

met her burden of proof to expand the acceptance of her claim to include additional conditions causally related to the accepted June 5, 1989 employment injury.

FACTUAL HISTORY

This case has previously been before the Board.³ The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

On June 5, 1989 appellant, then a 29-year-old casual clerk,⁴ filed a traumatic injury claim (Form CA-1) alleging that, on that same date, she experienced pain in her back, arm, and shoulder when she bent down to pick up and carry a tray full of mail while in the performance of duty. She stopped work on that date. OWCP accepted appellant's claim for cervical, thoracic, lumbar, and right shoulder strains. It paid wage-loss compensation and medical benefits and placed her on the periodic rolls, effective December 18, 1989.

In November 21, 1990, appellant began vocational rehabilitation and returned to modified-duty work as a part-time mail sorter at a private company on August 27, 1991. She received wage-loss compensation for partial disability. By decision dated October 3, 1991, OWCP issued a loss of wage-earning capacity (LWEC) determination reducing appellant's wage-loss compensation based on her actual earnings in the position of part-time mail sorter.

On May 22, 2014 OWCP referred appellant, along with a statement of accepted facts (SOAF), a copy of the case record, and a series of questions, to Dr. Richard Deerhake, a Board-certified orthopedic surgeon, for a second opinion evaluation regarding the status of her accepted June 5, 1989 employment injury. In a June 23, 2014 report, Dr. Deerhake noted that he had reviewed the SOAF and discussed the medical record. He provided physical examination findings and reported that appellant's current diagnoses were right shoulder arthritis and degenerative disc disease of the cervical spine. Dr. Deerhake explained that appellant's current conditions were not work related and were a result of age-related changes. He concluded that appellant no longer suffered from residuals or disability due to her June 5, 1989 employment injury.

Appellant submitted progress notes dated January 14 to November 11, 2015 by Dr. Louis J. DeMicco, an osteopath specializing in emergency medicine. Dr. DeMicco recounted her complaints of worsening right shoulder and lower back pain. Upon physical examination, he observed pain on palpation over the cervical spine and some pain in the lumbar midline and paraspinal musculature. Dr. DeMicco diagnosed cervical, lumbar, and right shoulder strains.

OWCP determined that a conflict in medical opinion existed between Dr. DeMicco, appellant's treating physician, and Dr. Deerhake, OWCP's second opinion physician, with respect to her employment-related conditions and disability. It referred appellant to Dr. Mark Berkowitz,

³ Docket No. 17-1352 (issued August 13, 2018).

⁴ Appellant's term appointment with the employing establishment ended on June 7, 1989.

a Board-certified orthopedic surgeon, for an impartial medical examination in order to resolve the conflict.

In a February 3, 2016 report, Dr. Berkowitz indicated that he had reviewed the case record, including the SOAF, and noted the accepted conditions of cervical, thoracic, lumbar, and right shoulder sprains. Upon examination of appellant's cervical and lumbar spines, he observed mild tenderness to palpation and no spasms. Sensation was intact. Examination of appellant's thoracic spine revealed no tenderness, spasms, or guarding. Dr. Berkowitz also noted range of motion findings. Upon examination of appellant's right shoulder, he observed no evidence of tenderness, muscle spasms, or guarding. Dr. Berkowitz opined that there were no objective findings to support that appellant had residuals of her accepted cervical, thoracic, lumbar, and right shoulder sprain injuries. He explained that, while appellant still had many subjective findings, those findings were more likely due to subsequent injuries that occurred after her federal employment. Dr. Berkowitz reported that appellant was not able to return to regular duty, but indicated that her work restrictions resulted from her other subsequent injuries and natural degenerative changes. He completed a work capacity evaluation (Form OWCP-5c) with appellant's work restrictions.

On April 8, 2016 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits because her June 5, 1989 work-related injury and disability had resolved. It found that the special weight of the medical evidence rested with Dr. Berkowitz's February 3, 2016 report, in which he determined that appellant's accepted injuries had ceased and that she was no longer totally disabled as a result of her accepted injury. OWCP afforded appellant 30 days to submit additional evidence or argument, in writing, if she disagreed with the proposed termination. No additional evidence or argument was received.

By decision dated May 13, 2016, OWCP finalized the termination of appellant's wage-loss compensation and medical benefits, effective that same date. It found that the special weight of the medical evidence rested with Dr. Berkowitz, the impartial medical examiner (IME), who had determined in a February 3, 2016 report that appellant did not have residuals or disability due to her June 5, 1989 employment injury.

On May 23, 2016 appellant, through counsel, requested a telephonic hearing before a representative of OWCP's Branch of Hearings and Review. Appellant submitted additional progress notes dated March 25 and May 25, 2016 by Dr. DeMicco who continued to treat appellant for complaints of neck and lower back pain.

OWCP also received a June 13, 2016 impairment rating report by Dr. Catherine Watkins Campbell, a Board-certified occupational and family medicine physician.

A hearing was held on February 13, 2017. By decision dated April 13, 2017, an OWCP hearing representative affirmed the May 13, 2016 decision.

Appellant filed an appeal before the Board.

By decision dated August 13, 2018, the Board affirmed the April 13, 2017 decision. The Board found that OWCP had met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective May 13, 2016, as the medical evidence of record was insufficient to establish that she continued to suffer from residuals or disability causally related to

her accepted June 5, 1989 employment injury. The Board further found that the medical evidence submitted after the May 13, 2016 termination decision was insufficient to establish continuing residuals or disability due to the June 5, 1989 employment injury.

Following the Board's August 13, 2018 decision, OWCP received an April 19, 2019 letter from counsel requesting that appellant's claim be expanded to include the additional conditions of status post cervical spinal fusion, spinal stenosis of the cervical region, and right shoulder tendinitis. Counsel noted that he was submitting additional medical documentation from Dr. Michael Eppig, a Board-certified orthopedic surgeon, to support his request.

In progress notes dated November 20, 2017 to December 19, 2018, Dr. Eppig recounted appellant's complaints of worsening neck pain and bilateral hand numbness and tingling. Upon initial examination, he observed normal range of motion of appellant's cervical spine and normal strength. Hoffman's test was negative. Dr. Eppig diagnosed status post cervical spinal fusion, cervical radiculopathy, cervical spinal stenosis, and herniated nucleus pulposus (HNP).

A December 13, 2018 cervical spine magnetic resonance imaging (MRI) scan revealed severe left-sided neural foraminal narrowing at the C6-7 level related to facet hypertrophy.

On July 11, 2019 appellant, through counsel, requested reconsideration and submitted additional medical evidence.

A referral note dated January 17, 2019 from Dr. Vladlen Kim, Board-certified in internal medicine, to Dr. Eppig noted the diagnoses of cervical degenerative disc disease, cervical radiculopathy, and lumbar pain.

In a March 12, 2019 report, Dr. Kim indicated that appellant was seen for diarrhea due to malabsorption, sprain of thoracic region, lumbar sprain, postgastrectomy syndrome, chronic gastroesophageal reflux disease (GERD), generalized abdominal pain, and chronic insomnia. He prescribed medication and scheduled a follow-up examination.

Appellant also submitted a March 19, 2019 cervical spine computerized tomography (CT) scan, which revealed straightening of the cervical lordosis with preserved vertebral alignment, postoperative changes of the anterior cervical disc fusion at C5-6, normal paraspinal soft tissues, degenerative changes at C6-7, small central disc protrusion at C2-3 and C3-4, and small disc osteophyte complex at C6-7.

In progress notes dated April 10 and July 17, 2019, Dr. Eppig recounted appellant's complaints of mid-cervical, posterior neck pain, bilateral hand numbness/tingling, and right shoulder pain. Upon examination of appellant's cervical spine, he observed normal range of motion, no atrophy or edema, and negative Hoffman's test. Dr. Eppig diagnosed subluxation of cervical vertebra and cervical spinal stenosis.

By decision dated September 26, 2019, OWCP denied modification. It found that the medical evidence of record was insufficient to establish that appellant continued to suffer residuals or disability causally related to her accepted June 5, 1989 employment injury. OWCP also

determined that the medical evidence of record was insufficient to establish additional cervical and right shoulder conditions causally related to her accepted June 5, 1989 employment injury.

LEGAL PRECEDENT -- ISSUE 1

As OWCP properly terminated appellant's compensation benefits, the burden shifts to her to establish continuing disability or residuals, after that date, causally related to her accepted injury.⁵ To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.⁶ A claimant must establish by the weight of the reliable, probative, and substantial evidence that he or she had employment-related residuals or disability which continued after termination of compensation benefits.⁷

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met her burden of proof to establish continuing residuals or disability causally related to her June 5, 1989 employment injury on or after May 13, 2016.

On prior appeal, the Board found that OWCP properly terminated appellant's wage-loss compensation and medical benefits because she did not have residuals or disability due to her accepted June 5, 1989 employment injury. The Board further found that the medical evidence submitted after the May 13, 2016 termination decision was insufficient to establish continuing residuals or disability due to the June 5, 1989 employment injury.⁸ The Board notes that it is unnecessary for the Board to consider the evidence that was previously considered in its August 13, 2018 decision. Findings made in prior Board decisions are *res judicata*, absent any further review by OWCP under section 8128 of FECA.⁹

Following the Board's August 13, 2018 decision, appellant, through counsel requested reconsideration and submitted additional medical evidence. In a March 12, 2019 report, Dr. Kim indicated that appellant received medical treatment for thoracic and lumbar sprains. He did not, however, address whether appellant was disabled from employment or required further medical treatment due to her accepted June 5, 1989 employment injury, and thus, his opinion is of no probative value.¹⁰

⁵ See *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *Manuel Gill*, 52 ECAB 282 (2001).

⁶ *C.L.*, Docket No. 18-1379 (issued February 3, 2019); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

⁷ *V.G.*, Docket No. 17-0583 (issued July 23, 2018).

⁸ *Supra* note 3.

⁹ *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *M.D.*, Docket No. 20-0007 (issued May 13, 2020).

¹⁰ *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

Likewise, Dr. Eppig's progress notes dated November 20, 2017 to July 17, 2019 are also of no probative value to establish appellant's entitlement to continued medical benefits or wage-loss compensation as he did not address the relevant issue of whether appellant had continued residuals of her work-related cervical, thoracic, lumbar, or right shoulder injuries.¹¹

OWCP also received a December 13, 2018 cervical spine MRI scan and a March 19, 2019 cervical spine CT scan. The Board has held that diagnostic tests standing alone lack probative value as they do not provide the physician's opinion on causal relationship.¹²

Dr. Kim's January 17, 2019 referral note does not contain a physician's opinion regarding continuing disability. Therefore, it is of no probative value and insufficient to establish continuing disability.¹³

As appellant has not provided rationalized medical evidence establishing continued residuals or disability on or after May 13, 2016 due to her accepted June 5, 1989 employment injury, the Board finds that she has not met her burden of proof.¹⁴

LEGAL PRECEDENT -- ISSUE 2

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury.¹⁵

The medical evidence required to establish causal relationship between a specific condition, as well as any attendant disability claimed, and the employment injury, is rationalized medical opinion evidence.¹⁶ A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background.¹⁷ Additionally, the opinion of the physician must be expressed in terms of a reasonable degree of medical certainty, and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and the accepted employment injury.¹⁸

¹¹ *Id.*

¹² *See* Docket No. 18-0559 (issued January 29, 2020).

¹³ *Id.*

¹⁴ *See C.C.*, Docket No. 19-1062 (issued February 6, 2020).

¹⁵ *W.L.*, Docket No. 17-1965 (issued September 12, 2018); *V.B.*, Docket No. 12-0599 (issued October 2, 2012); *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

¹⁶ *T.C.*, Docket No. 19-1043 (issued November 8, 2019); *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

¹⁷ *E.M.*, Docket No. 18-1599 (issued March 7, 2019); *Robert G. Morris*, 48 ECAB 238 (1996).

¹⁸ *M.V.*, Docket No. 18-0884 (issued December 28, 2018); *I.J.*, 59 ECAB 408 (2008); *Victor J. Woodhams*, 41 ECAB 345 (1989).

ANALYSIS -- ISSUE 2

The Board finds that appellant has not met her burden of proof to expand the acceptance of her claim to include additional conditions causally related to the accepted June 5, 1989 employment injury.

In support of her claim, appellant submitted a series of progress notes by Dr. Eppig dated November 20, 2017 to July 17, 2019. In the initial examination report, Dr. Eppig recounted appellant's complaints of neck pain and bilateral hand numbness and tingling. He conducted an examination and diagnosed status post cervical spinal fusion, cervical radiculopathy, cervical spinal stenosis, and HNP. Dr. Eppig did not, however, address the cause of appellant's additional cervical or lumbar conditions. Medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.¹⁹ Appellant was also treated by Dr. Kim who likewise did not specifically address how appellant's diagnosed conditions resulted from the accepted June 5, 1989 employment injury. Thus, Dr. Kim's reports are insufficient to establish any additional conditions as employment related.²⁰

The December 13, 2018 cervical spine MRI scan and March 19, 2019 cervical spine CT scan are also insufficient to establish appellant's claim. The Board has held that diagnostic studies standing alone lack probative value on the issue of causal relationship as they do not address whether the accepted employment injury caused any of the additional diagnosed conditions.²¹

As the medical evidence of record is insufficient to establish causal relationship between the diagnosed conditions and the accepted employment injury, the Board finds that appellant has not met her burden of proof.

On appeal counsel contends that OWCP failed to adjudicate the claim in accordance with the proper standard of causation and failed to give due deference to the findings of the attending physician. As explained above, however, the medical evidence of record is insufficient to establish appellant's claim for expansion. Thus, the Board finds that appellant has not met her burden of proof.

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.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish continuing residuals or disability on or after May 13, 2016 causally related to her June 5, 1989 employment injury. The Board also finds that appellant has not met her burden of proof to expand the

¹⁹ See *B.P.*, Docket No. 19-0777 (issued October 8, 2019); *L.B.*, Docket No. 18-0533 (issued August 27, 2018).

²⁰ See *G.V.*, Docket No. 20-0055 (issued April 21, 2020).

²¹ *F.D.*, Docket No. 19-0932 (issued October 3, 2019); *J.S.*, Docket No. 17-1039 (issued October 6, 2017).

acceptance of her claim to include additional conditions causally related to the accepted June 5, 1989 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the September 26, 2019 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 5, 2020
Washington, DC

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

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board