

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

P.K., Appellant)	
)	
and)	Docket No. 22-1345
)	Issued: June 28, 2023
U.S. POSTAL SERVICE, UNION POST)	
OFFICE, Union, NJ, Employer)	
)	

Appearances:
Appellant, pro se
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 September 23, 2022 appellant filed a timely appeal from a May 6, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.²

ISSUES

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 26, 2021, as she no longer had disability or residuals causally related to her accepted July 17, 2008 employment injury; and

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that following the May 6, 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.*

(2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after October 26, 2021, causally related to her accepted July 17, 2008 employment injury.

FACTUAL HISTORY

On December 16, 2008 appellant, then a 47-year-old letter carrier, filed a notice of recurrence (Form CA-2a) alleging that, on July 17, 2008, she sustained a recurrence of disability while casing mail due to a March 16, 2006 employment injury.³ OWCP converted her recurrence claim to a new traumatic injury claim and assigned the present claim OWCP File No. xxxxxx620.⁴ It accepted appellant's claim for bilateral carpal tunnel syndrome and brachial neuritis or radiculitis. OWCP paid her wage-loss compensation on the supplemental rolls effective September 3, 2008 and on the periodic rolls, effective March 15, 2009.

Appellant underwent OWCP-approved left wrist median nerve compression surgery on April 30 and August 20, 2009.

Appellant continued to receive medical treatment. In a report dated August 8, 2018, Dr. Diana Larrea, an osteopath specializing in family medicine, indicated that appellant was under her care for conditions of cervical radiculopathy, lumbar radiculopathy, and bilateral leg pain. She explained that during appellant's most recent examination on July 31, 2018 he complained of symptoms of body aches, cramp, difficulty in ambulation, numbness, swelling, tingling, and weakness in joints. Dr. Larrea noted that a recent cervical/lumbar spine magnetic resonance imaging (MRI) scan showed a syrinx at C6-7 and multi-level degenerative disc disease at L4-5 and L5-S1 with varying degrees of neural compromise. She opined that appellant's medical condition had not resolved or improved and that appellant was not medically able to return to work without restrictions.

On July 29, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions to Dr. Frank J. Corrigan, a Board-certified orthopedic hand surgeon, for a second opinion evaluation regarding the status of her employment-related injuries. In a September 13, 2019 report, Dr. Corrigan described the July 17, 2008 employment injury and noted appellant's current complaints of pain and numbness in fingers radiating up to her shoulders. On examination of appellant's bilateral wrists, he observed no tenderness to palpation and negative Phalen's, Tinel's, and compression tests for carpal tunnel syndrome. Strength was 5/5. Dr. Corrigan opined that appellant's work-related bilateral carpal tunnel syndrome and brachial neuritis or radiculitis had resolved and that she could return to work.

OWCP determined that a conflict in medical evidence existed between appellant's treating physician, Dr. Larrea, and OWCP's second-opinion examiner, Dr. Corrigan. It referred appellant,

³ Appellant previously filed a traumatic injury claim (Form CA-1) alleging that on March 16, 2006 she sprained her neck, thoracic and lumbar spine, left elbow, and left knee while in the performance of duty. OWCP assigned that claim OWCP File No. xxxxxx649 and accepted it for neck, thoracic, lumbar, left ankle, and left elbow sprains.

⁴ Appellant also has two other previously-accepted traumatic injury claims. Under OWCP File No. xxxxxx346, OWCP accepted a February 4, 2004 traumatic injury claim for left shoulder strain. Under OWCP File No. xxxxxx264, OWCP accepted a February 3, 2007 traumatic injury claim for left wrist sprain and right elbow and right knee contusion.

along with an updated SOAF, to Dr. James M. Kipnis, a Board-certified orthopedic surgeon, to serve as an impartial medical examiner (IME) to resolve the conflict.

In a January 6, 2021 report, Dr. Kipnis noted his review of appellant's records, including the SOAF, and noted that her present claim was accepted for bilateral carpal tunnel syndrome and brachial neuritis or radiculitis. He also noted appellant's previously accepted claims for left shoulder, neck, thoracic, lumbar, left ankle, left wrist, and left elbow sprains, right elbow contusion, and right knee contusion. Dr. Kipnis indicated that appellant currently complained of numbness and tingling in her hands, which radiated up to her forearms, posterior knee pain, numbness and itching in her feet, and her left knee giving out. On examination of appellant's bilateral hands, he observed healed carpal tunnel incisions. Dr. Kipnis noted appellant's complaints of abnormal sensation over the dorsal aspect of both hands, the dorsal and volar aspect of the fifth finger of the right hand and ulnar aspect of the left palm, and over the dorsal aspect of the forearms. Phalen's and Tinel's testing was negative with no report of distal radiation. Dr. Kipnis reported that appellant demonstrated diminished grip strength bilaterally and give away weakness. He also indicated that appellant's sensory examination was inconsistent and did not follow any anatomical radicular pattern.

In response to OWCP's questions, Dr. Kipnis indicated that appellant did not suffer from disabling residuals of the accepted conditions of brachial neuritis or radiculitis and bilateral carpal tunnel syndrome. He noted that there were no reported electromyography (EMG) findings, which included a diagnosis of brachial neuritis. Dr. Kipnis also explained that appellant did not describe a cervical radicular pain pattern and her physical findings did not substantiate a cervical radiculopathy or brachial neuritis. He further reported that there were no objective findings of a disabling bilateral carpal tunnel syndrome and specifically noted no thenar atrophy, inconsistent effort on grip strength testing, demonstrated weakness in muscle groups, and non-anatomical reported sensory deficits inconsistent with carpal tunnel syndrome. Dr. Kipnis concluded that appellant did not need further treatment for her employment-related conditions and that she was capable of returning to her date-of-injury job. He completed a work capacity evaluation (Form OWC-5c), which indicated that appellant was unable to perform her usual job without restrictions. Dr. Kipnis also indicated that appellant could work with restrictions and checked the boxes for sedentary level and light strength levels.

On February 16, 2021 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on the January 6, 2021 report of Dr. Kipnis, the IME, who found that appellant no longer had any disability or residuals causally related to her accepted employment injury. It afforded her 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

By decision dated March 17, 2021, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that date. It found that the special weight of the medical evidence rested with Dr. Kipnis, the IME, who found that appellant no longer had any disability or residuals causally related to her accepted employment injury.

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

By decision dated May 20, 2021, the Branch of Hearings and Review reversed the March 17, 2021 termination decision, finding that OWCP had improperly terminated appellant's wage-loss compensation and medical benefits less than 30 days after the February 16, 2021 pretermination notice. It also found that Dr. Kipnis's opinion required clarification regarding whether appellant had work restrictions. On remand, the Branch of Hearings and Review instructed OWCP to request a supplemental opinion from Dr. Kipnis and to administratively combine the present case with OWCP File Nos. xxxxxx346, xxxxxx649, and xxxxxx264.⁵

In an August 16, 2021 supplemental report, Dr. Kipnis opined that appellant's bilateral carpal tunnel syndrome and cervical radiculopathy conditions had resolved and that she was no longer in need of further treatment. He also indicated that appellant's other accepted conditions of left shoulder strain, left ankle sprain, left elbow and forearm sprain, sprain of lumbar and thoracic region, neck sprain, left wrist sprain, right knee bruise, and right elbow bruise had resolved. Dr. Kipnis explained that a review of the medical records showed no ongoing treatment to the left ankle, left elbow, left forearm, right elbow, and thoracic spine. He also reported that appellant had no work-related conditions that were causing the need for work restrictions. Dr. Kipnis indicated that appellant had nonwork-related right and left shoulder conditions, which caused the need for work restrictions.

In a work capacity evaluation (Form OWCP-5c) dated August 16, 2021, Dr. Kipnis indicated that appellant was capable of performing her usual job with regard to her accepted conditions. He also reported that appellant could work full-time sedentary and light duty. Dr. Kipnis explained that appellant's work limitations were due to her nonwork-related conditions.

On September 13, 2021 OWCP issued a *de novo* notice of proposed termination of appellant's wage-loss compensation and medical benefits because she no longer had disability or residuals causally related to her accepted July 17, 2008 employment injury. It informed her that the proposed termination was based on the January 6 and August 16, 2021 reports of Dr. Kipnis, the IME, who found that appellant 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 a January 25, 2021 EMG and nerve conduction velocity (NCV) study interpreted by Dr. Nilay Shan, a Board-certified neurologist, who noted moderate bilateral C5-C6 and C6-C7 radiculopathies and mild bilateral sensory demyelinating median nerve neuropathy at the wrist, which was consistent with carpal tunnel syndrome.

By decision dated October 26, 2021, OWCP finalized the notice of proposed termination of appellant's wage-loss compensation and medical benefits, effective that date. It found that the special weight of the medical evidence rested with Dr. Kipnis, the IME, who found that appellant no longer had any disability or residuals causally related to her July 17, 2008 employment injury.

⁵ On May 25, 2021 OWCP administratively combined the current case with OWCP File Nos. xxxxxx346, xxxxxx649, and xxxxxx264, with the current claim serving as the master file.

On November 16, 2021 appellant requested a hearing before a representative of OWCP's Branch of Hearings and Review, which was held on March 8, 2022.

Appellant submitted additional diagnostic testing. A December 21, 2020 EMG/NCV study showed sensorimotor axonal and demyelinating peripheral neuropathy affecting the lower extremities and bilateral L4-5 and L5-S1 radiculopathies. A September 16, 2021 lumbar spine MRI scan demonstrated bilateral facet hypertrophy at L4-5 level, marked hypertrophic facet joint disease on the left side and moderate facet joint disease on the right side at L5-S1 level. A September 28, 2021 cervical spine MRI scan revealed multilevel spondylosis, small central disc herniation at the C2-3 disc level, impinging upon the anterior thecal sac, posterior bulge at the C3-4 disc level with central disc herniation compressing upon anterior thecal cord, posterior bulge at the C4-C5 disc level, compressing upon the anterior spinal cord, central disc herniation at the C5-6 disc level, impinging upon the anterior spinal cord, right foraminal stenosis with impingement of right C6 exiting nerve root, and central disc herniation at the C6-7 disc level, impinging upon the anterior thecal sac.

A March 21, 2022 EMG/NCV study showed electrophysiological evidence of mild bilateral sensory demyelinating median nerve neuropathy at the wrists, which was consistent with carpal tunnel syndrome.

A March 11, 2022 cervical spine MRI scan revealed borderline Chiari 1 malformation with mild dilatation of the central canal of the lower cervical and upper thoracic spine, mild reversal of normal curvature of the cervical spine, small central disc herniation at the C2-C3 and C3-C4 disc level impinging upon anterior thecal sac, broad-based central disc herniation at the C4-C5 disc level, broad-based posterior disc/osteophyte ridge complex at the C5-6 disc level, central disc herniation at the C6-7 disc level impinging upon anterior thecal prominent to the left side and impingement on the left C7 exiting nerve root, posterior bulge at the T2-T3 disc level, and left paracentral disc herniation at the T4-T5 and T5-T6 disc levels with the left foraminal disc herniation and mild left foraminal stenosis.

By decision dated May 6, 2022, OWCP's hearing representative affirmed the October 26, 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.⁶ It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁷ OWCP's

⁶ *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).

⁷ *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.⁸

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁹ 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.¹⁰

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.¹¹ This is called an impartial medical examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.¹² When a case is referred 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.¹³

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 October 26, 2021.

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Larrea, appellant's treating physician, and Dr. Corrigan, an OWCP second opinion physician, regarding the status of appellant's July 17, 2008 employment injury and referred appellant, pursuant to 5 U.S.C. § 8123(a), to Dr. Kipnis for an impartial medical examination and an opinion as to whether appellant had disability or residuals causally related to her July 17, 2008 employment injury.

In a January 6, 2021 report, Dr. Kipnis noted his review of appellant's records, including the SOAF, and noted that her present claim was accepted for bilateral carpal tunnel syndrome and brachial neuritis or radiculitis. He described appellant's current complaints of numbness and tingling in her hands, which radiated up to her forearms. Dr. Kipnis provided examination findings and opined that appellant did not suffer from disabling residuals of the accepted conditions of brachial neuritis or radiculitis and bilateral carpal tunnel syndrome. He indicated that there were

⁸ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁹ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

¹⁰ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

¹¹ 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).

¹² 20 C.F.R. § 10.321.

¹³ *K.D.*, Docket No. 19-0281 (issued June 30, 2020); *J.W.*, Docket No. 19-1271 (issued February 14, 2020); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

no reported EMG findings, which included a diagnosis of brachial neuritis and that appellant's physical examination findings revealed no objective findings of cervical radiculopathy or brachial neuritis or bilateral carpal tunnel syndrome. In an August 16, 2021 supplemental report, Dr. Kipnis clarified that appellant had no work-related conditions, which required work restrictions, but that she had nonwork-related right and left shoulder conditions, which caused the need for work restrictions.

The Board finds, however, that Dr. Kipnis's opinion does not contain sufficient medical reasoning to establish that appellant no longer had disability or residuals due to her accepted July 17, 2008 employment injury.¹⁴ While Dr. Kipnis opined that appellant's bilateral brachial neuritis and carpal tunnel syndrome had resolved based on the lack of diagnostic studies and physical examination findings, he failed to explain why she remained symptomatic and presented with inconsistent sensory examination. Rationalized medical evidence must include rationale explaining how the physician reached the conclusion he or she is supporting.¹⁵ Accordingly, the Board finds that Dr. Kipnis did not provide an opinion with sufficient medical reasoning to establish that appellant no longer had disability or residuals due to her accepted July 17, 2008 employment injury.¹⁶ Dr. Kipnis' opinion, therefore, is insufficient to justify the termination of appellant's wage-loss compensation and medical benefits.¹⁷ The Board thus finds that OWCP failed to meet its burden of proof.

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective October 26, 2021.¹⁸

¹⁴ See *S.L.*, Docket No. 20-1010 (issued April 8, 2022); see also *C.G.*, Docket No. 20-0808 (issued April 23, 2021); *J.W.*, Docket No. 19-1014 (issued October 24, 2019); *S.W.*, Docket No. 18-0005 (issued May 24, 2018).

¹⁵ *B.B.*, Docket No. 19-1102 (issued November 7, 2019); *Beverly A. Spencer*, 55 ECAB 501 (2004).

¹⁶ *C.B.*, Docket No. 20-0629 (issued May 26, 2021); *A.G.*, Docket No. 20-0187 (issued December 31, 2020).

¹⁷ *S.R.*, Docket No. 19-1229 (issued May 15, 2020); *B.M.*, Docket No. 21-0101 (issued December 15, 2021); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008).

¹⁸ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the July 12, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 28, 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