

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

N.G., Appellant

and

U.S. POSTAL SERVICE, POST OFFICE,
Alpharetta, GA, Employer

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**Docket No. 07-1809
Issued: June 4, 2008**

Appearances:

Edward M. Fitts, 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 27, 2007 appellant filed a timely appeal of a decision of the Office of Workers' Compensation Programs' hearing representative dated March 23, 2007, which affirmed the termination of his compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the appeal.

ISSUES

The issues on appeal are: (1) whether the Office properly terminated appellant's compensation benefits effective August 16, 2006; and (2) whether appellant met his burden of proof to establish that he had any disability after August 16, 2006 causally related to his August 23, 2004 employment injury.

FACTUAL HISTORY

On August 23, 2004 appellant, then a 45-year-old part-time flexible rural carrier, sustained injury when a truck ran a red light and hit his motor vehicle on the left side. He became dizzy and felt his neck stiffen. He stopped work on August 23, 2004. On September 21,

2004 his treating physician, Dr. Howard Berkowitz, a Board-certified orthopedic surgeon, opined that appellant had headaches, dizziness and visual blurring. He diagnosed cervical strain and postconcussion syndrome with headaches and recommended a neurological evaluation. The Office accepted appellant's claim for a cervical strain and he was placed on the periodic rolls.¹

An October 7, 2004 cervical magnetic resonance imaging (MRI) scan read by Dr. Hugo Falcon, a Board-certified diagnostic radiologist, revealed a left-sided disc spur complex with cord compression at C3-4 and right paracentral disc spur complex with cord compression at C6-7. October 25, 2004 electrodiagnostic studies read by Dr. Sharon L. Thompson, a radiologist, revealed probable bilateral C6, 7, 8 polyradiculopathy and right median entrapment neuropathy.

Appellant received treatment from Dr. Walter Edwards, a Board-certified orthopedic surgeon. In a May 16, 2005 report, Dr. Edwards noted appellant's history of injury and diagnosed a whiplash injury to the cervical spine. On June 24, 2005 Dr. Edwards noted that appellant presented with cervical radiculopathy and pain in the right arm, greater than the left, and opined that he would probably require surgery in view of the positive MRI scan findings. A June 28, 2005 MRI scan read by Dr. Michael I. Chaliff, a Board-certified diagnostic radiologist, revealed a small disc herniation at C3-4, C4-5 centrally and a small disc herniation at C6-7. On June 29, 2005 Dr. Edwards noted that, despite three epidural injections, appellant's neck continued to be bothersome. Appellant's disc herniation at C6-7 would eventually require surgery.² On August 29, 2005 he indicated that appellant had two epidural steroid injections which were unsuccessful and opined that appellant was unlikely to improve without surgery. He found that appellant remained totally disabled due to his neck injury.

By letter dated November 10, 2005, the Office requested additional evidence from Dr. Edwards regarding the need for surgery, especially in light of appellant's preexisting cervical condition. The Office informed appellant's physician that no cervical degenerative disc disease or herniated disc had been accepted as employment related.

In a November 11, 2005 report, Dr. Edwards opined that he was "greatly surprised by [the Office's] interpretation of the medical records." He noted that the Office had diagnosed appellant as having a cervical strain, when the medical records indicated that he had a herniated cervical disc. Dr. Edwards indicated that a cervical strain would not be visible on the MRI scan whereas a ruptured disc would be visible.

On February 28, 2006 the Office referred appellant to Dr. Harold H. Alexander, a Board-certified orthopedic surgeon, for a second opinion examination. In a March 13, 2006 report, Dr. Alexander noted appellant's history of injury and treatment and conducted an examination. He determined that appellant's subjective complaints were out of proportion to the objective findings. Dr. Alexander opined that appellant's cervical strain was related to the accepted injury, but it was unclear whether his continuing symptoms were related to the injury. He diagnosed

¹ The record reflects that appellant has preexisting cervical degenerative changes.

² Dr. Edwards also referred appellant to Dr. Charles A. MacNeill, a Board-certified pain management specialist, who provided a July 14, 2005 report, noting appellant's history and diagnosing cervical radiculopathy.

cervical strain and chronic degenerative disc disease of the cervical spine and recommended a functional capacity evaluation (FCE).³ In an April 19, 2006 report, Dr. Alexander advised the Office that he had reviewed the FCE results. He found that appellant could sit four hours daily, stand one hour daily and walk one hour daily. Dr. Alexander indicated that appellant could work in a sedentary capacity. He completed a work capacity evaluation report on May 1, 2006 and opined that appellant had reached maximum medical improvement. Dr. Alexander indicated that appellant could return to work for eight hours per day and prescribed restrictions which included sitting, reaching, reaching above the shoulder for four hours per day; walking, standing, pushing, pulling or lifting of no more than 10 pounds for one hour per day; and operating a motor vehicle for no more than one to two hours per day.

By letter dated May 10, 2006, the Office requested clarification from Dr. Alexander. In a May 22, 2006 report, Dr. Alexander opined that the cervical strain from appellant's August 23, 2004 work injury had resolved. He opined that appellant's present symptoms were the result of his preexisting cervical degenerative disc disease, which was not work related. Dr. Alexander advised that it would be unusual for a chronic cervical strain to continue for this period of time. He indicated that appellant's present neck symptoms were related to his preexisting condition. Furthermore, Dr. Alexander opined that he did not believe that the work injury worsened the preexisting condition.

In a May 24, 2006 report, Dr. Edwards noted that appellant presented with blurred vision, vertigo, neck pain in the right shoulder and numbness in the right arm and hand, back pain radiating into the right leg and foot with pain and numbness. He indicated that he was unaware of appellant's current status and recommended a second opinion.

On July 10, 2006 the Office issued a notice of proposed termination of compensation. It found that the weight of the medical evidence was represented by the report of Dr. Alexander and established that the residuals of the work injury of August 23, 2004 had ceased.

On July 31, 2006 appellant's representative contended that appellant had been examined on August 20, 2004, three days prior to his work-related injury. The examination noted that his neck was supple, with no nodes, extremities or abnormalities. Appellant alleged that he did not have any of the diagnosed disc herniations prior to his work injury. He submitted a copy of the August 20, 2004 report, from Dr. Martin A. Dixon, a Board-certified family practitioner and an osteopath. Dr. Dixon noted that appellant was in for his physical and indicated that he had a history of tobacco use and rectal bleeding.

By decision dated August 16, 2006, the Office terminated appellant's compensation benefits effective that date. The Office found that the weight of the medical evidence was represented by Dr. Alexander and supported that appellant had no further disability or need for medical treatment causally related to the injury on August 23, 2004.

By letters dated August 29, 2006, appellant's representative requested a hearing which was held on January 24, 2007. The Office received additional evidence including copies of reports previously submitted. In an October 23, 2006 report, Dr. Edwards opined that appellant's

³ The record reflects that this was performed on April 17, 2006.

“problems have resulted from the accident that I previously saw him for on May 16, 2005. Apparently, appellant suffered a motor vehicle accident on August 23, 2004 as a postal carrier and had a severe motor vehicle accident with neck and back injuries at that time.” Dr. Edwards recommended additional testing such as a bone scan and repeat MRI scan to see if there was further deterioration of the disc injured in the accident.

In a January 8, 2007 report, Dr. Howard I. Levy, a Board-certified orthopedic surgeon, diagnosed cervical radiculopathy and recommended a root block at C7. In a January 17, 2007 operative report, he noted that appellant underwent a right C7 cervical root sleeve injection for cervical radiculopathy. In a February 12, 2007 report, Dr. Levy opined that he “did not understand why appellant was released from his workers’ compensation and not given anymore benefits.” He advised that, “if the accident caused [appellant] to have his symptoms then he certainly should have the benefits and it would appear that certainly is the case; however, I have no specific evidence to show for that.” Dr. Levy recommended a FCE to determine appellant’s capacity for work.

By decision dated March 23, 2007, the Office hearing representative affirmed the Office’s August 16, 2006 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁴ Having determined that, an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁵

Section 8123(a) of the Federal Employees’ Compensation Act 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.⁶ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁷

ANALYSIS -- ISSUE 1

The Office accepted appellant’s claim for cervical strain. On August 16, 2006 the Office terminated appellant’s compensation benefits, effective that date, finding that the weight of the medical opinion evidence rested with Dr. Alexander, the second opinion physician, who opined that appellant’s accepted conditions had resolved.

⁴ *Curtis Hall*, 45 ECAB 316 (1994).

⁵ *Jason C. Armstrong*, 40 ECAB 907 (1989).

⁶ 5 U.S.C. § 8123(a).

⁷ *William C. Bush*, 40 ECAB 1064, 1075 (1989).

However, the Board notes that, at the time of the Office's March 23, 2007 termination decision, there was a conflict in the medical evidence between, the second opinion physician, Dr. Alexander, a Board-certified orthopedic surgeon, who opined that appellant's August 23, 2004 work injury had resolved, and Dr. Edwards, a Board-certified orthopedic surgeon and treating physician, who opined that appellant's condition continued. Both physicians examined appellant and reviewed multiple medical records in support of their opinions.

Dr. Edwards submitted several reports in which he advised the Office that appellant's cervical strain condition continued. In a May 16, 2005 report, he noted appellant's history of injury and diagnosed a whiplash injury to the cervical spine culminating in herniated disc. In subsequent reports Dr. Edwards indicated that appellant's condition continued, that he remained disabled and that surgery would be necessary.

In contrast, Dr. Alexander, in his March 13 and April 19, 2006 reports, diagnosed a resolved cervical strain and chronic degenerative disc disease of the cervical spine. He recommended an FCE and provided restrictions for returning to work eight hours per day. On May 22, 2006 Dr. Alexander opined that appellant's cervical strain had resolved and that his present symptoms were solely related to his preexisting degenerative disc disease, which was not work related.

The Board finds that the opinions of Drs. Alexander and Edwards are in conflict as to whether appellant had any continuing residuals or disability resulting from the accepted injury. As this conflict existed at the time the Office terminated benefits on August 16, 2006, the Office did not meet its burden of proof in terminating such benefits. Consequently, the Office's termination of benefits must be reversed.⁸

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation benefits on the grounds that he had no further disability or need for medical benefits due to his August 23, 2004 work injury.

⁸ In light of the Board's finding on the first issue, the second issue is moot.

ORDER

IT IS HEREBY ORDERED THAT the March 23, 2007 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 4, 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