

FACTUAL HISTORY

On March 27, 2002 appellant, then a 49-year-old rural route carrier, filed a traumatic injury claim alleging that on March 26, 2002 she reinjured her neck when she swerved to avoid a car backing out of a driveway.¹ She stopped work on March 28, 2002. By letter dated May 20, 2002, the Office accepted appellant's claim for cervical strain. The Office paid appellant appropriate compensation.

The Office received several medical reports from Dr. Richard L. Smith-Sanchez, an attending physician Board-certified in anesthesiology and pain management, covering the period June 26 to September 16, 2002. He diagnosed cervicgia, degenerative disc disease of the cervical spine and cervical spondylosis. Dr. Smith-Sanchez found that appellant could perform permanent limited-duty work with physical restrictions.

By letter dated November 13, 2002, the Office requested that Dr. Smith-Sanchez provide a work-related diagnosis and address whether all the residuals of the accepted employment injury had resolved and, if not, provide the expected recovery date.

On November 18, 2002 Dr. Smith-Sanchez responded that appellant sustained a cervical strain and degenerative disc disease of the cervical spine. He opined that residuals of the accepted employment injury had not resolved and that her condition was permanent.

By letter dated March 31, 2003, the Office referred appellant, together with a statement of accepted facts,² the case record and a list of questions to be addressed, to Dr. David B. Lotman, a Board-certified orthopedic surgeon, for a second opinion medical examination.

In an April 25, 2003 medical report, Dr. Lotman provided a history of appellant's medical treatment. On physical examination, he reported restricted motion of the cervical spine. Dr. Lotman diagnosed cervical spondylosis, cervical strain and symptom magnification. He opined that appellant had reached maximum medical improvement of the March 26, 2002 employment injury. Dr. Lotman stated that the cervical strain caused a temporary aggravation of a preexisting condition which had resolved. He did not believe that appellant was experiencing any residuals of the March 26, 2002 employment injury but rather from her preexisting condition. Dr. Lotman stated that there were no objective physical findings of significant cervical spine disease. He concluded that appellant had restrictions attributable to her preexisting condition, which was not altered by the March 26, 2002 employment injury. In an accompanying work capacity evaluation (Form OWCP-5c) dated April 25, 2003, Dr. Lotman stated that appellant could work eight hours a day with physical restrictions.

¹ Prior to the instant claim, appellant filed claim number 06-067560 for a neck injury she sustained on April 17, 1997. The Office accepted a cervical sprain. The file was closed on June 10, 1997 and retired to the Federal Records Center in August 2002.

² The March 13, 2003 statement of accepted facts indicated that appellant's claim was accepted for cervical strain due to acute exacerbation of a preexisting condition.

By letter dated May 20, 2003, the Office issued a notice of proposed termination of appellant's compensation based on Dr. Lotman's April 25, 2003 report. The Office provided 30 days in which appellant could respond to this notice.

In a May 24, 2003 letter, appellant disagreed with the Office's proposed action. She stated that she advised her station manager that she reinjured her neck, which was originally injured in April 1997. Appellant was told that she could not reopen the April 1997 claim and that she had to file a claim for a new injury. She contended that Dr. Smith-Sanchez' medical reports established that her cervical condition was permanent and that she could no longer work without sustaining additional injury. Appellant requested that the Office reopen her April 17, 1997 claim and not terminate her medical benefits because she was still undergoing medical treatment.

By decision dated June 25, 2003, the Office terminated appellant's wage-loss compensation and medical benefits effective that date based on Dr. Lotman's April 25, 2003 report. The Office explained that the March 26, 2002 injury constituted a new injury and that appellant could file a claim for a recurrence of disability of the April 17, 1997 employment injury. The Office noted that she did not submit any medical evidence to outweigh the probative value of Dr. Lotman's opinion.

The Office received Dr. Smith-Sanchez' June 12, 2003 report, which reiterated his prior diagnoses of cervicalgia, degenerative disc disease and cervical spondylosis.

By letter dated July 25, 2003, the employing establishment submitted appellant's July 22, 2003 claim for an occupational disease and a July 23, 2003 claim alleging that she sustained a recurrence of disability on March 26, 2002. In a July 23, 2003 letter, appellant provided a history of her April 17, 1997 and March 26, 2002 employment injuries and medical treatment. She contended that Dr. Lotman's opinion was insufficient to terminate her compensation as he failed to perform any diagnostic testing. A July 7, 2003 partial report of Dr. T.J. Broderick, a Board-certified orthopedic surgeon, found that appellant had a cervical spine strain superimposed upon cervical spondylosis at multiple levels especially, at C5-6 and C6-7. Dr. Smith-Sanchez' June 7, 2003 report reiterated his prior cervical diagnoses and also diagnosed intractable headaches and bulging discs in the lower cervical spine. He noted that appellant reached maximum medical improvement in September 2002. Dr. Smith-Sanchez recommended that appellant be placed in a less strenuous position such as, a general clerk.

In a July 15, 2003 letter, appellant, through her attorney, requested an oral hearing before an Office hearing representative. She submitted Dr. Smith-Sanchez' May 13, 2003 operative report for paravertebral cervical facet joint injections on the left side at the C4-5, C5-6 and C6-7 levels and a left third occipital nerve block. A September 25, 2003 duty status report repeated his prior opinion and also diagnosed osteoarthritis. Dr. Smith-Sanchez provided appellant's physical limitations. During a November 14, 2003 deposition, he stated that he had a history of appellant's April 17, 1997 and March 26, 2002 employment injuries and a March 9, 2000 motor

vehicle accident and her medical treatment. Dr. Smith-Sanchez described the development of a degenerative condition and explained how it could be exacerbated by an event resulting in a chronic condition. He stated:

“Usually, what happens is that all the degenerative changes occurs [sic] very slowly, so the body adapts to those changes slowly until you have trauma. You know, the body is not built to receive any severe trauma like a motor vehicle accident or a lifting injury or whatever.

“So what happens is that those changes that have been very slowly and adapting very slowly, they have, then, achieved the position of the spine, you know, after the muscle spasm. So then more abnormal information starts to enter into the area that has degenerative changes and the nerve compressions and then an abnormal cycle happens.

“If that abnormal cycle is not treated or, you know, it continues, then an abnormal pain cycle occurs that, you know, abnormal stimuli enters the area that is damaged, then the spinal cord becomes very hyper-excitabile and then muscle spasms start to occur and then more muscle spasm, more abnormal information and then an abnormal cycle happens.”

Dr. Smith-Sanchez stated that, when he last examined appellant on September 24, 2003, she complained of severe neck pain and muscle spasms in both shoulders and he prescribed pain medication. He opined that her chronic condition fell into his previously described category of an asymptomatic condition that became chronic. Dr. Smith-Sanchez opined that appellant continued to suffer from residuals of her March 26, 2002 employment injury. He explained that she had a cumulative strain which caused her condition to become chronic. Dr. Smith-Sanchez further explained that the April 17, 1997 and March 26, 2002 employment injuries and March 9, 2000 motor vehicle accident lead to her permanent chronic cervical condition.

At a March 9, 2004 hearing, appellant described her April 17, 1997 and March 26, 2002 employment injuries and Dr. Lotman’s medical evaluation. She testified that, following the March 26, 2002 employment injury, she returned to full-time limited-duty work from late April 2002 to May 30, 2003.

By decision dated May 11, 2004, the Office hearing representative found that the Office did not meet its burden of proof to terminate appellant’s compensation and reversed the June 25, 2003 decision. He found that the statement of accepted facts reviewed by Dr. Lotman did not indicate that appellant had a preexisting employment-related neck condition stemming from a July 27, 2001 motor vehicle accident. In addition, Dr. Lotman was not provided with medical records regarding the April 1997 employment injury. The hearing representative found that his opinion was not based on a complete medical background and, thus, it could not be accorded determinative weight. Appellant’s compensation was reinstated retroactive to June 25, 2003. Upon return of the case record, the hearing representative directed the Office to combine the claim assigned number 06-0675606 with the current claim, to obtain copies of all medical records concerning the July 27, 2001 car accident from appellant and to further develop the case

record to determine whether she had any continuing injury-related disability causally related to the March 26, 2002 employment injury.

On September 15, 2004 the Office referred appellant, together with an amended statement of accepted facts, the case record and a list of questions to be addressed, to Dr. Lotman for a second opinion medical examination.

In an October 1, 2004 report, Dr. Lotman reviewed appellant's medical records. He reported his findings on physical examination and diagnosed a resolved cervical strain, cervical spondylosis and symptom magnification. Dr. Lotman opined that appellant's physical examination was slightly different than the previous one as it revealed more restricted motion but she still exhibited several instances of symptom magnification. He believed that her symptomatology and restricted motion were a result of her underlying cervical spondylosis and that she had no residual of her employment-related cervical strain. Dr. Lotman explained that there was insufficient muscle spasm to account for her restricted motion. He concluded that her preexisting accepted conditions did not affect his prior conclusions, which remained valid and unchanged.

By letter dated October 20, 2004, the Office issued a notice of proposed termination of appellant's compensation based on Dr. Lotman's October 1, 2004 report. The Office provided 30 days in which appellant could respond to this notice.

By letter dated November 1, 2004, appellant's attorney submitted Dr. Smith-Sanchez' August 2003 and July 1, 2004 reports in which he reiterated the diagnoses. On January 20 and 27 and February 3, 2004 he injected an epidural steroid into appellant's cervical spine. Dr. Smith-Sanchez' February 10, 2003 duty status report revealed appellant's physical restrictions. In reports dated March 3, July 1 and September 8, 2004, he diagnosed fibromyositis bilateral trapezius, severe muscle spasms bilateral trapezius and cervical radiculitis.

On November 23, 2004 the Office terminated appellant's compensation effective that date. The Office found that the evidence submitted was not sufficient to outweigh the probative value of Dr. Lotman's opinion in finding that appellant no longer had any residuals causally related to the March 26, 2002 employment injury. In a November 29, 2004 letter, appellant requested an oral hearing before an Office hearing representative.

Following an October 27, 2005 hearing appellant's counsel submitted an August 14, 2002 magnetic resonance imaging (MRI) scan from Dr. George Stanley, a Board-certified radiologist, which found spondylitic bulges at C4-5, C5-6 and C6-7 and bilateral foraminal stenosis at C5-6, which were all secondary to uncovertebral joint hypertrophy. Dr. Smith-Sanchez' March 1, 2005 report reiterated his prior cervical diagnoses. On April 6, 2005 Dr. Michael J. Broom, a Board-certified orthopedic surgeon, performed a cervical myelogram. In an April 6, 2005 report, he reviewed the results of a March 8, 2005 MRI scan performed by Dr. Mark M. Carter, a Board-certified radiologist,³ which revealed moderate degeneration at C4-5, bulging and milder degeneration at C5-6 and C6-7. Dr. Broom also found a bulge at C3-4 and a left osteophyte at

³ Dr. Carter stated that his March 8, 2005 MRI scan demonstrated an intact cervical spinal cord and osseous structures and marrow signal.

C5-6 with possible foraminal stenosis. Dr. Broom's April 6, 2005 narrative report found that appellant sustained cervical disc degeneration with possible symptoms of nerve root irritation and possible compression. In an April 27, 2005 report, he reviewed the results of an April 22, 2005 computerized tomography scan performed by Dr. James G. Mazalewski, a Board-certified radiologist.⁴ Dr. Broom found moderate degeneration at C5-6 and C6-7. Mild to moderate foraminal stenosis was noted on the right at C4-5 and milder right foraminal narrowing at C5-6. There was a moderate degree of right foraminal narrowing at C3-4. No cord compression was noted.

Appellant submitted an October 13, 2005 decision of the Social Security Administration finding that she was entitled to disability compensation and insurance benefits beginning May 31, 2003. She also submitted a form that provided her medical history and that she retired from the employing establishment on disability.

In a December 5, 2005 letter, the employing establishment responded to appellant's hearing testimony. It contended that her claim had been accepted for cervical strain and that her current problems were degenerative in nature and not related to the accepted employment injury.

In a December 15, 2005 decision, an Office hearing representative affirmed the November 23, 2004 decision, finding that Dr. Lotman's October 1, 2004 medical opinion constituted the weight of the medical opinion evidence in finding that appellant no longer had any residuals causally related to the March 26, 2002 accepted employment injury.

In a January 9, 2006 letter, appellant, through her attorney, requested reconsideration. Counsel contended that there was a conflict in the medical opinion evidence between Dr. Smith-Sanchez and Dr. Lotman. Appellant submitted a duplicate copy of Dr. Smith-Sanchez' November 14, 2003 deposition.

In a March 10, 2006 supplemental request for reconsideration, counsel argued that Dr. Lotman's medical opinion did not constitute the weight of the medical opinion evidence because four malpractice claims had been filed against him. He submitted documents from the Florida Board of Medicine regarding these claims.

By decision dated March 20, 2006, the Office denied appellant's reconsideration request on the grounds that it neither raised substantive legal questions nor included new and relevant evidence and was, therefore, insufficient to warrant review of the prior decision.

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 his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁵

⁴ Dr. Mazalewski stated that his April 22, 2005 MRI scan revealed multilevel degenerative disc disease with areas of foraminal stenosis. An obvious disc protrusion was not evident.

⁵ *Jason C. Armstrong*, 40 ECAB 907 (1989).

The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The Federal Employees' Compensation Act provides that, if 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.⁷ The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser or consultant, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has had no prior connection with the case.⁸

ANALYSIS

The Office accepted that appellant sustained a cervical strain following her March 26, 2002 employment injury. Appellant received appropriate compensation for partial disability. The Office subsequently terminated her compensation effective November 23, 2004, finding that she no longer had any residuals causally related to the accepted employment injury based on the October 1, 2004 medical report of Dr. Lotman, an Office referral physician. Dr. Lotman reported restricted motion on physical examination and diagnosed a resolved cervical strain. He opined that appellant's symptomatology and restricted motion were due to her underlying cervical spondylosis. Dr. Lotman explained that there was insufficient muscle spasm to account for her restricted motion. He concluded that appellant's preexisting accepted cervical condition did not affect his prior April 25, 2003 opinion, which also found that she no longer had any residuals of the March 26, 2002 employment injury. He noted that the accepted strain only a temporary aggravation of appellant's preexisting cervical condition which resolved without residuals.

Dr. Smith-Sanchez, appellant's attending physician, opined in a November 14, 2003 deposition that she continued to have residuals of the March 26, 2002 employment injury. He explained that appellant had a cumulative strain, resulting from her employment injuries, which caused her condition to become chronic thereby resulting in a permanent chronic cervical condition. He noted degenerative disc disease of the cervical spine, which he stated was permanently aggravated by the 2002 employment injury.

The Board finds a conflict between Dr. Lotman and Dr. Smith-Sanchez with regard to the issue of whether appellant has any continuing residuals or disability causally related to the March 26, 2002 employment injury. As an unresolved medical conflict existed at the time the Office terminated benefits, it did not meet its burden of proof.

⁶ See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁷ 5 U.S.C. §§ 8101-8193, 8123(a).

⁸ 20 C.F.R. § 10.321.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation effective November 23, 2004 because a conflict exists in medical opinion evidence as to whether she has any continuing residuals causally related to the March 26, 2002 employment injury.⁹

ORDER

IT IS HEREBY ORDERED THAT the March 20, 2006 and December 15, 2005 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: August 24, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

⁹ In light of the Board's disposition of this issue, the issues of whether appellant established any continuing employment-related residuals after November 23, 2004 and whether the Office properly denied her request for reconsideration are moot.