

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

M.N., Appellant)	
)	
and)	Docket No. 21-0980
)	Issued: July 24, 2023
DEPARTMENT OF VETERANS AFFAIRS,)	
BROOKLYN VA MEDICAL CENTER,)	
Brooklyn, NY, Employer)	
)	

Appearances: *Case Submitted on the Record*
Paul Kalker, Esq., for the appellant¹
Office of Solicitor, for the Director

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On June 14, 2021 appellant, through counsel, filed a timely appeal from a May 10, 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 to consider 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 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.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 10, 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 met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 26, 2020, finding that she no longer had disability or residuals causally related to her accepted June 19, 2017 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after March 26, 2020, causally related to the accepted June 19, 2017 employment injury.

FACTUAL HISTORY

On June 22, 2017 appellant, then a 54-year-old licensed practical nurse, filed a traumatic injury claim (Form CA-1) alleging that on June 19, 2017 she injured her back when she tripped and fell while in the performance of duty. She stopped work on June 29, 2017. OWCP accepted the claim for cervical, left knee, and left foot sprains and strains. It authorized wage-loss compensation on the supplemental rolls beginning August 31, 2017. Appellant returned to full-duty work on October 16, 2017.

On July 24, 2017 appellant underwent a lumbar spine magnetic resonance imaging (MRI) scan which demonstrated disc bulges at L1-2 and disc herniations at L2-3, L3-4, L4-5, and L5-S1.

OWCP subsequently expanded the acceptance of appellant's claim to include lumbar spine derangement. It further accepted that she sustained a recurrence of disability on January 16, 2018 and authorized wage-loss compensation on the supplemental rolls beginning November 21, 2017. OWCP paid appellant wage-loss compensation on the periodic rolls beginning April 21, 2018.

On June 7, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions to Dr. Andrew Farber, an osteopath, for a second opinion evaluation with regard to the status of appellant's accepted conditions.

In his July 10, 2018 report, Dr. Farber noted appellant's history of injury, reviewed her medical records and provided his findings on physical examination. He found that her left foot and left knee sprains/strains had resolved, but that she continued to experience disabling residuals of her accepted lumbar spine injury. Dr. Faber noted that there were no imaging studies or treatment reports regarding the cervical spine. He determined that appellant could work in a sedentary position lifting no more than 10 pounds. In a work capacity evaluation (Form OWCP-5c) of even date, Dr. Faber found that she could work full time with restrictions on walking and standing up to two hours per day and pushing, pulling, and lifting up to 10 pounds for eight hours per day.

On July 12 and August 9, 2018 appellant's attending physician, Dr. Howard I. Baum, a Board-certified orthopedic surgeon, found that she was totally disabled from work due to cervical spine derangement, lumbar spine derangement, and left foot derangement.

On August 18, 2018 appellant underwent an authorized cervical spine MRI scan, which demonstrated disc bulges at C2-3, C3-4, C4-5, and C7-T1 as well as a disc herniation at C6-7.

In reports dated September 6, and October 4 and 30, 2018, Dr. Baum diagnosed multilevel cervical disc herniations with bulging and thecal sac impingement, lumbar spine internal

derangement, and cervical spine internal derangement due to the accepted work-related injury. He found that appellant was totally disabled from work.

On November 6, 2018 Dr. Yolande Bernard, a Board-certified physiatrist, noted that appellant was injured at work on June 19, 2017 and that Dr. Baum continued to find her disabled from work. On physical examination, she reported appellant's pain with cervical and lumbar motion, and found diminished motor strength in the bilateral hip flexors and left knee extensors with normal sensation to fine touch in the upper and lower extremities. Dr. Bernard diagnosed cervical and lumbar herniated discs and myofascial derangement, and sprains/strains of the right hip, left knee, and left foot. She opined that appellant's current conditions were directly related to her June 19, 2017 employment injury.

On November 6, 2018 Dr. Angel Macagno, a Board-certified orthopedic surgeon, noted appellant's history of injury and performed a physical examination, finding evidence of muscle weakness of the left wrist dorsiflexor, decreased sensation to pinprick and light touch in the left C6 distribution, and absent left brachial radialis reflex. He further found evidence of bilateral paraspinal muscular spasms and tenderness to palpation. Dr. Macagno attributed appellant's neck and low back pain to her June 19, 2017 employment injury and diagnosed cervicgia, low back pain, herniation of lumbar disc, and herniation of cervical disc. He opined that based on her history and clinical evaluation, her current conditions were work related and consistent with her June 19, 2017 employment injury.

On November 9, 2018 OWCP determined that a conflict in evidence arose between Dr. Baum and appellant's treating physicians regarding whether appellant had continuing disability and residuals from the accepted employment injury. It referred appellant to Dr. Alan Crystal, a Board-certified orthopedic surgeon, to serve as an impartial medical examiner (IME).

On November 27, 2018 Dr. Baum noted appellant's reports of low back pain radiating to her posterior thighs, as well as bilateral shoulder and hand weakness. He diagnosed multilevel cervical disc herniation and lumbar spine internal derangement. Dr. Baum found that appellant was totally disabled.

In a December 5, 2018 report, Dr. Crystal reviewed appellant's history of injury, medical treatment, and the SOAF. On examination, he found no objective clinical findings. Dr. Crystal discussed appellant's accepted conditions of cervical sprain/strain, lumbar spine derangement, left knee sprain/strain, and left foot sprain/strain. He found that there were no additional conditions related to the employment injury of June 19, 2017. In regard to appellant's MRI scan findings of bulging and herniated cervical discs, Dr. Crystal found that the medical record did not have any documentation that would correlate these disc herniations with the June 19, 2017 employment injury. He opined that if the disc herniations were traumatic, the MRI scan would also have showed soft tissue and ligament damage. Dr. Crystal concluded that appellant's herniated cervical disc was not related to her accepted employment injury and that there were no other medical conditions causally related to the June 19, 2017 employment injury. He found that she had no current disability due to her accepted employment injuries as there was no physical condition limiting her movements, senses, or activities. Dr. Crystal concluded that appellant could perform her regular work duties on July 10, 2018, and that she required no further medical treatment.

On January 3 and 31, 2019 Dr. Baum diagnosed multilevel disc herniation of the cervical spine, and lumbar spine internal derangement with disc herniation. He found that appellant was totally disabled.

In a letter dated February 6, 2019, OWCP requested that Dr. Crystal clarify whether appellant's diagnosed lumbar spondylosis was employment related, whether her diagnosed cervical and lumbar spondylosis was caused or aggravated by her June 19, 2017 employment injury, and whether her arthritis had been caused or aggravated by her June 19, 2017 employment injury.

In an addendum report dated February 20, 2019, Dr. Crystal advised that appellant had not sustained left shoulder derangement, right hip strain, left foot derangement, or pain syndrome causally related to the accepted employment injury. He explained that he had reviewed the medical evidence and opined that the additional conditions of cervical and lumbar spondylosis were causally related to the June 19, 2017 employment injury as appellant's subjective complaints were consistent with these diagnoses which were demonstrated on her cervical and lumbar MRI scans. Dr. Crystal found that these conditions were aggravated by appellant's employment injury and that since she still experienced subjective complaints which correlated with aggravated cervical and lumbar spondylosis, the aggravation was permanent. He concluded that she had no objective findings which would contradict a return to full-time work and that she did not require further medical treatment.

On February 7, 2019 appellant underwent electromyogram and nerve conduction velocity (EMG/NCV) studies, which demonstrated left C6 radiculopathy, and bilateral sensory carpal tunnel syndrome.

In a February 28, 2019 note, Dr. Baum found left C6 radiculopathy based on EMG/NCV study and noted burning and pain radiating down into appellant's left arm.

In a letter dated March 19, 2019, OWCP requested that Dr. Crystal further clarify how appellant had a permanent aggravation of preexisting cervical and lumbar spondylosis, but no residuals of the accepted work injury. It asked whether she could return to full-time full-duty work with no restrictions.

On March 28, 2019 Dr. Baum diagnosed C6 radiculopathy, multilevel disc herniations in the cervical and lumbar areas of the spine, and left shoulder internal derangement. He found that appellant was totally disabled from work.

In an April 1, 2019 addendum report, Dr. Crystal found that appellant had subjective symptoms of cervical spondylosis and lumbar spondylosis, but no objective symptoms. He opined that the cervical and lumbar spondylosis were causally related to the June 19, 2017 employment injury based on her subjective complaints. Dr. Crystal determined that appellant had referred, but not radicular pain, with no objective findings. He opined that the aggravation of the cervical and lumbar spondylosis was permanent as she continued to have subjective symptoms. Dr. Crystal further advised that appellant had sustained a temporary aggravation of left knee and foot arthritis that had resolved without objective findings. He opined that she required no further medical treatment and could return to full duty.

In a letter dated May 9, 2019, OWCP requested an additional supplemental report from Dr. Crystal and provided appellant's EMG/NCV results.

In April 23, May 23, and June 20, 2019 reports, Dr. Baum diagnosed L5-S1 radiculopathy, C6 radiculopathy, and found that appellant was totally disabled. On June 20, 2019 he again determined that she was totally disabled.

On June 24, 2019 Dr. Crystal asserted that appellant's cervical and lumbar spondylosis were aggravated by her accepted employment injury. He related that spinal spondylosis could be asymptomatic or symptomatic, and that symptomatic spondylosis could cause axial referred pain without objective findings. Dr. Crystal indicated that the natural progression of spondylosis could, in time, result in radicular symptoms. He opined that appellant's radicular symptoms as demonstrated on February 7, 2019 EMG/NCV study were not causally related to her employment injury as 18 months had passed since the injury. Dr. Crystal reported that patients who have cervical spondylosis could develop spontaneous acute radiculopathies that were not causally related to any trauma, and that appellant may have developed a radiculopathy, but this condition was not related to her fall. He further determined that as pain was not a valid diagnosis under FECA, then aggravation of preexisting lumbar or cervical spondylosis was not a valid diagnosis. Dr. Crystal found that, if objective findings were required to establish ongoing lumbar derangement, this condition was not extant as there were no objective findings on examination to confirm appellant's subjective complaints of pain, which was not a diagnosis. However, he noted that a fall could aggravate preexisting arthritis or lumbar derangement. Dr. Crystal recommended that he perform an additional physical examination.

In July 18, August 19, October 10, November 7, and December 10, 2019 reports, Dr. Baum diagnosed cervical and lumbar spine herniated disc syndrome. He found that appellant was totally disabled from work.

On October 29, 2019 OWCP referred appellant for a another impartial medical examination by Dr. Crystal.

In a report dated November 20, 2019, Dr. Crystal reviewed appellant's medical records and noted her history of injury. He found mild spondylosis at C4-5 with moderate spondylosis at C6-7 as well as grade 1 anterolisthesis of C7 on T1 and multiple cervical disc narrowing's on x-rays. Appellant's left foot and ankle x-rays demonstrated a left moderate-sized plantar calcaneal spur. Lumbar x-rays demonstrated mild spondylosis at L1-2, moderate spondylosis at L2-3 and L3-4 as well as multilevel disc space degenerative narrowing. Dr. Crystal performed a physical examination and found that appellant had a difficult time moving from supine to sitting and vice versa which he felt was consistent with exaggeratory symptoms. He found no subjective deficits in sensation. Dr. Crystal asserted that there were no additional conditions causally related to the June 19, 2017 employment injury. He determined that the additional diagnoses provided by appellant's physicians were not related to the June 19, 2017 employment injury. Dr. Crystal opined that there were no objective physical findings consistent with a cervical herniated disc impinging on a nerve root and that the diagnosis of cervical radiculopathy was not related to the injury of June 19, 2017. He noted that the medical record did not contain any objective evidence of physical findings consistent with a cervical radiculopathy prior to the February 7, 2019 EMG/NCV testing. Dr. Crystal found that the additional lumbar diagnoses of lumbar herniated discs and lumbar myofascial derangements were not causally related to the accepted employment injury. He further determined that the diagnoses of right hip strain, left shoulder derangement, left

foot derangement, and pain syndrome were unrelated to the June 19, 2017 employment injury. Dr. Crystal opined that appellant's spine conditions were not aggravated by the June 19, 2017 fall. However, he noted that she had subjective complaints that corresponded with the objective findings of spondylosis on cervical and lumbar x-rays. Dr. Crystal found that appellant had no current employment-related disability and that any disability due to her June 19, 2017 employment injury had resolved. He found that she could return to her date-of-injury position and that she did not require additional treatment for her accepted employment injuries.

On February 21, 2020 OWCP notified appellant that it proposed to terminate her wage-loss compensation and medical benefits as the special weight of the evidence established that she no longer had any employment-related residuals or disability due to her accepted employment injury. It afforded her 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

On March 12, 2020 appellant, through counsel, responded and disagreed with the proposed termination. Appellant provided additional medical evidence from Dr. Baum dated February 13, 2020 diagnosing cervical and lumbar spine derangement with herniated disc and spondylosis. Dr. Baum found that appellant was totally disabled from work.

By decision dated March 25, 2020, OWCP terminated appellant's wage-loss compensation and medical benefits, effective March 26, 2020. It found that Dr. Crystal's opinion represented the special weight of the evidence and established that she had no further disability or residuals of her accepted employment injury.

On February 10, 2021 appellant, through counsel, requested reconsideration of the March 25, 2020 decision. Counsel contended that Dr. Crystal's reports were internally inconsistent and insufficiently rationalized to meet OWCP's burden of proof to terminate appellant's wage-loss compensation and medical benefits. Counsel submitted an additional report from Dr. Baum dated May 13, 2020. Dr. Baum opined that appellant's lumbar and cervical conditions were employment related and that she remained disabled.

By decision dated May 10, 2021, OWCP denied modification of its May 10, 2021 decision.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ OWCP'S burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

⁴ *G.M.*, Docket No. 21-0401 (issued September 14, 2021); *R.H.*, Docket No. 19-1064 (issued October 9, 2020); *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

⁵ *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁶ *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁸

Section 8123(a) of FECA provides in pertinent part: “If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.”⁹ Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant’s wage-loss compensation and medical benefits, effective March 26, 2020.

OWCP declared a conflict in medical opinion between appellant’s treating physicians and Dr. Baum, its second opinion physician, regarding appellant’s ability to return to work. It properly referred appellant for an IME with Dr. Crystal to resolve the conflict in the medical opinion evidence, pursuant to 5 U.S.C. § 8123(a).

In his December 5, 2018 report, Dr. Crystal found that appellant had no objective findings, no disability, and no medical residuals due to her accepted employment injury. OWCP subsequently requested clarification from Dr. Crystal on multiple occasions. On February 20, 2019 Dr. Crystal opined that the additional conditions of permanent aggravation of cervical and lumbar spondylosis should be accepted as causally related to the June 19, 2017 employment injury as her subjective complaints were consistent with these diagnoses which were demonstrated on her cervical and lumbar MRI scans. In an April 1, 2019 addendum report, he found that appellant had referred pain with no objective findings. Dr. Crystal determined that her aggravation of the preexisting spondylosis was permanent. On June 24, 2019 he found that appellant’s conditions of cervical and lumbar spondylosis were aggravated by her accepted employment injury, but that her radicular symptoms as demonstrated on the February 7, 2019 EMG/NCV study were not causally related to her employment injury. Dr. Crystal also noted that a fall could aggravate preexisting arthritis or spinal derangement.

In his November 20, 2019 report, Dr. Crystal reverted to his original finding that there were no additional conditions causally related to the June 19, 2017 employment injury. He indicated that the medical record did not contain any objective evidence of physical findings consistent with a cervical radiculopathy prior to the February 7, 2019 EMG/NCV study. Dr. Crystal found that

⁷ *E.J.*, Docket No. 20-0013 (issued November 19, 2020); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

⁸ *A.J.*, Docket No. 18-1230 (issued June 8, 2020); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

⁹ 5 U.S.C. § 8123(a); *S.J.*, Docket No. 22-0936 (issued April 27, 2023); *J.K.*, Docket No. 18-1250 (issued June 25, 2019).

¹⁰ 20 C.F.R. § 10.321; *L.S.*, Docket No. 20-1204 (issued October 4, 2021); *T.D.*, Docket No. 17-1011 (issued January 17, 2018).

the additional lumbar diagnoses of lumbar herniated discs and lumbar myofascial derangements were not causally related to the accepted employment injury as appellant's December 2, 2019 x-rays established that these conditions were degenerative. He opined that appellant's spine conditions were not aggravated by the June 19, 2017 fall. However, Dr. Crystal noted that she had subjective complaints that corresponded with the objective findings of spondylosis on cervical and lumbar x-rays. He determined that appellant had no current employment-related disability and that any disability due to her June 19, 2017 employment injury had resolved. Dr. Crystal found that she could return to her date-of-injury position and that she did not require additional treatment for her accepted employment injuries.

Dr. Crystal has provided conflicting opinions regarding whether the conditions of cervical and lumbar spondylosis should be accepted as causally related to the June 19, 2017 employment injury. The Board has held that an opinion which is equivocal in nature is of limited probative value regarding the medical matter addressed.¹¹ As Dr. Crystal has not offered a clear explanation that appellant no longer had disability or required medical treatment for her accepted employment injuries, his opinion cannot constitute the special weight of medical evidence.¹² When an IME fails to provide medical reasoning to support his or her conclusory statements about a claimant's condition, it is insufficient to resolve a conflict in the medical evidence.¹³

Because OWCP relied on the opinion of Dr. Crystal to terminate appellant's wage-loss compensation and medical benefits, effective March 26, 2020, without having resolved the existing conflict in the medical opinion evidence, the Board finds that OWCP failed to meet its burden of proof.¹⁴

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective March 26, 2020.

¹¹ See *P.J.*, Docket No. 20-0550 (issued April 26, 2021); *E.B.*, Docket No. 18-1060 (issued November 1, 2018); *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962).

¹² *G.M.*, Docket No. 21-0401 (issued September 14, 2021); *R.O.*, Docket No. 19-0885 (issued November 4, 2019); *Roger Dingess*, 47 ECAB 123 (1995).

¹³ *G.M., id.*; *M.P.*, Docket No 16-0551 (issued May 19, 2017); *James T. Johnson*, 39 ECAB 1252 (1988).

¹⁴ In light of the Board's disposition with regard to Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 10, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: July 24, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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