



## **FACTUAL HISTORY**

On August 19, 2011 appellant, then a 36-year-old letter carrier, filed a recurrence of disability claim for a September 21, 2006 injury.<sup>2</sup> He stated that, while delivering mail on August 18, 2011, he felt a sharp pain in his neck and upper back. Since he cited new work factors, OWCP adjudicated the claim as a traumatic injury claim. It accepted the conditions of aggravation of cervical sprain and aggravation of thoracic sprain. Appellant stopped work at the time of injury and resumed part-time limited-duty employment on October 1, 2011. OWCP paid wage-loss benefits.

On December 21, 2011 OWCP referred appellant for a second opinion examination to Dr. Kenneth Heist, a Board-certified orthopedic surgeon. In a January 5, 2012 report, Dr. Heist noted findings on examination, which included a normal examination of the cervical, dorsal and lumbar spine. He found no restricted range of motion, muscle spasm or trigger points. There was no sign of acute cervical or lumbar radiculopathy. Dr. Heist found no residuals of the accepted aggravations of the cervical and thoracic sprain and stated that there were no objective signs to substantiate appellant's subjective complaints. Appellant was found capable of returning to work as a letter carrier without restrictions and no further medical treatment was necessary.

On January 18, 2012 OWCP issued a notice of proposed termination of compensation. It found the weight of the medical evidence was represented by the opinion of Dr. Heist, the second opinion physician. OWCP allowed appellant 30 days to submit additional evidence or legal argument in response to the proposed termination. On February 8, 2012 it reissued the proposed termination as the January 18, 2012 notice was not sent to appellant's representative.

In a February 15, 2012 report, Dr. Nirav K. Shah, a Board-certified neurologist, noted evaluation findings for neck pains which appellant stated began after an August 2011 work injury and an aggravation on November 7, 2011. He proved an assessment of cervical neck pain and cervical radiculopathy. Dr. Shah noted that, while appellant presented with diffuse cervical and lumbar pain, his magnetic resonance imaging (MRI) scan did not show any significant pathology. He noted that appellant has disc bulges that could cause nerve impingement syndrome, but there was no evidence of any clear-cut severe stenosis to warrant surgical intervention.

By decision dated March 13, 2012, OWCP terminated appellant's medical and wage-loss benefits effective March 12, 2012, finding that Dr. Heist's second opinion report represented the weight of the medical evidence that the accepted conditions had resolved and appellant was capable of returning to his date-of-injury job without restrictions.

On March 19, 2012 appellant's counsel requested an oral hearing. A video hearing was scheduled for July 12, 2012; however, counsel subsequently requested review of the written

---

<sup>2</sup> Under case number xxxxxx947, OWCP accepted the September 21, 2006 injury for conditions of thoracic back sprain, lumbar sprain, sprain of lumbosacral joint. Appellant resumed full-time limited-duty employment on October 2, 2006. He filed a second claim number xxxxxx628 for a November 7, 2011 injury which was accepted for cervical radiculopathy and aggravation of cervical disc herniation.

record. Medical reports, physical therapy reports and diagnostic studies from several of appellant's claims, which counsel deemed relevant, were submitted.<sup>3</sup> These included reports from Dr. Shah, Dr. Barry D. Fass, a Board-certified physiatrist, Dr. Laura E. Ross, an orthopedic surgeon, and Dr. John J. Mahoney, Board-certified in preventive medicine.

In an August 22, 2011 report, Dr. Fass provided an evaluation, noting appellant's work injuries, past medical history, current symptomatic complaints, and physical and neurologic examination findings. An impression of aggravation of preexisting C4-5 disc herniation, aggravation of preexisting cervical strain, aggravation of preexisting thoracic strain and cervical radiculitis was provided. In reports dated November 3, 17, December 1 and 15, 2011, Dr. Fass noted that appellant continued to work in a limited-duty capacity and reported cervical pain, thoracic pain, upper extremity paresthesias and pain, loss of cervical motion and pain while driving. An impression of aggravation of preexisting C4-5 disc herniation and cervical radiculitis was provided. Duty status reports and attending physician reports dated September 28, November 18, December 1 and 16, 2011 were provided along with a January 12, 2012 MRI scan of the cervical spine and January 12, 2012 MRI scan of the thoracic spine. In a March 14, 2012 letter, Dr. Fass stated that he was a treating physician for appellant's August 18, 2011 automobile accident. He indicated that appellant was first evaluated on August 22, 2011 and his initial impression was aggravation of preexisting C4-5 disc herniation; aggravation of preexisting cervical strain; aggravation of preexisting thoracic strain and cervical radiculitis. Dr. Fass noted appellant's course of treatment and that he remained disabled from August 18 until October 10, 2011 when he returned to restricted light duty. He opined that appellant's disability and diagnoses were the result of the August 11, 2011 work injury. Dr. Fass opined that appellant sustained permanent injury to his cervical spine as a result of the August 18, 2011 accident and that continued cervical spinal pain, restricted spinal mobility and chronic cervical spinal muscle spasm are expected sequelae of the injuries caused by the August 18, 2011 accident. Also, in a March 14, 2012 certification pursuant to the Automobile Insurance Cost Reduction Act of 1998, he opined that appellant had sustained permanent injury that has not healed to function normally and will not heal to function normally with further medical treatment.

In a March 26, 2012 report, Dr. Ross, an orthopedic surgeon, noted appellant's descriptions of work injuries of September 2006, August and November 7, 2011 and that he presented for evaluation of his neck and mid back. An impression of multilevel cervical and thoracic disc protrusions with left cervical and thoracic radiculitis was provided. An electromyogram (EMG) was recommended. In a May 14, 2012 report, Dr. Ross stated that the EMG and nerve conduction study revealed bilateral mild-to-moderate carpal tunnel syndrome. She also noted that a review of the MRI scan from 2007 to the MRI scan from 2012 revealed more disc pathology on later MRI scan which she opined was consistent with the injuries which occurred in August and on November 7, 2011. An impression of multilevel cervical and thoracic disc protrusions with upper and lower extremity radiculitis was provided. Appellant concluded that appellant should continue with his work restrictions.

---

<sup>3</sup> See *id.*

In a June 18, 2012 report, Dr. Mahoney, Board-certified in preventive medicine, noted a history of ongoing neck and left upper extremity pain from a displaced cervical disc and cervical radiculitis. He indicated that appellant's diagnosis remained unchanged.

By decision dated September 26, 2012, an OWCP hearing representative vacated the March 13, 2012 termination of benefits and directed OWCP to seek clarification from Dr. Heist as it pertained to his medical condition. Specifically, the hearing representative noted that the statement of accepted facts which Dr. Heist used was deficient as it failed to identify his prior back injury claims. OWCP was instructed to amend the statement of accepted facts to reflect the medical conditions sustained in the prior claims and to note the mechanism for each injury. It was then to forward the new statement of accepted facts and medical records from those files to Dr. Heist for review and opinion on whether the medical evidence contained in appellant's additional case files altered his medical opinion on appellant's disability.

On October 19, 2012 OWCP doubled cases numbers xxxxxx947, xxxxxx922 and xxxxxx628 and made case number xxxxx922 the master claim number. It also amended the statement of accepted facts to reference all accepted conditions in appellant's three cases. In an October 19, 2012 letter, OWCP requested that Dr. Heist address any continuing residuals of and disability due to appellant's accepted workplace injuries as set forth in the undated statement of accepted facts and medical records from his additional injury claims to his back.

In an October 16, 2012 report, Dr. Joan F. O'Shea, a Board-certified neurosurgeon, noted a history of appellant's work injuries and treatment, his current complaints of neck pain, bilateral trapezius pain, bilateral scapular pain, left shoulder pain and occipital headaches and presented examination findings. She found appellant's symptoms were out of proportion to the physical findings. Dr. O'Shea reviewed the January 12, 2012 MRI scan of the cervical spine and noted it was essentially normal. While there was a tiny, central herniated disc at C7-T1, she found it was without impingement of the thecal sac or nerve roots. Dr. O'Shea also found the 2006 MRI scan of the cervical spine and January 12, 2012 MRI scan of the thoracic spine were essentially normal. The April 10, 2012 EMG and nerve conduction study revealed bilateral mild-to-moderate carpal tunnel syndrome with no clear evidence of radiculopathy. Dr. O'Shea opined that appellant's cervical sprain/strain as well as his thoracic sprain/strain had reached maximum medical improvement with no surgical indications. She opined that appellant could work full duty with no further medical treatment suggested.

In a November 12, 2012 report, Dr. Heist reviewed the additional medical records consisting of: the October 19, 2012 statement of accepted facts; Dr. Shah office notes; a January 12, 2012 thoracic MRI scan report and November 4, 2006 and January 12, 2012 cervical MRI scan reports; treatment notes of Dr. Fass, dating back to 2006; EMG/NCS testing dated November 22, 2006 and April 10, 2012; initial evaluation and treatment notes of Dr. Ross; treatment notes of Dr. Mahoney, physical therapy notes; and notes of Dr. Reznik dating back to 2006. Dr. Heist noted that, since his prior examination, cervical and thoracic MRI scan studies were obtained, which he found were unremarkable. He noted that multilevel bulging discs were reported, which he stated were common findings on MRI scan of the spine and there were no correlating orthopedic or neurologic deficits to support any relevance to this at the time of his examination. Dr. Heist also noted that Dr. Shah, in his February 15, 2012 report, noted that appellant's MRI scan showed no significant pathology. He reported that appellant had extensive

conservative treatment consisting of physical therapy, trigger point injections, epidural steroid injections and facet injections dating back to 2006. Dr. Heist opined that appellant has reached a plateau with respect to therapeutic benefit from conservative care. He opined that, after reviewing the extensive medical records, his determination remained the same. Dr. Heist opined that appellant has reached his maximum medical improvement and was capable of returning to work without restrictions.

By decision dated November 16, 2012, OWCP terminated appellant's medical and compensation benefits effective November 16, 2012. The weight of the medical evidence was accorded to Dr. Heist's November 12, 2012 report.

On November 26, 2012 appellant's counsel requested an oral hearing, which he later converted to a request to one for review of the written record.

In a February 27, 2013 report, Dr. Shah provided an assessment of cervical neck pain, cervical radiculopathy and cervical neck strain. He opined that appellant's continued cervical pain and thoracic pain would benefit from injections and continued pain management. Dr. Shah noted that appellant has no surgical pathology at this time. He further opined that appellant would reach maximum medical improvement once pain management was completed.

By decision dated March 7, 2013, an OWCP hearing representative affirmed the November 16, 2012 OWCP decision.

### **LEGAL PRECEDENT**

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>4</sup> Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>6</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>7</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.<sup>8</sup>

---

<sup>4</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>5</sup> *Id.*

<sup>6</sup> *Gewin C. Hawkins*, 52 ECAB 242 (2001).

<sup>7</sup> *Roger G. Payne*, 55 ECAB 535 (2004).

<sup>8</sup> *Pamela K. Guesford*, 53 ECAB 726 (2002).

## ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate compensation benefits as an unresolved conflict remains in the medical opinion evidence.

Appellant was referred for a January 5, 2012 second opinion evaluation by Dr. Heist. On the basis of that examination, OWCP proposed termination of appellant's medical and wage-loss compensation benefits. After further development, OWCP eventually combined the present claim, plus file numbers xxxxxx947 and xxxxxx628, prepared a new statement of accepted facts and sought clarification from Dr. Heist as to whether appellant has any continuing residuals of, and disability due to, his accepted workplace injuries. In his November 12, 2012 supplemental report, Dr. Heist opined that, after reviewing appellant's extensive medical records, appellant had reached maximum medical improvement and was capable of returning to work without restrictions. On the basis of his November 12, 2012 report, OWCP terminated appellant's compensation benefits effective November 16, 2012.

OWCP provided Dr. Heist with a statement of accepted facts, dated October 19, 2012, which consolidated appellant's claims, and listed the accepted conditions as thoracic back sprain, lumbar sprain, sprain of the lumbosacral joint, aggravation of cervical sprain, aggravation of thoracic sprain, aggravation of cervical disc herniation and cervical radiculopathy. In his November 12, 2012 report, Dr. Heist indicated that he reviewed additional medical records as well as cervical and thoracic MRI scan studies, which were performed since his examination of appellant. He noted that the reported multilevel bulging discs were common findings on MRI scan of the spine, there were no correlating orthopedic or neurologic deficits, and that Dr. Shah, in his February 15, 2012 report, had found no significant pathology on appellant's MRI scan. He opined that appellant had reached a plateau with respect from therapeutic benefit from conservative care which started in 2005. Dr. Heist opined that, after review of the extensive medical records, appellant had reached maximum medical improvement and was capable of returning to work without restrictions.

The Board finds that Dr. Heist's opinion is in conflict with that of appellant's treating physicians. Dr. Fass submitted a number of reports to the record from August 22, 2011 through March 14, 2012. He related that he had been appellant's treating physician since his August 18, 2011 automobile accident. Dr. Fass noted that appellant had undergone MRI scan evaluation and then related that appellant had continuing diagnoses of aggravation of preexisting C4-5 disc herniation, aggravation of preexisting cervical strain, aggravation of preexisting thoracic strain and cervical radiculitis. He related that these diagnoses were related to appellant's August 11, 2011 and August 18, 2011 work injuries and that his injuries were permanent in nature. Dr. Fass also opined that appellant remained partially disabled but could perform light duty. In a report dated March 26, 2012, Dr. Ross related that she had reviewed appellant's MRI scan studies from 2007 through 2012, and that his later studies revealed increased disc pathology which was consistent with his August and November 2011 injuries. She concluded that appellant had a current diagnosis of multilevel cervical and thoracic disc protrusion, with upper and lower extremity radiculitis and that appellant should continue with his work restrictions. In a June 18, 2012 report, Dr. Mahoney related that appellant had a history of ongoing neck and left upper extremity pain from displaced cervical disc and cervical radiculitis. He concluded that appellant's diagnosis remained unchanged.

While Dr. Heist concluded that appellant's accepted conditions had reached maximum medical improvement and were no longer disabling, appellant's treating physicians, Drs. Fass, Ross and Mahoney continued to opine that appellant's diagnosis remained unchanged and that appellant continued to have work restrictions. 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.<sup>9</sup> As an unresolved conflict remains in the medical opinion evidence, OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

### **CONCLUSION**

The Board finds that OWCP did not meet its burden of proof to terminate appellant's benefits effective November 16, 2012 on the grounds that his accepted conditions had ceased without residuals.

### **ORDER**

**IT IS HEREBY ORDERED THAT** the March 7, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 20, 2013  
Washington, DC

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

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

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

---

<sup>9</sup> 5 U.S.C. § 8123(a); *see M.A.*, 59 ECAB 355 (2008).