

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

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| E.O., Appellant |) | |
| |) | |
| and |) | Docket No. 19-0472 |
| |) | Issued: August 15, 2019 |
| U.S. POSTAL SERVICE, POST OFFICE, |) | |
| Oakland, CA, Employer |) | |
| |) | |

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

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
JANICE B. ASKIN, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On December 27, 2018 appellant filed a timely appeal from a September 21, 2018 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 over the merits of this case.²

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that appellant submitted additional evidence on appeal. 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 additional evidence for the first time on appeal. *Id.*

ISSUE

The issue is whether OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 21, 2018, as she no longer had residuals or disability causally related to her accepted bilateral upper extremity conditions.

FACTUAL HISTORY

On October 25, 2010 appellant, then a 49-year-old mail processing clerk, filed an occupational disease claim (Form CA-2) alleging bilateral hand tendinitis, which she attributed to her employment duties including sweeping and pulling mail. She first became aware of her condition and realized that it resulted from her federal employment on June 2, 2010. On December 6, 2010 OWCP accepted appellant's claim for bilateral shoulder, elbow, and hand sprains. Appellant received compensation for intermittent wage loss on the supplemental rolls.

Beginning August 3, 2011, OWCP paid wage-loss compensation for temporary total disability. It subsequently placed appellant on the periodic compensation rolls effective October 23, 2011. Appellant continued to receive wage-loss compensation for temporary total disability through June 2017. For a brief period, OWCP reduced her wage-loss compensation for failure to accept a temporary, limited-duty assignment. However, it resumed payment for temporary total disability effective August 15, 2017.

Appellant received medical treatment from Dr. Gary Martinovsky, Board-certified in anesthesiology and pain medicine. In a March 29, 2018 work status note, Dr. Martinovsky indicated that she was able to work with restrictions of: no lifting or carrying greater than 10 pounds; no repetitive pushing or pulling greater than 10 pounds; no reaching, gripping, grasping, handling, and fingering; and no typing or writing.

On April 5, 2018 OWCP referred appellant, along with a statement of accepted facts (SOAF) and a copy of the record, to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of her work-related upper extremity conditions and work capacity. In a May 15, 2018 report, Dr. Swartz reviewed the SOAF and the medical evidence of record. He accurately described appellant's employment duties and noted that her claim was accepted for bilateral shoulder, elbow, and hand strains. Upon examination of her shoulders, Dr. Swartz observed tenderness in the acromioclavicular (AC) joint and anteriorly. He also noted medial tenderness in both elbows and wrists. Durkan test was positive in both wrists. Sensation examination was intact in both upper extremities.

In response to OWCP's questions, Dr. Swartz indicated that appellant had no residuals of her soft tissue strains that she sustained while performing her employment duties. He indicated that there were no examination findings or diagnostic testing results to support that her work-related conditions were still active and required further medical treatment. Dr. Swartz noted that magnetic resonance imaging (MRI) scan reports were unremarkable, other than some early osteophyte formation, which were age related and not a result of appellant's federal employment. He reported that she had conditions of minor spurring and degenerative changes in the shoulders, fibromyalgia, and myofascial pain syndrome, which were not related to her accepted employment injury. Dr. Swartz indicated that there was no further need for treatment and completed a work

capacity evaluation form (OWCP-5c), which indicated that appellant could work with restrictions including reaching above the shoulders; operating a vehicle for more than four hours; and pushing, pulling, and lifting 25 to 35 pounds for more than four hours. He related that her current physical restrictions were based on her chronic fibromyalgia, chronic myofascial pain syndrome, and the chronic early degenerative changes in her wrists and shoulders, and explained that these physical restrictions were due to her nonemployment-related conditions.

OWCP received a May 10, 2018 examination note by Leonid Pugach, a certified physician assistant. Mr. Pugach related appellant's complaints of pain in the bilateral shoulders, which was aggravated by reaching and repetitive work. He provided examination findings and diagnosed unspecified bilateral shoulder sprains, bilateral elbow sprains, bilateral wrist sprains, and myalgia and myositis. Mr. Pugach noted that appellant should continue working with restrictions.

On August 17, 2018 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because her accepted bilateral upper extremity conditions had resolved. It found that the weight of medical evidence rested with the May 15, 2018 medical report of Dr. Swartz, who found that she no longer had any residuals or disability causally related to her accepted bilateral upper extremity conditions. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination.

On August 20, 2018 OWCP received a drug assessment report dated August 7, 2018.

By decision dated September 21, 2018, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective September 21, 2018. It found that the weight of medical evidence rested with Dr. Swartz, OWCP's second opinion examiner, who concluded in a May 15, 2018 report, that she had no residuals or disability due to her work-related bilateral upper extremity conditions.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justify termination or modification of an employee's benefits.³ It may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.⁶

³ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁴ *A.G.*, Docket No. 18-0749 (issued November 7, 2018); *see I.J.*, 59 ECAB 408 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁵ *R.R.*, Docket No. 19-0173 (issued May 2, 2019); *Del K. Rykert*, 40 ECAB 284 (1988).

⁶ *L.W.*, Docket No. 18-1372 (issued February 27, 2019); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

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.⁷

ANALYSIS

The Board finds that OWCP has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective September 21, 2018, as she no longer had residuals or disability causally related to her accepted bilateral upper extremity conditions.

In his May 15, 2018 report, Dr. Swartz reviewed the SOAF and noted that appellant's claim was accepted for bilateral shoulder, elbow, and hand strains. He reviewed her medical records and related that bilateral shoulder MRI scan reports were unremarkable, other than some age-related early osteophyte formation. Dr. Swartz conducted a physical examination of appellant's bilateral upper extremities and reported tenderness in the AC joint and anteriorly of her shoulders. He also noted medial tenderness in both elbows and wrists. Sensation examination was intact in both upper extremities. Dr. Swartz opined that appellant no longer had residuals of her soft tissue strains resulting from her employment. He explained that there were no examination findings or diagnostic testing results to support that her work-related conditions were still active and required further treatment. Dr. Swartz reported that appellant's current conditions of minor spurring and degenerative changes in the shoulders, fibromyalgia, and myofascial pain syndrome, were not related to her employment. He completed a work capacity evaluation (OWCP-5c) form, which indicated that she could work with restrictions, and explained that her physical restrictions were due to her nonemployment-related conditions. Dr. Swartz concluded that appellant no longer required further medical treatment.

The Board finds that OWCP properly accorded the weight of medical opinion with Dr. Swartz who reported that appellant no longer had residuals or disability as a result of her accepted bilateral shoulder, elbow, and wrist strains. Dr. Swartz based his opinion on a proper factual and medical history as he reviewed the SOAF and the medical evidence of record. He also related his comprehensive examination findings and provided medical rationale in support of his opinion opined that appellant did not have any current residual injury or work limitations causally related to her accepted conditions. Dr. Swartz explained that her bilateral upper extremity soft tissue strains had resolved and that any physical restrictions she had were due to preexisting and degenerative changes.⁸ The Board finds that Dr. Swartz's opinion is thorough and well rationalized and thus, constitutes the weight of the evidence establishing that appellant had no further residuals or disability due to her accepted bilateral shoulder, elbow, and hand strains.⁹ Accordingly, OWCP properly relied on his May 15, 2018 second opinion report in terminating her wage-loss compensation and medical benefits, effective September 21, 2018.¹⁰

⁷ *R.P.*, Docket No. 17-1133 (issued January 18, 2018); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

⁸ *See F.J.*, Docket No. 17-0147 (issued March 27, 2018).

⁹ *See H.W.*, Docket No. 18-1472 (issued March 6, 2019).

¹⁰ *See A.G.*, *supra* note 4; *see also A.F.*, Docket No. 16-0393 (issued June 24, 2016).

Following its August 17, 2018 notice of proposed termination, OWCP received a May 10, 2018 examination note by Leonid Pugach, a certified physician assistant. This report is of no probative value, however, because a physician assistant is not considered a physician as defined under FECA.¹¹ The Board finds, therefore, that the remaining contemporaneous medical evidence is insufficient to overcome the weight of medical evidence given to Dr. Swartz' May 15, 2018 second opinion report in terminating appellant's wage-loss compensation and medical benefits for her accepted bilateral shoulder, elbow, and wrist strains.¹²

On appeal appellant asserts that she is requesting a schedule award for 2010 to 2018. As noted above, however, the only issue before the Board is the September 21, 2018 OWCP decision, which terminated her wage-loss compensation and medical benefits as she no longer had residuals or disability causally related to her accepted bilateral upper extremity conditions.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation and medical benefits, effective September 21, 2018, as she no longer had any residuals or disability causally related to her accepted bilateral upper extremity conditions.

¹¹ 5 U.S.C. § 8102(2) of FECA provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors, and osteopathic practitioners within the scope of their practice as defined by State law. *See also David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006) (lay individuals such as physician assistants, nurses, and physical therapists are not competent to render a medical opinion under FECA). 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t). *George H. Clark*, 56 ECAB 162 (2004) (physician assistant); *James A. White*, 34 ECAB 515, 518 (1983) (physical therapist); *Nemat M. Amer*, Docket No. 03-338 (issued April 7, 2005) (acupuncturist).

¹² *See J.P.*, Docket No. 16-1103 (issued November 25, 2016).

ORDER

IT IS HEREBY ORDERED THAT the September 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: August 15, 2019
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

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