

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

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S.M., Appellant)	
)	
and)	Docket No. 18-0673
)	Issued: January 25, 2019
U.S. POSTAL SERVICE, POST OFFICE,)	
Nesquehoning, PA, 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
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On February 8, 2018 appellant filed a timely appeal from a September 15, 2017 merit decision and a December 13, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP).¹ Pursuant to the Federal Employees' Compensation Act² (FECA) 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 met its burden of proof to terminate appellant's medical benefits, effective January 14, 2016; (2) whether appellant met her burden of proof to establish continuing residuals on or after January 14, 2016; and (3) whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

¹ Appellant timely requested oral argument in this case. By order dated June 18, 2018, the Board exercised its discretion and denied her request as oral argument would further delay issuance of a Board decision and not serve a useful purpose. *Order Denying Request for Oral Argument*, Docket No. 18-0673 (issued June 18, 2018).

² 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 30, 2014 appellant, then a 51-year-old city mail carrier, filed a traumatic injury claim (Form CA-1) alleging that she injured her back and neck and developed a headache as a result of a motor vehicle accident that occurred that day while in the performance of duty. She stopped work on the date of injury and has not returned. OWCP accepted appellant's claim for concussion, not otherwise specified, back sprain in the thoracic region, and neck sprain. It paid her disability compensation on the supplemental rolls as of March 21, 2014.

In a May 8, 2014 duty status report (Form CA-17), Dr. David O'Neill, an attending Board-certified internist, described appellant's clinical findings and diagnosed muscle sprain of the neck due to the accepted January 30, 2014 employment injury. He released appellant to return to full-time, limited-duty work with restrictions as of the date of his examination.

OWCP, by letter dated June 11, 2015, referred appellant, together with a statement of accepted facts (SOAF), the medical record, and a series of questions, to Dr. Peter A. Feinstein, a Board-certified orthopedic surgeon, for a second opinion examination to determine whether she continued to suffer from residuals of her work-related conditions.

In a July 7, 2015 letter, the employing establishment's Office of the Inspector General (OIG) requested that OWCP refer its investigative report to a second opinion physician for review. It advised OWCP that surveillance videos taken from February 9 to July 6, 2015 demonstrated that appellant was working at Jim Thorpe Memorial Hall.

In a July 14, 2015 report, Dr. Feinstein reviewed the SOAF and medical record. He related appellant's history and her complaint of nonwork-related lower back problems when she was on her feet for a long period of time. Appellant denied problems with sitting, standing, or walking. She was able to drive and perform activities of daily living (ADLs). Appellant experienced a little bit of numbness radiating from her right elbow to her right shoulder. On physical examination, Dr. Feinstein reported apparent normal function, presentation, and range of motion of the lumbar spine and lower extremities. He related appellant's cervical spine physical examination findings with loss of about 20 degrees of range of motion of the right and left lateral rotation, flexion, and extension. There was left trapezius discomfort to palpation with some spasm, negative on the right side. There was no paravertebral muscular discomfort or spasm. Dr. Feinstein related that the rest of appellant's examination was essentially normal. Appellant had no sensory abnormalities in either upper extremity, anterior face, or chest area.

Dr. Feinstein responded to OWCP's questions, noting appellant's physical restrictions which he advised were likely permanent given her past history of treatment and length of time and nature of her injury. He reviewed the job offer dated July 25, 2014 and advised that she could perform the modified or limited-duty job as described. Dr. Feinstein related that this was primarily based on the fact that appellant was right-hand dominant, there were no issues with her right upper extremity, and any restrictions in her left trapezius and shoulder area, in terms of residual sprain or strain would not necessarily translate to restrictions in her right upper extremity. He noted that she still had very mild residuals of a cervical sprain or strain in the left neck and left upper extremity shoulder area. Dr. Feinstein opined that there was no need for additional physical therapy or aquatic therapy treatment as she had more than an adequate course and did not have

residual symptoms that would be amenable to additional treatment of this nature. He further noted that she did not even need a home exercise program as it would not add anything. Appellant was quite functional based on his above discussion. Dr. Feinstein indicated that appellant was incapable of performing the full duties of her job in a full-duty capacity. He completed a work capacity evaluation (Form OWCP-5c) and noted the accepted conditions. Dr. Feinstein indicated that, while appellant could not perform her usual job, she could perform sedentary, light-to-medium work for eight hours a day with restrictions.

On July 31, 2015 OWCP requested that Dr. Feinstein review the enclosed OIG surveillance video and a SOAF with addendum, and respond to a set of questions regarding appellant's physical limitations and work capacity.

In an August 12, 2015 letter, appellant having reviewed the OIG's July 7, 2015 investigative report and surveillance video responded that, among other things, her demonstrated actions were either within her restrictions or had occurred prior to her accepted injury.

In a letter dated August 21, 2015, Dr. Feinstein noted having reviewed the surveillance video. He maintained that she presented herself in an inappropriate and fraudulent way at the time of his examination. Dr. Feinstein again noted that appellant's complaints at the time of examination were subjective in nature. Based on his review of the surveillance video, he augmented his opinion and determined that she had no restrictions. Dr. Feinstein concluded that appellant had made a full and complete recovery from her work injury, had an excellent prognosis, and should be able to perform her normal-duty job without restrictions.

On September 30, 2015 OWCP proposed to terminate appellant's wage-loss compensation based on Dr. Feinstein's August 21, 2015 opinion. It noted that Dr. O'Neill failed to provide a rationalized medical opinion as to whether appellant had continuing employment-related residuals. OWCP afforded appellant 30 days to submit additional evidence or argument.

In an October 26, 2015 letter, appellant disagreed with the proposed action. She contended that OWCP should have requested that Dr. O'Neill review the investigative surveillance video and provide a rationalized medical opinion as to whether she had any residuals of her work-related conditions. Appellant further contended that Dr. Feinstein's August 21, 2015 opinion was not entitled to the weight of the medical evidence as he was unduly influenced and prejudiced by the OIG investigation as the information presented to him was not complete or accurate. She asserted that the weight of the medical evidence rested with his July 14, 2015 report in which he found that she could work with restrictions and that he contradicted this finding in his August 21, 2015 report without providing rationale in support of his conclusion.

By decision dated November 19, 2015, OWCP terminated appellant's wage-loss compensation effective that day. It found that the weight of the medical evidence rested with

Dr. Feinstein's August 21, 2015 opinion and established that appellant no longer had disability or residuals of her accepted conditions and could return to her date-of-injury job without restrictions.³

On November 20, 2015 OWCP proposed to terminate appellant's medical benefits based on Dr. Feinstein's August 21, 2015 opinion. It afforded her 30 days to submit additional evidence or argument.

A December 1, 2015 report from Dr. O'Neill was received. He examined appellant and assessed other muscle spasm and muscle spasms of the head or neck.

OWCP, by decision dated January 14, 2016, terminated appellant's medical benefits, effective that day. It again based its decision on the opinion of Dr. Feinstein as set forth in his August 21, 2015 supplemental report.

On February 9, 2016 appellant requested an oral hearing before an OWCP hearing representative regarding the January 14, 2016 decision.

In an April 21, 2016 letter, appellant continued to contend that Dr. Feinstein's opinion did not constitute the weight of the medical evidence.

Appellant submitted a letter dated May 6, 2016 from Dr. O'Neill in which he noted that the activities depicted in the addendum to the SOAF were incidental normal activities of daily living (ADLs). Dr. O'Neill agreed with Dr. Feinstein's July 14, 2015 finding that appellant's cervical strain was unresolved as there were objective findings of limited cervical range of motion and marked muscle spasm. He noted that appellant also suffered from post-traumatic myofascial pain syndrome. Dr. O'Neill related that this condition frequently developed following a strain injury and was a long-term condition. The diagnosis was based on the presence of trigger points-hypersensitive, taut bands within a muscle. Dr. O'Neill noted that the remainder of Dr. Feinstein's July 14, 2015 report was consistent with appellant's medical history on file and Dr. Feinstein's examination and limitations concurred with his own findings. He reiterated that appellant was quite functional with minimal restrictions. Dr. O'Neill disagreed with Dr. Feinstein's August 21, 2015 report. He related that the physician found no mention of appellant engaging in any form of strenuous activity or excessive lifting. Dr. O'Neill noted that, without this finding, a change of opinion was unwarranted. Regarding Dr. Feinstein's finding that appellant normally performed activities, Dr. O'Neill noted that it was previously documented that she was quite functional. He explained that she had been under his care since February 6, 2014 and she had never overstated her condition or presented herself as incapable of daily activity. In addition, Dr. O'Neill maintained that appellant's complaints had been consistent with his objective findings. Appellant had not demonstrated any behaviors consistent with symptom magnification. She was not a malingerer, but an individual who had been released to limited duty since March 2014. Appellant complained on numerous occasions that the employing establishment did not provide work and

³ On December 17, 2015 appellant requested an oral hearing before an OWCP hearing representative regarding the November 19, 2015 wage-loss termination decision. By decision dated June 24, 2016, an OWCP hearing representative affirmed the November 19, 2015 wage-loss termination decision. She found that the medical evidence submitted was insufficient to outweigh the weight accorded to Dr. Feinstein's August 21, 2015 opinion. Appellant did not appeal from this decision.

that she had requested modification of her restrictions to obtain a job offer. Dr. O'Neill noted that his most recent physical examination of appellant, on April 29, 2016, revealed limited cervical range of motion. He also reported that palpation of the paraspinal muscles revealed tenderness and myofascial trigger points. Appellant was able to perform light-duty work with lifting restrictions as set forth in an October 4, 2016 Form CA-17 report.

By decision dated August 18, 2016, an OWCP hearing representative affirmed the January 14, 2016 decision regarding termination of medical benefits, finding that the medical evidence submitted was insufficient to overcome the weight accorded to Dr. Feinstein's opinion.

Additional reports dated October 4 and 31, 2016 from Dr. O'Neill were received. He again examined appellant and assessed right shoulder arthralgia and trigger point of extremity.

On November 10, 2016 appellant requested reconsideration regarding the August 18, 2016 decision.

By decisions dated January 30 and June 12, 2017, OWCP denied modification of its termination of appellant's medical benefits.

In an appeal request form and letter received by OWCP on June 19, 2017, appellant requested reconsideration regarding the June 12, 2017 decision.

Appellant submitted additional Form CA-17 reports dated December 1, 2015 and April 29, 2016 from Dr. O'Neill who restated his opinion that appellant had muscle sprain due to her January 30, 2014 work injury and that she could return to work with restrictions.

By decision dated September 15, 2017, OWCP denied modification of the June 12, 2017 decision. It explained that there was no medical evidence of record sufficient to overcome the weight accorded to Dr. Feinstein's opinion.

In an appeal request form and letter received by OWCP on September 28, 2017, appellant requested reconsideration. She reiterated her prior contention that Dr. Feinstein's August 21, 2015 opinion did not constitute weight of the medical evidence. Appellant continued to argue that all the relevant facts were not presented to him for an accurate opinion and that he had not provided a rationalized medical opinion.

In an October 31, 2017 letter, appellant contended that a February 24, 2015 report from Dr. O'Neill confirmed that she was doing everything within her ability to return to work. She further contended that Dr. Feinstein's July 14, 2015 examination and Form OWCP-5c correlated with Dr. O'Neill's findings regarding the extent of her disability. Lastly, appellant asserted that an October 14, 2016 functional capacity evaluation substantiated her abilities and restrictions.

By decision dated December 13, 2017, OWCP denied further merit review of appellant's claim pursuant to 5 U.S.C. § 8128(a). It found that her request for reconsideration neither raised substantive legal questions nor included new and relevant evidence.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁴ OWCP may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.⁵

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

ANALYSIS -- ISSUE 1

The Board finds that OWCP has met its burden of proof to terminate appellant's medical benefits, effective January 14, 2016.

In terminating her medical benefits, effective January 14, 2016, OWCP relied on the medical opinion of Dr. Feinstein, an OWCP referral physician, to find that appellant's accepted conditions had resolved, and that she no longer required medical treatment.

In his initial report dated July 14, 2015, Dr. Feinstein reviewed the first SOAF and the medical file and noted essentially normal findings on physical examination. He opined that appellant suffered very mild residuals of her accepted cervical sprain or strain condition. Dr. Feinstein concluded that she did not require further medical treatment. He explained that appellant had more than an adequate course of physical therapy and aquatic therapy treatment. Dr. Feinstein further explained that she had no residual symptoms amenable to such additional treatment.

OWCP requested that Dr. Feinstein review an OIG investigative surveillance video along with a SOAF. In his August 21, 2015 supplemental report, Dr. Feinstein reviewed the OIG surveillance video of appellant's activities from February 9 to July 6, 2015 and the accompanying SOAF and opined that appellant normally performed the actions observed in the surveillance video. He maintained that the sequences of her actions indicated that appellant had no limitations, specifically with her left arm. Dr. Feinstein noted that she had subjective complaints at her July 14, 2015 examination. He concluded that appellant presented herself in an inappropriate and fraudulent manner at that time.

In order to terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical

⁴ *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

⁶ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁷ *Calvin S. Mays*, 39 ECAB 993 (1988).

treatment.⁸ While Dr. Feinstein opined that appellant had residuals of the accepted cervical condition, after reviewing the OIG video he was clearly of the opinion that she did not require further medical treatment for her accepted conditions and that she could return to her regular work duties without restrictions. The Board finds that Dr. Feinstein provided a comprehensive, well-rationalized opinion in support of his conclusion. Accordingly, his opinion represents the weight of the medical evidence with respect to the need for ongoing medical treatment.

The additional medical evidence submitted prior to the termination of appellant's medical benefits is insufficient to overcome the weight accorded to Dr. Feinstein's opinion. Dr. O'Neill's May 8, 2014 Form CA-17 report and December 1, 2015 report found that appellant had muscle sprain, neck strain, and muscle spasms of the head or neck due to the accepted January 30, 2014 employment injury. The Board notes that OWCP has not accepted that appellant sustained muscle sprain or head and neck muscle spasms as a result of the January 30, 2014 employment injury and Dr. O'Neill failed to offer medical rationale to support his opinion on causal relationship.⁹ A mere conclusion without necessary rationale explaining why the physician believes that a claimant's accepted employment incident resulted in the diagnosed condition is not sufficient.¹⁰ Moreover, Dr. O'Neill failed to address whether appellant continued to have residuals of her accepted neck strain condition that required further medical treatment. For these reasons, the Board finds that Dr. O'Neill's report is of diminished probative value.

LEGAL PRECEDENT -- ISSUE 2

As OWCP properly terminated appellant's medical benefits, the burden shifts to appellant to establish continuing residuals, after that date, causally related to her accepted injury.¹¹ To establish causal relationship between the diagnosed conditions and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such causal relationship.¹² Causal relationship is a medical issue and the medical evidence required to establish causal relationship is rationalized medical evidence.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established continuing residuals on or after January 14, 2016 causally related to her accepted January 30, 2014 employment injury.

⁸ *Id.*

⁹ See *Jaja K. Asaramo*, 55 ECAB 200 (2004) (for conditions not accepted by OWCP as due to a work injury, the claimant bears the burden of proof to establish that the condition is causally related to the work injury).

¹⁰ *S.K.*, Docket No. 15-0384 (issued May 7, 2015).

¹¹ *Manuel Gill*, 52 ECAB 282 (2001).

¹² *R.D.*, Docket No. 16-0982 (issued December 20, 2016).

¹³ *Paul Foster*, 56 ECAB 208 (2004); *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

Following OWCP's termination of appellant's medical benefits, effective January 14, 2016, the burden of proof shifted to appellant to demonstrate that she continued to have residuals of her employment-related conditions that required further medical treatment.¹⁴

While Dr. O'Neill, in a May 6, 2016 report, agreed with Dr. Feinstein's July 14, 2015 opinion that appellant had continuing residuals of her accepted cervical strain, he did not offer an opinion as to whether she required further medical treatment for this condition. Further, he disagreed with Dr. Feinstein's August 21, 2015 opinion that appellant normally performed the activities observed on the OIG's surveillance video as Dr. Feinstein had not mentioned that she had engaged in strenuous activity or excessive lifting or her medications. Dr. O'Neill further asserted that appellant had not exhibited symptom magnification as her complaints were consistent with his objective findings. However, he did not address whether she required further medical treatment. Further, while Dr. O'Neill found that appellant also suffered from post-traumatic myofascial pain syndrome, a condition that has not been accepted as work related by OWCP, he failed to provide an opinion addressing whether the diagnosed condition was causally related to the accepted employment injuries.¹⁵ For these reasons, the Board finds that Dr. O'Neill's report is of no probative value.¹⁶

Dr. O'Neill's remaining reports are also of diminished probative value. In his December 1, 2015 and April 29, 2016 Form CA-17 reports, he diagnosed muscle sprain and opined that the condition was caused by the accepted January 30, 2014 work injuries. However, he did not provide medical rationale explaining how the diagnosed condition was caused or contributed to by the accepted employment-related injury.¹⁷

Dr. O'Neill's October 4 and 31, 2016 reports diagnosed appellant as having muscle sprain right shoulder arthralgia and trigger point of extremity, but he failed to provide an opinion addressing the causal relationship between the diagnosed conditions and the accepted work injuries.¹⁸

Thus, the Board finds that appellant has not met her burden of proof to establish continuing residuals after January 14, 2016 due to her accepted conditions thereby warranting medical benefits.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

¹⁴ *Supra* note 11.

¹⁵ *Supra* note 8.

¹⁶ Medical evidence that does not offer an opinion regarding the cause of an employee's condition or disability is of no probative value on the issue of causal relationship. *See L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

¹⁷ *Supra* note 9.

¹⁸ *Supra* note 16.

LEGAL PRECEDENT -- ISSUE 3

Section 8128 of FECA vests OWCP with a discretionary authority to determine whether it will review an award for or against compensation, either under its own authority or on application by a claimant.¹⁹ Section 10.608(b) of OWCP's regulations provide that a timely request for reconsideration may be granted if OWCP determines that the claimant has presented evidence and/or argument that meet at least one of the standards described in section 10.606(b)(3).²⁰ This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.²¹ Section 10.608(b) provides that, when a request for reconsideration is timely, but fails to meet at least one of these three requirements, OWCP will deny the application for reconsideration without reopening the case for a review on the merits.²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered. In a September 28, 2017 request for reconsideration, she contended that OWCP improperly accorded determinative weight to Dr. Feinstein's August 21, 2015 report as the basis for terminating her medical benefits. This argument was previously raised by appellant and addressed by OWCP and its hearing representative in decisions dated November 19, 2015, August 18, 2016, and September 15, 2017. Evidence or argument that repeats or duplicates evidence previously of record has no evidentiary value and does not constitute a basis for reopening a case.²³ Because this argument has been previously considered, it was insufficient to require OWCP to conduct a merit review. Thus, appellant is not entitled to a review of the merits of the claim based on the first and second above-noted requirements under section 10.606(b)(3).²⁴

The Board also finds that appellant has not submitted relevant and pertinent new evidence. She submitted e-mails, other written correspondence, a check regarding a third-party recovery and an October 31, 2017 letter in which she contended that Dr. O'Neill's February 24, 2015 report confirmed her attempt to return to work. This evidence is not relevant to the underlying medical

¹⁹ 5 U.S.C. § 8128(a).

²⁰ 20 C.F.R. § 10.608(a).

²¹ *Id.* at § 10.606(b)(3).

²² *Id.* at § 10.608(b).

²³ *J.P.*, 58 ECAB 289 (2007).

²⁴ 20 C.F.R. § 10.606(b)(3); *see also B.H.*, Docket No. 18-0889 (issued November 21, 2018).

issue of whether OWCP properly terminated appellant's medical benefits, effective January 14, 2016, because she no longer had residuals of her accepted employment-related conditions that required further medical treatment. The Board finds, therefore, that this evidence is insufficient to warrant further merit review of the claim.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.²⁵

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate appellant's medical benefits, effective January 14, 2016. The Board also finds that appellant has not met her burden of proof to establish continuing residuals on or after January 14, 2016. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

²⁵ See *A.R.*, Docket No. 16-1416 (issued April 10, 2017); *A.M.*, Docket No. 16-0499 (issued June 28, 2016); *A.K.*, Docket No. 09-2032 (issued August 3, 2010); *M.E.*, 58 ECAB 694 (2007); *Susan A. Filkins*, 57 ECAB 630 (2006); (when an application for reconsideration 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).

ORDER

IT IS HEREBY ORDERED THAT the December 13 and September 15, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: January 25, 2019
Washington, DC

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

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

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board