

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

K.T., Appellant)	
)	
and)	Docket No. 22-1038
)	Issued: June 22, 2023
U.S. POSTAL SERVICE, BALTIMORE POST)	
OFFICE, Baltimore, MD, Employer)	
)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
JANICE B. ASKIN, Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 2, 2022 appellant, through her representative, filed a timely appeal from a March 28, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP).

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.

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

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation, effective February 24, 2021, as she no longer had disability causally related to her accepted June 24, 2020 employment injury; (2) whether appellant has met her burden of proof to establish continuing disability on or after February 24, 2021, causally related to her accepted June 24, 2020 employment injury; (3) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$7,575.28 for the period February 24 through May 7, 2021, for which she was without fault, because she continued to receive FECA wage-loss compensation to which she was not entitled; and (4) whether OWCP properly denied waiver of recovery of the overpayment.

FACTUAL HISTORY

On June 24, 2020 appellant, then a 51-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that on that date she sustained an abdominal injury when she was pinned between two wire cages while in the performance of duty. The record indicates that she stopped work.

Appellant was treated initially by Toni E. Rosal, a certified registered nurse practitioner (CRNP), who diagnosed an abdominal injury in reports dated from June 24 through 26, 2020. Ms. Rosal returned appellant to modified duty with restrictions, effective June 25, 2020.

In reports dated from June 30 through August 7, 2020, Dr. Christine L. Commerford, a Board-certified family practitioner, diagnosed a crush injury.⁴ She held appellant off work.

On August 25, 2020 appellant filed a claim for compensation (Form CA-7) for disability from work for the period August 9 through 14, 2020. She subsequently filed additional Form CA-7 claims for compensation through September 11, 2020.

In a September 8, 2020 report, Dr. Commerford described a six-month history of a right upper extremity condition.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the March 28, 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.*

⁴ A July 10, 2020 abdominal computerized tomography (CT) scan demonstrated a right pelvic kidney with an indeterminate mass warranting an ultrasound evaluation, and no acute post-traumatic anomaly. A July 14, 2020 retroperitoneal transabdominal ultrasound study demonstrated a right renal cyst.

In a report dated September 11, 2020, Dr. Commerford diagnosed “abdominal pain caused by a crush injury on June 24, 2020.” She noted that appellant had undergone an abdominal surgery in January 2020 but that there was no documentation of any preexisting abdominal conditions.

OWCP accepted the claim for crushing injury of the abdomen. It paid appellant wage-loss compensation on the supplemental rolls from August 9 through September 11, 2020.

On January 26, 2021 OWCP obtained a second opinion evaluation by Dr. Ross S. Myerson, Board-certified in occupational medicine, to determine the nature and extent of appellant’s employment-related conditions and her work capacity. In a February 9, 2021 report, Dr. Myerson reviewed the medical record and a statement of accepted facts (SOAF). He noted that appellant ambulated with a cane. On examination, Dr. Myerson observed mild tenderness to palpation in the right lower abdominal quadrant, limited range of forward lumbar flexion, and diffuse tenderness to palpation in the lumbar area. He noted that a lumbar magnetic resonance imaging (MRI) scan had been performed but that the results had not been made available to him. Dr. Myerson opined that as there was no orthopedic diagnosis related to the work injury, appellant’s low back pain was not an exacerbation or aggravation of the June 24, 2020 employment injury. He found that appellant’s “lower abdominal tenderness is a work-related condition and has not yet resolved; however, there are no objective findings with respect to her abdominal symptoms.” Dr. Myerson noted that further treatment would not likely result in any improvement.

On February 10, 2021 Dr. Myerson completed a Form OWCP-5c indicating that appellant could perform full-time work at the medium physical demand level, with no restriction on standing and lifting up to 20 pounds due to a nonoccupational lumbar spine condition.

In a February 12, 2021 report, Dr. Ruth noted performing an intra-articular injection.

In a February 15, 2021 report, Dr. Commerford noted that appellant continued to have abdominal, back, and lower extremity pain. She held appellant off work.

By decision dated February 24, 2021, OWCP terminated appellant’s wage-loss compensation effective that date. It found that the weight of the medical evidence rested with Dr. Myerson’s February 9, 2021 second opinion report. OWCP noted that appellant’s claim remained open for medical benefits.

On March 30, 2021 appellant requested an oral hearing before a representative of OWCP’s Branch of Hearings and Review.

Appellant subsequently submitted Dr. Ruth’s March 31, 2021 report of an intra-articular injection.

OWCP paid appellant wage-loss compensation on the supplemental rolls for the period September 12, 2020 through February 12, 2021.

In an April 26, 2021 report, Dr. Commerford noted the recent onset of swelling in appellant’s hands and feet, hand tremors and jerking, forgetfulness, and occasional confusion. Appellant’s abdominal pain had improved, but her lumbar pain continued. Dr. Commerford

diagnosed intention tremor, hypertension, pedal edema, and lumbar radiculopathy. She returned appellant to work effective May 26, 2021 with no heavy lifting.

OWCP thereafter received reports by Dr. Commerford dated October 29, 2020 and March 30, 2021 noting abdominal and lumbar symptoms.

On May 18, 2021 OWCP paid appellant wage-loss compensation on the supplemental rolls for the period February 13 through May 7, 2021.

On May 26, 2021 Dr. Ruth administered an intra-articular injection at L3-4.

In a June 4, 2021 report, Dr. Ruth found appellant's abdominal pain unchanged. He noted an impression of "[b]ilateral inguinal neuropathy after work injury -- likely secondary to acute exacerbation of her chronic lumbar radicular pain improved with epidural steroid injection," and lumbosacral radiculopathy, greater in the right L4, L5, and S1 distributions. Dr. Ruth held appellant off work.

In a June 8, 2021 report, Dr. Commerford returned appellant to work effective June 23, 2021.

A telephonic hearing was held before a representative of OWCP's Branch of Hearings and Review on July 6, 2021 regarding the February 24, 2021 termination decision. Appellant stated that she had returned to work in a full-time light-duty position on June 23, 2021, but that her schedule had been reduced to four hours effective July 6, 2021.

Thereafter, appellant submitted a July 2, 2021 report by Dr. Ruth finding her disabled from work due to ongoing bilateral inguinal neuropathy and right-sided L4, L5, and S1 radiculopathy. He opined that appellant required continued treatment directly related to the accepted employment injury.

In an August 13, 2021 duty status report (Form CA-17), Dr. Commerford noted appellant's symptoms of low back pain radiating to the left knee. She returned appellant to full-time work with restrictions.

By decision dated September 7, 2021, an OWCP hearing representative affirmed OWCP's February 24, 2021 termination decision.

In a September 10, 2021 Form CA-17, Dr. Commerford maintained appellant on restricted duty.

In a letter dated September 20, 2021, OWCP advised appellant that it had, inadvertently, paid her wage-loss compensation through May 7, 2021, beyond the date of the February 24, 2021 termination decision. Therefore, it would not pay any additional claims for wage-loss compensation.

In a preliminary overpayment determination dated September 21, 2021, OWCP notified appellant of its preliminary finding that she received an overpayment of compensation in the amount of \$7,575.28 for the period February 24 through May 7, 2021 because appellant had been

paid wage-loss compensation for total disability following the termination of her wage-loss compensation on February 24, 2021. It indicated that she was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable repayment method and advised her that she could request a waiver of recovery of the overpayment. It further requested that she provide financial documentation, including copies of income tax returns, bank account statements, bills, pay slips, and any other records to support her reported income and expenses. Additionally, OWCP further provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, she could request a final decision based on the written evidence or a precouplement hearing.

In response, appellant submitted an October 7, 2021 statement noting continued back and abdominal symptoms.

In a November 24, 2021 report, Dr. Ruth diagnosed lumbar post-laminectomy syndrome. He performed surgical percutaneous implantation of neurostimulator electrodes as part of a spinal cord neuromodulation trial. In a follow-up report dated November 30, 2021, Dr. Ruth noted that the leads had migrated and would be reprogrammed.

By decision dated March 28, 2022, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$7,575.28 during February 24 through May 5, 2021 as she received wage-loss compensation following its termination. It found that she was without fault in the creation of the overpayment but denied waiver of recovery of the overpayment. OWCP required recovery of the overpayment by payment in full.

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.⁵ After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

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

⁵ *M.M.*, Docket No. 17-1264 (issued December 3, 2018); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *T.N.*, Docket No. 22-0721 (issued September 14, 2022); *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁷ *T.N.*, *id.*; *R.L.*, Docket No. 20-1611 (issued September 30, 2022); *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *Del K. Rykert*, 40 ECAB 284 (1988).

appoint a third physician (known as a referee physician or IME) who shall make an examination.⁸ For a conflict to arise the opposing physicians' viewpoints must be of virtually equal weight and rationale.⁹

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective February 24, 2021.

OWCP terminated appellant's wage-loss compensation, effective February 24, 2021, based on the medical opinion of Dr. Myerson, the second opinion physician, who had determined in a February 9, 2021 report and February 10, 2021 Form OWCP-5c that appellant no longer had employment-related disability due to the June 24, 2020 employment injury. However, a conflict of medical opinion between Dr. Myerson, for the government, and Dr. Commerford, for appellant, remained unresolved.¹⁰

Dr. Commerford, in reports dated from January 15 through February 15, 2021, related that appellant had not fully recovered from her accepted employment injury, and that she remained disabled. She noted Dr. Ruth's diagnosis of ilioinguinal neuropathy and held appellant off work due to continued abdominal pain. Dr. Commerford opined that appellant had poor stamina and was at the time unable to stand for eight hours a day.

Dr. Myerson, in his February 9, 2021 report, opined that appellant continued to have subjective abdominal tenderness related to the accepted June 24, 2020 employment injury. In his February 10, 2021 Form OWCP-5c, he found appellant able to perform full-time, medium-duty work, with lifting restricted to 20 pounds due to a nonoccupational lumbar spine condition. Dr. Myerson indicated that appellant could stand for eight hours a day.

It is well established that where there are opposing medical reports of virtually equal probative value between an attending physician and a second opinion physician, 5 U.S.C. § 8123(a) requires OWCP to refer the case to a referee physician to resolve the conflict.¹¹ The Board finds that the medical reports of Drs. Commerford and Myerson are in equipoise on the issue of whether appellant was capable of returning to work, and are thus in conflict. The Board, therefore, finds that OWCP should have resolved this conflict of medical evidence before terminating appellant's wage-loss compensation.¹²

⁸ 5 U.S.C. § 8123(a); *R.H.*, Docket No. 20-1442 (issued February 9, 2022); *Q.S.*, Docket No. 20-0701 (issued November 10, 2021).

⁹ *R.H.*, *id.*; *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

¹⁰ *See R.H.*, *supra* note 8. *Q.S.*, *supra* note 8.

¹¹ *Id.*

¹² *Id.*

As there remains an unresolved conflict of medical opinion as to whether appellant was physically able to return to work, OWCP failed to meet its burden of proof to justify termination of her wage-loss compensation.¹³

LEGAL PRECEDENT -- ISSUE 3

Section 8102(a) of FECA¹⁴ provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.¹⁵

OWCP's regulations provide in pertinent part: "Compensation for wage loss due to disability is available only for any periods during which an employee's work-related medical condition prevents him or her from earning the wages earned before the work-related injury."¹⁶ A claimant is not entitled to receive temporary total disability benefits and actual earnings for the same period.¹⁷ OWCP's procedures also provide that an overpayment of compensation is created when a claimant returns to work, but continues to receive wage-loss compensation.¹⁸

ANALYSIS -- ISSUE 3

In light of the Board's disposition of Issue 1, the Board finds that OWCP improperly determined that appellant received an overpayment of compensation in the amount of \$7,575.28 for the period February 24 through May 7, 2021. Therefore, the March 28, 2022 overpayment decision must be reversed.¹⁹

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation, effective February 24, 2021. The Board further finds that OWCP improperly determined that he received an overpayment of compensation in the amount of \$7,575.28 for the period February 24 through May 7, 2021.

¹³ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

¹⁴ *Supra* note 2.

¹⁵ 5 U.S.C. § 8102(a).

¹⁶ 20 C.F.R. § 10.500.

¹⁷ *See Q.V.*, Docket No. 21-1188 (issued May 26, 2022); *J.L.*, Docket No. 18-1266 (issued February 15, 2019); *K.E.*, Docket No. 18-0687 (issued October 25, 2018); *L.S.*, 59 ECAB 350, 352-53 (2008).

¹⁸ *See J.S.*, Docket No. 17-0260 (issued December 28, 2017); *B.H.*, Docket No. 09-0292 (issued September 1, 2009); Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Actions*, Chapter 6.200.1a (September 2020).

¹⁹ In light of the Board's disposition of Issue 3, Issue 4 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the March 28, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 22, 2023
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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