

FACTUAL HISTORY

This case has previously been before the Board. On October 11, 2012 the Board affirmed a July 20, 2011 OWCP hearing representative's decision, which had affirmed a January 7, 2011 OWCP decision suspending her compensation benefits in accordance with 5 U.S.C. § 8123 on the grounds that she refused to cooperate with a scheduled medical examination.² The facts and circumstances of the case as set forth in the Board's prior decisions are incorporated herein by reference.³

In a December 18, 2012 report, Dr. Jay H. Warrick reported seeing appellant for her fibromyalgia condition. Diagnoses included lumbago, hypertension, fibromyalgia, depression and anxiety disorder due to general medical condition. A physical examination revealed musculoskeletal trigger point pain and positive trigger points on the supraspinatus, gluteus and trapezius muscles.

On December 12, 2012 OWCP informed appellant that she was being referred for a second opinion evaluation to determine the nature of her condition, the extent of her disability and appropriate medical treatment.

In a January 11, 2013 report, Dr. Carl S. Carlson, Jr., a second opinion Board-certified orthopedic surgeon, noted appellant's medical and employment injury history and noted that OWCP accepted the conditions of lumbago, lumbosacral joint sprain and myalgia and myositis. A physical examination revealed a slow and steady gait, no palpable back muscle spasm, 20 degrees lateral flexion, 0 degrees extension and 25 degrees lateral rotation. A review of an October 5, 2007 magnetic resonance imaging scan showed no evidence of significant stenotic or nerve root change and mild L5-S1 degenerative changes. Dr. Carlson stated that there were no objective findings on examination supporting any spinal condition. He noted an inaccurate range of motion due to noncompliance and resistance by appellant. Dr. Carlson concluded that appellant's July 6, 1988 employment injury had resolved and that he thought she suffered a contusion and perhaps spinal sprain. He related that appellant's problems were due to her subjective complaints of neurologic changes, pain with atrophy, range of motion, reflex changes and positive Waddell signs for functional behavior. In response to a question regarding whether appellant's work-related conditions of lumbago, myalgia/myositis, myofascial pain syndrome and lumbosacral sprain had resolved, he stated that he did "not think this has anything to do with beginning of myalgia, myositis or myofascial pain syndrome." In concluding, Dr. Carlson

² Docket No. 12-409 (issued October 11, 2012). As noted, in its October 11, 2012 decision, the Board found that OWCP properly suspended appellant's compensation benefits effective January 16, 2011 as she failed to attend the scheduled medical examination without showing good cause for her refusal. Decisions and orders of the Board are final upon expiration of 30 days from the date of issuance. 20 C.F.R. § 501.6(d). While an appellant may file a petition for reconsideration with the Board within 30 days of the date of issuance of a Board decision (20 C.F.R. § 501.7(a)), she did not file a petition for reconsideration with the Board of its October 11, 2012 decision. As such, this decision is *res judicata* and is not subject to further review by this Board on the current appeal as no further review of this issue was conducted by OWCP. See *Clinton E. Anthony, Jr.*, 49 ECAB 476 (1998).

³ On July 6, 1988 appellant, then a 34-year-old secretary/medical clerk, filed a traumatic injury claim alleging that on that day she injured her neck and back when she slipped and fell on a wet floor. OWCP accepted the claim for chronic low back pain, chronic low back strain myalgia and myositis, lumbago and low back strain myofascial pain syndrome. By letter dated October 16, 1991, it placed appellant on the periodic rolls effective September 12, 1988.

opined that appellant had no residuals from her employment injury and her subjective complaints outweighed any objective findings.

On February 13, 2013 OWCP issued a notice proposing to terminate appellant's compensation benefits based upon the report of Dr. Carlson.

On February 14, 2013 OWCP received a January 8, 2013 attending physician's report from Dr. Richard H. Mays, appellant's attending Board-certified family practitioner, who diagnosed fibromyalgia, lumbago and myofascial pain syndrome which he attributed to the accepted July 6, 1988 employment injury. Dr. Mays indicated that appellant remained currently disabled from working.

By decision dated March 21, 2013, OWCP finalized the termination of appellant's compensation benefits effective that day. It found that the opinion of Dr. Carlson constituted the weight of the evidence.

On April 30, 2013⁴ OWCP received appellant's April 20, 2013 request for an oral hearing before an OWCP hearing representative.

By decision dated May 30, 2013, OWCP denied appellant's request for an oral hearing before an OWCP hearing representative as untimely.

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.⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁷

ANALYSIS -- ISSUE 1

OWCP accepted the claim for chronic low back pain, chronic low back strain myalgia and myositis, lumbago and low back strain myofascial pain syndrome. By decision dated March 21, 2013, it terminated appellant's compensation benefits based on Dr. Carlson's opinion that she no longer had any residuals due to her accepted employment injuries. The issue on appeal is whether OWCP met its burden of proof to terminate appellant's wage-loss

⁴ This was the date stamped on the document as received by OWCP. A postmark on an attached envelope shows that the request was mailed by appellant on April 27, 2013.

⁵ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁶ *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁷ *B.K.*, Docket No. 08-2002 (issued June 16, 2009); *Kathryn E. Demarsh, id.*; *James F. Weikel*, 54 ECAB 660 (2003).

compensation and medical benefits effective March 21, 2013. The Board finds that OWCP failed to meet its burden of proof.

OWCP referred appellant for a second opinion evaluation with Dr. Carlson to determine the nature and extent of her employment-related disability. In his January 11, 2013 report, Dr. Carlson concluded that appellant no longer had any residuals due to the accepted July 6, 1988 employment injury, which he opined caused a contusion and perhaps spinal sprain. He concluded that appellant's complaints were subjective without any supporting objective evidence. However, the Board notes that Dr. Carlson, in addressing causal relationship, provided no medical rationale to support his conclusory opinion regarding whether appellant's accepted condition had resolved. Dr. Carlson did not explain how his examination supported the conclusion.

In addition, Dr. Carlson's opinion does not appear to be based on the statement of accepted facts. In response to a question as to whether appellant's conditions had resolved and she no longer had any residuals, Dr. Carlson related that he did "not think this has anything to do with beginning of myalgia, myositis or myofascial pain syndrome." As noted above, he concluded that the July 6, 1988 employment injury caused a contusion and possibly a spinal sprain. While Dr. Carlson noted that the conditions of lumbago, lumbosacral joint sprain and myalgia and myositis had been accepted as employment related by OWCP, he appears to conclude that the July 6, 1988 employment injury resulted in only a contusion and perhaps spinal sprain. OWCP procedures provide that accepted conditions must be included in a statement of accepted facts and further provide that, when a second opinion specialist renders a medical opinion based on a statement of accepted facts which is incomplete or inaccurate or does not use the statement of accepted facts as the framework in forming his or her opinion, the probative value of the opinion is diminished.⁸

Dr. Carlson did not fully address whether the accepted conditions of lumbago, lumbosacral joint sprain and myalgia and myositis had resolved and disputes that these conditions were employment related. The Board notes that, when OWCP referred the medical record to Dr. Carlson, it specifically requested that he provide an opinion on appellant's condition, the extent of her employment-related disability and appropriate medical treatment. The Board finds that his opinion is outside the framework of the statement of accepted facts and of reduced probative value.⁹ For these reasons, his opinion is insufficient to support OWCP's determination that appellant had no further condition or disability causally related to the accepted conditions.

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

⁹ *Willa M. Frazier*, 55 ECAB 379 (2004).

CONCLUSION

The Board finds that OWCP failed to meet its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective March 21, 2013.¹⁰

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 30 and March 21, 2013 are reversed.

Issued: January 23, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

¹⁰ In light of the disposition of the first issue, the second issue of whether OWCP properly denied appellant's request for an oral hearing is moot.