

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

_____)
K.W., Appellant)

and)

DEPARTMENT OF STATE, ATLANTA)
PASSPORT AGENCY, Atlanta, GA, Employer)
_____)

Docket No. 20-1591
Issued: February 11, 2022

Appearances:

Alan J. Shapiro, Esq., for the appellant¹
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 September 4, 2020 appellant, through counsel, filed a timely appeal from a June 8, 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.

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits, effective December 6, 2019, as she no longer had disability

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.*

causally related to her accepted November 28, 2018 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability causally related to her accepted November 28, 2018 employment injury on or after December 6, 2019.

FACTUAL HISTORY

On November 30, 2018 appellant, then a 43-year-old passport specialist, filed a traumatic injury claim (Form CA-1) alleging that on November 28, 2018 she injured both knees, both shoulders, inner right thigh, left thigh, lower back, buttocks, head, and the right side of her back and shoulder when she slipped and fell on a wet floor while in the performance of duty. At the time of the injury, she was working a four-hour per day schedule due to an unspecified medical condition. Appellant stopped work on November 28, 2018.

In November 28, 2018 reports, Dr. Shayan G. Zafrani, a Board-certified family practitioner, provided a history of injury and noted findings on examination. He diagnosed strains of the neck, right upper back, and low back sustained in a fall. Dr. Zafrani prescribed medication.³

In a report dated December 20, 2018, Dr. Sam Peng, Board-certified in family practice and geriatric medicine, noted a history of injury. On examination he observed full range of spinal motion with tenderness to palpation. Dr. Peng diagnosed dorsalgia, neck pain, low back pain, and left knee pain. He prescribed medication and physical therapy.

In a November 29, 2018 report, Dr. Virlyn Bishop, Board-certified in anesthesiology and pain management, returned appellant to work, effective January 12, 2019.

In a December 31, 2018 report, Dr. Zafrani returned appellant to work, effective December 4, 2018.

By decision dated January 24, 2019, OWCP accepted the claim for strain of muscle, fascia, and tendon at neck level and strain of muscle, fascia and tendon of lower back. Appellant filed claims for compensation (Form CA-7) for the period November 28, 2018 through February 15, 2019.

In a February 28, 2019 report, Linda Kujawski, a medical management field nurse, assigned to appellant's case, noted that the employing establishment advised that at the time of the accepted injury, appellant was working four hours per day with unspecified "reasonable accommodations" due to preexisting back problems.

In a March 13, 2019 letter, the employing establishment noted that appellant had not returned to work. The employing establishment noted that appellant had other preexisting conditions, and invoked Family and Medical Leave Act (FMLA) leave on December 13, 2018 for a medical condition unrelated to the occupational injury.

In an undated letter received by OWCP on March 14, 2019, appellant indicated that she received disability benefits through the Department of Veterans Affairs for right ulnar nerve

³ December 8, 2018 lumbar x-rays showed no acute osseous abnormality.

neuropathy, left Achilles tendinitis, degenerative disc disease, lumbosacral spine strain, right-sided sciatic radiculopathy, and painful surgical scars.

In development letters dated March 20 and 22, 2019, OWCP advised appellant of the type of additional medical evidence needed to establish the claimed period of disability. It afforded her 30 days to submit the necessary evidence.

In response, appellant submitted a December 13, 2018 report by Dr. Richard R. Maguire, a Board-certified orthopedic surgeon. Dr. Maguire provided a history of injury and treatment. On examination he observed tenderness to palpation of the paracervical muscles from C5 to C7 bilaterally, the right trapezius, and iliolumbar region bilaterally. Dr. Maguire diagnosed cervicalgia and low back pain. He prescribed medication and physical therapy.

In a March 19, 2019 report, Dr. Eric I. Francke, a Board-certified orthopedic surgeon, provided a history of injury. He related appellant's complaints of cervical and lumbar pain. On examination Dr. Francke noted ranges of cervical and lumbar spine motion within normal limits. He opined that December 8, 2018 x-rays revealed mild loss of interbody height at C6-7, L4-5, and L5-S1. Dr. Francke diagnosed cervicalgia and low back pain. He prescribed medication and physical therapy.⁴ Dr. Francke limited lifting to 10 pounds.

In an April 17, 2019 report, Dr. Francke noted that prescribed medication and physical therapy lessened appellant's symptoms. He opined that a March 26, 2019 cervical magnetic resonance imaging (MRI) scan demonstrated intervertebral disc degeneration from C3 through C7 with broad-based protrusions and generalized bulging.⁵ Dr. Francke related appellant's symptoms of numbness in the left upper extremity into the fourth and fifth digits, and low back pain radiating into the left lower extremity. On examination he observed a positive left straight raising test. Dr. Francke diagnosed lumbar radiculopathy, low back pain, and cervicalgia. He opined that appellant could "return to regular activities with regard to her sedentary job processing passport applications."

By decision dated April 29, 2019, OWCP denied appellant's claims for wage-loss compensation from November 28, 2018 through February 15, 2019 as the medical evidence of record was insufficient to establish that appellant was totally disabled from work for the claimed period.

On May 6, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review.

On May 8, 2019 OWCP received an April 10, 2008 official position description indicating that the full-time passport specialist position required long periods of sitting or standing.

⁴ Appellant participated in physical therapy treatments from April 9 through 22, 2019.

⁵ In a March 26, 2019 MRI scan, Dr. Robert Barton Price, a Board-certified radiologist, noted the cervical spine demonstrated a small disc herniation at C3-4, new since an April 30, 2012 study "and could be recent," mild disc narrowing at C5-6, and mild annular bulging at C6-7.

In a May 22, 2019 report, Dr. Francke noted appellant's symptoms of continued neck and low back pain. He noted that appellant had a history of chronic low back pain in the remote past. On examination Dr. Francke observed a positive left straight leg raising test.⁶ He limited lifting to 10 pounds and recommended that appellant alternate frequently between sitting and standing. Dr. Francke completed a Form OWCP-5c on May 27, 2019, returning appellant to full-time restricted duty with lifting limited to 10 pounds, and sitting and standing up to eight hours a day.

On June 25, 2019 OWCP referred appellant for a second opinion examination with Dr. Daniel Robert Schlatterer, an osteopath Board-certified in orthopedic surgery. It requested that Dr. Schlatterer evaluate whether appellant had residuals of the accepted injuries and address her work capacity. OWCP provided the case record, including a June 19, 2019 statement of accepted facts (SOAF). In a July 24, 2019 report, Dr. Schlatterer noted his review of the case record and SOAF. On examination he noted full range of motion of the cervical spine and normal strength in both lower extremities. Dr. Schlatterer opined that appellant required additional evaluation of her left knee as her mechanical symptoms of clicking, catching, and locking suggested internal derangement. He opined that appellant could not perform her date-of-injury position due to injury-related left knee symptoms and low back pain. Dr. Schlatterer noted that appellant could perform sedentary or light-duty work for four hours a day.

A telephonic hearing was held on August 14, 2019. During the hearing, appellant contended that at the time of the accepted injury, she was limited to working four hours per day due to an unspecified medical issue.

On August 21, 2019 OWCP requested that Dr. Schlatterer submit a supplemental report regarding the nature and extent of any disability remaining as a result of the accepted November 28, 2018 injuries, and indicate whether appellant was able to perform her date-of-injury job or other light-duty work. In a September 24, 2019 report, Dr. Schlatterer opined that appellant continued to have constant neck pain with shooting pains down her left side, which caused distraction and secondary weakness. He opined that the accepted November 28, 2018 employment incident had also caused a left meniscal tear, but noted that OWCP had not accepted an occupational left knee injury. Dr. Schlatterer found appellant able to perform her date-of-injury job for four hours a day, with permanent restrictions limiting her to working four hours per day, with hourly 10-minute breaks. He explained that appellant "can do most of this work on a limited time constraint of four hours a day."

By decision dated October 22, 2019, the hearing representative affirmed the April 29, 2019 decision.

On October 24, 2019 OWCP issued a notice of proposed termination of wage-loss compensation as both Dr. Francke and Dr. Schlatterer opined that appellant could return to work for four hours per day in her date-of-injury position. It afforded appellant 30 days to respond.

⁶ An April 2, 2019 lumbar MRI scan demonstrated minimal diffuse multilevel disc bulging encroaching on descending nerve roots at L2-3, L4-5, and L5-S1, and mild neuroforaminal narrowing at L3-4, L4-5, and L5-S1.

By decision dated December 6, 2019, OWCP terminated appellant's entitlement to wage-loss compensation benefits, based on Dr. Schlatterer's opinion as the weight of the medical evidence.

On December 11, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. She submitted additional evidence.

In a report dated November 29, 2018, Dr. Anantha N. Kamath, a Board-certified physiatrist, noted a history of chronic low back pain since 1998 while in the military. He diagnosed lumbar and lumbosacral spondylosis without myelopathy or radiculopathy, lumbar intervertebral disc degeneration, and lumbosacral intervertebral disc degeneration. Dr. Kamath administered bilateral lumbar medial branch block injections at three levels.

In reports dated from November 29, 2018 through November 21, 2019, Dr. Bishop noted appellant's history of chronic lumbar pain beginning in 1998, treated with periodic epidural steroid injections, and bilateral knee pain since 2008 with a torn right medial meniscus. He noted, in an August 30, 2019 report, that the November 28, 2018 occupational injury caused a severe flare-up of lumbar pain and the onset of left leg paresthesias due to possible L5 lumbar radiculopathy. Dr. Bishop diagnosed lumbar spondylosis without myelopathy or radiculopathy, lumbosacral spondylosis without myelopathy or radiculopathy, lumbar and lumbosacral disc degeneration, cervical radiculopathy, C6-7 disc displacement, and chronic pain syndrome. He administered a cervical spine epidural injection on August 15, 2019 and a series of lumbar injections in October and November 2019.

On January 14, 2020 appellant, through counsel, requested reconsideration of the October 22, 2019 decision.

By decision dated February 26, 2020, OWCP denied modification of the October 22, 2019 decision.

During the hearing, held on April 6, 2020, appellant noted that she was terminated from federal employment, effective February 25, 2020, due to excessive absences. She asserted that she continued to experience residuals of the accepted injuries, as well as bilateral knee pain. Appellant contended that she was unable to type or hold objects for an extended period of time and was unable to drive 38 miles to and from the employing establishment due to the effects of prescribed narcotics. She noted that she had claimed a prior occupational back strain,⁷ as well as a 1990 back injury while in military service for which she received a 20 percent service disability award.

By decision dated June 8, 2020, OWCP's hearing representative denied modification of the December 6, 2019 decision.

⁷ Under OWCP File No. xxxxxx465, appellant claimed a lumbar condition sustained in the performance of duty on or before February 10, 2014. OWCP denied the claim, by decision dated February 17, 2015, based on a lack of medical evidence.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it bears the burden of proof to justify termination or modification of benefits.⁸ It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁹ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective December 6, 2019, as she no longer had disability causally related to her accepted November 28, 2018 employment injury.

In his July 24, 2019 report, Dr. Schlatterer opined that appellant required additional evaluation of her left knee as her mechanical symptoms of clicking, catching, and locking suggested internal derangement. Additionally, he opined, in his September 24, 2019 report that the November 28, 2018 accepted employment incident had also caused a left meniscal tear. Instead of referring appellant for further medical studies, and conducting additional development on whether the acceptance of her claim should be expanded to include a left meniscal tear, OWCP terminated appellant's wage-loss compensation benefits based on Dr. Schlatterer's medical opinion.

The Board has found that, once OWCP undertakes development of the medical evidence, it has the responsibility to do so in a manner that will resolve the relevant issues in the case.¹¹ As such, OWCP should have obtained a supplemental report from Dr. Schlatterer clarifying his opinion as to the extent of internal derangement or left meniscal tear.¹²

The Board finds, therefore, that OWCP improperly terminated appellant's wage-loss compensation, effective December 6, 2019, as it did not properly develop the medical evidence of record prior to the termination.

⁸ *A.D.*, Docket No. 18-0497 (issued July 25, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁹ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see also I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

¹⁰ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

¹¹ *C.H.*, Docket No. 20-0608 (issued April 5, 2021); *see B.W.*, Docket No. 20-1033 (issued November 30, 2020); *R.B.* Docket No. 20-0109 (issued June 25, 2020); *M.H.*, Docket No. 19-0782 (issued September 9, 2019).

¹² *C.H.*, *id.*; *M.H.*, *id.*

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective December 6, 2019, as she no longer had disability causally related to her accepted November 28, 2018 employment injury.¹³

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 11, 2022
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

¹³ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.