

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

M.K., Appellant

and

**U.S. POSTAL SERVICE, DALLAS POST
OFFICE, Dallas, GA, Employer**

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**Docket No. 24-0135
Issued: March 25, 2024**

Appearances:

*Erik B. Blowers, 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
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On November 29, 2023 appellant, through counsel, filed a timely appeal from an October 26, 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 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 28, 2020, as she no longer

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.*

had disability or residuals causally related to her accepted July 26, 2019 employment injury; and (2) whether appellant has met her burden of proof to establish continuing disability or residuals, on or after September 28, 2020, causally related to her accepted January 26, 2019 employment injury.

FACTUAL HISTORY

This case has previously been before the Board on a different issue.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On July 29, 2019 appellant, then a 52-year-old rural carrier associate, filed a traumatic injury claim (Form CA-1) alleging that on July 26, 2019 she sustained a contusion to her right shoulder when she flipped her postal vehicle in a ditch while in the performance of duty. She stopped work on that day. OWCP accepted the claim for laceration of the right forearm, muscle spasm, cervical spine sprain, and cervicgia. It paid appellant wage-loss compensation on the periodic rolls beginning September 10, 2019.

Appellant's attending physician, Dr. Ernest L. Howard, a Board-certified physiatrist, completed reports dated April 16 through July 15, 2020 and diagnosed cervicgia, muscle spasm and cervical spine sprain following her July 26, 2019 employment injury. He reviewed a September 19, 2019 magnetic resonance imaging (MRI) scan which demonstrated bulging discs at C4-5 and C5-6, and posterior paracentral disc herniation with superior disc migration at C6-7. Dr. Howard recommended physical therapy, medication, and injections.

On May 14, 2020 Dr. Mark Feeman, an osteopath, completed a work capacity evaluation (Form OWCP-5c) and advised that appellant could return to work with restrictions of occasional pushing, pulling, and lifting up to 10 pounds, and occasional twisting, bending, stooping, squatting, kneeling, and climbing. He indicated that she could operate a motor vehicle at work for 4 hours and that she needs a 30-minute break every hour. Dr. Feeman based his work restrictions on appellant's May 12, 2020 functional capacity evaluation (FCE).

On July 13, 2020 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a series of questions to Dr. John G. Keating, an orthopedic surgeon, for a second opinion examination to determine whether she continued to have residuals or disability causally related to her July 26, 2019 employment injury. In his August 10, 2020 report, Dr. Keating reviewed the SOAF and medical history. He performed a physical examination finding no spasm, tenderness, atrophy, or radicular signs in the upper extremities with normal reflexes and sensation. Dr. Keating diagnosed cervicgia, laceration right forearm, and cervical sprain. He responded to OWCP's questions and reported no objective findings supporting ongoing medical conditions. Dr. Keating found no evidence of cervical radiculopathy, cervical spondylosis, and neck arthritis. He noted that appellant's MRI scan demonstrated degenerative cervical changes and opined that these degenerative changes in her neck were possibly aggravated by the employment injury, but determined that appellant had sufficient treatment and time for her accepted conditions and any aggravation to resolve. Dr. Keating further opined that there was

³ Docket No. 22-1328 (issued July 5, 2023).

nothing to indicate that the employment-related conditions had not resolved, and that there were no ongoing signs of disability. He concluded that she had no ongoing residuals of her July 26, 2019 employment injury and that she could return to her date-of-injury position.

By notice dated August 19, 2020, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on Dr. Keating's opinion that the accepted conditions had ceased without residuals and that she was no longer disabled from work due to the accepted conditions. It afforded her 30 days to submit additional evidence or argument challenging the proposed action.

In an August 12, 2020 report, Dr. Howard diagnosed cervicalgia, chronic pain syndrome, and muscle spasms following the July 26, 2019 employment injury. He performed an injection of the tendon sheath and recommended continued medication.

By decision dated September 23, 2020, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective September 28, 2020. It found that appellant no longer had employment-related disability or residuals and that the weight of the medical evidence rested with the August 10, 2020 report of Dr. Keating.

On October 1, 2020 appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

OWCP continued to receive medical evidence. On September 30, 2020 appellant was transported to the local hospital by ambulance due to right-side neck and shoulder pain. She recounted that her return to work caused her injury to flare up. Dr. Stuart B. Resnick, a radiologist, performed computerized tomography (CT) scans of appellant's thoracic and cervical spine and found disc protrusion at C6-7 and right paracentral disc osteophyte complex at T7-8. He also reported degenerative changes at C5-6 and C6-7.

In a report dated October 7, 2020, Dr. Howard noted appellant's increased neck pain following her return to work on September 26, 2020 and requested electromyogram (EMG) studies due to pain and weakness in the C5-6 nerve distribution.

Dr. Ki-Hon Lin, an orthopedic surgeon, examined appellant on October 23, 2020 and recounted her symptoms of neck pain and the inability to turn her neck following a car accident at work on July 26, 2019. On November 20, 2020 appellant underwent a second cervical MRI scan which demonstrated mild facet arthropathy and disc osteophyte formation at C4-5, C5-6, and C6-7.

In a note dated December 16, 2020, Dr. Elmore Alexander, an osteopath, noted appellant's history of injury on July 26, 2019, her accepted conditions of neck and right shoulder sprain, and reviewed her medical history. He performed a physical examination and diagnosed shoulder and cervical injury caused by the July 26, 2019 motor vehicle accident. Appellant underwent an additional cervical MRI scan on December 16, 2020 which demonstrated spurring and bony foraminal stenosis at C4-5 and C5-6 and small midline protrusion at C6-7 and spurring with bilateral bony foraminal stenoses.

By decision dated January 22, 2021, OWCP's hearing representative affirmed the September 23, 2020 termination decision, finding that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits based on Dr. Keating's August 10, 2020 report. He further found that appellant had not provided additional medical evidence establishing any continuing disability or medical residuals.

OWCP continued to receive evidence. Appellant completed an additional narrative statement disagreeing with findings and conclusions in Dr. Keating's August 10, 2020 report. She asserted that he did not complete a physical examination or testing.

On April 2, 2021 appellant requested reconsideration.

By decision dated May 27, 2021, OWCP denied modification of its prior decisions.

On July 7, 2021 appellant requested reconsideration.

By decision dated October 4, 2021, OWCP denied modification.

On February 24, 2022 appellant again requested reconsideration. In a May 11, 2022 attending physician's report (Form CA-20), Dr. Howard diagnosed cervicgia, muscle spasms, sprain, and cervical radiculopathy. He opined that the motor vehicle accident caused a traumatic injury and checked a box marked "Yes" indicating the diagnosed conditions were caused or aggravated by employment activity. Dr. Howard found that appellant was partially disabled. By decision dated May 25, 2022, OWCP denied modification.

On June 10, 2022 appellant requested reconsideration. She provided a narrative statement alleging that Dr. Keating's report was not based on a physical examination and therefore was not factually accurate. Appellant submitted an additional narrative statement on August 31, 2022 asserting that Dr. Keating did not rely on the SOAF as he reported no findings of cervical radiculopathy. She noted that he had opined that it was "possible" that her cervical degenerative changes were aggravated by the employment incident. Appellant asserted that Dr. Keating's report lacked the necessary explanation of the pathophysiological process to establish that her medical conditions had resolved. She alleged that he concluded that all conditions had resolved with no explanation. Appellant concluded that Dr. Keating's report was insufficient.

By decision dated September 8, 2022, OWCP denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).

Appellant, through counsel, appealed to the Board. By decision dated July 5, 2023, the Board found that appellant had provided a new and relevant legal argument not previously considered. The Board remanded the case to OWCP for an appropriate merit decision.

OWCP continued to receive medical evidence. Appellant submitted a series of notes from Mylena Kerce, Russell Branch, Melanie Marshall, and Star S. Kepner, nurse anesthetists, and Juan He, a physician assistant, dated April 28, 2021 through January 5, 2023.

In notes dated April 28 through September 1, 2021, Dr. Sackdinanh N. Keomahathai, a Board-certified physiatrist, diagnosed cervical spondylosis and spondylosis without myelopathy or radiculopathy. He performed cervical radiofrequency ablation (RFA).

Dr. Pallavi Gupta, a Board-certified anesthesiologist, completed notes dated October 20 through November 2, 2021, in which she diagnosed cervical spondylosis without myelopathy or radiculopathy. She performed a cervical medial branch RFA.

In notes dated December 3, 2021 through July 3, 2023, Dr. Chris Cable, a Board-certified internist, recounted that appellant's pain commenced following a July 26, 2019 work-related motor vehicle accident and diagnosed cervical spondylosis without myelopathy, disc protrusions, foraminal stenosis, cervical radiculopathy, and lumbar radiculopathy. He described her radiating arm pain suggestive of cervical radiculitis and opined that her reported work-related injury "may be" consistent with something that could induce cervical radiculopathy or aggravate an existing condition." Dr. Cable also provided a series of notes which are illegible.

On July 19, 2023 Dr. Brett A. Hall, a Board-certified orthopedic surgeon, examined appellant due to chest and neck pain.

In an August 2, 2023 note, Dr. David Rosenfeld, a Board-certified anesthesiologist, recounted appellant's neck and left shoulder pain. He diagnosed cervical spondylosis with myelopathy and degeneration of cervical intervertebral disc.

By decision dated October 26, 2023, OWCP denied modification of its prior merit decisions.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.⁴ After it has been determined that, an employee has a disability causally related to his or her employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ Its 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 compensation.⁷ To terminate authorization for medical treatment,

⁴ *Z.D.*, Docket No. 19-0662 (issued December 5, 2019); *see 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).

⁵ *See Z.D.*; *R.P.*, *id.*; *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

⁶ *See P.T.*, Docket No. 21-0328 (issued May 2, 2022); *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ *Z.D.*, *supra* note 4; *T.P.*, 58 ECAB 524 (2007); *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

OWCP must establish that he or she no longer has residuals of an employment-related condition which require further medical treatment.⁸

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 September 28, 2020, as she no longer had disability or residuals causally related to her accepted July 26, 2019 employment injury.

OWCP referred appellant to Dr. Keating for a second opinion regarding the status of her accepted employment-related conditions. In his August 10, 2020 report, Dr. Keating indicated that, upon physical examination, he detected no spasm, tenderness, atrophy, or radicular signs in the upper extremities with normal reflexes and sensation. He reviewed the SOAF and concluded that appellant had no ongoing residuals of her July 26, 2019 employment injury and that she could return to her date-of-injury position. Dr. Keating's opinion has reliability, probative value, and convincing quality with respect to its conclusions regarding the relevant issue of the present case. He provided a thorough factual and medical history and accurately summarized the relevant medical evidence.⁹ The Board thus finds that the weight of the medical evidence is represented by the opinion of OWCP's referral physician, Dr. Keating, establishing that appellant no longer had disability or residuals due to the accepted July 26, 2019 employment injury as of September 28, 2020.

Prior to OWCP's finalization of the proposed termination, appellant submitted a series of narrative reports dated April 16 through August 12, 2020, wherein Dr. Howard diagnosed cervicalgia, chronic pain syndrome, and muscle spasms following the July 26, 2019 employment injury. The Board, however, has held that a report is of limited probative value regarding causal relationship if it does not contain medical rationale.¹⁰

In a May 14, 2020 Form OWCP-5c, Dr. Feeman opined that appellant could return to work with restrictions based on her May 12, 2020 FCE. However, this report did not provide rationale explaining that she continued to have residuals due to the accepted employment injury. The Board has held that a medical report is of limited probative value on the issue of causal relationship if it contains a conclusion regarding causal relationship which is unsupported by medical rationale.¹¹

⁸ *T.C.*, Docket No. 20-1163 (issued July 13, 2021); *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *Furman G. Peake*, *id.*

⁹ *See W.C.*, Docket No. 18-1386 (issued January 22, 2019); *Melvina Jackson*, 38 ECAB 443 (1987).

¹⁰ *See S.P.*, Docket No. 23-0537 (issued October 31, 2023); *Y.D.*, Docket No. 16-1896 (issued February 10, 2017).

¹¹ *See C.B., widow of S.B.*, Docket No. 19-1629 (issued April 7, 2020); *V.T.*, Docket No. 18-0881 (issued November 19, 2018); *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

Appellant also submitted several diagnostic studies. However, diagnostic studies, standing alone, lack probative value on issue of causal relationship as they do not address whether the employment injury had resolved.¹²

As the medical evidence of record establishes that appellant no longer had residuals or disability causally related to the accepted employment injury, the Board finds that OWCP met its burden of proof.

LEGAL PRECEDENT -- ISSUE 2

When OWCP properly terminates compensation benefits, the burden shifts to appellant to establish continuing disability or residuals on or after that date, causally related to the accepted employment injury.¹³ 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.¹⁴

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to establish continuing disability or residuals, on or after September 28, 2020, causally related to her accepted January 26, 2019 employment injury.

In a May 11, 2022 Form CA-20, Dr. Howard diagnosed cervicgia, muscle spasms, sprain, and cervical radiculopathy. He opined that the motor vehicle accident caused a traumatic injury and checked a box marked “Yes” indicating the diagnosed conditions were caused or aggravated by employment activity. Dr. Howard found that appellant was partially disabled. However, he did not address whether the accepted conditions had resolved, or whether the appellant’s disability had ceased. The Board has held that a report that indicates causal relationship with a checkmark is of diminished probative value and insufficient to establish causal relationship.¹⁵

Appellant submitted notes dated December 3, 2021 through July 3, 2023 from Dr. Cable, who described the July 26, 2019 work-related motor vehicle accident and diagnosed cervical spondylosis without myelopathy, disc protrusions, foraminal stenosis, cervical radiculopathy, and lumbar radiculopathy. Dr. Cable opined that her reported work-related injury “may be” consistent with something that could induce cervical radiculopathy or aggravate an existing

¹² *S.P., id.*; *C.S.*, Docket No. 19-1279 (issued December 30, 2019).

¹³ *See S.M.*, Docket No. 18-0673 (issued January 25, 2019); *C.S.*, Docket No. 18-0952 (issued October 23, 2018); *Manuel Gill*, 52 ECAB 282 (2001).

¹⁴ *Id.*

¹⁵ *See S.B.*, Docket No. 24-0064 (issued February 28, 2024); *D.S.*, Docket No. 21-0037 (issued May 27, 2021); *S.C.*, Docket No. 20-0327 (issued May 6, 2021); *A.R.*, Docket No. 19-0465 (issued August 10, 2020); *Gary J. Watling*, 52 ECAB 278 (2001); *Lillian M. Jones*, 34 ECAB 379, 381 (1982).

condition. The Board has held that medical opinions that suggest that a condition “may be” work related, are speculative or equivocal in character.¹⁶ The indication that her continuing conditions “may be” work-related injuries is speculative in nature and not a firm opinion on causal relationship. Thus, these notes are insufficient to establish continuing residuals or disability.

Dr. Gupta completed notes dated October 20 through November 2, 2021, in which she diagnosed cervical spondylosis without myelopathy or radiculopathy. In an August 2, 2023 note, Dr. Rosenfeld diagnosed cervical spondylosis with myelopathy and degeneration of cervical intervertebral disc. The Board, however, has held that medical evidence that does not offer an opinion regarding the cause of an employee’s condition is of no probative value on the issue of causal relationship.¹⁷ Therefore, this evidence is also insufficient to establish continuing residuals or disability.

On October 7, 2020 Dr. Howard noted appellant’s increased neck pain following her return to work on September 26, 2020. Dr. Lin examined appellant on October 23, 2020 and recounted her symptoms. On December 16, 2020 Dr. Alexander diagnosed unspecified work-related cervical and shoulder injuries. On July 19, 2023 Dr. Hall examined appellant due to chest and neck pain. Under FECA, the assessment of pain is not considered a diagnosis, as pain merely refers to a symptom of an underlying condition.¹⁸ As such, these reports are insufficient to establish continuing residuals or disability causally related to the accepted employment injury.

Appellant also submitted a series of notes from nurse anesthetists and a physician assistant, dated April 28, 2021 through January 5, 2023. The Board has held that medical reports signed solely by a nurse anesthetists and physician assistant are of no probative value because these healthcare providers are not considered physicians as defined under FECA and are, therefore, not competent to provide medical opinions.¹⁹

As the medical evidence of record is insufficient to establish continuing disability or residuals on or after September 28, 2020 causally related to the accepted July 26, 2019 employment injury, the Board finds that appellant has not met her burden of proof.

¹⁶ *T.L.*, Docket No. 16-0687 (issued October 12, 2016); *see also D.L.*, Docket No. 23-0967 (issued November 30, 2023); *D.L.*, Docket No. 23-0853 (issued November 15, 2023); *L.B.*, Docket No. 23-0708 (issued November 6, 2023); *K.R.*, Docket No. 23-0696 (issued October 31, 2023); *F.S.*, Docket No. 22-0070 (issued June 14, 2023).

¹⁷ *Supra* note 11.

¹⁸ *M.V.*, Docket No. 18-0884 (issued December 28, 2018). The Board has consistently held that pain is a symptom, not a compensable medical diagnosis. *See P.S.*, Docket No. 12-1601 (issued January 2, 2013); *C.F.*, Docket No. 08-1102 (issued October 10, 2008).

¹⁹ Section 8101(2) of FECA provides that physician “includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law.” 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *See also* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013); *D.L.*, Docket No. 23-0967 (issued November 30, 2023) (a physician assistant is not considered a physician under FECA); *D.M.*, Docket No. 22-0527 (issued October 4, 2022) (a nurse anesthetist is not considered a physician under FECA); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA).

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(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 28, 2020, as she no longer had disability or residuals causally related to her accepted July 26, 2019 employment injury. The Board further finds that appellant has not met her burden of proof to establish continuing disability or residuals on or after September 28, 2020 causally related to her accepted January 26, 2019 employment injuries.

ORDER

IT IS HEREBY ORDERED THAT the October 26, 2023 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 25, 2024
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