

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

DEBORAH Y. MATTHEWS, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Brooklyn, NY, Employer**

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**Docket No. 04-312
Issued: April 9, 2004**

Appearances:
Deborah Y. Matthews, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On November 17, 2003 appellant filed a timely appeal from an Office of Workers' Compensation Programs hearing representative's decision dated February 20, 2003, which affirmed an Office decision terminating appellant's compensation and medical benefits. She also timely appealed an August 14, 2003 Office decision denying her request to have her case reopened for a merit review under 5 U.S.C. § 8128. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case and the nonmerit Office decision.¹

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation effective April 21, 2002; and (2) whether the Office properly refused to reopen appellant's claim for a merit review under 5 U.S.C. § 8128.

¹ Under 20 C.F.R. § 501.2(c), the Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. This decision does not preclude appellant from submitting additional evidence to the Office along with a request for reconsideration.

FACTUAL HISTORY

On October 8, 1999 appellant, then a 49-year-old postal clerk, filed a notice of traumatic injury alleging that she hurt her upper back and right arm that day, while boxing flats in the performance of duty. Appellant was treated by Dr. Elie J. Sarkis, a Board-certified orthopedic surgeon, who placed her on light duty effective October 8, 1999. On October 26, 1999 she underwent a magnetic resonance imaging scan (MRI) of the cervical spine that showed degenerative disc disease at C3-4, C4-5 and a C5-6 herniated disc. Appellant subsequently filed a claim on December 3, 1999 alleging that she sustained a recurrence of disability beginning December 2, 1999. In an attending physician's report (CA-20), dated December 16, 1999, Dr. Sarkis indicated that appellant had a cervical disc herniation caused or aggravated by her work injury and that she was totally disabled for work.

On January 19, 2000 the Office accepted the claim for sprains of the right shoulder and neck only. The Office, however, specifically advised appellant that the evidence was insufficient to establish a causal relationship between her diagnosed cervical disc herniation and the October 8, 1999 work injury. She was asked to submit a reasoned medical opinion addressing why her herniated disc was causally related to her work injury and not the preexisting conditions of degenerative cervical disc disease.

On July 28, 2000 the Office referred appellant, along with a statement of accepted facts to Dr. Andrew B. Weiss, a Board-certified orthopedic surgeon, for a second opinion evaluation scheduled for August 11, 2000. In a report dated August 12, 2000, Dr. Weiss described appellant's symptoms and physical findings. He noted that there were no objective clinical signs of a right shoulder or cervical sprain and, therefore, opined that appellant's work injury had resolved. Dr. Weiss further noted that his physical examination did not support a diagnosis of a cervical disc herniation. He opined that appellant's complaints of pain were subjective and that she was no longer in need of further medical treatment for her neck and shoulders. Dr. Weiss concluded that she could return to her date of injury job without restrictions.

On October 20, 2000 the Office issued a notice of proposed termination of compensation, finding that the weight of the medical evidence as represented by Dr. Weiss's report established that appellant was no longer disabled and had no continuing residuals due to her accepted work injury. Appellant was given 30 days to submit additional evidence or argument if she disagreed with the proposed action.

In a letter dated November 3, 2000, appellant alleged that Dr. Weiss's examination was inadequate because he did not consider her complaints of left arm pain. She also submitted additional medical evidence. In a June 20, 2000 report, Dr. Sarkis diagnosed that appellant suffered from bulging annulus fibrosis of the lumbar spine at L4-5 and L5-S1, right shoulder impingement of the right rotator cuff, degenerative disc disease of the cervical spine and a herniated disc at C5-6. Dr. Sarkis opined that appellant remained totally disabled for work. Attached to the report were copies of MRI reports for the lumbar spine dated March 20, 2000 and the right shoulder and cervical spine dated October 22, 1999. Appellant also submitted an undated report from Dr. Sarkis, which listed physical findings pertaining to the neck and the bilateral upper extremities.

On December 1, 2000 the Office advised appellant that a conflict existed in the record and that she was being referred for an impartial medical examination with Dr. Chandra M. Sharma, a Board-certified neurologist, to resolve the issue of whether her herniated cervical disc was work related and whether she had any continuing disability or residuals due to her accepted work injury. In a December 12, 2000 report, Dr. Sharma reviewed a statement of accepted facts and copies of the medical evidence of record. He noted physical and objective findings, including a normal electromyography (EMG) and nerve conduction studies performed on March 29, 2000. Dr. Sharma diagnosed that appellant sustained soft tissue sprains due to her work injury. He stated that her neurological examination was normal and that she had no clinical signs of a cervical disc herniation at C5-6. Dr. Sharma concluded that appellant could return to her usual work and daily activities.

On March 12, 2001 the Office also referred appellant for an impartial medical examination with Dr. Jacobo Toledano, a Board-certified orthopedist. In a March 12, 2002 report, he noted appellant's history of injury and complaints of pain in the neck area and right upper extremity. He reported physical findings, noting that there was no clinical evidence of a cervical sprain or cervical radiculopathy. Dr. Toledano indicated that appellant had preexisting cervical spondylosis and arthritis at C3-4, C4-5 and C5-6, as well as degenerative changes in the right shoulder, unrelated to the work injury. He opined that appellant's disc herniation was associated with her preexisting degenerative disease. Dr. Toledano reported that there was no evidence of a cervical sprain with range of motion of the cervical region within normal limits. He opined that appellant's complaints of continuing right shoulder pain were entirely nonphysiological and found no objective evidence of functional or peripheral neurological deficit. Dr. Toledano concluded that appellant could return to her regular work.

In a report dated March 15, 2002, Dr. Sarkis opined that appellant was unable to return to her prior job or limited duty based on her continuing complaints of pain in the neck, left shoulder numbness, tingling of the fingers of the right and left hand and low back pain radiating under the left leg. He requested authorization for an EMG.

In a decision dated April 12, 2002, the Office terminated appellant's wage-loss compensation and medical benefits effective April 21, 2002. She requested a hearing, which was held on December 18, 2002.² The record was left open for receipt of reports from Dr. Sarkis dated March 11, April 22, June 10, 13 and 24, 2002, July 15, August 5, September 5, June 10, October 7, November 14 and December 12, 2002. In each of these reports, he noted that appellant complained of bilateral shoulder pain and low back pain radiating to the lower left leg. Dr. Sarkis repeatedly requested authorization for an EMG. On November 14, 2002 Dr. Sarkis advised that appellant had undergone cervical surgery consisting of an anterior C5-6 microdiscectomy fusion with allograft and fixation with titanium screws. A copy of the surgical report is of record.

² Appellant subsequently filed claims that alleged a recurrence of disability beginning May 1 and June 10, 2002 respectively. She alleged that she had returned to work for four hours a day from April 25 to May 1, 2002 and experienced "a lot of back pain." Appellant submitted a report dated May 2, 2002 from Dr. Leo Weinstein, a Board-certified internist. Although he stated that appellant was reinjured on May 1, 2002 he did not describe the nature of the reinjury. Dr. Weinstein diagnosed cervical radiculopathy and sprain due to "her accident."

Appellant also submitted the following evidence: copies of cervical MRI reports dated August 20, 2002 and October 26, 1999; a lumbar MRI report dated March 20, 2000, physical therapy notes; hospitalization records pertaining to a C5-6 discectomy performed October 16, 2002; progress notes dated August 1 and October 2, 2002 through January 2, 2003; prescription forms completed by Dr. Sarkis; a report from Dr. Stefano Camici, a neurosurgeon, dated November 20, 2002; and a May 2, 2002 report from Dr. Weinstein, an internist. Dr. Camici stated that he had first seen appellant on July 25, 2002 for complaints of severe neck and back pain due to an October 8, 1999 work injury. He discussed appellant's October 16, 2002 surgery and discussed the results of the MRI tests, but provided no opinion on her disability or the cause of her cervical condition. Dr. Weinstein noted that appellant sustained a "reinjury" on May 1, 2000. He diagnosed a cervical and lumbosacral radiculopathy/sprain.

In a decision dated February 20, 2003, an Office hearing representative affirmed the Office's April 12, 2002 decision. On May 29, 2003 appellant requested reconsideration and submitted a report from Dr. Camici dated April 8, 2003, a report from Dr. Weinstein dated May 2, 2002, which was already of record and a January 15, 2001 report from Dr. Sarkis stating that appellant was totally disabled.

In his April 8, 2003 report, Dr. Camici discussed appellant's surgical procedure of October 16, 2002, noting that prior to that surgery she had lifted a heavy weight at work and had the sudden onset of pain in the neck and arm. He also noted that an MRI scan confirmed the presence of a herniated cervical disc at C4-5. Dr. Camici did not address appellant's disability for work.

LEGAL PRECEDENT -- ISSUE 1

It is well established that once the Office accepts a claim it has the burden of proof to justify termination or modification of compensation benefits.³ After it is determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition or injury that requires further medical treatment.⁵ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant.⁶

³ *John W. Graves*, 52 ECAB 160 (2000).

⁴ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Mary A. Lowe*, 52 ECAB 223 (2001).

⁵ *Manuel Gil*, 52 ECAB 282 (2001).

⁶ *Id.*

ANALYSIS -- ISSUE 1

In this case, the Board finds that the Office correctly referred appellant for an impartial medical evaluation with Drs. Sharma and Toledano to resolve the conflict in the medical record between Dr. Sarkis and Dr. Weiss, with respect to whether appellant's cervical disc herniation was due to her accepted work injury and whether her cervical and right shoulder sprains were resolved.⁷ The Board has carefully reviewed the reports of Drs. Sharma and Toledano and find that their opinions are entitled to special weight. Dr. Sharma prepared a reasoned opinion based on a proper factual and medical background. He concluded that appellant had no evidence of any neurological disorder and opined that she could return to work. Dr. Toledano also prepared a reasoned opinion based on a proper factual and medical background. He stated that appellant's cervical neck sprain and right shoulder sprain had resolved based on the physical and objective findings. Dr. Toledano noted that appellant's cervical disc herniation was due to preexisting degenerative disc disease unrelated to her work injury. He specifically opined that appellant was no longer disabled and required no further medical treatment for her work injury. Dr. Toledano concluded that appellant could return to work. Because the opinions of Drs. Sharma and Dr. Toledano establish that appellant is no longer disabled and that she has no residuals causally related to her October 8, 1999 work injury, the Board concludes that the Office met its burden of proof in terminating appellant's compensation and medical benefits.

The Board finds that the reports from Drs. Weinstein and Camici are insufficient to overcome the special weight assigned the reports of the impartial medical specialists. Dr. Weinstein did not address appellant's history of injury and provided no explanation of how she was reinjured on May 2, 2002. He did not address the causal relationship between her cervical disc herniation and her accepted work injury. Similarly, Dr. Camici did not provide a reasoned medical opinion on the issues of causal relationship or disability.

Given that the Board has found that the Office properly relied on the opinions of the impartial medical specialists in terminating appellant's compensation and medical benefits, the burden of proof shifts to appellant to establish that she remains entitled to compensation after that date. The Board finds that the majority of the evidence submitted by appellant before the Office hearing representative post-dated the Office's termination of compensation and did not address her disability for work. As such, the evidence is insufficient to carry appellant's burden of proof to show that the Office erred in terminating her compensation and medical benefits or that he had continuing disability or residuals subsequent to the Office's termination decision of April 12, 2002.

⁷ Section 8123(a) provides that, if there is a disagreement between the physician making the examination for the United States and the physician of the employee, the Office shall appoint a third physician who shall make an examination to resolve that conflict. When there exists 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. *See Gloria J. Godfrey*, 52 ECAB 486 (2001).

Although appellant maintains her total disability for work based on the opinion of her treating physician, Dr. Sarkis, the Board notes that his opinion created the original conflict in the medical record. Dr. Sarkis opinion has remained consistent with respect to appellant's capacity for work; therefore, his latter reports do not overcome or create a new conflict with the reports of the impartial medical specialists.⁸

LEGAL PRECEDENT -- ISSUE 2

Section 8128(a) of the Federal Employees' Compensation Act⁹ vests the Office with the discretionary authority to determine whether it will review an award for or against compensation.¹⁰ Office regulation provide that a claimant may obtain review of the merits of the claim by: (1) showing that the Office erroneously applied or interpreted a specific point of law; or (2) advancing a relevant legal argument not previously considered by the Office; or (3) constituting relevant and pertinent new evidence not previously considered by the Office.¹¹ When an application for review of the merits of a claim does not meet at least one of these three requirements, the Office will deny the application for review without reviewing the merits of the claim.¹²

ANALYSIS -- ISSUE 2

In this case, appellant's May 29, 2003 letter requesting reconsideration did not show that the Office erroneously applied or interpreted a specific point of law, nor did it advance a relevant legal argument not previously considered by the Office. In support of her reconsideration request, appellant also failed to submit any new and relevant evidence to show that the Office erred in terminating her compensation and medical benefits. The Board has held that evidence which repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a case.¹³ Evidence that does not address the particular issue involved also does not constitute a basis for reopening a case.¹⁴ The April 8, 2003 report from Dr. Camici does not address appellant's capacity for work and is duplicative of his prior report that was submitted before the Office hearing representative. Dr. Weinstein's report was already of record and Dr. Sarkis' work evaluation report simply reiterated that appellant was totally disabled. Consequently, because appellant has failed to satisfy the requirements of section 10.606(b)(2), the Board finds that the Office properly refused to reopen her case for a merit review.

⁸ See generally, *Manuel Gil*, *supra* note 5.

⁹ 5 U.S.C. § 8101 *et seq*; see 8128(a).

¹⁰ See *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

¹¹ 20 C.F.R. § 10.606(b)(2) (1999).

¹² *Edward W. Malaniak*, 51 ECAB 279 (2000).

¹³ *Kevin M. Fatzner*, 51 ECAB 407 (2000).

¹⁴ *Id.*

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation and medical benefits effective April 21, 2002. The Board also finds that the Office properly refused to reopen appellant's case for a merit review.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated August 14 and February 20, 2003 are affirmed.

Issued: April 9, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member