

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

DEIDRA A. LINTZ, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
San Francisco, CA, Employer**

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**Docket No. 05-1905
Issued: March 6, 2006**

Appearances:
Deidra A. Lintz, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On September 12, 2005 appellant filed a timely appeal from the September 17, 2004 merit decision of the Office of Workers' Compensation Programs, which affirmed the termination of her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the termination issue. The Board also has jurisdiction to review the Office's July 29, 2005 decision denying her request for reconsideration.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's compensation benefits; and (2) whether the Office properly denied appellant's March 28, 2005 request for reconsideration.

FACTUAL HISTORY

On May 31, 1994 appellant, then a 34-year-old letter carrier, sustained an injury in the performance of duty while pulling down her route. The Office accepted her claim for right

shoulder strain, cervical strain and right shoulder impingement. Appellant received appropriate compensation.

A conflict in medical opinion arose between appellant's physician, Dr. R. Thomas Grotz, and an Office referral physician, Dr. Richard G. Dedo, on whether she had any residuals of her May 31, 1994 employment injury requiring ongoing medical treatment. The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. James M. Glick, a Board-certified orthopedic surgeon, for resolution of the conflict.

In a report dated October 31, 2001, Dr. Glick related appellant's history. He reviewed many medical records, including the medical records of Dr. Grotz and Dr. Dedo and various electrodiagnostic studies. He described his findings on physical and neurological examination. Dr. Glick found that appellant sustained a cervical spine sprain, a right shoulder sprain and a right shoulder impingement on May 31, 1994. He stated: "In my opinion, the residual symptoms that [appellant] is experiencing are from a cervical sprain." Dr. Glick provided several reasons for this opinion:

"1. Pain in the back of her neck and on the top of her shoulder is more consistent with the cervical spine than the shoulder.

"2. Complaints of weakness in her right arm are consistent with a neck problem.

"3. There is little from my examination and what I could find in the medical records to suggest that the problem is emanating from the shoulder, such as an impingement. Furthermore, the time of relief that [appellant] states that she received from the steroid injection into her right shoulder (15 [to] 20 minutes) back in 1994 in my opinion is not sufficient enough to say that the problem was due to an impingement and that surgery was or is indicated. Also, in my experience, I have not found or even know about the x-ray findings that Dr. Grotz claims show evidence of a shoulder impingement.

"4. The objective findings on my examination do not substantiate a shoulder impingement or evidence of cervical nerve root irritation or compression.

"Therefore, by exclusion I believe, [appellant's] problems are most likely due to a muscle strain of the cervical spine (cervical sprain)."

Dr. Glick added, however, that there were no findings from his examination to explain appellant's present symptoms:

"Therefore, I am not sure why [appellant] is presently experiencing so much discomfort. From an objective standpoint, [she] should be healed now. For treatment, I would not consider surgery. I suggest that she use nonsteroidal anti-inflammatory medications as needed."

On May 16, 2002 the Office requested clarification from Dr. Glick on whether appellant continued to have any residuals of her accepted injury. The Office provided a March 4, 2002 report from Dr. Grotz, who commented on Dr. Glick's report and who continued to request acknowledgement of appellant's right shoulder impingement.

In a supplemental report dated June 3, 2002, Dr. Glick addressed the comments made by Dr. Grotz, stating:

"I realize that lidocaine was given and [appellant] gained some immediate relief, but in view of all the other vague objective findings that Dr. Grotz recorded at the time of the injection in 1998, I still do not feel that it is enough to say the problem was due to an impingement.

"In regards to the objective findings on my examination in October 2001, I do not consider these a very objective in [appellant's] case. I mentioned that she guarded motion because of pain. This means that she can voluntarily restrict motion, which I feel she did because of pain. Pain is a subjective factor, not objective. The same is true for the impingement sign. This test is positive if it elicits pain and again pain is a subjective sign and not objective.

"The x-rays of [appellant's] shoulder showed a type I acromion, which is not what you would expect in a true impingement syndrome. Also, the MRI [magnetic resonance imaging] [scan] reading of tendinosis is vague and does not mean that this is an actual impingement syndrome.

"Furthermore, [appellant's] pain pattern does not fit with the diagnosis of impingement. The pain that she presents is in the region of the trapezius rather than around the deltoid tubercle region where most often impingement pain occurs.

"Therefore, in my opinion, there is very little to explain the objectivity [sic] of [appellant's] problem. In my opinion, her disability is based on her subjective symptoms only.

"To comment further, I would like to know where Dr. Grotz got the figure of an 85 percent chance of [appellant's] gaining improvement from the surgery that he suggests. In [her] case, I feel that there is a greater chance of her gaining no relief from Dr. Grotz proposed surgery than obtaining relief. In my opinion, she would be better off with the treatment Dr. Grotz offered in the last paragraph of his [March 4, 2002] report commencing with 'for now.'

"In summary, [appellant's] residuals of injury to her neck and shoulder are based on subjective symptoms only, in my opinion.

"To explain Dr. Grotz' comment on 'my only performing hip arthroscopy at this time' I offer the following. I started performing shoulder arthroscopy in 1977. In my career, I performed many shoulder arthroscopies. I have lectured and published on the subject. I even believe I taught Dr. Grotz shoulder arthroscopy

when he was an orthopedic resident at the University of California, San Francisco. At the present time, because I am of retirement age, I have decided to stop performing all surgeries except for hip arthroscopy, which I have recently developed. I still see shoulders cases on a consultative basis and assist on these cases in the OR.”

Appellant submitted a November 1, 2002 MRI scan report. The Office asked Dr. Glick whether this report in any way affected or altered his opinion. Dr. Glick responded on September 24, 2003:

“The MRI [scan] report regarding her shoulder noted an undersurface tear of the supraspinatus tendon and tend[i]nitis of the infraspinatus and subscapularis tendons.

“These findings can be found in the normal aging process. As stated in my previous letters, in order for the MRI [scan] to be of significance, there should be objective findings on physical examination that would point to a rotator cuff problem. When I examined [appellant] on October 11, 2001, she did not have objective findings that explained the MRI [scan]. In fact, she had no objective findings to explain her symptoms at that time.

“Therefore, the MRI [scan] taken on November 1, 2002, does not alter my previous opinions given in reports dated October 31, 2001 and June 3, 2002.”

In a decision dated October 22, 2003, the Office terminated appellant’s compensation effective that date on the grounds that she had recovered from her work-related injuries. The Office found that the weight of the medical evidence rested with Dr. Glick, the impartial medical specialist.

In a decision dated September 17, 2004, an Office hearing representative affirmed the termination of appellant’s compensation benefits. She found that additional medical evidence from Dr. Grotz, submitted after the hearing on July 15, 2004, was insufficient to create a new conflict.¹

On March 28, 2005 the Office received appellant’s undated request for reconsideration: “I am requesting reconsideration of the decisions issued August 21, 2000 and March 23 and August 8, 2001 terminating my compensation for the accepted injuries on August 24, 1992 and May 31, 1994.”²

¹ Dr. Grotz argued that appellant’s problems came from overhead reaching casing in her job, which she did from her chair for about two and a half years. He stated that she cased about 15 to 30 feet of mail, resulting in the logical production of the cervical spine and shoulder maladies obtained. He emphasized the progression in the MRI scans, which he described as a continuum. Dr. Grotz again requested authorization for surgery.

² On August 24, 1992 appellant sustained an injury in the performance of duty when her left knee struck the bumper of her postal vehicle, causing her to fall. On August 26, 1992 she fell again. The Office accepted her claim for left knee sprain, right hip contusion and lumbosacral spine strain/sprain. OWCP File No. 13-0992724. That claim is current before the Board under a separate appeal docketed as Docket No. 05-1915.

In a decision dated July 29, 2005, the Office denied appellant's March 28, 2005 request for reconsideration on the grounds that it was untimely filed with respect to the decisions dated August 21, 2000 and March 23 and August 8, 2001. Further, the Office found that appellant's request failed to show clear evidence of error.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ After it has 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

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary of Labor shall appoint a third physician who shall make an examination.⁵ When 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.⁶

ANALYSIS -- ISSUE 1

The Office provided Dr. Glick, the impartial medical specialist, with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper background. His review of the medical record was extensive. He reported, consistent with the medical conditions accepted in this case, that appellant sustained a cervical spine sprain, a right shoulder sprain and a right shoulder impingement on May 31, 1994. In his initial report, Dr. Glick explained how appellant's current symptoms were most likely due to a muscle strain of the cervical spine or cervical sprain. There was little from his examination or from what he could find in the medical records to suggest that the problem was emanating from appellant's shoulder. In his second report, he countered arguments made by Dr. Grotz, an attending physician, that appellant had a right shoulder impingement. In his third report, Dr. Glick explained how the November 1, 2002 MRI scan findings on appellant's right shoulder were consistent with the normal aging process and how it lacked any significance in the absence of objective findings on physical examination.

The Board finds that Dr. Glick's opinion is well rationalized and is based on a proper factual background. It therefore must be given special weight in resolving whether appellant continues to suffer residuals of her accepted right shoulder strain or right shoulder impingement. The Board finds that the Office has met its burden of proof to terminate appellant's

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ 5 U.S.C. § 8123(a).

⁶ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

compensation benefits for the accepted right shoulder conditions and will affirm the Office's September 17, 2004 decision accordingly.

The Board finds, however, that the report of Dr. Glick does not establish that the accepted cervical strain, condition had resolved. Dr. Glick did not report that appellant had recovered from this condition. To the contrary, he stated that it was his opinion that the "residual" symptoms appellant was experiencing were from a cervical sprain. He reported that appellant's problems were most likely due to a muscle strain of the cervical spine or cervical sprain. Although he was not sure from an objective standpoint why appellant was currently experiencing so much discomfort, Dr. Glick suggested ongoing medical treatment consisting of nonsteroidal anti-inflammatory medications as needed. When the Office requested clarification on whether appellant continued to experience any residuals of her accepted injury, Dr. Glick did not report that the accepted cervical strain had resolved.

The Board finds that the Office has not met its burden of proof to terminate appellant's compensation benefits for the accepted condition of cervical strain. Where the impartial medical specialist reports that the claimant is experiencing residual symptoms of an accepted condition. The Office may not terminate compensation without a positive demonstration, by the weight of evidence, that residuals related to the accepted condition have ceased.⁷

The Board further finds that the additional medical evidence from Dr. Grotz, submitted after the hearing on July 15, 2004, is insufficient to overcome the weight accorded Dr. Glick's opinion as the impartial medical specialist or to create a new conflict.⁸ Dr. Grotz was on one side of the conflict that Dr. Glick resolved. His history that appellant's problems came from overhead reaching for about two and a half years ignores the traumatic nature of the accepted injury in this case, which occurred on May 31, 1994.

LEGAL PRECEDENT -- ISSUE 2

The Federal Employees' Compensation Act provides that the Office may review an award for or against payment of compensation at any time on its own motion or upon application.⁹ The employee shall exercise this right through a request to the district Office. The request, along with the supporting statements and evidence, is called the "application for reconsideration."¹⁰

An employee (or representative) seeking reconsideration should send the application for reconsideration to the address as instructed by the Office in the final decision. The application for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that the Office erroneously applied or

⁷ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

⁸ *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

⁹ 5 U.S.C. § 8128(a).

¹⁰ 20 C.F.R. § 10.605 (1999).

interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by the Office; or (3) constitutes relevant and pertinent new evidence not previously considered by the Office.¹¹

An application for reconsideration must be sent within one year of the date of the Office decision, for which review is sought.¹² Timely request for reconsideration may be granted if the Office determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, the Office will deny the application for reconsideration without reopening the case for a review on the merits.¹³

The Office will consider an untimely application only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.¹⁴

ANALYSIS -- ISSUE 2

Although appellant requested reconsideration of Office decisions dated August 21, 2000 and March 23 and August 8, 2001, which respectively terminated her compensation, affirmed the termination of her compensation and denied modification of the termination. It is noted that the most recent merit decision in this case is the hearing representative's September 17, 2004 decision, which also affirmed the termination of her compensation benefits. The Board therefore finds that appellant's March 28, 2005 request for reconsideration was timely filed within one year of the Office's most recent merit decision on the issue. Because the Office applied the "clear evidence of error" standard for untimely requests, the Board will set aside the Office's July 29, 2005 decision and remand the case for an appropriate final decision under the proper standard of review.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate compensation for the accepted right shoulder conditions. Because the impartial medical specialist supported continuing residuals of the accepted cervical strain for which he suggested ongoing medical treatment, the Office has not met its burden to establish that the accepted cervical condition has resolved. The Board further finds that the Office applied the wrong standard of review in denying appellant's March 28, 2005 request for reconsideration.

¹¹ *Id.* § 10.606.

¹² *Id.* § 10.607(a).

¹³ *Id.* § 10.608.

¹⁴ 20 C.F.R. § 10.607 (1999).

ORDER

IT IS HEREBY ORDERED THAT the September 17, 2004 decision of Office of Workers' Compensation Programs is affirmed with respect to the accepted right shoulder conditions and is reversed with respect to the accepted cervical strain. The Office's July 29, 2005 decision is set aside and the case remanded for further action consistent with this opinion.

Issued: March 6, 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