

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

L.M., Appellant)

and)

FEDERAL DEPOSIT INSURANCE)
CORPORATION, Downers Grove, IL, Employer)
-----)

Docket No. 23-1028
Issued: January 22, 2024

Appearances:

Stephanie Leet, Esq., for the appellant¹
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
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On July 31, 2023 appellant, through counsel, filed a timely appeal from a February 9, 2023 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 over the merits of this case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 4, 2022, finding that she no longer had disability or residuals causally related to her accepted February 26, 2019 employment injury; and

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.*

(2) whether appellant has met her burden of proof to establish continuing disability or residuals on or after May 4, 2022, causally related to her accepted February 26, 2019 employment injury.

FACTUAL HISTORY

On March 4, 2019 appellant, then a 50-year-old bank examiner, filed a traumatic injury claim (Form CA-1) alleging that on February 26, 2019 she injured/strained her knees, back, hands/wrists, and shoulders when she slipped and fell while in the performance of duty. She stopped work that day. OWCP accepted the claim for contusions of right rib, knees, and ankles, neck sprain, and right knee sprain. Appellant returned to part-time, limited-duty work, four hours per day, three days per week on April 15, 2019.³ OWCP paid her wage-loss compensation on the supplemental rolls commencing April 15, 2019.

In a January 22, 2020 report, Dr. Bryan W. Lapinski, appellant's attending physician and a Board-certified orthopedic surgeon, noted his examination findings and reviewed imaging of the feet and ankles, which were negative for fractures, dislocation and degenerative changes. He provided assessments of bilateral chronic ankle pain, bilateral gastric equinus, and bilateral foot pain. Dr. Lapinski indicated that it was unclear at this point as to why appellant was experiencing all of her discomfort, noting that her medical treatment had been appropriate and surgical intervention was not indicated.

In a February 18, 2020 report, Dr. Lena Shahbandar, a Board-certified physiatrist, noted the history of injury and that appellant had a history of compression fracture of the mid-back (thoracic spine). She provided examination findings and reviewed diagnostic testing. Dr. Shahbandar diagnosed myofascial pain of the cervical spine and intercostal pain since the fall nearly a year ago.

In a February 24, 2020 report, Dr. Brian Ward, an orthopedic surgeon, reported a one-year duration of bilateral knee pain after a fall. He provided examination findings and indicated that the x-rays of appellant's knees demonstrated mid medial lateral compartment degenerative changes and severe patellofemoral joint degenerative disease. Dr. Ward provided an impression of bilateral knee arthritis.

In a March 4, 2020 report, Dr. Diana Tabor, a podiatrist, noted the history of injury, and that appellant presented with bilateral foot and ankle pain. Following a physical examination and review of diagnostic testing, she provided an assessment of bilateral foot pain, chronic pain of both ankles, paresthesias, and bilateral arch pain.

On June 30, 2020 OWCP referred appellant, a statement of accepted facts (SOAF), the case record, and a list of questions, to Dr. Theodore J. Suchy, an osteopathic orthopedic surgeon, for a second opinion evaluation to determine the status of appellant's accepted conditions.

In an August 11, 2020 report, Dr. Suchy noted appellant's history of injury on February 26, 2019, reviewed her medical records and multiple diagnostic studies, and provided his findings on physical examination. He opined that the accepted contusion of knees, ankles and right rib cage, as well as the cervical strain, had resolved, and that appellant was at maximum medical improvement. Dr. Suchy explained that based on the lack of any objective findings in both

³ Appellant's regular schedule was eight hours per day three days per week.

diagnostic studies and multiple clinical examinations, including his examination, that appellant had no residuals related to the February 26, 2019 work-related injury, and that there appeared to be significant symptom magnification as the lack of objective findings did not support her subjective complaints. Based on the lack of objective findings, he opined that she could work full duty at eight hours a day without restrictions and that no further diagnostic studies, therapeutic modalities, or surgical intervention were indicated as related to the February 26, 2019 work-related injury. In an August 11, 2020 work capacity evaluation (Form OWCP-5c), Dr. Suchy indicated that appellant had reached maximum medical improvement and that she could perform her usual job without restrictions.

In letters dated September 15 and November 19, 2020, OWCP requested that Dr. Lapinski comment on appellant's medical status and disability based on Dr. Suchy's second opinion report. No response was received.

On January 28, 2021 OWCP determined that a conflict in evidence arose between Dr. Suchy and Dr. Lapinski, appellant's treating physician, regarding whether appellant had continuing disability and residuals from the accepted employment injury. It referred appellant to Dr. Hythern P. Shadid, a Board-certified orthopedic surgeon, to serve as an impartial medical examiner (IME).

In an April 5, 2021 report, Dr. Shadid reviewed appellant's history of injury, medical treatment, including her medical records and multiple diagnostic studies, and a January 28, 2021 SOAF. He provided his findings on physical examination. Dr. Shadid noted appellant's complaints of bilateral ankle, bilateral knee, and right rib cage pain if she worked for more than four hours a day, and that she had significant relief when she swam for an hour. Appellant denied any neck symptoms. Dr. Shadid noted that no one had been able to explain appellant's subjective complaints, and he found no objective evidence on his examination or in any of the diagnostic imaging to substantiate appellant's subjective complaints. He explained that, if appellant had fallen on her right side, the mechanism of injury was inconsistent with her bilateral ankle and bilateral knee pain. Dr. Shadid opined that there was no need for additional treatment and that there were signs of symptom magnification. He further explained the signs of symptom magnification he found during appellant's physical examination. Dr. Shadid also noted that appellant did not respond to any and all treatments over two years, her pain complaints were a non-physiologic response, and there was no physiologic explanation as to how a person can perform a one-hour swim workout a day yet not be able to work as a bank examiner, a non-physically high demand job. Noting the accepted work-related conditions and the absence of objective findings, he opined that the rib contusion and the neck strain had resolved in four to six weeks by definition of contusion, and no reliable findings on examination. For the bilateral knee contusions and bilateral ankle contusions, Dr. Shadid also found that those conditions had also resolved in four to six weeks by definition of contusion and normal examinations. Based on appellant's clinical presentation, lack of objective evidence, and his review of a description of her bank examiner position, Dr. Shadid found that she could return to her bank examiner position with no restrictions because there was no organic basis for disability.

On January 10, 2022 OWCP notified appellant that it proposed to terminate her wage-loss compensation and medical benefits. It found that Dr. Shadid's opinion represented the special weight of the evidence and established that she no longer had residuals or disability due to her accepted employment injury. OWCP afforded appellant 30 days to submit additional evidence or argument if she disagreed with the proposed termination.

On February 8, 2022 appellant, through counsel, responded and disagreed with the proposed termination. She provided additional medical evidence.

In a February 4, 2022 report, Dr. Gregory Dairyko, a Board-certified orthopedic surgeon, noted that appellant had bilateral knee pain, right greater than left, for the last few years. He noted that she reported that she has been unable to work a full day at work due to bilateral knee and back pain. Dr. Dairyko noted bilateral knee x-ray and physical examination findings and provided an assessment of acute bilateral knee pain. In a February 4, 2022 note, he indicated that appellant could work four-hour shifts for the next four weeks.

In a February 7, 2022 report, Dr. Tabor noted appellant's history of injury and provided examination findings. She provided assessments of bilateral foot pain, chronic pain of both ankles, bilateral arch pain, leg cramping, paresthesias and pronation of both feet. Dr. Tabor opined that appellant would benefit from a custom orthotic to better control the hindfoot and support the arch and midfoot and decrease pronation forces to the left and right foot, noting that over-the-counter inserts had minimal improvement.

In an interpretation of a July 13, 2019 magnetic resonance imaging (MRI) scan of the thoracic spine, Dr. Peter Cormier, a Board-certified diagnostic radiologist, noted a history of midback pain after a fall in February 2019, and provided an impression of mild chronic compression fracture of T11 with mild gibbus of the spine because of compression fracture. Mild spondylosis was also noted.

On January 23, 2020 Dr. Brooke Belcher, a physiatrist, provided assessments of pain in the thoracic back, neck, and thoracic spine. In earlier notes dated October 7, 2014, December 7, 2018 and June 7, 2019, she provided permanent restrictions for a chronic thoracic spine condition.

In a January 22, 2020 report, Dr. Lapinski indicated that appellant could work a reduced schedule of four-hour days.

By decision dated May 4, 2022, OWCP terminated appellant's wage-loss compensation and medical benefits, effective that date. It found that the opinion of Dr. Shadid as the IME represented the special weight of the evidence and established that she had no further disability or residuals due to her accepted employment injury.

OWCP thereafter received additional evidence. In a February 17, 2022 report, Dr. Belcher noted appellant's findings on examination, including x-ray findings, and reiterated her prior diagnoses of pain in the thoracic back, neck thoracic spine, and pain in both feet. She also diagnosed costalchondritis. In a separate note dated February 22, 2022, Dr. Belcher indicated that appellant had permanent restrictions, and could only work four hours per day due to her chronic thoracic spine condition.

On May 31, 2022 appellant, through counsel, requested a review of the written record by a representative of OWCP's Branch of Hearings and Review regarding the May 4, 2022 termination decision.

By decision dated February 9, 2023, an OWCP hearing representative affirmed OWCP's May 4, 2022 decision.

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.⁴ After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ 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.⁸

Section 8123(a) of FECA provides in pertinent part: "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."⁹ Where a case is referred to an IME for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.¹⁰

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 4, 2022, as she no longer had disability or residuals causally related to her accepted February 26, 2019 employment injury.

Dr. Lapinski did not provide an opinion that appellant continued to suffer from disability or residuals due to her accepted conditions as requested by OWCP's September 15 and November 19, 2020 letters and, thus, his opinion cannot create a conflict of medical opinion with Dr. Suchy. Even though the report of Dr. Shadid is not entitled to special weight afforded to the opinion of an impartial medical examiner resolving a conflict in medical opinion, his report can still be considered for its own intrinsic value, and can still constitute the weight of the medical evidence regarding the issue of remaining residuals and disability from the February 26, 2019

⁴ *G.M.*, Docket No. 21-0401 (issued September 14, 2021); *R.H.*, Docket No. 19-1064 (issued October 9, 2020); *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

⁵ *A.T.*, Docket No. 20-0334 (issued October 8, 2020); *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁶ *C.R.*, Docket No. 19-1132 (issued October 1, 2020); *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

⁷ *E.J.*, Docket No. 20-0013 (issued November 19, 2020); *L.W.*, Docket No. 18-1372 (issued February 27, 2019).

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

⁹ 5 U.S.C. § 8123(a); *S.J.*, Docket No. 22-0936 (issued April 27, 2023); *J.K.*, Docket No. 18-1250 (issued June 25, 2019).

¹⁰ 20 C.F.R. § 10.321; *L.S.*, Docket No. 20-1204 (issued October 4, 2021); *T.D.*, Docket No. 17-1011 (issued January 17, 2018).

work-related injury.¹¹ The referral to Dr. Shadid is therefore considered to be a second opinion evaluation.¹²

In an April 5, 2021 report, Dr. Shadid opined that the accepted work-related conditions of contusions of the rib, knees, and ankles, and neck strain had resolved, and that appellant could return to her bank examiner position with no restrictions. He explained that his physical examination and review of diagnostic test results revealed no objective evidence of the accepted conditions to substantiate her subjective complaints. Dr. Shadid further explained that the accepted conditions of rib contusion and neck strain had resolved in four to six weeks by definition of contusion, and no reliable findings on examination. Additionally, he explained that the accepted bilateral knee and bilateral ankle contusions had also resolved in four to six weeks by definition of contusion, and normal examinations. Dr. Shadid noted that his opinion on appellant's work capacity was also based on his review of her position description. The Board finds that his opinion represents the weight of the medical evidence in this case. Dr. Shadid provided a detailed medical report reviewing the medical record, unequivocally opined that appellant did not have residuals or disability from the accepted employment-related conditions and supported his opinion with medical rationale.¹³ Accordingly, OWCP properly relied on Dr. Shadid's second opinion report in terminating her wage-loss compensation and medical benefits.¹⁴

The remaining evidence submitted prior to OWCP's termination of appellant's compensation is insufficient to overcome the weight afforded to Dr. Shadid as the second opinion physician or to create a new conflict.

Dr. Belcher, in a January 23, 2020 report, diagnosed pain in the thoracic back, neck, and thoracic spine. In a February 18, 2020 report, Dr. Shahbandar diagnosed myofascial pain of the cervical spine and intercostal pain. In a February 4, 2022 report, Dr. Dairyko diagnosed acute bilateral knee pain. In a note of even date, he indicated that appellant could perform four-hour shifts for the next four weeks. In February 7 and March 4, 2022 reports, Dr. Tabor diagnosed bilateral foot and bilateral arch pain, chronic pain of both ankles, leg cramping, paresthesias, and pronation of both feet. However, neither Dr. Dairyko nor Dr. Tabor offered an opinion as to whether appellant had continuing disability or residuals causally related to the accepted employment injury. The Board has held that medical evidence that does not offer an opinion

¹¹ *C.C.*, Docket No. 20-1497 (issued August 8, 2023); *A.P.*, Docket No. 22-1054 (issued January 6, 2023); *Y.J.*, Docket No. 20-1337 (issued February 7, 2022).

¹² *Id.*; see also *M.G.*, Docket No. 19-1627 (issued April 17, 2020); *S.M.*, Docket No. 19-0397 (issued August 7, 2019) (the Board found that at the time of the referral for an impartial medical examination there was no conflict in medical opinion evidence; therefore, the referral was for a second opinion examination); *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

¹³ *K.M.*, Docket No. 22-0763 (issued November 4, 2022); *B.T.*, Docket No. 19-1505 (issued April 2, 2021); *T.W.*, Docket No. 18-1573 (issued July 19, 2019); *A.G.*, Docket No. 18-0749 (issued November 7, 2018).

¹⁴ See *K.M.*, *id.*; *B.T.*, *id.*; *T.C.*, Docket No. 19-1383 (issued March 27, 2020); *K.W.*, Docket No. 19-1224 (issued November 15, 2019); see *N.G.*, Docket No. 18-1340 (issued March 6, 2019); *A.F.*, Docket No. 16-0393 (issued June 24, 2016).

regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship.¹⁵

Dr. Lapinski, in a January 22, 2020 report, opined that appellant could work four hours per day. However, he likewise did not provide an opinion on whether she had continuing disability or residuals causally related to the accepted employment injury¹⁶

In a February 24, 2020 report, Dr. Ward provided an impression of bilateral knee arthritis. However, he also did not offer an opinion regarding the cause of appellant's bilateral knee arthritis and did not provide any opinion regarding her accepted conditions.¹⁷

Appellant also submitted a July 13, 2019 MRI scan report from Dr. Cormier. The Board has held, however, that diagnostic studies standing alone, lack probative value on the issue of causal relationship.¹⁸

The Board thus finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 4, 2022.

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.¹⁹ 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.²⁰ A claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.²¹

¹⁵ See *A.M.*, Docket No. 22-0300 (issued April 10, 2023); *K.K.*, Docket No. 22-0270 (issued February 14, 2023); *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *J.M.*, *id.*; *Y.J.*, Docket No. 20-1123 (issued September 27, 2021).

¹⁹ See *V.W.*, Docket No. 19-0645 (issued February 22, 2021); *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); *George Servetas*, 43 ECAB 424, 430 (1992).

²⁰ See *O.W.*, Docket No. 20-1343 (issued August 16, 2022); *L.S.*, Docket No., 20-0570 (issued December 15, 2020); *James Mack*, 43 ECAB 321 (1991).

²¹ *J.N.*, Docket No. 20-1030 (issued November 20, 2020); *S.F.*, Docket No. 17-1427 (issued May 16, 2018).

ANALYSIS -- ISSUE 2

The Board further finds that appellant has not met her burden of proof to establish continuing disability or residuals on or after May 4, 2022, causally related to her accepted February 26, 2019 employment injury.

Following the termination of her wage-loss compensation and medical benefits, effective May 4, 2022, appellant submitted a February 22, 2022 report from Dr. Belcher. Dr. Belcher diagnosed pain in the thoracic back, neck, thoracic spine, and both feet, and costochondritis. In a separate note of even date, she indicated that appellant could only work four hours per day with permanent restrictions due to her chronic thoracic spine condition. Dr. Belcher, however, did not provide an opinion on continuing residuals or disability on or after May 4, 2022 due to the accepted employment injury.²² For these reasons, this evidence is insufficient to establish appellant's burden of proof.

As the medical evidence of record is insufficient to establish continuing disability or residuals on or after May 4, 2022 causally related to the accepted employment injury, the Board finds that appellant has not met her burden of proof.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128 and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 4, 2022, as she no longer had disability or residuals causally related to her accepted February 26, 2019 employment injury. The Board further finds that she has not met her burden of proof to establish continuing disability or residuals on or after May 4, 2022, causally related to her accepted February 26, 2019 employment injury.

²² *Supra* note 15.

ORDER

IT IS HEREBY ORDERED THAT the February 9, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 22, 2024
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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