

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

_____)	
K.H., Appellant)	
)	
and)	Docket No. 22-0399
)	Issued: December 26, 2023
U.S. POSTAL SERVICE, PROCESSING & DISTRIBUTION CENTER, Baltimore, MD,)	
Employer)	
_____)	

Appearances:
Stephen C. Larkin, for the appellant¹
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge
JAMES D. MCGINLEY, Alternate Judge

JURISDICTION

On January 17, 2022 appellant, through her representative, filed a timely appeal from a December 2, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP).

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

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.³

ISSUE

The issue is whether appellant has met her burden of proof to establish continuing disability or residuals, on or after July 20, 2015, causally related to her accepted June 1, 2012 employment-related injury.

FACTUAL HISTORY

This case has previously been before the Board.⁴ 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 1, 2012 appellant, then a 52-year-old mail clerk, filed a traumatic injury claim (Form CA-1) alleging that, on that date, she sustained injuries to her left arm/shoulder when she tripped and fell over a skid rack while in the performance of duty. OWCP accepted the claim for left shoulder sprain and disorder of the bursa and tendons. Appellant underwent OWCP-authorized arthroscopic procedures to her left shoulder on August 23, 2012 and on December 2, 2013. OWCP paid her wage-loss compensation benefits on the supplemental rolls as of August 23, 2012 and on the periodic rolls as of January 12, 2014.

By decision dated June 9, 2015, OWCP notified appellant of its proposed termination of her wage-loss compensation and medical benefits based on the opinion of Dr. Robert Allen Smith, a Board-certified orthopedic surgeon serving as a second opinion physician, who had opined that the residuals of the accepted conditions had ceased, and that appellant was no longer disabled from work due to the accepted employment injury.

Appellant subsequently submitted additional medical evidence.

By decision dated July 21, 2015, OWCP finalized the notice of proposed termination of appellant's wage-loss compensation and medical benefits, effective July 20, 2015, finding that Dr. Smith's second opinion represented the weight of the medical evidence.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that, following the December 2, 2021 decision, OWCP received additional evidence. 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.*

⁴ *Order Dismissing Appeal*, Docket No. 18-1957 (issued September 9, 2019); Docket No. 17-0281 (issued July 17, 2018), *petition for recon. granted and prior Board decision reaffirmed*, Docket No. 17-0281 (issued June 9, 2021).

On August 10, 2015 appellant, through her then-counsel, requested an oral hearing before a representative of OWCP's Branch of Hearings Review. A telephonic hearing was held on December 29, 2015. Following the hearing, counsel submitted additional evidence and argument.

By decision dated March 11, 2016, an OWCP hearing representative affirmed the July 21, 2015 termination decision.

On April 18, 2016 appellant, through her then-counsel, requested reconsideration. New medical evidence was submitted.

By decision dated July 19, 2016, OWCP denied modification of the March 11, 2016 decision.

On September 30, 2016 appellant again requested reconsideration. New evidence was submitted in support of the request.

By decision dated October 14, 2016, OWCP denied appellant's request for reconsideration, pursuant 5 U.S.C. § 8128(a).

On November 17, 2016 appellant, through then-counsel, appealed to the Board. By decision dated July 17, 2018, the Board affirmed the July 19, 2016 merit decision and the October 14, 2016 nonmerit decision,⁵ finding that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 20, 2015, as she no longer had disability or residuals causally related to her accepted June 1, 2012 employment injury. The Board further found that appellant had not met her burden of proof to establish continuing disability or residuals after July 20, 2015 causally related to the accepted employment injury. The Board also found that OWCP properly denied appellant's request for reconsideration of the merits of her claim, pursuant to 5 U.S.C. § 8128(a).⁶

In a September 7, 2021 letter, appellant, through her representative, requested reconsideration. Appellant's representative argued that Dr. Smith was not provided with a complete and accurate SOAF and, thus, his medical opinion was of diminished probative value. The representative noted that the SOAF only listed the accepted conditions, but failed to mention that appellant was previously seen by Dr. Robert Draper, a second opinion Board-certified orthopedic surgeon, who opined, in an April 19, 2013 report, that her additional conditions of left shoulder impingement syndrome, bursitis and synovial hypertrophy were causally related to the June 1, 2012 employment incident.

By decision dated December 2, 2021, OWCP denied modification.

⁵ Docket No. 17-0281 (issued July 17, 2018).

⁶ On August 15, 2018 appellant filed a petition for reconsideration of the Board's July 17, 2018 decision. By order dated June 9, 2021, the Board granted her petition for reconsideration, in order to preserve her right to pursue reconsideration before OWCP; however, it reaffirmed its July 17, 2018 decision. *Supra* note 4.

LEGAL PRECEDENT

When OWCP properly terminates wage-loss compensation and medical benefits, the burden shifts to appellant to establish continuing disability or residuals, on or after that date, causally related to the accepted employment injury.⁷ To establish a causal relationship between continuing disability or residuals and the accepted employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.⁸

ANALYSIS

The Board finds that appellant has not met her burden of proof to establish continuing disability or residuals, on or after July 20, 2015, causally related to her accepted June 1, 2012 employment-related injury.

Preliminarily, the Board notes that it is unnecessary for the Board to consider the evidence appellant submitted prior to the issuance of OWCP's October 14, 2016 decision because the Board considered that evidence in its July 17, 2018 decision.⁹ Findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹⁰

In his September 7, 2021 request for reconsideration, appellant's representative argued that the SOAF provided to second opinion physician, Dr. Smith, was incomplete as it failed to mention that appellant was previously seen by a prior second opinion physician, Dr. Draper, who opined in an April 19, 2013 report that appellant's additional conditions of left shoulder impingement syndrome, bursitis, and synovial hypertrophy were causally related to the June 1, 2012 employment injury. Dr. Draper's report, however, was previously reviewed and considered by the Board when it affirmed the July 20, 2015 termination. As noted above, findings made in prior Board decisions are *res judicata* absent further review by OWCP under section 8128 of FECA.¹¹

As appellant has not submitted additional medical evidence following OWCP's October 14, 2016 decision to establish continuing disability or residuals on or after July 20, 2015 causally related to the accepted employment injury, the Board finds that she has not met her burden of proof.

⁷ *K.M.*, Docket No. 21-1351 (issued October 8, 2021); *S.M.*, Docket No. 18-0673 (issued January 25, 2019); *Manuel Gill*, 52 ECAB 282 (2001).

⁸ *C.L.*, Docket No. 18-1379 (issued February 3, 2019); *T.M.*, Docket No. 08-0975 (issued February 6, 2009).

⁹ *Supra* note 5.

¹⁰ *See M.H.*, Docket No. 21-1055 (issued March 30, 2022); *C.D.*, Docket No. 19-1973 (issued May 21, 2020); *B.W.*, Docket No. 17-0366 (issued June 7, 2017); *Clinton E. Anthony, Jr.*, 49 ECAB 476, 479 (1998).

¹¹ *Id.*

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish continuing disability or residuals, on or after July 20, 2015, causally related to her accepted June 1, 2012 employment-related injury.

ORDER

IT IS HEREBY ORDERED THAT the December 2, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 26, 2023
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

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

James D. McGinley, Alternate Judge
Employees' Compensation Appeals Board