

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

P.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Madison, WI, Employer**

)
)
)
)
)
)
)
)
)
)
)
)

**Docket No. 12-1429
Issued: July 23, 2013**

Appearances:
Timothy M. Scheffler, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 18, 2012 appellant, through her attorney, filed a timely appeal of a December 21, 2011 decision of the Office of Workers' Compensation Programs (OWCP) affirming the termination of her compensation and medical benefits effective April 29, 2011. 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 properly terminated appellant's medical and compensation benefits effective April 29, 2011.

On appeal, appellant's counsel contends that the evidence was insufficient to terminate her benefits. He specifically argues that the impartial medical adviser was not fully aware of her history, that his examination was incomplete and not medically appropriate and that he reached contradictory positions with regard to her injuries.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On May 18, 2000 appellant, then a 40-year-old clerk, filed a traumatic injury claim alleging that on May 9, 2000, when bending over to pick up labels from the floor, she pulled a muscle and strained her back and neck causing severe headaches and upper back and shoulder pain. OWCP accepted her claim for neck strain and cervical spinal subluxation. It paid medical and wage-loss compensation. In a decision dated June 14, 2004, OWCP accepted appellant's claim for a recurrence on February 6, 2004.

In an October 10, 2007 report, Dr. Norris Breitbart, appellant's treating chiropractor, indicated that appellant has been on permanent disability and permanent light duty since May 9, 2000.² He opined that she has maintained her ability to perform her work duties on a limited basis. Dr. Breitbart further noted that since appellant's injury she has experienced periods of short-term incapacity due to severe headaches and neck pain which are a direct result of the original injury. He noted that examinations of her have shown painful and restricted cervical range of motion as well as a positive Soto Hall test and a positive forminal compression test. Dr. Breitbart further noted that through the help of chiropractic care appellant has maintained her ability to work light duty, but has occasional flare-ups of neck pain and severe headaches which cause her to be absent for brief periods. In a June 15, 2009 report, he completed an attending physician's report wherein he listed his findings as lateral listhesis of C1, kyphosis C6, right rotation TB. Dr. Breitbart's diagnoses were subluxation C1, C6, T6, resulting in acute myositis, headaches and radiculitis. He opined that appellant was injured at work and listed the date of injury as May 9, 2000. Dr. Breitbart noted that his treatment included adjustment of subluxations, muscle stimulator and trigger point therapy.

On November 23, 2009 OWCP referred appellant to Dr. Kenneth H. Yuska, a Board-certified orthopedic surgeon, for a second opinion. In a December 7, 2009 report, Dr. Yuska noted that the objective examination showed normal range of motion of the shoulders, elbows, wrists and hands. He noted no objective findings of any injury tenderness or neurological dysfunction or restriction of movement. Dr. Yuska noted that the subjective status of appellant is that she complains of symmetrical myofascial discomfort over a wide area of the upper extremities and upper spine in a cape distribution and that the most consistent feature was a tension headache. He listed her height as five foot three inches and her weight as 171.6 pounds. Dr. Yuska opined that the May 9, 2000 work-related injury was a minor incident that cannot explain the nine years of treatment that followed. He opined that there were no conditions or residuals presently existing that were causally related in any way to the May 9, 2000 claim. Dr. Yuska noted that there was no permanent aggravation to result in any tissue breakage. He discussed the physical examinations and objective tests and noted that, due to the lack of objective findings, there may have been a temporary increase in pain on or about 2000, but this has long been forgotten. Dr. Yuska opined that there is no evidence of permanent injury and no aggravation of any preexisting conditions. He opined that there was no precipitation,

² In a May 9, 2000 radiology report, Dr. Breitbart found subluxations at C5, C6, C7 and T6 levels. In an April 11, 2001 report, he diagnosed neck strain producing subluxation of C1, C6 and T6 resulting in neck pain, headaches and myositis in trapezius muscles. Under FECA, a physician includes a chiropractor to the extent that his or her reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist. 5 U.S.C. § 8101(2).

acceleration or aggravation of any underlying conditions. Dr. Yuska opined that there were no conditions or residuals of the May 9, 2000 work-related claim that persists at this time. He based this finding on the physical examination, which showed normal movement of all joints of the upper extremities and no focal pain in the neck or upper thoracic region. Dr. Yuska further opined that there was no treatment required relative to the injury of May 9, 2000. He opined that the benefits from chiropractic care have long since been fully achieved and that no further chiropractic treatments, physical therapy treatment or medication treatments of any kind are required now or in the future.

On March 2, 2010 OWCP accepted appellant's claim for a recurrence of the May 9, 2000 injury on January 9, 2010.

In a May 6, 2010 report, Dr. Jerome C. Ebert, a Board-certified physiatrist, evaluated appellant for her chronic headaches associated with neck pain. He noted that she has a long history of myofascial pain and these symptoms have not changed and are chronic. Dr. Ebert also noted that appellant has chronic daily tension-type headaches associated with the myofascial pain. He stated that there was no evidence of any neurologic involvement. Dr. Ebert noted that appellant's examination did not suggest that there is any myelopathic aspect of her symptoms. He recommended physical therapy, triggers point injections and noted that acupuncture would be an excellent alternative as well. Dr. Ebert also discussed her pain medication regimen.

On December 1, 2010 OWCP referred appellant to Dr. Stephen E. Barron, a Board-certified orthopedic surgeon, for an impartial medical examination. After a recitation of the medical file to date and physical examination, Dr. Barron opined that her diagnosis was healed sprain of the cervicothoracic spine secondary to the work accident on May 9, 2000. He noted that appellant had no objective findings on physical examination, had no radicular symptoms and that her magnetic resonance imaging (MRI) scan was negative. Dr. Barron opined that, at the time, she had a normal orthopedic examination of her cervical and thoracic spine without objective findings. He noted appellant's weight of 270 pounds and a height of five feet four inches. Dr. Barron concluded that, due to her lack of any objective findings, her current diagnosis is a healed sprain of the cervical and thoracic spine related to the injury of May 9, 2000. He indicated that appellant does not have any residuals from this one time traumatic injury of May 9, 2000. Dr. Barron reasoned that she sustained a soft tissue sprain of her cervical and thoracic spine on May 9, 2000 and that soft tissue sprains will reach a healing plateau within three months and require no further treatment. He indicated that appellant's cervical and thoracic spine injury resolved as of August 9, 2000. Dr. Barron opined that she was capable of performing her regular duties as a mail clerk without restrictions.

On March 29, 2010 OWCP proposed to terminate appellant's compensation and medical benefits for the reason that the weight of the medical evidence demonstrated that she no longer had any disability or residuals due to the accepted work-related injuries.

By decision dated April 29, 2011, OWCP terminated appellant's compensation and medical benefits effective that date. At the hearing held on October 11, 2011, appellant's representative argued that Dr. Barron's report was insufficient and could not represent the weight of the medical evidence as it was deficient and not thorough. He argued that Dr. Barron incorrectly noted that appellant did not report subjective pain or tenderness, that he got details

such as her weight incorrect, that he did not properly discuss objective test results and that he did not discuss all the medical evidence. Appellant testified that she continues to see her chiropractor and physical therapist. She stated that when she gave Dr. Barron her MRI scans he was barely gone a minute before returning them. Appellant described her interaction with him and contended that the actual physical examination did not last more than three minutes.

In an October 24, 2011 note, Dr. Breitbach noted that appellant presented with upper thoracic, cervical and headache pain due to repetition of movement at work. He noted that she had subluxations at T6, C1 and C6 resulting in cervical and thoracic myositis and radiculitis. Dr. Breitbach opined that this condition was chronic in nature which will require adjustments of the subluxations for pain relief. He noted that he has seen appellant less often since she stopped working, but that her condition persists in the same spinal areas and need to be adjusted for pain relief and to improve mobility.

In a June 24, 2011 progress note, Dr. Dr. Sheryl Spitzer-Resnick, a Board-certified family practitioner, listed appellant's weight as 163 pounds. She discussed appellant's employment injury, noting that it was a bad upper back/neck injury that resulted from lifting a heavy bag of mail on May 9, 2000. Dr. Spitzer-Resnick noted that appellant's severe cervical and upper back strain from this injury is likely to have caused permanent weakness and a predisposition to injury that contributed to her persistent spasm in the shoulders and trapezius.

After the hearing, appellant also submitted several medical reports unrelated to this case including results of a normal mammogram, results of blood work and other lab work, reports on consultations with regard to menopause, fatigue and cold intolerance and a physician note excusing her from work due to the death of her mother-in-law. She also submitted a report from her physical therapist.

By decision dated December 21, 2011, the hearing representative affirmed the April 29, 2011 decision as she found that appellant no longer had residuals of the May 9, 2000 work-related injury.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.³ 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.⁴ To terminate authorization for medical treatment, it must establish that appellant no longer has residuals of an employment-related condition which requires further medical treatment.⁵

³ *Elaine Sneed*, 56 ECAB 373 (2005); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁴ *Gewin C. Hawkins*, 52 ECAB 242 (2001).

⁵ *M.D.*, Docket No. 11-1737 (issued April 3, 2012); *Calvin S. Mays*, 39 ECAB 993 (1988).

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.⁶ When 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.⁷

ANALYSIS

OWCP accepted appellant's claim for neck strain and cervical spinal subluxation as a result of an employment incident that occurred on May 9, 2000 and paid compensation and medical benefits. Appellant's treating physicians included Drs. Breitbach, Ebert and Spitzer-Resnick. Dr. Spitzer-Resnick is a family practitioner who followed appellant's care. She noted that appellant received chiropractic and physical therapy treatment for neck, shoulder and back pain following her work injury. Dr. Spitzer-Resnick opined that appellant's severe cervical and upper back strain from this injury is likely to have caused permanent weakness and a predisposition to injury that contributed her persistent spasm in the shoulders and trapezius. Dr. Ebert evaluated her for chronic headaches associated with neck pain and recommended physical therapy, trigger point injections and possibly acupuncture. Appellant received extensive treatment by Dr. Breitbach, her chiropractor. In his June 15, 2009 report, Dr. Breitbach opined that she had continuing residuals from her employment injury and noted that her treatment consisted of adjustments of subluxations, muscle stimulator and trigger point therapy.

OWCP referred appellant to a second opinion physician, Dr. Yuska, who opined that there was a normal range of motion and that there were no conditions or residuals that were causally related in any way to the May 9, 2000 claim. Due to the conflict in medical opinions between appellant's treating physicians and the second opinion physician with regard to whether she had continuing residuals causally related to her accepted employment injury, OWCP referred her to Dr. Barron for an impartial medical examination. Dr. Barron concluded that appellant had no residuals from the accepted employment injury. Based on his opinion, OWCP terminated her compensation and medical benefits effective April 29, 2011.

When there is conflict in the medical evidence 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 Dr. Barron noted that appellant had no objective findings on physical examination, had no radicular symptoms and that her MRI scan was negative. He concluded that, based on her normal physical examination, she no longer had any residuals from her one-time traumatic injury of May 9, 2000.

⁶ 5 U.S.C. § 8123(a).

⁷ *J.M.*, Docket No. 12-589 (issued September 14, 2012).

⁸ *Id.*

Appellant contends that Dr. Barron's examination was improper in that he did not accurately record her complaints of pain, that he did not let her tell him about her recurrences and other injuries and that her physical examination with him lasted approximately three minutes. The Board notes that he discussed the previous medical evidence of record, including the prior MRI scan. Also, despite appellant's comments that her physical examination lasted only three minutes, Dr. Barron took measurements with regard to her range of motion and reflexes. Dr. Barron noted that there were no areas of acute tenderness or evidence of spasm. He noted that she walked without a limp. These findings indicate a more thorough physical examination than appellant claims took place.

Appellant also contended that the findings of appellant's physical therapists with regard to her range of motion contradicted Dr. Barron's report. Physical therapists are not considered physicians under FECA⁹ and these reports are certainly not sufficient to call into question a report by the impartial medical examiner.

The Board further rejects appellant's argument that Dr. Barron's physical examination deviated from the medically approved standards for determining impairment found in the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, (6th ed. 2009) in that range of motion is no longer used as a basis for defining impairment. Dr. Barron was not assessing degree of impairment under a schedule award case; rather, he was noting physical examination findings to determine whether she had any residuals from her employment injury. Accordingly, appellant's argument is without merit. The Board also rejects her contention that Dr. Barron's report contradicts OWCP's findings that she had recurrences on February 6, 2004 and January 9, 2010. Although Dr. Barron did note that appellant's injury had resolved by August 9, 2000, his opinion is not being used to determine the exact date that the injury resolved. Rather, it is being used to determine that there were no more residuals as of the time he examined her on December 16, 2010. Dr. Barron provided a well-rationalized report based on a proper factual and medical history. He summarized the relevant medical evidence and provided detailed examination findings and medical rationale supporting his opinion. Although Dr. Barron incorrectly reported appellant's weight and height measurements, the Board finds that this is not sufficient to impact his opinion with regard to her residuals. His opinion therefore is entitled to special weight.

Accordingly, the Board finds that OWCP properly terminated appellant's benefits based on the opinion of Dr. Barron, as it was based on a proper factual background.

CONCLUSION

The Board finds that OWCP properly terminated appellant's medical and compensation benefits.

⁹ See 5 U.S.C. § 8101(2); A.C., Docket No. 08-1453 (issued November 18, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated December 21 and April 29, 2011 are affirmed.

Issued: July 23, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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