United States Department of Labor
Employees' Compensation Appeals Board

G.C., Appellant	)	
and	)	**Docket No. 07-1771**
	)	**Issued: February 12, 2008**
U.S. POSTAL SERVICE, WESTERN NASSAU P & DC, Garden City, NY, Employer	)	

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 20, 2007 appellant filed a timely appeal from a decision of the Office of Workers' Compensation Programs dated November 8, 2006 that terminated her compensation benefits and an April 12, 2007 decision that denied her request for reconsideration. 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 met its burden of proof to terminate appellant's compensation benefits on November 8, 2006 on the grounds that her disability was no longer employment related; and, (2) whether it properly refused to reopen appellant's claim for further review of the merits pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On March 27, 2005 appellant, then a 55-year-old distribution clerk, sustained injury to her neck when she hit it against a cart as she pushed her chair back. She stopped work that day.[1] Appellant was treated at an emergency room where x-rays of the thoracic spine demonstrated no evidence of fracture or subluxation. Cervical spine x-rays revealed no evidence of fracture and Grade I retrolisthesis of C5 on C6 with narrowing of the intervertebral disc at multiple levels. Contusion of the upper back was diagnosed. On June 23, 2005 the Office accepted that appellant sustained an employment-related cervical sprain/strain. She was placed on the periodic rolls. A June 2, 2005 magnetic resonance imaging (MRI) scan of the cervical spine was limited due to excessive motion but demonstrated a small right disc herniation at C4-5 that did not compress the cervical cord.

Appellant came under the care of Dr. David C. Silverstein, Board-certified in orthopedic surgery, who submitted reports dated April 9 to October 26, 2005. Dr. Silverstein noted the history of injury, appellant's complaints of pain and the MRI scan findings. He diagnosed herniated cervical disc, cervical radiculitis and cervical sprain as a result of the March 27, 2005 injury. Dr. Silverstein advised that appellant was totally disabled. In a July 25, 2005 report, Dr. Paul Lerner, a Board-certified neurologist, noted a history that appellant fell backwards on a chair, injuring her neck. She complained of neck pain radiating into her left arm and hand. Following physical examination, he diagnosed cervical disc herniation associated with radiculopathy affecting the left upper extremity and opined that this was caused by the March 27, 2005 employment injury. Electromyography (EMG) on August 8, 2005 was suggestive of radiculitis at C4-6 with electrodiagnostic evidence of bilateral median nerve slowing across the wrists. In an October 10, 2005 treatment note, Dr. Lerner diagnosed disc herniation with radiculopathy and carpal tunnel syndrome.

On October 27, 2005 the Office referred appellant to Dr. David A. Benatar, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a November 22, 2005 report, Dr. Benatar noted the history of injury, appellant's complaints and his review of the medical record, including the June 2, 2005 MRI scan. Following physical examination, he diagnosed a cervical strain/sprain that occurred on March 27, 2005. Dr. Benatar advised that there was no objective evidence to support a diagnosis of radiculopathy or myelopathy and no evidence of permanent impairment, noting that the MRI scan was "near negative" with no significant compressive pathology. Dr. Benatar opined that appellant should have been able to return to work within six weeks of the employment injury and was not totally disabled. He advised that she could return to work with limitations on lifting and over-the-shoulder lifting for an additional four to six weeks, after which appellant could return to full duty. In an attached work capacity evaluation, Dr. Benatar advised that appellant was capable of light duty with limitations for four to six weeks on reaching, twisting, bending and stooping and a 20-pound weight restriction.

On April 17, 2006 the Office again referred appellant to Dr. Benatar for examination. In reports dated May 2, 2006, he again diagnosed cervical strain/sprain and opined that the small

[1] The record indicates that appellant had been on limited duty for a number of years for a prior low back injury that occurred on November 12, 1986, adjudicated by the Office under file number 020565065. The instant case was adjudicated under file number 022501097.

disc herniation found at C4-5 did not correlate with appellant's symptoms, noting that there were multiple levels of degenerative changes also shown on the MRI scan. Dr. Benatar reiterated that appellant could return to light duty with physical restrictions. Dr. Silverstein submitted additional reports reiterating his findings, diagnoses and conclusion that appellant was totally disabled.

The Office found that a conflict in medical opinion arose between the opinions of Dr. Silverstein and Dr. Benatar regarding whether appellant's current condition was caused by the employment injury. It referred her to Dr. Jerrold M. Gorski, Board-certified in orthopedic surgery, for an impartial evaluation.[2] In an August 29, 2006 report, Dr. Gorski reported that appellant described the employment injury as a fall from a chair. He noted her previous medical treatment and his review of the medical record, including MRI scan findings and her complaints of pain. Physical examination of the neck and upper extremities demonstrated a resting tremor and limitations of neck range of motion with no focal motor or sensory deficits of the upper extremities. Dr. Gorski diagnosed cervical arthritis at multiple levels and advised that the March 27, 2005 injury resulted in a temporary aggravation of underlying arthritis which had ceased. He advised that her current complaints were entirely due to the underlying arthritic condition which was present in multiple parts of her body. Dr. Gorski advised that it was unlikely that appellant would return to work due to the nonemployment-related arthritis and benign essential tremor, noting that as she aged, her arthritis would worsen and she would experience more pain; however, this was not caused by the employment injury.

On September 1, 2006 Dr. Silverstein reiterated his findings. On September 5, 2006 appellant had a consultation for pain management.

By letter dated October 3, 2006, the Office proposed to terminate appellant's compensation benefits on the grounds that Dr. Gorski, who provided an impartial medical evaluation, advised that the March 27, 2005 cervical strain/sprain had resolved. On October 13, 2006 appellant disagreed with the proposed termination and advised that she had formerly been a patient of Dr. Benatar's father.

In a decision dated November 8, 2006, the Office finalized the proposed termination.

On March 16, 2007 appellant, through her attorney, requested reconsideration. She contended that she sustained extensive injuries on March 27, 2005 and that referral for the second opinion evaluation and referee examination exceeded the bounds of reasonableness. Dr. Benatar's report was insufficient to establish a conflict in medical evidence and that Dr. Gorski's report was not supported by medical reasoning. In an October 16, 2006 treatment note, Dr. Lerner noted his review of the medical record, including the MRI scan findings. Physical examination demonstrated restricted neck motion. He advised that the March 27, 2005 work injury caused a cervical strain and disc herniation and radiculitis when appellant's chair fell backwards and opined that she could not return to work. In a November 20, 2006 report, Dr. Silverstein noted the history of injury and that appellant came under his care on April 14, 2005. He reviewed his examination findings and treatment regimen and advised that

[2] Dr. Benatar and Dr. Gorski were provided with a statement of accepted facts, a set of questions and the medical record.

on October 30, 2006 appellant remained in chronic pain and remained totally disabled for any work at the employing establishment. Dr. Silverstein concluded that on March 27, 2005 appellant sustained an injury to her neck resulting in cervical sprain, cervical radiculitis and herniated cervical disc and in a January 11, 2007 report, reiterated his findings and conclusions. In a December 1, 2006 report, Dr. Lerner noted his review of additional medical evidence including the reports of Dr. Benatar and Dr. Gorski. He noted that appellant also had a lower back condition and carpal tunnel syndrome with examination findings of restricted neck motion and significant impairment in the use of the left upper extremity and advised that appellant suffered from a chronic cervical strain and radiculopathy/radiculitis affecting the left upper extremity which was associated with a cervical spine disc herniation. Dr. Lerner opined that there was no evidence of any preexisting condition responsible for these conditions which were caused by the March 27, 2005 employment injury. He concluded that, while appellant was totally disabled, additional palliative treatment was reasonable.

By decision dated April 12, 2007, the Office denied appellant's request for reconsideration on the grounds that the argument and evidence submitted were insufficient to warrant further merit review.

LEGAL PRECEDENT -- ISSUE 1

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

Section 8123(a) of the Federal Employees' Compensation Act[5] provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.[6]

ANALYSIS -- ISSUE 1

The Board notes that, in an October 13, 2006 letter, appellant stated that she had previously been seen by Dr. Benatar's father which led to bias on the part of Dr. Benatar. Appellant did not raise this argument until the proposed termination, section 8123(a) authorizes the Office to require an employee who claims disability as a result of an employment injury to undergo such physical examination as it deems necessary.[7] The determination of the need for an

[3] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[4] *Id.*

[5] 5 U.S.C. §§ 8101-8193.

[6] 5 U.S.C. § 8123(a).

[7] *Id*.

examination, the type of examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of the Office. The only limitation on this authority is that of reasonableness.[8] The Office procedures for selecting a physician to perform a second opinion examination do not preclude medical specialists who may have previously ministered to a claimant or performed a fitness-for-duty evaluation for a federal agency other than the employing establishment.[9] The record before the Board does not contain any medical reports from Dr. Benatar' father and appellant has not provided support for her assertion that Dr. Benatar was biased or behaved unprofessionally.[10] Her assertion is therefore without merit.

The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation effective November 8, 2006. The Office determined that a conflict in the medical evidence arose between the opinions of Dr. Benatar, an orthopedic surgeon, who provided a second opinion evaluation and Dr. Silverstein, an attending orthopedic surgeon, regarding whether her accepted conditions had resolved. The Office properly referred appellant to Dr. Gorski, Board-certified in orthopedic surgery, for an impartial evaluation.[11] In a comprehensive report dated August 29, 2006, Dr. Gorski reported that appellant described the employment injury as a fall from a chair. He noted her previous medical treatment and his review of the medical record including MRI scan findings and appellant's complaints of pain. Physical examination of the neck and upper extremities demonstrated a resting tremor and limitations of neck range of motion with no focal motor or sensory deficits of the upper extremities. Dr. Gorski diagnosed cervical arthritis at multiple levels and advised that the March 27, 2005 injury resulted in a temporary aggravation of the underlying arthritis. He opined that the temporary aggravation had ceased and appellant's current complaints were entirely due to the underlying arthritic condition which was present in multiple parts of her body. Dr. Gorski advised that it was unlikely that appellant would return to work due to the nonemployment-related arthritis and benign essential tremor, noting that as she aged, her arthritis would worsen and she would have more pain but that this was not caused by the employment injury.

Appellant submitted a September 1, 2006 report in which Dr. Silverstein reiterated his opinion that appellant's herniated cervical disc and radiculitis were caused by the March 27, 2005 employment injury and that she was totally disabled. However, he was on one side of the conflict in medical evidence resolved by Dr. Gorski. An additional report from a claimant's physician, which essentially repeats earlier findings and conclusions, is generally insufficient to overcome the weight accorded to an impartial medical specialist's report.[12]

The Board finds that, as Dr. Gorski provided a comprehensive, well-rationalized evaluation in which he clearly advised that any residuals of appellant's March 27, 2005

[8] *Bobbie F. Cowart*, 55 ECAB 746 (2004).

[9] Federal (FECA) Procedure Manual, Part 3 -- Medical Examinations, *Second Opinion Examinations*, Chapter 3.500.3.b (March 1994); *see John Watkins*, 47 ECAB 597 (1996).

[10] *See Atanacio G. Sambrano*, 51 ECAB 557 (2000).

[11] *Id.*

[12] *See Roger G. Payne*, 55 ECAB 535 (2004).

sprain/strain of the cervical region had resolved and that her current condition was caused by preexisting arthritis which was not employment related, his report is entitled to the special weight accorded an impartial examiner and therefore constitutes the weight of the medical evidence.[13] The Office therefore met its burden of proof to terminate appellant's compensation benefits on November 8, 2006.

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Act vests the Office with 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.[14] Section 10.608(a) of the Code of Federal Regulations provides that a timely request for reconsideration may be granted if the Office determines that the employee has presented evidence and/or argument that meets at least one of the standards described in section 10.606(b)(2).[15] This section provides that the application for reconsideration must be submitted in writing and set forth arguments and contain evidence that either: (i) shows that the Office erroneously applied or interpreted a specific point of law; or (ii) advances a relevant legal argument not previously considered by the Office; or (iii) constitutes relevant and pertinent new evidence not previously considered by the Office.[16] Section 10.608(b) provides that when a request for reconsideration is timely but fails to meet at least one of these three requirements, the Office will deny the application for reconsideration without reopening the case for a review on the merits.[17]

ANALYSIS -- ISSUE 2

The Board finds that the Office improperly denied appellant's request for a merit review pursuant to section 8128(a) of the Act. In denying her request for reconsideration, the Office found and the Board agrees that her attorney's arguments did not show that the Office erroneously interpreted a point of law or advanced a legal argument not previously considered by the Office. Consequently, appellant was not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).[18]

The Board, however, finds that, appellant submitted new and relevant evidence not previously considered by the Office. Since the Office met is burden of proof to terminate appellant's compensation benefits on November 8, 2006, the burden shifted to appellant to establish that she had disability causally related to her accepted injury after that date.[19] To

[13] *See Sharyn D. Bannick*, 54 ECAB 537 (2003).

[14] 5 U.S.C. § 8128(a).

[15] 20 C.F.R. § 10.608(a).

[16] 20 C.F.R. § 10.608(b)(1) and (2).

[17] 20 C.F.R. § 10.608(b).

[18] 20 C.F.R. § 10.606(b)(2).

[19] *See Manuel Gill*, 52 ECAB 282 (2001).

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 factual and medical background, supporting such a causal relationship.[20] With her March 16, 2007 reconsideration request, appellant submitted additional medical evidence, including reports dated October 16 and December 1, 2006 in which Dr. Lerner noted his review of the medical record, including the MRI scan findings and the reports of Dr. Benatar and Dr. Gorski. He provided physical findings, advised that the March 27, 2005 work injury caused a cervical strain and disc herniation and concluded that appellant was totally disabled. In reports dated November 20, 2006 and January 11, 2007, Dr. Silverstein advised that on October 30, 2006 appellant remained in chronic pain and remained totally disabled for any work at the employing establishment. He concluded that appellant's diagnoses of cervical sprain, cervical radiculitis and herniated cervical disc were caused by the March 27, 2005 employment injury.

The Board therefore finds that appellant submitted new and relevant evidence not previously considered by the Office. The case will be remanded to the Office for a decision on the merits of whether she had any continuing disability due to the accepted cervical strain/sprain.[21]

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on November 8, 2006. The Office improperly denied her request for a merit review pursuant to section 8128(a) of the Act.

[20] *Id.*

[21] *Annette Louise*, 54 ECAB 783 (2003).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 8, 2006 be affirmed. The decision dated April 12, 2007 is vacated and the case remanded to the Office for proceedings consistent with this decision of the Board.

Issued: February 12, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board