

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

M.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Sacramento, CA, Employer**

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**Docket No. 15-0893
Issued: July 20, 2015**

Appearances:
Sally F. LaMacchia, Esq., for the appellant
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 March 11, 2015 appellant, through counsel, filed a timely appeal from the January 21, 2015 merit 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 to review the merits of this case.

ISSUE

The issue is whether appellant's medical condition or wage loss after March 28, 2008 was causally related to the June 11, 2003 work injury.

FACTUAL HISTORY

This case has previously been before the Board. The facts and circumstances as outlined in the prior Board decisions are incorporated herein.

¹ 5 U.S.C. § 8101 *et seq.*

On June 11, 2003 appellant, a 51-year-old casual clerk, sustained a traumatic injury in the performance of duty when some carts (metal cages on wheels) were pushed in her direction and one of them struck her left arm, which she extended to push against the carts. OWCP accepted her claim for left shoulder/arm strain and cervical strain.

In a decision dated October 6, 2009,² the Board found that OWCP had properly terminated compensation for the accepted muscle strains. The Board also found that appellant had not met her burden to establish a medical condition or disability causally related to the June 11, 2003 work injury.

In decisions dated December 2, 2011³ and November 14, 2013,⁴ the Board again found that appellant had not met her burden to establish that her medical condition or disability after March 28, 2008 was causally related to the June 11, 2003 work injury.

OWCP received a December 27, 2013 progress report from Dr. Patrick N. Rhoades, the attending Board-certified physiatrist and specialist in pain medicine. Dr. Rhoades examined appellant and diagnosed lumbago, low back pain. Appellant was to continue her current medications.

On February 20, 2014 OWCP denied a merit review of appellant's case. By decision dated October 22, 2014, the Board found that OWCP had acted prematurely, as appellant had not requested reconsideration.

On October 24, 2014 appellant requested that OWCP reconsider the Board's November 14, 2013 decision.⁵ She asserted that the issue continued to be whether OWCP met its burden of proof to terminate her medical and wage-loss benefits after March 28, 2008 based on the second-opinion report of Dr. Alice Martinson, a Board-certified orthopedic surgeon and referral physician. Appellant argued that Dr. Martinson's opinion on the issue of cervical cancer could not justly be given weight to terminate medical and wage-loss benefits. Dr. Martinson was not an oncologist, and her opinion regarding appellant's cancer was in stark and complete conflict with that of Dr. Vikas Mahavni, the treating Board-certified obstetrician and gynecologist with a subspecialty in oncology. Further, Dr. Rhoades also disagreed with Dr. Martinson. Yet appellant argued that OWCP had declined to further develop these medical facts. She argued that Dr. Martinson's opinion was clearly inadequate to meet OWCP's burden. Based on the reports of Drs. Rhoades, Mahavni, and Martinson, appellant requested a merit decision.

² Docket No. 09-646 (issued October 6, 2009).

³ Docket No. 11-1117 (issued December 2, 2011).

⁴ Docket No. 13-1315 (issued November 14, 2013).

⁵ The Board notes that OWCP has no such jurisdiction. *See* 20 C.F.R. § 501.6(d), which states in pertinent part: "The decisions and orders of the Board are final as to the subject matter appealed, and such decision and orders are not subject to review, except by the Board."

In a decision dated January 21, 2015, OWCP reviewed the merits of appellant's case and denied modification of its prior decision. It noted, among other things, that the accepted conditions were orthopedic in nature, and therefore Dr. Martinson was an appropriate specialist to provide an opinion with respect to the accepted medical conditions. OWCP found no conflict in the medical opinion evidence warranting referral to an impartial medical specialist under 5 U.S.C. § 8123(a). It further found that Dr. Martinson's opinion continued to represent the weight of the medical opinion evidence. In summary, the evidence supported that OWCP met its burden to terminate appellant's compensation and medical benefits. Additionally, OWCP found that the latest report from Dr. Rhoades, the December 27, 2013 progress report, did not support that she continued to suffer residuals of the June 11, 2003 work injury.

On appeal, appellant's counsel contends that OWCP has refused to properly develop medical evidence, depriving appellant of the fairness of process that is due her under FECA. She argues that OWCP's burden to terminate appellant's benefits was not met. Appellant's counsel seeks an order from the Board that directs OWCP to fully resolve the reason for appellant's ongoing and indisputably present residual symptoms. She contends that her argument that Dr. Martinson's opinion on cancer cannot be given decisive weight has not been addressed. Appellant's counsel also contends that appellant's argument that once OWCP sets out to procure a medical opinion, it must fully develop that opinion and resolve the outstanding issues has also not been addressed.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her duty.⁶ Where OWCP meets its burden of proof to justify the termination of compensation benefits, the burden switches to the claimant to establish that any subsequent medical condition or disability is causally related to the accepted employment injury.⁷

The claimant must submit a rationalized medical opinion that supports a causal connection between her current condition or disability and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the employment injury, and must explain from a medical perspective how the current disabling condition is related to the injury.⁸

⁶ 5 U.S.C. § 8102(a).

⁷ *Wentworth M. Murray*, 7 ECAB 570 (1955) (after a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation, he had a disability causally related to the employment resulting in a loss of wage-earning capacity); *Maurice E. King*, 6 ECAB 35 (1953).

⁸ *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

ANALYSIS

Although the issue in this case is a medical issue, appellant submitted no medical opinion evidence to support her October 24, 2014 reconsideration request. Instead, appellant's counsel offered a legal argument that this Board has already addressed and found to be insufficient.

Counsel continues to assert that the issue is whether OWCP met its burden of proof to terminate her compensation after March 28, 2008, but this was previously decided. The Board settled this matter in its October 6, 2009 decision when it found that the weight of the medical evidence established that appellant no longer suffered from the accepted left shoulder/arm or cervical strain she sustained on June 11, 2003.

The matter has thus been adjudicated. Decisions and orders of the Board are final as to the subject matter appealed.⁹ With respect to the findings made in the Board's October 6, 2009 decision, those matters are *res judicata* absent any further review by OWCP under section 8128 of FECA.¹⁰

On appeal, appellant argues that once OWCP sets out to procure a medical opinion, it must fully develop that opinion and resolve the outstanding issues. Indeed, the Board has held that OWCP has the responsibility to obtain from its referral physician an evaluation that will resolve the issue involved in the case.¹¹ When OWCP referred appellant to Dr. Martinson, the issue was whether appellant continued to suffer from the left shoulder/arm strain or cervical strain she sustained on June 11, 2003. Dr. Martinson offered a probative opinion on that issue, an opinion that was sufficient to resolve the issue presented, and the Board so held. The matter was adjudicated. Appellant seeks an order from the Board that directs OWCP to fully resolve the reason for her ongoing symptoms, but she has the burden of proof and the burden of going forward with the evidence. OWCP properly resolved whether she continues to suffer from the accepted muscle strains, and there is no conflict that warrants referral to an impartial medical specialist. Appellant may not use Dr. Martinson's immaterial remarks on ovarian cancer to place a broad burden on OWCP to develop the reason for her ongoing symptoms.

CONCLUSION

The Board finds that appellant has failed to meet her burden to establish that her medical condition or wage loss after March 28, 2008 was causally related to the June 11, 2003 work injury.

⁹ 20 C.F.R. § 501.6(d).

¹⁰ *Hugo A. Mentink*, 9 ECAB 628 (1958); *see also Robert G. Burns*, 57 ECAB 657 (2006).

¹¹ *Mae Z. Hackett*, 34 ECAB 1421, 1426 (1983); *Richard W. Kindler*, 32 ECAB 863, 866 (1981) (noting that the report of an OWCP referral physician did not resolve the issue in the case).

ORDER

IT IS HEREBY ORDERED THAT the January 21, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 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