for fracture of unspecified part of neck of right femur. It paid appellant wage-loss compensation on the supplemental rolls effective July 23, 2017, and on the periodic rolls effective November 12, 2017.

Appellant returned to work on May 7, 2019 in a modified position as a city carrier technician. The job duties included casing routes and sorting parcels. Appellant filed claims for compensation (Form CA-7) for disability from work commencing May 14, 2019.

In a June 13, 2019 report, Dr. William Bergin, a Board-certified physiatrist and an osteopath, noted appellant's history that he had a right hairline stress fracture of the hip, with rod placement in July 2017 and removal of hardware in April 2018. He related that a functional capacity evaluation had cleared appellant to return to medium level duties, with no frequent walking or standing, however, appellant was sent back to his daily mail route and was on his feet all day. Dr. Bergin provided an assessment of gait abnormality, low back and bilateral hip pain, and related that appellant should continue his medium level of duty "avoiding prolonged standing and walking and no frequent walking or standing frequent position."

On September 27, 2019 OWCP referred appellant along with a statement of accepted facts (SOAF) for a second opinion evaluation with Dr. Mitchell E. Antin, an osteopath specializing in orthopedic surgery, to determine the status of his accepted employment-related conditions, and his current work restrictions.

In an October 21, 2019 report, Dr. Antin noted appellant's history of injury and medical treatment. Appellant's physical examination findings indicated that his lower extremities revealed overall symmetry, his thigh and calf measurements were the same on either leg, patellar reflexes were brisk and intact 2/4, no swelling or edema or deformities of the lower extremities, no complaints of ankle or foot pain, no weakness in dorsiflexion or plantar flexion, and normal

sensation. Dr. Antin found that the right thigh had three prior surgical scars and tenderness around the greater trochanter. He found range of motion (ROM) around the right hip was intact and full, appellant had no complaint of pain during the examination, no complaint of low back pain, and the iliotibial appeared to have normal tension. Dr. Antin noted that x-rays from May 14, 2019 revealed a satisfactory healed fracture without complication of the right femoral neck. He further noted that appellant was discharged from physical therapy and that Dr. Bergin did not provide any rationale as to why he continued appellant on medium level duty with avoidance of prolonged standing and walking. Dr. Antin opined that appellant had fully recovered and he advised that no further or ongoing medical care was warranted.

In a December 30, 2019 report, Dr. Bergin related that appellant was seen for follow up. He related that appellant had a normal neurologic sensory and muscle strength examination. Dr. Bergin noted that appellant's coordination was impaired for tandem walking, and heel toe walking, however, appellant had a normal gait. He again provided an assessment of gait abnormality, low back pain, and bilateral hip pain. Dr. Bergin recommended that appellant continue his medium level of duty and avoid prolonged standing, walking. He further recommended no frequent walking or standing, frequent position changes, and to take breaks as needed.

In a January 29, 2020 letter, OWCP requested that Dr. Bergin review Dr. Antin's report and provide an opinion with regard to whether he agreed or disagreed with Dr. Antin's findings and conclusions.

In a report dated April 30, 2020, Dr. Bergin noted that appellant was seen in follow up and that his symptomatology remained stable. He again diagnosed gait abnormality, back pain and bilateral hip pain. Dr. Bergin indicated that appellant should continue to work medium duty, 8 hours per day, 5 days per week, for 40 hours, and avoid prolonged standing, no frequent walking, and frequent position changes and breaks as needed.

On August 3, 2020 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits, as the evidence of record, as represented by Dr. Antin's report, established that he no longer had employment-related residuals or disability due to his accepted work-related conditions. It afforded him 30 days to submit additional evidence or argument in writing, if he disagreed with the proposed termination of benefits.

In an August 14, 2020 letter, appellant disagreed with the proposal to terminate his benefits. He argued that Dr. Antin was inaccurate in his examination and that his physician, Dr. Bergin, provided current documentation regarding his ability to work. Appellant argued that he only returned to work for one week in May, and then experienced complications from his injury.

By decision dated September 23, 2020, OWCP terminated appellant's wage-loss compensation and medical benefits effective October 11, 2020. It found that the weight of the medical evidence rested with Dr. Antin's opinion that appellant did not have disability or residuals due to the employment injury.

In a September 24, 2020 letter, appellant disagreed with the termination and noted that his physician, Dr. Bergin, informed him that returning to work without restrictions would cause his

right leg to stiffen up and cause pain. OWCP also received an August 31, 2020 report from Dr. Bergin, essentially repeating his prior findings and conclusions.

On September 30, 2020 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. The hearing was held on January 15, 2021.

In an October 7, 2020 report, Dr. Vincent E. Vena, a Board-certified orthopedic surgeon, noted appellant's history of injury and medical treatment. He explained that appellant had an intertrochanteric hip fracture from a stress fracture that displaced and that underwent internal fixation in the summer of 2017, eventually having hardware removal. Dr. Vena related that appellant's recent release to return to work apparently prompted his visit and noted that appellant described pain that affected his sleep and groin pain radiating to his thigh that limited his steps, and that extended activity aggravated his problems. He examined appellant and noted that appellant had "an extreme amount of apprehension and guarding" on both sides, his leg lengths were equal, and with distraction had "quite excellent range of motion." Dr. Vena noted 80 degrees of abduction, full extension, straight leg raise seemed to aggravate him, and his examination was benign. He diagnosed chronic right hip pain. Dr. Vena opined, "I have difficulty supporting all the patient's subjective complaints with objective findings. I think he is stricken by a little anxiety and apprehension and likely worried about doing regular duties." He noted that he would order a magnetic resonance imaging (MRI) scan, however, if the scan was unremarkable, he would recommend that appellant return to work without restrictions. Dr. Vena also noted that appellant might consider other work if his walking duties as a mail carrier did not agree with him.

Dr. Bergin submitted a January 12, 2021 follow-up report and repeated his prior findings and conclusions. In a January 14, 2021 narrative report, he noted appellant's history of injury and treatment and explained that appellant had pain aggravated by climbing stairs, general physical activity, prolonged standing, sitting, squatting, straining, walking, and work duties. Dr. Bergin diagnosed gait abnormality, bilateral hip pain with a history of surgical fixation of a hairline stress fracture of the right hip, status post subsequent removal of hardware, low back pain, muscle spasms, and paresthesia. He explained that appellant was cleared to work at medium duty 8 hours per day, 5 days per week, 40 hours per week and that appellant attempted to return to work, but he was required to perform above and beyond his work restrictions. Dr. Bergin explained that appellant was on medication and "would continue to need lifelong modified adapted work status." He also advised that appellant was at increased risk for developing osteoarthritis of the hip, back, and knee as a long-term sequela result of repetitive activity as a mail carrier, which continued to cause a break down in the joint.

By decision dated March 31, 2021, OWCP's hearing representative affirmed the September 23, 2020 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.⁴ It may not terminate compensation

⁴ See *J.T.*, Docket No. 20-1470 (issued October 8, 2021); *C.C.*, Docket No. 19-1062 (issued February 5, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

without establishing that the disability had ceased or that it was no longer related to the employment.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁷ 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.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 11, 2020, as he no longer had disability or residuals due to his accepted July 13, 2017 employment injury.

OWCP referred appellant to Dr. Antin for a second opinion evaluation to determine the status of appellant's accepted condition and his work capacity. In an October 21, 2019 report, Dr. Antin noted that he examined appellant and that his May 14, 2019 x-rays revealed a satisfactory healed fracture without complication of the right femoral neck. He opined that appellant had fully recovered, that no further or ongoing medical care was warranted, that appellant did not have any residuals of the accepted conditions, and that appellant was able to return to his full-time regular duties with no restrictions.

The Board finds that OWCP properly determined that Dr. Antin's opinion constitutes the weight of the medical opinion evidence. Dr. Antin based his opinion on a proper factual and medical history and physical examination findings and provided medical rationale for his opinion that appellant did not have a current residual injury. He noted that examination findings were normal with no objective findings to indicate any residuals of the accepted conditions. The Board finds that Dr. Antin provided a well-rationalized opinion based on medical evidence regarding appellant's employment injury residuals and disability. Accordingly, OWCP properly relied on his second opinion report in terminating appellant's wage-loss compensation and medical benefits for the July 13, 2017 employment injury.⁹

OWCP continued to receive follow-up reports from Dr. Bergin. In December 30, 2019 and April 30, 2020 reports, Dr. Bergin related that appellant had a normal neurologic sensory and muscle strength examination, as well as normal gait. He again provided an assessment of gait abnormality, low back pain, and bilateral hip pain. The Board consistently has held that pain is a

⁵ See *T.M.*, Docket No. 19-1058 (issued March 30, 2021); *G.T.*, Docket No. 18-01302 (issued October 22, 2019); *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *Elsie L. Price*, 54 ECAB 734 (2003).

⁶ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284 (1988).

⁷ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ See *T.M.*, *supra* note 5; *A.M.*, Docket No. 18-1243 (issued October 7, 2019); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

⁹ See *C.C.*, *supra* note 4; *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *see also A.F.*, Docket No. 16-0393 (issued June 24, 2016).

symptom and not a compensable medical diagnosis.¹⁰ The Board further notes that while Dr. Bergin provided an assessment of gait derangement, he also noted that appellant's gait was normal. Further, while Dr. Bergin indicated that appellant should continue his medium level of duty and avoid prolonged standing, walking, no frequent walking or standing, frequent position changes, and breaks as needed, he provided no objective finding to substantiate these restrictions. As he did not explain why appellant's accepted condition caused residuals or disability, these reports are insufficient to overcome the weight of the medical evidence accorded to Dr. Antin, or to create a conflict in medical opinion as to whether appellant's condition had resolved.¹¹

LEGAL PRECEDENT -- ISSUE 2

When OWCP properly terminates compensation benefits, the burden shifts to appellant to establish continuing residuals or 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 his burden of proof to establish continuing employment-related disability or residuals or after October 11, 2020.

Subsequent to the termination of benefits, OWCP received August 31, 2020 and January 12, 2021 reports from Dr. Bergin in which he repeated his prior findings and conclusions. In a January 14, 2021 narrative report, Dr. Bergin reiterated appellant's diagnosis and noted that appellant was on meloxicam and opined that appellant "would continue to need lifelong modified adapted work status." He further advised that appellant was at increased risk for developing osteoarthritis of the hip, back, and knee as a long-term sequela result of repetitive activity as a mail carrier. However, the Board has long held that medical limitations based solely on the fear of a possible future injury are also insufficient to support payment of compensation.¹⁴ While Dr. Bergin continued to provide an opinion that appellant was unable to return to regular work, his opinion was conclusory.¹⁵ The reports from Dr. Bergin are, therefore, of diminished probative value to establish appellant's entitlement to continued wage-loss compensation and medical benefits.¹⁶

¹⁰ *A.G.*, Docket No. 20-1319 (issued May 19, 2021); *T.S.*, Docket No. 20-0343 (issued July 15, 2020).

¹¹ *K.R.*, Docket No. 21-0152 (issued February 16, 2022).

¹² *See L.S.*, Docket No. 20-1204 (issued October 4, 2021); *S.M.*, *supra* note 9.

¹³ *Id.*

¹⁴ *W.S.*, Docket No. 21-0257 (issued February 22, 2022).

¹⁵ *See J.T.*, *supra* note 4; *A.T.*, Docket No. 20-0334 (issued October 8, 2020).

¹⁶ *See R.R.*, *supra* note 6; *O.W.*, Docket No. 17-1881 (issued May 1, 2018).

OWCP also received an October 7, 2020 report from Dr. Vena who related that appellant had an intertrochanteric hip fracture and underwent internal fixation in the summer of 2017 and eventual hardware removal. Dr. Vena examined appellant and noted that he had “an extreme amount of apprehension and guarding” on both sides and that, with distraction, appellant had “quite excellent range of motion.” He explained, “I have difficulty supporting all the patient’s subjective complaints with objective findings. I think he is stricken by a little anxiety and apprehension and likely worried about doing regular duties.” Dr. Vena indicated that he would request an MRI scan and that if the MRI scan results were unremarkable, appellant would be able to return to unrestricted work. However, he did not address whether appellant had continuing disability or residuals causally related to the accepted employment injury.¹⁷ This report is therefore of no probative value and is insufficient to establish that appellant had continuing residuals or disability on or after October 11, 2020.

Appellant has not submitted rationalized medical evidence sufficient to establish continuing disability or residuals causally related to the accepted July 13, 2017 employment injury on or after October 11, 2020. Accordingly, the Board finds that he has not met his burden of proof.¹⁸

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 and medical benefits, effective October 11, 2020, as he no longer had disability or residuals due to his accepted July 13, 2017 employment injury. The Board further finds that appellant has not met his burden of proof to establish continuing employment-related disability or residuals on or after October 11, 2020, causally related to his accepted July 13, 2017 employment injury.

¹⁷ *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁸ *R.C.*, Docket No. 19-0376 (issued July 15, 2019).

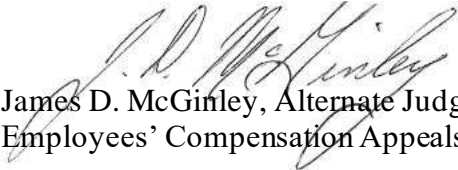
ORDER

IT IS HEREBY ORDERED THAT the March 3, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 2, 2022
Washington, DC

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

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


James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board