

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

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C.O., Appellant )

and )

DEPARTMENT OF VETERANS AFFAIRS, )  
BROOKLYN VA MEDICAL CENTER, )  
Brooklyn, NY, Employer )

**Docket No. 22-0267**  
**Issued: September 29, 2022**

*Appearances:*

*Paul Kalker, Esq., for the appellant<sup>1</sup>*

*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 December 9, 2021 appellant, through counsel, filed a timely appeal from a November 3, 2021 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>

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<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 November 3, 2021 decision, OWCP received additional evidence. 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 met its burden of proof to terminate appellant's wage-loss compensation benefits and medical benefits, effective January 7, 2021, as she no longer had disability or residuals causally related to her accepted employment condition; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after January 7, 2021.

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> 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 October 29, 2015 appellant, then a 56-year-old nurse, filed an occupational disease claim (Form CA-2) alleging that she sustained bilateral vocal cord paresis due to factors of her federal employment including exposure to airborne irritants in the ground floor emergency department.<sup>5</sup> She noted that she first became aware of her condition and realized its relation to her federal employment on May 22, 2015. Appellant stopped work on May 22, 2015. On April 28, 2016 OWCP accepted the claim for vocal cord paralysis. OWCP paid appellant wage-loss compensation.

In reports dated November 16, 2015 through August 2, 2016, Dr. John Meyer, an attending physician Board-certified in occupational medicine, public health, and general preventative medicine, opined that appellant's occupational exposure in the emergency department to germicides, biocides, alcohol, quaternary ammonium compounds, and bleach caused the diagnosed vocal cord paralysis. Dr. Meyer noted that medical literature documented that nurses were a "group with a high incidence or predisposition for VCD [vocal cord dysfunction] because of" occupational exposures to the specified substances. He noted that appellant's physicians had misinterpreted her initial presenting symptoms as bronchitis and that OWCP should ignore the diagnosis.

On June 18, 2016 OWCP received an April 1, 2016 operative note by Dr. Radu Lucian Sulica, a Board-certified otolaryngologist, who performed a left medialization laryngoplasty to address left vocal cord paresis.

On October 15, 2016 OWCP obtained a second opinion report from Dr. Gerald E. Pflum, a Board-certified otolaryngologist, who reviewed the medical record and a statement of accepted facts (SOAF). Dr. Pflum diagnosed mild erythema of the left vocal cord with "left vocal cord paralysis probably due to a viral infection when she initially presented with bronchitis." He found that appellant's vocal cord paralysis was not caused by any toxic exposure and that appellant had no current disability.

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<sup>4</sup> Docket No. 18-0980 (issued January 2, 2019).

<sup>5</sup> On October 6, 2015 Dr. Radu Lucian Sulica, an attending Board-certified otolaryngologist, performed a stroboscopy, which demonstrated left vocal fold paresis.

In a report dated January 3, 2017, Dr. Meyer diagnosed vocal cord palsy and paresis, symptomatic dyspnea, and occupational exposure to air contaminants. He noted that there were “numerous reports in the medical literature of vocal cord dysfunction in nurses exposed to inhalation of irritating agents,” often misdiagnosed as bronchitis or asthma. Dr. Meyer found that appellant remained totally disabled from work.

On May 15, 2017 OWCP received an August 20, 2015 report by Dr. Shawn C. Ciecko, Board-certified in otolaryngology and head and neck surgery, who attributed appellant’s dyspnea and dysphonia to spasmodic dysphonia as her symptoms were relieved by a prescription muscle relaxant medication. Dr. Ciecko commented that appellant also had signs of laryngopharyngeal reflux.

On May 15, 2017 OWCP also received August 28, 2015 and September 20, 2016 reports by Dr. Farhad Reza Chowdhury, an osteopath Board-certified in otolaryngology, who diagnosed bilateral vocal cord paresis and other voice and resonance disorder.

OWCP found a conflict of medical opinion between Dr. Meyer, for appellant, and Dr. Pflum, for the government. To resolve the conflict, it appointed Dr. Henry de Blasi, a Board-certified otolaryngologist, as an impartial medical examiner (IME) in the case. The SOAF provided for his review specified that OWCP had accepted vocal cord paralysis as occupationally related.

Dr. de Blasi submitted a report dated May 1, 2017 in which he diagnosed idiopathic vocal paralysis unrelated to toxic irritants or inhalants at the workplace. He explained that they can cause irritation to the airway including cough, dyspnea, and hoarseness, but he had never heard of vocal cord paralysis. Dr. de Blasi therefore did not believe that there was a relationship between the condition and employment-related exposure.

In duty status reports (Form CA-17) dated November 6, 2017 and April 9, 2018, Dr. Meyer found appellant totally disabled from work due to vocal cord paralysis with shortness of breath and hoarseness. He opined that she could not tolerate exposure to chemicals, solvents, fumes, dust, temperature extremes, and high humidity.

By notice of proposed termination dated February 14, 2018 and finalized March 19, 2018, OWCP terminated appellant’s wage-loss compensation and medical benefits, effective March 20, 2018, as the accepted vocal cord paralysis had ceased without residuals. It accorded Dr. de Blasi the special weight of the medical evidence. Appellant, through counsel, subsequently appealed to the Board.<sup>6</sup>

By decision dated January 2, 2019, the Board reversed OWCP’s February 14, 2018 termination decision.<sup>7</sup> The Board found that OWCP failed to meet its burden of proof as Dr. de Blasi’s report did not conform to the SOAF as he opined the accepted condition had never

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<sup>6</sup> Appellant retired from the employing establishment, effective August 15, 2018.

<sup>7</sup> *Supra* note 4.

occurred. The Board noted that OWCP had, in effect, attempted to rescind the acceptance of claim but had not given appellant appropriate notice.

On March 15, 2019 OWCP referred appellant, the medical record, an updated SOAF, and a series of questions to Dr. Chong S. Kim, a Board-certified otolaryngologist, for a second opinion on the nature and extent of the accepted condition and any continuing effect on appellant's work capacity. In an April 9, 2019 report, Dr. Chong reviewed the SOAF and medical record. He observed a "low level of raspiness" when appellant spoke softly that disappeared when she spoke more forcefully. Dr. Chong performed fiber optic nasopharyngeal lower endoscopy, which demonstrated normal movement and appearance of the vocal cords, moderate redness and swelling of the arytenoid and interarytenoid area, and fullness of the subglottis on the left from the placement of the medialization prosthesis. He opined that the employment-related vocal cord paralysis and voice dysfunction had completely resolved with "no significant degree of disability with her breathing or voice function that would hinder" her from performing her date-of-injury position. Dr. Chong characterized appellant's breathlessness and hoarseness both as subjective symptoms and a reflection of laryngeal pathology related, to a reasonable medical probability, to nonoccupational laryngopharyngeal reflux disease as also observed by Dr. Ciecko.

On June 11, 2019 OWCP requested that Dr. Chong provide a supplemental report with additional medical evidence on the condition of laryngopharyngeal reflux disease and any causal relationship to work factors.

In a June 14, 2019 addendum report, Dr. Chong explained that contributing factors for laryngopharyngeal reflux disease included "heredity, obesity, obstructive sleep apnea, hiatal hernia, pregnancy, smoking, alcohol abuse, diabetes mellitus, scleroderma, and delayed gastric emptying." He noted that he had not found "medical literature to support work-related factors contribute to laryngopharyngeal reflux disease."

OWCP found a conflict of medical opinion between Dr. Meyer, for appellant, and Dr. Chong, for the government, regarding whether the accepted conditions remained active and disabling. It referred appellant, an updated SOAF, the medical record, and a series of questions to Dr. Stefan P. Kieserman, a Board-certified otolaryngologist, to resolve the conflict of opinion as the IME. The SOAF noted that OWCP had accepted vocal cord paralysis as an employment-related condition. OWCP requested that Dr. Kieserman address whether appellant had disabling residuals of the accepted condition, and if she had any concurrent nonoccupational disability.

In a March 10, 2020 report, Dr. Kieserman noted his review of the medical record and SOAF. On clinical examination including flexible fiber optic examination, he observed a left thyroplasty scar, normal pharynx, some reflux changes of the larynx, and normal vocal fold motion. Dr. Kieserman opined that it was not possible to "ascertain with clarity that the vocal fold paresis of [appellant] was related to environmental work exposure." He noted that he did not believe that a diagnosis of vocal fold paralysis was applicable to appellant's case as Dr. Chowdhury found vocal cord paresis on the right and Dr. Sulica on the left. Dr. Kieserman commented that workplace chemical exposures could have changed the quality of secretions and lubrication of the larynx, resulting in dysphonia. He also noted that laryngeal pharyngeal reflux could have contributed to appellant's dysphonia, as indicated by Dr. Kim. Dr. Kieserman concluded that appellant had sustained vocal cord paresis but not vocal cord paralysis, and that she had no current disability. He returned her to full-duty work with no restrictions.

On November 5, 2020 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits based on Dr. Kieserman's opinion that the May 22, 2015 accepted condition had ceased without disability or residuals. It afforded her 30 days to submit additional evidence of argument challenging the proposed termination.

In a letter dated November 23, 2020, appellant, through counsel, contended that the proposed termination was based upon an erroneous interpretation of the medical record.

By decision dated January 7, 2021, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that date. It found that Dr. Kieserman's report constituted the special weight of the medical opinion evidence.

On October 26, 2021 appellant, through counsel, requested reconsideration. He contended that Dr. Kieserman had not provided objective evidence to support his conclusion that appellant had recovered full vocal cord function, or that her laryngopharyngeal reflux was not occupationally related. Counsel submitted a September 14, 2021 report by Dr. Richard Fazio, Board-certified in gastroenterology and internal medicine, who had treated appellant for gastroenterology associated conditions beginning in 2008. He had diagnosed appellant with gastro esophageal reflux disease (GERD), esophagitis, and mild gastritis after an upper endoscopy in 2013. Dr. Fazio asserted that appellant's conditions had worsened during years of occupational exposure to mold and asbestos. She had been diagnosed subsequently with dysphonia and vocal cord damage. Dr. Fazio explained that years of workplace exposures caused permanent damage to her vocal cords and affected her gastroenterology issues. He opined that appellant's vocal cord damage, chronic GERD, and chronic gastritis were a direct result of workplace exposures, and that these conditions remained active and disabling.

By decision dated November 3, 2021, OWCP denied modification of the January 7, 2021 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 compensation benefits.<sup>8</sup> It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>9</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>10</sup>

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<sup>8</sup> *D.C.*, Docket No. 21-0780 (issued December 22, 2021); *R.R.*, Docket No. 20-1653 (issued May 17, 2021); *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).

<sup>9</sup> *J.M.*, Docket No. 21-0071 (issued August 27, 2021); *T.S.*, Docket No. 19-0476 (issued September 24, 2020); *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).

<sup>10</sup> *D.C.*, *supra* note 8; *J.O.*, Docket No. 20-0519 (issued November 30, 2020); *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

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

The Federal (FECA) Procedure Manual<sup>13</sup> provides that the findings of an OWCP referral physician or IME must be based on the factual underpinnings of the claim, as set forth in the SOAF. When OWCP's referral physician or IME does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is diminished or negated altogether.<sup>14</sup>

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

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 7, 2021.

In his March 10, 2020 report, Dr. Kieserman, serving as the IME, opined that appellant had not sustained vocal cord paralysis due to the accepted occupational exposures. He asserted that the medical record contained no reliable clinical evidence of vocal cord paralysis at any time. Additionally, Dr. Kieserman indicated that reflux disease could have contributed to appellant's vocal cord paresis but did not provide the requested medical rationale explaining whether the diagnosed reflux was work related.

The SOAF provided to Dr. Kieserman specified that OWCP had accepted vocal cord paralysis caused by occupational exposures. OWCP instructed him to utilize the SOAF as the framework for his opinion. Instead, Dr. Kieserman concluded that appellant had no credible evidence of vocal cord paralysis caused by the accepted work factors. As his opinion was not based upon the SOAF, it is therefore of no probative value.<sup>15</sup>

The Board notes that OWCP did not indicate whether it was attempting to rescind acceptance of appellant's vocal cord paralysis based on Dr. Kieserman's impartial report. OWCP did not notify appellant, or counsel, that it was contemplating rescission or actually rescinding acceptance of the vocal cord paralysis in its termination decision. OWCP must inform a claimant

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<sup>11</sup> *M.R.*, Docket No. 20-0993 (issued August 27, 2021); *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>12</sup> *A.A.*, Docket No. 21-0222 (issued November 17, 2021); *M.E.*, Docket No. 20-0877 (issued August 17, 2021); *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

<sup>13</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.1 (September 2009); see *K.M.*, Docket No. 21-1351 (issued April 28, 2022); *G.Y.*, Docket No. 19-1683 (issued March 16, 2021).

<sup>14</sup> *Id.* at Chapter 3.600.3(10) (October 1990); *N.W.*, Docket No. 16-1890 (issued June 5, 2017); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

<sup>15</sup> *Id.*; see *N.S.*, Docket No. 20-1495 (issued March 30, 2022); *C.L.*, Docket No. 21-0451 (issued February 11, 2022); *F.M.*, Docket No. 20-1274 (issued September 28, 2021).

correctly and accurately of the grounds on which a rejection rests so as to afford the claimant an opportunity to meet, if possible, any defect appearing therein.<sup>16</sup>

As the report from Dr. Kieserman is of no probative value, the Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 7, 2021.

**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 7, 2021.<sup>17</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 3, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: September 29, 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

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<sup>16</sup> *Supra* note 4; V.A., Docket No. 14-0722 (issued May 8, 2014).

<sup>17</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.