

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

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<b>C.P., Appellant</b>	)	
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<b>and</b>	)	
	)	
<b>DEPARTMENT OF VETERANS AFFAIRS,</b>	)	<b>Docket No. 21-1120</b>
<b>CORPORAL MICHAEL J. CRESCENZ</b>	)	<b>Issued: January 27, 2023</b>
<b>DEPARTMENT OF VETERANS AFFAIRS</b>	)	
<b>MEDICAL CENTER, Philadelphia, PA,</b>	)	
<b>Employer</b>	)	
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*Appearances:* *Case Submitted on the Record*  
*Michael D. Overman, Esq., for the appellant*<sup>1</sup>  
*Office of Solicitor, for the Director*

**DECISION AND ORDER**

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

**JURISDICTION**

On July 16, 2021 appellant, through counsel, filed a timely appeal from a January 29, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the

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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.

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>

### **ISSUES**

The issues are: (1) whether OWCP met its burden of proof to establish that appellant's employment-related temporary aggravations of cervical disc disorder at the C5-C6 level with radiculopathy; lumbar intervertebral disc disorders with radiculopathy, and other cervical disc degeneration had resolved, effective July 20, 2017; and (2) whether appellant met her burden of proof to establish continuing disability or residuals on or after July 20, 2017 causally related to the accepted employment injury.

### **FACTUAL HISTORY**

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

On August 3, 2016 appellant, then a 47-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that at 3:40 p.m. on July 20, 2016 she slipped and fell in the employing establishment's retail store while in the performance of duty. She alleged injury to her right knee, buttocks, hip, back, hand, wrist, arm, shoulder, and neck. Appellant stopped work on July 21, 2016 and has not returned. At the time of the incident, appellant was working in a light-duty, sedentary position.<sup>4</sup>

In a July 21, 2016 form report, an unidentified provider noted the history of the July 20, 2016 injury and that appellant had a history of chronic pain following a fall at work five years ago for which she had lifting restrictions. The provider noted examination findings and provided an assessment that the July 20, 2016 fall appeared to have exacerbated preexisting chronic pain from a prior fall at work. A copy of appellant's restrictions and recommendations were also provided.

Reports from Dr. Michael D. Cirigliano, a Board-certified internist, dated from July 21, 2016 through December 21, 2017 were received. In an August 1, 2016 report, Dr. Cirigliano noted that appellant fell at work on July 20, 2016 and injured her knees, neck, and hip on the right side.

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that, following the July 29, 2021 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.*

<sup>4</sup> OWCP assigned the present claim OWCP File No. xxxxxx918. Appellant has a prior claim under OWCP File No. xxxxxx868, wherein she alleged that on April 20, 2011 she sustained multiple injuries to her neck, right shoulder, back, and right leg. Under OWCP File No. xxxxxx502, OWCP accepted that on May 10, 2011 appellant sustained cervical sprain/strain and displacement of lumbar intervertebral disc without myelopathy/temporary aggravation of herniated disc at L4-L5 when she fell while walking out from the parking lot door. Appellant's claims have not been administratively combined by OWCP.

He indicated that x-ray studies showed significant cervical spine pathology and a small effusion of the right knee. Dr. Cirigliano opined that appellant was incapacitated. The additional reports from Dr. Cirigliano described various findings on diagnostic studies, stated that she was under medical care and was incapacitated from work. In his December 21, 2017 letter, Dr. Cirigliano repeated prior diagnostic findings. He indicated that appellant's symptoms were temporally related to her fall. Dr. Cirigliano also opined that appellant's injury had led to significant disability in her personal and professional life.

In an August 19, 2016 medical report, Dr. Adrian Papescu, a Board-certified internist, noted appellant's medical history and that she reported neck and low back pain due to her July 20, 2016 fall. He reviewed diagnostic tests and reported an inconsistent medical examination. Diagnoses provided were degenerative joint disease of the cervical spine, neck pain, and a herniated lumbar disc and annular tear.

Physical therapy reports commencing September 9, 2016 and operative notes for bilateral sacroiliac joint injections commencing November 10, 2016 were also received.

By decision dated September 14, 2016, OWCP denied appellant's claim, finding that the evidence of record was insufficient to establish that she was injured in the performance of duty.

On October 12, 2016 appellant requested a review of the written record before a representative of OWCP's Branch of Hearings and Review. By decision dated January 13, 2017, the hearing representative affirmed the September 14, 2016 decision.

On January 9, 2018 appellant, through counsel, requested reconsideration.

By decision dated April 9, 2018, OWCP denied modification.

On September 19, 2018 appellant appealed to the Board. By decision dated July 5, 2019, the Board set aside OWCP's April 9, 2018 decision, which found that appellant was not injured in the performance of duty. The Board found that appellant had met her burden of proof to establish the factual portion of her claim, and remanded the case for evaluation of the medical evidence to determine causal relationship between a medical condition and the accepted employment incident.<sup>5</sup>

Following the Board's decision, OWCP referred appellant along with an August 16, 2019 statement of accepted facts (SOAF) to Dr. Noubar Didizian, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine whether appellant sustained an injury secondary to the July 20, 2016 incident and, if so, whether she was partially or temporarily totally disabled from work as a result. The SOAF did not list appellant's prior claims.<sup>6</sup>

In a September 10, 2019 report, Dr. Didizian reviewed the SOAF and the medical record and reported examination findings. He related that appellant's past medical history was significant for prior chronic cervical and lumbar pathology five years before the July 20, 2016 work incident and that her last medical treatment involving her neck and back, which included injections,

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<sup>5</sup> Docket No. 18-1741 (issued July 5, 2019).

<sup>6</sup> *See id.*

ablations, and chiropractic treatment, occurred one year before the July 20, 2016 incident. Dr. Didizian also noted that appellant had been off work since July 20, 2016. He found that neurologically appellant's cervical and lumbar spine had no cervical and lumbar nerve root involvement. For the right knee, Dr. Didizian found that she had fascia lata syndrome, which can give symptoms in the knee and the hip at the same time, and indicated that medical treatment involved stretching the fascia lata. He found no pathology for the wrist. Dr. Didizian also found no sensory element involvement in the upper extremities related to either extremity or the neck. Based on the reports from Dr. Cirigliano, he opined that appellant had a temporary exacerbation or aggravation of her chronic neck and back problems, which he expected to have achieved baseline level one year following the July 20, 2016 incident based on the absence of any neurologic findings. Dr. Didizian further opined that appellant's ongoing complaints and current symptomatology were based on her preexisting degenerative disease.

In separate decisions dated September 27, 2019, OWCP vacated its January 13, 2017 decision, and accepted the claim for temporary aggravation of cervical disc disorder at the C5-C6 level with radiculopathy -- resolved; temporary aggravation of lumbar intervertebral disc disorders with radiculopathy -- resolved; and temporary aggravation of other cervical disc degeneration, unspecified cervical region -- resolved. The weight of the medical opinion evidence was afforded to Dr. Didizian's second opinion that the above aggravations/exacerbations were temporary in nature and had resolved one year from the date of injury, July 20, 2017.

On October 10, 2019 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on February 14, 2020.

OWCP subsequently received reports from Dr. Steven J. Valentino, an osteopathic physician Board-certified in orthopedic surgery. In an October 25, 2018 progress report, Dr. Valentino noted that appellant was on light duty prior to the July 2016 injury due to neck and back pain from prior injuries. He presented examination findings and provided an assessment of cervical pain, cervical radiculopathy, sprain of ligaments of cervical spine, subsequent encounter, and sprain of ligaments of lumbar spine, subsequent encounter. In a November 28, 2018 progress report, Dr. Valentino noted the history of injury, and that he had evaluated appellant on October 25, 2018. He provided his review of appellant's medical records, including diagnostic studies. Dr. Valentino diagnosed aggravation of cervical and lumbar degenerative disc disease with right cervical radiculopathy, which he opined were causally related to the accepted July 20, 2016 work incident. In his March 3, 2020 progress report, he described an essentially normal physical examination with a limited cervical range of motion. Dr. Valentino noted that appellant reported radiating pain and weakness into the right arm, but neurological findings on examination were normal. He diagnosed: sprain of ligaments of lumbar spine; sprain of ligaments of cervical spine; cervical radiculopathy and cervical pain.

On March 4, 2020 OWCP received additional reports from Dr. Didizian. In a February 21, 2020 report, Dr. Didizian opined, based on his review of the records commencing from 2016, that appellant's diagnosis was aggravation and exacerbation of the preexisting low back chronic pain as a result of the July 20, 2016 incident. He further opined that appellant's exacerbation and aggravation had resolved, that she had fully recovered from the effect of the July 20, 2016 injury, that she had reached maximum improvement, and that she did not require any further ongoing

medical care and/or physical therapy. In a March 4, 2020 work capacity evaluation (Form OWCP-5c), Dr. Didizian opined that appellant was able to perform her usual job without restriction.

By decision dated April 30, 2020, OWCP's hearing representative affirmed OWCP's September 27, 2019 decision, finding that the medical evidence of record was insufficient to establish continuing disability or residuals due to the accepted July 20, 2016 injury.

On November 24, 2020 appellant, through counsel, requested reconsideration.

In a November 11, 2020 report, Dr. Valentino noted that appellant was on light duty secondary to previous complaints of low back pain and neck pain from a prior work injury. He noted the history of injury of the July 20, 2016 work incident, and provided a summary of appellant's medical treatment, including findings of diagnostic reports. Dr. Valentino stated that appellant's diagnoses were an aggravation of cervical and lumbar degenerative disc disease with right cervical radiculopathy, and effusion of the right knee, which he opined was causally related to the July 20, 2016 work injury based on the mechanism of injury, ongoing symptomatology, review of diagnostic studies and medical records. He noted that she continued to be symptomatic from the July 20, 2016 injuries, and has not made a full recovery. Dr. Valentino further opined that appellant was unable to participate in any type of work given her ongoing symptoms and need for medication.

By decision dated January 29, 2021, OWCP denied modification of its April 30, 2020 decision.

### **LEGAL PRECEDENT**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of an employee's compensation benefits.<sup>7</sup> It may not terminate compensation without establishing that the disability ceased, or that it was no longer related to the employment injury.<sup>8</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>9</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.<sup>10</sup> To terminate authorization for medical treatment,

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<sup>7</sup> *A.M.*, Docket No. 18-1243 (issued October 7, 2019); *Gewin C. Hawkins*, 52 ECAB 242, 243 (2001); *Alice J. Tysinger*, 51 ECAB 638, 645 (2000).

<sup>8</sup> *S.P.*, Docket No. 19-0196 (issued June 24, 2020); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>9</sup> *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>10</sup> *S.P.*, *supra* note 8; *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.<sup>11</sup>

Where OWCP has accepted a resolved aggravation of a preexisting condition, the date by which the condition resolved must be established by probative medical evidence.<sup>12</sup>

### ANALYSIS

The Board finds that OWCP failed to meet its burden of proof to establish that appellant's employment-related temporary aggravations of cervical disc disorder at the C5-C6 level with radiculopathy; lumbar intervertebral disc disorders with radiculopathy, and other cervical disc degeneration had resolved, effective July 20, 2017.

In his September 10, 2019 report, Dr. Didizian noted his review of the SOAF and the medical record, which was significant for prior chronic cervical and lumbar pathology, and related appellant's physical examination findings. He opined that appellant had experienced a temporary exacerbation or aggravation of her prior chronic neck and back problems, which he expected to have achieved baseline level one year following the July 20, 2016 incident based on the absence of any neurologic findings. Dr. Didizian further opined that appellant's ongoing complaints and current symptomatology were based on her preexisting degenerative disease. In his subsequent February 21, 2020 report, he reiterated his opinion that the exacerbation and aggravation had resolved, and appellant had fully recovered from the effect of the July 20, 2016 incident and did not require any further ongoing medical care and/or physical therapy. Dr. Didizian also opined, in a March 4, 2020 Form OWCP-5c, that appellant was capable of performing her usual job without restrictions.

Dr. Didizian's opinion that he expected appellant to have achieved baseline level one year following the July 20, 2016 incident based on the absence of any neurologic findings is conclusory in nature. It does not contain sufficient medical reasoning to establish that appellant's temporary aggravation of the accepted conditions had resolved as of July 20, 2017,<sup>13</sup> and that she was no longer disabled from work due to her accepted July 20, 2016 employment injury.<sup>14</sup>

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<sup>11</sup> *D.G.*, *supra* note 9; *L.S.*, Docket No. 19-0959 (issued September 24, 2019); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

<sup>12</sup> *J.C.*, Docket No. 13-1200 (issued November 1, 2013); *F.M.*, Docket No. 12-590 (issued September 24, 2012); *J.D.*, Docket No. 11-131 (issued December 21, 2011); and *Daniel A. Davis*, 39 ECAB 151 (1987).

<sup>13</sup> *See C.W.*, Docket No. 20-1339 (issued September 15, 2021); *G.Y.*, Docket No. 19-1683 (issued March 16, 2021); *M.R.*, Docket No. 17-0634 (issued July 24, 2018).

<sup>14</sup> *See J.A.*, Docket No. 20-1258 (issued August 4, 2021); *A.C.*, Docket No. 19-1522 (issued July 27, 2020); *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.B.*, Docket No. 18-0700 (issued January 9, 2019); *S.J.*, Docket No. 17-0543 (issued August 1, 2017).

As Dr. Didizian's reports are insufficient to establish that the accepted conditions had resolved, the Board finds that OWCP failed to meet its burden of proof.<sup>15</sup>

**CONCLUSION**

The Board finds that OWCP failed to meet its burden of proof to establish that the employment-related temporary aggravations of cervical disc disorder at the C5-C6 level with radiculopathy; lumbar intervertebral disc disorders with radiculopathy; and other cervical disc degeneration had resolved, effective July 20, 2017.

**ORDER**

**IT IS HEREBY ORDERED THAT** the January 29, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 27, 2023  
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>15</sup> In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.