

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

R.B., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS, VA
NY HARBOR HEALTHCARE SYSTEM,
New York, NY, Employer**

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**Docket No. 19-1501
Issued: February 23, 2021**

Appearances:
*Paul Kalker, 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
CHRISTOPHER J. GODFREY, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 3, 2019 appellant, through counsel, filed a timely appeal from a May 30, 2019 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.³

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 May 30, 2019 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 evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss compensation, effective May 30, 2018, as she no longer had disability causally related to her accepted employment injuries; and (2) whether appellant has met her burden of proof to establish continuing disability due to the accepted conditions after May 30, 2018.

FACTUAL HISTORY

On November 23, 2009 appellant, then a 53-year-old social worker, filed a traumatic injury claim (Form CA-1) alleging that on November 18, 2009 she was attacked by a patient that shoved her in her back and hit her twice with a door while in the performance of duty. She alleged that she injured her right side, shoulder, back, calf, and foot. On January 21, 2010 OWCP accepted appellant's claim for neck and lumbar back sprain, and right shoulder contusion. On May 27, 2010 it expanded acceptance of her claim to include post-traumatic stress disorder (PTSD). On July 14, 2010 OWCP again expanded acceptance of appellant's claim to include lumbar disc displacement. On June 11, 2014 it expanded acceptance of her claim to include rotator cuff syndrome of the right shoulder and allied disorders.

In an attending psychologist's report dated October 13, 2010, Dr. C. Edward Robins, a licensed clinical psychologist, found appellant to be totally disabled through October 6, 2010 due to PTSD. Dr. Debra H. Goldman, a licensed clinical psychologist, found her totally disabled from work due to her accepted PTSD through October 19, 2010.

On December 8, 2010 OWCP referred appellant for a second opinion evaluation with Dr. Solomon Miskin, a Board-certified psychiatrist. In a January 5, 2011 report, Dr. Miskin found that appellant continued to exhibit symptoms of PTSD, but that she could return to her regular work duties with the restrictions that she not be assigned to violent patients or those with a known history of combativeness.

Drs. Goldman and Robins continued to support appellant's diagnosis of PTSD and disability from work through August 25, 2011.

On August 26, 2011 OWCP referred appellant, a statement of accepted facts (SOAF), and a list of questions for an impartial medical examination with Dr. Harry Aaron, a Board-certified psychiatrist.

In a report dated October 14, 2011, Dr. Aaron noted appellant's history of injury and her symptoms of occasional nightmares and disturbing memories of her assault. He reported that she had returned to the employing establishment without significant emotional discomfort and that she felt emotionally ready to return to her duties and to work with patients even if they had a history of violence. Appellant noted that she wanted to return to work without restrictions. Dr. Aaron diagnosed PTSD, chronic type, and paranoid personality disorder. He agreed that it was in appellant's best interest to return to work to aid in her continuing recovery. Dr. Aaron also recommended that appellant be given up to one year to pass her social work licensing examination. He found that the intensity of appellant's PTSD had diminished to the extent that it no longer interfered with her test-taking ability. Dr. Aaron found that, although appellant continued to suffer

from the symptoms of PTSD, the intensity of the symptoms had diminished to the point that she was no longer psychiatrically disabled by her disorder and could immediately return to work with no restrictions.

Appellant continued to treat with Dr. Goldman through November 2, 2012 and Dr. Robins through July 15, 2014. On March 22, 2012 Dr. Goldman found that appellant was unable to return to work due to continuing health problems, even though she had a strong desire to resume employment. Her last note, dated November 2, 2012, addressed stress associated with interactions with the employing establishment and the rehabilitation counselor. Dr. Goldman indicated that appellant was considering disability retirement, but did not specifically address her ability to return to work due to PTSD. Dr. Robins completed a series of weekly and biweekly form reports.

On January 15, 2015 the employing establishment offered appellant a light-duty position as a financial account technician. Appellant accepted the light-duty position on January 26, 2015 and returned to work on February 9, 2015.

On June 28, 2016 OWCP authorized right shoulder rotator cuff repair.

Appellant filed a notice of recurrence (Form CA-2a) on August 8, 2017 alleging that on June 15, 2017 she sustained a recurrence of disability causally related to her November 18, 2009 employment injury. On August 15, 2017 she underwent right shoulder surgery.

By decision dated August 18, 2017, OWCP accepted that appellant sustained a recurrence of disability on June 15, 2017 due to the accepted right shoulder condition and resultant surgery. On October 10, 2017 it placed her on the periodic rolls, with wage-loss compensation retroactive to September 16, 2017.

On September 20 and November 15, 2017 appellant's attending physician, Dr. David Capiola, a Board-certified orthopedic surgeon, found that she was totally disabled from work.

By letter dated November 27, 2017, the employing establishment informed appellant that her term appointment as a "social worker associate" would be terminated effective December 30, 2017.

On January 19, 2018 OWCP referred appellant, a SOAF, and a series of questions to Dr. Andrew Farber, an osteopath specializing in orthopedic surgery, to address her disability from work.

In a February 5, 2018 report, Dr. Farber noted appellant's history of injury and medical treatment and performed a physical examination, noting that appellant walked without an assistive device or antalgic gait. He found that appellant was neurovascularly intact in the upper extremities, but had some hypertrophic paraspinal musculature on the right extending toward the trapezial region. Dr. Farber found loss of range of motion (ROM) in the neck. Regarding appellant's lumbar spine, Dr. Farber reported loss of ROM and positive straight leg raising with no radicular symptoms and no reflex abnormalities. He noted that appellant's right shoulder was recovering from surgery. Dr. Farber found that she had disabling residuals of her accepted conditions including hypertonic paraspinal musculature on the right and limited ROM. He determined that appellant's conditions had not resolved, but that she had reached maximum medical improvement

and could return to her date-of-injury job eight hours a day with no restrictions. Dr. Farber noted that appellant believed that she could adequately walk, sit, write, and stand when needed.

On February 7, 2018 Dr. Capiola found that appellant could return to part-time work for six hours a day beginning March 12, 2018. On February 15 and March 1, 2018 Dr. Irfan Alladin, a Board-certified orthopedic surgeon, noted appellant's history of injury and listed her diagnoses as low back pain, thoracic spine pain, cervicalgia, shoulder pain, cervicobrachial syndrome, cervical radiculopathy, and lumbar radiculopathy.

On February 15 and March 1, 2018 Dr. Torrance Winn, a physician Board-certified in pain medicine, completed form reports and opined that appellant could not return to work due to pain and restricted movement of her neck, mid and lower back, and right shoulder.

In a letter dated March 19, 2018, OWCP requested a supplemental report from Dr. Farber and provided him with appellant's date-of-injury position description as well as her limited-duty position as a financial accounts technician. On March 23, 2018 Dr. Farber provided an addendum after he reviewed the position description, and opined that appellant was capable of returning to her position as a social worker.

In a March 28, 2018 form report, Dr. Capiola found that appellant was totally disabled due to limited ROM of her right shoulder.

On April 25, 2018 OWCP provided appellant with a notice of proposed termination of her wage-loss compensation. It found that Dr. Aaron's October 14, 2011 report established that she was no longer psychiatrically disabled and could return to work in her date-of-injury position. OWCP noted that appellant had remained under psychological treatment from Dr. Robins and returned to full-time limited-duty work on February 9, 2015 as a financial accounts technician until her right shoulder surgery. It found that Dr. Farber's February 5, 2018 report established that she had no continuing physical disability and could return to her date-of-injury position, despite her ongoing medical residuals. OWCP afforded appellant 30 days to submit additional evidence or arguments if she disagreed. Appellant did not respond.

By decision dated May 29, 2018, OWCP terminated appellant's wage-loss compensation effective May 30, 2018.

On May 31, 2018 counsel requested that OWCP further develop the issue of appellant's psychiatric condition and resulting disability, if any.

In a report dated May 24, 2018, Dr. Winn continued to list appellant's diagnosed conditions.⁴

On August 13, 2018 appellant underwent a lumbar spine magnetic resonance imaging (MRI) scan which demonstrated a herniated disc at L3-4 and disc bulges at L1-2, L2-3, L4-5, and L5-S1.

⁴ In August 2 and 30, 2018 reports, Dr. Winn repeated his diagnoses.

On August 20, 2018 Dr. Alladin opined that appellant could not work due to pain and limited movement from ongoing pain. On August 22, 2018 appellant underwent an electromyogram and a nerve conduction velocity (EMG/NCV) study, which demonstrated evidence of right L5-S1 lumbar radiculopathy and sensory neuropathy of the bilateral lower extremities.

On December 4, 2018 appellant, through counsel, requested reconsideration of the May 29, 2018 decision. Counsel contended that the medical evidence that appellant's PTSD was no longer disabling was stale and failed to establish that the condition had resolved. He further contended that there was an existing conflict of medical opinion evidence between Dr. Farber and appellant's attending physicians. Counsel provided a report dated August 28, 2018 from Dr. Capiola and an August 29, 2018 report from Dr. Goldman.

On August 28, 2018 Dr. Capiola found that appellant was totally disabled and diagnosed status post right shoulder arthroscopy. He noted that she had requested to return to work due to financial constraints in August 2018 and that the accident of November 18, 2009 was the competent producing cause of her disability.

In her August 29, 2018 report, Dr. Goldman addressed appellant's ongoing PTSD. She opined that appellant could no longer function optimally under conditions of stress or in crowds as she had flashbacks of the attack. Dr. Goldman noted that appellant's sleep was interrupted and disturbed by nightmares. She found that appellant was hyper-alert and fearful that the unexpected could recur. Dr. Goldman found that without the wherewithal to resume her pre-accident life, she was unable to work at a job that had defined who she was. She reported that appellant continued to ruminate about the employment injury and had developed a personality that was inconsistent with her pre-accident personality. Dr. Goldman opined that appellant's moodiness, tearfulness, obsessive thinking, anxiety, and sadness did not predate her employment injury.

On October 18, 2018 Dr. Capiola provided an addendum to his August 28, 2018 report and noted that appellant continued to have severe pain in her right shoulder, difficulties lifting, lifting overhead, typing, and sleeping on her right shoulder. He reported physical findings including edema, tenderness, and positive Hawkin's and Neer signs. Dr. Capiola found that appellant was totally disabled from her work as a social worker due to her inability to type as well as her inability to lift files and paperwork. He noted that in February 2015 appellant had requested a return to work due to financial constraints.

In a December 5, 2018 report, Dr. Jacob Nir, a Board-certified physiatrist, found that appellant was disabled from all work due to continued restricted motion, pain, and weakness to the right arm. He diagnosed cervical and lumbar radiculopathy with nerve root involvement. Dr. Nir noted that appellant had returned to clerical work which entailed typing and sitting for prolonged periods. He advised that appellant could not perform these duties.

On February 21, 2019 OWCP referred appellant, a SOAF, and a list of questions for a second opinion evaluation with Dr. Tara Brass, a Board-certified psychiatrist.

In her March 20, 2019 report, Dr. Brass noted appellant's history of injury and described her medical treatment. She diagnosed PTSD causally related to the accepted employment injury.

Dr. Brass recommended further psychiatric treatment. She found a moderate, partial disability, but determined that appellant was able to return to work part time to minimize stress.

In a decision dated May 30, 2019, OWCP affirmed the finding that appellant was not totally disabled as her physicians had not provided a rationalized medical explanation for her continued disability. It determined, therefore, that the weight of the medical evidence remained with Dr. Farber who found that she was capable of physically returning to her date-of-injury position as a social worker. With regard to appellant's continuing disability due to PTSD, OWCP further found that appellant continued to be partially disabled due to this condition and continued to require medical treatment. Therefore, it vacated this aspect of the May 29, 2018 termination decision and thus, the issue of termination of wage-loss compensation due to PTSD is not before the Board on appeal.⁵

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.⁶ 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.⁷ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation benefits, effective May 30, 2018.

OWCP terminated appellant's wage-loss compensation effective May 30, 2018 due to her accepted physical conditions based on the February 5 and March 23, 2018 reports of Dr. Farber, OWCP's referral physician. In his February 5, 2018 report, Dr. Farber found that appellant had some hypertrophic paraspinal musculature on the right extending toward the trapezial region as well as loss of ROM in the neck. Regarding appellant's lumbar spine, he reported loss of ROM and positive straight leg raising. Dr. Farber found that appellant had disabling residuals of her accepted conditions, that her conditions had not resolved, but that she could return to her date-of-injury job eight hours a day. He noted that appellant believed that she could adequately walk, sit, write, and stand when needed. In his March 23, 2018 addendum, Dr. Farber reviewed appellant's date-of-injury position description, and opined that appellant was capable of returning to her position as a social worker.

⁵ See *S.S.*, Docket No. 19-1091 (issued December 3, 2019) (in which an OWCP hearing representative vacated a termination decision and that decision was not before the Board on appeal).

⁶ *M.M.*, Docket No. 17-1264 (issued December 3, 2018).

⁷ *E.B.*, Docket No. 18-1060 (issued November 1, 2018).

⁸ *G.H.*, Docket No. 18-0414 (issued November 14, 2018).

The Board notes that Dr. Farber provided no specific objective medical findings to substantiate that appellant's accepted conditions had resolved, such that she was no longer disabled. Dr. Farber related that she continued to have hypertrophic paraspinous musculature on the right extending toward the trapezial region as well as loss of ROM in the neck and in the lumbar spine with positive straight leg raising, but he opined that she was not totally disabled. To establish that appellant is no longer disabled due to the accepted conditions, the medical evidence must explain that she ceased to exhibit objective findings of the accepted conditions.⁹ Dr. Farber provided a conclusory opinion, without rationalized objective support for his opinion that appellant's disability had ceased.¹⁰

The Board has held that the weight of a medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested, and the medical rationale expressed in support of stated conclusions.¹¹ As Dr. Farber provided no medical reasoning and merely communicated appellant's belief that she could return to work, his report is insufficient to meet OWCP's burden of proof.¹² The Board therefore finds that Dr. Farber's opinion is of limited probative value on the underlying issue of this case because he failed to provide a rationalized medical opinion based on objective findings, that appellant ceased to have disability or residuals of her accepted employment-related physical conditions.¹³

For these reasons, the Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective May 30, 2018.¹⁴

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 30, 2018.

⁹ *M.R.*, Docket No. 20-0707 (issued November 30, 2020); *A.D.*, Docket No. 18-0497 (issued July 25, 2018).

¹⁰ *R.G.*, Docket No. 16-0271 (issued May 18, 2017).

¹¹ *G.B.*, Docket No. 20-0750 (issued October 27, 2020); *A.R.*, Docket No. 20-0335 (issued August 7, 2020).

¹² *Cf. L.A.*, Docket No. 19-0820 (issued December 6, 2019) (finding that medical rationale is based on an independent analysis rather than a claimant's belief).

¹³ *G.B.*, *supra* note 11.

¹⁴ In light of the Board's disposition in Issue 1, Issue 2 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the May 30, 2019 decision of the Office of Workers' Compensation Programs is reversed.¹⁵

Issued: February 23, 2021
Washington, DC

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

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

¹⁵ Christopher J. Godfrey, Deputy Chief Judge, who participated in the preparation of the decision, was no longer a member of the Board effective January 20, 2021.