

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

_____)	
J.D., Appellant)	
)	
and)	Docket No. 22-0496
)	Issued: October 17, 2023
U.S. POSTAL SERVICE, POST OFFICE, Southeastern, PA, Employer)	
_____)	

Appearances:
Thomas R. Uliase, Esq., 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
JANICE B. ASKIN, Judge

JURISDICTION

On February 22, 2022 appellant, through counsel, filed a timely appeal from a September 23, 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 September 23, 2021 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 medical benefits, effective April 26, 2020, as he no longer had residuals due to his accepted September 21, 2017 employment injury; and (2) whether appellant has met his burden of proof to establish continuing residuals on or after April 26, 2020, causally related to his accepted September 21, 2017 employment injury.

FACTUAL HISTORY

On September 21, 2017 appellant, then a 55-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on September 21, 2017 he injured his back, shoulder, head, and neck when his stationary vehicle was struck by another vehicle while in the performance of duty. He stopped work on September 21, 2017. OWCP accepted appellant's claim for sprain of the thorax, thoracic spine sprain, cervical spine sprain, and concussion without loss of consciousness. It paid him wage-loss compensation on the supplemental rolls, effective November 6, 2017, and on the periodic rolls, effective March 4, 2018. By decisions dated April 16, June 15, and September 10 and 18, 2018, OWCP expanded the acceptance of appellant's claim to include cervical radiculopathy, convergence insufficiency, cervical disc disorder with radiculopathy, adjustment disorder with mixed anxiety, and depressed mood.

On May 21, 2019 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Steven J. Valentino, a Board certified orthopedic surgeon, for a second opinion evaluation regarding the status of his employment-related conditions.

In a June 18, 2019 report, Dr. Valentino noted his review of the history of injury and appellant's medical records. On examination of appellant's lumbar spine, he observed normal spinal curves without spasm, malalignment, trigger points, or subluxation. Range of motion was full about the cervical, thoracic, and lumbar regions. Sitting and standing straight leg raise testing were negative. Dr. Valentino diagnosed resolved sprain of other specified parts of the thorax, resolved sprain of the cervical spine, resolved sprain of the thoracic sprain, resolved cervical radiculopathy, and resolved cervical disc with radiculopathy. He opined that appellant did not require further medical treatment and did not have any physical limitations related to his resolved orthopedic and spine injuries.

In a report dated May 31, 2019, Dr. Michael Marino, a Board-certified physiatrist noted appellant's complaints of increased anxiety, especially nausea and headache, and intermittent burning in his arm. He provided examination findings and diagnoses, including post-concussion syndrome, trigeminal neuralgia, balance disorder, blurry vision, anxiety and depression, and fatigue due to an old head injury.

In reports dated June 10 and 27, 2019, Dr. Andres Botero, a Board-certified internist, diagnosed cervical disc disorder with radiculopathy of the cervicothoracic region, post-concussion syndrome, gait instability, and convergence insufficiency. He completed duty status reports (Forms CA-17), noting that appellant could not resume work.

In a report dated June 24, 2019, Dr. Philip Sasso, a Board-certified anesthesiologist, indicated that appellant was seen for complaints of neck and bilateral upper extremity pain. On physical examination, he observed tenderness to palpation and spasms of the cervical spine and increased pain with range of motion. Examination of appellant's upper extremities demonstrated normal motor testing and reflexes. Dr. Sasso diagnosed trigeminal neuralgia, cervical radiculopathy, cervical disc disorder with radiculopathy, other cervical disc displacement of the cervicothoracic region, disorder of the trigeminal nerve, and postconcussion syndrome.

By notice dated July 25, 2019, OWCP proposed to terminate appellant's medical benefits for his accepted orthopedic medical conditions due to his September 21, 2017 employment injury. It found that the weight of the medical evidence rested with Dr. Valentino, who opined that appellant no longer had residuals of his accepted thorax sprain, cervical spine sprain, thoracic spine sprain, and cervical disc disorder with. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if he disagreed with the proposed termination.

In a letter dated August 9, 2019, Dr. Botero noted his disagreement with Dr. Valentino's June 18, 2019 second-opinion report. He asserted that appellant could not perform some of the tasks mentioned, including walking heel-to-toe, and had evident weakness on physical examination. Dr. Botero explained that both he and Dr. Marino believed that appellant had yet to reach maximum medical improvement for the cervical radiculopathy and postconcussion syndrome. He provided additional progress reports and CA-17 forms dated August 7 through November 4, 2019.

In a letter dated August 21, 2019, Dr. Marino indicated that appellant continued to have residuals of his September 21, 2017 work injury. He noted that appellant had continued paresthesia and weakness secondary to cervical radiculopathy. Dr. Marino reported that appellant's symptoms were improving, but not to the point that he was able to return to work.

OWCP determined that a conflict in medical evidence existed between appellant's treating physician, Dr. Botero, and OWCP's second-opinion examiner, Dr. Valentino, regarding whether appellant had continued residuals due to his accepted sprain of the thorax, cervical spine sprain, thoracic spine sprain, and cervical disc disorder with radiculopathy. OWCP referred appellant, the medical record, a SOAF and a series of questions to Dr. Stanley Askin, a Board-certified orthopedic surgeon, to serve as an impartial medical examiner (IME) to resolve the conflict.

In a January 30, 2020 report, Dr. Askin noted his review of the SOAF and appellant's accepted conditions of sprain of thorax, concussion without loss of consciousness, cervical spine sprain, thoracic spine sprain, cervical radiculopathy, convergence insufficiency, cervical disc disorder with radiculopathy, adjustment disorder with mixed anxiety and depressed mood, and postconcussion syndrome. He indicated that appellant still complained of headaches, nausea, back pain, and neck pain radiating into his right shoulder and arm. On examination of appellant's back, Dr. Askin observed no tenderness or pain. Range of motion testing demonstrated 90 degrees forward flexion. Dr. Askin reported that examination of appellant's neck showed no spasm of the paracervical muscles and full extension and rotation on range of motion. He indicated that appellant noted pain in the left posterior neck on Spurling's test.

In response to OWCP's questions, Dr. Askin opined that there was "no documentation that [appellant's] musculoskeletal system was traumatically altered." He indicated that diagnostic

imaging did not reveal any “traumatic change imposed upon [appellant’s] baseline condition by the September 21, 2017 incident.” Dr. Askin explained that the usual explanation for neck complaints for a person in the middle years of life, especially one who was substantially overweight, was cervical spondylosis. He opined that, from a musculoskeletal point of view, there is no medical evidence of record to support consideration of direct cause, aggravation, acceleration, or precipitation of any musculoskeletal condition. Dr. Askin reported that no further medical treatment was necessary and no physical limitation resulted from the September 21, 2017 employment injury from a “purely musculoskeletal point of view” since “no objectively determinable traumatically[-]imposed musculoskeletal consequence” was present. He completed a work-capacity evaluation (Form OWCP-5c), indicating that appellant could resume work without restrictions.

Appellant submitted additional evidence. In a letter dated January 7, 2020, Dr. Marino explained that appellant had ongoing symptoms related to his concussion injury sustained in September 2017. He described appellant’s symptoms and the treatment that he received.

In a February 25, 2020 letter, Dr. Botero opined that appellant had not reached maximum medical improvement from his September 21, 2017 employment injury. He indicated that appellant still had cognitive deficits, convergence insufficiency, cognitive fatigue, and postconcussion syndrome. Dr. Botero provided additional reports and CA-17 forms dated November 4, 2019 through March 17, 2020 and diagnosed cervical disc disorder with radiculopathy of the cervicothoracic region, postconcussion syndrome, trigeminal neuralgia, gait instability and convergence insufficiency. In an attending physician’s report (Form CA-20) of even date, he noted the September 21, 2017 employment injury and diagnoses of postconcussion syndrome, cervical disc disorder with radiculopathy, trigeminal neuralgia, cervical radiculopathy, adjustment disorder with anxiety and depressed mood.

In a March 9, 2020 Form CA-20, Dr. Marino noted the September 21, 2017 employment injury and diagnoses of cognitive deficits, impaired balance, concussion, neck pain, cervicogenic headaches, concussion and cervical radiculopathy. He reported that appellant remained totally disabled from work.

By decision dated April 7, 2020, OWCP finalized the July 25, 2019 notice of proposed termination of appellant’s medical benefits effective April 26, 2020. It found that the special weight of the medical evidence rested with Dr. Askin, the IME, who indicated in a January 30, 2020 report that appellant no longer had residuals due to his September 21, 2017 musculoskeletal injuries.

On May 7, 2020 appellant, through counsel, requested a hearing before a representative of OWCP’s Branch of Hearings and Review, which was held on August 12, 2020. Counsel alleged that Dr. Askin’s January 30, 2020 impartial medical report was insufficiently rationalized.

Appellant submitted additional evidence. In reports dated April 17 through August 14, 2020, Dr. Marino noted appellant’s continued complaints of neck and back pain, headaches, nausea, and difficulty reading and concentrating. He diagnosed concussion with no loss of consciousness, anxiety and depression, blurry vision, headache, and cervicalgia.

In a letter dated August 10, 2020, Dr. Botero noted his disagreement with OWCP's decision to terminate appellant's medical treatment for his September 21, 2017 employment injury. He indicated that appellant still complained of numbness in the 5th digit of the left hand and 4th and 5th digits of the right hand. Dr. Botero reported that there was electrodiagnostic evidence of left C8 and possibly T1 radiculopathy. He opined that the electrodiagnostic studies and clinical findings supported that there was radicular impairment with symptoms that occurred after the accepted employment injury. Dr. Botero explained that appellant's symptoms had improved, but he still needed further medical treatment and was unable to perform his work duties.

Dr. Botero provided additional progress notes dated April 27 through October 23, 2020, which noted appellant's complaints of paresthesia and carpal tunnel symptoms. He diagnosed cervical disc disorder with radiculopathy, postconcussion syndrome, trigeminal neuralgia of the right side of the face, gait instability, convergence insufficiency, and anxiety.

By decision dated September 30, 2020, the hearing representative affirmed the April 7, 2020 termination decision.

On December 14, 2020 appellant, through counsel, requested reconsideration.

Appellant submitted progress notes dated October 23, 2020 through February 4, 2021, wherein Dr. Botero discussed the medical treatment that appellant continued to receive for his symptoms and noted that he conducted an examination. Dr. Botero diagnosed cervical disc disorder with radiculopathy, postconcussion syndrome, trigeminal neuralgia of the right side of the face, gait instability, convergence insufficiency, nausea, and anxiety. He completed CA-17 forms, which indicated that appellant was unable to work.

In a November 27, 2020 report, Dr. Marino indicated that appellant continued to suffer from a broad array of symptoms related to his concussion. He conducted an examination and diagnosed concussion with no loss of consciousness, fatigue, anxiety and depression, post-traumatic headache, and cervicalgia.

In a December 14, 2020 progress report, Dr. Sasso noted appellant's complaints of continued neck pain, bilateral upper extremity radicular pain, right facial pain, and traumatic brain injury. He reported physical examination findings of limited cervical range of motion and tenderness to palpation of the cervical spine. Dr. Sasso diagnosed cervical radiculopathy, chronic pain syndrome, cervical disc disorder with radiculopathy, other cervical disc displacement, disorder of the trigeminal nerve, trigeminal neuralgia, and postconcussional syndrome.

By decision dated March 9, 2021, OWCP denied modification of the September 30, 2020 decision.

On July 16, 2021 appellant, through counsel, requested reconsideration.

In form reports dated March 16 through June 29, 2021, Dr. Botero indicated that appellant still complained of issues of fatigue, cognition, and short-term memory. He conducted an examination and diagnosed cervical disc disorder with radiculopathy, postconcussive syndrome, trigeminal neuralgia of the right side of the face, gait instability, convergence insufficiency, anxiety, and nausea. Dr. Botero reported that appellant was unable to work.

In an April 7, 2021 letter, Dr. Botero opined that appellant had not reached maximum medical improvement regarding his September 21, 2017 employment injury. He reported that he still had significant recurrent symptoms and was unable to resume meaningful work.

In reports dated March 29 through June 11, 2021, Dr. Sasso noted that appellant was evaluated for follow up of neck pain, bilateral upper extremity radicular pain, and right facial pain. Examination of appellant's cervical spine revealed limited range of motion and tenderness to palpation. Dr. Sasso diagnosed cervical radiculopathy, chronic pain syndrome, cervical disc disorder with radiculopathy, other cervical disc displacement, disorder of the trigeminal nerve, trigeminal neuralgia, and postconcussional syndrome.

By decision dated September 23, 2021, OWCP denied modification of the March 9, 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.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 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

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.⁹ For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."¹⁰ When OWCP has referred the case to an IME for the purpose of resolving the conflict,

⁴ *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 *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).

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

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

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

⁹ 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).

¹⁰ *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).

the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹

ANALYSIS -- ISSUE 1

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's medical benefits, effective April 26, 2020.

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Botero, appellant's treating physician, and Dr. Valentino, an OWCP second-opinion examiner, regarding the status of appellant's musculoskeletal conditions due to his September 21, 2017 employment injury. It properly referred appellant to Dr. Askin for an impartial medical examination and opinion as to whether appellant had disability or residuals of his musculoskeletal conditions causally related to his September 21, 2017 employment injury.

In a January 30, 2020 report, Dr. Askin reviewed appellant's history of injury and noted that his claim was accepted for sprain of thorax, concussion without loss of consciousness, cervical spine sprain, thoracic spine sprain, cervical radiculopathy, convergence insufficiency, cervical disc disorder with radiculopathy, adjustment disorder with mixed anxiety and depressed mood, and postconcussion syndrome. He provided examination findings and discussed appellant's medical history and records. In response to OWCP's questions, Dr. Askin opined that there was no evidence to establish that appellant's musculoskeletal system "was traumatically altered" by the September 21, 2017 incident." He reported that no further medical treatment was necessary and no physical limitation resulted from the September 21, 2017 employment incident from a "purely musculoskeletal point of view" since there was "no objectively determinable traumatically[-] imposed musculoskeletal consequence" present.

The Board finds that Dr. Askin's report is insufficient to establish that appellant no longer had residuals causally related to his September 21, 2017 employment injury as he did not conclusively opine that appellant no longer needed further medical treatment due to his accepted employment injury.¹² Rather, Dr. Askin reported that there was no evidence to establish that appellant's musculoskeletal system "was traumatically altered" by the September 21, 2017 employment injury and that there was no evidence of physical limitation or need for medical treatment from a "purely musculoskeletal point of view." The Board has held that a report is of limited probative value regarding a medical issue if a physician does not provide medical rationale explaining his or her opinion on that matter.¹³ His opinion is, therefore, of diminished probative

¹¹ *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).

¹² *See J.B.*, Docket No. 21-0483 (issued May 19, 2022); *J.W.*, Docket No. 19-1014 (issued October 24, 2019).

¹³ *Y.J.*, Docket No. 20-1337 (issued February 7, 2022); *L.G.*, Docket No. 19-0142 (issued August 8, 2019); *C.M.*, Docket No. 14-0088 (issued April 18, 2014).

value and insufficient to justify termination of appellant's wage-loss compensation and medical benefits.¹⁴

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's medical benefits, effective April 26, 2020.¹⁵

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2021 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 17, 2023
Washington, DC

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

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

¹⁴ *C.G.*, Docket No. 20-0808 (issued April 23, 2021); *S.R.*, Docket No. 19-1229 (issued May 15, 2020); *R.H.*, 59 ECAB 382 (2008).

¹⁵ In light of the Board's disposition of Issue 1, Issue 2 is rendered moot.