

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

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J.H., Appellant)

and)

SOCIAL SECURITY ADMINISTRATION,)
OFFICE OF HEARINGS AND APPEALS,)
Falls Church, VA, Employer)
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Docket No. 23-0701
Issued: December 28, 2023

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

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 7, 2023 appellant filed a timely appeal from a December 13, 2022 merit decision and a February 1, 2023 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over 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 December 13, 2022, as she no longer had disability or residuals due to her accepted November 12, 1998 employment injury; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed, pursuant to 5 U.S.C. § 8124(b).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On November 20, 1998 appellant, then a 43-year-old copier and duplicating equipment operator, filed a traumatic injury claim (Form CA-1) alleging that on November 12, 1998 she sustained a right arm injury when she walked her arm into a security bracket that was left open on a file cabinet while in the performance of duty. OWCP accepted the claim for contusion of right and right lateral epicondylitis. Appellant stopped work. It paid her wage-loss compensation on the periodic rolls.

In a May 7, 2021 report, Dr. Emmanuel P. Brown, a Board-certified internist, requested expansion of the acceptance of appellant's claim to include the additional conditions of right ulnar nerve entrapment, right medial epicondylitis, right shoulder impingement, depression, dry mouth disease, and alopecia areata causally related to her November 12, 1998 employment injury.

On August 5, 2022 OWCP referred appellant, along with the case record, a statement of accepted facts (SOAF), and a series of questions to Dr. John C. Barry, a Board-certified orthopedic surgeon, for a second opinion evaluation and determination regarding whether she had any disability or residuals causally related to the November 12, 1998 employment injury.

In his September 8, 2022 report, Dr. Barry documented appellant's physical examination findings and discussed her history of injury. On examination of the right elbow he noted 0 to 130 degrees range of motion, tenderness over the lateral epicondyle, and no lateral epicondyle pain with resisted extension of the wrist and fingers. Dr. Barry reported that contusion of the right elbow had resolved, and appellant had subjective complaints of tenderness at the lateral epicondyle, but without pain produced with resisted extension of the wrist and fingers. He opined that appellant had symptoms consistent with mild residual lateral epicondylitis at the elbow. Dr. Barry reported that she had reached maximum medical improvement on September 8, 2022, as little recovery should be expected. He opined that appellant's prognosis was poor, but no further treatment was indicated, noting that she has had symptoms for 24 years and only mild findings consistent with persistent lateral epicondylitis of the elbow. Dr. Barry noted that electrodiagnostic studies revealed findings consistent with cubital tunnel syndrome, which was not related to the November 12, 1998 employment injury. He concluded that appellant could return to her previous line of work without restrictions due to minimal findings on examination.

On September 13, 2022 OWCP requested that Dr. Barry provide a supplemental report addressing whether the acceptance of appellant's claim should be expanded to include the additional conditions of right ulnar nerve entrapment, right medial epicondylitis, right shoulder impingement, depression, dry mouth disease, and alopecia areata based on the May 7, 2021 report of Dr. Brown.

In an October 15, 2022 supplemental report, Dr. Barry opined that the additional diagnoses of ulnar nerve entrapment, medial epicondylitis right, right shoulder impingement, depression, dry mouth disease, and alopecia areata were in no way connected to appellant's November 12, 1998 employment injury.

On November 8, 2022 OWCP notified appellant of its proposed termination of her wage-loss compensation and medical benefits because she no longer had any disability or residuals

causally related to her November 12, 1998 employment injury. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

On December 4, 2022 appellant submitted an August 3, 2022 magnetic resonance imaging (MRI) scan of the right elbow, which established small elbow joint effusion and abnormal signal in the proximal portion of the common extensor tendon, consistent with tendinosis and lateral epicondylitis. An MRI scan of the right shoulder also dated August 3, 2022, established moderate degenerative arthritis of the acromioclavicular (AC) joint, mild degenerative arthritis of the glenohumeral joint, small right shoulder joint effusion and a full thickness tear of the supraspinatus tendon. She also submitted an August 15, 2022 electromyography and nerve conduction velocity (EMG/NCV) study of the right upper extremity, which established mild right ulnar neuropathy and mild left carpal tunnel syndrome.

In a December 6, 2022 narrative statement, appellant contested the proposed termination arguing that Dr. Barry failed to evaluate the relevant diagnostic studies in his report and providing contradictory findings. She further asserted that she remained disabled as a result of her work-related injury as documented in the medical evidence of record.

By decision dated December 13, 2022, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that same date. It found that the weight of the medical evidence rested with Dr. Barry's September 8, 2022 opinion, which established that appellant's accepted work-related conditions had ceased and she had no further disability or residuals of her accepted November 12, 1998 employment injury.

On January 13, 2023 appellant requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. In support of her claim, she submitted a May 3, 2004 EMG/NCV study of the right upper extremity, as well as the previously submitted August 3, 2022 MRI scan studies.

By decision dated February 1, 2023, OWCP denied appellant's request for an oral hearing as untimely filed, finding that the request was not made within 30 days of the December 13, 2022 decision as it was received on January 13, 2023. It further exercised discretion and determined that the issue in this case could equally well be addressed through a request for reconsideration before OWCP along with the submission of new evidence.

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.² After it has been determined that an employee has a disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to

² *Z.D.*, Docket No. 19-0662 (issued December 5, 2019); *see R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

the employment.³ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁵ 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.⁶

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 December 13, 2022.

In his September 8, 2022 report, Dr. Barry provided an equivocal opinion as to appellant's employment injury. He reported that appellant had symptoms consistent with mild residual lateral epicondylitis at the elbow, her prognosis was poor, and little recovery should be expected. However, Dr. Barry opined that appellant could return to full-duty work without restrictions. The Board notes that Dr. Barry's examination documents findings related to appellant's right lateral epicondylitis, reporting that physical examination revealed tenderness at the lateral epicondyle. Dr. Barry's opinion is equivocal as he reports that her prognosis is poor while also stating that no further treatment is necessary. This discrepancy casts doubt on Dr. Barry's understanding of appellant's employment injuries.⁷ Therefore, the opinion of Dr. Barry is of diminished probative value regarding OWCP's termination of appellant's wage-loss compensation and medical benefits.⁸

The Board therefore finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 13, 2022, as the medical evidence of record is insufficient to establish that she no longer had disability or residuals causally related to her accepted November 12, 1998 employment injury.⁹

³ See *R.P., id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁴ See *P.T.*, Docket No. 21-0328 (issued May 2, 2022); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁵ *Z.D.*, *supra* note 2; *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009). *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁶ *T.C.*, Docket No. 20-1163 (issued July 13, 2021); *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake, id.*

⁷ *S.R.*, Docket No. 19-1229 (issued May 15, 2020).

⁸ *P.E.*, Docket No. 19-0837 (issued October 20, 2020).

⁹ *S.J.*, Docket No. 22-0936 (issued April 27, 2023); *L.B.*, Docket No. 20-0692 (issued November 20, 2020).

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective December 13, 2022.¹⁰

ORDER

IT IS HEREBY ORDERED THAT the December 13, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 28, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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

¹⁰ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.