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<b>D.F., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 20-0690</b>
	)	<b>Issued: June 2, 2022</b>
<b>DEPARTMENT OF JUSTICE, FEDERAL</b>	)	
<b>BUREAU OF INVESTIGATION,</b>	)	
<b>Winchester, VA, Employer</b>	)	
	)	

*Andrew Douglas, Esq.*, for the appellant<sup>1</sup>  
*Office of Solicitor*, for the Director

## DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
JANICE B. ASKIN, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

## JURISDICTION

On February 10, 2020 appellant, through counsel, filed a timely appeal from a January 3, 2020 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>

<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 an 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 January 3, 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 appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include additional conditions as causally related to her accepted October 11, 2018 employment injury; (2) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 15, 2019, as she no longer had residuals or disability causally related to her accepted October 11, 2018 employment injury; (3) whether appellant has met her burden of proof to establish continuing disability or residuals on or after September 15, 2019 due to the accepted October 11, 2018 employment injury.

## **FACTUAL HISTORY**

On October 15, 2018 appellant, then a 53-year-old analyst, filed a traumatic injury claim (Form CA-1) alleging that, on October 11, 2018, she slipped on water as she entered a bathroom while in the performance of duty. She explained that, when she slipped, her right ankle turned and she heard a "pop" in her right knee. As appellant grabbed for the wall, she hit her head, wrists, and upper body on the wall. She claimed injury to her right ankle and right knee, wrists, neck, back, and ribcage. Appellant stopped work that day. OWCP accepted the claim for right knee complex tear of medial meniscus, effusion, contusion, and chondromalacia. It paid appellant wage-loss compensation benefits on the supplemental rolls from November 26, 2018 through April 27, 2019 and on the periodic rolls commencing April 28, 2019.

Appellant was initially treated by Dr. Robert T. Smith, a Board-certified orthopedic surgeon, on October 16, 2018. Dr. Smith performed OWCP-authorized right knee partial medial and lateral meniscectomy and chondroplasty of the lateral femoral condyle on January 21, 2019.

In a December 4, 2018 report, Dr. Charles N. Seal, a Board-certified orthopedic surgeon, indicated that appellant previously underwent lumbar surgery L4-5 decompression fusion for back pain and radicular symptoms on May 23, 2017 with excellent recovery. He noted the history of the October 11, 2018 work injury, provided examination findings, and reviewed the November 3, 2018 cervical spine and lumbar spine magnetic resonance imaging (MRI) scans. Dr. Seal assessed cervical spondylosis with radiculopathy, exacerbated by the October 11, 2018 work injury, severe enough to consider surgical intervention. He recommended two-level anterior cervical discectomy and fusion at C5-6 and C6-7.

On March 12, 2019 Dr. Smith opined that appellant, who was status post right knee arthroscopy, could return to full-duty work without restriction on March 13, 2019. In a report of the same date, he noted that appellant also complained that she still experienced symptoms relating to her neck and headaches, which Dr. Seal managed. Dr. Smith recommended a follow-up in three months.

On March 29, 2019 OWCP referred appellant for a second opinion evaluation with Dr. Norman Marcus, a Board-certified orthopedic surgeon, to determine whether appellant's preexisting cervical and lumbar conditions were aggravated or precipitated by the October 11, 2018 work injury and to determine if appellant's accepted right knee conditions had resolved.

In an April 25, 2019 report, Dr. Marcus described appellant's October 11, 2018 employment injury, noted his review of a March 14, 2019 statement of accepted facts (SOAF)<sup>4</sup> and the medical evidence of record. He related that she indicated that her right knee symptoms were 95 percent resolved following the recent surgery, but that she complained of unremitting migraine headaches, refractive to medication, dizziness, neck pain and bilateral carpal tunnel syndrome. Dr. Marcus presented physical examination findings regarding her right knee and upper extremity. He opined that the employment injury aggravated appellant's preexisting knee conditions and that she was doing fairly well on an early basis status post repeated arthroscopic surgery of the right knee. Dr. Marcus advised that appellant had not reached maximum medical improvement (MMI) for her knee, which would take at least one year postoperatively. He recommended a two-year follow-up from the microfracture surgery. Dr. Marcus explained that the question of whether appellant's chondromalacia right knee condition was temporary or was permanently aggravated should not be made until two years have elapsed as the natural history of an anterior cruciate ligament (ACL) reconstruction is that of degenerative joint disease, failure of microfracture was bimodal, and appellant was at high risk for development of multifocal osteoarthritis of the knee. He indicated that light duty could be used as part of the treatment protocol, but opined that other medical treatment, such as physical therapy or pain management, was not necessary as it was a structural problem of the right knee. Dr. Marcus also indicated that the issue of whether a blow to the head exacerbated appellant's preexisting history of cervical spondylosis remained unresolved as it is unclear, based on the evidence of record, whether there was a concurrent blow to the head region. He recommended that she be evaluated by a spine surgeon and undergo further diagnostic testing. Dr. Marcus completed a work capacity evaluation (Form OWCP-5c) and opined that appellant should remain off work indefinitely.

On May 23, 2019 OWCP requested an addendum report from Dr. Marcus to address his conclusion that appellant was unable to work indefinitely due to her accepted right knee conditions. A May 23, 2019 updated SOAF was provided.<sup>5</sup> In a June 10, 2019 response, Dr. Marcus noted that he evaluated appellant some three months after her right knee chondral surgery and explained that the early date of evaluation plus the presence of medical manifold of other complaints made her return to the workplace problematic. He suggested that she be reevaluated approximately six months status post the January 21, 2019 surgery.

On May 23, 2019 OWCP also referred appellant, together with the May 23, 2019 SOAF, a copy of the case record, and a series of questions, to Dr. Taghi Kimyai-Asadi, a Board-certified neurologist and psychologist, for a second opinion evaluation regarding appellant's preexisting cervical and lumbar spinal conditions and her right knee conditions.

In a June 25, 2019 report, Dr. Kimyai-Asadi noted his review of the SOAF and the medical evidence of record. He reported physical examination findings, noting that appellant's cervical spine was limited in movement and appellant reported pain in the lower lumbar on the right side. Dr. Kimyai-Asadi found no tender spots over the paraspinal areas and no related reflexes. He indicated that appellant had tenderness of the occipital nerves on both sides. Dr. Kimyai-Asadi opined that the work-related injuries had resolved and she was capable of returning to work

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<sup>4</sup> The March 14, 2014 SOAF noted the history of injury as appellant slipping on water as she entered a bathroom. Appellant injured her right ankle, right knee twisted and "popped," and she fell towards the right twisting at waist and neck, hit her right elbow on wall and slid down the wall.

<sup>5</sup> The history of injury was the same as noted in the previous SOAF.

regarding her knee issues. He advised that there were no active current diagnoses related to the work incident that had remained untreated and there were no residual issues related to the work incident. In response to the question of whether the work injury aggravated an underlying/preexisting condition and, if so, whether the aggravation was temporary or permanent, Dr. Kimyai-Asadi advised that appellant's preexisting chondromalacia patella and weight issues predisposed her to more injury of her right knee as a result of the fall. He further indicated that appellant had many unrelated underlying conditions that are unrelated to the work fall. Dr. Kimyai-Asadi noted that she had a complex medical history, including cervical and lumbar disc disease, and she has post-concussive syndrome and migraines. He opined that her diagnoses should not be expanded to include cervical or lumbar disc pathologies as her spinal issues preexisted the employment incident and there were no immediate issues related to those pathologies. Dr. Kimyai-Asadi completed a Form OWCP-5c indicating that MMI had been reached and appellant could return to her job without restrictions.

OWCP subsequently received additional medical evidence including multiple reports and diagnostic testing pertaining to memory impairment, cervicgia, skin sensation disturbance, bilateral carpal tunnel syndrome, headache, ulnar neuropathy of left arm, and occipital neuralgia.

By notice dated August 1, 2019, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on Dr. Kimyai-Asadi's opinion that her accepted conditions had ceased without residuals or disability and that her preexisting cervical, lumbar and underlying knee conditions were unrelated to the October 11, 2018 work injury. It afforded her 30 days to submit additional evidence or argument challenging the proposed termination.

In a June 14, 2019 report, Dr. Smith opined that physical examination of appellant's right knee showed no erythema, warmth, or induration surrounding the incisions and well-healed portal sites. Appellant also had no calf pain and was not limping when ambulating. Dr. Smith discharged appellant from medical care with respect to her right knee. He noted that she reported continued difficulties regarding her neck, headaches, and visual disturbances.

Dr. Smith noted, in a July 19, 2019 report, that appellant reported that around the weekend of July 4, 2019, her right knee buckled and gave out. He noted the history of the employment injury, that she ultimately underwent surgery for meniscus pathology, and that she had been released to work with no restrictions several months ago. Dr. Smith provided examination finding and ordered a right knee MRI scan, which appellant underwent on July 27, 2019.

In an August 6, 2019 report, Dr. Smith provided physical examination findings and assessed right knee pain, status post right knee arthroscopy, right knee effusion and osteoarthritis of right knee. He indicated that review of appellant's recent right knee MRI scan indicated an effusion and tricompartmental osteoarthritis. Dr. Smith opined the changes of the medial and lateral meniscus were simple post meniscectomy changes with no evidence of a new tear. He indicated that the other changes were chronic. Additional progress reports from Dr. Smith were submitted.

In an August 20, 2019 report, Dr. Pari Nikpey, a Board-certified neurologist, diagnosed chronic migraine without aura; cervicgia; obesity; major depressive disorder, recurrent, moderate; vertigo of central origin, unspecified ear; and concussion without loss of consciousness. She reported that appellant slipped and fell at work and hit the back of her head on the wall.

Dr. Nikpey noted that she experienced right knee pain, back and neck pain and, after a week, started to have headaches. She noted appellant's medical progress as well as her treatment for post-concussion syndrome, chronic daily headaches, and vertigo, which she opined were caused by the fall at work.

In an August 23, 2019 report, Dr. David B. Miller, a Board-certified orthopedic surgeon, reported that on October 11, 2018 appellant sustained a work-related fall when she slipped on the wet floor in the bathroom. He advised that she fell striking her head and neck on the wall which caused a whiplash-type injury to her neck and the fall on her back and gluteal region in a twisting manner exacerbated and aggravated significantly her preexisting chronic lumbar and cervical conditions. Dr. Miller opined that appellant's debilitating, severe daily headaches and post-concussion syndrome symptoms were consistent with her fall and injuries on October 11, 2018. Based on her history, physical and medical record, which included objective identifiable changes in her cervical pathology, he explained that, as a result of her October 11, 2018 fall, her post-concussive syndrome as well as exacerbation and aggravation of her cervical spine disease caused increased chronic neck pain and chronic low back pain. Dr. Miller further explained that her vertigo and headaches, which included tension-type headaches and post-concussive syndrome headaches, most likely are the result of her chronic neck pain as a result of the fall.

In an August 28, 2019 medical report, Dr. Nigel Azer, a Board-certified orthopedic surgeon, indicated that appellant fell in the summer of 2019 and the latest MRI scan showed fraying of the meniscus as well as grade 3 and grade 4 chondromalacia involving three compartments. He indicated that she failed conservative treatment and was a candidate for a total knee arthroplasty. Dr. Azer opined that appellant's post-traumatic arthritis of the right knee was aggravated and exacerbated by the work injury to her articular cartilage damage and new meniscal tears. He opined that appellant currently was unable to return to work.

Additional evidence was also received from a chiropractor, a nurse practitioner, and physical therapists.

By decision dated September 13, 2019, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective September 15, 2019, finding that the medical evidence submitted was insufficient to outweigh Dr. Kimyai-Asadi's second opinion.

On November 8, 2019 appellant, through counsel, requested reconsideration. Counsel alleged that new evidence from Dr. Smith dated September 30, 2019 and Dr. Azer dated October 7, 2019 as well as appellant's October 1, 2019 statement established that OWCP did not meet its burden of proof to justify the termination of appellant's benefits.

In her statement of October 1, 2019, appellant related that her right knee suddenly gave out on July 4, 2019 while walking down a slight incline. She indicated that this was not a new injury; rather, her knee gave out because it was still weak from her work injury and subsequent surgery to repair her meniscus.

In his September 30, 2019 report, Dr. Smith noted the history of appellant's employment injury and that appellant did well after her surgery for a meniscus tear until her knee buckled and gave out on the weekend of July 4, 2019. He indicated that she denied any new injury and was not doing anything out of the ordinary. Dr. Smith opined that the July 4, 2019 episode was related to appellant's original injury.

Dr. Azer, in his October 7, 2019 report, noted the history of injury, appellant's medical treatment pertaining to her right knee, and that her knee gave out on the weekend of July 4, 2019 which caused her to fall and the knee to become swollen and painful. He noted that he had previously evaluated her and diagnosed post-traumatic arthritis of the right knee, for which knee replacement surgery was recommended. Dr. Azer advised that, while appellant had a history of an ACL surgery in 2008, she was not having trouble with her knee prior to the October 11, 2018 work injury. He opined that there had been no new injury to her knee besides the October 11, 2018 work injury and that her subsequent fall on July 4, 2019 was secondary to the work injury. Dr. Azer continued to recommend total knee arthroplasty.

On September 19, 2019 appellant began treatment with Dr. Corey J. Wallach, a Board-certified orthopedic surgeon, for her cervical and lumbar spine conditions. Dr. Wallach performed an anterior cervical discectomy and fusion at the C5-6 and C6-7 level on November 26, 2019.

OWCP received continued progress reports from Dr. Smith, and a September 9, 2019 report from Dr. Usman Zafar, a Board-certified pain medicine specialist. Dr. Zafar's report indicated that appellant received a bilateral occipital nerve block on September 9, 2019 for treatment of occipital neuralgia and headaches. OWCP also received additional diagnostic studies, physical therapy reports, and reports from a nurse practitioner and a physician assistant.

By decision dated January 3, 2020, OWCP denied modification of its September 13, 2019 decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.<sup>6</sup>

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized medical opinion evidence.<sup>7</sup> A physician's opinion on whether there is a causal relationship between the diagnosed condition and the employment must be based on a complete factual and medical background.<sup>8</sup> Additionally, the opinion of the physician must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the specific employment incident identified by the claimant.<sup>9</sup>

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<sup>6</sup> *L.F.*, Docket No. 20-0459 (issued January 27, 2021); *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

<sup>7</sup> *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

<sup>8</sup> *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

<sup>9</sup> *See M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

OWCP's procedures provide that the findings of an OWCP referral physician or impartial medical specialist must be based on the factual underpinnings of the claim, as set forth in the SOAF.<sup>10</sup> Its procedures and Board precedent dictate that when OWCP's referral physician or impartial medical specialist 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>11</sup>

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

The Board finds that this case is not in posture for decision with regard to whether the acceptance of her claim should be expanded to include additional conditions as causally related to her accepted October 11, 2018 employment injury.

OWCP developed the issue of whether the October 11, 2018 employment injury aggravated appellant's preexisting cervical and lumbar conditions by referring appellant to Dr. Kimyai-Asadi, a Board-certified neurologist and psychologist. In his June 25, 2019 report, Dr. Kimyai-Asadi opined that appellant's diagnoses should not be expanded to include cervical or lumbar disc pathologies.

The Board notes that on her CA-1 form, appellant alleged that, when she slipped on October 11, 2018, she grabbed for the wall and hit her head, wrists, and upper body on the wall. The May 23, 2019 SOAF, which Dr. Kimyai-Asadi used as the framework for his opinion, however, does not reflect that appellant hit her head. Rather, it notes only that appellant hit her right elbow on wall and slid down wall. The Board, therefore, finds that Dr. Kimyai-Asadi was not provided a complete and accurate framework, rendering his opinion of diminished probative value.<sup>12</sup> The case must therefore be remanded to OWCP for further development.

On remand, OWCP shall prepare a corrected SOAF to include that appellant struck her head on the wall as she fell. It shall then refer the case record, together with the corrected SOAF, to Dr. Kimyai-Asadi for a reasoned opinion regarding whether the acceptance of appellant's claim should be expanded to include an aggravation, whether temporary or permanent, of her preexisting cervical and lumbar disc disease due the accepted mechanisms of the employment injury.<sup>13</sup> If Dr. Kimyai-Asadi is unable to clarify or elaborate on his original report, or if his supplemental report is vague, speculative, or lacking in rationale, OWCP shall refer appellant to a new second opinion specialist with the appropriate credentials.<sup>14</sup> Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding appellant's claim for expansion.

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<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.810.11a (September 2019).

<sup>11</sup> *Id.* at Chapter 3.600.3(10) (October 1990); *J.R.*, Docket No. 19-1321 (issued February 7, 2020); *M.D.*, Docket No. 18-0468 (issued September 4, 2018); *Paul King*, 54 ECAB 356 (2003).

<sup>12</sup> *L.F.*, *supra* note 6.

<sup>13</sup> *See P.S.*, Docket No. 17-0802 (issued August 18, 2017).

<sup>14</sup> *See M.S.*, Docket No. 18-1228 (issued March 8, 2019); *R.H.*, Docket No. 17-1903 (issued July 5, 2018).

## **LEGAL PRECEDENT -- ISSUE 2**

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify modification or termination of an employee's benefits.<sup>15</sup> It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment injury.<sup>16</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>17</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability. To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.<sup>18</sup>

## **ANALYSIS -- ISSUE 2**

The Board finds that OWCP did not meet its burden of proof improperly terminated appellant's wage-loss compensation and medical benefits, effective September 15, 2019.

As explained above, OWCP undertook development of the medical record to determine whether the acceptance of appellant's claim should be expanded, but did not resolve the issue. As the issue of expansion is not in posture for decision, the Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.<sup>19</sup>

## **CONCLUSION**

The Board finds that OWCP improperly terminated appellant's wage-loss compensation and medical benefits, effective September 15, 2019. The Board further finds that the case is not in posture for decision on the issue of whether the October 11, 2018 employment injury aggravated appellant's preexisting cervical and lumbar conditions.<sup>20</sup>

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<sup>15</sup> *S.P.*, Docket No. 19-0196 (issued June 24, 2020); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>16</sup> *See S.P., id.*; *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>17</sup> *D.G.*, *supra* note 15; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>18</sup> *D.G.*, *supra* note 15; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

<sup>19</sup> *See C.S.*, Docket No. 20-0621 (issued December 22, 2020).

<sup>20</sup> In light of the Board's disposition of Issues 1 and 2, the Board finds that Issue 3, is rendered moot.



**ORDER**

**IT IS HEREBY ORDERED THAT** the January 3, 2020 decision of the Office of Workers' Compensation Programs is reversed in part and set aside in part and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: June 2, 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