United States Department of Labor
Employees' Compensation Appeals Board

J.C., Appellant	)	
and	)	**Docket No. 22-0018**
	)	**Issued: September 5, 2023**
U.S. POSTAL SERVICE, POST OFFICE, Keyport, NJ, Employer	)	

Appearances:
Michael D. Overman, Esq., for the appellant[1]
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 October 5, 2021 appellant, through counsel, filed a timely appeal from an April 12, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).[2] Pursuant to the

[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] The Board notes that following the April 12, 2021 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*.

Federal Employees' Compensation Act[3] (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 properly determined that appellant's employment-related lumbar strain and temporary aggravation of lumbar degenerative disc disease had resolved as of September 24, 2019; and (2) whether appellant met her burden of proof to establish continuing disability or residuals on or after September 24, 2019 causally related to her accepted August 9, 2013 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.[4] The facts and circumstances set forth in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On August 12, 2013 appellant, then a 46-year-old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on August 9, 2013 she injured her back when she bent over to lift a tray of mail while in the performance of duty. She stopped work on August 10, 2013.

After extensive adjudication and development of the medical evidence,[5] appellant submitted reports dated May 10, 2017 and March 22, 2018 from her attending physician, Dr. Mark Filippone, a Board-certified physiatrist, who opined that she sustained a disc herniation at L3-4 and an exacerbation of preexisting disc conditions at L4-5 and L5-S1 causally related to the August 9, 2013 employment incident.

By decision dated July 3, 2018, OWCP denied modification of its prior decisions finding that appellant had not established a traumatic injury causally related to her accepted August 9, 2013 employment incident.

On November 7, 2018 appellant, through counsel, filed a timely appeal to the Board of OWCP's July 3, 2018 decision. By decision dated July 26, 2019,[6] the Board set aside OWCP's July 3, 2018 decision and remanded the case for OWCP to refer appellant for a second opinion examination and an evaluation regarding whether she sustained a low back condition due to the accepted August 9, 2013 employment incident. The Board directed that OWCP issue a *de novo* decision following any necessary further development.

During the pendency of the appeal, appellant provided reports from Dr. Filippone dated December 4, 2018 and February 19, 2019 in which he described her symptoms of low back pain

[3] 5 U.S.C. § 8101 *et seq*.

[4] Docket No. 14-1673 (issued November 14, 2014); Docket No. 16-1724 (issued April 20, 2017); Docket No. 19-0219 (issued July 26, 2019).

[5] *Id*.

[6] *Id*.

radiating into both lower extremities. He found that pain, guarding, and spasm persisted in the lumbar paraspinals. Dr. Filippone opined that appellant remained totally disabled and recommended electromyogram and nerve conduction velocity EMG/NCV testing of the lower extremities.

On August 20, 2019 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions to Dr. Paul Teja, an osteopathic Board-certified orthopedic surgeon, for a second opinion evaluation on the nature and extent of any employment-related back conditions.

In a September 24, 2019 report, Dr. Teja reviewed the SOAF and the medical records. He noted that appellant continued to report left-sided pain in her legs and toes bilaterally. On physical examination Dr. Teja found mild discomfort in the center of her lumbar spine to palpation, but no pain on range of motion. He determined that sensation was intact to light touch in the bilateral lower extremities and that reflexes were intact and symmetric. Dr. Teja diagnosed lumbar strain superimposed on preexisting lumbar degenerative disc disease. He opined that appellant's work injury caused a temporary aggravation of her preexisting condition. Dr. Teja noted that she had no objective evidence of lumbar radiculopathy on physical examination and found that her work-related conditions had resolved. He determined that appellant could return to full duty and that no further treatment was indicated.

On October 17, 2019 OWCP requested a supplemental report from Dr. Teja clarifying the medical conditions caused or aggravated by the accepted August 9, 2013 employment incident. In an October 28, 2019 report, Dr. Teja resubmitted his September 24, 2019 report. After a November 5, 2019 request for clarification from OWCP, he again provided a duplicative report dated November 6, 2019.

By decision dated November 21, 2019, OWCP accepted appellant's claim for lumbar strain, resolved as of September 24, 2019, and temporary aggravation of degenerative disc disease, resolved as of September 24, 2019. It paid wage-loss compensation on the supplemental rolls from August 10, 2013 through November 29, 2013.

On December 2, 2019 appellant, through counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings and Review. A telephonic hearing took place on April 6, 2020.

OWCP received additional evidence. In reports dated February 11 and March 18, 2020, Dr. Laura E. Ross, an osteopathic Board-certified orthopedic surgeon, found that appellant was totally disabled. She reviewed appellant's February 5, 2020 magnetic resonance imaging (MRI) scan and recommended lumbar epidurals.

By decision dated June 3, 2020, OWCP's hearing representative affirmed OWCP's November 21, 2019 decision, finding that the medical evidence of record established that appellant's accepted lumbar strain and temporary aggravation of lumbar degenerative disc disease had resolved by September 24, 2019.

On September 23, 2020 appellant, through counsel, requested reconsideration. On September 22, 2020 Dr. Ross opined that appellant's accepted August 9, 2013 employment

incident resulted in an exacerbation of her lumbar disc pathology. She disagreed with Dr. Teja's finding that the exacerbation had resolved, noting that appellant continued to exhibit objective findings of her accepted condition including limited range of motion, paravertebral spasm, and positive left leg raise test on the left. Dr. Ross also noted that appellant's EMG/NCV studies demonstrated left L3-4 and L5-S1 radiculopathy and right L5-S1 radiculopathy. She found that appellant required further treatment.

By decision dated October 14, 2020, OWCP denied modification of its June 30, 2020 decision. It found that Dr. Ross' report was insufficient to create a conflict with that of Dr. Teja.

On January 12, 2021 appellant, through counsel, requested reconsideration. She provided a February 5, 2020 lumbar MRI scan which demonstrated an annular bulge at L5-S1, L4-5 spondylolisthesis with annular bulging, and L3-4 annular bulge causing central thecal sac compression and foraminal narrowing.

In a report dated May 17, 2019, Dr. Filippone reviewed the results of EMG/NCV studies, of even date, which demonstrated left L3-S1 lumbosacral radiculopathy and right L5-S1 lumbosacral radiculopathy. He opined that the diagnosed conditions were directly and solely the result of the accepted employment injury. Dr. Filippone found that appellant was totally disabled.

In May 20, August 21, and October 16, 2020 reports, Dr. Ross provided physical findings including spasm in the lumbar spine, tenderness to palpation along the paralumbar musculature, and limited range of motion. She recommended further medical treatment.

By decision dated April 12, 2021, OWCP denied modification of its October 14, 2020 decision.

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty. Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.[7] 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.[8] The fact that OWCP accepted an employee's claim for a specified period of disability does not shift the burden of proof to the employee. The burden of proof is on OWCP to demonstrate an absence of employment-related disability or residual in the period subsequent to the date of termination or modification.[9]

[7] *See D.W.*, Docket No. 20-0885 (issued June 11, 2021); *M.M.*, Docket No. 17-1264 (issued December 3, 2018); *M.L.* Docket No. 13-0442 (issued September 3, 2013).

[8] *S.J.*, Docket No. 22-0936 (issued April 27, 2023); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

[9] *See K.O.*, Docket No. 20-0425 (issued November 12, 2021); *R.H.*, Docket No. 12-1085 (issued April 9, 2013); *Elsie L. Price*, 54 ECAB 734 739 (2003); *Raymond M. Shulden*, 31 ECAB 297 (1979); *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

Under OWCP procedures, if a case is accepted as resolved, but continued as an open case, OWCP must address the medical evidence upon which it determines the condition has resolved and provide appellant appeal rights.[10] Where multiple conditions have been accepted, the medical evidence may support that one or more condition has resolved while residuals are ongoing for the remaining accepted conditions. Such cases should be open for benefits related to the ongoing accepted conditions while finding no further entitlement for those conditions which have resolved.[11]

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant's employment-related lumbar strain and temporary aggravation of lumbar degenerative disc disease had resolved as of September 24, 2019.

Preliminary, the Board notes that it is unnecessary for the Board to consider the evidence submitted prior to OWCP's July 3, 2018 decision, because the Board considered that evidence in its July 26, 2019 decision, finding that it was insufficient to establish appellant's claim. Findings made in prior Board decisions are *res judicata* absent any further review by OWCP under section 8128 of FECA.[12]

On September 24, 2019 Dr. Teja noted that appellant's physical examination did not demonstrate any objective evidence of lumbar radiculopathy on physical examination. He diagnosed lumbar strain and temporary aggravation of lumbar degenerative disc disease. Dr. Teja opined that these conditions were causally related to her work-related activities, but that appellant did not require any further treatment and that she could return to full duty.

The Board finds that OWCP properly relied upon Dr. Teja's opinion that lumbar strain and temporary aggravation of lumbar degenerative disc disease were causally related to her work-related activities and had resolved.[13] His opinion was sufficiently rationalized and based on physical examination as well as review of the medical records.

While Dr. Filippone initially diagnosed appellant's lumbar strain and temporary aggravation of lumbar degenerative disc disease, his December 4, 2018 and February 19, 2019 reports in which he described her symptoms of low back pain radiating into both lower extremities and found that she was totally disabled, predate Dr. Teja's September 24, 2019 finding that her work-related lumbar strain and temporary aggravation of lumbar degenerative disc disease had resolved. Additionally, Dr. Filippone failed to provide a probative medical opinion relating

[10] *See D.W.*, Docket No. 20-0885 (issued June 11, 2021); *R.H., id.;* Federal (FECA) Procedure Manual, Part 2 – Claims, *Initial Acceptance*, Chapter 2.806.5 (June 2011).

[11] *Id*.

[12] *See K.V.*, Docket No. 21-0008 (issued November 15, 2021); *B.R.*, Docket No. 17-0294 (issued May 11, 2018); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

[13] *See P.B.*, Docket No. 21-0894 (issued February 8, 2023); *M.L.*, Docket No. 13-0442 (issued September 3, 2013).

appellant's disability to her accepted employment injury. Consequently, his reports are of limited probative value.[14]

Accordingly, the Board finds that OWCP met its burden of proof to establish that appellant's employment-related lumbar strain and temporary aggravation of lumbar degenerative disc disease had resolved as of September 24, 2019.

LEGAL PRECEDENT -- ISSUE 2

When OWCP properly terminates compensation benefits, the burden shifts to appellant to establish continuing disability or residuals after that date, causally related to the accepted employment injury.[15] 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.[16]

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.[17] 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.[18]

ANALYSIS -- ISSUE 2

The Board finds that the case is not in posture for decision regarding whether appellant has met her burden of proof to establish continuing employment-related disability or residuals on or after September 24, 2019 due to her accepted August 9, 2013 employment injury.

Subsequent to the termination of appellant's compensation, she submitted reports from Dr. Ross. In reports dated February 11 through September 22, 2020, Dr. Ross opined that the accepted August 9, 2013 employment injury resulted in an exacerbation of appellant's lumbar disc pathology and that she continued to be totally disabled. She reported objective findings of limited range of motion, paravertebral spasm, and positive left leg raise test on the left. Dr. Ross also noted that EMG/NCV studies demonstrated left L3-4 and L5-S1 radiculopathy and right L5-S1 radiculopathy.

[14] *See J.T.*, Docket No. 20-1470 (issued October 8, 2021); *A.M.*, Docket No. 18-1243 (issued October 7, 2019).

[15] *See Y.J.*, Docket No. 20-1123 (issued September 27, 2021); *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *Manuel Gill*, 52 ECAB 282 (2001).

[16] *Id*.

[17] 5 U.S.C. § 8123(a); *L.T.*, Docket No. 18-0797 (issued March 14, 2019); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[18] 20 C.F.R. § 10.321; *see also J.C.*, Docket No. 21-1401 (issued July 20, 2023).

As discussed, Dr. Teja, the second opinion examiner, found that appellant had no residuals or disability due to her accepted employment-related lumbar strain and temporary aggravation of aggravation of lumbar degenerative disc disease after September 24, 2019. Both Dr. Teja and Dr. Ross provided rationale for their respective opinions based on their review of the medical evidence and findings on examination. For a conflict to arise, the opposing physicians' viewpoints must be of virtually equal weight and rationale.[19] The Board, therefore, finds that a conflict in medical opinion exists regarding whether appellant has established continuing employment-related disability and residuals after September 24, 2019.[20]

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 an examination.[21] The Board will, thus, remand the case 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 24, 2019 due to her accepted employment injury. Following this and any such further development as may be deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

The Board finds that OWCP properly determined that appellant's employment-related lumbar strain and temporary aggravation of lumbar degenerative disc disease had resolved as of September 24, 2019. The Board further finds that the case is not in posture for decision on the issue of whether she has met her burden of proof to establish continuing employment-related disability or residuals on or after September 24, 2019 due to her accepted August 9, 2013 employment injury.

[19] *J.C., id.*; *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006); *James P. Roberts*, 31 ECAB 1010 (1980).

[20] *See R.M.*, Docket No. 21-1150 (issued April 5, 2022); *J.B.*, Docket No. 20-0147 (issued September 20, 2021).

[21] 5 U.S.C. § 8123(a); *see R.M.*; *J.B., id.*; *G.K.*, Docket No. 16-1119 (issued March 16, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 12, 2021 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: September 5, 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