

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

P.J., Appellant)	
)	
and)	Docket No. 22-0905
)	Issued: November 15, 2022
U.S. POSTAL SERVICE, CORONA-ELMHURST STATION POST OFFICE, Corona, NY, Employer)	
)	

Appearances:
Paul Kalker, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On May 27, 2022 appellant, through counsel, filed a timely appeal from an April 28, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the

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 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.

² The Board notes that, following the April 28, 2022 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.*

Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider 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 July 18, 2021, as she no longer had disability or residuals causally related to the accepted May 3, 2012 employment injury, and (2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after July 18, 2021, causally related to her accepted May 3, 2012 employment injury.

FACTUAL HISTORY

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

On May 3, 2012 appellant, then a 41-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on that date she missed a step and fell, injuring her right hand while in the performance of duty. She stopped work on May 4, 2012. OWCP accepted the claim for right hand sprain. OWCP paid appellant wage-loss compensation on the periodic rolls, beginning September 4, 2012.

On September 4, 2012 OWCP proposed to terminate appellant's medical benefits, finding that the report of a second opinion physician represented the weight of the medical evidence, establishing that appellant no longer had residuals due to her accepted work-related injury. It afforded her 30 days to submit additional evidence or argument in writing, if she disagreed with the proposed termination of benefits.

By decision dated September 4, 2012, OWCP terminated appellant's wage-loss compensation, effective that date.

On March 27, 2013 appellant, through counsel requested reconsideration.

By decision dated June 25, 2013, OWCP denied modification.

Appellant appealed the June 25, 2013 decision to the Board. By decision dated April 14, 2014, the Board reversed OWCP's September 4, 2012 termination decision.

Appellant's attending physician, Dr. Ignatius Daniel Roger, a Board-certified plastic surgeon, submitted a series of notes dated October 13, 2014 through January 18, 2021 recounting that she fell and injured her right hand at work on May 3, 2012. He diagnosed tenosynovitis of the right hand and wrist, right carpal tunnel syndrome, and contusion. Dr. Roger opined that the diagnosed conditions of right carpal tunnel syndrome and right wrist sprain were directly due to

³ 5 U.S.C. § 8101 *et seq.*

⁴ Docket No. 13-1998 (issued April 14, 2014).

the trauma when appellant fell onto her right hand at work on May 3, 2012. He also indicated that she was capable of performing modified-duty work beginning October 15, 2014.

On September 7, 2016 appellant underwent right-hand electromyogram and nerve conduction velocity (EMG/NCV) testing which demonstrated right carpal tunnel syndrome.

On November 9, 2020 OWCP expanded the acceptance of the claim to include right carpal tunnel syndrome and right wrist sprain.

On February 24, 2021 OWCP referred appellant along with a statement of accepted facts (SOAF) and a series of questions to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination to determine her ability to return to work and her medical residuals.

In his March 15, 2021 report, Dr. Sultan recounted appellant's history of injury on May 5, 2012 and her medical treatment. On physical examination he found no swelling deformity, or discoloration of the right hand and wrist. Dr. Sultan determined that appellant had no complaints of pain on palpation, no intrinsic muscle atrophy, and no trophic changes involving the skin or nails. He found that her sensory testing was intact, with negative Tinel's sign and Phalen's test. Dr. Sultan reported normal range of motion of the right wrist. He found that, although appellant reported subjective symptoms, she had no objective findings regarding her right hand and wrist. Dr. Sultan reported no evidence of ongoing disability due to the accepted employment injuries of May 3, 2012. He opined that appellant could return to her date-of-injury position with no restrictions and that she had reached maximum medical improvement.

On May 14, 2021 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, finding that the report of the second opinion physician, Dr. Sultan, represented the weight of the medical evidence establishing that she no longer had any residuals or continuing disability from work due to her accepted work-related injury. It afforded her 30 days to submit additional evidence or argument in writing, if she disagreed with the proposed termination of benefits.

By decision dated July 1, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 18, 2021. It found that the weight of the medical evidence, represented by Dr. Sultan's report, established that she no longer had residuals or disability from work due to her accepted May 3, 2012 employment injury.

In a report dated July 19, 2021, Dr. Roger recounted appellant's continuing symptoms of pain and numbness in the right hand and wrist and triggering of the right middle and ring fingers. He diagnosed right carpal tunnel syndrome and tenosynovitis, right hand.

On February 1, 2022 appellant requested reconsideration. She provided a July 28, 2021 report from Dr. Roger in which he described her history of injury on May 3, 2012 and her medical treatment from May 3, 2012 through July 19, 2021. Dr. Roger found that appellant had loss of range of motion of the right wrist and fingers. He diagnosed flexor stenosing tenosynovitis of the right hand with right carpal tunnel syndrome. Dr. Roger disagreed with Dr. Sultan's findings of normal strength and range of motion of the right wrist and fingers instead reporting decreased mobility of the right wrist and limited dexterity and strength in her dominant right hand. He found that appellant's physical examination was consistent with positive Phalen's test, Tinel's sign, and

compression test that correlated with her positive EMG/NCV test findings. Dr. Roger determined that she could not perform the full duties of her date-of-injury position.

By decision dated April 28, 2022, OWCP denied modification.

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.⁵ It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁶ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁸ 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.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 18, 2021, as she no longer had disability or residuals causally related to her accepted May 3, 2012 employment injury.

OWCP based its decision to terminate appellant's wage-loss compensation and medical benefits on the March 15, 2021 opinion of Dr. Sultan, OWCP's second opinion physician, who found that the accepted conditions of right wrist and hand sprains and right carpal tunnel syndrome had resolved with no residuals and no need for further medical treatment. Dr. Sultan further opined that appellant was capable of performing her date-of-injury position with no restrictions. In his March 15, 2021 report, he described the May 5, 2012 employment injury, noting the accepted conditions as set forth in the SOAF. Dr. Sultan further related appellant's physical examination findings and reviewed diagnostic testing. He found no objective findings in the right upper

⁵ *A.P.*, Docket No. 22-0155 (issued July 22, 2022); *K.R.*, Docket No. 22-0019 (issued July 11, 2022); *C.C.*, Docket No. 19-1062 (issued February 5, 2020); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *See T.M.*, Docket No. 19-1058 (issued March 30, 2021); *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).

⁷ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284 (1988).

⁸ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁹ *See T.M.*, *supra* note 6; *A.M.*, Docket No. 18-1243 (issued October 7, 2019); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

extremity. Dr. Sultan noted appellant's accepted diagnoses, but opined that there were no objective findings supporting her subjective symptoms.

The factors that comprise the evaluation of medical opinion evidence include the opportunity for and thoroughness of physical examination, the accuracy, or completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.

The Board finds that OWCP properly determined that Dr. Sultan's opinion constitutes the weight of the medical opinion evidence. He based his opinion on a proper factual and medical history and physical examination findings. Dr. Sultan noted that appellant's physical examination indicated subjective findings, which did not correlate with objective findings and the history of her employment injury. He further opined that she could resume full-duty work with no restrictions. The Board finds that Dr. Sultan's opinion is sufficiently probative, rationalized, and based upon a proper factual background¹⁰ and it represents the weight of the medical evidence at the time of the July 17, 2021 termination decision. Accordingly, OWCP properly relied on his second opinion report in terminating appellant's wage-loss compensation and medical benefits for the May 3, 2012 employment injury.¹¹

The Board thus finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 17, 2021.

LEGAL PRECEDENT -- ISSUE 2

When OWCP properly terminates wage-loss compensation and medical benefits, the burden shifts to appellant to establish continuing disability or residuals, on or after that date, causally related to the accepted employment injury.¹² To establish causal relationship between continuing residuals and/or disability and the accepted employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such causal relationship.¹³

Section 8123(a) provides that, 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.¹⁴ This is called a referee examination and OWCP

¹⁰ *K.R.*, *supra* note 5; *B.C.*, Docket No. 16-0978 (issued November 21, 2016).

¹¹ *J.T.*, Docket No. 20-1470 (issued October 8, 2021); *C.C.*, *supra* note 5; *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *see also A.F.*, Docket No. 16-0393 (issued June 24, 2016).

¹² *K.M.*, Docket No. 21-1351 (issued April 28, 2022); *E.J.*, Docket No. 20-0013 (issued November 19, 2020); *B.A.*, Docket No. 17-1471 (issued July 27, 2018); *Manuel Gill*, 52 ECAB 282 (2001).

¹³ *C.L.*, Docket No. 18-1379 (issued February 3, 2019); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

¹⁴ 5 U.S.C. § 8123(a); *R.M.*, Docket No. 21-1150 (issued April 5, 2022); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that this case is not in posture for decision regarding whether appellant has met her burden of proof to establish continuing disability or residuals on or after July 18, 2021 causally related to her accepted May 3, 2012 employment injury.

Following the termination of her wage-loss compensation and medical benefits, effective July 18, 2021, appellant submitted additional reports from Dr. Roger. In his July 28, 2021 report, Dr. Roger described her history of injury on May 3, 2021 and her medical treatment from May 3, 2012 through July 19, 2021. He reported objective findings on physical examination, including loss of range of motion of the right wrist and fingers and limited dexterity and strength in her dominant right hand. Dr. Roger found that appellant's demonstrated positive Phalen's test, Tinel's sign, and compression test that correlated with her positive EMG/NCV test findings. He determined that she could not perform the full duties of her date-of-injury position.

As discussed, Dr. Sultan, the second opinion examiner, on the other hand, found that appellant had no residuals or disability due to her accepted right wrist and hand conditions. Both Dr. Sultan and Dr. Roger provided rationale for their respective opinions based on their review of the medical evidence and findings on examination. The Board, therefore, finds that a conflict in medical opinion exists regarding whether appellant has established continuing employment-related disability after July 18, 2021.¹⁶

As noted, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of a second opinion physician, OWCP shall appoint a third physician to make an examination.¹⁷ The case will therefore be remanded for OWCP to refer appellant to an impartial medical specialist, pursuant to 5 U.S.C. § 8123(a), to determine whether she has met her burden of proof to establish continuing employment-related disability or residuals on or after July 18, 2021 due to her accepted employment injury. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding whether appellant has established continuing disability or residuals on or after July 18, 2021 causally related to the accepted employment injury.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 18, 2021, as she no longer had disability or residuals causally related to her accepted May 3, 2012 employment injury. The Board further finds that the case is not in posture for decision regarding whether she has met her burden of proof

¹⁵ 20 C.F.R. § 10.321.

¹⁶ See *R.M.*, *supra* note 14; *J.B.*, Docket No. 20-0147 (issued September 20, 2021).

¹⁷ 5 U.S.C. § 8123(a); *Id.*; *G.K.*, Docket No. 16-1119 (issued March 16, 2018).

to establish continuing disability or residuals on or after July 18, 2021 causally related to her accepted May 3, 2012 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2022 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: November 15, 2022
Washington, DC

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board