

ISSUES

The issues are: (1) whether appellant has established a left shoulder or cervical condition causally related to her federal employment; and (2) whether OWCP properly denied her requests for merit review of the claim under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

This case has previously been before the Board. The record establishes that appellant had previously filed a traumatic injury claim (Form CA-1) for a March 28, 2007 injury when she lifted a bucket of ice, which was accepted by OWCP for bilateral shoulder strains and degenerative cervical intervertebral discs. By decision dated November 9, 2010, the Board found that appellant had not established an employment-related disability from May 6 to 23, 2009.³ In addition, the Board found that OWCP had properly determined in a November 6, 2009 decision that the accepted bilateral shoulder strains and degenerative cervical intervertebral discs had resolved. By decision dated June 20, 2011, the Board found that appellant had not established a recurrence of disability commencing January 12, 2010.⁴

On July 2, 2012 appellant, then a 51-year-old food service worker, filed the current claim, an occupational disease claim (Form CA-2) alleging that she sustained new left shoulder and cervical degenerative conditions as a result of her federal employment. On the claim form, she indicated that she became aware of the condition on January 12, 2010. Appellant submitted an October 7, 2011 statement describing her work history related to the occupational disease claim, noting that she became aware of the condition on January 12, 2010. She indicated that she worked from September 18, 2006 and described her regular duties as a food service worker, which included unloading trucks and filling soda machines with ice. According to appellant, she was placed on light duty on September 7, 2007, which included a 20-pound lifting restriction, but she continued to work beyond her restrictions. Appellant stated that she stopped working on October 30, 2007, returned to light duty in November 2007, then had cervical surgery on January 9, 2008. She reported that she returned to a light-duty cashier and grill relief position in May 2008 and continued to do most of her regular duties except filling soda machines and unloading trucks. In May 2009, appellant reduced her hours to four a day, underwent left shoulder surgery in June 2009 and returned to light duty in December 2009.

In a November 18, 2014 decision, the Board found that the issue in the present case was whether appellant has established causal relationship between any diagnosed condition and the identified job duties, including work performed in September and October 2007, as well as work from April or May 2008.⁵ As the Board noted, appellant had begun working as a food service worker in September 2006 and was working light-duty positions as of September 2007, although the exact work duties were not clear from the record.⁶ The Board reviewed the medical

³ Docket No. 10-0525 (issued November 9, 2010).

⁴ Docket No. 10-1749 (issued June 20, 2011).

⁵ Docket No. 14-0219 (issued November 18, 2014).

⁶ The Board did find that Dr. Jack Rook, a Board-certified physiatrist, indicated in his September 22, 2013 report that he understood appellant's work duties from April 2008 to June 2009 did not involve lifting buckets of ice.

evidence, including a July 14, 2012 report from Dr. Rook. The Board found that Dr. Rook did not discuss in detail appellant's work history or clearly explain causal relationship between job duties and the diagnosed aggravation of cervical and left shoulder myofascial conditions. Dr. Rook appeared to be referring to heavy lifting, but the nature and extent of such lifting was not clear from the record. Appellant had indicated, for example, that she did not perform heavy lifting such as lifting of ice buckets in the light-duty job performed in 2008. The Board affirmed an October 10, 2013 OWCP merit decision denying the occupational claim.

On April 14, 2014 appellant, through counsel, requested reconsideration. In a March 4, 2015 statement, she discussed her work duties from May 2008 to May 2009. Appellant described a typical workday in the cafeteria, including work as a cashier, cooking and serving food, and stocking shelves.

Appellant submitted an April 2, 2015 report from Dr. Rook, who reported that he had additional information regarding appellant's work activities from September 2006 to October 2007. Dr. Rook described appellant's work duties as food preparation, cooking, serving, pushing carts, loading food and other items, as well as filling soda machines with ice. He noted that she was performing these duties in September and October 2007. Dr. Rook opined that based upon the description of appellant's job duties, he would again state within a reasonable degree of medical certainty that the work activities that appellant performed after she returned to work in September 2007 resulted in a worsening of her neck and left shoulder condition. He further explained that the shoulder and cervical condition were particularly aggravated by loading the ice machine on a daily basis. Dr. Rook reported this activity required contraction of the shoulder muscles and the cervical paraspinal muscles. As to cervical degenerative disc disease, he discussed hyperextension movement of the head and stretching of the annular fibers which make up the cervical discs especially at the mid cervical level. With regards to a left rotator cuff tear, Dr. Rook reported that repetitive reaching overhead required contraction of the rotator cuff on a repeated basis. He also opined that repeated impact of the rotator cuff against the acromioclavicular joint contributed to wear and tear and progressive inflammation of this structure leading to the need for surgical treatment of the symptomatic rotator cuff tear. Dr. Rook also indicated that other tasks performed by appellant required repetitive forceful contraction of the rotator cuff, including cleaning industrial kettles, loading dishes into the dishwasher, cleaning large industrial pots and pans, mopping floors using a large industrial mop, and loading and unloading supplies.

In a letter dated April 29, 2015, OWCP requested that the employing establishment submit comments regarding the reconsideration request. In a May 14, 2015 response, an employing establishment human resources specialist asserted that appellant's description of her light-duty job duties from 2008 to 2009 was inaccurate. A May 11, 2015 statement from a supervisor was submitted. The supervisor asserted that appellant worked as a cashier, sitting by the cash register and conducting transactions.

On June 25, 2015 OWCP received a June 25, 2015 letter from counsel. Counsel argued that work activities in September and October 2007 had worsened appellant's condition. In addition, appellant argued that work activities since April 2008 were corroborated by medical and eyewitness evidence. Counsel resubmitted an August 25, 2015 statement from a coworker

asserting that in May 2008 appellant did work as a cashier, but also did other jobs such as “working the grill.”⁷

By decision dated June 25, 2015, OWCP reviewed the case on its merits and denied modification. It found that appellant’s March 4, 2015 statement has “in essence” indicated that work duties from May 2008 to May 2009 had caused her cervical and left shoulder conditions. According to OWCP, “Dr. Rook’s explanation is moot, because he discussed the impact of duties performed prior to May 2008.”

On July 30, 2015 appellant, through counsel, requested reconsideration. She argued that OWCP had misrepresented her argument, as her claim was also based on job duties performed in 2007. In addition, appellant indicated that, with respect to job duties from 2008 to 2009, there were eyewitness statements corroborating appellant’s account of her physical duties at work.

By decision dated October 7, 2015, OWCP found the reconsideration request was insufficient to warrant merit review of the claim. It found that appellant had not met the requirements for a merit review. The claims examiner indicated that she could not find a witness statement dated August 25, 2013 referenced by appellant.

Appellant, through counsel, again requested reconsideration on October 19, 2015. The August 25, 2013 coworker statement was again submitted. By decision dated November 9, 2015, OWCP found the reconsideration request was insufficient to warrant merit review of the claim.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁸

To establish that an injury was sustained in the performance of duty, a claimant must submit: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant.⁹ Since the Board’s jurisdiction of a case is limited to reviewing the evidence which was before OWCP at the time of its final decision, it is necessary that OWCP review all evidence submitted by a claimant and received by it prior to issuance of its final decision. As the Board’s decisions are final as to the subject matter

⁷ The statement had originally been submitted on September 30, 2013.

⁸ 20 C.F.R. § 10.115(e), (f) (2005); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

⁹ *Ruby I. Fish*, 46 ECAB 276, 279 (1994).

appealed, it is critical that all evidence relevant to that subject matter which was properly submitted to OWCP prior to the time of issuance of its final decision be addressed by it.¹⁰

ANALYSIS -- ISSUE 1

In the present case, the June 25, 2015 OWCP decision finds that appellant's occupational disease claim was not based only on job duties from 2008 to 2009. As a result of this determination, OWCP's analysis of the detailed April 2, 2015 report from Dr. Rook is limited to a finding that it was "moot" because he discussed job duties performed by appellant in 2007.

It is well established, as discussed above, that OWCP must consider all relevant evidence that was properly submitted to OWCP at the time of its final decision.¹¹ This includes evidence that was received on the date the decision was issued.¹² On June 25, 2015 OWCP received information from counsel that clearly indicated her claim included the job duties she was performing in September and October 2007. This is consistent with the prior development of the claim. As the Board found in its November 18, 2014 decision, appellant had claimed that her job duties in 2007 had contributed to a neck and left shoulder condition.

The Board therefore finds that this case shall be remanded to properly consider the evidence of record and make appropriate findings upon a *de novo* review. These findings must include a proper review of the April 2, 2015 report authored by Dr. Rook. After such further development as is deemed necessary, OWCP should issue an appropriate decision. In view of the Board's finding, the nonmerit decisions dated October 7 and November 9, 2015 will not be addressed on this appeal as they are now considered moot.

CONCLUSION

The Board finds that the case is not in posture for decision and is remanded to OWCP.

¹⁰ *William A. Couch*, 41 ECAB 548 (1990).

¹¹ *Id.*

¹² *K.K.*, Docket No. 15-1662 (issued December 2, 2015); *Linda Johnson*, 45 ECAB 439 (1994).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 25, 2015 is set aside and the case remanded for further action consistent with this decision of the Board.

Issued: November 16, 2016
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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