

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

DIANE M. JAMES, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Oakland, CA, Employer**

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**Docket No. 05-1866
Issued: February 13, 2006**

Appearances:
Carl J. Debevec, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 7, 2005 appellant, through counsel, filed a timely appeal of a decision of the Office of Workers' Compensation Programs dated August 4, 2005 which denied modification of a May 17, 2004 decision affirming the termination of her compensation benefits effective August 10, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits on the grounds that disability causally related to her accepted May 20, 1999 employment injuries had resolved; and (2) whether appellant has established that she has any continuing disability on or after August 10, 2003 causally related to her accepted employment injuries.

FACTUAL HISTORY

On May 20, 1999 appellant, a 44-year-old clerk, filed a traumatic injury claim alleging that she injured her neck that day by lifting heavy objects. The Office accepted her claim for a left cervical strain which was subsequently expanded to include permanent aggravation

degenerative arthritic cervical spine with left radiculopathy. By letter January 11, 2001, the Office placed appellant on the periodic rolls for temporary total disability effective September 23, 2000.

In a report dated November 8, 1999, Dr. Norman B. Livermore, III, a treating Board-certified orthopedic surgeon, diagnosed cervical spondylosis with chronic cervical mechanical pain, referred into right deltoid and no neurologic findings. He reported degenerative changes in the cervical spine at C4-5, C5-6 and C6-7 based upon an x-ray interpretation. A physical examination revealed limited range of motion in the cervical spine, moderate range of motion restriction in the shoulders and a normal upper extremity neurologic examination.

In a February 22, 2000 report, Dr. Livermore reported “marked stiffness of cervical rotation and of flexion and extension” and noted appellant’s “neck is quite rigid” on physical examination. He diagnosed chronic mechanical neck syndrome with underlying cervical spondylosis.

In a report dated September 18, 2000, Dr. Stanley Baer, a second opinion Board-certified orthopedic surgeon, diagnosed severe cervical spine degenerative arthritis with probable radiculopathy into left upper extremity and history of syrinx involving the cervical spine. He concluded that appellant’s work activities permanently aggravated her underlying degenerative disease, but that appellant was partially disabled.

Dr. Livermore, in a September 20, 2000 report, diagnosed chronic left shoulder adhesive capsulitis and joint contracture, chronic cervical strain syndrome with chronic cervical mechanical dysfunction and cervical spine degenerative disc disease with mild cervical syrinx. A physical examination revealed limited range of motion in the cervical spine, moderate range of motion restriction in the shoulders and a normal upper extremity neurologic examination. Dr. Livermore recommended that appellant “be taken off work on a permanent disability basis” and “retrained into lighter work.”

On June 19, 2001 the Office referred appellant to Dr. Howard Sturtz, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Livermore and Dr. Baer regarding the number of hours she could work.

In a report dated July 27, 2001, Dr. Sturtz concluded that appellant was capable of performing the usual duties of a distribution window clerk eight hours a day. He diagnosed cervical spine degenerative disc disease without radiculopathy. Dr. Sturtz concluded no further medical treatment was necessary. In support of this conclusion, he reviewed the medical records and listed findings on physical examination. Dr. Sturtz stated:

“[I]t is my opinion that [appellant] probably has low-grade symptomatology from underlying degenerative disc disease. I believe there is a large functional component as to her level of symptomatology and the ability to perform various activities. [Appellant] demonstrates no consistent objective physical findings. Noteworthy is the alleged reduced range of motion which I observed to be increased at other times. Furthermore, the alleged reduced shoulder motion has been noted to be full by other examiners. I felt that the decreased grip strength on

the left was due to a lack of voluntary effort. Furthermore, I believe [appellant] responded inappropriately to various Waddell's tests. Her x-rays and [magnetic resonance] MRI [scan] does show findings not unusual in patients of this age, even those who are symptomatic."

In a supplemental report dated November 20, 2001, Dr. Sturtz, based upon a new and revised statement of accepted facts, noted his disagreement with Dr. Baer's opinion that appellant sustained a permanent aggravation of cervical degenerative arthritis with left radiculopathy due to her work duties. In support of his opinion, Dr. Sturtz referred to her performance which he stated "was most unnatural and not medically credible" and that appellant "lacked any physical findings to support her continuing complaints." He disagreed with the Office's acceptance of the condition of a permanent aggravation of her degenerative disc disease and reiterated that appellant was fully capable of performing her job duties.

On January 24, 2002 the Office determined that a conflict in the medical opinion evidence existed between Dr. Baer and Dr. Sturtz on the issue of whether appellant sustained a permanent aggravation of her underlying cervical degenerative condition and referred her to Dr. Vatache Cabayan to resolve the conflict.

In a February 15, 2002 report, Dr. Cabayan, based upon a review of the medical evidence, statement of accepted facts, list of questions and physical examination, diagnosed cervical sprain with disc disease and no radiculopathy and an element of thoracic outlet syndrome. A physical examination revealed 5 degrees neck flexion, 15 degrees extension, 10 degrees right tilting, 5 degrees left tilting "and rotation is 30 percent of normal to the right and to the left." Dr. Cabayan stated:

"I certainly think that spurring and loss of motion on flexion and extension views on the cervical spine and resulting stiffness are objective findings. [Appellant] might be somewhat exaggerating her limitation with regard to her neck at times when she can drive on the highway, but I am sure that there is some loss of motion and some residuals, but these are objective residuals which seem to clearly have nothing to do with her job activities. The job activities did not cause any disc deterioration or abnormalities along C5 vertebra as noted on the x-rays and the multi-level disc disease noted by MRI."

Dr. Cabayan opined that appellant's "job could have caused subjective aggravation of such objective residuals," but opined that this aggravation was not permanent. In support of his conclusion that the aggravation was temporary, Dr. Cabayan noted that appellant "actually seems to agree with Dr. Sturtz that she is more or less back to much less subjective than she had in 1999 and maybe even 1996."

On April 4, 2003 the Office referred to Dr. Jerrold M. Sherman, a Board-certified orthopedic surgeon, for a second opinion as to whether appellant continue to experience employment-related residuals. In the statement of accepted facts, the Office noted that, at the time of the referral to Dr. Cabayan, there was no conflict in the medical opinion evidence as both Dr. Baer and Dr. Sturtz were Office physicians with respect to whether appellant sustained aggravation of her preexisting degenerative disc disease. The Office recommended a referral for

another second opinion as Dr. Sturtz's report was over two years old and Dr. Cabayan's report was over a year old.

In a report dated April 30, 2003, Dr. Sherman diagnosed cervical spine osteoarthritis without mechanical or neurologic deficit and normal upper extremities and shoulders. He concluded, based upon a review of the medical evidence, statement of accepted facts and physical examination, that appellant no longer had any residuals due to her accepted May 20, 1999 employment injury. A physical examination revealed no muscle spasms, 40 degrees forward flexion and 70 degrees right and left cervical spine rotation. Dr. Sherman noted x-ray interpretations "reveal advanced osteoarthritis changes at the C4-5, C5-6 and C6-7 interspaces with disc narrowing and moderate sized anterior osteophytes." In support of his conclusion that appellant did not sustain an aggravation, Dr. Sherman opined that "[t]he osteoarthritis changes in the cervical spine on today's x-rays have been present for a least 10 years and would be as they are today even absent her work activity." As to her pain and arm numbness, he concluded these "match no known neurologic pattern." Dr. Sherman concluded that appellant had no neurologic deficit and "[a]ny aggravation of her cervical spine osteoarthritis as the result of repetitive lifting would have been short lived, for no longer than two weeks, whereupon after stopping the lifting her neck condition would have returned to its preinjury level." In concluding, Dr. Sherman opined that appellant had no employment-related disability or residuals and any work restrictions would be due to her nonemployment neck osteoarthritis.

In a report dated May 20, 2003, Dr. Livermore reviewed Dr. Sherman's report and indicated his disagreement with his conclusion that appellant had no residuals. Dr. Livermore reported that a physical examination of appellant on January 31, 2002 revealed "restricted range of motion of the left shoulder, restricted range of motion of the neck and reported arm tingling and pain with repetitive use of the arms or neck." He indicated that he believed Dr. Sherman "underestimated the significance of the amount of cervical spondylosis which [she] suffers from." In support of his disagreement, Dr. Livermore noted that "[n]ot only does [appellant] have multiple levels of cervical degenerative disc disease, but [appellant] has right moderate central stenosis at C4-5 and C5-6 and a mild cervical syrinx seen." With regards to her repetitive stress neuritis, Dr. Livermore opined that appellant's "symptoms are contributed to by the repetitive use of the left upper extremity." Next, he stated that Dr. Sherman "also has missed the fact that [appellant] has a chronic restricted range of motion in the left shoulder" by previous examiners.

On June 16, 2003 the Office issued a notice of proposed termination proposing that appellant's compensation for wage-loss and medical benefits be terminated because the medical evidence established that she was no longer disabled or had residuals due to her accepted condition. She was given 30 days to submit additional evidence.

In a letter dated July 8, 2003, appellant disagreed with the proposed termination and noted that Dr. Livermore found that she continued to have residuals and disability due to her employment injury.

In a July 17, 2003 decision, the Office finalized the termination of appellant's compensation benefits effective August 10, 2003. The Office found that the weight of the medical evidence rested with the opinion of Dr. Sherman.¹

In a July 14, 2003 report, by Dr. Livermore, he diagnosed chronic cervical strain syndrome with mechanical neck irritability, mild left shoulder adhesive capsulitis and myofascial pain syndrome with left arm neuritic pain. A physical examination revealed:

“[Appellant] has only 40 [percent] of normal cervical rotation to the left and to the right, 30 [percent] of normal flexion and 40 [percent] of normal extension. She has normal motor and sensory testing in both arms today. [Appellant] has slight restriction of internal and external rotation of the left shoulder compared to the right, affected by pain and spasm in the left shoulder.”

Dr. Livermore reiterated his objections to “Dr. Sherman’s dismissal of [appellant]’s symptoms and findings” and opined that she continued to be disabled.

In a January 19, 2004 supplemental report, Dr. Livermore diagnosed cervical degenerative disc disease with some radicular pressure, work-related onset of mechanical neck pain symptoms with pain into the left arm and milder left shoulder adhesive capsulitis. He concluded that the degenerative condition was aggravated by appellant’s work activities. A physical examination revealed:

“[Appellant] has only 40 [percent] of normal cervical range of motion, 30 [percent] of normal cervical flexion, 40 [percent] of normal cervical extension. Neurologic exam[ination] was normal in the upper extremities. [She] had mild decreased range of motion of the left shoulder with abduction to 170 degrees compared to 180 degrees on the right, internal rotation to the level of T8 compared to the level of T6 on the right and external rotation to the level of T2 on the left compared to that of T3 on the right.”

Dr. Livermore opined that appellant’s condition was “a combination of underlying cervical degenerative disease and repetitive stress injury syndrome involving the neck and upper extremities, worse on the left, due to work activities both prior to her reported work injury of May 20, 1999 and continuing with further work duties thereafter.” He concluded that these work activities permanently aggravated her underlying degenerative disc disease and caused radicular pressure.

In a letter dated February 9, 2004, appellant’s attorney requested reconsideration and contended the Office erred in relying upon Dr. Sherman’s April 30, 2003 report to terminate her benefits.

¹ The Board notes that appellant filed a claim on June 5, 2000 for a schedule award. The Office also denied appellant’s claim for a schedule award based upon its finding that appellant no longer had any residuals or disability due to her accepted employment injury.

By decision dated May 17, 2004, the Office denied modification of the July 17, 2003 decision terminating her compensation benefits.

Appellant requested reconsideration on March 24, 2005. In a letter dated May 2, 2005, her counsel requested reconsideration and submitted an April 26, 2005 report from Dr. Robert S. Blum, a physician specializing in neurological surgery. He concluded that appellant sustained a permanent aggravation of her underlying degenerative condition. Dr. Blum noted that objective findings included an “abnormal MRI scan showing evidence of multilevel degenerative disc disease, disc herniation at multiple levels, angulations of the cord in the mid cervical position, presence of a cervical syrinx.” Loss of neck range of motion, bilateral grip weakness and hand and feet numbness. In support of this conclusion that appellant’s condition was employment related, Dr. Blum noted:

“A cervical strain was previously accepted as a work[-]related condition and the nature of her work activities did cause the strain. This was superimposed upon the previously existing arthritis and syrinx and is responsible for the delay in recovery. While Dr. Sherman opines that a simple cervical strain should resolve in short order, the reason it did not resolve is because [appellant’s] underlying problems, which were lit up and caused to become symptomatic by the effects of the industrial cervical strain and her activities of employment. She did not suffer just a simple strain.”

In support of his conclusion that appellant’s condition was employment related, Dr. Blum noted:

“It is medically reasonably probable that [appellant’s] activities of employment at the USPS, namely lifting, bending, pushing and pulling activities required as a clerk, caused her underlying conditions to become symptomatic and required temporary disability and treatment. In my opinion her employment was a direct cause and caused aggravation and acceleration of her underlying medical condition.”

By decision dated August 4, 2005, the Office denied modification of the decision terminating her compensation benefits.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee’s benefits.² After it has determined that an employee has disability causally related to her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to

² Paul L. Stewart, 54 ECAB 824 (2003).

the employment.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁵

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is 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."⁶ Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.⁷

ANALYSIS -- ISSUE 1

Appellant's claim had been accepted for left cervical strain, which was subsequently expanded to include permanent aggravation of degenerative arthritic cervical spine with left radiculopathy. The Board finds that the Office did not meet its burden of proof to terminate appellant's compensation benefits as there is a conflict in medical opinion evidence on the issue of whether she sustained a permanent aggravation of her underlying degenerative condition and whether she has continuing disability and residuals related to her accepted condition.

Initially, the Board notes that the Office correctly determined that a conflict in the medical opinion evidence did not exist at the time of the referral to Dr. Cabayan. On January 24, 2002 the Office determined a conflict in the medical opinion evidence existed between Dr. Baer and Dr. Sturtz on the issue of whether appellant sustained an aggravation of her underlying cervical degenerative condition and referred her to Dr. Cabayan. Section 8123 states a conflict cannot exist unless there is a conflict between an attending physician and an Office physician.⁸ As both Dr. Baer and Dr. Sturtz were Office referral physicians, a conflict in the medical opinion evidence did not exist. Thus, Dr. Cabayan is not considered an impartial medical specialist in this case.⁹ Moreover, the Office properly determined, Dr. Cabayan's report was stale medical

³ *Elsie L. Price*, 54 ECAB 734 (2003).

⁴ *See Del K. Rykert*, 40 ECAB 284 (1988).

⁵ *James F. Weikel*, 54 ECAB 690 (2003).

⁶ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

⁷ *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

⁸ *Delphia Y. Jackson*, 55 ECAB ____ (Docket No. 04-165, issued March 10, 2004).

⁹ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

evidence as it was more than a year old and that, in keeping with Board precedent regarding stale medical evidence, a referral to another Office physician was warranted.¹⁰

In a second opinion dated April 30, 2003, Dr. Sherman diagnosed cervical spine osteoarthritis without mechanical or neurologic deficit and normal upper extremities and shoulders. He concluded, based upon a review of the medical evidence, statement of accepted facts and physical examination, that appellant no longer had any residuals due to her accepted May 20, 1999 employment injury. In support of his conclusion that her condition was not a permanent aggravation, Dr. Sherman opined that “[t]he osteoarthritis changes in the cervical spine on today’s x-rays have been present for a least 10 years and would be as they are today even absent her work activity.” With regards to her pain and arm numbness, Dr. Sherman concluded these “match no known neurologic pattern.” He concluded that appellant had no neurologic deficit and “[a]ny aggravation of her cervical spine osteoarthritis as the result of repetitive lifting would have been short lived, for no longer than two weeks, whereupon after stopping the lifting her neck condition would have returned to its preinjury level.” In concluding, Dr. Sherman opined that appellant had no employment-related disability or residuals and any work restrictions would be due to her nonemployment neck osteoarthritis. In his reports, Dr. Livermore has consistently opined that appellant’s work activities permanently aggravated her underlying degenerative disease and continues to have residuals and disability due to her accepted employment injury.

Dr. Livermore and Dr. Sherman, both Board-certified specialists are in disagreement on the issue of whether appellant has any permanent aggravation of her preexisting cervical degenerative disc disease including any residual disability causally related to the accepted condition. Accordingly, the Board finds that the Office did not meet its burden of proof to terminate appellant’s compensation due to an unresolved conflict of medical opinion.¹¹

CONCLUSION

The Board finds that the Office did not meet its burden of proof to terminate appellant’s compensation effective August 10, 2003.

¹⁰ See *Keith Hanselman*, 42 ECAB 680 (1991); *Ellen G. Trimmer*, 32 ECAB 1878 (1981). (Reports almost two years old deemed invalid basis for disability determination and loss of wage-earning capacity).

¹¹ In view of the disposition of this issue, the Board need not address the issue of whether appellant has any continuing disability on and after August 10, 2003 due to her accepted May 20, 1999 employment injury.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 4, 2005 is reversed.

Issued: February 13, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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