

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

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A.P., Appellant))	
and))	
U.S. POSTAL SERVICE, SOUTHERN))	Docket No. 22-1054
MARYLAND PROCESSING & DISTRIBUTION))	Issued: January 6, 2023
CENTER, Capitol Heights, MD, Employer))	
_____))	

Appearances:
Stephen Larkin, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 24, 2022 appellant, through her representative, filed a timely appeal from a May 13, 2022 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 May 13, 2022 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 January 31, 2021, as she no longer had disability or residuals causally related to her accepted April 4, 2011 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after January 31, 2021, causally related to her accepted April 4, 2011 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 decision are incorporated herein by reference. The relevant facts are as follows.

On April 11, 2011 appellant, then a 57-year-old clerk, filed a traumatic injury claim (Form CA-1) alleging that on April 4, 2011 she was loading a machine when she experienced sharp pain in her left thigh and lower back while in the performance of duty. OWCP accepted her claim for lumbar sprain and thoracic or lumbosacral neuritis or radiculitis. It paid appellant wage-loss compensation on the supplemental rolls effective May 19, 2011,⁵ and on the periodic rolls effective September 18, 2016.

Appellant continued to receive medical treatment. In a September 5, 2019 report, Dr. Daniel R. Ignacio, a physiatrist, noted lumbar examination findings of spasm with limited motion rotation to 70 degrees and tenderness along the mid and lower lumbar paraspinal with trigger points along the paraspinal muscles. He diagnosed chronic lumbar strain with lumbar neuritis, chronic lumbar disc displacement with lumbar radiculopathy, and chronic pain syndrome and reported that appellant remained totally disabled from work.

On September 19, 2019 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. Chester DiLallo, a Board-certified orthopedic surgeon, for a second opinion on the nature and extent of her accepted conditions and work capacity. In an October 4, 2019 report, Dr. DiLallo reviewed the medical record, including the SOAF, and noted that her accepted conditions were lumbar sprain and lumbosacral radiculitis. He noted that electrodiagnostic testing was significant for abnormal electromyographic findings.⁶ On physical examination of appellant's lumbar spine, Dr. DiLallo observed pain on range of motion testing and on palpation of the interspinous space. He indicated that she currently suffered from lumbar spine spondylosis, but noted that this condition was not included in the SOAF. In response to OWCP's questions, Dr. DiLallo opined that appellant's accepted lumbar sprain had resolved. He also reported that her lumbosacral neuritis conditions had resolved, "with the

⁴ Docket No. 14-1237 (issued September 18, 2014).

⁵ By decision dated May 29, 2013, OWCP finalized the September 28, 2012 proposed termination of wage-loss compensation and medical benefits, effective May 29, 2013. By decision dated February 4, 2014, OWCP's hearing representative affirmed the May 29, 2013 decision. Appellant appealed to the Board. By decision dated September 18, 2014, the Board reversed the February 4, 2014 decision and remanded the case for reinstatement of compensation benefits. *Id.*

⁶ A May 30, 2019 electromyography (EMG) and nerve conduction velocity (NCV) study revealed chronic right S1 and bilateral L5 radiculopathies.

exception that [appellant] has persistent S1 radiculopathy in the right lower extremity manifest by decreased sensation in the S1 dermatome, decreased plantar reflex at the Achilles area and decreased plantar strength, as well as atrophy of the right calf muscle.” Dr. DiLallo completed a work capacity evaluation report (Form OWCP-5c) indicating that appellant was totally disabled.

In response to an OWCP inquiry, Dr. DiLallo submitted a supplemental report dated November 24, 2019, wherein he reiterated that appellant’s accepted lumbar sprain injury had resolved and explained that a spraining injury does not persevere over the period of eight years. He also reported that there was evidence of lumbosacral neuritis, but, opined that her lumbosacral neuritis was associated with her lumbar spondylosis, which was preexisting. Dr. DiLallo concluded that appellant did not suffer an aggravation of her preexisting lumbosacral spondylosis due to the April 4, 2011 employment injury.

On December 23, 2019 OWCP found a conflict in the medical opinion evidence between Dr. Ignacio, appellant’s treating physician, and Dr. DiLallo, the second opinion examiner, regarding the nature and extent of her accepted conditions and work capacity. It referred her, the medical record, a SOAF, and a series of questions to Dr. Edward Cohen, a Board-certified orthopedic surgeon, for an impartial medical examination and opinion in order to resolve the conflict. In a February 5, 2020 report, Dr. Cohen reviewed the medical record and SOAF. On examination of appellant’s lumbar spine, he observed no visible or palpable muscle spasm. Dr. Cohen noted subjective tenderness to light touch from the lower thoracic to the mid-sacral region. Cervical compression test and simulated rotation test were positive for back pain. Dr. Cohen opined that appellant’s ongoing complaints were on the basis of severe degenerative lumbar spondylosis (arthritis and disc disease) and were not related to the April 4, 2011 employment injury. He indicated that her inability to work was not related to the April 4, 2011 employment injury and completed a Form OWCP-5c indicating that she was totally disabled.

In response to an OWCP inquiry, Dr. Cohen submitted a March 11, 2020 supplemental report, wherein he clarified that appellant’s lumbar sprain condition had resolved. He explained that there was no evidence of ongoing sprain symptomatology, such as muscle spasm, point tenderness, curvature, or asymmetrical range of motion. Dr. Cohen also reported that appellant’s lumbar neuritis or radiculitis had resolved because there was no evidence of any neurological deficit in any spinal nerves that he tested. He indicated that there was evidence that she was suffering from a preexisting scoliosis and degenerative disc disease at all lumbar levels from L1 through S1. Dr. Cohen further noted that serial diagnostic imaging scans showed the natural progression of degenerative disc disease, which was expected over time.

On September 4, 2020 OWCP issued a notice proposing to terminate appellant’s wage-loss compensation and medical benefits because she no longer had disability or residuals causally related to her accepted April 4, 2011 employment injury. It found that the special weight of the medical evidence rested with Dr. Cohen who found that she no longer had any disability or residuals causally related to her accepted employment injury. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

Appellant submitted reports dated June 17 through December 1, 2020 from Dr. Darlene Jones, an osteopath Board-certified in physiatry, who indicated that appellant was reevaluated for complaints of back pain related to medical conditions sustained in an April 4, 2011 employment

injury. Dr. Jones provided examination findings and diagnosed lumbar spondylosis, lumbar stenosis, L4-5 tethering nerve root, and exacerbation of lower back pain.

In an attending physician's report (Form CA-20) dated August 12, 2020, Dr. Jones noted that on April 4, 2011 appellant sustained a back injury at work. She diagnosed lumbar sprain and lumbosacral neuritis and indicated that appellant remained totally disabled.

Appellant underwent diagnostic testing on August 22, 2020. A lumbar spine x-ray scan showed no significant change of the marked multilevel degenerative disc disease and spondylolisthesis. A lumbar spine magnetic resonance imaging (MRI) scan revealed diffuse degenerative disc disease throughout the lumbar spine, which was severe at L1-2, L2-3, and L3-4 with progressive spinal stenosis and neural outlet stenosis at L2-S1.

In a September 16, 2020 note, Dr. Baljeet S. Sethi, a Board-certified neurologist, indicated that appellant had a history of low back pain and numbness in the lower extremities since 2011. On examination of her lumbar spine, he observed abnormal straight leg raise testing. Dr. Sethi diagnosed peripheral neuropathy and radiculopathy.

OWCP also received progress notes dated September 24 through December 28, 2020 by Dr. Joshua A. Thomas, an osteopath Board-certified in physiatry, who noted appellant's complaints of back pain. Dr. Thomas conducted an examination and diagnosed lumbosacral joint sprain, backache, spinal stenosis of lumbar region, lumbar sprain, lumbar radiculopathy, radiculopathy of lumbosacral spine due to disc disorder, low back pain, sacroiliitis, lumbar spondylosis, and myalgia. He described the April 4, 2011 employment injury and opined that appellant's low back, buttock, and leg pain were causally related to the April 4, 2011 employment injury.

An October 5, 2020 EMG/NCV study demonstrated evidence of mild sensory peripheral neuropathy of the bilateral lower extremities and no electrodiagnostic evidence of any other lumbar radiculopathy.

In an October 7, 2020 report, Dr. Eric G. Dawson, an orthopedic surgeon, described the April 11, 2011 employment injury and noted appellant's accepted conditions of back sprain and lumbosacral neuritis or radiculitis. On physical examination of the lumbar spine, he observed soft-touch impingement at L5 and S1 partial loss, following the dermatomes both dorsal and ventral bilaterally. Straight leg raise testing in the supine position was positive on the right side. Dr. Dawson noted his disagreement with Dr. DiLallo and Dr. Cohen's reports and indicated that both physicians had acknowledged that appellant still had objective evidence of sensory and motor deficits. He concluded that she still had nerve dysfunction due to the original injury, which limited her activities.

In a January 6, 2021 supplemental report, Dr. Cohen indicated that he reviewed the additional medical records submitted after his medical evaluation. He reported that none of the additional medical evidence changed his previous opinion.

By decision dated January 8, 2021, OWCP finalized the notice of proposed termination of appellant's wage-loss compensation and medical benefits, effective January 31, 2021. It found that the special weight of the medical evidence rested with Dr. Cohen, the impartial medical

examiner (IME), who had determined in reports dated February 5 and March 11, 2020, that she did not have disability or residuals due to the accepted April 4, 2011 employment injury.

On January 21, 2021 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on April 21, 2021.

In a May 5, 2021 letter, Dr. Dawson expressed his disagreement with Dr. Cohen's reports. He also indicated that recent diagnostic testing demonstrated that appellant still had sensorial peripheral neuropathies.

By decision dated June 1, 2021, OWCP's hearing representative affirmed the January 8, 2021 decision.

On February 12, 2022 appellant, through counsel, requested reconsideration.

In a June 14, 2021 letter, Dr. Dawson alleged that Dr. Cohen's report was not sufficiently rationalized because he did not perform a thorough physical examination and ignored objective evidence.

In office visit notes dated October 6, 2021 and January 4 and April 8, 2022, Dr. Dawson recounted appellant's complaints of pain, spasm, and stiffness to the lower back. He conducted an examination and assessed that she had signs of nerve impingement to the lower extremities that were clearly due to the August 4, 2011 employment injury.

By decision dated May 13, 2022, OWCP denied modification of the June 1, 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 benefits.⁷ It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁸ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.¹⁰ 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.¹¹

⁷ *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).

⁸ *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).

⁹ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

¹⁰ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹¹ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

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.¹² For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹³ When OWCP has referred the case to an IME 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.¹⁴

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 January 31, 2021.

OWCP improperly determined that a conflict in the medical opinion existed between Dr. Ignacio, appellant's treating physician, and Dr. DiLallo, OWCP's second opinion examiner, regarding whether her accepted April 4, 2011 employment injuries had resolved. In reports dated October 4 and November 24, 2019, Dr. DiLallo provided examination findings and noted the abnormal May 30, 2019 EMG/NCV findings. He opined that appellant's lumbosacral neuritis conditions had resolved, "with the exception that [appellant] has persistent S1 radiculopathy in the right lower extremity manifest by decreased sensation in the S1 dermatome, decreased plantar reflex at the Achilles area and decreased plantar strength, as well as atrophy of the right calf muscle."

As noted above, for a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.¹⁵ In this case, however, the Board finds that Dr. DiLallo reports did not contain sufficient medical reasoning to establish that appellant no longer had disability or residuals due to her April 4, 2011 employment injury. He concluded that her lumbosacral neuritis had resolved, except for persistent S1 radiculopathy in the right lower extremity and decreased sensation. However, Dr. DiLallo did not explain whether or how this conclusion was supported by objective evidence, given the diminished examination findings and abnormal electrodiagnostic test results.¹⁶ Rationalized medical evidence must include rationale explaining how the physician reached the conclusion he or she is supporting.¹⁷ Therefore, the Board finds that Dr. DiLallo's opinion was not of equal weight and was, thus, insufficient to create

¹² 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).

¹³ *H.B.*, Docket No. 19-0926 (issued September 10, 2020); *C.H.*, Docket No. 18-1065 (issued November 29, 2018); *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹⁴ *S.S.*, Docket No. 19-0766 (issued December 13, 2019); *W.M.*, Docket No. 18-0957 (issued October 15, 2018); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

¹⁵ *Supra* note 13.

¹⁶ *See A.G.*, Docket No. 21-0315 (issued December 29, 2021).

¹⁷ *P.E.*, Docket No. 19-0837 (issued October 20, 2020); *B.B.*, Docket No. 19-1102 (issued November 7, 2019); *Beverly A. Spencer*, 55 ECAB 501 (2004).

a conflict with Dr. Ignacio.¹⁸ As no true conflict existed in the medical evidence at the time of the referral to Dr. Cohen, the Board finds that his report may not be afforded the special weight of an IME and should be considered for its own intrinsic value.¹⁹ The referral to Dr. Cohen is therefore considered to be a second opinion evaluation.²⁰

In reports dated February 5 and March 6, 2020, Dr. Cohen reviewed appellant's records and the SOAF. On examination of her lumbar spine, he observed subjective tenderness to light touch from the lower thoracic to the mid-sacral region. Dr. Cohen opined that appellant's ongoing complaints were due to severe degenerative lumbar spondylosis, which was not related to the April 4, 2011 employment injury. He concluded that her lumbar sprain condition had resolved as there was no evidence of muscle spasm, point tenderness, curvature, or asymmetrical range of motion. Dr. Cohen also reported that appellant's lumbar neuritis or radiculitis had resolved because there was no evidence of any neurological deficit in any spinal nerves.

Appellant's treating physician, Dr. Dawson, however, submitted numerous reports wherein he noted that she still suffered residuals of her accepted lumbar injury. He noted lumbar examination findings of soft touch impingement at L5 and S1 partial loss. Dr. Dawson also noted that an October 5, 2020 EMG/NCV study showed evidence of mild sensory peripheral neuropathy of the bilateral lower extremities. He concluded that appellant still suffered from nerve dysfunction and was totally disabled due to the April 4, 2011 employment injury.

The Board therefore finds that the medical reports of Dr. Cohen and Dr. Dawson are of virtually equal weight and rationale, and therefore an unresolved conflict in medical opinion now exists between Dr. Dawson and Dr. Cohen regarding whether appellant's accepted April 4, 2011 employment injury had resolved. It is well established that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the case should be referred to an IME for the purpose of resolving the conflict.²¹ As a conflict in medical evidence regarding whether appellant's accepted April 4, 2011 employment injury had resolved remains prior to the January 31, 2021 termination, the Board finds that OWCP has not met its burden of proof to terminate her wage-loss compensation and medical benefits.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective January 31, 2021.²²

¹⁸ *Y.J.*, Docket No. 20-1337 (issued February 7, 2022) (the Board found that a second opinion examiner's report was of limited probative value and insufficient to create a conflict in medical opinion with the claimant's treating physician); *see also R.B.*, Docket No. 20-0109 (issued June 25, 2020).

¹⁹ *Id.*

²⁰ *See M.G.*, Docket No. 19-1627 (issued April 17, 2020); *S.M.*, Docket No. 19-0397 (issued August 7, 2019) (the Board found that at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

²¹ *Supra* notes 12 and 13.

²² In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

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

Issued: January 6, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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