United States Department of Labor
Employees' Compensation Appeals Board

C.A., Appellant	)	
and	)	**Docket No. 25-0398**
	)	**Issued: May 20, 2025**
DEPARTMENT OF HOMELAND SECURITY, CYBERSECURITY AND INFRASTRUCTURE SECURITY AGENCY, Boston, MA, Employer	)	

Appearances:
Thomas S. Harkins, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On March 17, 2025 appellant, through counsel, filed a timely appeal from a September 26, 2024 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[3]

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[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*.

[3] The Board notes that, following the September 26, 2024 decision, appellant submitted additional evidence to OWCP. However, the Board's *Rules of Procedures* 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.

ISSUE

The issue is whether appellant has met her burden of proof to establish that the acceptance of her claim should be expanded to include concussion, post-concussion syndrome, bilateral tinnitus, vertigo, bulging cervical intervertebral disc, and/or cervical intervertebral disc disorder with displacement as causally related to, or a consequence of, her accepted December 4, 2023 employment injury.

FACTUAL HISTORY

On December 27, 2023 appellant, then a 42-year-old information technology manager, filed a traumatic injury claim (Form CA-1) alleging that on December 4, 2023 she sustained neck and lower extremity injuries when involved in a motor vehicle accident (MVA) while in the performance of duty. She explained that her car skidded on ice and struck the roadway's right guardrail, then ricocheted into the left guardrail, causing the airbags to deploy. Appellant noted that she was put in a neck brace and transported to a hospital emergency department by ambulance. She stopped work on December 4, 2023.

By decision dated January 16, 2024, OWCP accepted the claim for contusion of left lower leg, strain of muscle, fascia, and tendon at neck level, and strain of unspecified muscle, fascia, and tendon at shoulder and upper arm level, left arm.

In hospital emergency department reports dated December 5, 2023, Dr. Paul M. Newton, Board-certified in family practice, recounted that appellant had been in a single vehicle MVA with a "ping pong back and forth" trajectory between guardrails. He related appellant's symptoms of "pain in the back of the left shoulder, left shin, and back of the neck. Mild headache." On examination, Dr. Newton observed "normocephalic atraumatic" status of the head, no neurological deficits, mild tenderness to palpation over the upper posterior cervical processes, tenderness behind the left shoulder, and tenderness and slight bruising of the lower left shin. He obtained x-rays and a computerized tomography (CT) scan of the cervical spine, which revealed multilevel degenerative changes. Dr. Newton diagnosed cervical strain, left shoulder strain, contusion of left leg, and MVA. He prescribed medication.

OWCP received reports dated January 12 through May 9, 2024 wherein Dr. Allan B. Perel, a Board-certified neurologist, recounted a history of the December 4, 2023 accepted MVA. Dr. Perel noted that appellant "had head trauma," and injured her neck, middle and lower back, left knee, and left hip. Appellant complained of chronic headaches, dizziness, vertigo, bilateral tinnitus, decreased concentration, memory deficits, nausea, photosensitivity, numbness in the left upper and lower extremities, cervical, thoracic, and lumbar pain, and left knee pain. Dr. Perel also noted that appellant had a history of relapsing-remitting multiple sclerosis, and "anxiety, which is worsened." On examination, he observed mild paraspinal spasm in the cervical region with decreased rotation bilaterally, mid-thoracic paraspinal muscle spasms, bilaterally positive straight leg raising tests, decreased range of motion of the left knee and hip, a mildly diminished right biceps reflex, decreased pinprick sensation in the right C5-6 and right L4-5 dermatomes, and an antalgic, wide-based gait.[4] Dr. Perel diagnosed post-concussion syndrome, post-concussion headaches, cervical radiculopathy radiating into the right upper extremity, thoracic radiculopathy, lumbar radiculopathy radiating into the right lower extremity, neck pain, low back pain, bilateral tinnitus, and a history of relapsing-remitting multiple sclerosis. He opined that the diagnosed conditions were causally related to the December 4, 2023 employment injury. Dr. Perel held appellant off work.

OWCP received reports dated February 2 through May 10, 2024, wherein Dr. Daniel W. Wilen, a Board-certified orthopedic surgeon, related a history of the accepted December 4, 2023 MVA, with complaints of cervical spine, left shoulder, and left lower extremity pain. On examination, Dr. Wilen observed swelling and tenderness to palpation of the left supraspinatus muscle, and an "abnormal appearance" of the cervical spine with restricted motion. He obtained x-rays of the cervical spine, which revealed spasm,[5] and x-rays of the left shoulder and left lower extremity, which were negative for fracture or dislocation. Dr. Wilen diagnosed a bulging disc in the cervical spine, tendinosis of the left shoulder, and pain in the neck, left shoulder, and left lower leg. He administered a series of intra-articular injections to the cervical spine.[6]

On June 24, 2024 OWCP referred appellant, along with the medical record, a statement of accepted facts (SOAF), and a series of questions, to Dr. Paul Lerner, a Board-certified neurologist, for a second opinion examination regarding the nature and extent of the accepted conditions, whether additional medical treatment was necessary, and whether OWCP should expand its acceptance of the conditions in the claim to include concussion, post-concussion syndrome, bilateral tinnitus, vertigo, bulging intervertebral disc, and cervical intervertebral disc disorder with displacement.

Thereafter, OWCP received a June 20, 2024 report wherein Dr. Perel related appellant's continued vertigo, tinnitus, and migraine headaches. Dr. Perel diagnosed post-concussion syndrome, cervical radiculopathy, neck pain, bilateral tinnitus, and vertigo.

In a July 24, 2024 report, Dr. Perel related that appellant "suffered head trauma" in the accepted December 4, 2023 MVA. He diagnosed "post-concussion syndrome, cervical radiculopathy, bilateral tinnitus, and vertigo from a work-related injury of [December 4,] 2023 when she was in a [MVA]." Dr. Perel noted clinical evidence of thoracic radiculopathy with a

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[4] A January 25, 2024 electromyography/nerve conduction velocity (EMG/NCV) study of the upper extremities, cervical paraspinal muscles, and lower extremities revealed left greater than right C5-6 radiculopathy at the wrist with denervation in the paraspinal muscles, no electrophysiological evidence of carpal tunnel syndrome or brachial plexopathy, left greater than right L4-5 radiculopathy with denervation in the paraspinal muscles, and no electrophysiological evidence of distal neuropathy.

[5] A March 8, 2024 magnetic resonance imaging (MRI) scan of the cervical spine demonstrated reversal of the usual cervical lordosis consistent with muscular strain or spasm, posterior disc bulge impinging on the thecal sac and the right lateral neural foramina at C3-4, spondylosis and disc herniation impinging on the thecal sac at C4-5, spondylosis disc base narrowing and disc herniation with facet joint hypertrophy compressing the thecal sac and impinging on the lateral neural foramina of C5-6, and disc herniation and spondylosis at C6-7.

[6] In a March 26, 2024 report, Dr. James Caviness, a medical review physician Board-certified in occupational medicine, reviewed appellant's medical records and recommended a second opinion examination to differentiate between the effects of the accepted December 4, 2023 employment injury and appellant's preexisting multiple sclerosis.

T11-12 disc bulge, EMG/NCV study evidence of cervical and lumbar, and discogenic pathology evident on MRI studies. He explained that appellant "has been followed for her multiple sclerosis, which has been relatively stable with her being on disease-modifying therapy." Dr. Perel opined that appellant was permanently disabled from work as her symptoms had persisted for more than six months. He recommended continued physical and vestibular therapy.

In June 21 and August 2, 2024 reports, Dr. Wilen related continued cervical spine, left shoulder, and left lower extremity symptoms attributable to the December 2023 employment injury. He diagnosed a bulging cervical disc, tenderness in the left shoulder, and pain in the left lower leg. Dr. Wilen administered an intra-articular injection to the left side of the cervical spine.

In an August 19, 2024 report, Dr. Lerner reviewed the medical record and SOAF. On examination, he reported neurologic findings within normal limits. Dr. Lerner stated an impression of subjective headache with migraine features, and subjective neck and back pain. He opined that appellant had no objective neurologic residuals or disability related to the December 4, 2023 employment injury. Dr. Lerner asserted that appellant's subjective symptoms of forgetfulness, concentration difficulties, and vertigo were not present in the initial medical records. Additionally, the medical record did "not support the diagnosis of initial concussion." Dr. Lerner therefore opined that appellant's symptoms were "not due to a post-concussion syndrome." He also opined that the cervical disc herniations revealed by imaging studies were degenerative in nature and "therefore likely not causally related" to the December 4, 2023 employment injuries, and there was no spasm or other correlating abnormalities on examination. Dr. Lerner opined that while the accepted employment injuries had ceased without residuals, it was unclear whether her current symptoms were related to multiple sclerosis. He returned appellant to full-time sedentary work, but indicated that he needed additional information regarding her multiple sclerosis to properly assess her work capacity.

On August 27, 2024 OWCP requested that Dr. Lerner provide a supplemental report addressing whether the accepted conditions partially or totally disabled appellant from work during the period February 25 through May 31, 2024.

Thereafter, OWCP received June 21 and September 9, 2024 reports, wherein Dr. Wilen related appellant's complaints of significant neck pain with pain and paresthesias radiating into the left upper extremity, clicking in her left shoulder, and instability and pain in the left knee. On examination, Dr. Wilen observed paraspinal spasm from C1 through C6, tenderness to palpation over the spinous processes from C3 through C5, decreased cervical spine motion in all planes, 4/5 weakness and diminished reflexes in the upper extremities, positive Neer and Hawkins impingement signs in the left shoulder, clicking on range of motion of the left shoulder, decreased left shoulder motion in all planes, swelling and tenderness of the left knee with clicking on range of motion, swelling in the left calf, and "weakness on plantar and dorsiflexion of the left ankle, due to the injury to the gastroc[nemius] muscle of the left leg and injury to the left knee joint." He opined that the December 4, 2023 MVA caused a herniated cervical disc, left shoulder impingement, and buckling and clicking in the left knee. Dr. Wilen recommended continued physical therapy and possible surgery to address the herniated cervical disc, and arthroscopic surgery of the left shoulder "due to the impingement and bursitis that has developed as a result of this accident. These injuries are causally related to this accident."

In an August 15, 2024 report, Dr. Perel related appellant's symptoms of dizziness, vertigo, cervical spine pain, tinnitus, and generalized paresthesias. He noted that appellant underwent a steroid infusion for multiple sclerosis in January and might be a candidate for additional medications.

In a supplemental report dated September 23, 2024, Dr. Lerner opined that as he had not seen or examined appellant during the period February 25 through May 31, 2024, he could not determine with certainty whether she was partially or totally disabled from work at that time.

By decision dated September 26, 2024, OWCP denied appellant's request to expand the acceptance of her claim to include concussion, post-concussion syndrome, bilateral tinnitus, vertigo, bulging cervical intervertebral disc, and cervical intervertebral disc disorder with displacement. It found that the medical evidence of record was insufficient to establish causal relationship between these additional conditions and the accepted employment injury.

LEGAL PRECEDENT

When an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.[7]

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.[8] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[9] The weight of the medical evidence is determined by its reliability, its probative value, its convincing quality, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.[10]

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[11]

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[7] *D.M.*, Docket No. 24-0512 (issued December 9, 2024); *L.F.*, Docket No. 20-0359 (issued January 27, 2021); *S.H.*, Docket No. 19-1128 (issued December 2, 2019); *M.M.*, Docket No. 19-0951 (issued October 24, 2019); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[8] *D.M.*, *id.*; *L.F.*, *id.*; *T.K.*, Docket No. 18-1239 (issued May 29, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

[9] *D.T.*, Docket No. 20-0234 (issued January 8, 2021); *D.S.*, Docket No. 18-0353 (issued February 18, 2020); *T.K.*, *id.*; *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

[10] *See D.T.*, *id.*; *P.M.*, Docket No. 18-0287 (issued October 11, 2018).

[11] *F.R.*, Docket No. 24-0075 (issued March 4, 2024); *V.K.*, Docket No. 19-0422 (issued June 10, 2020); *K.S.*, Docket No. 17-1583 (issued May 10, 2018).

Section 8123(a) of FECA 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.[12] 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. In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner (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.[13]

ANALYSIS

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

Dr. Perel, in reports dated January 12 through August 15, 2024, opined that the December 4, 2023 employment incident caused concussion and post-concussion syndrome, with neurologic sequelae of chronic headaches, dizziness, vertigo, bilateral tinnitus, decreased concentration, memory deficits, nausea, and photosensitivity. He also opined that the accepted December 4, 2023 employment incident caused cervical radiculopathy with decreased pinprick sensation in the right C5-6 dermatome, and lumbar radiculopathy with decreased sensation in the right L4-5 dermatome and bilaterally positive straight leg raising tests. Dr. Perel noted that appellant's preexisting multiple sclerosis was relatively stable under treatment.

Dr. Wilen, in reports dated February 2 through May 10, 2024, diagnosed a bulging cervical disc, and tendinosis of the left shoulder. He opined in reports dated June 21 through September 9, 2024 that appellant's cervical spine, left shoulder, and left lower extremity symptoms remained causally related to the accepted December 4, 2023 employment injury. In a September 15, 2024 report, Dr. Wilen opined that the December 4, 2023 employment incident caused a herniated cervical disc that might require surgery. He recommended continued physical therapy.

In contrast, Dr. Lerner, in his August 19 and September 23, 2024 reports, opined that the medical evidence of record did not support that the accepted December 4, 2023 employment incident caused a concussion, and that there were no neurologic residuals of the accepted employment conditions. He characterized the cervical disc herniations as degenerative in nature, and noted that multiple sclerosis should be considered as the cause of appellant's symptoms. The Board, therefore, finds that a conflict in medical opinion exists between Dr. Lerner, the second opinion physician, and Drs. Perel and Wilen, the treating physicians, regarding whether appellant sustained or developed a concussion, post-concussion syndrome, bilateral tinnitus, vertigo, bulging

[12] 5 U.S.C. § 8123(a). *See R.C.*, Docket No. 18-0463 (issued February 7, 2020); *see also G.B.*, Docket No. 16-0996 (issued September 14, 2016).

[13] 20 C.F.R. § 10.321. *See also D.M.*, Docket No. 25-0317 (issued April 15, 2025); *J.H.*, Docket No. 22-0981 (issued October 30, 2023); *N.D.*, Docket No. 21-1134 (issued July 13, 2022); *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001); *James P. Roberts*, 31 ECAB 1010 (1980).

cervical intervertebral disc, and cervical intervertebral disc disorder with displacement as causally related to, or a consequence of, her accepted December 4, 2023 employment injury.[14]

OWCP's regulations provide that, if a conflict exists between the medical opinion of the employee's treating physicians and the medical opinion of a second-opinion physician, OWCP shall appoint a third physician to make an examination.[15]

The Board shall, therefore, remand the case to OWCP for referral to an IME regarding whether appellant has met her burden of proof to establish a concussion, post-concussion syndrome, bilateral tinnitus, vertigo, bulging cervical intervertebral disc, and/or cervical intervertebral disc disorder with displacement as causally related to, or a consequence of, her accepted December 4, 2023 employment injury.[16] Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision.

CONCLUSION

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

[14] The Board notes that OWCP has not yet conducted additional development to determine whether the acceptance of the claim should be expanded to include left shoulder impingement with bursitis, and additional conditions of the left knee.

[15] 5 U.S.C. § 8123(a); *D.M.*, *supra* note 13; *R.R.*, Docket No. 25-0220 (issued February 10, 2025).

[16] *Id*.

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2024 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: May 20, 2025
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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

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