

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

_____)	
K.S., Appellant)	
)	
and)	Docket No. 21-0851
)	Issued: June 8, 2022
U.S. POSTAL SERVICE, ATLANTA)	
NETWORK DISTRIBUTION CENTER,)	
Atlanta, GA, Employer)	
_____)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

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

JURISDICTION

On May 18, 2021 appellant filed a timely appeal from a March 12, 2021 merit decision and a May 4, 2021 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ 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 The Board notes that, during the pendency of this appeal, OWCP issued a n August 5, 2021, decision which denied modification of its March 12, 2021 decision. The Board and OWCP may not simultaneously exercise jurisdiction over the same issue(s). Consequently, OWCP's August 5, 2021 decision is set aside as null and void. 20 C.F.R. §§ 501.2(c)(3), 10.626; *see J.W.*, Docket No. 19-1688, n.1 (issued March 18, 2020); *J.A.*, Docket No. 19-0981, n.2 (issued December 30, 2019); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the March 12, 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 properly terminated appellant's wage-loss compensation and medical benefits, effective January 20, 2021, as she no longer had disability or residuals causally related to her accepted October 29, 2010 employment injury; (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals on or after January 20, 2021 due to her accepted employment injury; and (3) whether OWCP properly denied appellant's request for a review of the written record.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.⁴ The facts and circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference. The facts relevant to the present appeal are as follows.

On February 18, 2011 appellant, then a 59-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she sustained cubital tunnel syndrome causally related to factors of her federal employment including lifting trays of mail and pushing mail containers on the workroom floor.⁵ She noted that she first became aware of her condition and realized its relation to factors of her federal employment on October 29, 2010. OWCP accepted the claim for bilateral cubital tunnel syndrome/bilateral ulnar nerve lesions. Appellant stopped work on December 1, 2010 and has not returned. OWCP paid her wage-loss compensation on the supplemental rolls as of December 11, 2010 and on the periodic rolls as of March 13, 2011.⁶ It authorized bilateral cubital tunnel release surgeries, which were performed on March 14 and June 13, 2011. Appellant also underwent an authorized left cubital tunnel subcutaneous ulnar nerve transposition on August 18, 2014.

Appellant came under the care of Dr. Jeffrey Kesten, a Board-certified physiatrist, on September 28, 2015. Dr. Kesten noted appellant's history of injury and medical treatment. He provided physical examination findings and diagnosed bilateral upper extremity pain; right hand paresthesias; history of right carpal tunnel syndrome; history of bilateral cubital tunnel syndrome; history of 1st, 2nd, 3rd, 4th, and 5th trigger finger; status post right carpal tunnel release; and status post left and cubital tunnel subcutaneous ulnar nerve transposition. Dr. Kesten noted that appellant had been previously released to return to modified work with restrictions.

Appellant continued to be followed by Dr. Kesten who submitted reports and follow-up evaluations covering October 12, 2015 through September 11, 2019, finding that appellant continued to have residuals of bilateral carpal tunnel syndrome and bilateral cubital tunnel

⁴ Docket No. 17-1663 (issued March 28, 2018).

⁵ The record indicates that appellant had originally filed a claim for recurrence of disability (Form CA-2a) under OWCP File No. xxxxxx846, which was accepted for bilateral carpal tunnel syndrome. OWCP determined that the cubital tunnel syndrome claim was a new occupational disease, to be adjudicated separately under File No. xxxxxx845. It administratively combined the case records on May 21, 2018, with OWCP File No. xxxxxx846 serving as the master file.

⁶ Appellant retired on disability effective June 25, 2012.

syndrome. Dr. Kesten also continued to relate that appellant was capable of working a modified job with restrictions.

On October 18, 2019 OWCP referred appellant, together with a statement of accepted facts (SOAF), list of questions, and medical record, to Dr. Wallace K. Larson, a Board-certified orthopedic surgeon, for a second opinion regarding the status of appellant's work-related conditions.

In a report dated November 26, 2019, Dr. Larson noted an injury history, reviewed medical records and SOAF, and detailed physical examination findings. He reported inconsistent sensory testing, no anesthesia in any of her digits, very weak bilateral interosseous function, greater on the right side, no definitive atrophy, tenderness on palpation of the medial nerve greater on the right elbow than the left elbow, no thenar atrophy, and full bilateral wrist and elbow range of motion. Dr. Larson opined that appellant continued to have residuals of the accepted cubital tunnel syndrome and mild carpal tunnel syndrome. He observed that her reported symptoms were out of proportion to any objective findings, and the majority of her symptoms were related to somatoform pain disorder, rather than residual cubital tunnel syndrome. Dr. Larson reported that appellant demonstrated exaggerated withdrawal behaviors on palpation of either elbow medial aspect. In addition, there are significant inconsistencies on sensory testing. Dr. Larson opined that the cubital tunnel condition was unlikely to be work related although it was listed as an accepted condition on the SOAF. He found that the work restrictions from Dr. Kesten were not justified based on objective findings, and he found no additional treatment was necessary for appellant's accepted work-related conditions. In an attached work capacity evaluation (Form OWCP-5c), Dr. Larson provided permanent work restrictions, which limited her to up to 20 pounds pushing, pulling, and lifting for 8 hours per day.

Dr. Kesten, in follow-up medical evaluations dated December 13, 2019 and January 10, 2020, summarized medical treatment and prescribed medication. On December 13, 2019 he reported positive bilateral Phalen's signs and 2+ bilateral biceps, triceps, and brachioradialis muscle reflexes while on January 10, 2020 he reported 1+ bilateral brachioradialis, right biceps, and right triceps muscle stretch reflexes. Dr. Kesten diagnosed bilateral upper extremity pain, right-hand paresthesias, history of right carpal tunnel syndrome, bilateral cubital tunnel syndrome, history of right 1st, 2nd, 3rd, 4th, and 5th trigger finger, status post left cubital tunnel release on March 14, 2011, status post endoscopic right elbow endoscopic cubital tunnel release, status post revision subcutaneous ulnar nerve transposition, and status post right neuroplasty and transposition of the right ulnar nerve at the elbow for cubital tunnel syndrome and elbow flexor pronator muscles tendon lengthening. He concluded that appellant's symptoms and findings resulted from her work-related injuries as documented and assessed at every evaluation/consultation.

In a supplemental report dated February 4, 2020, Dr. Larson opined that appellant did not require any additional treatment or medication for the accepted conditions. He reiterated that her reported symptoms were out of proportion to objective findings and that her restrictions were due to her deconditioned state. Dr. Larson found no objective data on which to provide specific physical limitations, but he also noted that appellant's electrodiagnostic studies of February 17, 2016 demonstrated severe right ulnar neuropathy, and left greater than right carpal tunnel syndrome.

OWCP received February 10 and March 11, 2020 follow-up medical evaluation reports from Dr. Kesten, which were repetitive of his prior reports.

On March 4, 2020 OWCP determined that there was a conflict in the medical opinion evidence between Dr. Kesten⁷ and Dr. Larson regarding whether appellant continued to have residuals or disability causally related to the accepted employment injury. In order to resolve the conflict, it referred appellant, pursuant to 5 U.S.C. § 8123(a), to Dr. Jeffrey J. Sabin, a Board-certified orthopedic surgeon, for an impartial medical examination. OWCP provided Dr. Sabin with a copy of the case record, a current SOAF, and a series of questions.

Dr. Kesten, in follow-up medical evaluation reports dated April 10, May 11, July 10, and August 10, 2020, reiterated findings and diagnoses from prior reports.

In an August 14, 2020 report, Dr. Sabin detailed appellant's medical history and reported the findings of the physical examination he conducted that day. He noted that she primarily complained of sharp shooting pain from her hands to her shoulders with any type of activity or movement. Dr. Sabin indicated that, upon examination, appellant demonstrated severe pain behavior throughout her entire upper extremity examination, which included checking reflexes, exhibiting pain with even any light touch of any arm part, and global weakness secondary to 3+/5 pain of all upper extremity muscles. He indicated that her fibromyalgia trigger points were likely invalid based on her complaint of severe left posterior shoulder pain upon his touching her forehead with his finger. Dr. Sabin diagnosed somatization disorder and status post multiple failed nerve decompression surgeries in both arms. He opined that appellant's symptoms were exaggerated and out of proportion to the accepted cubital tunnel syndrome. Dr. Sabin concluded that her numerous subjective complaints were attributable to her somatoform disorder, which was unrelated to the accepted employment injury and that her prognosis was poor. In an August 28, 2020 Form OWCP-5c, he indicated that, with respect to the accepted cubital tunnel syndrome, appellant could perform her regular work on a full-time basis.

A follow-up medical evaluation report dated September 2, 2020 from Dr. Kesten was repetitive and unchanged from prior reports.

On October 8, 2020 OWCP issued a notice of proposed termination advising appellant that it proposed to terminate her wage-loss compensation and medical benefits because she ceased to have residuals or disability due to her accepted employment injury. It informed her that the proposed termination was based on the opinion of Dr. Sabin, the impartial medical examiner (IME). OWCP afforded appellant 30 days to submit additional evidence or argument challenging the proposed action.

On November 5, 2020 appellant disagreed with the proposal to terminate her compensation benefits, asserting that she continued to have residuals and disability due to her accepted work injury.

In reports dated December 10, 2020 and January 7, 2021, Dr. Rasheed Singleton, a physician specializing in pain medicine, noted appellant's history of injury and provided examination findings. He noted that she complained of bilateral hand, joint, and nerve pain. Dr. Singleton diagnosed right carpal tunnel syndrome, bilateral ulnar nerve lesion, and chronic pain syndrome. On January 7, 2021 Dr. Singleton reported: physical examination findings, which

⁷ OWCP noted the conflict as between Dr. Hanna Bisset and Dr. Larson rather than Dr. Kesten and Dr. Larson. It also referred to Dr. Bisset as a second opinion physician. The Board notes the record does not contain any reports from Dr. Bisset either as a treating physician or as an OWCP referral physician.

included bilateral upper extremity, hand/wrist, forearms, and elbow abnormal sensation changes; positive Tinel's sign; and bilateral medial epicondyles tenderness. A review of a December 17, 2020 electromyograph (EMG) demonstrated mild bilateral median neuropathy, moderate right chronic ulnar neuropathy, and normal left ulnar nerve. Dr. Singleton diagnosed right carpal tunnel syndrome, bilateral upper limb ulnar nerve lesion, and chronic pain syndrome.

By decision dated January 20, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits, effective January 20, 2021. It found Dr. Sabin's opinion as the IME represented the special weight of the evidence and established that she had no further disability or residuals of her accepted employment injury. OWCP also noted that it had not received any additional medical evidence following the proposed termination of appellant's compensation benefits.

On February 4, 2021 appellant requested reconsideration.

In a February 4, 2021 report, Dr. Singleton noted appellant's history of medical treatment and provided examination findings. Physical examination findings were unchanged from his January 7, 2021 report. Dr. Singleton again reviewed appellant's December 17, 2020 EMG and diagnosed right upper limb carpal tunnel syndrome, bilateral upper limb ulnar nerve lesion, chronic pain syndrome, major depressive disorder, and long-term current opiate use.

By decision dated March 12, 2021, OWCP denied modification of its January 20, 2021 decision. It found that Dr. Singleton failed to explain how the diagnosed conditions were causally related to the accepted employment injury. Thus, OWCP found the special weight of the medical opinion continued to rest with Dr. Sabin, the IME.

In an appeal request form dated and received on April 13, 2021, appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review.

By decision dated May 4, 2021, OWCP denied appellant's request for a review of the written record noting that she had previously requested reconsideration under 5 U.S.C. § 8128 and, therefore, she was not entitled to a review of the written record on the same issue as a matter of right. It also considered whether to grant a discretionary hearing and found that the issue could equally well be addressed by requesting reconsideration and submitting evidence not previously considered which established that she continued to have residuals and disability due to her accepted employment injury.

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.⁸ After it has determined that, an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to

⁸ *C.M.*, Docket No. 20-1647 (issued October 5, 2021); *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).

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

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹¹ 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.¹²

Section 8123(a) of FECA provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹³ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹⁴

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 20, 2021.

OWCP improperly determined that there was a conflict in the medical opinion evidence between Dr. Kesten, an attending physician, and Dr. Larson, an OWCP referral physician, as to whether appellant continued to have residuals or disability causally related to the accepted employment injury.

In his initial report dated November 26, 2019, Dr. Larson opined that appellant continued to have residuals of the accepted cubital tunnel syndrome. He also observed that her reported symptoms were out of proportion to any objective findings and were related to somatoform pain disorder, rather than residual cubital tunnel syndrome. Dr. Larson found no objective data on which to provide specific physical limitations, but he also noted that appellant's electrodiagnostic studies of February 17, 2016 demonstrated severe right ulnar neuropathy. He provided permanent work restrictions limited her to up to 20 pounds pushing, pulling, and lifting for eight hours per day. In a supplemental report dated February 4, 2020, Dr. Larson opined that appellant did not require any additional treatment for the accepted conditions. He reiterated that her reported

⁹ See *C.M., 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).

¹⁰ *C.M., id.*; *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

¹¹ *C.M., id.*; *A.G.*, Docket No. 19-0220 (issued August 1, 2019); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

¹² See *C.M., id.*; *A.G., id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

¹³ 5 U.S.C. § 8123(a).

¹⁴ *M.C.*, Docket No. 20-1396 (issued November 22, 2021); *C.M., supra* note 8; *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008); *James P. Roberts*, 31 ECAB 1010 (1980).

symptoms were out of proportion to objective findings and that her restrictions were due to her deconditioned state. The Board finds that Dr. Larson's reports were internally inconsistent as he noted that appellant continued to have residuals of the accepted cubital tunnel syndrome, and that her last objective diagnostic study demonstrated severe right ulnar neuropathy, but he concluded that she did not require any additional treatment and that her symptoms were out of proportion to her objective findings. Dr. Larson also noted that appellant had restrictions due to her deconditioned state, but provided permanent restrictions limiting appellant to 20 pounds of lifting, pushing, and pulling. The Board has held that medical reports are of limited probative value if they are internally inconsistent.¹⁵ As Dr. Larson offered inconsistent conclusions regarding whether appellant had residuals of her accepted conditions and whether she remained disabled from her date-of-injury position, his opinion was of limited probative value.

OWCP had referred appellant to Dr. Sabin for an impartial medical evaluation; however, as no conflict existed in the medical evidence at the time of the referral to Dr. Sabin, the Board finds that his reports may not be afforded the special weight of an IME and should instead be considered for its own intrinsic value.¹⁶ The Board also finds that Dr. Sabin's August 14, 2020 report was not sufficiently well rationalized to be of probative value and to justify OWCP's termination of appellant's medical benefits. Dr. Sabin provided only a cursory and minimal discussion of the accepted bilateral upper limb ulnar nerve lesion and bilateral cubital tunnel syndrome as caused by the October 29, 2010 employment injury. With respect to the resolution of these conditions, he simply noted, without elaboration, that appellant's symptoms were exaggerated and out of proportion to her accepted cubital tunnel syndrome. Dr. Sabin diagnosed somatization disorder and status post multiple failed bilateral nerve compression surgeries. He attributed appellant's many subjective complaints to her somatoform disorder without any explanation or supporting rationale, and without addressing whether her diagnosed disorder was not causally related to her accepted injury. Dr. Sabin advised that she had no restrictions due to the accepted cubital tunnel syndrome and could return to her usual full-time position. He did not provide any discussion of when the cubital tunnel syndrome resolved. The Board further notes that prior to the January 20, 2021 decision terminating appellant's compensation benefits, OWCP, on January 14, 2021, had received Dr. Singleton's January 7, 2021 report wherein he noted that review of a December 17, 2020 EMG demonstrated mild bilateral median neuropathy, moderate right chronic ulnar neuropathy, and normal left ulnar nerve. However, OWCP did not request that Dr. Sabin review Dr. Singleton's report or the December 17, 2020 EMG study. As Dr. Sabin failed to provide adequate medical rationale in support of his opinions regarding the status of appellant's accepted conditions, his opinion was also of limited probative value.

As the medical evidence of record is insufficient to establish that appellant no longer had residuals or disability as of January 20, 2021, the Board finds that OWCP failed to meet its burden of proof.

¹⁵ *L.L.*, Docket No. 18-0861 (issued April 5, 2019).

¹⁶ *Q.S.*, Docket No. 20-0701 (issued November 10, 2021); *see F.R.*, Docket No. 17-1711 (issued September 6, 2018).

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective January 20, 2021.¹⁷

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2021 decision of the Office of Workers' Compensation Programs is reversed. The May 4, 2021 decision of the Office of Workers' Compensation Programs is set aside as moot.

Issued: June 8, 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

¹⁷ In light of the Board's disposition of Issue 1, Issues 2 and 3 are rendered moot.