

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

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**M.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Atlanta, GA, Employer**

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**Docket No. 11-690  
Issued: October 13, 2011**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case submitted on the record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On January 25, 2011 appellant filed a timely appeal from a September 2, 2010 decision of the Office of Workers' Compensation Programs (OWCP) affirming the termination of her compensation benefits, and an October 14, 2010 nonmerit decision denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)<sup>1</sup> 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 7, 2010 on the grounds that accepted right shoulder injuries had ceased without residuals; (2) whether appellant established continuing disability on and after June 7, 2010; and (3) whether OWCP properly denied appellant's request for reconsideration.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

On appeal, appellant asserts that OWCP wrongfully failed to consider new, relevant medical evidence submitted on reconsideration. She also contends that an impartial medical examiner's opinion was based on an incomplete history as OWCP did not include 1996 imaging studies in the statement of accepted facts.

### **FACTUAL HISTORY**

This is appellant's second appeal before the Board in this case. By decision dated November 3, 1998,<sup>2</sup> the Board affirmed OWCP's November 27, 1997 decision denying her request for an oral hearing and reversed OWCP's April 21 and August 27, 1997, February 23 and March 30, 1998 decisions affirming an August 9, 1996 decision terminating appellant's wage-loss compensation benefits on the grounds she refused an offer of suitable work. The Board found that OWCP did not establish that the offered position was suitable work under 5 U.S.C. § 8106(c)(2), as there was no contemporaneous medical evidence supporting that appellant could perform the physical requirements of the offered position. The law and the facts of the case as set forth in the Board's prior decision and order are incorporated by reference.

OWCP accepted that, on October 26, 1988, appellant, then a 42-year-old distribution clerk, sustained a herniated nucleus pulposus at L4-5 and a spinal subluxation from C5 to T3 when she lifted a sack of mail. Appellant had undergone five back injuries from 1977 to January 7, 1988 while working at the employing establishment. She stopped work on October 26, 2008 and did not return. Appellant received wage-loss compensation. A June 19, 1989 lumbar magnetic resonance imaging (MRI) scan and August 28, 1989 lumbar myelogram showed a small ventral herniation at L4-5 with minor compression of the thecal sac and right L5 nerve root. Appellant sustained musculoskeletal back pain due to a March 24, 1995 nonoccupational motor vehicle accident. A June 21, 1996 lumbar MRI scan showed a minimal L5-S1 disc bulge with mild degenerative changes at L4-5 and L5-S1.

OWCP obtained additional medical evidence during the pendency of the prior appeal. In an August 11, 1998 report, Dr. Merton B. Shure, a second opinion physician,<sup>3</sup> noted L5-S1 tenderness on examination. He opined that appellant had fully recovered.

In an April 5, 1999 report, Dr. Clifford W. Roberson, an attending orthopedic surgeon, found a good range of lumbar motion, a normal gait, a normal neurologic examination of both lower extremities, negative straight leg raising tests bilaterally, no muscular weakness or atrophy, and a "[g]eneralized decreased sensation to pinprick." He diagnosed a herniated L4-5 disc by previous MRI scan and chronic lumbosacral strain. Dr. Roberson found that appellant had attained maximum medical improvement and was totally and permanently disabled for work.<sup>4</sup>

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<sup>2</sup> *Martha A. McConnell*, 50 ECAB 129 (1998).

<sup>3</sup> Dr. Shure's field of specialty is not of record.

<sup>4</sup> There is no medical evidence of record dated between May 1999 and June 2003. Appellant submitted July 9, 2003 unsigned hospital discharge instructions for "back pain."

In an April 13, 2004 report, Dr. Simon E. Portee, an attending internist, related appellant's complaints of lumbar pain, with weakness and numbness in both legs. He diagnosed degenerative disc disease, a herniated nucleus pulposus, lumbar pain and intervertebral disc displacement. Dr. Portee found appellant totally and permanently disabled for work.

On May 25, 2007 OWCP obtained a second opinion from Dr. Alexander N. Doman, a Board-certified orthopedic surgeon. A copy of the medical record and statement of accepted facts were provided for his review. Dr. Doman related appellant's account of pain in all extremities and nonanatomic stocking anesthesia in the right leg. On examination, he found lumbosacral tenderness to palpation, normal lower extremity reflexes, normal sensation, and no muscular atrophy or weakness. Dr. Doman stated that spinal x-rays were normal. He opined that appellant was malingering. Dr. Doman found that the L4-5 disc herniation had "resolved as documented both on the physical examination and ... the 1996 MRI scan." He attributed appellant's symptoms to preexisting degenerative lumbar changes. Dr. Doman released appellant to full duty as a distribution clerk.

On June 22, 2007 OWCP found a conflict of medical opinion between Dr. Doman, for the government, and Dr. Portee, for appellant, regarding the nature and extent of any injury-related residuals. To resolve this conflict, OWCP selected Dr. Walter C. Edwards, a Board-certified orthopedic surgeon, as impartial medical examiner. OWCP provided a copy of the medical record and a statement of accepted facts for his review. In an August 8, 2007 report, Dr. Edwards provided a history of injury and treatment, noting the development of neck pain with upper extremity symptoms in 2005. On examination, he found normal gait, a full range of lumbar motion, normal reflexes in the extremities and a normal sensory examination. Dr. Edwards diagnosed "[h]istory of back and neck injury and disability" without any current abnormal findings. In an August 13, 2007 report, Dr. Edwards stated that the accepted conditions had resolved without residuals, and that her current condition was due to the progression of preexisting degenerative disc disease. He found appellant able to perform sedentary to light-duty work with lifting limited to 25 pounds.

By notice dated April 29, 2010, OWCP advised appellant that it proposed to terminate her wage loss and medical compensation benefits on the grounds that the accepted lumbar injury had ceased without residuals. It accorded Dr. Edwards the weight of the medical evidence as the impartial medical examiner.<sup>5</sup> OWCP allowed appellant 30 days to submit additional evidence. Appellant did not submit additional evidence prior to June 8, 2010.

By decision dated June 8, 2010, OWCP terminated appellant's wage loss and medical compensation benefits effective June 7, 2010 on the grounds that the accepted herniated L4-5 disc had resolved without residuals.

In a July 6, 2010 letter, appellant requested reconsideration. She submitted two reports from Dr. Derron A. Jones, an attending Board-certified physiatrist. In a July 8, 2010 report,

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<sup>5</sup> On its face, page four of the April 29, 2010 notice referred to Dr. Doman as the impartial medical examiner. However, from the detailed discussion of Dr. Edwards' opinion that preceded this reference, the characterization of Dr. Doman as the impartial medical examiner appears to be a nondispositive typographical error.

Dr. Jones noted appellant's complaints of severe chronic back pain beginning with a December 1987 injury. He related appellant's account of muscle weakness, balance problems and bladder incontinence. On examination, Dr. Jones observed a normal gait, normal lower extremity reflexes, no tenderness to lumbar palpation, normal strength and muscle tone in both legs and nonanatomic hypoesthesia in the right leg. He diagnosed lumbosacral spondylosis without myelopathy and lumbar facet pain. In a July 22, 2010 report, Dr. Jones noted no changes from the prior examination. He diagnosed limb pain, cervical facet pain and cervical spondylosis without myelopathy.

By decision dated September 2, 2010, OWCP denied modification of its previous decision. It found that Dr. Jones did not find any objective residuals of the accepted injuries or explain why the conditions he newly diagnosed were related to those injuries. OWCP found that Dr. Edwards' opinion continued to represent the weight of the medical evidence.

In September 9 and 13, 2010 letters, appellant requested reconsideration. She contended that Dr. Doman failed to report her lumbar spasms, and that Dr. Edwards did not explain how the accepted L4-5 disc herniation resolved when it was still visible on imaging studies.

By decision dated October 14, 2010, OWCP denied reconsideration on the grounds that appellant's September 9 and 13, 2010 letters were irrelevant to the claim. It noted that the critical issue at the time of the last merit decision in the case was the presence of continuing injury-related residuals, a medical question requiring resolution by medical evidence. As appellant's letters did not constitute medical evidence, they were irrelevant to the claim and insufficient to warrant a merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>6</sup> 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.<sup>7</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>8</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>9</sup> OWCP's burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>10</sup>

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<sup>6</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>7</sup> *Id.*

<sup>8</sup> *Roger G. Payne*, 55 ECAB 535 (2004).

<sup>9</sup> *Pamela K. Guesford*, 53 ECAB 726 (2002).

<sup>10</sup> *Id.*

Section 8123(a) of FECA provides that, when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>11</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.<sup>12</sup> The impartial medical specialist's report must actually fulfill the purpose for which it was intended; it must resolve the conflict in medical opinion. An impartial medical specialist's report is entitled to greater weight than other evidence of record as long as the conclusion is not vague, speculative or equivocal and is supported by substantial medical reasoning.<sup>13</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that appellant sustained a herniated L4-5 disc and a spinal subluxation from C5 to T3. Appellant remained off work from October 26, 1988 onward. On August 1, 1998 OWCP obtained a second opinion from Dr. Shure finding that the accepted conditions had ceased without residuals and she could resume full duty. Appellant then submitted an April 5, 1999 report from Dr. Roberson, an attending orthopedic surgeon, finding her totally and permanently disabled for work although her examination was objectively normal. Dr. Portee, an attending internist, opined on April 13, 2004 that appellant was totally and permanently disabled for work due to the accepted herniated disc. OWCP then obtained a second opinion from Dr. Doman, a Board-certified orthopedic surgeon, who opined on May 25, 2007 that the accepted injuries had resolved. It found a conflict between Dr. Portee and Dr. Doman, and selected Dr. Edwards, a Board-certified orthopedic surgeon, as impartial medical examiner. In his August 8, 2007 report, Dr. Edwards noted no abnormal findings. He attributed appellant's symptoms to idiopathic degenerative disc disease and released her to light duty. Based on Dr. Edwards' opinion OWCP terminated appellant's compensation and medical benefits effective June 7, 2010.

The Board finds that Dr. Edwards' opinion was of sufficient weight to resolve the conflict of medical evidence. It was based on a complete and accurate factual and medical history<sup>14</sup> and presented detailed clinical findings demonstrating no residuals of the accepted conditions. Dr. Edwards provided a clear explanation that appellant's subjective symptoms could not be related to the accepted conditions and were therefore due to idiopathic degenerative disc disease.<sup>15</sup> Also, he was unequivocal in finding that the herniated disc and spinal subluxation

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<sup>11</sup> 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

<sup>12</sup> *Delphia Y. Jackson*, 55 ECAB 373 (2004).

<sup>13</sup> *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>14</sup> *E.S.*, Docket No. 10-565 (issued December 21, 2010).

<sup>15</sup> *Deborah L. Beatty*, 54 ECAB 340 (2003).

had resolved.<sup>16</sup> Therefore, OWCP properly accorded Dr. Edwards the weight of the medical evidence.<sup>17</sup>

On appeal, appellant contends that Dr. Edwards' opinion was based on an incomplete history as OWCP did not include 1996 imaging studies in the statement of accepted facts. However, Dr. Edwards was given the complete medical record, which would include the 1996 imaging studies. Therefore, his opinion was based on a complete factual and medical history.

### **LEGAL PRECEDENT -- ISSUE 2**

After termination or modification of benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of reliable, probative and substantial evidence that he or she had an employment-related disability that continued after termination of compensation benefits.<sup>18</sup> For conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.<sup>19</sup> The fact that a condition's etiology is unknown or obscure neither relieves appellant of the burden of establishing a causal relationship by the weight of the medical evidence, nor shifts OWCP's burden of proof to disprove an employment relationship.<sup>20</sup>

### **ANALYSIS -- ISSUE 2**

Following the Office's June 8, 2010 decision terminating her compensation benefits, appellant submitted additional medical reports from Dr. Jones, an attending Board-certified psychiatrist. In July 8 and 22, 2010 reports, Dr. Jones related appellant's nonanatomic pain complaints and subjective symptoms. He found no objective abnormalities on examination. Dr. Jones diagnosed lumbosacral spondylosis, cervical and lumbar facet pain, limb pain and cervical spondylosis. However, he did not explain the pathophysiologic relationship between the accepted injuries and the newly diagnosed conditions, or how the herniated L4-5 disc and spinal subluxation would cause continuing residuals on and after June 7, 2010.<sup>21</sup> Also, Dr. Jones diagnosed cervical and lumbosacral conditions not accepted by OWCP. He did not provide sufficient rationale supporting a medical causal relationship between these conditions and work factors.<sup>22</sup> Therefore, Dr. Jones' reports are insufficiently rationalized to outweigh Dr. Edwards' opinion or create a conflict of medical opinion.

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<sup>16</sup> *D.E.*, 58 ECAB 369 (2007).

<sup>17</sup> *James P. Roberts*, *supra* note 13.

<sup>18</sup> *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *see also Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

<sup>19</sup> *Alice J. Tysinger*, 51 ECAB 638 (2000).

<sup>20</sup> *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

<sup>21</sup> *Mary E. Marshall*, 56 ECAB 420 (2005).

<sup>22</sup> *Alice J. Tysinger*, *supra* note 19.

Thus, the Board finds that appellant submitted insufficient rationalized medical evidence to establish a causal relationship between her condition on and after June 7, 2010 and the accepted herniated lumbar disc. Therefore, appellant has failed to meet her burden of proof.

On appeal, appellant contends that OWCP wrongfully failed to consider Dr. Jones' opinion. As stated, OWCP properly found that Dr. Jones' reports were of insufficient probative quality to outweigh Dr. Edwards' opinion or create a conflict of medical opinion.

### **LEGAL PRECEDENT -- ISSUE 3**

To require the office to reopen a case for merit review under section 8128(a) of FECA,<sup>23</sup> section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>24</sup> Section 10.608(b) provides that when an application for review of the merits of a claim does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.<sup>25</sup>

In support of a request for reconsideration, appellant is not required to submit all evidence which may be necessary to discharge his or her burden of proof.<sup>26</sup> She need only submit relevant, pertinent evidence not previously considered by OWCP.<sup>27</sup> When reviewing an OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.<sup>28</sup>

### **ANALYSIS -- ISSUE 3**

In its September 2, 2010 decision, OWCP affirmed its June 8, 2010 decision terminating appellant's wage loss and medical compensation benefits. It found that new medical evidence submitted from Dr. Jones was insufficient to warrant modification of the termination decision. The critical issue at the time of the last merit decisions in the case was whether the medical evidence established that appellant had continuing residuals of the accepted condition on and after June 7, 2010. To be relevant, the evidence submitted supporting the request for reconsideration must address the causal relationship of the conditions diagnosed by Dr. Jones to appellant's federal employment.

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<sup>23</sup> 5 U.S.C. § 8128(a).

<sup>24</sup> 20 C.F.R. § 10.606(b)(2).

<sup>25</sup> *Id.* at § 10.608(b). *See also D.K.*, 59 ECAB 141 (2007).

<sup>26</sup> *Helen E. Tschantz*, 39 ECAB 1382 (1988).

<sup>27</sup> *See* 20 C.F.R. § 10.606(b)(3). *See also Mark H. Dever*, 53 ECAB 710 (2002).

<sup>28</sup> *Annette Louise*, 54 ECAB 783 (2003).

In support of her September 9, 2010 request for reconsideration, appellant submitted her September 9 and 13, 2010 letters. She asserted deficiencies in Dr. Doman's and Dr. Edwards' reports. As appellant's letters do not constitute medical evidence, they are irrelevant to the claim. Therefore, they do not comprise a basis for reopening the case.<sup>29</sup>

Appellant has not established that OWCP improperly refused to reopen her claim for a review of the merits under section 8128(a) of FECA. She did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP or submit relevant and pertinent new evidence not previously considered by OWCP. Therefore, OWCP's October 14, 2010 decision denying her September 9, 2010 request for reconsideration was proper under the law and facts of this case.

### **CONCLUSION**

The Board finds that OWCP properly terminated appellant's wage loss and medical compensation benefits effective June 7, 2010. The Board further finds that she did not establish continuing disability or residuals on and after June 7, 2010. The Board further finds that OWCP properly denied appellant's September 9, 2010 request for reconsideration.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated October 14 and September 2, 2010 are affirmed.

Issued: October 13, 2011  
Washington, DC

Alec J. Koromilas, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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<sup>29</sup> *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004).