

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

|                                     |   |                                 |
|-------------------------------------|---|---------------------------------|
| S.G., Appellant                     | ) |                                 |
|                                     | ) |                                 |
| and                                 | ) | <b>Docket No. 23-0652</b>       |
|                                     | ) | <b>Issued: October 11, 2023</b> |
| DEPARTMENT OF HOMELAND SECURITY,    | ) |                                 |
| U.S. CUSTOMS AND BORDER PROTECTION, | ) |                                 |
| U.S. BORDER PATROL ACADEMY,         | ) |                                 |
| Calexico, CA, 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  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On April 3, 2023 appellant filed a timely appeal from a January 23, 2023 merit decision of the Office of Workers' Compensation Programs (OWCP).<sup>1</sup> 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 to consider the merits of this case.

**ISSUES**

The issues are: (1) whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 3, 2019, as she no longer had

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<sup>1</sup> The Board notes that following the January 23, 2023 decision, OWCP received additional evidence. 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.*

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

disability or residuals causally related to her accepted October 30, 2009 employment injury; and (2) whether appellant has met her burden of proof to establish continuing employment-related disability or residuals on or after September 3, 2019 due to her accepted October 30, 2009 employment injury.

### **FACTUAL HISTORY**

On November 2, 2009 appellant, then a 31-year-old border patrol agent trainee, filed a traumatic injury claim (Form CA-1) alleging that on October 30, 2009 she injured her neck and back when an instructor pushed her during fighting practice causing her head and neck to tilt backwards while she was in the performance of duty. She stopped work on that date and returned to a limited-duty position on November 25, 2009, and then subsequently stopped work again on April 23, 2010. OWCP accepted the claim for sprains of the neck, right shoulder and right arm, and lumbosacral joint. It paid wage-loss compensation on the supplemental rolls beginning April 24, 2010 and on the periodic rolls beginning June 6, 2010. Appellant briefly returned to work on July 25, 2011, and sustained a recurrence of total disability on August 1, 2011. OWCP resumed payment of wage-loss compensation on the periodic rolls on October 23, 2011.

On June 8, 2018 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. Andrew Faber, an osteopath. In a June 28, 2018 report, Dr. Farber reviewed the SOAF and medical records. He performed a physical examination and found that appellant's cervical spine and paraspinal region were tender to palpation. Dr. Faber reported that paresthesias existed in both upper extremities in a nonanatomic distribution. He diagnosed cervical disc pathology as noted on MRI scans, right shoulder sprain, and sprain of the lumbosacral joint. Dr. Faber found that appellant was partially disabled and could perform sedentary work lifting up to 10 pounds. He found continuing residuals of the neck and back, but no current shoulder pathology.

In notes dated June 18, 2018 through March 6, 2019, Dr. Farhana Ahmed, an osteopath, diagnosed cervical sprain/strain, cervical bulging discs, cervical radiculopathy, lumbar sprain/strain, lumbar bulging discs, lumbar radiculopathy, and bilateral shoulder sprain/strain. She found that appellant was totally disabled.

In a note dated January 28, 2019, Dr. Emad F. Soliman, a Board-certified neurologist, examined appellant due to her accepted October 30, 2009 employment injury. He found that her cervical spine was within normal limits with no tenderness. Dr. Soliman reported that appellant's motor strength was symmetrical and within normal limits in all upper and lower extremity muscles with no fasciculation, no atrophy, and normal tone. He also found that her sensory examination was intact. Dr. Soliman opined that appellant continued to experience neck pain and arm weakness due to a double crush syndrome between cervical radiculopathy and carpal tunnel syndrome. He found that she was 95 percent disabled.

On May 24, 2019 OWCP referred appellant, a SOAF, and a series of questions to Dr. Stanley Askin, a Board-certified orthopedic surgeon, for a second opinion evaluation.

Dr. Brian Haftel, a Board-certified anesthesiologist, completed a June 18, 2019 report which described the October 30, 2009 employment injury and diagnosed cervical sprain/strain, cervical bulging discs, cervical radiculopathy, lumbar sprain/strain, lumbar bulging discs, lumbar

radiculopathy, and bilateral shoulder sprain/strain. He attributed the diagnosed conditions to the accepted employment injury and found that appellant was totally disabled.

Dr. Askin completed a report on June 21, 2019 after examining appellant, reviewing the SOAF, and her medical treatment. He reported no objective findings other than positive Phalen's test and Tinel's sign for carpal tunnel syndrome. Dr. Askin found no cervical muscle spasms, but recounted that appellant reported pain over the left posterior neck, both upper trapezius muscles, and the upper thoracic spine area. He found that her subjective complaints were consistent with carpal tunnel syndrome which was not accepted as employment related. Dr. Askin however, found that appellant had no medical residuals of her accepted conditions of right shoulder sprain, lumbosacral joint sprain, neck sprain, and dislocation of the lumbar vertebra which had resolved. He opined that she had no work-related reason precluding her return to her date-of-injury position as a border patrol agent trainee.

By decision dated July 24, 2019, OWCP denied the expansion of the acceptance of appellant's claim to include additional conditions of headaches, cervical disc disorder at C5-6 with radiculopathy, cervical arthropathy, cervical bulging discs, lumbar bulging discs, lumbar radiculopathy, bilateral shoulder sprains, and bilateral carpal tunnel syndrome as causally related to the October 30, 2009 employment injury.

In a notice dated July 25, 2019, 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 October 30, 2019 employment injury. It found that the weight of the medical evidence rested with Dr. Askin, 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.

OWCP continued to receive medical evidence. On June 25 and August 8, 2019 Dr. Soliman recounted appellant's continuing headaches, radiating to her neck and shoulders, with difficulty using her arms, and hand weakness. He repeated his diagnosis of double crush syndrome and found that she was 95 percent disabled. Dr. Soliman provided an undated report diagnosing headache, tension headache, cervical disc disorder at C5-6 with radiculopathy, and bilateral carpal tunnel syndrome. He found that appellant was totally disabled from work and had reached maximum medical improvement.

By decision dated September 3, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective September 2, 2019, finding that the weight of the medical evidence rested with Dr. Askin.

On August 4, 2020 appellant, through her then-counsel, requested reconsideration of the September 3, 2019 termination decision. She contended that Dr. Askin's report was insufficiently rationalized to constitute the weight of the medical evidence. Appellant also provided a July 15, 2020 report, wherein Dr. Soliman detailed his disagreement with Dr. Askin's findings and conclusions. Dr. Soliman opined that appellant continued to experience residuals from her accepted employment injury including sprain of the lumbosacral joint, neck sprain, and bilateral shoulder sprains as well as from the additional employment-related conditions of cervical radiculopathy, lumbar radiculopathy, and carpal tunnel syndrome. He also found that she was

totally disabled. Dr. Soliman reviewed cervical and lumbar magnetic resonance imaging (MRI) scans dated November 6, 2009 through July 25, 2017 with findings of disc bulges and herniations and a December 16, 2016 electromyogram and nerve conduction velocity (EMG/NCV) studies with findings of right C5-6 radiculopathy. He explained how the accepted conditions occurred as a result of the October 30, 2009 employment injury and found that these conditions had not resolved due to the severity of the injuries that appellant sustained. Dr. Soliman further explained that the additional condition of cervical radiculopathy resulted from cervical disc displacement occurring in the October 30, 2009 employment incident, which placed abnormal pressure on the affected discs, leading to inflammation, and resulting in narrowing of the intravertebral spaces, which compressed the spinal cord impinging the nerve roots and resulting in cervical radiculopathy. He found that appellant continued to experience residuals of this condition including chronic and severe pain.

Dr. Soliman further explained that appellant's accepted October 30, 2009 employment injury, which resulted in cervical sprain and sprain of the lumbosacral joint also precipitated, caused, and accelerated damage to the outer walls of her lumbar discs or disc degeneration which in turn caused her continuing lumbar radiculopathy. He opined that an individual experiencing a neck injury was susceptible to the development of carpal tunnel syndrome because when the neck muscle was weakened other muscle groups were recruited to compensate as occurred in appellant. Dr. Soliman found that appellant's upper extremities became highly overworked due to her neck injury, that subjacent muscles, tendons, and ligaments over compensated and that she began to experience these progressing effects in her wrists and hands which manifested as carpal tunnel syndrome. He attributed this condition to the October 30, 2009 employment injury.

By decision dated November 2, 2020, OWCP denied modification of its September 3, 2019 termination decision.

On May 27, 2021 appellant requested reconsideration. In reports dated February 15 and March 2, 2021, Dr. Bruce Kammerman, a family practitioner, reviewed appellant's history of injury and medical treatment and diagnosed sprains and strains of the shoulder and upper arm, sprain of the lumbosacral joint, closed dislocation of the lumbar vertebra, and cervicgia.

By decision dated August 18, 2021, OWCP denied modification.

On February 15, 2022 appellant, through her then-counsel, requested reconsideration. She provided additional medical evidence from Dr. Conrad D. Tamea, Jr., a Board-certified orthopedic surgeon, dated October 27, 2021 diagnosing post-traumatic herniated cervical discs at C5-6, and C4-5, post-traumatic herniated lumbar disc, L4-5, post-traumatic cervical radiculopathy, and bilateral shoulder impingement syndrome which required further treatment. He further found that she was unable to return to her date-of-injury position.

By decision dated May 13, 2022, OWCP denied modification.

On October 25, 2022 appellant, through her then-counsel, requested reconsideration. In an August 31, 2022 report, Dr. Tamea described the October 30, 2009 employment injury and repeated his previous diagnoses. He found that appellant required further medical treatment and that she could not return to her date-of-injury position. Dr. Tamea related that she was struck forcefully in the head and neck and immediately felt pain and numbness in her neck, down her

right arm, and into her fingertips. He opined that, while the claim was accepted for sprain of the lumbosacral joint, the accepted condition was later established to be a herniated disc. Dr. Tamea disagreed with Dr. Askin's findings and conclusions.

In a November 30, 2022 report, Dr. Tamea repeated his findings and conclusions.

By decision dated January 23, 2023, OWCP denied modification.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>3</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>4</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>6</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 3, 2019, as she no longer had disability or residuals causally related to her accepted October 30, 2009 employment injury.

In his June 21, 2019 report, Dr. Askin, OWCP's referral physician, discussed appellant's factual and medical history and reported the findings of her physical examination. He reported that there were no objective findings other than positive Phalen's test and Tinel's sign for carpal tunnel syndrome. Dr. Askin found no cervical muscle spasms. He found that appellant's subjective complaints were consistent with carpal tunnel syndrome which was not accepted as employment related. Dr. Askin, however, found that she had no medical residuals of her accepted conditions of right shoulder sprain, lumbosacral joint sprain, neck sprain, and dislocation of the

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<sup>3</sup> *P.A.*, Docket No. 21-0658 (issued March 13, 2023); *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>4</sup> *See R.P., id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>5</sup> *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *K.W.*, Docket No. 19-1224 (issued November 15, 2019); *see M.C.*, Docket No. 18-1374 (issued April 23, 2019); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> *E.J.*, Docket No. 20-0013 (issued November 19, 2020); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

<sup>7</sup> *A.J.*, Docket No. 18-1230 (issued June 8, 2020); *R.P.*, Docket No. 18-0900 (issued February 5, 2019).

lumbar vertebra which had resolved. He opined that appellant had no work-related reason precluding her return to her date-of-injury position.

The Board has reviewed the opinion of Dr. Askin and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the issue of termination. Dr. Askin provided a thorough factual and medical history and accurately summarized the relevant medical evidence. He provided medical rationale for his opinion by explaining that appellant had no objective signs of the October 30, 2009 employment injury.<sup>8</sup> Accordingly, OWCP properly relied on Dr. Askin's second-opinion report in terminating her wage-loss compensation and medical benefits.<sup>9</sup>

The remaining evidence submitted prior to OWCP's termination of appellant's compensation is insufficient to overcome the weight accorded to Dr. Askin as the second-opinion physician.

Appellant submitted reports from Dr. Ahmed dated June 18, 2018 through March 6, 2019 and Dr. Haftel, dated June 18, 2019, which described the October 30, 2009 employment injury and diagnosed cervical sprain/strain, cervical bulging discs, cervical radiculopathy, lumbar sprain/strain, lumbar bulging discs, lumbar radiculopathy, and bilateral shoulder sprain/strain. These physicians attributed the diagnosed conditions to the accepted employment injury and found that appellant was totally disabled. However, Drs. Ahmed and Haftel failed to offer an opinion addressing why she continued to have disability or residuals from work due to the accepted conditions from the October 30, 2009 employment injury.<sup>10</sup>

On January 28, June 25, and August 8, 2019 Dr. Soliman opined that appellant continued to experience neck pain and arm weakness due to a double crush syndrome between cervical radiculopathy and carpal tunnel syndrome. He found that she was 95 percent disabled. Dr. Soliman also provided an undated letter of medical necessity diagnosing headache, tension headache, cervical disc disorder at C5-6 with radiculopathy, and bilateral carpal tunnel syndrome. However, he failed to offer a medical explanation explaining why these additional conditions were causally related to the accepted October 30, 2009 employment injury.<sup>11</sup>

The Board finds, therefore, that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective September 3, 2019.

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<sup>8</sup> See *C.W.*, Docket No. 21-0943 (issued February 17, 2023); *W.C.*, Docket No. 18-1386 (issued January 22, 2019); *D.W.*, Docket No. 18-0123 (issued October 4, 2018); *Melvina Jackson*, 38 ECAB 443 (1987).

<sup>9</sup> See *P.B.*, Docket No. 21-0894 (issued February 8, 2023); *E.S.*, Docket No. 20-0673 (issued January 11, 2021); *K.W.*, Docket No. 19-1224 (issued November 15, 2019); *N.G.*, Docket No. 18-1340 (issued March 6, 2019); *A.F.*, Docket No. 16-0393 (issued June 24, 2016).

<sup>10</sup> See *P.B.*, Docket No. 21-0894 (issued February 8, 2023); *V.W.*, Docket No. 20-0693 (issued June 2, 2021); *E.S.*, Docket No. 20-0673 (issued January 11, 2021).

<sup>11</sup> *Id.*

## LEGAL PRECEDENT -- ISSUE 2

Once OWCP properly terminates a claimant's compensation benefits, the burden shifts to appellant to establish continuing disability or residuals after that date causally related to the accepted injury.<sup>12</sup> To establish causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such causal relationship.<sup>13</sup>

Section 8123(a) provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>14</sup> 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.<sup>15</sup>

## ANALYSIS -- ISSUE 2

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

Following the termination of her wage-loss compensation and medical benefits, effective September 3, 2019, appellant submitted additional reports from Dr. Soliman. In his July 15, 2020 report, Dr. Soliman described her history of injury on October 30, 2009 and her medical treatment. He reported objective findings on diagnostic studies and provided detailed medical reasoning for his opinion that appellant continued to experience disability and medical residuals due to her accepted conditions and the additional condition of carpal tunnel syndrome. Dr. Soliman determined that she could not perform the full duties of her date-of-injury position.

As discussed, Dr. Askin, the second opinion examiner, on the other hand, found that appellant had no continuing disability or residuals due to her accepted conditions and that carpal tunnel syndrome was not employment related. Both Dr. Askin and Dr. Soliman provided rationale for their respective opinions based on their review of the medical evidence and findings on examination. The Board, therefore, finds that a conflict in medical opinion exists regarding whether appellant has established continuing employment-related disability or residuals on or after September 3, 2019.<sup>16</sup>

As noted, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of a second opinion physician, OWCP shall appoint a third physician to make

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<sup>12</sup> *V.W.*, *supra* note 10; *D.G.*, Docket No. 19-1259 (issued January 29, 2020); *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *J.R.*, Docket No. 17-1352 (issued August 13, 2018); *Manuel Gill*, 52 ECAB 282 (2001).

<sup>13</sup> *Id.*

<sup>14</sup> 5 U.S.C. § 8123(a); *P.J.*, Docket No. 22-0905 (issued November 15, 2022); *R.M.*, Docket No. 21-1150 (issued April 5, 2022); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

<sup>15</sup> 20 C.F.R. § 10.321.

<sup>16</sup> *See P.J.*, and *R.M.*, *supra* note 14; *J.B.*, Docket No. 20-0147 (issued September 20, 2021).

an examination.<sup>17</sup> The case will therefore be remanded for OWCP to refer appellant to an impartial medical specialist, pursuant to 5 U.S.C. § 8123(a), to determine whether she has met her burden of proof to establish continuing employment-related disability or residuals on or after September 3, 2019 due to her accepted employment injury. Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision regarding whether appellant has established continuing disability or residuals on or after September 3, 2019, causally related to the accepted October 30, 2009 employment injury.

### **CONCLUSION**

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 3, 2019, as she no longer had disability or residuals causally related to her accepted October 30, 2009 employment injury. The Board further finds that the case is not in posture for decision regarding whether she has met her burden of proof to establish continuing disability or residuals on or after September 3, 2019, causally related to her accepted October 30, 2009 employment injury.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the January 23, 2023 decision of the Office of Workers' Compensation Programs is affirmed in part and set aside in part. The case is remanded for further proceedings consistent with this decision of the Board.

Issued: October 11, 2023  
Washington, DC

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

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

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

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<sup>17</sup> 5 U.S.C. § 8123(a); *Id.*; *G.K.*, Docket No. 16-1119 (issued March 16, 2018).