

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

V.L., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer

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**Docket No. 22-0336
Issued: September 28, 2022**

Appearances:

Thomas S. Harkins, 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 January 5, 2022 appellant, through counsel, filed a timely appeal from an August 27, 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.³

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.*

³ The Board notes that, following the August 27, 2021 decision, appellant submitted additional evidence to OWCP. 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 has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 11, 2020, as she no longer had disability or residuals causally related to her February 3, 2004 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after June 11, 2020 causally related to her accepted February 3, 2004 employment injury.

FACTUAL HISTORY

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

On March 5, 2004 appellant, then a 48-year-old customer service supervisor, filed a traumatic injury claim (Form CA-1) alleging that on February 3, 2004 she suffered a cervical spine collapse while she was pushing large metal containers containing parcels while in the performance of duty. At the time of her alleged February 3, 2004 work injury, she was working on a full-time basis for the employing establishment. Appellant stopped work on February 27, 2004. OWCP assigned the claim OWCP File No. xxxxxx689 and accepted it for herniated cervical disc at C6-7. It paid appellant wage-loss compensation on the supplemental rolls beginning August 16, 2004.

On April 4, 2005 appellant returned to light-duty work as a modified customer service supervisor for the employing establishment, working four hours per day for a total of 20 hours per week.⁵

By decision dated November 16, 2006, OWCP reduced appellant's compensation based on its determination that her actual earnings in this position fairly and reasonably represented her wage-earning capacity.

Appellant subsequently requested reconsideration. By decisions dated May 3 and November 13, 2007, August 7 and November 21, 2008, July 2, 2009, January 15 and August 9, 2010, and November 1, 2011, OWCP denied modification of its November 16, 2006 loss of wage-earning capacity determination.

Appellant, through counsel, appealed to the Board. By order dated February 25, 2013, the Board reversed the November 1, 2011 merit decision, finding that OWCP abused its discretion in determining appellant's wage-earning capacity based on a part-time position.

⁴ *Order Reversing Case*, Docket No. 12-834 (issued February 25, 2013).

⁵ By decision dated September 6, 2005, OWCP reduced appellant's compensation based on its determination that her actual earnings in this position fairly and reasonably represented her wage-earning capacity. Appellant stopped work on September 29 and October 13, 2005 and filed a notice of recurrence (Form CA-2a). By decision dated November 3, 2005, OWCP accepted that she sustained a recurrence of disability on September 29 and October 13, 2005. On October 14, 2005 appellant returned to light-duty work as a modified customer service supervisor for the employing establishment, working 4 hours per day for a total of 20 hours per week. She stopped work on June 8, 2006 and filed a recurrence of disability claim. By decision dated October 23, 2006, OWCP denied the claim for recurrence of disability.

On October 31, 2017 Dr. John M. Olsewski, a Board-certified orthopedist, treated appellant for severe cervical spinal stenosis. He indicated that she was totally disabled because of the combination of cervical spondylosis, disc herniation, stenosis, risk of pulmonary embolism, and the necessity for chronic anti-coagulation. Surgical intervention and interventional pain management was precluded due to the necessity for anti-coagulation. Dr. Olsewski advised that appellant reached maximum medical improvement (MMI) and was totally disabled from work.

On March 6, 2018 Dr. Sireen Gopal, a Board-certified physiatrist, treated appellant for pain in the upper right neck that began after a work accident on February 2, 2004 when she was pushing and pulling heavy metal containers. He diagnosed cervical spondylosis with radiculopathy, cervicgia, cervical radiculopathy, myalgia, and abnormalities of the gait and mobility. In a form report of even date, Dr. Gopal noted an onset of the work-related injury on February 3, 2004 provided diagnoses and opined that appellant was totally disabled from work.

On December 20, 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. Debra Ann Pollack, a Board-certified neurologist, for a second opinion evaluation regarding the status of her employment-related conditions. In a January 16, 2019 report, Dr. Pollack reviewed appellant's history of injury and noted physical examination findings of normal sensation to light touch throughout the face, arms, and legs, limited range of motion testing for the cervical spine, pain with all movements, guarding and defensive posturing, limited range of motion for the thoracolumbar spine, negative percussion tenderness, and muscle spasm. She diagnosed status post work-related incident, cervical sprain and strain, resolved, and chronic pain. Dr. Pollack noted that appellant reached MMI and her examination was notable for symptom exaggeration. She opined that there was no disability secondary to the injuries sustained in the work-related incident of February 3, 2004 and that appellant could return to work without restrictions and required no further treatment. Dr. Pollack completed a work capacity evaluation (Form OWCP-5c), which indicated that appellant could return to her regular job with restrictions.

In a February 21, 2019 report, Dr. Olsewski reported treating appellant for severe cervical spinal stenosis. He again indicated that she was totally disabled from all work because of the combination of cervical spondylosis, disc herniation, stenosis, and her risk of pulmonary embolism.

On March 14, 2019 OWCP requested a supplemental report from Dr. Pollack asking that she clarify whether the restrictions provided on the Form OWCP-5c were due to the employment injury.

In an undated Form OWCP-5c, Dr. Pollack noted that appellant could return to her regular job without restrictions.

OWCP found a conflict in the medical opinion evidence between Dr. Olsewski, appellant's treating physician, and Dr. Pollack, OWCP's second opinion examiner, with regard to the status of appellant's accepted condition and her ability to return to work. As such, on November 12, 2019 it referred appellant to Dr. Ramesh Gidumal, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict of medical evidence. OWCP prepared a SOAF dated October 4, 2019 noting that appellant's claim was accepted for herniated cervical disc at C6-7.

In a December 4, 2019 report, Dr. Gidumal noted his review of the SOAF, as well as the medical evidence of record. Upon examination of appellant's neck, he observed active range of motion was limited by subjective complaints of pain, mild tenderness over the midline and bilateral paraspinal muscles, no muscle spasm noted, upper extremity strength was intact, and upper extremity sensation to light touch was grossly intact. Dr. Gidumal noted that a review of the medical records and x-rays showed that she had preexisting degenerative arthritis of the cervical spine. A magnetic resonance imaging (MRI) scan revealed multiple level disc bulges and narrowing of the right neural foramen at C5-6 and C6-7 and he opined that these findings were consistent with age-related degenerative changes. Dr. Gidumal found no evidence of an acute traumatic injury resulting from a single event. He noted that at most there may have been a temporary aggravation of appellant's underlying cervical spine condition. Dr. Gidumal opined that there was no direct causal relationship, no aggravation, acceleration, or precipitation, rather her medical condition was a nature age-related progression of her underlying degenerative disease. He opined that appellant suffered from degenerative spondylosis of her cervical spine related to years of use and that there was no relationship between her degenerative condition and her work-related injury. Dr. Gidumal opined within a reasonable degree of medical certainty that there was no evidence of any permanent aggravation or significant exacerbation of this condition as a result of the events of February 3, 2004. He found that appellant could perform her regular duties and that any limitations were related to age-related degenerative spondylosis of the cervical spine. Dr. Gidumal advised that she reached MMI.

On February 20, 2020 Dr. Olsewski reiterated his findings in his October 31, 2017 and February 21, 2019 reports.

On April 23, 2020 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because her February 3, 2004 work-related injury had resolved. It found that the special weight of medical evidence rested with the December 4, 2019 medical report of Dr. Gidumal, OWCP's impartial medical examiner (IME), who found that she no longer had any residuals or disability causally related to her accepted February 3, 2004 employment injury. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

OWCP received additional evidence. On March 26, 2020 Dr. Gopal diagnosed other spondylosis with radiculopathy cervical region, cervicgia, radiculopathy cervical region, myalgia, and abnormalities of the gait and mobility. In a Form OWCP-5c dated May 8, 2020, he noted that appellant was totally disabled from work.

In response to the proposed termination, on May 21, 2020 appellant, through counsel, asserted that the proposed termination of compensation benefits was contrary to the medical evidence of record. He referenced Dr. Gopal's March 26, 2020 report, which supported that she continued to have employment-related disability.

By decision dated June 10, 2020, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective June 11, 2020. It found that the special weight of the medical evidence rested with Dr. Gidumal, the IME, who had determined in his December 4, 2019 report that she did not have residuals or disability due to a work-related cervical injury.

OWCP subsequently received additional evidence. In a July 9, 2020 report, Dr. Olsewski reported treating appellant since July 7, 2004 for work-related injuries sustained on February 3, 2004. He noted that her condition had worsened and deteriorated since the date of initial injury on February 3, 2004. Dr. Olsewski noted that appellant continued to have balance issues and gait ataxia secondary to impingement on the spinal cord. He indicated that the precipitating event for her symptoms and physical findings was the work injury on February 3, 2004, noting that there was no documented prior history of neck or arm symptoms. Dr. Olsewski advised that appellant was totally disabled from any gainful employment.

On June 4, 2021 appellant, through counsel, requested reconsideration.

By decision dated August 27, 2021, OWCP denied modification of the June 11, 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 compensation benefits.⁶ It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁹ 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.¹⁰

Section 8123(a) of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or IME) who shall make an examination.¹¹ This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹² When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an IME

⁶ *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).

⁷ *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).

⁸ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁹ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁰ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹¹ 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

¹² 20 C.F.R. § 10.321.

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.¹³

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 June 11, 2020.

OWCP accepted that appellant sustained a herniated cervical disc at C6-7. It found a conflict in medical opinion between Dr. Olsewski, appellant's treating physician, and Dr. Pollack, OWCP's second opinion examiner, regarding whether appellant's accepted conditions resolved and if she had continuing disability as a result of the accepted employment injury. OWCP properly referred appellant, together with a SOAF, to Dr. Gidumal for an impartial medical examination, pursuant to 5 U.S.C. § 8123(a). The SOAF provided to him specifically noted that her claim was accepted for herniated cervical disc at C6-7.

In a report dated December 4, 2019, Dr. Gidumal, in addressing whether the accepted condition of herniated cervical disc at C6-7 had resolved, he stated that the MRI scan revealed multiple level disc bulges and narrowing of the right neural foramen at C5-6 and C6-7, which were age-related degenerative changes and he noted no evidence of an acute traumatic injury resulting from a single event. He opined that, at most, there may have been a temporary aggravation of appellant's underlying cervical spine condition. Dr. Gidumal noted that she suffered from degenerative spondylosis of her cervical spine related to years of use and that there was no relationship between her degenerative condition and her work-related injury. He opined, within a reasonable degree of medical certainty, that there was no evidence of any permanent aggravation of appellant's condition as a result of the events of February 3, 2004. Although Dr. Gidumal stated that he would follow the framework of the SOAF, he nonetheless reached conclusions that were contrary to the findings in the SOAF.

It is OWCP's responsibility to provide a complete and proper frame of reference for a physician by preparing a SOAF. OWCP's procedures dictate that when an OWCP medical adviser, second opinion specialist, or IME 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.¹⁴ As Dr. Gidumal did not use the SOAF as the framework in forming his opinion, his opinion is of diminished probative value.¹⁵ He failed to rely upon a complete and accurate SOAF and, thus, his opinion is of diminished probative value and is not entitled to the special weight accorded to an IME.¹⁶

¹³ *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁴ *Id.*; *see also N.W.*, Docket No. 16-1890 (issued June 5, 2017).

¹⁵ *Id.*; *see also Y.D.*, Docket No. 17-0461 (issued July 11, 2017).

¹⁶ *See S.T.*, Docket No. 18-1144 (issued August 9, 2019) (medical opinions based on an incomplete or inaccurate history are of limited probative value).

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 11, 2020.

ORDER

IT IS HEREBY ORDERED THAT the August 27, 2021 decision of the Office of Workers' Compensation Programs is reversed.¹⁷

Issued: September 28, 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

¹⁷ In light of the Board's disposition of Issue one, Issue two is rendered moot.