United States Department of Labor
Employees' Compensation Appeals Board

J.F., Appellant	)	
and	)	**Docket No. 08-1182**
	)	**Issued: June 18, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Waco, TX, Employer	)	

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

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 30, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs hearing representative' decision dated December 17, 2007, which affirmed the Office's July 30, 2007 decision that terminated her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office properly terminated appellant's compensation benefits effective July 30, 2007.

FACTUAL HISTORY

On February 5, 2003 appellant, then a 57-year-old clerk, filed a traumatic injury claim alleging that on that same date she fell out of a chair with rollers and injured her right wrist and arm, in the performance of duty. She did not stop work; however she returned to a modified position.[1] The Office accepted appellant's claim for lumbar strain, cervical strain, right shoulder

[1] File No. xxxxxx571.

strain, right knee strain, left foot contusion and aggravation of carpal tunnel syndrome. Appellant underwent right shoulder arthroscopy and subacromial decompression on October 16, 2003. She received appropriate compensation benefits including wage-loss compensation for periods of disability.[2]

The record reflects that on February 10, 2005, Dr. Anthony Hicks, a Board-certified internist, advised that appellant could return to work with restrictions for six hours per day. He indicated that her conditions remained employment related as Dr. Hicks continued to recommend modified duty. On April 1, 2005 he placed appellant off work, pending chronic pain intervention. Appellant was returned to modified duty and accepted a modified position on October 3, 2005. Dr. Hicks continued to treat appellant and place her on modified restrictions.

The Office continued to develop the claim and by letter dated December 14, 2005, referred appellant for a second opinion, along with a statement of accepted facts, a set of questions and the medical record to Dr. Robert Chouteau, an orthopedic surgeon and osteopath for a second opinion examination. In a report dated on December 27, 2005, Dr. Chouteau noted appellant's history of injury and treatment. He opined that appellant was able to return to work on a full-time basis without restrictions. Dr. Chouteau advised that there were no residuals of the work-related conditions.

On January 19, 2006 the Office found that Dr. Chouteau's report created a conflict with the opinion of appellant's attending physician, Dr. Hicks on the issues of the nature and extent of any ongoing residuals of the work injury and appellant's ability to work.

On February 8, 2006 the Office referred appellant along with a statement of accepted facts and the medical record to Dr. Robert Holladay, a Board-certified orthopedic surgeon, for an impartial medical evaluation to resolve the conflict in medical opinion regarding the resolution of appellant's accepted condition and work restrictions.

In a March 3, 2006 report, Dr. Holladay, noted appellant's history of injury and treatment. He opined that there were no residuals of the accepted injuries and advised that she was capable of returning to work for eight hours a day and advised that she had mild limitations of reaching and working overhead.

In a March 21, 2006 report, Dr. Hicks requested authorization for treatment with percutaneous neuromodulation therapy.

In an April 3, 2006 report, Dr. Holladay stated that he was asked to clarify his prior report regarding appellant's ability to work. He opined that she was able to work for eight hours per

[2] On November 27, 2006 appellant filed a claim for a November 16, 2006 traumatic injury where she injured her right shoulder while lifting a file. The Office accepted the claim for right shoulder and upper arm sprains. File No. xxxxxx618. It doubled this claim with File No. xxxxxx571 on July 17, 2007 after it issued pretermination notice on June 26, 2007, with regard to terminating benefits relative to the February 5, 2003 injury, but before it terminated benefits on July 30, 2007. Consequently, to the extent that the Office intended to terminate benefits for both the February 5, 2003 and November 16, 2006 injuries, appellant was not afforded pretermination notice required under Office procedures. *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.6 (a) (March 1997). Thus, the Office's termination decision only pertains to the February 5, 2003 injury.

day with some overhead and reaching restrictions. Dr. Holladay advised that appellant's restrictions were not from her employment injury but were due to "her current disease of life conditions." The Office proposed to terminate appellant's benefits on April 6, 2006.

By letter dated April 21, 2006, the Office advised appellant that a telephone call was made to Dr. Holladay requesting clarification with regard to appellant's work restrictions in view of the physician's opinion that work-related injury had resolved.

By decision dated May 9, 2006, the Office terminated appellant's compensation and medical benefits effective May 13, 2006. It found that, based on the weight of medical evidence, appellant was capable of working eight hours a day without restrictions.

In a report dated May 2, 2006, Dr. Hicks disagreed with Dr. Chouteau and opined that appellant suffered from significant physical pain complaints and significant physical limitations.

Appellant requested a hearing that was held on January 25, 2007. She questioned the validity of Dr. Choteau and Dr. Holladay's reports. Appellant alleged that they had several actions taken against them. In a letter dated February 7, 2007, she informed the Office that she believed that Dr. Holladay's report should not be utilized because the Office contacted him by telephone to clarify his opinion and persuaded him to change his report.

By decision dated March 14, 2007, the Office hearing representative vacated the Office's May 9, 2006 decision. She found that the Office did not follow its procedures when it improperly requested clarification from the impartial medical examiner by telephone and determined that the report of Dr. Holladay should be disqualified. The Office hearing representative remanded the case to the Office with instructions to reinstate appellant's compensation and benefits and to arrange for a new impartial examination to resolve the conflict.

In an April 13, 2007 report, Dr. Hicks continued to recommend restrictions for work. He continued to treat appellant and submit reports in which he advised continued restrictions.

On May 7, 2007 the Office referred appellant along with a statement of accepted facts and the medical record to Dr John Sklar, Board-certified in physical medicine and rehabilitation, for an impartial medical evaluation to resolve the conflict in opinion between Dr. Choteau and Dr. Hicks.

In a June 19, 2007 report, Dr. Sklar noted appellant's history of injury and treatment. He examined appellant and reported findings which included widespread generalized tenderness to palpation, which was severe in the bilateral shoulder girdles, trapezeii, posterior cervical region, right shoulder and right lateral forearm with mild to moderate tenderness in those areas on the left. Dr. Sklar also noted that appellant's shoulder range of motion was decreased in a symmetrical pattern bilaterally with 145 degrees of abduction on the right and left and deep tendon reflexes which were intact and symmetrical. He noted that the physical examination was consistent with the diagnosis of fibromyalgia with predominant right shoulder and upper extremity symptoms. Dr. Sklar explained that appellant had generalized loss of motion involving both shoulders not just her injured right shoulder and opined that this "suggests that the previous right shoulder injury has now resolved and that her ongoing complaints are due to generalized chronic myofascial pain which is not a result of her compensable injuries." He

opined that appellant's current complaints were not due to her alleged compensable injuries which had resolved. Dr. Sklar explained that the current complaints were due to "fibromyalgia which is a disease of life not the effects of her compensable injuries. As such, then, in relation to [appellant's] compensable injuries I find no reason why she is not currently working on full duty without restrictions." He further noted that appellant's employment injury had resolved that her current condition would not preclude her working on full duty without restrictions.

On June 26, 2007 the Office proposed to terminate appellant's compensation benefits on the basis that the weight of the medical evidence, as represented by the report of Dr. Sklar, established that the residuals of the February 5, 2003 work injury had ceased.

On July 22, 2007 appellant questioned Dr. Sklar's findings and alleged that the Office had a "vendetta" to terminate her benefits. She also questioned the diagnosis of fibromyalgia and alleged that, if she did have fibromyalgia, her physician would have diagnosed her. Appellant asserted that, if she had fibromyalgia, it was caused by the February 5, 2003 traumatic injury. The Office also received a December 12, 2006 magnetic resonance imaging (MRI) scan of the right shoulder read by Dr. Howard Klaskin, a Board-certified diagnostic radiologist, which revealed rotator cuff tendinopathy without convincing evidence for tear and anterior cruciate acromioclavicular joint arthritic changes and Type III acromion. A June 19, 2007 MRI scan of the cervical spine read by Dr. James Remkus, a Board-certified diagnostic radiologist, revealed findings to include a diffuse disc bulge at C4-5 and foraminal narrowing and an annual disc bulge without foraminal encroachment at C6-7. In a February 13, 2007 report, Dr. Linden Dillin, a foot and ankle surgeon, diagnosed right cervical radiculopathy and right shoulder impingement, possible rotator cuff tear. He advised that appellant was on limited duty. The Office also received reports from Dr. Hicks, dated June 22 and July 13, 2007, wherein he continued to place appellant on limited duty.

By decision dated July 30, 2007, the Office terminated appellant's compensation benefits effective July 30, 2007.

On August 21, 2007 appellant requested an examination of the written record. The Office also continued to receive reports from Dr. Hicks, wherein he continued to advise restricted duty. In his August 10, 2007 report, Dr. Hicks repeated his previous restrictions and which included no lifting over 10 pounds and opined that appellant was on permanent modified duty.

By decision dated December 17, 2007, the Office hearing representative affirmed the Office's July 30, 2007 decision.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[3] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation

[3] *Curtis Hall*, 45 ECAB 316 (1994).

without establishing either that the disability has ceased or that it is no longer related to the employment.[4]

The Federal Employees' Compensation Act[5] provides that if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[6] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

ANALYSIS

The Office determined that a conflict of medical opinion existed regarding the resolution of appellant's accepted condition and her work restrictions based on the opinions of Dr. Hicks, her physician, who supported an ongoing employment-related condition and disability and Dr. Choteau, an Office referral physician, who opined that the employment-related condition had resolved. Therefore, it properly referred appellant to Dr. Sklar, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.[8]

In his June 19, 2007 report, Dr. Sklar noted examining appellant and reported findings which included widespread generalized tenderness to palpation, which was severe in the bilateral shoulder girdles, trapezeii, posterior cervical region, right shoulder and right lateral forearm with mild to moderate tenderness in those areas on the left. He concluded that appellant's findings were consistent with fibromyalgia in the right shoulder and upper extremity. Dr. Sklar explained that because appellant had generalized loss of motion effecting both shoulders and not just her injured right shoulder, this supported that her right shoulder injury had resolved and that her ongoing complaints were "due to generalized chronic myofascial pain which is not a result of her compensable injuries." He opined that appellant's current complaints were due to "fibromyalgia which is a disease of life not the effects of her compensable injuries." Dr. Sklar concluded that there was "no reason why she is not currently working on full duty without restrictions." He further noted that appellant's employment injury had resolved. The Board finds that Dr. Sklar analyzed the case record and provided his own findings on examination to support his conclusion

[4] *Jason* C. *Armstrong*, 40 ECAB 907 (1989).

[5] 5 U.S.C. §§ 8101-8193, 8123(a).

[6] *Id*. at § 8123(a); *Shirley Steib*, 46 ECAB 309, 317 (1994).

[7] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[8] Appellant was initially referred to Dr. Holladay. However, Dr. Holladay's opinion was properly excluded as the Office had an improper oral communication with him regarding a disputed issue, clarification of his opinion that work-related residuals had resolved. *Samuel Theriault*, 45 ECAB 586 (1994) (the Office is only required to exclude medical reports where the Office has had telephone contact with the impartial physician); *see Carlton L. Owens*, 36 ECAB 608 (1985) (oral communications between the Office and the impartial medical specialist on disputed issues should not occur, as it undermines the appearance of impartiality).

regarding appellant's accepted conditions.[9] He also addressed, in detail, whether appellant's disability and residuals from her right shoulder condition had resolved. Dr. Sklar also explained that appellant's current complaints were not from her accepted injuries. The Board finds that Dr. Sklar's opinion is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight[10] and establishes that there were no ongoing residuals of appellant's work injury of February 5, 2003.

In these circumstances, the Office properly accorded special weight to the impartial medical examiner's June 19, 2007 findings.

Appellant did not submit sufficient medical evidence to overcome the weight of Dr. Sklar's opinion or create a new conflict. She submitted additional reports from Dr. Hicks, who continued to opine that she had restrictions and was limited in her ability to work. However, Dr. Hicks essentially reiterated previously stated findings and conclusions regarding appellant's condition. As this physician was on one side of the conflict that had been resolved, the additional reports, in the absence of any new findings or rationale, were insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[11]

The record also contains diagnostic reports dated December 12, 2006 and June 19, 2007 and a February 13, 2007 report from Dr. Dillin. However, these reports do not specifically support that appellant had a continuing work-related condition. Consequently, these reports are of limited probative value.

Consequently, the weight of the medical evidence rests with Dr. Sklar and establishes that appellant had no continued disability or residuals due to her accepted conditions from the February 5, 2003 injury and, therefore, the Office met its burden of proof to terminate her compensation benefits.[12]

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective July 30, 2007.

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[9] *See Naomi Lilly*, 10 ECAB 560 (1959) (the opportunity for and thoroughness of examination, the accuracy and completeness of the doctor's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are factors which enter into the weight of an evaluation).

[10] *See Y.A.*, 59 ECAB ___ (Docket No. 08-254, issued September 9, 2008) (when a case is referred to an impartial medical specialist for the purpose of resolving a conflict in medical opinion, the opinion of such specialist, if sufficiently well rationalized and based on a proper background, must be given special weight).

[11] *See Jaja K. Asaramo*, 55 ECAB 200 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003).

[12] Appellant submitted additional evidence on appeal. However, the Board may not consider this evidence as its review of the case is limited to the evidence of record which was before the Office at the time of its final decision. *See* 20 C.F.R. § 501.2(c).

ORDER

IT IS HEREBY ORDERED THAT the December 17, 2007 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: June 18, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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