

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

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<b>L.I., Appellant</b> )		
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<b>and</b> )		<b>Docket No. 22-0236</b>
)		<b>Issued: August 3, 2022</b>
<b>DEPARTMENT OF VETERANS AFFAIRS,</b> )		
<b>FAYETTEVILLE VETERANS AFFAIRS</b> )		
<b>MEDICAL CENTER, Fayetteville, NC, Employer</b> )		
_____ )		

*Appearances:*  
Daniel F. Read, 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  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On December 1, 2021 appellant, through counsel, filed a timely appeal from a November 2, 2021 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 November 2, 2021 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 benefits, effective September 22, 2021, as he no longer had disability causally related to his accepted July 9, 2018 employment injury; and (2) whether appellant met his burden of proof to establish continuing disability after September 22, 2021 causally related to the accepted employment injury.

## **FACTUAL HISTORY**

On July 9, 2018 appellant, then a 44-year-old medical clerk, filed a traumatic injury claim (Form CA-1) alleging that on that day he was exposed to chemicals due to roofing work being performed at the employing establishment from sometime in May through July 9, 2019. He alleged that this exposure caused him disoriented thoughts, irregular sinus drainage, dry mouth, burning eyes, head pressure, and a loss of balance. On July 9, 2018 appellant was transferred to a different building, but stopped work on September 19, 2018. OWCP accepted the claim on January 14, 2020 for sinusitis aggravation, and on January 22, 2020 accepted the additional diagnosis of pneumonitis.<sup>4</sup> It paid appellant on its supplemental rolls from August 24, 2018 through February 27, 2021 and on its periodic compensation rolls commencing February 28, 2021.

On April 7, 2021 Dr. Ronald F. Halbrooks, a Board-certified internist, completed a Form OWCP-5c work capacity evaluation and opined that appellant was totally disabled as he could not perform any repetitive activity for more than 15 minutes.

OWCP subsequently referred appellant to Dr. Ashish Singh, Board-certified in pulmonary medicine, for a second opinion evaluation to determine the status of appellant's employment-related conditions, and an opinion as to whether he could return to work in some capacity. The November 18, 2019 statement of accepted facts (SOAF) provided to Dr. Singh did not list the accepted conditions.

In a May 6, 2021 report, Dr. Singh reviewed the SOAF along with appellant's medical record and indicated that he relied upon the history of injury described by appellant since he had no documentation of a July 2018 employment injury.<sup>5</sup> Appellant's April 30, 2021 physical examination findings indicated normal respiratory rate and oxygen saturations, with lungs clear to auscultation. Dr. Singh indicated that appellant's methacholine challenge test suggested a hyper-reactive airway, allergy tests performed before and after the July 2018 exposure showed allergies to mold, and computerized tomography (CT) scans of the chest were noted to be unremarkable on multiple occasions. He diagnosed allergies to mold, chronic sinusitis, and asthma. Dr. Singh indicated that the documentation of record supported that appellant's mold allergy and chronic sinusitis conditions preexisted July 2018, but it was unclear whether his asthma existed prior to July 2018. He opined that it was likely that appellant had undiagnosed asthma prior to July 2018 as many patients with allergies and sinus disease also had asthma, and his methacholine challenge test, the primary test for diagnosing asthma, would likely have been

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<sup>4</sup> These conditions are noted in the International Classification of Diseases (ICD-10) screen of the case record as chronic maxillary sinusitis, and bronchitis and pneumonitis due to chemicals, gases, fumes and vapors.

<sup>5</sup> Dr. Singh noted that he had requested clarification of the SOAF, but had not yet received clarification and was providing a report with the documentation available to him.

positive given his history of mold allergy and sinusitis. Based on appellant's history of the employment injury, Dr. Singh opined "it likely aggravated [appellant's] preexisting chronic sinusitis and precipitated asthma." He opined that the aggravation of chronic sinusitis by the employment injury was temporary, but that the current ongoing aggravation of chronic sinusitis was due to the preexisting mold allergy condition and not because of the work injury. Dr. Singh thus concluded that the aggravation of chronic sinusitis caused by work injury had likely resolved as the active problem of chronic sinusitis was due to mold allergies and not due to continuation of the effect of the July 9, 2018 work-related injury. He noted that "the asthma, if precipitated by work injury, continued to be an active problem because of appellant's underlying chronic sinusitis and allergies." Dr. Singh explained that both the chronic sinusitis and asthma problems were not expected to resolve completely due to appellant's mold allergies and probable exposure. Based on appellant's clinical presentation, Dr. Singh opined that he was capable of returning to his July 9, 2018 date-of-injury position, provided that his work area did not have mold. Dr. Singh explained that, although appellant had chronic sinusitis and asthma, there was no objective evidence that appellant would be unable to perform his employment duties as his clinical presentation was devoid of respiratory distress, appellant's oxygen saturations were good, and his lungs were clear. He further opined that appellant would need long term treatment for his chronic sinusitis and asthma caused by his allergies to mold. In an accompanying June 5, 2021 OWCP-5c form, Dr. Singh opined that appellant could perform his usual job as long as his work area did not have mold.

On July 19, 2021 OWCP advised appellant that it proposed to terminate appellant's wage-loss compensation benefits because his July 9, 2018 employment injury no longer caused disability. It found that weight of the medical evidence rested with the April 30, 2021 second opinion of Dr. Singh, who found that appellant was able to return to his date-of-injury position in a mold-free work area. OWCP afforded appellant 30 days to submit additional evidence and argument if he disagreed with the proposed termination.

OWCP received a response from the notice of proposed termination along with additional medical evidence including an August 4, 2020 report from Dr. Yuh-Chin T. Huang, a Board-certified pulmonary disease specialist, a November 23, 2020 progress report from Dr. William Reed, a Board-certified otolaryngologist, March 9, 2021 progress notes from Dr. David Jang, a Board-certified otolaryngologist, March 30, 2021 progress notes from Dr. Feras Y. Ackall, an otolaryngologist specialist, April 13, 2021 progress notes from Dr. Irlene Locklear, a Board-certified pulmonary specialist, a July 27, 2021 attending physician's report (Form CA-20) signed by Dr. Jang, a July 27, 2021 progress note from Dr. Connor L. Pratson, a Board-certified otolaryngologist, a July 28, 2021 sinus CT scan signed by Dr. Alexie Riofrio, a Board-certified diagnostic radiologist, an August 9, 2021 report by Dr. Huang, and diagnostic tests dated December 8, 2020 and July 28, 2021.

By decision dated September 22, 2021, OWCP terminated appellant's wage-loss compensation, effective that day. The weight of the medical evidence was afforded to Dr. Singh, who opined that appellant was able to return to his July 9, 2018 date-of-injury position as a medical clerk provided that his work area did not have mold problems.

On October 5, 2021 appellant, through counsel, requested reconsideration and provided additional legal arguments. OWCP also received a March 10, 2021 report from Dr. Dennis J. Darcey, Board-certified in occupational medicine, was received. Dr. Darcey concluded that

appellant may be able to return to work, but that he must work in an environment free of irritant chemicals, mold, dust, and in a temperature and humidity-controlled environment.

By decision dated November 2, 2021, OWCP denied modification of its prior 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.<sup>6</sup> 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.<sup>7</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>8</sup>

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.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective September 22, 2021, as he no longer had disability causally related to his accepted July 9, 2018 employment injury.

OWCP accepted the claim for sinusitis aggravation and pneumonitis. None of these diagnoses however were listed on the November 18, 2019 SOAF provided to Dr. Singh as the SOAF was prepared prior to the acceptance of the claim.

In his May 6, 2021 report, Dr. Singh specifically noted that his opinion that was based on appellant's recitation of his employment injury as OWCP had not provided any documentation as to how the work injury in July 2018 occurred. He opined that appellant's diagnosed conditions of allergy to mold, chronic sinusitis, and asthma were preexisting and concluded that the temporary aggravation of chronic sinusitis caused by work injury had "likely resolved" as the active problem of chronic sinusitis was due to mold allergies and not due to continuation of the effect of the July 9, 2018 work-related injury. Dr. Singh noted that the asthma, if precipitated by work injury, continued to be an active problem because of appellant's underlying chronic sinusitis and allergies. He explained that both the chronic sinusitis and asthma problems were not expected to resolve completely due to appellant's mold allergies and probable exposure and continuing medical treatment was required. Dr. Singh further opined, based on appellant's clinical presentation, that

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<sup>6</sup> 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).

<sup>7</sup> *J.D.*, Docket No. 18-0958 (issued January 8, 2019); *I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>8</sup> See *D.P.*, Docket No. 18-0038 (issued January 4, 2019); *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>9</sup> 20 C.F.R. § 10.5(f); *S.T.*, Docket No. 18-0412 (issued October 22, 2018); *Cheryl L. Decavitch*, 50 ECAB 397 (1999).

appellant was capable of returning to his July 9, 2018 date-of-injury position provided his work area did not have mold problems.

While Dr. Singh reviewed appellant's medical record in detail, he did not have a complete and accurate SOAF which documented the nature and duration of appellant's employment exposure to chemicals on July 9, 2018 and which contained a list of the accepted conditions. OWCP procedures and the Board precedent dictate that when an OWCP medical adviser, second opinion specialist, or impartial medical examiner 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.<sup>10</sup>

As Dr. Singh did not have a complete and accurate SOAF which fully described appellant's accepted employment exposure to chemicals and which listed the accepted conditions, his report was not based on an accurate history of injury and was insufficient to carry the weight of the medical evidence. The Board thus finds that OWCP failed to meet its burden of proof.<sup>11</sup>

### CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective September 22, 2021, as he no longer had disability causally related to his accepted July 9, 2018 employment injury.

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990). *C.L.*, Docket No. 21-0451 (issued February 11, 2022); *M.D.*, Docket No. 18-0468 (issued September 4, 2018); *see also Paul King*, 54 ECAB 356 (2003).

<sup>11</sup> In light of the disposition of Issue, Issue 2 is rendered moot.

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 2, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 3, 2022  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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