

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

C.N., Appellant	)	
	)	
and	)	<b>Docket No. 23-0463</b>
	)	<b>Issued: October 13, 2023</b>
<b>COMMISSION OF FINE ARTS, NATIONAL</b>	)	
<b>BUILDING MUSEUM, Washington, DC,</b>	)	
<b>Employer</b>	)	
	)	

*Appearances:*  
Thomas R. Uliase, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
ALEC J. KOROMILAS, Chief Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge  
JAMES D. MCGINLEY, Alternate Judge

**JURISDICTION**

On February 16, 2023 appellant, through counsel, filed a timely appeal from a November 17, 2022 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

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<sup>1</sup> 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.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUES**

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation benefits, effective February 4, 2018, as she no longer had disability causally related to her accepted June 9, 2003 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability on or after February 4, 2018, causally related to her accepted June 9, 2003 employment injury.

## **FACTUAL HISTORY**

On July 3, 2004 appellant, then a 46-year-old administrative officer, filed a traumatic injury claim (Form CA-1) alleging that on June 9, 2003 she ruptured a disc in her back when loading paper into a copy machine while in the performance of duty. She stopped work on that date and returned on June 23, 2003. OWCP accepted appellant's claim for lumbar sprain/strain. On September 22, 2004 appellant stopped work again. OWCP paid her wage-loss compensation on the supplemental rolls, effective March 20, 2005, and on the periodic rolls, effective January 22, 2006. By decision dated April 5, 2005, it expanded the acceptance of appellant's claim to include herniated disc at L4-5 without myelopathy.

On March 8, 2017 OWCP referred appellant, the medical record, a statement of accepted facts (SOAF), and a series of questions to Dr. Willie E. Thompson, a Board-certified orthopedic surgeon, for a second opinion examination and evaluation regarding the nature and extent of her accepted conditions and work capacity. In a March 23, 2017 report, Dr. Thompson reviewed the medical record, including the SOAF, and noted her complaints of localized low back pain. On physical examination of appellant's lumbar spine, he observed no tenderness or muscle spasms and full range of motion. Dr. Thompson noted that multiple diagnostic testing reports showed no evidence of any significant spinal stenosis or nerve root impingement. He opined that appellant had no residuals of her soft tissue sprain injury.

In response to an OWCP inquiry, Dr. Thompson submitted a supplemental report dated May 4, 2017, wherein he opined that appellant's accepted lumbar sprain and herniated disc injuries had resolved. He explained that examination of the lumbar spine was benign and diagnostic testing did not show any specific pathology to the lumbar spine.

On May 24, 2017 OWCP issued a notice proposing to terminate appellant's wage-loss compensation and medical benefits because she no longer had disability or residuals causally related to her accepted June 9, 2003 employment injury. It found that the weight of the medical opinion evidence rested with Dr. Thompson who found that she 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 June 15, 2017 report from Dr. David Levin, a Board-certified orthopedic surgeon, who indicated that she continued to have severe pain with prolonged sitting, standing, or bending. Dr. Levin reported that physical examination of her lumbar spine revealed tenderness to palpation over the right greater left sacroiliac joint and pain with range of motion. He noted that a magnetic resonance imaging (MRI) scan of the lumbar spine demonstrated

moderately severe degenerative changes at L4-5, subtle L4-5 spondylolisthesis, and severe right L4-5 foraminal stenosis. Dr. Levin diagnosed chronic predominantly right-sided buttock and leg pain associated with L4-5 degenerative spondylosis and right L4 foraminal stenosis. He reported that appellant remained totally disabled due to her low back condition.

A June 15, 2017 lumbar spine MRI scan revealed decreasing, now minimal disc protrusion at L3-4, otherwise stable.

OWCP found a conflict in medical opinion evidence between Dr. Levin, appellant's treating physician, and Dr. Thompson, the second opinion examiner, regarding the nature and extent of her accepted conditions and work capacity. It referred her, the medical record, a SOAF, and a series of questions to Dr. Robert F. Draper, Jr., a Board-certified orthopedic surgeon, for an impartial medical examination and opinion in order to resolve the conflict. In an August 18, 2017 report, Dr. Draper reviewed the medical record, including the SOAF, and noted appellant's accepted conditions of herniated disc at L4-5 without myelopathy and lumbar sprain. On examination of her lumbar spine, he observed negative straight leg raise testing bilaterally at 90 degrees in the sitting position. Range of motion testing revealed 30 degrees forward flexion, 10 degrees of right lateral flexion, 10 degrees of left lateral flexion, and 5 degrees of extension. Dr. Draper diagnosed low back pain syndrome and multilevel degenerative protruding lumbar disc disease at L3-4, L4-5, and L5-S1. He reported that the majority of appellant's disc conditions were preexisting degenerative bulging disc disease and protruding degenerative disc disease, not accident related, but OWCP had determined that she has an accepted condition of herniated disc at L4-5 without myelopathy. Dr. Draper indicated that "this accepted condition results in some limitations on [appellant's] work capabilities." He opined that appellant could perform medium-duty work with restrictions of no lifting more than 50 pounds occasionally, 25 pounds frequently, and excessive bending and stooping. Dr. Draper completed a work-capacity evaluation (Form OWCP-5c) indicating that she was unable to perform full-duty work, but could perform full-time, modified-duty work. He noted restrictions of pushing, pulling, and lifting up to 50 pounds occasionally and 25 pounds frequently.

By decision dated February 1, 2018, OWCP finalized the notice of proposed termination of appellant's wage-loss compensation, effective February 4, 2018. It found that the special weight of the medical evidence rested with Dr. Draper, the impartial medical examiner (IME), who had determined in an August 18, 2017 report, that she did not have disability due to the accepted June 9, 2003 employment injury. OWCP noted, "This decision does not terminate your medical benefits, which remain open if treatment is still needed for your accepted conditions."

In an April 12, 2018 report, Dr. Levin indicated that appellant complained of chronic low back and right leg pain associated with L4-5 degenerative spondylolisthesis and right L4 foraminal stenosis. Examination of appellant's lumbar spine revealed mild low back pain with lumbar extension and intact sensation. Dr. Levin diagnosed right lumbar radiculopathy associated with L4-5 degenerative spondylolisthesis with stenosis.

On October 16, 2018 appellant, through counsel, requested reconsideration. Counsel alleged that Dr. Draper's report was not entitled to special weight because he was improperly selected and his report was not sufficiently rationalized. He also asserted that OWCP should have

expanded the acceptance of her claim to include additional work-related conditions and considered when OWCP determined work capacity.

In a report dated July 5, 2018, Dr. Richard M. Podolin, a licensed clinical psychologist, indicated that appellant was evaluated for chronic back pain related to a June 9, 2003 employment injury. He reported that because of her chronic pain she no longer works and is unable to engage in physical activity. Dr. Podolin noted that appellant developed major depressive disorder due to her pain and functional losses. He opined that she developed major depressive disorder due to the June 9, 2003 employment injury.

In a Form OWCP-5c dated July 9, 2018, Dr. Levin indicated that appellant was unable to work.

In a report dated July 20, 2018, Dr. Levin noted his disagreement with Dr. Draper's opinion. He reported that, based on his review of appellant's history and physical examination, she has preexisting degenerative lumbar conditions that were permanently aggravated by her employment injury on June 9, 2003 which led to the subsequent development of lumbar spinal stenosis and spondylolisthesis. Dr. Levin explained that a traumatic injury, such as having to bend and pull an object with force, can cause force or pressure to be exerted on the spine from a different direction than it was meant to absorb pressure. He reported that, when such pressure is exerted on the lumbar spine, it can cause an already weakened and damaged disc to collapse further and lead the discs to bulge or protrude further from the spine. Dr. Levin indicated that when appellant had to bend and pull the paper out of the copier with force, this caused significant pressure to be exerted on her lumbar spine, which permanently aggravated her lumbosacral spondylosis by causing her discs to bulge. He opined that, due to her lumbar conditions, she remained completely and totally disabled from light or even sedentary tasks.

By decision dated January 9, 2019, OWCP denied modification of its February 1, 2018 decision.

On December 9, 2019 appellant, through counsel, requested reconsideration.

In an April 15, 2019 report, Dr. Levin described the June 9, 2003 employment injury and noted appellant's complaints of persistent and severe back pain. He reviewed her medical records and diagnosed L4-5 degenerative spondylolisthesis with stenosis. Dr. Levin explained that the force that appellant used to open and close the printer drawers caused strenuous pressure on her lumbar spine and permanently aggravated the lumbosacral spondylosis. He indicated that her bending and stooping over the machine placed a disproportionate amount of force on her spine and resulted in a herniated disc.

In an undated report, Dr. Podolin noted appellant's June 9, 2003 employment injury and indicated that she had not worked since 2004. He conducted a mental status examination and diagnosed major depressive disorder. Dr. Podolin opined that appellant's major depressive disorder resulted from the June 9, 2003 work-related back injury and her subsequent inability to work or do physical activity. He reported that she was unable to work or participate in other such activities due to the high chronic pain levels from her work injury.

By decision dated March 3, 2020, OWCP denied modification of its January 9, 2019 decision.

On March 2, 2021 appellant, through counsel, requested reconsideration.

In a progress note dated February 8, 2021, Dr. Chike G. Onwuka, a Board-certified internist, indicated that appellant was treated for complaints of back and hip pain and noted that the onset was a work-related injury many years ago. On physical examination of appellant's lumbar spine, he observed tenderness to palpation over the lumbosacral spine and paraspinal muscle spasm. Dr. Onwuka diagnosed lumbosacral spondylosis with radiculopathy.

By decision dated November 17, 2022, OWCP denied modification of its March 3, 2020 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.<sup>3</sup> It may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>4</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

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.<sup>6</sup> For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."<sup>7</sup> When OWCP has referred the case 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.<sup>8</sup>

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<sup>3</sup> *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).

<sup>4</sup> *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).

<sup>5</sup> *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *T.P.*, 58 ECAB 524 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>6</sup> 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).

<sup>7</sup> *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); *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>8</sup> *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).

## ANALYSIS -- ISSUE 1

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective February 4, 2018.

OWCP properly determined that there was a conflict in the medical opinion evidence between Dr. Levin, appellant's treating physician and Dr. Thompson, an OWCP second opinion examiner, regarding the status of her June 9, 2003 employment injury and properly referred her, pursuant to 5 U.S.C. § 8123(a), to Dr. Draper for an impartial medical examination and an opinion as to whether she had disability causally related to his June 9, 2003 employment injury.

In an August 18, 2017 report, Dr. Draper reviewed the history of injury and noted appellant's accepted conditions of herniated disc at L4-5 without myelopathy and lumbar sprain. He provided examination findings and diagnosed low back pain syndrome and multilevel degenerative protruding lumbar disc disease at L3-4, L4-5, and L5-S1. Dr. Draper reported that the majority of appellant's disc conditions were preexisting degenerative bulging disc disease and protruding degenerative disc disease, not accident related, but OWCP had determined that she has an accepted condition of herniated disc at L4-5 without myelopathy. He explained that, due to her lumbar injury, she could not return to full duty. Dr. Draper indicated that "this accepted condition results in some limitations on [appellant's] work capabilities." He indicated that appellant could perform medium-duty work with restrictions of no lifting more than 50 pounds occasionally, 25 pounds frequently, and no excessive bending and stooping.

The Board finds that Dr. Draper's report fails to establish that appellant no longer has disability due to her accepted June 9, 2003 employment injury.<sup>9</sup> Dr. Draper did not conclusively opine that she was no longer disabled due to her June 9, 2003 employment injury, but instead indicated that she could work modified duty with restrictions.<sup>10</sup> Furthermore, he did not specifically explain, with medical rationale, whether all of appellant's work-related injuries had resolved.<sup>11</sup> Although Dr. Draper noted that her claim was accepted for lumbar sprain and herniated disc at L4-5 without myelopathy, he only addressed her herniated disc conditions in his report. His opinion, therefore, that appellant could return to modified work is, therefore, of diminished probative value and insufficient to justify the termination of her wage-loss compensation benefits.<sup>12</sup> The Board thus finds that OWCP did not meet its burden of proof.

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<sup>9</sup> See *C.G.*, Docket No. 20-0808 (issued April 23, 2021); *J.W.*, Docket No. 19-1014 (issued October 24, 2019).

<sup>10</sup> See *A.B.*, Docket No. 21-0150 (issued January 10, 2022); see also *A.G.*, Docket No. 20-1087 (issued December 31, 2020).

<sup>11</sup> See *J.B.*, Docket No. 21-0483 (issued May 19, 2022).

<sup>12</sup> *B.M.*, Docket No. 21-0101 (issued December 15, 2021); *S.R.*, Docket No. 19-1229 (issued May 15, 2020); *D.M.*, Docket No. 18-0746 (issued November 26, 2018); *R.H.*, 59 ECAB 382 (2008).

**CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss compensation benefits, effective February 4, 2018.<sup>13</sup>

**ORDER**

**IT IS HEREBY ORDERED THAT** the November 17, 2022 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 13, 2023  
Washington, DC

Alec J. Koromilas, 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

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