

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

J.C., Appellant)
)
and)
)
DEPARTMENT OF HOMELAND SECURITY,)
U.S. CITIZENSHIP & IMMIGRATION)
SERVICES, Miami, FL, Employer)
_____)

**Docket No. 15-284
Issued: May 14, 2015**

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
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 19, 2014 appellant filed a timely appeal from a May 30, 2014 merit decision and an August 21, 2014 attorney fee decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (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 properly terminated appellant's wage-loss and medical compensation benefits effective June 1, 2014; and (2) whether it abused its discretion by approving appellant's prior counsel's fee in the amount of \$4,560.00.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

OWCP accepted that on March 30, 2012 appellant, then a 53-year-old clerk, sustained a cervical sprain and cervicgia while lifting file boxes. Following emergency room treatment on April 4, 2012, he was followed by Dr. Christopher Brown, an attending Board-certified orthopedic surgeon, who ordered a magnetic resonance imaging (MRI) scan, which was performed on May 16, 2012 that showed cervical spondylosis with central stenosis at C4-5, C6-7, a disc herniation at C3-4, and bilateral foraminal stenosis from C4 to 7 due to spondylitic changes.² Appellant stopped work at the time of injury. He reported for duty on May 23, 2012, again stopped work and did not return.

Dr. Guillermo Pasarin, an attending Board-certified neurosurgeon, provided an August 17, 2012 report noting multilevel spondylitic disc disease from C3 through C7, with myelomalacia at C5-6 consistent with appellant's neurologic symptoms in the right upper extremity, and advanced degenerative disc disease with congenital stenosis. He opined that the accepted cervical sprain likely exacerbated appellant's preexisting degenerative conditions, causing them to become symptomatic.

Dr. Brown provided duty restrictions through March 2013 due to impaired cervical spine strength and mobility.³ He opined that appellant reached maximum medical improvement as of March 8, 2013, with a permanent restriction against lifting or carrying more than 25 pounds.

On June 3 2013 OWCP obtained a second opinion report from Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, who reviewed the medical record and a statement of accepted facts. Dr. Millheiser related appellant's symptoms of numbness and paresthesias in both hands and feet, as well as neck and back pain. On examination, he found voluntarily restricted motion of the cervical, thoracic, and lumbar spine without spasm, tenderness, trigger points, motor loss, or neurologic abnormalities. Dr. Millheiser noted hypoesthesia of the dorsal aspect of the first ray in both feet and on the plantar surfaces of the hallux bilaterally. He diagnosed a cervical sprain, cervical spondylosis, cervical radiculopathy, a focal disc herniation at C3-4, bilateral cervical canal stenosis, and bilateral foraminal stenosis. Dr. Millheiser opined that the accepted cervical sprain had ceased without residuals. He explained that appellant's ongoing symptoms were caused by preexisting degenerative disc disease, unaffected by his sedentary work duties as described in the statement of accepted facts. Dr. Millheiser found appellant able to perform full-duty work with no restrictions.

In a September 19, 2013 addendum, Dr. Millheiser stated that Dr. Pasarin's report demonstrated that appellant's "main problems [were] the preexisting advanced degenerative disease," which may have been exacerbated by the accepted injury. On February 6, 2014 he added that the accepted cervical sprain caused a temporary, resolved aggravation of preexisting degenerative, disc disease and cervical spondylosis.

² Appellant had concomitant diagnoses of major depressive disorder and obstructive sleep apnea related to his military service.

³ Appellant participated in physical therapy from May through September 2012.

Appellant's counsel at the time provided a February 7, 2014 letter asserting that both Dr. Brown and Dr. Millheiser supported a continuing causal relationship between appellant's ongoing symptoms and the accepted cervical sprain. OWCP placed appellant's case on the periodic rolls as of March 9, 2014.

By notice dated April 9, 2014, OWCP advised appellant that it proposed to terminate his wage-loss and medical compensation benefits as the accepted cervical sprain and cervicgia had ceased without residuals, considering Dr. Millheiser's opinion the weight of the medical evidence. It afforded him 30 days to submit additional evidence and argument.

Appellant provided a May 9, 2014 statement disagreeing with the proposed termination. He asserted that he was unable to work due to back and neck pain, as well as side effects from prescribed medications. Appellant submitted a May 8, 2014 report from Dr. Brown, noting that physical therapy was not effective in reducing appellant's symptoms. On examination, Dr. Brown found a normal range of motion in the cervical spine, no paraspinal tenderness or trigger points, and normal reflexes throughout the extremities. He opined that appellant remained at maximum medical improvement. Dr. Brown recommended a pain management program.

By decision dated May 30, 2014, OWCP finalized the termination of appellant's wage-loss and medical compensation benefits effective June 1, 2014 finding that the accepted neck sprain had ceased without residuals. It accorded Dr. Millheiser the weight of the medical evidence.

On June 17, 2014 appellant's prior counsel requested that OWCP approve a fee request for \$4,560.00 for 15.2 hours of work from June 4, 2012 to March 11, 2014, at the rate of \$300.00 an hour. Counsel noted that he rendered an additional three hours of legal services in appellant's case for which he did not charge appellant. He explained that appellant had signed an agreement agreeing to pay the fee, but then "expressed no interest in paying any type of [representative] fee, although he is well aware that he [was] responsible for payment." Counsel provided an itemized timesheet, describing the type, and duration of the services provided on the 46 listed dates.

In a June 18, 2014 letter, OWCP requested that appellant comment on his counsel's fee request for \$4,560.00. It advised him that, if he did not respond by July 18, 2014, it would assume that he did not wish to comment on the fee and would consider the fee request approved as fair and reasonable.

In a June 22, 2014 letter, appellant contended that he had active residuals of the accepted injury and disputed the termination of his compensation. He submitted his claim form and medical evidence dated from 2002 to 2004 related to the right thumb and right elbow. Appellant did not address counsel's fee request.

By decision dated August 21, 2014, OWCP approved the request for a \$4,560.00 fee for services rendered from June 4, 2012 to March 11, 2014. It found that appellant had failed to raise a timely objection to the proposed fee.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁴ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁵

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained a cervical sprain and cervicgia in a March 30, 2012 lifting incident. Apart from a brief return to work on May 23, 2012, appellant stopped work on the date of injury and did not return. Dr. Brown, the attending Board-certified orthopedic surgeon, diagnosed significant degenerative cervical disc disease with foraminal stenosis. Dr. Pasarin, the attending Board-certified neurosurgeon, opined that the accepted sprain aggravated the preexisting cervical spine conditions. OWCP obtained a second opinion from Dr. Millheiser, a Board-certified orthopedic surgeon, who submitted June 3 and September 19, 2013, and February 6, 2014 reports. Dr. Millheiser opined that the accepted cervical sprain temporarily aggravated underlying degenerative disc disease. OWCP terminated appellant's wage-loss and medical benefits effective June 1, 2014, based on Dr. Millheiser's reports as the weight of the medical evidence.

Dr. Millheiser provided detailed medical rationale, based on the complete medical record and statement of accepted facts. He explained that the accepted cervical sprain resolved as there were no objective findings on examination. Dr. Millheiser found appellant fit for full-duty work. Dr. Brown also found that appellant had reached maximum medical improvement as of March 8, 2013, and he could perform full-time modified duty. He found appellant's condition unchanged as of May 8, 2014, concurring with Dr. Millheiser that appellant had no objective neurologic abnormalities on examination attributable to the accepted cervical sprain. Neither Dr. Millheiser nor Dr. Brown found continuing residuals of the accepted injury. The Board, therefore, finds that OWCP's May 30, 2014 decision terminating appellant's medical and wage-loss compensation was proper under the law and facts of the case.

On appeal, appellant alleges that OWCP sabotaged his compensation case by denying him necessary medical care and ignoring his neurologic symptoms. He asserts the need for cervical discectomies to address neurologic difficulties with his bladder, right hand, and both feet. The Board notes that there is no evidence of record that OWCP mishandled appellant's case or denied him medical care required by the accepted injuries.

LEGAL PRECEDENT -- ISSUE 2

It is not the Board's function to determine the fee for representative services performed before OWCP. That is a function within the discretion of OWCP based on the criteria set forth

⁴ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

⁵ *Id.*

in Title 20 of the Code of Federal Regulations and mandated by Board decisions. The Board's sole function is to determine whether the action by OWCP constituted an abuse of discretion.⁶ Generally, an abuse of discretion is shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.⁷

Section 10.703 of the Code of Federal Regulations provide in pertinent part that a representative must submit a fee application, which includes a statement of agreement or disagreement with the amount charged, signed by the claimant.⁸ When a fee application has been disputed, OWCP is required to provide the claimant with a copy of the fee application and request the submission of further information in support of any objection.⁹ After the claimant has been afforded 15 days from the date the request was forwarded to respond to the request, OWCP will then proceed to review the fee application to determine whether the amount of the fee is substantially in excess of the value of services received by looking at the following factors: (1) usefulness of the representative's services; (2) the nature and complexity of the claim; (3) the actual time spent on development and presentation of the claim; and (4) customary local charges for similar services.¹⁰

ANALYSIS -- ISSUE 2

The Board finds that OWCP did not abuse its discretion. OWCP considered the detailed fee application submitted by appellant's counsel, describing the specific legal services provided on 46 dates from June 4, 2012 to March 11, 2014. Counsel preferred that appellant had signed an agreement acknowledging his responsibility to pay the legal fee.

OWCP advised appellant by June 18, 2014 letter of his counsel's fee request and of his opportunity to submit evidence or argument against approval of the fee. It explained that, if he did not respond, it would approve the fee as fair and reasonable. Appellant provided a June 22, 2014 letter discussing his symptoms, but did not address counsel's fee issue. Therefore, OWCP approved the fee request by decision dated August 21, 2014. The Board finds that, as appellant did not object to the approval of the fee request, OWCP did not abuse its discretion by approving the \$4,560.00 fee for 15.2 hours of legal services rendered from June 4, 2012 to March 11, 2014.

On appeal, appellant contends that OWCP failed to mail him a notice of oral hearing on an unspecified issue because it was solely within the Board's jurisdiction. It appears that he is referring to the fee issue. However, counsel's fee decision, with attached appeal rights, was sent to appellant's address of record. To the extent that appellant asserts he should have a

⁶ *J.P.*, Docket No. 11-63 (issued June 19, 2012); *L.H.*, Docket No. 11-900 (issued December 6, 2011); *C.H.*, Docket No. 10-987 (issued March 22, 2011).

⁷ *Daniel J. Perea*, 42 ECAB 214 (1990).

⁸ 20 C.F.R. § 10.703(a)(i).

⁹ *Id.* at § 10.703(c).

¹⁰ *Id.*

hearing with regard to issues that are before the Board in the present appeal, the Board and OWCP may not simultaneously have jurisdiction over the issues in a case.¹¹

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss and compensation benefits effective June 1, 2014 because the accepted cervical sprain and cervicgia resolved without residuals. The Board further finds that OWCP properly approved his counsel's fee in the amount of \$4,560.00.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 21 and May 30, 2014 are affirmed.

Issued: May 14, 2015
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹¹ See *Arlonia B. Taylor*, 44 ECAB 591 (1993); *Russell E. Lerman*, 43 ECAB 770 (1992); *Douglas E. Billings*, 41 ECAB 880 (1990).