

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

_____)
M.G., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Omaha, NE, Employer)
_____)

**Docket No. 07-1196
Issued: January 4, 2008**

Appearances:
Linda Temple, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 30, 2007 appellant filed a timely appeal from Office of Workers' Compensation Programs' merit decision dated May 10, 2006, denying modification of its termination of his compensation benefits and a nonmerit decision dated January 8, 2007 denying reconsideration. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's compensation benefits effective November 7, 2003; (2) whether appellant met his burden of proof to establish that he had any disability or condition after November 7, 2003, causally related to the September 4, 1999 employment injury; and (3) whether the Office properly denied further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On January 5, 2003 appellant, then a 54-year-old city letter carrier, filed an occupational disease claim for neck and lower back conditions which he attributed to his to federal employment.¹ The Office accepted the claim for lumbar and cervical subluxations. Appellant returned to limited duty on September 29, 1999. In September 2003, he decreased his work hours to six hours a day with restrictions on carrying mail and walking.

In an April 25, 2003 letter and work capacity evaluation, Dr. Julie Owen-Wagner, a chiropractor, determined that appellant reached maximum medical improvement and issued permanent restrictions. She referred appellant to Dr. Michael Longley, a Board-certified orthopedic surgeon. In a May 19, 2003 report, Dr. Longley diagnosed lumbar back pain, cervicgia/neck pain and shoulder pain, degenerative disc disease in both the cervical and lumbar spine and generalized osteoarthritis. Following the Office's request for clarification in a June 23, 2003 report, Dr. Longley opined that appellant was able to work regular duty as a city carrier without restrictions.

The Office referred appellant to Dr. Anil Agarwal, a Board-certified orthopedic surgeon, for a second opinion. In an August 21, 2003 report, Dr. Agarwal noted appellant's history of injury and treatment, set forth his examination findings and reviewed the medical reports of record. He opined that appellant's accepted conditions of September 4, 1999 had resolved as there were no positive findings. Dr. Agarwal noted that appellant had some preexisting foraminal stenosis and lumbar spondylosis. He opined that appellant could not go back to full-time duty as a letter carrier, but was able to work eight hours a day with restrictions. Following the Office's request for clarification, Dr. Agarwal advised that appellant's work restrictions were as a result of his underlying and preexisting conditions, not a result of the accepted conditions.

On September 17, 2003 the Office proposed to terminate compensation benefits based on Dr. Agarwal's opinion that appellant's accepted conditions had resolved.

In response, appellant submitted September 23 and October 9, 2003 letters offering argument, an excerpt from the Gate City News from January 2001 and an October 3, 2003 magnetic resonance imaging (MRI) scan report, which noted bilateral foraminal stenosis at C3-4 and right foraminal stenosis at C4-5.

In a February 26, 2003 report, Dr. Brian P. Conroy, a Board-certified orthopedic surgeon, noted that appellant had complaints of neck pain and bilateral shoulder pain since 1999 and had previously been diagnosed with neck arthritis. He noted that the only thing that had changed since that time was appellant's job, which got "heavier." Dr. Conroy listed an impression of either a rotator cuff tear or nerve injury to the left shoulder and cervical arthritis. In a March 21, 2003 report, he stated that the cervical stenosis at the neural foramen could explain appellant's neck pain and some of his shoulder pain. Dr. Conroy found that appellant had subacromial impingement, bursitis and rotator cuff tendinitis (which were all the "same thing") and

¹ In a separate claim, the Office previously accepted the conditions of right tennis elbow and right acromioclavicular tendinitis due to a June 20, 1988 injury.

hypertrophy of the acromioclavicular joint and the inferior acromion, which affected both shoulders, the right worse than the left. He opined that the impingement could be work related due to appellant's amount of and height of overhead lifting. Dr. Conroy further opined that carrying a bag on the shoulder could aggravate the acromial joint and the neck. He also opined that appellant's neck condition appeared to be work related as he was tolerating his neck problem before his job change, which involved twisting back and forth and carrying.

In a September 30, 2003 report, Dr. Stephen E. Doran, a neurosurgeon, noted the history of injury and presented his examination findings. He diagnosed chronic neck and bilateral arm pain and recommended a follow-up MRI scan of his cervical spine. Dr. Doran noted that appellant had multiple questions as to whether his current condition was related to his occupation. He advised that, in the absence of a specific job injury, it would be difficult to attribute his current condition entirely to his occupation.

Medical reports dated April 25, May 22 and October 9, 2003 from Dr. Owen-Wagner were submitted. On October 9, 2003 she disagreed with Dr. Agarwal's opinion that appellant's accepted conditions had resolved. Dr. Owen-Wagner advised that appellant had vertebral subluxation complex in various areas of the spine which was complicated by osteoarthritis, fibromyalgia and job stress. She indicated that appellant had reached maximum medical improvement and had a moderate-severe disability.

By decision dated November 7, 2003, the Office terminated appellant's compensation effective that date. It found that the weight of the medical opinion evidence rested with Dr. Agarwal, the second opinion physician, who opined that appellant's accepted conditions had resolved.

On November 28, 2003 appellant requested an oral hearing, which was held on March 18, 2004. He submitted a November 30, 1999 MRI scan and various medical forms discussing treatment and evaluation at the Rejuvenation Center. In an October 7, 2003 report, Dr. Doran advised that an October 3, 2003 MRI scan showed mild foraminal narrowing at C3-4 bilaterally and on the right at C4-5. He opined that appellant was at maximum medical improvement and his restrictions should remain the same.

In a January 29, 2004 report, Dr. Rod Hall, an osteopath, advised that several conditions in appellant's spine may be contributing to his condition. He advised that the pain in the cervical area was primarily from bony encroachment and sclerosis of degenerative arthritic spondylosis and degenerative disc disease. Dr. Hall further advised that the lumbar pain and intermittent radiculopathy resulted from mild anterolisthesis of L4-5, mild to moderate degenerative disc disease, annular disc bulging at various levels, hypertrophy of posterior elements of the lumbar spine and mild to moderate spinal canal stenosis. He opined that the lumbar spine changes were the result of cumulative overuse and unequal stressors that were most likely job related. On March 15, 2004 Dr. Hall described appellant's work activities and opined that his symptomatology was related to his repetitive work stressors of carrying heavy mailbags and repetitive turning of the head over a number of years. He further stated that appellant had definite arthropathies that were a pathologic response to overuse.

On May 6, 2004 an Office hearing representative affirmed the termination of wage-loss compensation benefits effective November 7, 2003 based on Dr. Agarwal's opinion. The Office hearing representative found, however, a conflict in medical opinion evidence was created between Dr. Hall, for appellant, and Dr. Agarwal, the Office referral physician, as to whether appellant had continuing employment-related residuals. The hearing representative directed the Office to refer appellant to an impartial medical examiner to resolve the conflict.

On June 10, 2004 the Office referred appellant, together with a statement of accepted facts, the record and a list of questions, to Dr. Lonnie R. Mercier, a Board-certified orthopedic surgeon, for an impartial medical examination.² In a July 1, 2004 report, Dr. Mercier reviewed appellant's history and noted that, since August 2002, he worked as a city letter carrier for six hours a day, which involved delivery for two hours and sorting mail for four hours. He reported diminished cervical spine movement on examination, range of motion of the lumbar spine consistent with age and an essentially normal neurologic examination. Dr. Mercier opined that appellant had degenerative disc disease involving the cervical and lumbar spines, which was confirmed by his radiographic studies. He noted that the term "subluxation" was generally not accepted as a valid diagnosis in the medical community and found no clinical evidence or diagnostic studies to support a "subluxation." Dr. Mercier explained that there was no evidence indicating problems with spinal alignment and opined that appellant's neck and low back pain was the result of the aging process. He stated that appellant's underlying degenerative disc disease of the cervical and lumbar spine did not develop from either his regular work duties or his limited-duty position and that any pain or symptoms he experienced resulted from the underlying degenerative disc disease and was unrelated to work activities. Dr. Mercier further opined that appellant could not return to his original position due to degenerative disc disease and age, but that he should be able to perform his position as a city letter carrier full time with restrictions. He explained that the restrictions were due to appellant's underlying degenerative disc disease and age and not due to the work injury or activity. In a work capacity evaluation dated June 30, 2004, Dr. Mercier stated that appellant was capable of working eight hours a day and noted his physical restrictions.

In a July 14, 2004 decision, the Office found that appellant had no continuing disability due to his accepted condition. The Office accorded special weight to Dr. Mercier's report.

On August 4, 2004 appellant requested an oral hearing which was held on November 21, 2005. He submitted a statement disagreeing with the Office's development of his claim and submitted evidence regarding administrative matters and the duties he performed. Appellant also submitted reports from Dr. Hall who disagreed with Dr. Mercier's opinion and indicated that his repetitive stress injuries were employment related. In an August 30, 2004 report, Dr. Owen-Wagner disagreed with Dr. Mercier's opinion, noting the manner in which subluxations could be diagnosed. She advised that appellant had vertebral subluxation complex that was complicated by osteoarthritis, fibromyalgia and repetitive twisting of the spine from his job.

² The Office's letter inadvertently noted that a conflict in medical opinion evidence was between Dr. Owen-Wagner and Dr. Agarwal. In a letter dated July 2, 2004, the Office indicated to appellant that this mistake would not affect the content of the referee physician's report.

In a decision dated January 27, 2006, the Office hearing representative found that the impartial examiner's report was based on a complete and accurate listing of appellant's work duties and physical requirements. The hearing representative found that appellant's allegations regarding an increased workload and twisting on the job was not established. The Office hearing representative, however, set aside the Office's July 14, 2004 decision on the grounds that Dr. Mercier's medical opinion was not well reasoned on the issue of whether appellant's underlying degenerative condition was caused or contributed to by his work duties. The case was remanded for Dr. Mercier to provide a supplemental report.

In a February 14, 2006 supplemental report, Dr. Mercier stated: "with regard to the question of degenerative disc disease, all standard textbooks describe the changes that occur in the disc material as the result of the normal aging process." He described such changes and indicated that the lower discs in the cervical and lumbar spine were known to age more rapidly than others and that there were no evidence-based studies to support that disc degeneration was related to work activity. Dr. Mercier concluded that, although he had no doubt that appellant's symptoms were real, they were the result of an aging spine, a "normal disease of life," and not caused by a work injury. He additionally stated that there usually was no objective physical evidence of trauma, recent, remote or repetitive in degenerative disc disease.

By decision dated May 10, 2006, the Office denied appellant's continuing entitlement to compensation benefits.

Appellant requested reconsideration and reiterated previous arguments. In an August 23, 2006 report, Dr. Owen-Wagner opined that appellant had vertebral subluxation complex with associated degenerative disc disease and fibromyalgia that was aggravated by repetitive twisting in his job. She referred appellant to Dr. John McClaren, a chiropractic neurologist. In an August 2, 2006 report, Dr. McClaren opined that appellant's pain syndrome and vertebral subluxation complex at multiple levels were directly caused and aggravated by his work duties. In an October 3, 2006 report, Dr. McClaren advised that August 31, 2006 x-rays were indicative of chiropractic subluxation. He opined that appellant's work duties caused and aggravated his spine conditions. In an "addendum" he noted his opinion on the term "subluxation." A copy of a Dr. McClaren's September 15, 2006 x-ray report was also submitted.

By decision dated January 8, 2007, the Office denied reconsideration on the grounds that the evidence submitted was insufficient to warrant review of the claim.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ The Office may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.⁴ The

³ *Barry Neutach*, 54 ECAB 313 (2003); *Lawrence D. Price*, 47 ECAB 120 (1995).

⁴ *Id.*

Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵

Section 8123(a) 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.⁶

ANALYSIS

The Office accepted appellant's claim for lumbar and cervical subluxations. The Office terminated appellant's compensation on November 7, 2003, finding that the weight of the medical opinion evidence rested with Dr. Agarwal, the second opinion physician, who opined on August 21, 2003 that appellant's accepted conditions had resolved.

However, the Board notes that, at the time the Office terminated benefits, there was a conflict in the medical evidence between Dr. Agarwal, for the Office, and Dr. Owen-Wagner, appellant's treating chiropractor. In an October 9, 2003 report, Dr. Owen-Wagner disagreed with Dr. Agarwal's opinion that appellant's accepted subluxation conditions had resolved. She indicated that appellant had vertebral subluxation complex in various areas of the spine, had a moderate-severe disability and was still experiencing residuals from the accepted injury. Dr. Agarwal, the second opinion physician, indicated that appellant had no residuals from the accepted conditions. Rather, he attributed appellant's current condition to his underlying and preexisting spinal stenosis and lumbar spondylosis. Both physicians examined appellant and reviewed multiple medical records in support of their opinions.

The Board finds that the opinions of Drs. Agarwal and Owen-Wagner are in conflict as to whether appellant had any continuing residuals or disability resulting from the accepted injury. As this conflict existed at the time the Office terminated benefits on November 7, 2003, the Office did not meet its burden of proof in terminating such benefits. Consequently, the Office's termination of benefits must be reversed.

CONCLUSION

The Board finds that the Office failed to meet its burden of proof in terminating appellant's compensation and medical benefits effective November 7, 2003.⁷

⁵ See *Del K. Rykert*, 40 ECAB 284 (1988).

⁶ 5 U.S.C § 8123(a); *Regina T. Pellecchia*, 43 ECAB 155 (2001).

⁷ In light of the disposition of this issue, the remaining issues are moot.

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2007 and May 10, 2006 decisions of the Office of Workers' Compensation Programs are reversed.

Issued: January 4, 2008
Washington, DC

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

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

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