

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

LEONA A. O'CONNELL, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Irwin, PA, Employer**

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**Docket No. 05-1969
Issued: April 4, 2006**

Appearances:
Justin M. Walsh, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 26, 2005 appellant, through her attorney, filed a timely appeal of a July 6, 2005 merit decision of the Office of Workers' Compensation Programs, which denied modification of a March 16, 2005 decision, affirming the termination of her compensation. Pursuant to 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 the Office properly terminated appellant's compensation effective September 7, 2003 on the grounds that she no longer had any residuals or disability causally related to her December 26, 1989 employment injury; and (2) whether appellant met her burden of proof to establish that she had continuing employment-related disability or residuals causally related to the December 26, 1989 employment injury.

FACTUAL HISTORY

On December 27, 1989 appellant, then a 39-year-old substitute rural carrier, filed a traumatic injury claim alleging that on December 26, 1989 she experienced whiplash to the neck, back, chest and abdomen muscles when her motor vehicle was rear-ended by another vehicle while delivering the mail. She stopped work on December 26, 1989. The Office accepted appellant's claim for cervical strain, fibromyositis, cervical subluxation at C4-5 and lumbar and thoracic subluxations. The Office paid appropriate compensation.¹

On December 5, 2002 appellant filed a claim alleging that she sustained a recurrence of disability. She stated that she worked for Dr. Martin Gallagher for nine years and that she received free chiropractic treatment. At the time of the filing of her claim, appellant worked for an oncology practice where no chiropractic treatment was available. After further development of the case record, the Office, by letter dated March 6, 2003, accepted that appellant sustained a recurrence of disability causally related to the December 26, 1989 employment injury.

The Office received reports and treatment notes from Dr. Stephen Marsales, a chiropractor, which covered intermittent dates from March 14 to June 17, 2003. He treated appellant for cervicobrachial pain with associated cervical spondylosis without myelopathy complicated by degeneration of the cervical disc, cervicalgia with associated cervical disc displacement complicated by chronic postural strain and myalgia/myosistis with associated hypolordiosis complicated by fibromyalgia.

By letter dated May 16, 2003, the Office referred appellant, together with the case record, a statement of accepted facts and a list of questions, to Dr. Stephen R. Bailey, a Board-certified orthopedic surgeon, for a second opinion medical examination. In a June 17, 2003 medical report, Dr. Bailey provided a history of the December 26, 1989 employment injury and appellant's medical treatment and work status. He noted her complaints of neck and back pain and reviewed the medical record. Dr. Bailey reported essentially normal findings on physical examination and opined that there was no objective evidence to support a finding that any of the accepted conditions were present at the time of his examination. He stated that his examination revealed no neuromuscular impairment in any area examined including, the neck, shoulders, upper extremities, upper back and lower back and extremities. Dr. Bailey did not place any restrictions on appellant at that time. He found no evidence of a nonindustrial or preexisting disability. Dr. Bailey concluded that appellant had no continuing residuals of the November 26, 1989 employment injury as the examination was unremarkable. In a work capacity evaluation dated June 17, 2003, Dr. Bailey stated that appellant could work eight hours a day with no restrictions.

By letter dated July 23, 2003, the Office issued a notice of proposed termination of compensation based on Dr. Bailey's June 17, 2003 medical report. The Office provided appellant 30 days to respond. She did not respond within the allotted time period.

¹ Appellant stopped working at the employing establishment and on July 8, 1994 she went to work as a medical assistant for Dr. Martin Gallagher, a chiropractor.

By decision dated September 4, 2003, the Office terminated appellant's compensation effective September 7, 2003. It found the evidence of record insufficient to establish that she had any continuing residuals or total disability causally related to the December 26, 1989 employment injury. The Office accorded determinative weight to Dr. Bailey's June 17, 2003 second opinion medical report.

By letter dated September 30, 2003, appellant requested an oral hearing before an Office hearing representative. In support of her claim for continuing disability, she referred to page 30 of a deposition of Dr. Jack D. Smith, a Board-certified orthopedic surgeon, who testified on behalf of the insurance company that covered the car responsible for her accident. He indicated that she would never fully recover from the injuries she sustained in the employment-related accident and that she would only be able to return to sedentary or light-duty employment.

At the June 29, 2004 hearing, appellant testified about her continuing residuals and medical treatment. Her attorney submitted Dr. Smith's October 31, 1994 report, which found that she had probably reached maximum medical improvement and that he could not specifically identify any thoracic or lumbar objective findings of disability related to his clinical examination. In a November 7, 1994 report, Dr. Smith reviewed the findings of x-rays and a magnetic resonance imaging (MRI) scan of appellant's cervical, lumbar and thoracic spines and stated that they did not alter his prior opinions. Dr. Smith's February 9, 2004 report provided a diagnosis of cervical degenerative disc disease secondary to a herniated nucleus pulposus at C5-6. He opined that appellant could perform a sedentary, light job with light to medium duties. At that time, she could not return to her rural mail carrier duties with the requirements for driving and lifting weighted bags of mail. Dr. Smith concluded that appellant's cervical condition did not require medical treatment, but noted that her condition may need to be treated in the future if it decompensated either spontaneously or in response to activities.

Counsel also submitted Dr. Smith's January 5, 1995 deposition addressing appellant's continuing orthopedic symptoms and ability to work. He opined that she sustained a herniated disc at C5 but that he was not certain that it was caused by the December 26, 1989 employment injury. Regarding the thoracic and right shoulder areas, Dr. Smith testified that he did not find any residuals of the accepted work-related injury. He stated that she still experienced residuals in the neck area and that she had reached maximum medical improvement with regard to the herniated disc.

By decision dated September 28, 2004, an Office hearing representative affirmed the September 4, 2003 termination decision. The hearing representative found that appellant no longer had any residuals or total disability due to her December 26, 1989 employment injury based on Dr. Bailey's June 17, 2003 medical report.

In a December 20, 2004 letter, appellant, through her attorney, requested reconsideration. He submitted a December 2, 2004 supplemental report from Dr. Smith, clarifying his 1994 opinion. He noted that a January 8, 1990 MRI scan demonstrated the presence of a minimal disc herniation. Dr. Smith stated that his comments about the clinical significance of this finding did not provide that a disc herniation was not present rather it was not causing any radicular symptoms at that time. When he saw appellant in October 1994, she had soft tissue complaints accompanied by spasm and abnormalities on the cervical range of motion in her neck which

constituted objective findings. Appellant's history indicated that over the ensuing years, she had experienced continued symptoms and received treatment as a "benefit" from a chiropractic office where she worked. Dr. Smith stated that assuming there were records to corroborate his statement, appellant received continuing treatment and care from the time he saw her in 1994 until the present time. He noted that recent x-rays showed cervical degenerative disc disease at the same level where the previous disc herniation was present. Dr. Smith attributed appellant's disability to cervical degenerative disc disease, which was related to the original herniation at C5-6. He stated that, although it was a minimal herniation, it did not cause a radicular syndrome, but rather a structural abnormality in the spine which over a period of years led to the present degenerative condition.

On March 16, 2005 the Office denied modification of the September 28, 2004 decision. The Office found that the evidence of record was insufficient to establish that appellant had any continuing residuals or total disability causally related to the accepted employment injury. In a letter dated May 5, 2005, appellant, through her attorney, requested reconsideration. She submitted treatment notes from her chiropractor regarding the treatment of her accepted work-related orthopedic conditions and temporomandibular joint (TMJ) condition on intermittent dates from August 17, 1994 to May 11, 2002.²

By decision dated July 6, 2005, the Office denied modification of the March 16, 2005 decision. The Office found that the evidence submitted by appellant was insufficient to create a conflict in the medical opinion evidence with Dr. Bailey or to establish any continuing residuals or total disability causally related to the December 26, 1989 employment injury.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

ANALYSIS -- ISSUE 1

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits. In order to obtain a current assessment of appellant's condition, the Office referred appellant to Dr. Bailey, an Office second opinion physician, who submitted a June 17, 2003 medical report, in which he provided an accurate factual and medical background. He conducted a thorough medical examination, which provided essentially normal findings on

² The Board notes that the Office in a June 20, 1994 decision, found that appellant's TMJ condition was not causally related to the December 26, 1989 employment injury.

³ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁴ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

physical examination. Dr. Bailey found no objective evidence to support a finding that any of the accepted related conditions were present at the time of his examination. He explained that his examination revealed no neuromuscular impairment in any area examined including, the neck, shoulders, upper extremities, upper back and lower back and extremities. Dr. Bailey found that restrictions were not necessary for appellant. He further found no evidence of a nonindustrial or preexisting disability. Dr. Bailey concluded that appellant had no continuing residuals of the November 26, 1989 employment injury as his examination was unremarkable.⁵

The Board finds that Bailey's opinion is entitled to weight and establishes that appellant no longer has any residuals or disability due to her December 26, 1989 employment injury as it is sufficiently rationalized and based on a proper factual and medical background.

LEGAL PRECEDENT -- ISSUE 2

If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.⁶ To prevail appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.⁷

ANALYSIS -- ISSUE 2

Dr. Smith opined that appellant sustained cervical degenerative disc disease secondary to a herniated disc at C5, but stated that he was unable to find a causal relationship between the diagnosed condition and her disability and the December 26, 1989 employment injury. His reports dated prior to the termination of compensation are not relevant to appellant's condition in 2003. His December 2, 2004 report was speculative in nature as he made assumptions regarding her medical treatment. Further, he provided little rationale for equating the subluxation accepted by the Office with a cervical disc herniation. The Board finds that Dr. Smith's report is insufficient to outweigh the probative value of Dr. Bailey's June 17, 2003 report as he did not provide sufficient rationale explaining how the cervical condition and disability was related to the accepted employment injury.

The chiropractic notes regarding the treatment of appellant's accepted employment injuries on intermittent dates from August 17, 1994 through May 11, 2002, failed to address how her symptoms were causally related to the December 26, 1989 employment and whether there was any resultant disability. Therefore, the Board finds that this evidence does not outweigh the probative value of Dr. Bailey's report.

⁵ *Supra* note 2.

⁶ See *Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

⁷ *Talmadge Miller*, 47 ECAB 673, 679 (1996); see also *George Servetas*, 43 ECAB 424 (1992).

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective September 7, 2003 on the grounds that she no longer any residuals or disability causally related to her December 26, 1989 employment injury. The Board further finds that appellant failed to meet her burden of proof to establish that she had any continuing disability or residuals causally related to the December 26, 1989 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the July 6 and March 16, 2005 and September 28, 2004 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: April 4, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board