

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PILAR R. SALAS and DEPARTMENT OF THE ARMY, DIRECTORATE OF
PUBLIC WORKS, REAL ESTATE DIVISION, SCHOFIELD BARRACKS, HI

*Docket No. 99-1115; Submitted on the Record;
Issued December 13, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits.

The Board has duly reviewed the case on appeal and finds that the Office did not meet its burden to terminate appellant's compensation benefits.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.¹

On June 14, 1996 appellant, then a 55-year-old data automation secretary, filed an old claim, alleging that factors of employment caused neck and shoulder pain. Appellant had stopped work on April 11, 1996, and the Office accepted that she sustained an employment-related myofascial neck condition.² Following further development, on January 9, 1997, the Office referred her, along with the medical record, a statement of accepted facts and a set of questions, to Dr. Ramon H. Bagby, a Board-certified orthopedic surgeon, for a second opinion evaluation. Based on Dr. Bagby's reports, by letter dated March 13, 1997, the Office proposed to terminate appellant's compensation benefits. She submitted additional medical evidence and by decision dated April 17, 1997, the Office terminated her compensation, effective that day, finding that the weight of the medical evidence rested with the opinion of Dr. Bagby.

¹ See *Patricia A. Keller*, 45 ECAB 278 (1993).

² The instant claim was adjudicated by the Office under file number A13-1114296. The record indicates that appellant has a traumatic injury claim, adjudicated under file number A13-870867, in which the Office accepted that appellant, then a 45-year-old plumber, sustained an employment-related low back strain on September 22, 1988. She missed 45 days from work and returned to a light-duty position as a secretary.

Appellant, through counsel, requested a hearing, which was held on June 1, 1998 and submitted additional medical evidence. By decision dated July 23, 1998, an Office hearing representative remanded the case to the Office, finding that the Office erred in case development because the statement of accepted facts submitted to Dr. Bagby did not indicate that appellant's myofascial cervical condition was an accepted condition. After preparation of an updated statement of accepted facts, Dr. Bagby provided a supplemental report dated October 17, 1998. By decision dated November 30, 1998, the Office found that appellant had no residuals of the accepted myofascial neck condition, based on Dr. Bagby's supplemental report. The instant appeal follows.

The relevant medical evidence includes³ numerous form reports from appellant's treating physician, Dr. D. Scott McCaffrey, who is Board-certified in emergency medicine. He consistently opined that appellant could not work and diagnosed, *inter alia*, cervical strain and degenerative disc disease of the cervical spine with complex chronic pain disorder. In an April 8, 1997 report, Dr. McCaffrey stated that appellant continued to be plagued with a chronic pain syndrome regarding her neck and opined:

“Regarding the establishment of proximate causation, based on a lack of medical history for preexisting disability and medical care, as well [as] her history of being a very functional and mentally healthy individual prior to her injury, a causal relationship does exist between her workplace injury and her present medical problems to a high degree of medical probability.”

Dr. Bagby submitted a report dated March 3, 1997 in which he diagnosed chronic cervical myofascitis and degenerative joint disease of the lumbar spine with chronic lumbar fascitis. Dr. Bagby stated that appellant did not complain about her neck symptomatology until at least three and one-half months after she stopped work. He concluded that appellant's cervical condition was not employment-related and that she had no work-related limitations relating to the cervical spine or shoulder.

In a May 27, 1998 report, Dr. McCaffrey disagreed with Dr. Bagby's conclusions stating that appellant had presented on multiple visits with complaints of cervical and left shoulder pain with loss of range of motion and motor strength of the cervical musculature and muscle spasm with textbook trigger points. He noted that her job of word-processing required extensive cervical motion, which could have contributed to the chronic inflammatory disorder involving her neck and shoulders.

³ Regarding appellant's claim number A13-870867, *supra* note 1, Dr. Mark A. Silver, a Board-certified orthopedic surgeon, provided a September 18, 1996 report in which he diagnosed, *inter alia*, musculoligamentous strain and sprain of the cervical spine which he opined was not related to appellant's September 22, 1988 employment injury.

In a supplemental report dated October 17, 1998, Dr. Bagby stated that he had reviewed the updated statement of accepted facts and advised:

“While it is reasonable that a certain element of secretarial activities, particularly those involved with prolonged head flexion could precipitate myofascial pain, [appellant’s] medical records suggest that her symptoms began some three and a half months after she stopped performance of this work.... This type of problem would certainly be expected to be temporary and self-limited and consequently even if [appellant] had sustained a myofascial neck strain, certainly by the time of my evaluation one would have expected that any industrially-related contribution should have been resolved.

“Therefore, in summary, this new information does not compel me to alter any of the previously expressed opinions regarding the issues of diagnosis, causation, disability status, apportionment, future medical and vocational rehabilitation.”

When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a) of the Federal Employees’ Compensation Act,⁴ to resolve the conflict in the medical opinion. In this case, appellant’s treating physician, Dr. McCaffrey continued to advise that appellant’s employment-related neck condition was a continuing process and that she could not work.

Although, Dr. Bagby, the Office referral physician, offered an opinion that appellant’s employment-related neck condition had ceased, he based his opinion in part on the fact that appellant’s cervical pain began some three months after she stopped work in April 1996. The record, however, indicates that when appellant filed her claim on June 14, 1996 she stated that the repetitive neck motions required by her work caused neck and shoulder pain which became worse in January 1995. Furthermore, in reports dated April 10, 15, 22 and continuing until March 6, 1998, Dr. McCaffrey diagnosed a myofascial condition in the cervical region and advised that appellant could not work.

The Board finds that the reports of Drs. McCaffrey and Bagby are of approximately equal value and are in conflict on the issue of whether appellant continued to be disabled from her employment-related myofascial neck condition. Consequently, the Office did not meet its burden of proof in terminating appellant’s compensation.⁵

⁴ 5 U.S.C. § 8123(a).

⁵ See *Gail D. Painton*, 41 ECAB 492 (1990). To resolve this conflict, the Office should have referred the case record, including all test results, and a statement of accepted facts to a Board-certified specialist for resolution of the conflict. It is also recommended that the files for the instant case, A13-1114296, and that for A13-870867 be doubled.

The decision of the Office of Workers' Compensation Programs dated November 30, 1998 is hereby reversed.

Dated, Washington, D.C.
December 13, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member