

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

M.L., Appellant)	
)	
and)	Docket No. 23-0383
)	Issued: October 17, 2023
DEPARTMENT OF COMMERCE, NATIONAL)	
TECHNICAL INFORMATION SERVICE,)	
Springfield, VA, Employer)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REVERSING CASE

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

On January 17, 2023 appellant filed a timely appeal from a January 9, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned the appeal Docket No. 23-0383.

On September 24, 2004 appellant, then a 41-year-old inventory management specialist, filed a traumatic injury claim (Form CA-1) alleging that on September 23, 2004 she sustained a lumbar injury with right-sided radiculopathy when she lifted several heavy boxes off a shelf while in the performance of duty. OWCP accepted the claim for a lumbar strain. It paid appellant wage-loss compensation on the supplemental rolls, effective November 8, 2004, and on the periodic rolls, effective October 26, 2008.

On July 20, 2022 OWCP referred appellant, the medical record, and a statement of accepted facts (SOAF) to Dr. Andre Eglevsky, Jr., a Board-certified orthopedic surgeon. In a September 1, 2022 report and October 26, 2022 supplemental report, Dr. Eglevsky reviewed the medical record and SOAF. He opined that the accepted lumbar strain had ceased without disability or residuals and had not aggravated preexisting conditions.

On December 6, 2022 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because she no longer had disability or residuals causally related to her accepted September 23, 2004 employment injury. It afforded her 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

In response, appellant submitted a January 5, 2023 statement contending that the September 23, 2004 employment incident caused or aggravated lumbar disc herniations, lumbar radiculopathy, and degenerative disc disease, which continued to disable her for work.

On January 5, 2023 OWCP received additional evidence. Dr. Mirza S. Baig, a Board-certified internist, provided notes dated September 24 and 30, 2004, and May 2, 2005, diagnosing back pain related to the employment injury.

In a November 3, 2004 work slip, Dr. Ronald J. Bortnick, a Board-certified neurosurgeon, held appellant off work from September 23, 2004 through January 1, 2005.

Dr. Tajammul Ehsan, a Board-certified neurologist, provided work slips holding appellant off work from February 15 through April 30, 2005.

In a December 15, 2014 work capacity evaluation (Form OWCP-5c), Dr. Amy Traylor, a neurologist, diagnosed chronic lumbar myofascial pain syndrome and noted work restrictions.

Dr. Michael S. Chung, a Board-certified physiatrist, prescribed a repeat magnetic resonance imaging (MRI) scan on February 22, 2017. In work capacity evaluation forms (Form OWCP-5c) dated February 12, 2020 and July 2, 2021, he diagnosed a herniated lumbar disc, lumbalgia, and right-sided lumbar radiculopathy. Dr. Chung also noted work restrictions.

In a March 29, 2021 report, Dr. Sassan Hassassian, Board-certified in anesthesiology and pain medicine, diagnosed cervical spondylosis, lumbar disc degeneration, and lumbar spondylosis.

OWCP also received an October 27, 2022 report by Brooke Utley, a licensed professional counselor.

In a response to an OWCP development questionnaire dated October 13, 2022, Dr. Grace Stonerock, a Board-certified family practitioner, diagnosed degenerative disc disease aggravated by the September 23, 2004 employment injury, reactive depression aggravated by chronic pain, and arthritis. She found appellant totally disabled from work.

In a December 8, 2022 report, Dr. Stonerock opined that the September 23, 2004 employment injury caused radiculopathy, chronic pain, reactive insomnia, and aggravated degenerative disc disease and arthritis. She found appellant permanently disabled from work. In a December 23, 2022 Form OWCP-5c, Dr. Stonerock found appellant totally and permanently disabled from work due to arthritis, chronic pain, and depression.

By decision dated January 9, 2023, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits effective that day. It found that the opinion of Dr. Eglevsky, the second opinion physician, represented the weight of the evidence and established that appellant no longer had disability or residuals due to her accepted employment injury. OWCP noted that it had "not received any additional evidence or argument in response to the Notice of Proposed Termination."

The Board, having duly considered the matter, finds that this case is not in posture for decision.

In its January 9, 2023 decision, OWCP noted that it had "not received any additional evidence or argument in response to the Notice of Proposed Termination." However, on January 5, 2023, it had received appellant's January 5, 2023 statement; Dr. Baig's September 24 and 30, 2004 and May 2, 2005 reports; Dr. Bortnick's November 3, 2004 work slip; Dr. Ehsan's work slips; Dr. Traylor's December 15, 2014 report; Dr. Chung's February 22, 2017, February 12, 2020, and July 2, 2021 reports; Dr. Hassassian's March 29, 2021 report; Ms. Utley's October 27, 2022 report; and Dr. Stonerock's October 13, December 8 and 23, 2022 reports. Accordingly, OWCP did not review all evidence received prior to the issuance of the January 9, 2023 termination decision.

As the Board's decisions are final as to the subject matter appealed, it is crucial that all evidence relevant to the subject matter of the claim, which was properly submitted to OWCP prior to the time of issuance of its final decision be reviewed and addressed by OWCP.¹ Because OWCP did not consider and address the medical evidence submitted by appellant following the notice of proposed termination, the Board cannot review such evidence for the first time on appeal.² The January 9, 2023 decision, therefore will be reversed. Accordingly,

¹ The Board's *Rules of Procedure* provides: "The Board's review of a case is limited to evidence in the case record which 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); *R.D.*, Docket No. 17-1818 (issued April 3, 2018); *P.W.*, Docket No. 12-1262 (issued December 5, 2012).

² *Id.*

IT IS HEREBY ORDERED THAT the January 9, 2023 decision of the Office of Workers' Compensation Program is reversed.

Issued: October 17, 2023
Washington, DC

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

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

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