United States Department of Labor
Employees' Compensation Appeals Board

J.S., Appellant	)	
and	)	**Docket No. 08-1864**
	)	**Issued: March 18, 2009**
U.S. POSTAL SERVICE, POST OFFICE, Sister Bay, WI, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 23, 2008 appellant filed a timely appeal from the Office of Workers' Compensation Programs' hearing representative's decision dated June 3, 2008 which affirmed the Office's October 23, 2007 decision that terminated her compensation. Pursuant to 20 C.F.R. § 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue on appeal is whether the Office properly terminated appellant's compensation benefits effective October 23, 2007.

FACTUAL HISTORY

On May 9, 2006 appellant, then a 50-year-old part-time flexible clerk, filed an occupational disease claim alleging that she sustained an injury to her neck as a result of bending and unloading mail in the performance of duty. She first realized the disease or illness was caused or aggravated by her employment on October 14, 2005. Appellant stopped work on October 17, 2005. The Office accepted her claim for temporary aggravation of spinal

osteoarthritis and cervical disc protrusions at C3-4 and C6-7.[1] Appellant received appropriate compensation benefits.

In reports dated June 9 and 21, 2006, Dr. Jonathan S. Citow, a Board-certified neurological surgeon and treating physician, noted that appellant's neck pain was worsening and exacerbated by repetitive heavy lifting at work. He diagnosed disc protrusions at C3-4 and C6-7 surrounding her C4-6 cervical fusion. Dr. Citow advised that appellant was unable to work and requested authorization for a two level cervical discectomy and fusion with extension of fusion mass.

On August 1, 2006 the Office requested that an Office medical adviser address whether the request for cervical surgery was medically necessary due to the work-related condition. On August 9, 2006 the Office medical adviser noted that appellant had a history of multiple sclerosis and was post C4-5 and C5-6 anterior cervical decompression and fusion (ACDF). He advised that appellant developed acute bilateral lower extremity weakness and numbness and was diagnosed with multiple sclerosis in mid October 2005. The Office medical adviser indicated that a magnetic resonance imaging (MRI) scan of the cervical spine revealed spinal stenosis with cord compression at C3-4; however, her physician indicated that he did not believe that it was the cause of her condition, "especially with her being hypo- and not hyper-reflexic." He was unable to determine whether surgery was medically warranted and recommended a neurological examination.

In a September 22, 2006 report, Dr. Erik M. Borgnes, a Board-certified diagnostic radiologist, advised that appellant had severe central spinal stenosis at C3-4 due to a disc protrusion and a somewhat small spinal canal. Dr. Borgnes related that appellant had evidence of significant spinal cord deformity at the C3-4 level which was typically associated with cervical myelopathy and myelomalacia (damage to the spinal cord) at the C5 level on the left. The Office also received reports from Dr. Joan A. Traver, Board-certified in internal medicine, who indicated that appellant needed surgery. On June 22, 2006 Dr. Traver noted that appellant had a long history of osteoarthritis of her spine which required surgery in the past. In a September 24, 2006 report, Dr. Maria Antoniou, Board-certified in internal medicine, found that appellant had severe central spinal stenosis at C3-4 secondary to central disc protrusion. She noted that appellant also had posterior osteophytosis at the C4 level, and narrowing of the neural foramen carrying the left C6 nerve which were manifested by severe and worsening neck pain with bilateral upper and lower extremity numbness and weakness. Dr. Antoniou noted that appellant was recently diagnosed with multiple sclerosis in October 2005, which complicated her current condition. She advised that the cervical discectomy was warranted.

On November 2, 2006 the Office referred appellant to Dr. Lawrence Frazin, a Board-certified neurological surgeon, to determine whether appellant's need for a cervical surgery was for the work-related or nonwork-related medical condition. In a December 11, 2006 report, Dr. Frazin reviewed appellant's history of injury and treatment. Although he opined that the surgery at C3-4 was medically necessary, he advised that it was not due to the work-related injury.

[1] The record reflects that appellant has nonwork-related multiple sclerosis, a cervical discectomy and fusion and a hysterectomy.

On January 5, 2007 the Office advised appellant that a follow-up examination was needed to determine if her work-related condition had resolved or whether she had residuals of the work-related injury. In a February 20, 2007 report, Dr. Frazin reiterated appellant's history of injury and treatment. He diagnosed cervical spondylosis without myelopathy and multiple sclerosis. On examination, there was no evidence to support the previous diagnosis of myelopathy from spinal cord compression. Dr. Frazin did not believe the symptomatic cervical spondylosis was related to the work accident in question and explained that the most dramatic x-ray changes were at C3-4 which would cause the neck and shoulder pain, but there was no evidence of spinal cord myelopathy. Appellant had myelomalacia at C6 at the previous surgical site that could be influencing some of the findings. Dr. Frazin noted that appellant's coordination problems and rapid alternating movement problems were more consistent with multiple sclerosis than with cervical radiculopathy or myelopathy. He added that "once a person has a fusion it puts additional stress at the adjacent nonfused levels which is the case here at both C3-4 and C6-7. This can, on its own, cause degenerative changes at those adjacent levels which is the case here." Dr. Frazin opined that these diagnoses were not medically connected to the work accident. He found that appellant's cervical spondylosis was not related to her work injury. Dr. Frazin explained that she had only worked at the job nine months and actually became symptomatic in August 2005. He advised that appellant's job required strength and movement of the arms and shoulders but did not require undue strain or motion of the cervical spine and its supporting structure. Dr. Frazin approved of the proposed surgery "not because of a work-related injury but rather a progression of an underlying degenerative spine condition that was aggravated/accelerated by her previous surgery." He added that it was due to her underlying cervical spondylosis and multiple sclerosis, neither of which were related to or caused by the accident of October 11, 2005.

On May 3, 2007 Dr. Citow performed a cervical discectomy.

The Office found a conflict in opinion between Dr. Citow and Dr. Frazin regarding the extent and duration of the accepted work-related aggravation and residuals. On July 10, 2007 it referred appellant, together with a statement of accepted facts and the medical record to Dr. Kenneth C. Yuska, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a September 7, 2007 report, Dr. Yuska reviewed appellant's history of injury and treatment and conducted an examination. He indicated that the cervical spine examination revealed restriction of movement and two cervical incisions that were well healed. Dr. Yuska advised that the incision from 1996 was hardly noticeable and that, slightly above the incision, from May 3, 2007, was well healed. Appellant's cervical range of motion was 30 percent of flexion with extension of 20 percent. Dr. Yuska noted that the neurological examination was abnormal. He attributed appellant's complaints to multiple sclerosis as opposed to cervical spondylosis. Dr. Yuska advised that the length of time that appellant had worked at her job was not long enough to provide a work exposure to cause lasting injury. He noted that the cervical surgery was medically reasonable but not necessary due to her work injury. Dr. Yuska stated that the wear and tear of the adjacent levels and the popping sensations that appellant had in her neck were due to degeneration of the discs, particularly at C6-7. Regarding appellant's neurological complaints, he explained that her symptoms waxed and waned which was typical for multiple sclerosis. Dr. Yuska agreed with Dr. Frazin with regard to the need for surgery, which he indicated was medically reasonable, but not related to the accepted work exposure. He

explained that appellant had a history of cervical spondylosis with surgery at the C4 and C5, and a fusion from C4-6 in 1996 or 1997. Dr. Yuska noted that an after effect of surgery was that the adjacent levels had worn out at the C3 and C6 disc levels and became symptomatic in 2005. He noted that the symptoms were predominantly neck pain and popping. Dr. Yuska also indicated that the waxing and waning of neurological dysfunction was consistent with multiple sclerosis. He explained that, with multiple sclerosis, the neurologic picture would typically change from time to time. Dr. Yuska stated that the medical records revealed that appellant's neurological findings included cranial nerves, her balance, and numbness and weakness of the extremities. These symptoms had come and gone through the various examinations and was consistent with multiple sclerosis. Dr. Yuska reiterated that the recent surgery was not related to the work-related aggravation of October 11, 2005. He explained that the fact that appellant's neurologic symptoms recurred and relapsed was consistent with multiple sclerosis. Dr. Yuska advised that, if the cervical condition had been permanently aggravated by her work, there would have been a permanent neurological change. These changes would have been characterized by spasticity of the lower extremities, which was not the case with appellant. Dr. Yuska opined that appellant was not able to return to work as a mail clerk where heavy lifting was involved; however, her inability to return to work was due to her preexisting neurological problems. He indicated that she had reached maximum medical improvement and completed a work capacity evaluation form advising that appellant could work with restrictions.

On September 19, 2007 the Office issued a termination of compensation claim on the basis that the weight of the medical evidence, represented by Dr. Yuska, established that appellant no longer had any disability or residuals due to her accepted work-related conditions.[2]

By decision dated October 23, 2007, the Office terminated appellant's compensation benefits effective October 23, 2007.

On November 12, 2007 appellant's representative requested a telephonic hearing, which was held on March 6, 2008.

In a November 2, 2007 report, Dr. Citow advised that appellant had a previous C4-6 cervical fusion and then developed spinal cord compression at C3-4 and C6-7 surrounding this fusion. He noted that she had a C3-7 construct in May 2007. Appellant had been doing repetitive heavy lifting at work and Dr. Citow opined that this "certainly would cause progression of the disease rostral and caudal to the previous fusion." Dr. Citow advised that appellant was doing well until her symptoms became bothersome due to heavy lifting at work. He indicated that she developed bilateral, upper and lower extremity numbness and weakness. Dr. Citow explained that it could not be assumed that appellant's multiple sclerosis was the cause of all of her problems. When he saw her on October 12, 2007, five months after her surgery, she was doing much better. Dr. Citow did not believe that multiple sclerosis was the cause of many of her symptoms but, rather, he attributed them to the work injury.

In a January 8, 2008 report, Dr. Daniel R. Wynn, a Board-certified psychiatrist and neurologist, noted that he saw appellant on July 31, 2007. Appellant's problems related to her cervical disc disease and low back and were "likely related to the very heavy lifting she was

[2] An earlier notice dated March 19, 2007, was prematurely issued.

required to do while working for the [employing establishment]." Despite several visits over two years, she had not had further exacerbations of multiple sclerosis. Dr. Wynn disagreed that the waxing and waning of appellant's symptoms meant they were due to multiple sclerosis. He advised that as a "specialist in multiple sclerosis, this is not my opinion. Individuals with multiple sclerosis may be more sensitive to physical conditions." Dr. Wynn opined that appellant's physical conditions were related to her work injuries. He also added that "there would be no reason that she would not be able to work related to multiple sclerosis."

By decision dated June 3, 2008, the Office hearing representative affirmed the October 23, 2007 decision.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[3] Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[4]

The Federal Employees' Compensation Act[5] provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination.[6] In cases where the Office has referred appellant to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[7]

ANALYSIS

The Office determined that a conflict of medical opinion existed regarding the extent and duration of the accepted work-related aggravation and work ability based on the opinions of Dr. Citow, appellant's physician, who supported an ongoing employment-related condition and disability, and Dr. Frazin, an Office referral physician, who opined that the employment-related condition had resolved. Therefore, the Office properly referred appellant to Dr. Yuska, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.[8]

The Board finds that Dr. Yuska's September 7, 2007 report is sufficiently well rationalized and based upon a proper factual background such that it is entitled to special weight

[3] *Curtis Hall,* 45 ECAB 316 (1994).

[4] *Jason C. Armstrong,* 40 ECAB 907 (1989).

[5] 5 U.S.C. §§ 8101-8193, 8123(a).

[6] 5 U.S.C. § 8123(a); *Shirley Steib,* 46 ECAB 309, 317 (1994).

[7] *Gary R. Sieber,* 46 ECAB 215, 225 (1994).

[8] *Id.*

in establishing that residuals of appellant's employment injury had ceased. Dr. Yuska provided an extensive review of appellant's medical history, reported his examination findings and explained that appellant's continuing findings and residuals were due to her preexisting multiple sclerosis and degenerative cervical discs. He found no basis on which to attribute any continuing residuals to appellant's accepted employment conditions. When an impartial medical specialist is asked to resolve a conflict in medical evidence, his opinion, if sufficiently well rationalized and based on a proper factual background, must be given special weight.[9] The Board finds that Dr. Yuska's report represents the weight of the medical evidence and established that there were no ongoing objective findings of residuals of accepted employment injury.

Appellant subsequently requested a hearing and submitted additional evidence. The additional evidence included a November 2, 2007 report, from Dr. Citow, her attending physician, who opined that appellant's condition was work related and not related to her multiple sclerosis.[10] However, Dr. Citow essentially reiterated previously stated findings and conclusions regarding appellant's condition. As he was on one side of the conflict that had been resolved, the additional reports, in the absence of any new findings or rationale, from appellant's doctor were insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.[11]

Appellant also provided a January 8, 2008 report from Dr. Wynn, who indicated that he was a specialist in multiple sclerosis. Dr. Wynn related that appellant's condition was "likely related to the very heavy lifting she was required to do while working for the [employing establishment]." However, he did not provide any objective findings to support this conclusion, nor did he explain how this condition would arise after only a few months. Thus, at best this provides equivocal support for causal relationship and is insufficient to meet appellant's burden of proof.[12]

Accordingly, Office met its burden of proof to justify termination of benefits effective October 23, 2007.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's benefits effective October 23, 2007.

[9] *See supra* note 6.

[10] She also indicated that appellant had marked depression; however, depression is not an accepted condition.

[11] *See Guiseppe Aversa*, 55 ECAB 164 (2003); *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[12] *See Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions which are speculative or equivocal in character have little probative value).

ORDER

IT IS HEREBY ORDERED THAT the June 3, 2008 decision of the Office of Workers' Compensation Programs' hearing representative is affirmed.

Issued: March 18, 2009
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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