



She stopped working following the date of injury. By letter dated September 8, 1999, the Office accepted appellant's claim for lumbar and cervical strains and she received appropriate compensation.

Appellant accepted the employing establishment's limited-duty job offer and returned to work eight hours a day on January 10, 2000. She later alleged that she sustained a recurrence of disability beginning on February 4, 2000 and underwent vocational rehabilitation counseling.<sup>2</sup>

The Office referred appellant to Dr. James E. Callan, a Board-certified orthopedic surgeon, who submitted an April 14, 2000 medical report. In this report, he provided a history that she sustained a work-related injury on July 27, 1999 and that in 1989 appellant did not sustain a back injury, but rather pain in the back that developed with her employment. Dr. Callan also provided appellant's medical background and his normal findings on physical examination. He stated that he had no medical records available on her and that based on the history provided, it appeared that she did not sustain a specific injury either in 1989 or 1999. Dr. Callan further stated that the amount of treatment appellant had with no documented evidence of significant abnormalities, as well as, the amount of time off work was completely unreasonable. He opined that assuming that she sustained the July 1999 incident she had long since reached maximum medical improvement and that further diagnostic studies and treatment were not indicated. Dr. Callan further opined that appellant was fully capable of returning to her usual job with no restrictions other than to follow generally accepted principles for the back regarding lifting, pushing and pulling. In an accompanying work restriction form dated April 11, 2000, Dr. Callan indicated that appellant could work eight hours a day with no physical restrictions.

By letter dated December 28, 2000, the Office referred appellant together with a statement of accepted facts, the case record and a list of questions to be addressed to Dr. Michael A. Franchetti, a Board-certified orthopedic surgeon, for a second opinion medical examination. He submitted a February 20, 2001 report in which he diagnosed cervical degenerative disc disease at C4-5 and clinically resolved cervical and lumbar strains resulted from the July 27, 1999 employment injury. Dr. Franchetti opined that appellant was no longer suffering with any continuing work-related disabilities from the July 27, 1999 employment injury. He stated that her present symptomatic degenerative disc disease at C4-5 was consistent with the natural history of progression of the degenerative changes and not due to the employment-related cervical strain. Dr. Franchetti opined that appellant could work eight hours a day in a limited-duty work capacity, but noted that the limitations were not related to the July 27, 1999 employment injury. He concluded that no further medical treatment was necessary for the work-related conditions sustained on July 27, 1999.

On July 7, 2001 appellant accepted the employing establishment's limited-duty job offer and returned to work on July 14, 2001 for six hours a day for three months to be followed by an eight-hour workday. She subsequently stopped work and submitted medical reports and treatment notes of Dr. Peter S. Trent, her attending Board-certified orthopedic surgeon, which

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<sup>2</sup> The Board notes that the record does not contain a decision issued by the Office regarding appellant's alleged recurrence of disability.

found that appellant experienced cervical and lumbar symptoms and that she was totally disabled during the period October 25, 2001 through March 19, 2004.

By letter dated June 23, 2004, the Office referred appellant together with a statement of accepted facts, the case record and a list of questions to be addressed to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion medical examination. He submitted a July 28, 2004 report in which he provided a history of her July 27, 1999 employment injury and medical treatment. Dr. Smith reported essentially normal findings on physical and neurological examination of appellant's neck and back. He opined that she had no objective residuals of the accepted employment-related conditions and that her continued subjective symptoms could only be attributed to a preexisting change in her spine. Dr. Smith stated that appellant had no ongoing soft tissue problems or any clinical evidence of radiculopathy. He noted that an electromyogram (EMG) of both the upper and lower extremities ruled out any evidence of radiculopathy. Dr. Smith further noted that a magnetic resonance imaging (MRI) scan showed spondylitic disease neither caused nor aggravated by appellant's work activities with no evidence of any traumatically herniated disc or stenosis. He opined that she could return to full-time work in her preinjury capacity as a mail handler. Dr. Smith stated that appellant did not require any further medical treatment, testing or activity modification with regard to the July 1999 employment injury, noting that it had resolved. In addition, he noted that appellant did not have any residuals of the 1989 employment-related back injury and did not require specific restrictions regarding this injury. In a work capacity evaluation dated July 29, 2004, Dr. Smith indicated that appellant had reached maximum medical improvement and that she could work eight hours a day with no restrictions.

By letter dated January 4, 2005, the Office issued a notice of proposed termination of appellant's compensation based on Dr. Smith's July 28, 2004 medical report. The Office noted that the medical opinions of Dr. Callan and Dr. Franchetti supported a finding that she no longer had any residuals or disability causally related to the July 27, 1999 employment injury. The Office provided 30 days in which appellant could respond to this notice.

Appellant submitted Dr. Trent's March 19, 2004 report, in which he noted her chronic neck and back pain. He also noted that she had been shot in the face and had a residual bullet lodged at the base of her brain and in her sinuses which caused constant recurrent sinus infections. Dr. Trent reported tenderness in the interspinous ligaments of the lower cervical spine at C5, C6 and C7 throughout the examination. An examination of the shoulders, elbows, wrists and hands revealed good range of motion and no diminution of grip strength on either side. A thoracic examination was unremarkable. Regarding the lumbar region, Dr. Trent reported acute pain in the midline at L4-5 and surrounding paralumbar muscle spasm. He noted that he administered a cervical and lumbar block and that he was going to arrange diagnostic testing for appellant in response to an official request for a complete report.

By decision dated February 15, 2005, the Office terminated appellant's compensation. The Office found the evidence submitted by her insufficient to establish that she was totally disabled for work and accorded greater weight to Dr. Smith's medical report.

## LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>3</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup> If the Office, however, meets its burden of proof and properly terminates compensation, the burden for reinstating compensation benefits properly shifts to appellant.<sup>5</sup> To prevail appellant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.<sup>6</sup>

## ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits. Dr. Smith, an Office referral physician, submitted a February 20, 2001 medical report, in which he provided an accurate factual and medical background. He conducted a thorough medical examination which provided normal results. Dr. Smith opined that appellant had no objective residuals of the accepted employment-related cervical and lumbar strains and that her continued subjective symptoms could only be attributed to a preexisting change in her spine. He stated that she had no ongoing soft tissue problems or any clinical evidence of radiculopathy, an EMG of both the upper and lower extremities ruled out any evidence of radiculopathy and an MRI scan showed spondylitic disease that was neither caused nor aggravated by appellant's work activities with no evidence of any traumatically herniated disc or stenosis. Dr. Smith concluded that appellant could return to full-time work in her preinjury capacity as a mail handler and that she did not require any further medical treatment, testing or activity modification with regard to the accepted employment injury.

The Board finds that Dr. Smith's opinion is entitled to greater weight in finding that appellant no longer has any residuals or disability due to her July 27, 1999 employment injury as it is sufficiently rationalized and based on a proper factual and medical background.

Dr. Trent's March 19, 2004 report noted appellant's chronic neck and back pain, his findings of tenderness and pain on physical examination and treatment of her cervical and lumbar problems. The Board finds that Dr. Trent's report is insufficient to outweigh the probative value of Dr. Smith's February 20, 2001 report as it failed to address whether appellant has any continuing residuals or disability causally related to the July 27, 1999 employment injury.

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<sup>3</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>4</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>5</sup> *See Virginia Davis-Banks*, 44 ECAB 389 (1993); *Joseph M. Campbell*, 34 ECAB 1389 (1983).

<sup>6</sup> *Talmadge Miller*, 47 ECAB 673, 679 (1996); *see also George Servetas*, 43 ECAB 424 (1992).

On appeal appellant argues for the first time that she did not receive the Office's January 4, 2005 notice of proposed termination prior to the actual date of termination. The Board may not consider evidence for the first time on appeal which was not before the Office at the time it issued the final decision in the case.<sup>7</sup> As the Office did not address appellant's contention, the Board cannot address it for the first time on appeal.

**CONCLUSION**

The Board finds that the Office properly terminated appellant's compensation on the grounds that she no longer had any residuals or disability causally related to the July 27, 1999 employment injury.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 15, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 2, 2005  
Washington, DC

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

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>7</sup> 20 C.F.R. § 501.2(c). Appellant can submit her argument to the Office and request reconsideration. 5 U.S. C. § 8128; 20 C.F.R. § 10.606.