

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

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D.R., Appellant	)	
	)	
and	)	
	)	Docket No. 12-1441
	)	Issued: February 13, 2013
GENERAL SERVICES ADMINISTRATION,	)	
FEDERAL ACQUISITION SERVICE,	)	
Auburn, WA, Employer	)	
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*Appearances:*  
Howard L. Graham, Esq., for the appellant  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
RICHARD J. DASCHBACH, Chief Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On June 21, 2012 appellant, through her counsel, filed a timely appeal from a June 6, 2012 merit decision of the Office of Workers’ Compensation Programs. Pursuant to the Federal Employees’ Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the hearing representative’s June 6, 2012 decision, OWCP received additional evidence. However, the Board may only review evidence that was in the record at the time OWCP issued its final decision. *See* 20 C.F.R. § 501.2(c)(1); *M.B.*, Docket No. 09-176 (issued September 23, 2009); *J.T.*, 59 ECAB 293 (2008); *G.G.*, 58 ECAB 389 (2007); *Donald R. Gervasi*, 57 ECAB 281 (2005); *Rosemary A. Kayes*, 54 ECAB 373 (2003).

## ISSUES

The issues are: (1) whether OWCP properly rescinded its acceptance of appellant's claim for aggravation of cervical degenerative disc disease; and (2) whether OWCP met its burden to terminate compensation benefits effective November 30, 2010.

## FACTUAL HISTORY

On December 9, 2010 appellant, then a 46-year-old senior transportation operations specialist, filed an occupational disease claim alleging that on October 25, 2010 she first became aware of overuse and strain of her cervical spine and right arm. She stated that it was not until November 15, 2010 that she first realized that the conditions were due to her working on computers for extended periods of time. OWCP accepted the claim for aggravation of degenerative cervical disc disease and a recurrence of disability for the period April 13 to 17, 2011. Appellant stopped work on April 25, 2011.<sup>3</sup>

In developing various recurrence claims filed by appellant, OWCP received an April 1, 2011 report by Dr. Jason H. Thompson, a treating Board-certified orthopedic surgeon, who diagnosed cervical disc herniation, significant radiculopathy and axial neck pain. A physical examination revealed a positive Spurling sign, right arm and forearm muscle atrophy, bilateral negative Hoffman signs and restricted and painful neck motion. Dr. Thompson opined that appellant sustained a cervical strain as a result of her work injury and that the majority of her symptoms were due to her nonemployment-related cervical degenerative disc disease with C5-6 and C6-7 disc herniation. He noted that she attributed the worsening of her symptoms to being required to work eight hours on a computer. However, Dr. Thompson concluded that appellant only sustained a cervical strain. In support of this conclusion, he referenced the objective evidence, the insidious onset and the fact that there was no particular actual injury which would cause an aggravation.

In a report dated May 9, 2011, Dr. David Y.B. Chang, a treating Board-certified family practitioner, noted that appellant's current diagnoses included chronic neck pain and C5-6 lateral disc herniation and depression. He related that the stressors of dealing with her chronic neck pain and ongoing work disability issues were the cause of her depression, anxiety and insomnia. Dr. Chang stated that appellant had been referred to see Dr. Anna Wong, a Board-certified neurologist, for further evaluation of her neck condition.

In a May 9, 2011 report,<sup>4</sup> Dr. Wong reported seeing appellant that day for an evaluation of neck and arm pain. She diagnosed possible right C6 radiculopathy. A review of a January 20, 2011 magnetic resonance imaging (MRI) scan revealed possible impingement of the right C6 nerve root in C5-6 lateral recess due to focal disc bulge. Dr. Wong related that appellant continued to have intermittent right arm pain which was exacerbated by certain activities. She noted that appellant was on disability as she was unable to sufficiently perform her work duties.

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<sup>3</sup> The Office of Personnel Management approved disability retirement for appellant effective October 13, 2011.

<sup>4</sup> This is the date the report was signed by Dr. Wong.

Based on this report, appellant was referred for a second opinion evaluation with Dr. Aleksandar Curcin, a Board-certified orthopedic surgeon. In a July 30, 2011 report, Dr. Curcin, based upon a review of the medical evidence, statement of accepted facts and physical examination, concluded that appellant had no aggravation of her underlying cervical degenerative disc disease due to her work duties. A physical examination revealed 45 degrees cervical flexion, restricted cervical extension which worsens neck and right arm symptoms, dull sensation at C5-6, 7, 8 and T1 and flat reflexes at the biceps, triceps and brachioradialis. Dr. Curcin reported his examination of appellant's neck revealed cervical degenerative disc disease and resolved right upper extremity radiculopathy, which were unrelated to appellant's computer work. In support of his conclusion, he noted the lack of any objective findings supporting an aggravation. In addition, Dr. Curcin concurred with Dr. Thompson, appellant's treating physician, that she had only sustained a cervical strain which would have resolved within 6 to 10 weeks, as this is the time frame when this type of musculoligamentous condition is expected to resolve. He opined that her current condition was due to her cervical degenerative disc disease, which was not employment related and that she was capable of working full time.

On August 15, 2011 based on the reports of Dr. Thompson and Dr. Curcin, OWCP proposed to rescind acceptance of aggravation of cervical degenerative disc disease, to terminate appellant's compensation benefits on the grounds that she no longer had any residuals or disability due to her accepted employment injury.

In a letter dated September 6, 2011, appellant's counsel disagreed with the August 15, 2011 OWCP proposed decision.

By decision dated December 15, 2011, OWCP finalized the rescission of its acceptance of appellant's claim for aggravation of cervical degenerative disease and accepted the condition of cervical strain. It further terminated her wage-loss and medical compensation effective November 30, 2010 finding no work-related disability due to her accepted cervical strain.

On December 16, 2011 appellant's counsel requested an oral hearing before an OWCP hearing representative, which was held on March 15, 2012.

Following appellant's request for an oral hearing OWCP received reports for the period December 9, 2011 through May 4, 2012 from Dr. Steve Huffman, a treating Board-certified family practitioner, who diagnosed cervical degenerative disc disease with right C7 radicular symptoms. In a December 9, 2011 report, Dr. Huffman noted that she had worked as a computer administrator and that her symptoms progressed gradually over the years. In a March 22, 2012 report, he did not believe that there was a causal relationship between appellant's years of working on a computer and her degenerative disc disease.

By decision dated June 6, 2012, an OWCP hearing representative affirmed the rescission of appellant's claim for aggravation of cervical degenerative disease and the acceptance of her claim for cervical strain. She also found that appellant had no residuals or disability due to her accepted cervical strain after November 30, 2010.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his or her own motion or on application.<sup>5</sup> The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.<sup>6</sup> The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.<sup>7</sup>

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provisions, where there is good cause for so doing, such as mistake or fraud.<sup>8</sup> It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a claim. In establishing that, its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.<sup>9</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP met its burden of proof to rescind its acceptance of appellant's claim for aggravation of cervical degenerative disc disease. OWCP detailed how the reports of Drs. Curcin and Thompson showed that employment factors identified by appellant would not have caused an aggravation of her underlying cervical degenerative disc condition, but would only have caused a cervical strain.

In his April 1, 2011 report, Dr. Thompson diagnosed cervical disc herniation, significant radiculopathy and axial neck pain. He opined that appellant sustained a cervical strain as a result of her work injury and that the majority of her symptoms were due to her nonemployment-related cervical degenerative disc disease with C5-6 and C6-7 disc herniation. In support of this conclusion that she only sustained a cervical strain as a result of her work injury, Dr. Thompson referenced the objective evidence, the insidious onset of the condition and the fact that there was no particular actual injury.

Dr. Curcin also concluded that appellant had only sustained cervical strain and that her underlying cervical degenerative disc condition had not been aggravated by appellant's computer work. He indicated that he concurred with Dr. Thompson's assessment of a cervical strain, but that her underlying degenerative cervical condition had not been aggravated by the identified

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<sup>5</sup> 5 U.S.C. § 8128.

<sup>6</sup> *D.G.*, 59 ECAB 74 (2008); *L.C.*, 58 ECAB 493 (2007); *John W. Graves*, 52 ECAB 160 (2000).

<sup>7</sup> 20 C.F.R. § 10.610.

<sup>8</sup> *V.C.*, 59 ECAB 137 (2007).

<sup>9</sup> *S.R.*, Docket No. 09-2332 (issued August 16, 2010); *H.G.*, 59 ECAB 552 (2008); *John W. Graves*, *supra* note 6.

work factor. Based on the evidence submitted by Drs. Curcin and Thompson, the Board finds that OWCP met its burden of proof to rescind acceptance of aggravation of degeneration of cervical intervertebral disc. The reports from Drs. Chang and Wong are insufficient to create a conflict in the medical opinion evidence as they do not explain or discuss how appellant's cervical degenerative disease had been aggravated by her computer work.

OWCP received various reports from Dr. Huffman who diagnosed cervical degenerative disc disease with right C7 radicular symptoms but found no causal relationship between appellant's years of working on a computer and her degenerative disc disease. This report supports OWCP's rescission of acceptance of aggravation of her preexisting cervical degenerative disc disease. Appellant has not submitted any probative medical evidence establishing causal relationship between the aggravation of cervical degenerative disc disease and her employment factors.

On appeal, appellant's counsel contended that OWCP provided leading questions to Dr. Curcin. Contrary to appellant's contention, the questions posed to Dr. Curcin were appropriate. He was asked to provide his opinion on which neck conditions were found on examination, which diagnosed conditions as described in the statement of accepted facts were due to computer work and whether there was a material or temporary aggravation to the preexisting condition. Other than a general allegation, appellant has not identified how the questions OWCP provided to Dr. Curcin were leading.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>10</sup> After it has determined that an employee has disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>11</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>12</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>13</sup> To terminate authorization for medical treatment, OWCP must

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<sup>10</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>11</sup> *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

<sup>12</sup> *See J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>13</sup> *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>14</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits based on the opinion of Dr. Curcin who reviewed her employment injury and medical history and concluded that her accepted cervical strain had resolved and there had been no loss of work time. Dr. Curcin reported that her current condition was due to her preexisting degenerative disc disease and that her computer work did not cause or aggravate this condition. He opined that appellant no longer had any residuals or disability due to her cervical strain as this type of condition resolves within 6 to 10 weeks. Dr. Curcin concluded that her current condition was due to a preexisting cervical degenerative disc disease, which was unrelated to the accepted condition. He also opined that appellant was capable of working full duty.

The weight of the medical opinion is determined by the opportunity for and thoroughness of examination, the accuracy and completeness of physician's knowledge of the facts of the case, the medical history provided, the care of analysis manifested and the medical rationale expressed in support of stated conclusions.<sup>15</sup> Dr. Curcin fully discussed the history of injury and explained that there were no objective findings to establish that appellant had any employment-related residuals or disability due to a cervical strain. The Board finds that his opinion is detailed, well rationalized and based upon a complete and accurate history. Dr. Curcin's opinion represents the weight of the medical evidence. OWCP met its burden of proof to terminate medical and compensation benefits.

As noted above, appellant submitted various reports from Dr. Huffman in which he diagnosed cervical degenerative disc disease with right C7 radicular symptoms, but none of these reports attributed her condition to her work on the computer. Rather, Dr. Huffman specifically opined that her computer work did not aggravate or cause her cervical degenerative disc disease with right C7 radicular symptoms.

On appeal, appellant's counsel contends that Dr. Curcin's opinion is insufficient to support termination as two attending physician's cannot create a conflict and he did not provide a set date as to when the strain resolved. Contrary to appellant's contention, Dr. Curcin was not selected as an impartial medical examiner, but was selected to provide a second opinion report. He opined that she lost no time from work due to her cervical strain and explained that the condition would have resolved within 6 to 10 weeks. Thus, OWCP properly determined that appellant's accepted cervical strain had resolved with no residuals or disability.

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<sup>14</sup> *Kathryn E. Demarsh, id; James F. Weikel, 54 ECAB 660 (2003).*

<sup>15</sup> *See K.W., 59 ECAB 271 (2007); Ann C. Leanza, 48 ECAB 115 (1996).*

**CONCLUSION**

The Board finds that OWCP met its burden of proof to rescind acceptance of appellant's claim for aggravation of degeneration disc disease and to terminate her compensation benefits effective November 30, 2010.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 6, 2012 is affirmed.

Issued: February 13, 2013  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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