United States Department of Labor
Employees' Compensation Appeals Board

E.J., Appellant	)	
and	)	**Docket No. 11-1672**
	)	**Issued: July 20, 2012**
U.S. POSTAL SERVICE, POST OFFICE, Atlanta, GA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 12, 2011 appellant filed a timely appeal from the May 19, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which terminated her compensation. Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's compensation benefits effective August 29, 2010.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The record contains a March 5, 2011 decision of the Branch of Hearings and Review which denied appellant's hearing request as untimely. She subsequently sought reconsideration before OWCP, which issued the May 19, 2011 merit denial.

FACTUAL HISTORY

On March 10, 2004 appellant, then 56-year-old flat sorter clerk, filed a traumatic injury claim alleging she hurt her right shoulder, right wrist and low back that day while bending down to push flat boxes through rollers that became stuck. OWCP accepted the claim for neck sprain and strain, right shoulder and upper arm sprain and strain and a complete rupture of the right rotator cuff. Appellant stopped work on December 3, 2004 and did not return. She underwent an authorized right shoulder arthroscopic surgery on April 12, 2005 by Dr. Howard B. Krone, a Board-certified orthopedic surgeon. OWCP paid wage-loss benefits and placed appellant on the periodic compensation rolls.

On November 22, 2005 Dr. Krone advised that appellant could return to work full time within specified physical limitations regarding her right upper extremity. He precluded lifting above shoulder level with no pushing, pulling or lifting over 10 pounds. On January 17, 2006 Dr. Krone advised that appellant was at maximum medical improvement with a full passive range of motion.

The record reflects that appellant was treated by Dr. Michael G. Hartman, a neurosurgeon, for cervical radiculopathy and degenerative lumbar disc disease. On February 2, 2006 she underwent a cervical magnetic resonance imaging (MRI) scan that revealed degenerative disc disease and spondylosis at C4-5 on the right and C6-7 on the left. Based on this finding, Dr. Hartman kept appellant off work. In response to the physician's request for authorization of cervical surgery, on March 8, 2006, an OWCP medical adviser reviewed the medical records and recommended against surgery. He noted that appellant's cervical degenerative disease had not been established as related to the accepted right shoulder injury or neck strain.

On November 6, 2006 Dr. Ralph D'Auria, an attending physician, noted that appellant was at maximum medical improvement with regards to her right shoulder but was in need of surgery for her neck condition. He advised that neurological examination of both upper extremities was normal. On December 6, 2006 Dr. D'Auria noted that diagnostic testing revealed cervical radiculopathy predominantly at C7, with multilevel degenerative changes. He stated that the cervical radiculopathy was of recent onset, within the time frame of appellant's March 10, 2004 injury. Dr. D'Auria provided work restrictions based on her right shoulder condition but noted that she remained disabled due to her cervical condition that required surgery. On March 3, 2008 in response to a question from OWCP, he advised that appellant's right shoulder condition had resolved. Dr. D'Auria stated that it was unclear whether there was any actual functional aggravation of her condition that could be demonstrated objectively. He continued appellant's disability through July 15, 2008.

By decision dated January 14, 2009, OWCP found that appellant's degenerative disc disease at C4-5 and C6-7 with cord compression at C4-5 and encroachment of the left C7 nerve root was not causally related to the March 10, 2004 injury.[3] It determined that the medical reports of Dr. D'Auria did not adequately address how appellant's preexisting cervical degenerative disc disease was caused or aggravated by the accepted injury.

[3] The record indicates that appellant did not appeal from this decision.

In March 2009, OWCP referred appellant, with a statement of accepted facts, the complete medical record and a list of questions, to Dr. Joseph C. Tatum, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an April 22, 2009 report, Dr. Tatum reviewed the history of injury and medical treatment. He noted that, following shoulder surgery on April 12, 2005, appellant was treated for cervical degenerative disc disease and surgery recommended. Dr. Tatum noted that, on examination, she stated that she did not have any pain with her right shoulder but complained of neck pain with radiation into the left upper extremity with occasional tingling but no significant weakness. Examination of the right shoulder showed active and passive abduction to 45 degrees above horizontal with tightness. Appellant revealed full internal and external rotation with excellent firm grip strength and pinch in both hands. There was no evidence of muscle atrophy in either arm. Dr. Tatum found that appellant's accepted neck and right shoulder sprain had cleared and that the right rotator cuff tear had been repaired and healed. He advised that residuals of the accepted 2004 injury had resolved without need of further medical treatment and that appellant's current complaints were due to her cervical disc disease. Dr. Tatum provided physical restrictions for full-time light-duty work.

On May 26, 2009 OWCP proposed to terminate appellant's compensation benefits based on Dr. Tatum's report. A copy of the notice was not provided to appellant's attorney.

In a June 25, 2009 letter, appellant disagreed with the proposed termination. In a June 29, 2009 report, Dr. Mark W. Feeman, an osteopath and a Board-certified physiatrist, noted a history that in the March 10, 2004 incident she was jerked forward by a malfunctioning conveyor mail sorting machine. He diagnosed right rotator cuff injury with surgical repair and cervical spondylosis without myelopathy. Dr. Feeman stated that appellant's C7 nerve root was aggravated by the work-related injury as she was jerked forward. He noted that she complained of numbness in the right upper extremity with trouble raising her right arm. Dr. Feeman noted that diagnostic testing revealed mild right neural foraminal narrowing with a disc/osteophyte complex at C6-7, cord compression at C4-5 and encroachment of the C7 nerve root. He provided an impression of chronic right shoulder pain; status post rotator cuff injury and right rotator cuff repair with residual limitation in right shoulder range of motion related to March 10, 2004 work injury; cervical spondylosis without myelopathy; cervical radiculitis aggravated by the 2004 work injury; and possible carpal tunnel syndrome. Dr. Feeman stated that appellant could return to work with restrictions, but was unable to perform her date-of-injury position.

OWCP found a conflict in medical opinion between Dr. Feeman, for appellant and Dr. Tatum, the second opinion examiner, as to the extent of disability and residuals due to the March 10, 2004 injury. It referred appellant to Dr. Bennett J. Axelrod, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a January 13, 2010 report, Dr. Axelrod reviewed the history of injury, medical treatment and set forth findings on physical examination. He noted that appellant complained predominately of pain on the right side of her neck with occasional numbness in both hands, worse on the right. Dr. Axelrod reviewed the reports of Dr. D'Auria, noting that, on November 6, 2006, he advised that appellant had full right shoulder range of motion without complaint of pain and had reached maximum medical improvement. He reviewed magnetic resonance imaging (MRI) scan testing obtained of the cervical spine on January 15, 2008, which showed degenerative disc disease with disc-osteophyte complex at C4-5 and C6-7, without evidence of neural compression at either level. Dr. Axelrod noted there was no evidence of

significant stenosis at either level and that there was no evidence for cervical fusion surgery based on these findings. He reviewed the medical records of Dr. Tatum and Dr. Feeman. On examination, Dr. Axelrod found the cervical and lumbar spines to be within normal limits as to range of motion, stability, motor strength and reflex testing. Appellant held her neck stiffly when moving about the examination room, but range of motion testing revealed at least 60 degrees lateral gaze in both directions. She also complained of pain to light pressure at the surgical incision of the right shoulder. Appellant had good grip strength bilaterally, slightly diminished on the right with no thenar or interosseous atrophy. Forment's sign and Finkelstein's test were negative bilaterally as was median compression at both wrists. Reflexes were reported.

Dr. Axelrod opined that right shoulder injury of 2004 had completely resolved following surgical repair and rehabilitation. He also found that the accepted neck strain that occurred in 2004 had also resolved. Dr. Axelrod stated that appellant's current symptoms of severe pain on the right side of her neck exceeded his expectations based on the physical examination and previous and recent radiographic studies. He found that her current neck symptoms were the result of the natural progression of preexisting underlying degenerative cervical disease and the natural aging process. Dr. Axelrod advised that no further medical treatment was needed for the accepted conditions but noted that symptoms related to the natural progression of the arthritic process in appellant's neck would continue to follow the natural progression, including gradual worsening overtime. He noted that she was not able to perform her date-of-injury position or lift 70 pounds due to her age and size.

On February 24, 2010 OWCP proposed to terminate appellant's compensation based on Dr. Axelrod's opinion. Counsel was not provided a copy of this notice.

OWCP received a March 25, 2010 letter from counsel together with a March 17, 2010 report from Dr. Feeman, who disagreed with the findings and conclusions of Dr. Tatum and Dr. Axelrod that appellant's work-related conditions had resolved. Dr. Feeman stated that appellant's cervical spondylosis and degenerative disc disease would not be in its current state without the physical stress placed on her cervical spine during the work-related incident of March 10, 2004. The work injury placed severe physical stress on her cervical spine which caused a disc-osteophyte complex at C4-5 to result in cord compression and the disc-osteophyte complex at C6-7 to result in nerve root impingement at the left C7 nerve root and also resulted in a complete rotator cuff rupture of the right shoulder. Dr. Feeman stated cord compression and nerve root impingement were not the natural progression of the arthritic process in appellant's neck, but rather new conditions directly caused by the March 10, 2004 injury that permanently aggravated her underlying cervical degenerative disc disease. He referred to a February 11, 2005 MRI scan, restricted range of motion and chronic pain over the acromioclavicular (AC) joint as residuals of the rotator cuff tear. Dr. Feeman stated that appellant's rotator cuff surgery was not 100 percent successful as confirmed by Dr. Axelrod's examination.[4]

By decision dated April 13, 2010, OWCP terminated appellant's compensation benefits effective May 9, 2010. It found the weight of the medical evidence was with Dr. Axelrod, the impartial medical specialist.

[4] The record reflects that appellant subsequently requested authorization to change attending physician's from Dr. D'Auria to Dr. Feeman.

On May 11, 2010 appellant requested an oral hearing. In a June 22, 2010 decision, OWCP's hearing representative set aside the April 13, 2010 decision as counsel was not provided a copy of the February 24, 2010 pretermination notice. OWCP was directed to reissue appropriate notice to appellant and counsel. Appellant was placed back on the periodic rolls on May 9, 2010 pending a new decision.

On June 23, 2010 OWCP reissued the notice of proposed termination which found that the weight of the medical evidence was with Dr. Axelrod.

On July 22, 2010 counsel submitted the July 20, 2010 report from Dr. Feeman, which essentially duplicated the contents of his March 17, 2010 report. Dr. Feeman stated that an April 28, 2010 right shoulder MRI scan confirmed postoperative changes after the 2005 rotator cuff repair but found no new rotator cuff tear or internal derangement. He stated that appellant met the criteria for rotator cuff syndrome because of residual range of motion deficit and severe pain over the AC joint. Dr. Feeman noted that both Dr. Tatum and Dr. Axelrod confirmed that she was unable to perform her usual job. He concluded that appellant had residuals of her work injury consisting of cervical spondylosis with myelopathy at C4-5 due to cord compression, cervical spondylosis with radiculitis at C6-7 due to nerve root impingement and rotator cuff residuals. Appellant submitted a copy of the April 28, 2010 diagnostic test of the right shoulder.

By decision dated August 5, 2010, OWCP terminated appellant's compensation benefits effective August 29, 2010. It found the weight of medical opinion represented by Dr. Axelrod.

In a January 3, 2011 letter, received by OWCP on January 13, 2011, counsel requested an oral hearing before an OWCP hearing representative. A copy of an oral hearing request form dated August 15, 2010 was also provided.

By decision dated March 15, 2011, OWCP denied appellant's request for a hearing on the grounds that it was not timely filed. It found that her request for a hearing was received on January 13, 2011, more than 30 days after issuance of the August 5, 2010 decision. OWCP additionally denied appellant's request for a hearing on the grounds that the issues involved could be addressed equally well by submitting new, relevant evidence pursuant to a request for reconsideration.

In an April 7, 2011 reconsideration request, counsel argued that Dr. Feeman supported additional diagnoses due to the work-related injury and the claim should be accepted for her cervical conditions. He contended that Dr. Feeman's March 17, 2010 report was based on a comprehensive review of appellant's medical records and supported ongoing residuals of the work injury. Counsel argued that the medical reports of Dr. Tatum and Dr. Axelrod did not support that appellant's conditions had resolved. Appellant submitted the diagnostic testing of April 28, 2010.

By decision dated May 19, 2011, OWCP denied modification of the August 5, 2010 termination decision.

LEGAL PRECEDENT

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[5] Having determined that an employee has a disability causally related to his or her federal employment, it may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[6]

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.[7] To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.[8]

Section 8123(a) of FECA provides in pertinent part: 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.[9] Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.[10]

ANALYSIS

OWCP accepted that appellant sustained a neck sprain and strain, right shoulder and upper arm sprain and strain and complete rupture of the right rotator cuff, which was surgically repaired by Dr. Krone on April 12, 2005. Appellant stopped work on December 3, 2004 and did not return. She was placed on the periodic rolls in receipt of compensation benefits.

OWCP properly determined that there was a conflict in medical opinion evidence between Dr. Feeman, for appellant and Dr. Tatum, a Board-certified orthopedic surgeon acting as an OWCP referral physician, on the issue of whether appellant continued to have disabling residuals of her March 10, 2004 employment injury.[11] In order to resolve the conflict, it properly referred appellant, pursuant to section 8123(a) of FECA, to Dr. Axelrod for an impartial medical examination and opinion on the matter.[12]

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[5] *Bernadine P. Taylor*, 54 ECAB 342 (2003).

[6] *Id.*

[7] *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *A.P.*, Docket No. 08-1822 (issued August 5, 2009).

[8] *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002); *A.P.*, *supra* note 7.

[9] 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

[10] *V.G.*, 59 ECAB 635 (2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

[11] Dr. Feeman opined that appellant had residuals from her work-related conditions and was unable to do her date-of-injury position. In contrast, Dr. Tatum opined that her work-related conditions had resolved and she could return to light-duty work due to restrictions imposed for her cervical degenerative condition.

[12] *See supra* note 7.

Dr. Axelrod was provided with appellant's medical record, a statement of accepted facts and questions to be addressed in resolving the conflict of medical opinion between Dr. Feeman and Dr. Tatum. In a January 13, 2010 report, he provided an extensive review of the medical reports of record, diagnostic tests and the differing conclusions reached by Dr. Feeman and Dr. Tatum. Dr. Axelrod also reviewed the reports of Dr. D'Auria, who had found on November 6, 2006 that appellant had full right shoulder range of motion and had reached maximum medical improvement. He set findings pertaining to the right shoulder and the cervical spine. Dr. Axelrod found that the shoulder injury had completely resolved following surgical repair and rehabilitation as had the accepted neck strain. He noted that appellant held her neck stiffly on examination but attributed her ongoing symptoms of cervical pain to the natural progression of her preexisting underlying degenerative cervical condition and natural aging process. Dr. Axelrod found that the conditions accepted by OWCP did not require further medical treatment. He opined that appellant was unable to perform her regular job, but noted that her lifting restrictions were due to her age and size.

The Board finds that Dr. Axelrod offered a medical opinion that is sound, rational and logical. He clearly advised that the residuals of appellant's accepted cervical sprain and right shoulder conditions resolved and did not require further treatment. It is well established that the opinion of an impartial medical specialist based on a proper history and sufficiently rationalized, is of special weight. The Board finds that Dr. Axelrod's opinion is entitled to special weight and resolved the conflict.[13]

Following receipt of Dr. Axelrod's report, appellant submitted the March 17 and July 20, 2010 reports from Dr. Feeman[14] who stated his disagreement with the opinion and findings of Dr. Tatum and Dr. Axelrod and opined that appellant had residuals of her work injury that necessitated work limitations. The Board has held that reports from a physician who was on one side of a medical conflict that is resolved by an impartial medical specialist, are generally insufficient to overcome the special weight accorded to the impartial examiner or to create a new conflict.[15] Dr. Feeman stated that the March 10, 2004 injury permanently aggravated appellant's underlying cervical degenerative disc disease and that her claim should be accepted for cervical spondylosis with myelopathy at C4-5 due to cord compression and cervical spondylosis and radiculitis at C6-7 due to nerve root impingement. However, these were not conditions accepted by OWCP in this case and were addressed by Dr. Axelrod.[16] Dr. Feeman also opined that appellant had ongoing residuals of the rotator cuff tear as documented in an April 28, 2010 MRI scan. The Board notes, however, that Dr. Axelrod attributed appellant's ongoing limitations in neck range of motion to her underlying degenerative disease process. Dr. Axelrod reviewed the opinion of Dr. Feeman and explained that her symptoms and complaints on examination exceeded his expectations based on the physical examination and diagnostic studies. He recommended work limitations that he noted were due to appellant's arthritic process in her neck and unrelated to the accepted injury.

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

[14] Dr. Feeman's July 20, 2010 report contains the same information as his March 17, 2010 report.

[15] *I.J.*, 59 ECAB 408 (2008).

[16] The issue of additional conditions was addressed and denied in the January 14, 2009 OWCP decision. Appellant did not timely appeal from that decision and it is not presently before the Board.

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective August 29, 2010.

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective August 29, 2010.

ORDER

IT IS HEREBY ORDERED THAT the May 19, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 20, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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