

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

M.O., Appellant

and

**U.S. POSTAL SERVICE, DEWEY STATION,
Rochester, NY, Employer**

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**Docket No. 11-1449
Issued: December 8, 2011**

Appearances:
Paul Kalker, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 2, 2011 appellant, through her attorney, filed an appeal of the May 12, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) modifying a wage-earning capacity determination and terminating compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) 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 met its burden of proof to modify its determination of appellant's wage-earning capacity and to terminate her wage-loss compensation and medical benefits effective September 26, 2010.

On appeal, counsel contends that the medical evidence of record is sufficient to establish appellant's continuing employment-related disability. He states that she is unable to perform either her date-of-injury position or constructed position of data entry clerk. Counsel contends

¹ 5 U.S.C. § 8101 *et seq.*

that OWCP's January 21, 1997 wage-earning capacity determination was issued in error as there was an unresolved conflict in medical opinion between Dr. Robert Dickerson, a Board-certified orthopedic surgeon and an OWCP referral physician, and Dr. Richard C. Dobson, an attending physiatrist. He concludes that appellant is entitled to retroactive wage-loss compensation.

FACTUAL HISTORY

This case was previously before the Board.² In a May 8, 2001 decision, the Board affirmed a January 21, 1997 OWCP wage-earning capacity determination, finding that the constructed position of data entry clerk represented appellant's wage-earning capacity. Appellant was entitled to \$458.00 every four weeks. The Board found that the constructed position was within the physical restrictions set forth by Dr. Dickerson who opined that appellant was totally disabled from her regular work duties due to her September 16, 1993 employment injuries, but that she could perform light or sedentary work for four hours per day. The Board further found that, although Dr. Dobson's reports found that appellant could not perform the duties of the constructed data entry clerk position, he failed to provide any medical rationale explaining how or why appellant could not perform the duties of this position. The Board also found that his fear that she would sustain further injury or a recurrence of disability was not compensable. The facts and the circumstances of the case as set forth in the Board's prior decision are incorporated herein by reference.³ The facts and the history relevant to the present appeal are hereafter set forth.

On March 1, 2010 OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. David P. Nichols, a Board-certified orthopedic surgeon, for a second opinion to determine the extent of her employment-related residuals and disability. In a March 16, 2010 medical report, Dr. Nichols reviewed a history of the September 16, 1993 employment injuries and appellant's medical treatment. He noted her complaints of neck and mid and low back pain radiating to both lower extremities. On most days appellant was in excruciating pain. On the date of examination, her pain level was 6 or 7 out of 10. On physical examination, Dr. Nichols reported essentially normal findings with the exception of appellant's complaints of pain on palpation of the cervical, thoracic and lumbar spinous processes with even a light touch. On neurological examination of the upper and lower extremities, he reported normal findings. All upper and lower extremity motor groups were 5/5 in strength. There was no visible muscle atrophy. Biceps, triceps and brachioradialis reflexes were equal and reactive bilaterally. Knee and ankle jerk reflexes were also equal and reactive bilaterally. Straight leg raising was negative at 90 degrees bilaterally.

Dr. Nichols advised that appellant had no normal current diagnosis or detectable physical abnormality. There were no current diagnostic studies to support any type of physical diagnosis. Dr. Nichols advised that the accepted employment-related conditions resolved years ago. The

² Docket No. 99-1308 (issued May 8, 2001).

³ OWCP accepted that on September 16, 1993 appellant, then a 34-year-old mail carrier, sustained cervical and thoracic sprains as a result of a motor vehicle accident. Appellant was separated from the employing establishment on October 1, 1993. By decision dated June 2, 1995, OWCP accepted that she sustained a recurrence of disability on October 28, 1993 causally related to her accepted injuries.

nature of sprain injuries was to heal within a four- to eight-week period. Dr. Nichols advised that appellant's current symptoms of neck and mid and low back pain with radiation to the lower extremities had no causal relationship to the 1993 accepted injuries. Appellant was not currently suffering from any other medical conditions. She related to Dr. Nichols that she was otherwise in good health and had no chronic medical condition. Dr. Nichols opined that appellant was capable of returning to full-duty work in any capacity. Appellant did not have any physical impairment and there were no diagnostic studies indicating any type of structural abnormality with her musculoskeletal system. Dr. Nichols concluded that she had no current disability, work restrictions or need for medical treatment causally related to the accepted injuries.

On August 20, 2010 OWCP issued a notice of proposed modification of its January 21, 1997 wage-earning capacity reducing to zero and terminating appellant's wage-loss compensation and medical benefits based on Dr. Nichols' March 16, 2010 findings.

In a September 17, 2010 letter, appellant, through counsel, contended that the conditions for which her claim was accepted were unduly narrow and limited in scope. Counsel contended that the objective medical evidence of record established that her claim should be expanded to include cervical, thoracic and lumbar disc herniations. He concluded that Dr. Nichol's report was based on an inaccurate history and did not constitute the weight of the medical evidence. Counsel contended that OWCP failed to refer appellant to an impartial medical examiner to resolve a conflict in medical opinion which violated her rights under FECA.

In a September 22, 2010 decision, OWCP terminated appellant's wage-loss compensation and medical benefits effective September 26, 2010 and modified the 1997 wage-earning capacity determination to reflect that she had no wage loss. It based the termination on the opinion of Dr. Nichols who found that she no longer had any residuals or disability causally related to her accepted employment injuries.

By letter dated February 4, 2011, appellant, through her attorney, requested reconsideration.

In a June 9, 2010 report, Dr. Dobson noted appellant's complaint of continuing back and neck pain radiating down her right leg. Appellant also continued to have very limited endurance to engage in physical activities due to increasing pain. She received chiropractic treatment on a weekly basis to treat her pain. On physical examination, Dr. Dobson reported fair to good hand grasp and wrist, elbow, hip and knee flexion and extension. Reflexes were grade 2 at the biceps, triceps and brachioradialis. Knee reflexes were absent but, ankle reflexes were grade 2 bilaterally. Trunk flexion reached 45 degrees and extension was 0 degrees. Lateral bending was 10 degrees to the right and 5 degrees to the left. Left bending was associated with audible crepitus in the lower back. Dr. Dobson addressed appellant's treatment plan and recommended a lumbar magnetic resonance imaging (MRI) scan. He concluded that she remained totally disabled due to her accepted employment injuries.

In reports dated November 29, 2010, Dr. Dobson reviewed Dr. Nichols' March 16, 2010 findings. He stated that Dr. Nichols was not professionally qualified to assess painful conditions involving the muscles unless they were focal severe tears of the muscles. Dr. Dobson stated that he failed to take an adequate history or at least to recognize the history provided by appellant as

he did not assess any history of her endurance for physical activities. He also conducted a limited examination as reported by appellant. Dr. Dobson stated that Dr. Nichols was looking for traditional orthopedic surgical impairments rather than nonsurgical chronic pain and musculoskeletal impairments that occurred especially in patients with chronic pain syndromes. On physical examination, he advised that appellant was alert, oriented and cooperative. Neck flexion was slightly reduced at 30 degrees. Extension was 30 degrees and rotation was 60 degrees bilaterally. Lateral bending was 15 degrees in each direction. Trunk flexion reached 80 degrees. There was very limited unfolding of the lumbar lordosis. Appellant used a modified Gower maneuver to get back up to the standing posture (hands pushing on her thighs). She used this maneuver to re-extend her back. Dr. Dobson found a palpable spasm in the cervical paraspinal muscles on the right side from C3 through C7. This finding had been a persistent in all of appellant's examinations. Appellant had some tenderness across the lumbosacral junction. There was a mild increase in tone in the lumbar paraspinal muscles between L4 and L5. Dr. Dobson advised that appellant suffered from chronic myofascial pain dysfunction syndrome as a consequence of her September 16, 1993 employment injuries. He stated that patterns of abnormal brain activity could be seen on functional MRI scans performed in patients suffering from myofascial pain syndrome, but indicated that such tests results were not readily available. Dr. Dobson recommended diagnostic imaging studies because it had been approximately 10 years since such studies had been performed. He related that neither he nor Dr. Nichols measured the effect of appellant's pain syndrome or her ability to engage in activities not only hour by hour but, day-to-day. Dr. Dobson reiterated his prior opinion that she remained totally disabled due to her employment injuries.

In a May 12, 2011 decision, OWCP denied modification of the September 22, 2010 decision. It found that the evidence submitted was insufficient to outweigh the weight accorded to Dr. Nichol's opinion that appellant no longer had any residuals or disability causally related to her accepted employment-related injuries.

LEGAL PRECEDENT

Under FECA,⁴ once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁵ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Once a loss of wage-earning capacity is determined, a modification of such a determination is not warranted unless there is a material change in the nature and extent of the work-related condition, the employee has been retrained or otherwise vocationally rehabilitated

⁴ 5 U.S.C. §§ 8101-8193.

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁶ *Id.*

⁷ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

or the original determination was in fact erroneous.⁸ The burden of proof is on the party attempting to show the award should be modified.⁹

ANALYSIS

OWCP accepted that appellant sustained cervical and thoracic sprains while working as a mail carrier on September 16, 1993. Appellant stopped working for the employing establishment on October 1, 1993. In a January 21, 1997 decision, OWCP determined that her wage-earning capacity was represented by the constructed position of data entry clerk. By its September 22, 2010 decision, it modified the loss of wage-earning capacity determination, finding that appellant had no employment-related residuals or disability and reduced the loss of wage-earning capacity determination to zero, thereby terminating compensation benefits.

The Board finds that the opinion of Dr. Nichols, an OWCP referral physician, establishes that appellant ceased to have residuals and disability causally related to her accepted conditions and thus OWCP met its burden of proof to modify her loss of wage-earning capacity determination to zero and to terminate compensation. On March 16, 2010 he reported essentially normal findings on physical and neurological examination of the upper and lower extremities with the exception of appellant's complaints of pain on palpation of the cervical, thoracic and lumbar spinous processes with even a light touch. Dr. Nichols opined that the accepted employment-related conditions resolved years ago and that appellant's current neck and back symptoms were not causally related to the accepted conditions. He found no current diagnosis or detectable physical abnormality. Dr. Nichols indicated that it was the nature of sprain injuries to heal within four to eight weeks. He related that appellant was not suffering from any other medical conditions. Dr. Nichols noted her own statement that she was in otherwise good health and had no chronic medical condition. He advised that appellant was capable of returning to full-duty work in any capacity as she did not have any physical impairment and there were no diagnostic studies showing any type of structural abnormality with her musculoskeletal system. Dr. Nichols concluded that she had no current disability, work restrictions or need for medical treatment causally related to the accepted injuries.

The Board has carefully reviewed the opinion of Dr. Nichols and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. His report shows that appellant ceased to have any continuing residuals and disability causally related to the accepted work injuries. Dr. Nichols' opinion is based on a proper factual and medical history and he provided medical rationale for his opinion by explaining that there was no medical diagnosis or physical limitations found during his examination.

For these reasons, OWCP has presented sufficient medical evidence to justify its termination of appellant's wage-loss compensation and medical benefits effective September 26, 2010 and thereby justifying the modification of its 1997 wage-earning capacity determination to zero. The weight of the medical evidence establishes that appellant sustained a

⁸ *George W. Coleman*, 38 ECAB 782, 788 (1987); *Ernest Donelson, Sr.*, 35 ECAB 503, 505 (1984).

⁹ *Jack E. Rohrbaugh*, 38 ECAB 186, 190 (1986).

material change in her work-related conditions for the better such that she no longer had wage loss due to the work injuries.

On reconsideration Dr. Dobson, an attending physician, disagreed with Dr. Nichols' conclusion that appellant no longer had any employment-related residuals or disability. In reports dated June 9 and November 29, 2010, he listed his findings on physical examination, which included restricted range of motion of the upper and lower extremities, a palpable spasm in the cervical paraspinal muscles on the right side from C3 through C7, tenderness across the lumbosacral junction and a mild increase in tone in the lumbar paraspinal muscles between L4 and L5. Dr. Dobson advised that appellant had chronic myofascial pain dysfunction syndrome as a consequence of the accepted employment injuries. He opined that she remained totally disabled due to the accepted conditions, but he recommended additional diagnostic testing to determine patterns of abnormal brain activity to measure the affect of the diagnosed condition on her ability to engage in physical activities. Dr. Dobson did not provide sufficient rationale explaining how appellant's medical condition or disability was causally related to the accepted conditions.¹⁰ The Board notes that OWCP has not accepted the condition of chronic myofascial pain dysfunction syndrome and Dr. Dobson's opinion is insufficiently rationalized to establish that any other condition is employment related.¹¹ Without medical reasoning explaining how the accepted conditions caused appellant's diagnosed condition and disability, the Board finds that Dr. Dobson's reports are insufficient to establish continuing loss of wage-earning capacity.

On appeal, counsel contended that the medical evidence of record is sufficient to establish that appellant's disability was due to the employment-related conditions. For reasons stated, the Board finds that the evidence submitted by appellant is insufficient to outweigh the weight accorded to Dr. Nichol's rationalized medical opinion that she no longer had any residuals or disability causally related to the September 16, 1993 employment injuries.

Counsel further contended that OWCP's original January 21, 1997 wage-earning capacity determination was issued in error as there was an unresolved conflict in the medical opinion evidence regarding appellant's disability between Dr. Dickerson, an OWCP referral physician, and Dr. Dobson requiring a referee medical examination. However, a mere disagreement between two physicians does not constitute a conflict. Rather, the disagreement must arise from equally weighted medical opinions.¹² The Board found on prior appeal that Dr. Dickerson's opinion was entitled to the weight of the medical evidence in establishing that appellant could perform part-time light-duty work with restrictions. The Board further found that Dr. Dobson's opinion that she could not perform the duties of the constructed position was not supported by medical rationale. The Board also found that his fear that she would sustain further injury or a recurrence of disability was not compensable. The Board concluded that Dr. Dobson's reports were insufficient to satisfy appellant's burden of proof to modify OWCP's 1997 wage-earning

¹⁰ See *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

¹¹ See *G.A.*, Docket No. 09-2153 (issued June 10, 2010) (for conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation, not OWCP's burden to disprove such relationship).

¹² See 20 C.F.R. § 10.321(b). See also *James P. Roberts*, 31 ECAB 1010 (1980).

capacity determination. As Dr. Dobson's opinion was not of equal weight as that provided by Dr. Dickerson, it did not create a conflict of medical opinion. Further, appellant has not offered any new evidence to establish that the January 21, 1997 wage-earning capacity decision was erroneous. In addition, she submitted no evidence to establish that she had been retrained or otherwise was vocationally rehabilitated. The Board finds, therefore, that appellant did not establish that the January 21, 1997 wage-earning capacity decision was in error.

Appellant may request modification of the wage-earning capacity determination, supported by new evidence or argument, at any time before OWCP.

CONCLUSION

The Board finds that OWCP met its burden of proof to modify its determination of appellant's wage-earning capacity to reduce it to zero and thus to terminate her wage-loss compensation and medical benefits effective September 26, 2010.

ORDER

IT IS HEREBY ORDERED THAT that the May 12, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 8, 2011
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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