

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

P.R., Appellant)

and)

DEPARTMENT OF VETERANS AFFAIRS,)
VETERANS ADMINISTRATION HOSPITAL,)
Perry Point, MD, Employer)

_____)

**Docket No. 07-1543
Issued: November 5, 2007**

Appearances:
Appellant, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 18, 2007 appellant filed a timely appeal from an Office of Workers' Compensation Programs' hearing representative's decision dated February 23, 2007, which affirmed a July 26, 2006 Office decision terminating her compensation benefits. Under 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 met its burden of proof to terminate appellant's compensation benefits; and (2) whether appellant has established continuing disability after August 5, 2006, causally related to the accepted employment injury.

FACTUAL HISTORY

On August 14, 1981 appellant, a 37-year-old nursing assistant, injured her left wrist and left arm while lifting a patient in bed. She filed a claim for benefits, which the Office accepted for fracture of the left carpal scaphoid. The Office commenced payment for temporary total

disability compensation. Appellant's claim was accepted for the additional conditions of de Quervain's syndrome, secondary left shoulder/hand syndrome and reflex sympathetic dystrophy (RSD), left upper extremity.

In a report dated August 13, 2004, Dr. Vincent M. Osteria, a Board-certified orthopedic surgeon and appellant's treating physician, stated that appellant had been totally disabled for the past several years he had been treating her and remained totally disabled. He stated that appellant had cervical strain, brachial plexus and cervical degenerative disc disease, all of which were medically connected to and caused by her work injury. Dr. Osteria stated that appellant virtually had no use of the left upper extremity and was unable to do repetitive tasks with the left upper extremity such as pushing, pulling, driving and climbing. He continued to submit periodic reports updating appellant's condition.

In order to determine appellant's current condition and to ascertain whether she still suffered residuals from her accepted condition, the Office referred her for a second opinion examination with Dr. Kevin F. Hanley, Board-certified in orthopedic surgery.

In a report dated March 25, 2003, Dr. Hanley, after reviewing the medical history and statement of accepted facts, stated that on examination of the upper extremity appellant had no signs of any RSD. He stated:

"At this point in time, it is my belief that absolutely nothing is going on with [appellant] that has anything to do with the fact that she broke her navicular bone 24 years ago. She did develop a pain syndrome afterward, but that is gone.

"There is no reason to believe that [appellant] currently has an ongoing chronic pain syndrome in the upper extremity. One would have to conclude that, at the present time, she does not have any injury-related factors of disability directly related to work activities either as a direct cause, aggravation, precipitation or acceleration.

"[Appellant] has a nonindustrial and preexisting disability in the sense that she has widespread and medical problems as outlined in the statement of accepted facts. She also has degenerative disease of the cervical spine which has no relationship whatsoever to her work exposure. As a consequence of these findings, [appellant] has no restrictions to return to work activities as a nursing assistant, though it appears that this long ago was decided as she was rehabilitated into other types of jobs. However, again, other than restrictions that were placed upon her for her age and other medical problems, she does not have any that directly relate to the upper extremity or residuals of her wrist fracture. The other accepted conditions, in my mind, are not active at the present time."

In a report dated March 5, 2006, Dr. Osteria reiterated his diagnosis of persistent neck and left upper extremity pain and paresthesias with weakness. He expressed his disagreement with Dr. Hanley's opinion, noting that appellant had developed conditions which were not related to her work injury but did impact her ability to work. Dr. Osteria stated that, although Dr. Hanley did not address the possibility of brachial plexus injury this diagnosis has been

“entertained” since the late 1990’s. He advised that brachial plexus had been demonstrated on electromyogram since 1999 and asserted that although her RSD had subsided she did have some vascular sequela stemming from RSD, which might also be related to the mesogenic thoracic outlet.

The Office found that there was a conflict in the medical evidence between appellant’s treating physician, Dr. Osteria, who opined that appellant remained totally disabled from her previous job as a nursing assistant, and Dr. Hanley, the second opinion physician, who opined that appellant’s accepted conditions had resolved and that appellant was able to perform her date-of-injury job without restrictions. The Office referred the case to a referee medical specialist, Dr. Gary W. Pushkin, a Board-certified orthopedic surgeon. In a report dated March 30, 2006, Dr. Pushkin reviewed the medical history and statement of accepted facts and stated findings on examination. He advised that appellant had a healed scaphoid fracture and resolved de Quervain’s tenosynovitis of the left wrist, post left ulnar neuropathy, post pronator syndrome, with a history of RSD and thoracic outlet syndrome. Dr. Pushkin stated:

“[Appellant] sustained a fracture to her hand back in 1981 which was treated and healed. She subsequently developed several other problems including ulnar neuropathy and RSD. Based on the electrodiagnostic studies [appellant] had in 1990, she had recovered from all of these problems.

“The studies [appellant] had in 1999 certainly are suggestive of thoracic outlet syndrome and may merit further work-up; however, I cannot relate these problems to the wrist fracture and subsequent problems she sustained in the years after that to her initial injury. I feel that she reached maximum medical improvement for her initial injuries a number of years ago. It concerns me that we have a woman who is on so many medications just related to this injury. Even with the thoracic outlet syndrome, I see no reason why [appellant] cannot be working so long as she is not working overhead. I think any further evaluation and/or treatment for the thoracic outlet syndrome would be unrelated to the injuries accepted in her statement of facts. [Appellant] also has a number of nonrelated medical problems. I do not feel that any of her persistent problems are a residual of her original injury.”

In a supplemental report dated April 27, 2006, Dr. Pushkin stated that appellant demonstrated no evidence of neuropathy, radiculopathy, thoracic outlet syndrome or residual RSD. He noted that electrical studies in 1999 were suggestive of a neuropathy; however, he stated that this was something that would have developed in the intervening decade and was not related to her scaphoid fracture and RSD of 1981. Dr. Pushkin asserted that “It is my opinion [appellant] has recovered from the injury and subsequent sequelae of her 1981 injury and that her current problems are unrelated to that injury.”

In a notice of proposed termination dated May 8, 2006, the Office, based on Dr. Pushkin’s opinion, found that the weight of the medical evidence demonstrated that appellant was no longer disabled due to her August 14, 1981 employment injury. The Office found that Dr. Pushkin’s opinion was that of an impartial medical examiner sufficient to resolve the conflict in the medical evidence and constituted the weight of the medical evidence. The Office allowed

appellant 30 days to submit additional evidence or legal argument in opposition to the proposed termination.

In a report dated June 5, 2006, Dr. Osteria expressed his opposition to the proposed termination. He stated:

“As far as I am concerned, [appellant’s] complaints and symptomatology in the 80’s were consistent with thoracic outlet syndrome but were obscured by the fact that she had both RSD and a broken wrist. In my opinion, the present difficulty that she has with the thoracic outlet syndrome stems from her original injury in the 1980’s at the time of her employment with [the employing establishment]. The date of that injury was August 14, 1981.”

By decision dated July 26, 2006, the Office terminated appellant’s compensation benefits.

On August 18, 2006 appellant’s attorney requested an oral hearing, which was held on December 22, 2006.

By decision dated February 23, 2007, an Office hearing representative affirmed the July 26, 2006 termination decision, finding that the Office met its burden to terminate compensation.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.¹

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.²

Section 8123(a) provides that, 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.³

ANALYSIS

In order to resolve the conflict in the medical evidence between appellant’s treating physician, Dr. Osteria, and Dr. Hanley, the second opinion physician, the Office referred the case to a referee medical specialist, Dr. Pushkin, who stated in his March 30, 2006 report that the accepted conditions of left scaphoid fracture, de Quervain’s tenosynovitis of the left wrist and RSD of the left upper extremity, stemming from her 1981 work injury, had resolved.

¹ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

² *Id.*

³ *Regina T. Pellicchia*, 53 ECAB 155 (2001).

Dr. Pushkin noted that the 1999 electrodiagnostic studies suggested thoracic outlet syndrome, but did not relate these findings to the wrist fracture and subsequent problems that appellant experienced due to her initial injury. He did not believe that any of her current problems were residuals from her 1981 work injury and opined that she could return to her preinjury job as long as she avoided overhead lifting. Dr. Pushkin stated in his April 27, 2006 report that appellant demonstrated no evidence of neuropathy, radiculopathy, thoracic outlet syndrome or residual RSD. He reiterated that electrical studies in 1999 suggested neuropathy, but opined that this was something that would have developed in the intervening decade and was unrelated to her 1981 scaphoid fracture and RSD of 1981. Dr. Pushkin opined that appellant had recovered from the injury and subsequent sequelae of her 1981 injury. The Office relied on Dr. Pushkin's opinion in its July 26, 2006 decision, finding that appellant had no residuals or continuing disability stemming from her August 1981 work injury and was therefore not entitled to compensation or medical benefits.

The Board finds that Dr. Pushkin's referee opinion negated a causal relationship between appellant's condition and disability and constituted medical evidence sufficient to establish that appellant no longer had any residuals from her accepted August 1981 injury. His opinion is sufficiently probative, rationalized and based upon a proper factual background. Therefore, the Office properly accorded Dr. Pushkin's opinion the special weight of an impartial medical examiner.⁴

LEGAL PRECEDENT -- ISSUE 2

Once the Office properly terminated appellant's compensation in its July 26, 2006 decision, the burden of proof shifted to appellant to establish continuing disability.⁵

ANALYSIS -- ISSUE 2

Appellant argued at the hearing that she still had residuals from her 1981 employment injury and was still totally disabled. However, she did not submit any additional medical evidence. Thus the Office hearing representative properly found in his February 23, 2007 decision that the opinion of Dr. Pushkin still represented the weight of the medical evidence. The Board will affirm the February 23, 2007 Office decision.

CONCLUSION

Under the circumstances described above, the Board finds that the Office met its burden of proof to terminate appellant's compensation benefits and she has not established an employment-related continuing disability following the termination of her benefits.

⁴ Gary R. Seiber, 46 ECAB 215 (1994).

⁵ Talmadge Miller, 47 ECAB 673, 679 (1996); see also George Servetas, 43 ECAB 424 (1992).

ORDER

IT IS HEREBY ORDERED THAT the February 23, 2007 and July 26, 2006 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: November 5, 2007
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board