

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

K.L., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Edison, NJ, Employer

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**Docket No. 21-0104
Issued: February 24, 2022**

Appearances:

Thomas R. Uliase, 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 October 29, 2020 appellant, through counsel, filed a timely appeal from an August 26, 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 and medical benefits, effective January 17, 2020, as she no longer had

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.*

residuals or disability causally related to the accepted October 8, 2005 employment injury; and (2) whether appellant has met her burden of proof to establish continuing residuals or disability on or after January 17, 2020, causally related to her accepted October 8, 2005 employment injury.

FACTUAL HISTORY

On October 8, 2005 appellant, then a 49-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date she suffered injuries when she fell down wet stairs while in the performance of duty. She stopped work that day and has not returned. OWCP assigned the claim OWCP File No. xxxxxx916 and accepted it for thoracic or lumbosacral neuritis or radiculitis, brachial neuritis or radiculitis, displacement of thoracic intervertebral disc without myelopathy, displacement of cervical intervertebral disc without myelopathy, and sprain of right shoulder and upper arm. It paid appellant wage-loss compensation on the supplemental rolls as of November 25, 2005, and on the periodic rolls as of March 19, 2006.³ On February 27, 2008 appellant underwent an OWCP-authorized cervical discectomy and decompression at C5-C8 and C6-C7, with anterior cervical interbody fusion at C5-C8 and C6-C7.

In a November 17, 2016 medical report, Dr. Gregory J. Lawler, a Board-certified anesthesiologist, indicated that appellant continued with lumbar pain.

In a March 14, 2018 medical report, Dr. Mark Filippone, a Board-certified physiatrist, opined that appellant was totally disabled from work.

On August 9, 2019 OWCP referred appellant for a second opinion medical examination with Dr. Stanley Askin, a Board-certified orthopedic surgeon to determine the status of appellant's accepted condition and work capacity. In a September 13, 2019 report, Dr. Askin reviewed an August 7, 2019 statement of accepted facts (SOAF), which did not reference appellant's accepted injury in OWCP File No. xxxxxx390.⁴ He also reviewed a September 4, 2015 magnetic resonance imaging (MRI) scan of appellant's right shoulder and a January 14, 2019 MRI scan of her lumbar spine. Dr. Askin noted appellant's physical examination findings, including findings involving the right shoulder and bilateral carpal tunnel. He indicated that appellant's physical presentation was one of overt pain behavior. Dr. Askin opined that there were no objective findings, other than the changes imposed by the surgery upon her cervical spine and age-related changes, and that her subjective complaints were markedly exaggerated compared with objective findings. He opined that appellant had fully recovered from the accepted conditions resulting from her 2005 injury, given the 14-year period of convalescence. Dr. Askin concluded that appellant had no need for further medical treatment and that she could return to her date-of-injury position as a mail handler as there was no objective manifestation of any musculoskeletal consequence of the October 8, 2005 injury.

On October 1, 2019 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits, finding that the report of second opinion physician

³ Appellant has a prior claim for an April 12, 2002 traumatic injury, accepted under OWCP File No. xxxxxx390 for right shoulder impingement syndrome.

⁴ *Id.*

Dr. Askin represented the weight of the medical evidence that appellant no longer had any residuals or continuing disability from work due to her October 8, 2005 employment injury. It afforded her 30 days to submit additional evidence or argument.

In a letter dated October 9, 2019, appellant, through counsel, alleged that the SOAF provided to Dr. Askin was deficient as it failed to note that appellant's February 27, 2008 cervical fusion surgery was authorized by OWCP, and it failed to reference appellant's prior claims.

By decision dated January 16, 2020, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective January 17, 2020. It found that the weight of the medical evidence, represented by Dr. Askin's report, established that she no longer had residuals or disability from work due to her October 8, 2005 employment injury.

On January 23, 2020 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held telephonically on April 29, 2020. Appellant submitted additional evidence, including: a November 30, 2007 MRI scan of the cervical spine; September 19, 2008 cervical spine x-rays; January 14, 2009 MRI scan of the lumbar spine; September 4, 2015 MRI scan of the right shoulder; November 8, 2019 cervical spine x-ray report; a November 8, 2019 right shoulder x-ray report; and a November 8, 2019 lumbar MRI scan report. The November 8, 2019 cervical spine x-ray report noted reversal of the normal lordotic curvature in the lateral view with associated mild flexion deformity with convexity towards the left and restriction of motion in extension, the November 8, 2019 right shoulder x-ray report noted a high riding humeral head, and the November 8, 2019 lumbar MRI scan noted posterior disc herniation at L5-S1 with associated annular tear, slight straightening of the normal lordotic curvature of the lumbar spine suggestive of muscle spasm and lumbar myalgia, and umbilical hernia containing omental adipose tissue.

In an October 31, 2019 medical report, Dr. Laura E. Ross, an osteopathic physician Board-certified in emergency medicine, noted positive examination findings and provided an impression of history of cervical, thoracic, and lumbar spinal disc pathology and right shoulder impingement. She opined that appellant was currently disabled and unable to work due to her injuries.

In a December 11, 2019 report, Dr. Ross reviewed appellant's recent lumbar MRI scan, cervical x-ray and right shoulder x-ray reports and provided examination findings, which included right shoulder crepitus with positive impingement signs. She opined that appellant appeared to have a herniated disc at L5-S1, cervical spondylosis and possible junctional syndrome above the fusion in her neck, and impingement of her right shoulder. Dr. Ross recommended pain management, which she opined was medically necessary and causally related to the October 8, 2005 employment injury.

A hearing was held on April 29, 2020. By decision dated June 25, 2020, the hearing representative affirmed OWCP's January 16, 2020 termination decision, finding that no rationalized conflicting medical evidence had been received, which disagreed with Dr. Askin's report. The hearing representative found, however, that further development was required to determine whether appellant's work-related injuries had resolved. The hearing representative related that the instant case should be administratively combined with OWCP File No. xxxxxx390, that the SOAF should be updated, and that all pertinent medical evidence from appellant's prior

shoulder injury should be referred to Dr. Askin. Dr. Askin was then to provide a supplemental report addressing whether appellant had residuals of her October 8, 2005 employment injury. The hearing representative also indicated that appellant's November 8, 2019 diagnostic tests should be referred to Dr. Askin for review.

On July 16, 2020 OWCP administratively combined appellant's present claim with OWCP File No. xxxxxx390, with the present claim serving as the master file number. It then issued an updated SOAF⁵ and referred the case record to Dr. Askin for a supplemental opinion regarding whether appellant had residuals of her April 12, 2002 and October 8, 2005 employment injuries and if further medical treatment was warranted due to the accepted injuries.

In a June 5, 2020 report, Dr. Ross indicated that she disagreed with Dr. Askin's conclusions in his September 13, 2019 report. She opined, based in part on diagnostic testing not available to Dr. Askin, that appellant's conditions from the October 8, 2005 work-related injury had not resolved as she had continued findings consistent with her complaints after the October 8, 2005 injury. Dr. Ross also opined that, since appellant had long-term sequelae resulting from her employment injuries, she was unable to work full-time, full duty.

In a July 29, 2020 supplemental report, Dr. Askin reviewed the July 16, 2020 SOAF and the diagnostic evidence and medical reports, which were received following his September 13, 2019 evaluation. He opined that the updated documentation was unpersuasive that appellant's condition persisted for either the April 12, 2002 or October 8, 2005 injuries that would preclude her from resuming her date-of-injury employment. Dr. Askin also opined that further medical treatment was not warranted.

By decision dated August 26, 2020, OWCP denied modification of the January 16, 2020 termination 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.⁶ It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the

⁵ The July 16, 2020 SOAF referenced OWCP File No. xxxxxx390 and listed appellant's diagnostic testing, her February 27, 2008 spinal surgery, and second opinion examinations.

⁶ See *S.H.*, Docket No. 19-1855 (issued March 10, 2021); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

employment.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 17, 2020, as she no longer had residuals or disability causally related to the accepted October 8, 2005 employment injury.

OWCP based its decision to terminate appellant's wage-loss compensation and medical benefits on the September 13, 2019 opinion of Dr. Askin, OWCP's second opinion physician, who found that the accepted conditions had ceased with no residuals and that appellant had no longer had disability causally related to the accepted October 8, 2005 employment injury.

The Board finds, however, that the SOAF provided to Dr. Askin on August 7, 2019 was deficient, as it failed to note that appellant had a prior claim pertaining to her accepted right shoulder condition under OWCP File No. xxxxxx390 and that the February 27, 2008 spinal surgery had been authorized by OWCP. OWCP's procedures 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.⁹ The Board finds that as Dr. Askin based his September 13, 2019 report on an inaccurate SOAF, the probative value of his opinion is diminished.¹⁰

Once OWCP undertook development of the record it was required to complete development of the record by procuring medical evidence that would resolve the relevant issue in the case.¹¹ As OWCP did not provide an accurate SOAF to the second opinion physician, the Board finds that it did not meet its burden of proof in terminating appellant's wage-loss compensation and medical benefits.¹²

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's entitlement to wage-loss compensation and medical benefits, effective January 17, 2020, as she no

⁷ *G.T.*, Docket No. 18-01302 (issued October 22, 2019); *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁸ *See T.M.*, Docket No. 19-1068 (issued March 30, 2021); *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284 (1988).

⁹ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990); *see S.C.*, Docket No. 18-1011 (issued March 23, 2020).

¹⁰ *See P.C.*, Docket No. 20-0935 (issued February 19, 2021).

¹¹ *See C.B.*, Docket No. 20-0629 (issued May 26, 2021); *J.F.*, Docket No. 17-1716 (issued March 1, 2018).

¹² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

longer had residuals or disability causally related to her accepted October 8, 2005 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the August 26, 2020 decision of the Office of Workers' Compensation Programs is reversed.

Issued: February 24, 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