

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

_____)	
R.G., Appellant)	
)	
and)	Docket No. 22-0627
)	Issued: November 2, 2022
DEPARTMENT OF THE NAVY, NAVAL)	
SURFACE WARFARE CENTER, Dahlgren, VA,)	
Employer)	
_____)	

Appearances:
Analese Dunn, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge

JURISDICTION

On March 24, 2022 appellant, through counsel, filed a timely appeal from an October 5, 2021 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.

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.*

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 9, 2018, as he no longer had disability or residuals causally related to his accepted April 3, 2012 employment injury; and (2) whether appellant has met his burden of proof to establish continuing disability or residuals on or after December 9, 2018, causally related to his accepted April 3, 2012 employment injury.

FACTUAL HISTORY

On April 10, 2012 appellant, then a 60-year-old engineer, filed a traumatic injury claim (Form CA-1) alleging that on April 3, 2012 he sustained injuries to his head, resulting in headache dizziness and nausea, and to his low back, hip, and upper and lower extremities when he leaned backwards in his chair and the chair broke while in the performance of duty. He stopped work on April 4, 2012. By decision dated May 4, 2012, OWCP accepted appellant's claim for left acromioclavicular (AC) joint separation, cervical sprain, and left ulnar mononeuropathy. It paid him wage-loss compensation on the supplemental rolls effective May 23, 2012 and on the periodic rolls, effective July 1, 2012.

On October 11, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions to Dr. Chester DiLallo, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of his employment-related injuries. The SOAF, dated October 9, 2018, noted appellant's accepted conditions as "left, closed fracture of upper end of ulna"; "neck sprain"; and "left, mononeuritis of upper limb."

In a report dated October 30, 2018, Dr. DiLallo reviewed appellant's history of injury and noted appellant's accepted conditions of closed fracture of the upper end of the ulna, neck sprain, and left mononeuritis of the left upper extremity. He reported that appellant had informed him that the diagnosis of closed fracture of the left ulna was miscoded and that the proper diagnosis that should have been used was ulnar neuritis. Dr. DiLallo indicated that appellant currently complained of pain in his neck, middle back in the area of his thoracic spine, and low back area, particularly in the sacroiliac (SI) area on the right. Appellant also reported dizziness, unsteadiness on his feet, headaches, heaviness, weakness, sensations, numbness, and weakness in his legs. Dr. DiLallo discussed appellant's medical records. On examination of appellant's cervical spine, he observed crepitus on flexion and extension and complaints of pain on range of motion. Spurling's test was negative for radicular pain. Dr. DiLallo reported that examination of appellant's left shoulder revealed good motion. Examination of appellant's left arm and hand demonstrated tenderness to palpation over the ulnar nerve and decreased sensation in the distribution of the ulnar nerve.

In response to OWCP's questions, Dr. DiLallo indicated that appellant's accepted condition was closed fracture of the upper end of the ulna "which is inaccurate and inappropriately applied." He reported that the conditions of neck sprain and left upper limb mononeuritis was more appropriate. Dr. DiLallo opined that the objective findings did "not confirm the presence of any acute or now chronic or subacute injury." He explained that appellant's left shoulder complaints have a basis from a surgery unrelated to the April 3, 2012 employment injury.

Dr. DiLallo indicated that magnetic resonance imaging (MRI) scan findings showed the presence of chronic changes that were present before the employment injury. He concluded that appellant's accepted conditions, regarding the musculoskeletal system, had resolved and that appellant had reached maximum medical improvement as of that date.

In a notice dated November 2, 2018, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because he no longer had disability or residuals causally related to his accepted April 3, 2012 employment injury. It found that the weight of the medical evidence rested with Dr. DiLallo who found that appellant no longer had any disability or residuals causally related to his accepted employment injury. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

In a statement dated December 1, 2018, appellant expressed his disagreement with the November 2, 2018 proposed termination letter. He submitted medical reports dated from 2012 and 2013 regarding treatment for neurologic and psychiatric symptoms.

By decision dated December 7, 2018, OWCP finalized the notice of proposed termination of appellant's wage-loss compensation and medical benefits, effective December 9, 2018. It found that the weight of the medical evidence rested with Dr. DiLallo, the second opinion examiner, who indicated, in an October 30, 2018 report, that appellant no longer had disability or residuals due to his April 3, 2012 employment injury.

On January 8, 2019 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review.

By decision dated January 16, 2019, OWCP's Branch of Hearings and Review denied appellant's hearing request. It determined that the request was untimely filed as it was postmarked January 8, 2019, more than 30 days after its December 7, 2018 merit decision. After exercising its discretion, OWCP further found that the issue in the case could equally well be addressed through the reconsideration process.

On December 4, 2019 appellant, through counsel, requested reconsideration of the December 7, 2018 decision. She asserted that appellant continued to suffer from pain and discomfort in his neck, back, and left arm as a result of the April 3, 2012 employment injury. Counsel also noted that appellant had difficulty staying focused on a specific task and frequently had severe nausea, dizziness, and loud ringing in his ears. She argued that OWCP failed to properly develop the medical evidence regarding whether appellant had multiple psychiatric conditions as a result of the accepted April 3, 2012 employment injury.

In a signed affidavit, appellant described that immediately after the April 3, 2012 employment injury he felt "very foggy," had extreme pain in his lower back, neck, shoulders, and head, and experienced severe headaches, dizziness, and nausea. He reported that he had been unable to perform his job duties since the April 3, 2012 employment injury. Appellant noted that he did not have these symptoms after his cervical surgery in April 2005. He pointed out that he had no pain or limitations with his neck or left arm prior to the April 3, 2012 employment injury.

A November 30, 2019 brain MRI scan report showed no acute intracranial findings.

In a letter dated December 23, 2019, Dr. John Lion, a Board-certified psychiatry and neurology specialist, described the April 3, 2012 employment incident and indicated that he had reviewed medical records following the injury. He indicated that since the injury, appellant had shown deterioration in mental functioning, had been unable to speak clearly, and seemingly suffered from aphasia and cognitive impairments. Dr. Lion noted that diagnostic testing of appellant's brain was normal. On physical examination, he observed that appellant attempted to answer questions, but his speech varied between word-finding difficulties, stammering, and stuttering. Dr. Lion also noted that impairment was indicated on the mini-mental status examination. He opined that appellant suffered from a conversion disorder as a result of the April 3, 2012 employment injury. Dr. Lion noted that appellant's symptoms of the disorder appeared within a few months of his physical injury and had been chronic since the April 2012 work injury. He indicated that the conversion disorder prevented appellant from returning to work.

By decision dated February 28, 2020, OWCP denied modification of the December 7, 2018 decision.

On August 13, 2020 appellant, through counsel, requested reconsideration.

In a June 25, 2020 addendum report, Dr. Lion explained that a conversion disorder, also known as a functional neurological disorder, was a well-established psychiatric diagnosis in which a patient complained of somatic symptoms without any underlying physical findings. He noted that the disorder was often associated with a traumatic incident. Dr. Lion indicated that, in appellant's case, the symptoms occurred within a few months of his physical injury. He referenced several articles in medical literature and opined that while no objective findings explained appellant's symptoms of speech, memory, and cognitive deficits, medical findings "clearly link the etiology of a conversion disorder/functional neurological disorder with earlier trauma." Dr. Lion pointed out that appellant did not have any symptoms related to speech, memory, or cognition prior to his injury, but developed these symptoms subsequent to the original injury. He concluded that appellant suffered from conversion disorder as a result of the April 3, 2012 employment injury and that the condition prevented appellant from continuing in his employment.

By decision dated October 8, 2020, OWCP denied modification of the February 28, 2020 decision.

On July 7, 2021 appellant, through counsel, requested reconsideration.

By decision dated October 5, 2021, OWCP denied modification of the October 8, 2020 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 benefits.³ It may not terminate compensation without establishing

³ *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).

either that the disability has ceased or that it is no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶ To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition, which require further medical treatment.⁷

For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relationship, not OWCP's burden to disprove such relationship.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 December 9, 2018.

By decision dated May 4, 2012, OWCP accepted appellant's claim for left acromioclavicular (AC) joint separation, cervical sprain, and left ulnar mononeuropathy. However, on October 11, 2018 OWCP referred appellant to Dr. DiLallo, along with an October 9, 2018 SOAF, which noted the accepted conditions as "left, closed fracture of upper end of ulna"; "neck sprain"; and "left, mononeuritis of upper limb." In an October 30, 2018 report, Dr. DiLallo noted appellant's accepted conditions as closed fracture of the upper end of the ulna, neck sprain, and left mononeuritis of the left upper extremity. He indicated that appellant currently complained of pain in his neck, middle back in the area of his thoracic spine, and low back area and also reported dizziness, unsteadiness on his feet, headaches, heaviness, weakness, sensations, numbness, and weakness in his legs. On examination of appellant's cervical spine, Dr. DiLallo observed crepitus on flexion and extension and complaints of pain on range of motion. He reported that examination of appellant's left shoulder revealed good motion. Examination of appellant's left arm demonstrated tenderness to palpation over the ulnar nerve and decreased sensation in the distribution of the ulnar nerve. In response to OWCP's questions, Dr. DiLallo opined that the objective findings did "not confirm the presence of any acute or now chronic or subacute injury." He noted that appellant's left shoulder symptoms stemmed from his prior surgery and were unrelated to the April 3, 2012 employment injury. Dr. DiLallo concluded that appellant's accepted

⁴ 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).

⁵ *R.P.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁶ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁷ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

⁸ *G.A.*, Docket No. 09-2153 (issued June 10, 2010); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Alice J. Tysinger*, 51 ECAB 638 (2000).

conditions, regarding the musculoskeletal system, had resolved and that appellant had reached maximum medical improvement as of that date.

OWCP's procedures provide that when an OWCP medical adviser, second opinion specialist, or referee physician 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 In this case, the SOAF dated October 9, 2018, incorrectly noted closed fracture of the upper end of the left ulna as an accepted condition instead of the accepted condition of left AC joint separation. As Dr. DiLallo relied upon a SOAF that was inaccurate, his opinion is of diminished probative value.¹⁰ Accordingly, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits.¹¹

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 9, 2018.¹²

⁹ Federal Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990). See also *D.E.*, Docket No. 17-1794 (issued April 13, 2018); *Paul King*, 54 ECAB 356 (2003).

¹⁰ *D.S.*, Docket No 21-1129 (issued April 19, 2022).

¹¹ *S.R.*, Docket No. 19-1229 (issued May 15, 2020); *B.M.*, Docket No. 21-0101 (issued December 15, 2021); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008).

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

ORDER

IT IS HEREBY ORDERED THAT the October 5, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 2, 2022
Washington, DC

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

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board