

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

M.G., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Orlando, FL, Employer**

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**Docket No. 11-882
Issued: November 9, 2011**

Appearances:
Ronald S. Webster, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 22, 2011 appellant, through her attorney, filed a timely appeal of the November 18, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her compensation benefits. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective April 6, 2010 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injury.

On appeal, counsel contends that OWCP engaged in physician shopping and that it should have given weight to the medical opinion of the initial impartial medical examiner, who supported that appellant sustained consequential cervical conditions causally related to her

¹ 5 U.S.C. § 8101 *et seq.*

accepted employment-related injury. He further contended that the medical reports of the second impartial medical specialist were insufficient to constitute the weight of opinion because the physician failed to adequately respond to OWCP's questions regarding causal relationship.

FACTUAL HISTORY

This case has previously been before the Board.² In an August 24, 2006 decision, the Board reversed a December 15, 2005 OWCP decision, which terminated appellant's compensation benefits on the grounds that she no longer had any residuals or disability causally related to her accepted March 26, 2002 employment-related injury. The Board found that a conflict in the medical opinion evidence was created between Dr. David B. Lotman, a second opinion referral physician, and Dr. Richard L. Smith-Sanchez, an attending physician, as to whether she had any continuing employment-related residuals or disability. The facts from the prior decision are hereby incorporated by reference.³

By letter dated January 8, 2007, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Shafaat Ahmed, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict in medical opinion.

On February 13, 2007 the employing establishment submitted a report and DVD depicting appellant's activities which it contended were significantly inconsistent with a claim for total disability. The DVD showed her walking, standing, driving, entering and exiting her vehicle, sitting, lifting/carrying, twisting, kneeling, bending and gardening in her yard on numerous occasions on September 4, 2006 and January 22, 24, 27, 29, 31 and February 5 and 7, 2007. Appellant showed no sign of incapacitation or restrictive movement. She did not wear a neck or back brace during the noted observations.

On February 15, 2007 OWCP requested that Dr. Ahmed also review the investigative DVD and report prior to his scheduled examination.

In a February 23, 2007 medical report, Dr. Ahmed reviewed a history of the April 17, 1997 and March 26, 2002 employment injuries, a March 2000 motor vehicle accident at work and appellant's medical, family, social and educational background. He noted her complaint of neck pain which radiated up to her left upper extremity and down to her hand and digits with numbness and tingling. Dr. Ahmed listed his findings on physical and neurological examination of cervical and lumbar spines. He reviewed diagnostic test results which included a cervical and thoracic x-ray, a cervical computerized tomography scan and magnetic resonance imaging (MRI) scan and electromyogram (EMG). The MRI scan showed degenerative changes and disc bulges at C3-4, C4-5, C5-6 and C6-7 and mild scoliosis. The EMG was normal. Dr. Ahmed advised that appellant had an acceleration hyperextension injury with acute musculo ligamentous cervical

² Docket No. 06-1092 (issued August 24, 2006).

³ OWCP accepted that on March 26, 2002 appellant, then a 49-year-old rural route carrier, sustained a cervical strain when she reinjured her neck as she swerved to avoid a car backing out of a driveway. Appellant stopped work on March 28, 2002. Prior to the instant claim, it accepted that she sustained a cervical sprain on April 17, 1997 as a result of a motor vehicle accident while in the performance of duty under File No. xxxxxx606.

and trapezial strain, cervical radiculitis and post-traumatic headache syndrome with a history of migraines due to her April 17, 1997 employment injury. Appellant's April 17, 1997 employment injury was exacerbated by an improved, but continuing cervical pain and probable radiculitis and headaches due to the March 2000 injury. The April 17, 1997 employment injury was further exacerbated by musculo ligamentous and cervical strain, radiculitis and spondylosis with degenerative discogenic and foraminal encroachment pathology.

By letter dated November 5, 2007, OWCP requested that Dr. Ahmed address whether appellant's current disability was due to her preexisting cervical conditions, whether her April 17, 1997 and March 26, 2002 employment injuries had resolved and whether she had any work restrictions due to the accepted injuries.

In an April 23, 2008 report, Dr. Ahmed reviewed the investigative DVD and stated that, based on the quality of the DVD, it was unknown whether appellant performed the observed activities while taking medication such as analgesics or muscle relaxants. The DVD may have raised some doubts about her physical functional ability and impairment. Dr. Ahmed recommended reevaluation as appellant may have benefited from additional medical treatment.

By letter dated September 4, 2008, OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Robert W. Elkins, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an October 1, 2008 report, Dr. Elkins obtained a history of the April 17, 1997 and March 26, 2002 employment injuries and a March 2000 motor vehicle accident and appellant's medical treatment. He noted her complaints of pain in her neck and left wrist and trapezius that went down to her forearm and fingers. Appellant also complained about numbness in her left arm. Dr. Elkins reviewed the employing establishment's investigative DVD. On physical examination, he reported decreased range of motion in the neck and bilateral shoulders which may have been voluntary. The elbow, wrist and hand had full range of motion. There was mild generalized tenderness in the neck, shoulder, scapula, arm, forearm and trigger points. There was decreased sensation to pin wheel in the entire left upper extremity which was nonphysiologic in nature. Shoulder strength in general was 4/5, biceps strength was 3/5 and grip and pinch strength was 4/5. Reflexes were equal at +2 at the biceps, triceps and brachial radialis. Dr. Elkins did not examine appellant's back, since she had been referred to him for examination of her neck only. Appellant's claim had only been accepted for neck problems. Dr. Elkins reported ancillary test results regarding her bilateral hands, pain and depression. He diagnosed chronic neck pain, pain syndrome and mild to moderate symptom magnification and pain accentuation. Dr. Elkins stated that appellant had multiple car injuries and the last two accidents did not involve collisions, just jerking of the neck. He reviewed the results of an MRI scan which showed neural foraminal stenosis at C4-5 and C6-7 with bilateral neural foraminal stenosis at C5-6. Appellant had possible depression and exaggeration of symptomatology.

Dr. Elkins noted that appellant's last two accidents were minimal in nature, but involved an extraordinarily long recovery period. He advised that she had underlying degenerative arthritic changes in her neck. Dr. Elkins opined that appellant's employment-related cervical strain had resolved and she had no residuals of the accepted condition. He stated that her symptomatology appeared to be related to degenerative arthritic changes, narrowing foraminal

stenosis and discogenic degeneration. Dr. Elkins further stated that the most recent MRI scans revealed no herniated discs.

On March 3, 2009 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Elkins' medical opinion.

In reports dated March 9 and 23 and April 7, 2009, Dr. Eugene A. Melvin, Jr., a Board-certified anesthesiologist, advised that appellant had depression, gastroesophageal reflux disease, hypertension, hypothyroidism, mitral valve prolapse, left splenius capitis myofasciitis/occipital neuralgia, left levator scapulae tendinitis, bilateral C4-7 facet osteoarthropathy, left superior cluneal neuralgia, bilateral lumbar facet osteoarthropathy at L1-2, L2-3, L3-4, L4-5 and L5-S1, left sacroiliac arthropathy, lumbar postoperative spine surgery syndrome and lumbago, left arm numbness and cervicalgia.

Diagnostic test reports dated March 9, 2009 contained the typed name of Dr. Paul T. Wadina, a Board-certified radiologist. An x-ray of the cervical spine showed no fracture or subluxation. An x-ray of the lumbar spine showed postoperative changes, but was otherwise negative.

An unsigned report dated March 9, 2009, listed essentially normal physical examination findings and stated that appellant did not have subluxation.

In a May 15, 2009 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective June 7, 2009. It found that Dr. Elkins' opinion represented the weight of the medical evidence in establishing that she no longer had any residuals or disability causally related to her accepted employment injuries.

On May 26, 2009 appellant, through her attorney, requested a telephone hearing.

In a December 23, 2009 decision, an OWCP hearing representative set aside the May 15, 2009 decision and remanded the case to OWCP to obtain a supplemental report from Dr. Elkins addressing whether the diagnosed cervical conditions were caused, aggravated, precipitated or accelerated by the April 17, 1997 employment injury.

On January 14, 2010 OWCP requested that Dr. Elkins clarify his opinion.

In a February 18, 2010 report, Dr. Elkins advised that appellant's persistent changes were related to degenerative arthritic changes in her neck. Appellant had multiple accidents and there had never been any significant disc herniations. An early EMG was negative, but she continued to have neck pain, arthritis and radiculitis. Dr. Elkins advised that appellant had a temporary exacerbation of her symptomatology after each automobile accident. However, each exacerbation had resolved. Appellant was left with degenerative arthritis in her neck which was mostly age related and had not been accepted by OWCP. Based solely on the statement of accepted facts, Dr. Elkins advised that the accepted cervical sprain/strain had resolved. He stated that this condition usually lasted three to an outside time limit of six months. Dr. Elkins noted that the April 17, 1997, March 2000 and March 26, 2002 employment injuries exacerbated appellant's constant neck pain. Appellant's condition seemed to stabilize although she continued with treatment. Dr. Elkins noted that some of this treatment was for symptomatic conditions

with a high self-pain image, which was exaggerated based on the investigative DVD. He concluded that the March 26, 2002 employment-related injury and aggravation resolved by March 8, 2005 when there was no essential change in appellant's MRI scan.

On March 5, 2010 OWCP issued a notice of proposed termination of appellant's wage-loss compensation and medical benefits based on Dr. Elkins' reports. It gave her 30 days to submit rebuttal evidence. Appellant did not respond.

In an April 6, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the weight of the medical opinion evidence rested with Dr. Elkins' reports.

By letter dated April 19, 2010, appellant, through her attorney, requested a telephone hearing. In an August 16, 2010 letter, counsel contended that Dr. Elkins' February 18, 2010 report incorrectly assumed that she had chronic neck pain and lumbar conditions prior to the April 17, 1997 employment injury. He further contended that Dr. Elkins did not address the questions of whether appellant had any preexisting conditions that were aggravated by the accepted employment injuries and whether the aggravation was temporary or permanent in nature.

In a November 18, 2010 decision, an OWCP hearing representative affirmed the April 6, 2010 decision, terminating appellant's compensation. He found that Dr. Elkins' opinion constituted the weight of the medical evidence in establishing that she no longer had any residuals or disability causally related to her accepted injuries.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁴ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.⁶

Section 8123(a) of FECA 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.⁷ When there exists opposing

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

⁵ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁶ *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

⁷ 5 U.S.C. § 8123(a).

medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁸

In a situation where OWCP secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, OWCP has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion. If the specialist is unwilling or unable to clarify and elaborate on his or her opinion, the case should be referred to another appropriate impartial medical specialist.⁹

ANALYSIS

The Board previously reversed OWCP's termination decision on the grounds that there was an unresolved conflict in the medical opinion evidence between Dr. Lotman, an OWCP referral physician, and Dr. Smith-Sanchez, an attending physician, regarding whether appellant continued to have any residuals and disability due to her accepted cervical strain. The Board remanded the case to OWCP to refer her to an impartial medical specialist to resolve the conflict in medical opinion.

On remand, OWCP obtained an impartial medical opinion from Dr. Ahmed pursuant to the Board's decision. In a February 23, 2007 report, Dr. Ahmed set forth findings on examination and reviewed the medical record, including results of prior diagnostic testing and the investigative DVD. He noted that appellant sustained employment-related cervical injuries on April 17, 1997, March 2000 and March 26, 2002. Dr. Ahmed reviewed diagnostic testing of the cervical spine and found degenerative changes and disc bulges at C3-4, C4-5, C5-6 and C6-7 and mild scoliosis. He advised that appellant had an acceleration hyperextension injury with acute musculoligamentous cervical and trapezial strain, cervical radiculitis and post-traumatic headache syndrome with a history of migraines due to the April 17, 1997 employment injury. Dr. Ahmed further advised that the April 17, 1997 employment injury was exacerbated by an improved, but continuing cervical pain and probable radiculitis and headaches due to the March 2000 injury. He concluded that the April 17, 1997 employment injury was also exacerbated by musculoligamentous and cervical strain, radiculitis and spondylosis with degenerative discogenic and foraminal encroachment pathology.

On November 5, 2007 OWCP requested that Dr. Ahmed clarify his opinion addressing whether appellant's current disability was due to her preexisting cervical conditions, whether her April 17, 1997 and March 26, 2002 employment injuries had resolved and whether she had any work restrictions due to the accepted injuries. In an April 23, 2008 report, Dr. Ahmed advised that it was unknown as to whether she performed the observed activities while taking medication such as analgesics or muscle relaxants based on his review of the investigative DVD. He recommended reevaluation because the quality of the DVD raised doubts about appellant's

⁸ See *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁹ See *Phillip H. Conte*, 56 ECAB 213 (2004); *Guiseppe Aversa*, 55 ECAB 164 (2003).

physical functional ability and impairment. The Board finds that, as Dr. Ahmed declined to clarify his medical opinion, OWCP properly referred the case record to Dr. Elkins for a second impartial evaluation.¹⁰

In an October 1, 2008 report, Dr. Elkins found that residuals of appellant's employment-related cervical strain had ceased. He reviewed the investigative DVD. Dr. Elkins provided an extensive review of appellant's medical history and reported his examination findings. He found decreased range of motion in the neck and bilateral shoulders, which may have been voluntary and decreased strength in the entire left upper extremity which was nonphysiologic in nature. Dr. Elkins also found mild generalized tenderness in the neck, shoulder, scapula, arm, forearm and trigger points. He reviewed cervical MRI scans which revealed neural foraminal stenosis at C4-5 and C6-7 with bilateral neural foraminal stenosis at C5-6 and no herniated discs. Dr. Elkins stated that appellant had chronic neck pain, pain syndrome and mild to moderate symptom magnification and pain accentuation. He advised that she had possible depression and exaggeration of symptomatology. Dr. Elkins concluded that appellant's symptomatology appeared to be related to degenerative arthritic changes, narrowing foraminal stenosis and discogenic degeneration.

In response to OWCP's request to clarify whether the diagnosed cervical conditions were caused, aggravated, precipitate or accelerated by the employment injury, Dr. Elkins reported on February 18, 2010 that appellant's persistent cervical changes were related to her degenerative arthritis, noting that this condition had not been accepted by OWCP. He stated that this condition was mostly age related. Dr. Elkins noted that an EMG study was negative. He advised that the employment injuries temporarily exacerbated appellant's symptomatology. Dr. Elkins, however, stated that each exacerbation had resolved. He related that although appellant continued to undergo treatment for her condition, the condition had stabilized. Dr. Elkins further related that her high self-pain image was exaggerated based on his review of the investigative DVD. He concluded that the March 26, 2002 employment injury and aggravation had resolved by March 8, 2005 as there were no essential changes in the MRI scan evidence.

The Board finds that Dr. Elkins' opinion is sufficient to establish that the accepted cervical strain resolved without residuals. Dr. Elkins based his opinion on a statement of accepted facts and the complete medical record. He provided extensive medical rationale explaining that the exacerbations of the accepted condition were temporary in nature and had ceased. The Board finds that Dr. Elkins' opinion is well rationalized and based on a complete, accurate factual and medical history. Therefore, OWCP properly accorded his opinion special weight in terminating appellant's compensation benefits.¹¹ Its termination of her medical and wage-loss compensation benefits was proper under the facts and the circumstances of this case.

Dr. Melvin's reports did not address whether the diagnosed cervical conditions were causally related to the accepted April 17, 1997 and March 26, 2002 injuries. Medical evidence which does not offer any opinion regarding the cause of an employee's condition is of limited

¹⁰ *Id.*

¹¹ *Supra* note 8.

probative value on the issue of causal relationship.¹² The Board finds, therefore, that Dr. Melvin's reports are of limited probative value in establishing that appellant has any residuals or disability causally related to the accepted injuries.

The diagnostic test reports which contained the typed name of Dr. Wadina and the unsigned report dated March 9, 2009 have no probative value in establishing that appellant has any continuing employment-related residuals or disability, as it is not clear whether a physician under FECA prepared the reports. It is well established that medical evidence lacking proper identification is of no probative medical value.¹³

On appeal, appellant contended that OWCP engaged in "[physician] shopping" when it referred her for a second impartial medical examination. FECA and the Board precedent provide that OWCP has the authority to develop the medical evidence as it deems necessary. There is no evidence that OWCP acted improperly in referring appellant to Dr. Elkins.¹⁴ OWCP referred her to Dr. Elkins because Dr. Ahmed, the first impartial medical specialist, was unable to determine the extent of her employment-related disability based on his review of the investigative DVD and that because this may have raised some doubts as to appellant's functional ability and impairment, Dr. Elkins recommended reevaluation.

Appellant also contended that Dr. Elkins' medical reports were not entitled to the weight of the medical opinion evidence because he failed to adequately respond to OWCP's questions regarding the causal relationship between her current conditions and accepted injury. However, as explained above, Dr. Elkins provided a well-rationalized opinion based on a complete background, his review of the accepted facts and the medical record and his examination findings. Dr. Elkins' opinion that appellant does not have any residuals of her accepted injury is entitled to special weight and represents the weight of the evidence.¹⁵

There is no other medical evidence contemporaneous with the termination of appellant's benefits which supports that she has any continuing residuals or disability from her employment-related condition. OWCP, therefore, met its burden of proof to terminate compensation.

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.

¹² *S.E.*, Docket No. 08-2214 (issued May 6, 2009); *Michael E. Smith*, 50 ECAB 313 (1999).

¹³ *Thomas L. Agee*, 56 ECAB 465 (2005); *Richard F. Williams*, 55 ECAB 343 (2004); *Merton J. Sills*, 39 ECAB 572 (1988).

¹⁴ See 5 U.S.C. § 8123(a); *Lynn C. Huber*, 54 ECAB 281 (2002) (section 8123(a) authorizes OWCP to require an employee who claims compensation to undergo a physical examination as it deems necessary; the determination of the need for an examination, the choice of locale and the choice of medical examiners are matters within the province and discretion of OWCP).

¹⁵ *Supra* note 8.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation effective April 6, 2010 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related cervical strain.

ORDER

IT IS HEREBY ORDERED THAT the November 18, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 9, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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