

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PATRICIA A. WINTERBERG and U.S. POSTAL SERVICE,
POST OFFICE, Titusville, FL

*Docket No. 02-1377; Submitted on the Record;
Issued October 25, 2002*

DECISION and ORDER

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

The issues are: (1) whether the Office of Workers' Compensation Programs properly terminated appellant's benefits effective March 28, 2002; and (2) whether the Office properly denied appellant's request for surgery.

On December 26, 1997 appellant, then a 54-year-old temporary casual clerk, filed a notice of traumatic injury and claim for continuation of pay/compensation alleging that on that date she sustained an injury when she was hit by a bulk mail carrier. By letter dated January 8, 1998, the Office accepted appellant's claim for cervical contusion and sprain/strain.

Appellant was treated for his injury by Dr. Joseph E. Rojas, a Board-certified orthopedic surgeon. On January 5, 1998 he diagnosed appellant with impingement, cervical sprain. On February 6, 1998 Dr. Rojas noted that appellant also had impingement, right shoulder. In a progress note dated March 6, 1998, he noted that appellant was still having quite a bit of pain in her right shoulder and suggested an arthroscopy. In a medical report dated June 1, 1998, Dr. Rojas indicated that appellant had several injections in her right shoulder and had not responded to them and, therefore, needed arthroscopic surgery.

On June 25, 1998 the Office denied appellant's request for a right shoulder arthroscopy, noting that it had not accepted a claim for injury to the right shoulder. By letter dated July 7, 1998, she requested a hearing. Thereafter, appellant submitted a medical report dated July 9, 1998 from Dr. Rojas, wherein he noted that appellant had "rotator cuff tendinitis (impingement)" and requested a review of the denial of surgery.

In a decision dated December 4, 1998, the hearing representative set the June 25, 1998 decision aside. The hearing representative found that Dr. Rojas' reports were sufficient to warrant a second opinion regarding appellant's shoulder condition and the recommended surgery.

Accordingly, the Office referred appellant to Dr. Donald Pearson, a Board-certified orthopedic surgeon. In a report dated February 10, 1999, he indicated that appellant had a right trapezial strain and right shoulder bicipital tendinitis. Dr. Pearson stated that at this point he would not recommend surgical treatment for the shoulder and would recommend instead local Cortisone injections to see if that helped. He also opined that appellant was capable of work with restrictions of no heavy lifting and no repetitive overhead work. Dr. Pearson also stated that appellant's condition was related by history to her December 27, 1997 injury. Finally, he noted that he believed that appellant's ongoing symptoms were more related to her complaints in the right trapezial muscle and the right medial border of the scapula.

By letter dated March 24, 1999, the Office accepted appellant's claim for right shoulder strain and right shoulder tendinitis. However, on February 7, 2001, the Office denied appellant's request for right shoulder surgery, based on the opinion of Dr. Pearson. The Office noted that appellant was still entitled to receive treatment for her accepted right shoulder strain.

By letter dated April 24, 2001, the Office referred appellant to Dr. Bernard Z. Albina, a Board-certified orthopedic surgeon, for a second opinion. In a medical report dated May 23, 2001, he stated that he did not believe that appellant's present symptoms in her neck and right shoulder were caused by the injury of December 26, 1997, but rather were related to degenerative osteoarthritic changes in the cervical spine compatible with appellant's age. Dr. Albina opined that the December 26, 1997 injury that was diagnosed as cervical contusion sprain had resolved as of March 1998, when appellant was last treated for that condition. He further opined that the sprain in the right shoulder had resolved approximately three to four months after its occurrence on December 26, 1997 and that the degenerative acromioclavicular joint disease as common and compatible with appellant's age and not related to any specific injury. Finally, Dr. Albina found that the proposed surgery on appellant's right shoulder was not medically warranted.

By decision dated June 13, 2001, the Office found that the evidence was insufficient to establish that appellant's condition warranted the requested surgery. The Office noted, however, that medical treatment for the accepted strain was still authorized.

By letter dated July 13, 2001, appellant requested a hearing. In a decision dated November 15, 2001, the hearing representative found that the case was not in posture for a hearing and vacated the June 13, 2001 decision. The hearing representative found that the Office should have issued a notice of proposed termination of compensation and given appellant the opportunity to submit further evidence. The hearing representative further noted that the issue of authorization for surgery would be relevant only if the evidence established ongoing residuals of the work injury. The case was, therefore, remanded for a *de novo* decision on the issue of whether the residuals of the December 26, 1997 work injury had ceased.

Pursuant to the hearing representative's decision, on February 26, 2002 the Office issued a notice of proposed termination of benefits. Appellant did not file a timely response and by decision dated March 28, 2002, the Office termination of benefits was made final.

The Board finds that the Office improperly terminated appellant's benefits effective March 28, 2002.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ After it has been determined that a claimant has disability causally related to her federal employment, the Office may not terminate compensation without establishing that disability has ceased or that it is no longer related to the employment.² To terminate authorization for medical treatment, the Office has the burden of establishing that appellant no longer has residuals of the employment-related condition that requires further medical treatment.³

In the instant case, Dr. Rojas opined that appellant had sustained rotator cuff tendinitis (impingement) that was still unresolved as of the date of his last report, July 9, 1998. When the Office referred appellant to Dr. Pearson for a second opinion, Dr. Pearson indicated that appellant had right trapezial strain and right shoulder bicipital tendinitis. Dr. Pearson disagreed with Dr. Rojas as to appellant's need for surgery, but did place work restrictions on appellant of no heavy lifting and no repetitive overhead work. However, when the Office referred appellant to Dr. Albina for a second opinion evaluation, Dr. Albina contended that the cervical contusion sprain had resolved as of March 1998 and that the sprain in the right shoulder had resolved approximately three to four months after its occurrence on December 26, 1997. Dr. Albina's opinion is contrary to the opinion of appellant's treating physician, Dr. Rojas and is also contrary to the opinion of Dr. Pearson.

Title 5 U.S.C. § 8123(a) states in pertinent part: "[I]f there is a 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." In this case, Dr. Albina disagreed with appellant's treating physician as to whether appellant continues to suffer from residuals of his December 26, 1997 accepted injury. As an unresolved conflict in medical opinion evidence exists, the Office has failed to meet its burden of proof to terminate appellant's wage-loss compensation benefits and the termination must be reversed.⁴

The Board further finds that this case is not in posture for decision with regard to the issue of the whether the Office erroneously denied appellant's request for surgery to his right shoulder.

After two months of treating appellant's right shoulder impingement, Dr. Rojas noted that appellant was still in "quite a bit of pain" and suggested an arthroscopy. In a medical report dated June 1, 1998, Dr. Rojas indicated that appellant had several injections in her right shoulder and not responded to them, hence the need for arthroscopic surgery. Dr. Pearson, the surgeon to whom the Office referred appellant for a second opinion, disagreed, noting that he would not recommend surgery at this point and recommended Cortisone injections. However, as indicated by Dr. Rojas, these injections had already been tried and failed. On April 24, 2001 the Office referred appellant to Dr. Albina for another second opinion. Dr. Albina, in his report of May 23,

¹ *Theodore Parker*, 50 ECAB 542, 547 (1999).

² *Id.*

³ *Jose Hernandez*, 47 ECAB 288, 295 (1996).

⁴ *See Craig M. Crenshaw, Jr.*, 40 ECAB 919, 922 (1989).

2001, opined that the proposed surgery to appellant's right shoulder was not warranted. As there is a disagreement between appellant's treating physician and the second opinion physician, the Office should have referred appellant to an impartial medical examiner to resolve the existing conflict, as discussed *supra*.⁵ As the Office did not refer the case to an impartial medical examiner, there remained an unresolved conflict in the medical evidence.

Accordingly, the case is remanded to the Office for referral of appellant, the case record and a statement of accepted facts to a Board-certified orthopedic surgeon selected in accordance with the Office's procedures, to resolve the outstanding conflict in the medical evidence with regard to the proposed surgery. After such development of the case record as the Office deems necessary, a *de novo* decision shall be issued.

The decision of the Office of Workers' Compensation Programs dated February 26, 2002 terminating appellant's benefits is reversed. The June 13, 2001 decision denying surgery is vacated and this case is remanded for further consideration consistent with this opinion.

Dated, Washington, DC
October 25, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

⁵ 5 U.S.C. § 8123(a).