

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

J.S., Appellant)
)
and) **Docket No. 09-641**
) **Issued: January 27, 2010**
U.S. POSTAL SERVICE, POST OFFICE,)
Miami, FL, Employer)

)

Appearances:
Jeffrey P. Zeelander, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 6, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' May 30 and December 17, 2008 merit decisions concerning the termination of 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 is whether the Office met its burden of proof to terminate appellant's compensation effective June 8, 2008 on the grounds that she no longer had residuals of her June 20, 2001 employment injury after that date.

FACTUAL HISTORY

The Office accepted that on June 20, 2001 appellant, then a 68-year-old patch-up mail handler, sustained a cervical sprain, right shoulder contusion and right retinal detachment when a pole fell and hit her in her face and right shoulder and arm. At the time of the injury, she was

performing light-duty work for 4 hours per day, 20 hours per week.¹ Appellant received appropriate compensation from the Office for disability caused by the June 20, 2001 injury.²

On July 2, 2001 Dr. Andrew Nolan, an attending Board-certified ophthalmologist, performed a retina repair on appellant's right eye. On July 30, 2001 he determined that she did not have any limitations due to her work-related eye condition. There is no indication that appellant received treatment for her June 20, 2001 eye injury after July 2001. She received treatment for her orthopedic problems from Dr. Gerald S. Goldberg, a Board-certified neurologist.

On September 20, 2006 Dr. Barry Lotman, a Board-certified orthopedic surgeon serving as an Office referral physician, indicated that examination of appellant's cervical spine showed diffuse midline tenderness and with fairly good range of motion except for decreased lateral turning. He noted that she had a positive Tinel's sign over the cubital tunnel on the right and that her right shoulder showed tenderness in the anterior portion of the rotator cuff. Dr. Lotman indicated that there was no pain over the clavicle, acromioclavicular (AC) joint or biceps tendon, no periscapular atrophy and no crepitation on active and passive range of motion. He stated that appellant had cervical spondylosis and lumbar spondylosis and posited that her current symptoms are the result of progression of these underlying degenerative conditions. Dr. Goldberg stated, "I believe that they were aggravated at the time of the respective injuries. The persistence in those symptoms at present is the result of symptom magnification rather than persistence of those specific injuries." He found that appellant could not work as a regular mail handler but that she was able to work in the modified position of patch-up mail handler.

On October 25, 2006 Dr. Goldberg indicated that appellant reported having continuing pain in her neck and right shoulder, with the shoulder pain predominating. On examination appellant had decreased range of motion on lateral turning of her neck, more so to the left. There was pain with extension and general tenderness in the cervical and trapezius muscles. Dr. Goldberg found that appellant had decreased range of motion of the right shoulder, but that there is no winging of the scapula. Motor strength in the arms was normal although appellant favored the right arm secondary to pain. Dr. Goldberg determined that, given the reaching and carrying duties, she could not work in the modified position of patch-up mail handler or as a regular mail handler.

The Office determined that there was a conflict in the medical opinion between Dr. Goldberg and Dr. Lotman regarding appellant's ability to work. In order to resolve the conflict, it referred her, pursuant to section 8123(a) of the Federal Employees' Compensation

¹ The job restricted lifting and carrying to 15 pounds intermittently for four hours per day and allowed two hours of intermittent sitting or walking and one hour of intermittent standing. Appellant fell out of a chair at work on February 2, 1977 and the Office accepted that she sustained right leg thrombophlebitis, right leg pulmonary emboli, cervical disc displacement and lumbar intervertebral disc disorder. Prior to 1985 she had worked as a regular mail handler for various periods. The current case does not involve the matter of whether appellant continues to have residuals of her February 2, 1977 injury. It appears that appellant continued to receive schedule award compensation in connection with her February 2, 1977 injury after the Office terminated her compensation with respect to her June 20, 2001 injury.

² Appellant last worked for the employing establishment in September 2003.

Act, to Dr. Jeffrey T. Haimes, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.

In a March 21, 2007 report, Dr. Haimes stated that appellant presented complaining of neck pain and right shoulder pain, which radiated down her right arm. He provided a history of her medical problems, including the effects of the June 20, 2001 employment injury and observed that she was able to get up and down from her chair and the examination table without any difficulty or the use of a cane.³ Examination of the cervical spine showed positive tenderness over the right paraspinal musculature and right trapezius, but there was no tenderness over the left paraspinal musculature. Appellant had 5/5 strength in all aspect of her arms, but there was decreased sensation in the right arm compared to the left. Dr. Haimes stated that examination of the right shoulder showed positive tenderness over the subacromial bursa with extension, positive impingement sign and weakness and pain elicited with resistance of the supraspinatus. There was no weakness to resistance of the infraspinatus and teres minor. Dr. Haimes noted that January 24, 2005 magnetic resonance imaging (MRI) scan testing of the cervical spine showed a broad disc protrusion at C4-5 effacing the subarachnoid space and touching the cord but not compressing it and a disc osteophyte complex at C5-6 effacing the subarachnoid space but not compressing or narrowing the foramen. The findings of a November 14, 2001 MRI scan of the right shoulder showed a high-grade intrasubstance tear of the anterior distal supraspinatus tendon and tendinosis of the anterior infraspinatus tendon and marked AC joint hypertrophic changes.

Dr. Haimes stated that prior to June 20, 2001 appellant had a long-standing history of cervical pain and indicated that the cervical strain/sprain that she sustained as a result of the pole hitting her in 2001 was a temporary aggravation of a preexisting condition. As far as the pain in her right shoulder was concerned, she had an impingement syndrome with chronic degeneration of the rotator cuff and the accepted contusion was a temporary aggravation of a preexisting condition. Dr. Haimes posited that the underlying progressive disease would have been at the same stage now whether or not the June 20, 2001 injury had occurred. He stated:

“It must be remembered that [appellant] is 74 years old and has not worked since September 2003. From an orthopedic standpoint, the injury that she sustained on [June 20, 2001] caused temporary aggravation of preexisting neck and shoulder conditions. [Appellant] had been using a cane prior to her [June 20, 2001] injury. She had been working light duty with restrictions for lifting, carrying 10 [to] 15 pounds [for] [four] hours intermittently, [two] hours intermittent sitting or walking, [one] hour intermittent standing, [four] hours a day [for] five days a week prior to the [June 20, 2001] injury. Obviously, [appellant] cannot work her original duties as a mail handler. However, she could work the restrictions noted for a patch-up mail handler. However, [appellant] is 74 years old and has and will continue to deteriorate as a natural process of aging. I do not feel that [she] has

³ Dr. Haimes inadvertent listed the June 20, 2001 injury as occurring on June 1, 2001. He provided a proper description of the mechanism of injury.

sustained any permanent impairment as a result of the [June 20, 2001] cervical strain and right shoulder contusion, from an orthopedic standpoint.”⁴

The Office requested that Dr. Haimés provide additional clarification of whether appellant continued to have residuals of her June 20, 2001 employment injury. In a supplemental report dated May 15, 2007, Dr. Haimés summarized the findings on physical examination and diagnostic testing. He noted that objective cervical findings included underlying degenerative disease at multiple levels and positive tenderness over the right paraspinal musculature. Objective right shoulder findings included a tear of the supraspinatus tendon, severe degenerative changes of the AC joint, impingement syndrome signs and weakness to resistance of the supraspinatus. Dr. Haimés indicated that the orthopedic injuries appellant sustained on June 20, 2001 were temporary in nature and had since resolved themselves leaving no permanent effects. Appellant’s current’s cervical and right shoulder symptoms were due to the natural progression of her underlying nonwork-related processes. Dr. Haimés stated:

“[F]rom an orthopedic standpoint, [appellant] had no objective findings as a result of the 2001 injury. However, the objective findings were a result of the degenerative conditions that [she] is experiencing. [Appellant’s] current condition is due to the preexisting degenerative condition rather than the work-related injury.... Her current condition is not related to her work injury from 2001. Indeed, objective findings are consistent with the degenerative condition which is present in the cervical spine as well as her right shoulder. [Appellant] is not able to work her original duties as a mail handler. However, she is able to continue the light[-]duty position that she was able to perform prior to her 2001 injury with the restrictions that she had prior to her 2001 injury. [Appellant] could continue to perform the duty of a patch-up mail handler with restrictions that were listed prior to her 2001 injury.”

In a July 19, 2007 letter, the Office advised appellant that it proposed to terminate her compensation on the grounds that she no longer had residuals of her June 20, 2001 employment injury. It indicated that the weight of the medical evidence regarding orthopedic residuals of the June 20, 2001 injury rested with the opinion of the impartial medical specialist, Dr. Haimés. The Office noted that the July 30, 2001 report of Dr. Nolan, showed that appellant had no residuals of the June 20, 2001 eye injury. The Office informed her that she had 30 days from the date of the letter to submit evidence contesting this proposed action.

Appellant submitted September 12 and December 21, 2007 reports of Dr. Peter J. Millheiser, a Board-certified orthopedic surgeon, who reported findings on examination and discussed the nature of her neck, back, right hip, right shoulder and right knee problems. Dr. Millheiser stated that appellant was 74 years old and that it did not appear that she was going to be able to work. In a March 7, 2007 report, Dr. Dwight Reynolds, an attending Board-certified emergency physician, provided findings on examination for appellant’s neck, back and extremities. In an August 13, 2007 report, he indicated that she remained totally disabled due to her February 2, 1977 and June 20, 2001 injuries.

⁴ Dr. Haimés noted that on July 30, 2001 Dr. Nolan, an attending ophthalmologist, determined that appellant did not have any limitation due to her work-related eye condition.

In a May 30, 2008 decision, the Office terminated appellant's compensation effective June 8, 2008 on the grounds that she had no residuals of her June 20, 2001 employment injury after that date. Appellant requested a review of the written record by an Office hearing representative. She did not submit any additional medical evidence showing residuals of the June 20, 2001 injury. In a December 17, 2008 decision, the Office hearing representative affirmed the Office's May 30, 2008 decision.

LEGAL PRECEDENT

Under the Act,⁵ once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁶ The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁷ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁸

Section 8123(a) of the 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."⁹ In situations where there exist opposing medical reports of virtually equal weight and rationale and 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.¹⁰

ANALYSIS

The Office accepted that on June 20, 2001 appellant sustained a cervical sprain, right shoulder contusion and right retinal detachment when a pole fell and hit her in her face and right shoulder and arm. At the time of the injury, appellant was performing light-duty work for 4 hours per day, 20 hours per week. On July 2, 2001 Dr. Nolan, an attending Board-certified ophthalmologist, performed a retina repair on appellant's right eye. The Office based its termination with respect to orthopedic residuals of the June 20, 2001 injury on the March 21 and May 15, 2007 reports of Dr. Haimes, a Board-certified orthopedic surgeon who served as an impartial medical specialist. It based its termination with respect to ocular residuals of the June 20, 2001 injury on the June 30, 2001 report of Dr. Nolan.

The Office determined that there was a conflict in the medical opinion between Dr. Goldberg, an attending Board-certified neurologist, and Dr. Lotman, a Board-certified

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁷ *Id.*

⁸ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁹ 5 U.S.C. § 8123(a).

¹⁰ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

orthopedic surgeon serving as an Office referral physician, regarding the extent of her orthopedic disability. In order to resolve the conflict, it referred appellant, pursuant to section 8123(a) of the Act, to Dr. Haimes for an impartial medical examination and an opinion on the matter.¹¹

The Board finds that the weight of the medical evidence with respect to orthopedic residuals of the June 20, 2001 injury is represented by the thorough, well-rationalized opinion of Dr. Haimes.¹² His March 21 and May 15, 2007 reports establish that appellant did not have any orthopedic residuals of her June 20, 2001 employment injury after June 8, 2008.

In his reports, Dr. Haimes provided an extensive history of appellant's medical condition, with an emphasis on her cervical and right shoulder conditions. He noted that objective cervical findings, derived from the findings on examination and diagnostic testing, included underlying degenerative disease at multiple levels and positive tenderness over the right paraspinal musculature. Objective right shoulder findings included a tear of the supraspinatus tendon, severe degenerative changes of the AC joint, impingement syndrome signs and weakness to resistance of the supraspinatus. Dr. Haimes found that the orthopedic injuries appellant sustained on June 20, 2001 were not permanent and that her current symptoms were due to underlying degenerative processes. He indicated that appellant was 74 years old and posited that her underlying progressive diseases would have been at the same stage now whether or not the June 20, 2001 injury had occurred. Dr. Haimes concluded that she had no orthopedic residuals of the June 20, 2001 injury. He indicated that she could work her date-of-injury job as a patch-up mail handler.¹³

The Board has carefully reviewed the opinion of Dr. Haimes and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Haimes' opinion is based on a proper factual and medical history and he accurately summarized the relevant medical evidence.¹⁴ He provided medical rationale for his opinion by explaining that the orthopedic injuries appellant sustained on June 20, 2001 were temporary in nature and had since resolved themselves leaving no permanent effects. Appellant's current cervical and right shoulder symptoms were due to the natural progression of her underlying nonwork-related disease processes. Dr. Haimes stated that from an orthopedic standpoint appellant had "no objective findings as a result of the 2001 injury. [T]he objective findings were a result of the degenerative conditions that [appellant] is

¹¹ See *supra* note 9. On September 20, 2006 Dr. Lotman found that appellant could not work as a regular mail handler but that she was able to work in the modified position of patch-up mail handler. In contrast, Dr. Goldberg determined on October 25, 2006 that she could not work as a patch-up mail handler or regular mail handler.

¹² See *supra* note 10.

¹³ Dr. Haimes stated that appellant could not work as a regular mail handler but indicated that this restriction was due to nonwork-related conditions.

¹⁴ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

experiencing. [Appellant's] current condition is due to the preexisting degenerative condition rather than the work-related injury."¹⁵

With respect to appellant's eye condition, the Office properly found that the July 30, 2001 report of Dr. Nolan shows that appellant did not have residuals of her June 20, 2001 eye injury after July 30, 2001. In that report, Dr. Nolan determined that she did not have any limitations due to her work-related eye condition. There is no indication that appellant received treatment for her June 20, 2001 eye injury after July 30, 2001.

For these reasons, the Office properly terminated appellant's compensation effective June 8, 2008 with respect to her June 20, 2001 employment injury.¹⁶

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective June 8, 2008 on the grounds that she no longer had residuals of her June 20, 2001 employment injury after that date.

¹⁵ Appellant submitted an August 13, 2007 report of Dr. Reynolds, an attending Board-certified emergency physician, who indicated that she remained totally disabled due to her June 20, 2001 work injuries. This report is of limited probative value because Dr. Reynolds did not provide any reasoning for his opinion. *See George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value). Other physicians posited that appellant was disabled after June 20, 2008 but they provided no cause for the disability.

¹⁶ On appeal, appellant's attorney argued that the Office hearing representative did not have access to all the appropriate records, but the text of her decision shows that she evaluated all the relevant evidence in reaching her decision.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' December 17 and May 30, 2008 decisions are affirmed.

Issued: January 27, 2010
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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