

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

C.T., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS HEALTH ADMINISTRATION,)
BROADVIEW HEIGHTS VETERANS)
MEDICAL CENTER, Brecksville, OH, Employer)

Docket No. 09-1120
Issued: January 12, 2010

Appearances:

Alan J. Shapiro, Esq., for the appellant
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 March 16, 2009 appellant filed a timely appeal from the February 25, 2009 merit decision of the Office of Workers' Compensation Programs, which affirmed as modified the termination of appellant's compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective July 31, 2008.

FACTUAL HISTORY

The Office accepted that on November 15, 2005 appellant, then a 44-year-old practical nurse, sustained a neck strain and a right shoulder strain while she was turning a patient.

Appellant lost intermittent time from work until she returned to full-time light duties on June 26, 2006. The Office paid compensation for all appropriate time periods.

In a February 21, 2006 report, Dr. Morris W. Pulliam, a Board-certified neurosurgeon, noted the history of injury and indicated that appellant had intermittent pain since the injury. He advised that electrodiagnostic testing was “very nondiagnostic.” Magnetic resonance imaging (MRI) scan and x-rays showed some cervical spondylosis at C5-6 and C6-7. There was no evidence of an acute herniated disc and paresthesias in the last two digits of her right hand did not fit with diagnostic testing. Dr. Pulliam advised that he did not see an immediate need for surgery and opined that the “odds of surgery helping her would be low.” In an April 21, 2006 report, he advised appellant’s attending physician, Dr. Ruth F. Quarles, a Board-certified family practitioner, that appellant’s cervical spondylosis at C5-6 and C6-7 was supported by MRI scan findings. Dr. Pulliam recommended physical therapy and possibly surgery at those two levels. Appellant stopped work on May 19, 2006 and returned to full-time light duty with restrictions on June 26, 2006.

As neither Dr. Quarles nor Dr. Pulliam discussed how the cervical spondylosis at C5-6 and C6-7 conditions were caused or aggravated by the November 15, 2005 work injury, the Office scheduled a second opinion examination with Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon. In his September 26, 2006 report, Dr. Kaffen noted appellant’s history of injury and medical course, set forth his review of the medical records and noted his examination findings. He diagnosed: cervical sprain/strain, resolved; sprain/strain right shoulder; degenerative disc disease of the cervical spine; osteoarthritis of the cervical spine; and spinal stenosis cervical spine. Dr. Kaffen opined that there were no objective findings to indicate that appellant has residuals of the accepted conditions of neck and shoulder sprains/strains. He noted that those were soft tissue injuries, which should have resolved since the date of injury. Dr. Kaffen stated that appellant’s current findings were related to the other conditions involving the cervical spine and underlying degenerative process in the right rotator cuff.

In a November 16, 2006 letter, the Office requested that Dr. Pulliam comment regarding Dr. Kaffen’s findings and opinion. No response was provided. In a March 8, 2007 letter, the Office requested that Dr. Quarles provide a detailed and rationalized report responsive to specific questions regarding continuing injury-related medical residuals and disability. A statement of accepted facts was provided.

In a March 12, 2007 report, Dr. Quarles opined that appellant’s chronic pain with right arm radiculopathy, neck pain and headaches resulted from the November 15, 2005 work injury. She explained that prior to the work injury appellant did not have the symptoms of right arm pain, numbness and weakness. Dr. Quarles also stated that while appellant may have had some cervical degenerative changes related to osteoarthritis, she was fully functional and did her job on a daily basis prior to the work injury.

On March 21, 2007 appellant underwent a cervical discectomy at C5-6, C6-7, that was performed by Dr. Pulliam, who diagnosed cervical spondylosis C5-6, C6-7, with radiculitis. The Office did not authorize the surgery.

On March 26, 2008 the Office found a conflict of medical opinion between Dr. Quarles and Dr. Kaffen as to whether appellant's current conditions were related to the November 15, 2005 work injury. To resolve the conflict, it referred her, a statement of accepted facts and the medical record to Dr. James D. Brodell, a Board-certified orthopedic surgeon, for an impartial medical examination.

In an April 14, 2008 report, Dr. Brodell reviewed the medical record, statement of accepted facts and diagnostic studies and noted his findings on examination. He diagnosed: resolved cervical strain/sprain; advanced cervical spondylosis, status post two level anterior discectomy and instrumented fusion; resolved right shoulder sprain/strain; and resolved right shoulder impingement syndrome. Dr. Brodell stated that the sprains/strains appellant received in her neck and right shoulder as a result of the work injury were soft-tissue injuries, which resolved long before Dr. Kaffen and Dr. Quarles wrote their opinions in September 2006 and March 2007, respectively. He explained that generally such soft tissue trauma of that type heals within a time frame of four to six weeks. Dr. Brodell indicated that when other conditions are present, such as advanced age, obesity, deconditioned state and underlying arthritis, it could take two to three months to heal. Thus, as he stated that, the accepted conditions healed long ago, he opined that appellant had been and continued to be capable of working as a full-duty practical nurse without restriction based on the accepted conditions. Dr. Brodell further found that there was no reasonable medical indication for future diagnostic studies or treatment related to the accepted conditions. He noted that, while Dr. Quarles believed that appellant suffered from long-term neck pain, right arm radiculopathy and headaches as a result of the November 15, 2005 work injury, those were symptoms and not diagnoses. Dr. Brodell explained that her cervical sprain/strain of November 15, 2005 was superimposed on preexisting spondylosis. He opined that the arthritic changes in appellant's neck were already severe at the time of the November 15, 2005 work injury and her cervical spondylosis and radiculopathy were not causally related to the employment injury. Dr. Brodell explained it took years of the aging process to create the chemical composition changes in the intervertebral jelly discs of the spine and connective tissue coverings and disc space narrowing to cause the spondylosis and secondary symptoms of myelopathy and/or radiculopathy. He further stated that Dr. Quarles' argument that the cervical degenerative disc and joint disease was aggravated by the employment incident, was a purely subjective theory and could not be objectively verified. Dr. Brodell opined that appellant's March 21, 2007 surgery addressed the severe, preexisting arthritic changes and would have been required regardless of the employment injury. He stated that her current work restrictions were not related to the November 15, 2005 employment injury.

By notice dated June 26, 2008, the Office advised appellant that it proposed to terminate her wage-loss compensation and medical benefits as the weight of the medical evidence established that the accepted condition had ceased without residuals. Appellant was accorded 30 days within which to submit additional evidence and argument. No response was received from appellant.

By decision dated July 31, 2008, the Office terminated appellant's wage-loss compensation and medical benefits that day. It accorded determinative weight to Dr. Brodell's impartial medical opinion that all work-related residuals and disability had ceased.

In an August 6, 2008 letter, appellant's attorney disagreed with the Office's decision and requested an oral hearing, which was held on December 9, 2008. Appellant's attorney argued that while appellant no longer suffered from active residuals of the accepted conditions of cervical strain and right shoulder strain, the Office did not state that evidence failed to substantiate a relationship between her current conditions and the employment injury. No additional evidence or comments were submitted.

By decision dated February 25, 2009, the Office hearing representative affirmed as modified the previous decision. It affirmed that the weight of the medical evidence rested with the impartial report of Dr. Brodell and modified its earlier decision to reflect there was no basis for termination of wage-loss compensation benefits since appellant was not in receipt of wage-loss compensation. The Office hearing representative noted that its proposal to terminate benefits explained that her current conditions were not accepted as injury related.

LEGAL PRECEDENT

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ 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.² The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.³ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁴

Section 8123(a) of the Federal Employees' Compensation Act 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.⁵ In situations where there exist opposing 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.⁶

ANALYSIS

In developing the medical evidence, the Office properly determined that a medical conflict existed regarding whether appellant's current conditions and cervical spine surgery were

¹ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

² *Id.*

³ *Roger G. Payne*, 55 ECAB 535 (2004).

⁴ *Pamela K. Guesford*, 53 ECAB 726 (2002).

⁵ 5 U.S.C. § 8123(a).

⁶ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

related to the November 15, 2005 work injury between Dr. Quarles, appellant's attending neurosurgeon, and Dr. Kaffen, the second opinion physician.⁷ It referred appellant to Dr. Brodell for an impartial medical examination.

In his April 14, 2008 report, Dr. Brodell advised that the accepted conditions of neck and right shoulder strain/sprains had previously resolved. Thus, he opined that appellant was capable of working full duty as a practical nurse without restrictions and there was no need for further medical treatment with regard to the accepted conditions. Dr. Brodell explained that the accepted conditions were soft-tissue injuries which generally heal within four to six weeks or, in the case of advancing age, obesity, deconditioned state and underlying arthritis, heal within two to three months. He further opined that appellant's current cervical condition and work restrictions were not related to the November 15, 2005 employment injury. Dr. Brodell opined that the arthritic changes in her neck were already severe at the time of the November 15, 2005 work injury and her cervical spondylosis and radiculopathy were not causally related to the work injury. He explained that appellant had preexisting spondylosis and it took years of the aging process to cause the spondylosis and secondary symptoms of myelopathy and/or radiculopathy. Dr. Brodell further stated that there was no objective evidence to verify that the November 15, 2005 work injury aggravated her preexisting cervical degenerative disc and joint disease and that she would have required surgery regardless of the work injury. The Office relied on Dr. Brodell's opinion to find that appellant had no continuing residuals of her November 15, 2005 work injury and, therefore, was not entitled to medical benefits.⁸

The Board finds that Dr. Brodell's referee opinion constitutes the weight of the medical evidence. Dr. Brodell's report was based on a thorough history of appellant's condition and a review of the medical evidence and diagnostic studies. On examination, he found that appellant no longer had any disabling residuals from her accepted November 15, 2005 work injury as such strains/sprains were soft-tissue injuries which would have resolved no later than two to three months after the injury. Dr. Brodell further found that the arthritic changes in her neck were severe at the time of the work injury and the work injury did not aggravate her underlying condition as it takes years for the aging process to cause spondylosis and secondary symptoms of myelopathy and/or radiculopathy, for which appellant underwent surgery. His opinion is probative, rationalized and based upon a proper factual background and establishes that the accepted injuries had resolved and that appellant's degenerative conditions were not caused or aggravated by the accepted work injury.⁹ Therefore, the Office properly accorded his opinion the special weight of an impartial medical examiner.¹⁰

⁷ See *Geraldine Foster*, 54 ECAB 435 (2003).

⁸ The Office's hearing representative properly found in the February 25, 2009 decision that entitlement to wage-loss compensation benefits was not an issue as appellant was not in receipt of wage-loss compensation.

⁹ Where an employee claims that a condition not accepted or approved by the Office was due to an employment injury, he or she bears the burden of proof to establish that the condition is causally related to the employment injury. *Jaja K. Asaramo*, 55 ECAB 200 (2004).

¹⁰ *Gary R. Seiber*, 46 ECAB 215 (1994).

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's medical benefits on July 31, 2008.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated February 25, 2009 is affirmed.

Issued: January 12, 2010
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