

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

A.M., Appellant)	
)	
and)	Docket No. 22-0707
)	Issued: October 16, 2023
U.S. POSTAL SERVICE, SOUTH OZONE)	
PARK POST OFFICE, South Ozone Park, NY,)	
Employer)	
)	

Appearances:
Alan J. Shapiro, Esq., for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On April 8, 2022 appellant, through counsel, filed a timely appeal from a March 30, 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 to consider the merits of this case.

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.*

ISSUES

The issues are: (1) whether appellant has met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to the accepted May 10, 2019 employment injury; and (2) whether appellant has met her burden of proof to establish that she was disabled from work, commencing April 14, 2021, causally related to the accepted May 10, 2019 employment injury.

FACTUAL HISTORY

On August 1, 2019 appellant, then a 43-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on May 10, 2019 she sustained pain in her low back and left side when two dogs ran through an opened fence and knocked her to the ground causing her to land on her buttocks and hands while in the performance of duty. She stopped work on July 24, 2019.³

In an August 7, 2019 development letter, OWCP notified appellant of the deficiencies of her claim. It advised her of the type of factual and medical evidence needed and provided a questionnaire for her completion. OWCP afforded appellant 30 days to respond.

On August 15, 2019 Dr. David Angelillo, an osteopath specializing in orthopedic surgery, diagnosed low back pain and lumbar radiculopathy. He found that appellant was totally disabled.

By decision dated September 9, 2019, OWCP denied appellant's traumatic injury claim finding that she had not submitted sufficient medical evidence to establish causal relationship between the diagnosed conditions and the accepted employment incident of May 10, 2019.

OWCP continued to receive medical evidence. On July 24, 2019 appellant underwent a lumbar spine x-ray which demonstrated mild thoracolumbar dextroscoliosis, mild multilevel degenerative spurring, mild retrolisthesis of L5 on S1 and moderate multilevel facet arthrosis. In a report dated August 15, 2019, Dr. Angelillo described appellant's history of injury on May 10, 2019. He recounted her symptoms of lower back pain, and bilateral hip and knee pain with radiating numbness and tingling into her lower legs and feet. On physical examination Dr. Angelillo found positive paravertebral muscle tenderness to palpation, negative straight leg raising tests bilaterally, and normal deep tendon reflexes. He diagnosed low back pain, radiculopathy, lumbar region, and sprain of the lumbar spine. Dr. Angelillo recommended a lumbar magnetic resonance imaging (MRI) scan to rule out a disc herniation and found that she was totally disabled.

³ OWCP assigned the present claim OWCP File No. xxxxxx410. The record reveals that appellant had a prior claim under OWCP File No. xxxxxx234, alleging injuries to her left ankle, left knee, left hand, and right hip due to an October 8, 2015 fall down stairs. OWCP denied the claim finding that appellant did not establish an employment injury, which was affirmed by the Board on May 25, 2018. See Docket No. 17-0285 (issued May 25, 2018). The claims under OWCP File No. xxxxxx234 and xxxxxx410 have been administratively combined by OWCP with the latter serving as the master file.

On September 26, 2019 appellant requested reconsideration. She provided August 12, 19, 26, and 29, 2019 reports from Dr. Angelillo repeating his findings and conclusions from August 15, 2019.

On October 22, 2019 OWCP accepted the claim for sprain of the lumbar spine.

OWCP continued to receive medical evidence. In a report dated October 17, 2019, Dr. Angelillo repeated his diagnoses and again recommended a lumbar MRI scan. On October 31, 2019 he reviewed appellant's lumbar MRI scan and found mild retrolisthesis of L5 on S1, multilevel degenerative spurring, multilevel facet arthrosis, and small central disc herniation with annular tear at L5-S1. Dr. Angelillo provided an additional diagnosis of other intervertebral disc displacement, lumbar region.

Dr. Oryan Baruch, an osteopath and Board-certified physiatrist, examined appellant on November 6, 2019 and diagnosed lumbar intervertebral disc disorders with radiculopathy. He noted that she was attacked by two dogs walking on her mail route. Dr. Baruch opined that the accepted employment incident was "the competent medical cause" of appellant's injuries, and that her complaints were consistent with her history of injury. He performed an epidural injection on November 13, 2019 for radicular pain symptoms with limited improvement.

On December 13, 2019 Dr. Baruch diagnosed intervertebral disc disorders with radiculopathy, lumbar region, and low back pain. He noted appellant's history of a dog attack at work and reviewed electromyogram (EMG) findings of right L5-S1 lumbar radiculopathy and left peroneal motor neuropathy. Dr. Baruch recommended an endoscopic discectomy at L5-S1 to treat her herniated disc. He again opined that the employment incident was "the competent medical cause" of appellant's injury.

In a report dated December 19, 2019, Dr. Angelillo diagnosed low back pain, lumbar radiculopathy, lumbar spine sprain, and disc displacement lumbar region. He found that appellant was partially disabled, but that there was no light-duty work available.

On December 31, 2019 Dr. Baruch requested authorization for a lumbar spine, L5-S1 surgery of under transpedicular or costovertebral approach for posterolateral extradural exploration/decompression procedures on the spine and spinal cord.

In a letter dated January 7, 2020, OWCP denied this request as it was not accompanied by an explanation as to the need for the procedure due to the accepted lumbar sprain.

Dr. Baruch completed reports dated January 13 through July 15, 2020 and described the May 10, 2019 employment injury. He diagnosed low back pain and intervertebral disc disorders with radiculopathy, lumbar region. Dr. Baruch recommended endoscopic discectomy at level L5-S1 and opined that the employment incident was the competent cause of these injuries. In his March 4 through July 15, 2020 notes, he opined that there seemed to be a causal relationship between appellant's initial work injury on May 10, 2019 and her currently diagnosed conditions. Dr. Baruch explained that she had experienced back pain since the injury, that her MRI scan demonstrated L5-S1 disc herniation and tear, and that her symptoms were consistent with the medical findings and history of injury. He again recommended an endoscopic discectomy.

In a June 15, 2020 letter, appellant through counsel, requested that the acceptance of her claim be expanded to include the additional conditions of lumbar radiculopathy and intervertebral disc disorders with lumbar radiculopathy. She provided a June 8, 2020 note from Dr. Baruch opining that there seemed to be a causal relationship between the initial work injury on May 10, 2019 and the diagnosed conditions of intervertebral disc disorders with radiculopathy, lumbar region, low back pain, radiculopathy, lumbar region, and pain in the bilateral hips.

Dr. Baruch completed an undated attending physician's report (Form CA-20) and diagnosed lumbar radiculopathy. He indicated that appellant, a mail carrier, was attacked by two dogs. Dr. Baruch checked a box marked "Yes" indicating that the diagnosed condition was caused or aggravated by the May 10, 2019 employment activity. He found that appellant was totally disabled from November 6, 2019 through September 4, 2020.

On September 11, 2020 appellant filed claims for compensation (Form CA-7) for disability from work for the period August 10, 2019 through September 11, 2020.

In a September 16, 2020 development letter, OWCP informed appellant of the deficiencies of her claim for wage-loss compensation. It advised her of the type of additional factual and medical evidence required and afforded her 30 days to respond.

On September 16, 2020 OWCP paid appellant compensation on the supplemental rolls from August 15, 2019 through September 11, 2020.

OWCP continued to receive medical evidence. In a note dated August 14, 2019, Dr. Charlene Andrews, an internist, reported examining appellant on July 19, 2019 and diagnosing degeneration of the lumbar intervertebral disc based on the July 24, 2019 x-ray.

Appellant underwent a lumbar MRI scan on October 28, 2019 which demonstrated slight disc desiccation indicating disc degeneration at L5-S1, small central disc herniation with annular tear at L5-S1, and scoliosis convex to the right.

On August 7 and September 4, 2020 Dr. Baruch noted appellant's history of injury and diagnosed intervertebral disc disorders with radiculopathy, lumbar region, low back pain, radiculopathy lumbar region, and bilateral hip pain.

In a report dated September 15, 2020, Dr. Cristy Perdue, a Board-certified anesthesiologist, recounted appellant's symptoms of bilateral wrist, low back, bilateral hip, and bilateral knee pain. She described the May 10, 2019 employment injury. Dr. Perdue noted that appellant had been diagnosed with carpal tunnel syndrome and underwent a right carpal tunnel release. She diagnosed lumbar radiculopathy, lumbar facet syndrome, myofascial pain, and bilateral wrist and knee pain.

By decision dated October 26, 2020, OWCP denied appellant's claim for compensation for the period August 10 through 14, 2019 finding that the medical evidence did not establish disability due to the accepted employment injuries.

On November 4, 2020 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. The hearing took place on February 4, 2021.

In a note dated January 14, 2021, Dr. Perdue recounted appellant's symptoms and diagnosed lumbar radiculopathy, myofascial pain syndrome, and cervicalgia.

On March 23, 2021 OWCP referred appellant, a statement of accepted facts, and a series of questions to Dr. Leon Sultan, a Board-certified orthopedic surgeon, for a second opinion examination.

On March 26, 2021 OWCP received appellant's December 4, 2019 EMG and nerve conduction velocity (EMG/NCV) testing results. The tests demonstrated electrodiagnostic evidence of right L5-S1 lumbar radiculopathy and left peroneal motor neuropathy.

By decision dated March 29, 2021, OWCP's hearing representative affirmed the October 26, 2020 decision.

In an April 13, 2021 report, Dr. Sultan recounted appellant's symptoms of right knee clicking, left knee weakness, and left hip pain. He reviewed her medical records, the SOAF, and provided physical findings. Dr. Sultan found no active parathoracic or paralumbar muscle spasm, negative straight leg raising, and intact sensory testing, but dull reflexes. He determined that there were no objective findings of the accepted back strain and that appellant had reached maximum medical improvement. Dr. Sultan opined that she was no longer disabled to her accepted back strain and could return to her date-of-injury position. He did not recommend any further treatment. Dr. Sultan completed a work capacity evaluation (Form OWCP-5c) and determined that appellant had no restrictions.

In a May 4, 2021 notice, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because the weight of the medical evidence, as represented by Dr. Sultan's opinion, established that she no longer had disability or residuals causally related to her accepted employment-related lumbar sprain. It afforded her 30 days to submit written argument and evidence.

In a report dated April 15, 2021, Dr. William Jones, a Board-certified physiatrist, recounted appellant's complaints of neck, upper back, and low back pain radiating to the extremities. He described the May 10, 2019 employment injury and reviewed diagnostic testing. On physical examination, Dr. Jones found tenderness of the vertebral spine and paraspinal muscles of the neck, upper and lower back and decreased range of motion and strength secondary to pain. He diagnosed cervical and lumbosacral radiculopathy, cervical and lumbar disc displacements, and muscle spasm of the back. Dr. Jones attributed the diagnosis of intervertebral disc displacement, lumbar region, to appellant's May 10, 2019 traumatic injury. He recommended a lumbar endoscopic discectomy at L5-S1.

By decision dated June 17, 2021, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 18, 2021. On June 22, 2021 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review.

OWCP continued to receive medical evidence. In a June 11, 2021 report, Dr. Jones repeated his earlier findings and conclusions.

In a letter dated July 13, 2021, appellant, through counsel, again requested to expand the acceptance of her claim.

On August 6, 2021 appellant filed a Form CA-7 requesting wage-loss compensation from August 10, 2020 through June 8, 2021.

Following a preliminary review, by decision dated September 1, 2021, OWCP's hearing representative reversed the June 17, 2021 termination decision and remanded the case for an amended SOAF, further medical development, and for appellant's claims to be administratively combined. The hearing representative further directed OWCP to "address the more recent claim for wage loss after September 11, 2020," to issue a decision on claim expansion, and "to address wage[-]loss entitlement and termination of any benefits as appropriate."

On September 9, 2021 OWCP referred a revised SOAF and series of questions to Dr. Sultan for a supplemental report. Dr. Sultan responded on September 23, 2021 and related that his physical examination of appellant's low back on April 13, 2021 was fully within normal limits with no motion restriction or lower extremity neurological impairment. He reviewed diagnostic testing and opined that there may have been temporary aggravation of her lower back condition following the May 10, 2019 employment injury. Dr. Sultan found that appellant's disability began on July 23, 2019, but had since resolved. He recounted that appellant did not report low back symptoms, including radiculopathy, muscle spasm, or myalgia. Dr. Sultan again found that there were no restrictions on work activity as a city carrier.

In a notice dated September 30, 2021, OWCP proposed to terminate appellant's wage-loss compensation and medical benefits, as the accepted employment conditions had ceased. It afforded her 30 days to submit additional evidence or argument.

In a September 30, 2021 decision, OWCP denied appellant's claim for wage-loss compensation for the period April 13, 2021 and continuing. In a separate decision of even date, it denied appellant's request to expand the acceptance of her claim to include the additional conditions of lumbar radiculopathy, lumbar intervertebral disc displacement, cervical radiculopathy, and cervical disc displacement.

On October 5, 2021 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review regarding both September 30, 2021 decisions. The telephonic hearing took place on January 14, 2022.

OWCP continued to receive medical evidence. In notes dated June 11, October 20, and December 10, 2021, Dr. Jones repeated his previous findings and conclusions. On November 19, 2021 appellant underwent an additional lumbar MRI scan which demonstrated a broad-based protruded central disc herniation with central annular tear impinging on the thecal sac, and right subarticular stenosis encroaching on the right descending S1 nerve root.

By decision dated March 30, 2022, OWCP's hearing representative affirmed the September 30, 2021 OWCP decisions finding that Dr. Sultan's reports were entitled to the weight of the medical opinion evidence.

LEGAL PRECEDENT -- ISSUE 1

When an employee claims that, a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.⁴

To establish causal relationship between the condition, as well as any attendant disability claimed and the employment event or incident, the employee must submit rationalized medical opinion evidence based on a complete factual and medical background, supporting such a causal relationship.⁵ The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁶ The weight of medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.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 appoint a third physician (known as a referee physician or impartial medical examiner (IME)) who shall make an examination.⁸ This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.⁹

ANALYSIS -- ISSUE 1

The Board finds that this case is not in posture for decision.

Dr. Baruch provided reports dated January 13 through September 4, 2020 supporting a causal relationship between appellant's diagnosed conditions of low back pain and intervertebral disc disorders with radiculopathy, lumbar region and her accepted employment injury of May 10, 2019. He described the employment injury and opined that it was competent to cause the diagnosed conditions. Dr. Baruch further explained that appellant had back pain since the injury,

⁴ *V.P.*, Docket No. 21-1111 (issued May 23, 2022); *S.B.*, Docket No. 19-0634 (issued September 19, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

⁵ *K.B.*, Docket No. 22-0842 (issued April 25, 2023); *T.K.*, Docket No. 18-1239 (issued May 29, 2019).

⁶ *R.P.*, Docket No. 18-1591 (issued May 8, 2019).

⁷ *Id.*

⁸ 5 U.S.C. § 8123(a); *L.R.*, Docket No. 21-0018 (issued February 17, 2023); *K.C.*, Docket No. 19-0137 (issued May 29, 2020); *M.W.*, Docket No. 19-1347 (issued December 5, 2019); *C.T.*, Docket No. 19-0508 (issued September 5, 2019); *R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

⁹ 20 C.F.R. § 10.321; *S.W.*, Docket No. 23-0513 (issued September 28, 2023).

that her MRI scan demonstrated L5-S1 disc herniation and tear, and that her symptoms were consistent with the medical findings and history of injury.

Appellant also provided a series of reports from Dr. Jones dated April 15 through December 10, 2021. On physical examination, Dr. Jones found tenderness of the vertebral spine and paraspinal muscles of the neck, upper and lower back and decreased range of motion and strength secondary to pain. He attributed the diagnosis of intervertebral disc displacement, lumbar region, to appellant's May 10, 2019 traumatic injury and recommended a lumbar endoscopic discectomy at L5-S1.

Dr. Sultan, OWCP's second opinion physician, completed reports on April 13 and September 23, 2021 finding no active parathoracic or paralumbar muscle spasm, negative straight leg raising, and intact sensory testing. He determined that there were no objective findings of the accepted back strain, and that appellant could return to her date-of-injury position.

The Board finds that a conflict in the medical evidence exists between Drs. Baruch and Jones, the employee's treating physicians, and Dr. Sultan, OWCP's second opinion physician, with respect to whether the May 10, 2019 employment injury resulted in continuing objective symptoms and the additional conditions of lumbar spine.¹⁰ As previously stated, when there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an IME to resolve the conflict in the medical evidence.¹¹ Consequently, the case must be referred to an IME to resolve the existing conflict of medical opinion evidence regarding whether appellant has submitted sufficient evidence to establish that she sustained continuing residuals or additional conditions causally related to the May 10, 2019 employment injury.¹²

On remand OWCP shall refer appellant, along with all relevant medical evidence regarding her back injuries and medical treatment to an IME for resolution of the conflict in accordance with section 8123(a) of FECA and the implementing regulations.¹³ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.¹⁴

¹⁰ See *T.D.*, Docket No. 21-1292 (issued April 19, 2022); *B.T.*, Docket No. 20-1665 (issued July 2, 2021); *D.B.*, Docket No. 20-1142 (issued December 31, 2020); *R.P.*, Docket No. 15-1893 (issued February 24, 2016).

¹¹ 5 U.S.C. § 8123(a); *S.C.*, Docket No. 20-0856 (issued August 26, 2021); *K.C.*, Docket No. 19-0137 (issued May 29, 2020); *M.W.*, Docket No. 19-1347 (issued December 5, 2019); *S.T.*, Docket No. 16-1911 (issued September 7, 2017); *G.B. (R.B.)*, Docket No. 16-1363 (issued March 2, 2017); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

¹² *Id.*

¹³ 5 U.S.C. § 8123(a); *id.*

¹⁴ In light of the Board's disposition of the issue of whether appellant has met her burden of proof to expand the acceptance of her claim to include additional conditions as causally related to her accepted May 10, 2019 employment injury, it is premature to address the issue of disability. See *D.H.*, Docket No. 19-0809 (issued August 24, 2020); *C.N.*, Docket No. 19-0621 (issued September 10, 2019).

CONCLUSION

The Board finds that this case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the March 30, 2022 decision of the Office of Workers' Compensation Programs is remanded for further proceedings consistent with this decision of the Board.

Issued: October 16, 2023
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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

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