

United States Department of Labor
Employees' Compensation Appeals Board

K.S., Appellant)

and)

U.S. POSTAL SERVICE, DOMINICK V.)
DANIELS PROCESSING & DISTRIBUTION)
CENTER, Kearney, NJ, Employer)

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Docket No. 22-1011
Issued: January 5, 2023

Appearances:

Michael D. Overman, 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 June 17, 2022 appellant, through counsel, filed a timely appeal from a December 22, 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 December 22, 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.*

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 9, 2021, as she no longer had disability or residuals causally related to her accepted employment injuries; (2) whether appellant has established continuing disability or residuals on or after June 9, 2021 causally related to her accepted employment injuries.

FACTUAL HISTORY

On March 16, 2006 appellant, then a 27-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that she developed bilateral hand and arm numbness and pain due to the repetitive duties of her federal employment. OWCP accepted the claim for bilateral joint shoulder derangement and subsequently expanded acceptance of the claim to include bilateral carpal tunnel syndrome, bilateral sprain of shoulder and arm sprain coracoclavicular, bilateral shoulder region articular cartilage disorder, brachial neuritis or radiculitis, and cervical radiculopathy. It authorized left carpal tunnel surgery, which occurred on May 7, 2010; right carpal tunnel surgery, which occurred on October 6, 2010; and left rotator cuff repair, left partial removal of collar bone, and repair of shoulder, which occurred on September 15, 2011. OWCP paid appellant wage-loss compensation on the supplemental rolls commencing April 30, 2006 and on the periodic rolls commencing February 18, 2007.

On March 17, 2021 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the case record, to Dr. Chason S. Hayes, a Board-certified orthopedic surgeon, for a second opinion evaluation. An October 9, 2020 SOAF noted that appellant's claim had been accepted for bilateral shoulder and upper arm sprain, bilateral carpal tunnel syndrome, brachial neuritis or radiculitis, bilateral shoulder articular cartilage disorder, and cervical radiculopathy. It requested that Dr. Hayes evaluate the nature of appellant's condition, the extent of disability, and appropriate treatment for her accepted employment injuries.

In a report dated April 9, 2021, Dr. Hayes noted appellant's history of injury and medical treatment, and reported his findings on physical examination. He advised that appellant had informed him that her claim had also been accepted for cervical radiculopathy, but that he had no documentation of this. Dr. Hayes reported examination findings of tenderness on cervical palpation and range of motion (ROM), decreased cervical ROM, normal bilateral upper extremity light touch sensation, normal bilateral shoulder rotation, normal gait, bilateral shoulder tenderness with ROM, normal bilateral wrist ROM, and negative bilateral wrist Phalen's test, Tinel's sign, ulnar grind test, and Finkelstein's test. He diagnosed cervical radiculopathy, status post bilateral carpal tunnel releases, and status post rotator cuff repair. Dr. Hayes indicated that appellant's conditions continued to cause relatively minor hand symptoms and left shoulder symptoms, with most of the symptoms attributable to her cervical spine. He advised that appellant had a poor prognosis noting the poor outcomes from her prior extensive treatment. While appellant had subjective complaints of pain, Dr. Hayes found no supporting objective finding of ongoing structural abnormalities. Thus, he concluded that she could return to her date-of-injury job as a mail handler.

On April 28, 2021 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits because her accepted bilateral shoulder articular cartilage disorder, bilateral brachial neuritis or radiculitis, bilateral carpal tunnel syndrome, cervical

radiculopathy, and bilateral shoulder and upper arm coracoclavicular sprain had resolved. It found that the weight of the medical evidence rested with the April 9, 2021 medical report of Dr. Hayes, OWCP's second opinion examiner, who found that she no longer had any disability or residuals causally related to her accepted bilateral shoulder, carpal tunnel, or cervical conditions. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

OWCP subsequently received progress notes dated May 4, 2021, wherein Anthony Robinson, a certified physician assistant, noted that appellant was seen for complaints of neck pain. He detailed examination findings and diagnosed cervical radiculopathy, cervicgia, cervical spondylosis, bilateral carpal tunnel syndrome, and other shoulder articular cartilage disorders.

By decision dated June 9, 2021, OWCP finalized the notice of proposed termination of appellant's wage-loss compensation and medical benefits, effective that date. It found that the weight of the medical evidence rested with opinion of Dr. Hayes, OWCP's second opinion examiner, who had determined in his April 9, 2021 report that she no longer had residuals or disability due to her accepted conditions.

On June 17, 2021 appellant, through counsel, requested a hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing was held on October 7, 2021.

Following the hearing, OWCP received additional evidence. In progress notes dated April 7, 2021, Dr. Mark Reznik, an osteopathic physician Board-certified in physiatry, provided examination findings and diagnoses of cervicgia and cervical spondylosis without myelopathy or radiculopathy.

Mr. Robinson, in progress notes dated May 4 and 25, and July 13, 2021, reiterated the diagnosis and examination findings from his prior report.

In reports dated May 13 and July 15, 2021, Dr. Reznik provided examination findings and diagnosed cervical radiculopathy.

By decision dated December 22, 2021, OWCP's hearing representative affirmed the June 9, 2021 termination 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 benefits.⁴ It may not terminate compensation without establishing either that the disability has ceased, or that it is no longer related to the employment.⁵ OWCP's

⁴ *J.C.*, Docket No. 22-0376 (issued September 20, 2022); *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).

⁵ *J.C.*, *id.*; *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).

burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁷ 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.⁸

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 9, 2021.

In an April 9, 2021 report, Dr. Hayes diagnosed cervical radiculopathy, status post bilateral carpal tunnel release, and status post rotator cuff repair. He reported that the accepted conditions were bilateral carpal tunnel syndrome and bilateral shoulder derangement, and noted that he had no documentation that cervical radiculopathy had been accepted by OWCP. Dr. Hayes advised that appellant's conditions had not resolved as she continued to have minor symptoms, with most of the symptoms attributable to her cervical spine. He advised that her prognosis was poor as she had not responded well to prior medical treatment. Dr. Hayes found appellant was capable of returning to her job as a mail handler.

OWCP accepted that appellant sustained bilateral joint shoulder derangement bilateral carpal tunnel syndrome, bilateral sprain of shoulder and arm sprain coracoclavicular, bilateral shoulder region articular cartilage disorder, brachial neuritis or radiculitis, and cervical radiculopathy in the performance of duty. It is well established that a physician's opinion must be based on a complete and accurate factual and medical background. When OWCP has accepted an employment condition as occurring in the performance of duty, the physician must base his opinion on these accepted conditions.⁹

OWCP's procedures and Board precedent dictate that when an OWCP medical adviser, second opinion specialist, or referee physician 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.¹⁰

Dr. Hayes did not rely on the SOAF as a framework in reaching his conclusions. Significantly, he only referenced two of the conditions accepted by OWCP and noted the lack of

⁶ *J.C., id.; R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁷ *J.C., id.; L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ *J.C., id.; R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

⁹ *D.T.*, Docket No. 21-1168 (issued April 6, 2022); *G.B.*, Docket No. 20-0750 (issued October 27, 2020); *T.P.*, 58 ECAB 524 (2007).

¹⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990). See also *D.T., id.; D.C.*, Docket No. 21-0780 (issued December 22, 2021); *Paul King*, 54 ECAB 356 (2003).

documentation that cervical radiculopathy was an accepted condition. The Board, thus, finds that Dr. Hayes' report is of diminished probative value and is insufficient to carry the weight of the medical evidence.¹¹

The Board thus finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective June 9, 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 June 9, 2021.¹²

ORDER

IT IS HEREBY ORDERED THAT the December 22, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: January 5, 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

¹¹ *Id.*

¹² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.