

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

B.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Mobile, AL, Employer**

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**Docket No. 10-384
Issued: October 15, 2010**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 25, 2009 appellant filed a timely appeal from the June 9, 2009 merit decision of the Office of Workers' Compensation Programs regarding 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 properly terminated appellant's compensation effective October 16, 2007 on the grounds that she had no residuals of her June 26, 2003 work injury.

FACTUAL HISTORY

The Office accepted that on June 26, 2003 appellant, then a 47-year-old flat sorter operator, sustained thoracic, rhomboid and left shoulder strains and aggravation of cervical and thoracic arthritis due to lifting mail tubs and placing mail on a machine ledge. She stopped work on June 27, 2003 and returned to work on June 28, 2003 in a light-duty position. Appellant

stopped work for intermittent periods and received wage-loss compensation for disability and medical benefits.

A magnetic resonance imaging (MRI) scan of appellant's thoracic spine in August 2003 and her cervical spine in February 2004 showed mild to moderate degenerative disc changes. On January 4, 2004 appellant underwent left shoulder surgery, including articular debridement chondroplasty, acromioplasty and distal clavicle excision.¹

On August 19, 2005 Dr. Jeffrey Pirofsky, an attending osteopath Board-certified in physical medical and rehabilitation, stated that on examination appellant had no palpable tenderness over the cervical spine, bilateral trapezius area or thoracic spine. Appellant had normal muscle tone with no muscle spasm and no spinal deformities were appreciated. Cervical and thoracic spine range of motion was diminished in all planes of movement by approximately 15 percent. Dr. Pirofsky diagnosed cervical and thoracic pain with spondylosis. In a November 4, 2005 report, he advised that he was not sure how appellant's prior evaluations related to her June 26, 2003 injury.

In a January 23, 2006 report, Dr. Glenton W. Davis, an attending Board-certified family practitioner, diagnosed chronic bursitis, hypertension and osteoarthritis and determined that appellant was unable to work.

The Office referred appellant to Dr. Howard L. Fowler, a Board-certified orthopedic surgeon, to determine whether she continued to have residuals of her June 26, 2003 work injury. On November 7, 2006 Dr. Fowler noted that appellant had cervical spondylosis, thoracic spondylosis, degenerative arthritis of the left shoulder acromioclavicular joint and cervical radiculopathy. On physical examination, there were diffuse complaints of pain with palpation involving the cervical and thoracic region. No direct bony tenderness could be elicited and there was no evidence of any paraspinal muscle spasm. Range of motion of appellant's cervical, thoracic and lumbar spine was within normal limits and rhomboid and serratus functions were intact. Dr. Fowler stated that evaluation of appellant's left shoulder showed full passive range of motion, but she did have some slight limitations of active range of motion particularly upon abduction and external rotation. There was diffuse tenderness to palpation involving the posterior aspect of her shoulder but negative apprehension. Labral stress testing was negative and rotator cuff strength was intact. Appellant was neurologically intact in both upper and lower extremities. Dr. Fowler stated that he found no medical connection between the diagnoses he provided and appellant's June 26, 2003 work injury. The diagnosed conditions were not medically connected to the accepted work injury by direct cause, aggravation, precipitation or acceleration and no physical limitations existed due to the work-related injury.² Dr. Fowler found that appellant had no disabling residuals of the June 26, 2003 work injury and that all conditions appeared to be preexisting problems.

¹ It does not appear from the record that the surgery was authorized by the Office.

² Dr. Fowler indicated that appellant was restricted from lifting more than 25 pounds but he did not indicate that this restriction was necessitated by a work-related condition.

The Office found that a conflict in the medical opinion arose between Dr. Davis and Dr. Fowler regarding whether appellant had residuals of her June 26, 2003 work injury. It referred appellant to Dr. Keith W. Weaver, a Board-certified orthopedic surgeon, for an impartial medical examination and evaluation regarding the existence of residuals of the June 26, 2003 work injury. Dr. Weaver was asked to determine whether appellant continued to have work restrictions due to her June 26, 2003 work injury.

On February 6, 2007 Dr. Weaver opined that appellant no longer had a medical condition or disability as a result of the June 26, 2003 work injury. He provided a detailed description of her factual and medical history and performed a review of the relevant medical evidence. On examination, appellant had essentially full range of motion of her neck without radicular complaints, although she had a touch of decreased rotation to the left versus right. She had full range of motion of her shoulders with no impingement and she was nontender to light touch of her neck or back. Dr. Weaver indicated that appellant had no complaints, except minimal discomfort in her low back with pelvic and axial rotation. He diagnosed arthritis of the left shoulder that appeared to be preexisting from what was noted at the time of surgery and significant arthritic changes to the thoracic spine as seen on MRI scan and x-ray testing. Dr. Weaver noted that the current conditions of arthritis of the left shoulder and thoracic spine appeared to be preexisting and stated:

“I agree that the claimant’s current conditions are preexisting and unrelated to her June 26, 2003 injury claim.... [T]he arthritis would not have occurred in such a short span of time for her shoulder nor the thoracic spine. In regards to the accepted conditions, the aggravation has resolved, though she has residual chronic arthritis that is not related to her work injury claim. The arthritis noted for her shoulder and cervical and thoracic spine is preexisting and will likely follow a slow and normal progression not related to any work injury.”

In a July 9, 2007 letter, the Office advised appellant that it proposed to terminate her compensation for wage-loss and medical benefits as she no longer had residuals of her June 26, 2003 work injury. It noted that the weight of medical opinion was represented by the well-rationalized report of Dr. Weaver. The Office provided appellant 30 days from the date of the letter to submit evidence challenging the proposed termination.³

In an October 18, 2007 decision, the Office terminated appellant’s compensation effective October 16, 2007 on the grounds that she no longer had residuals of her June 26, 2003 injury.

Appellant requested a telephone hearing with an Office hearing representative. At the February 11, 2008 hearing, she asserted that she continued to have residuals of her June 26, 2003 injury. On March 12, 2008 the Office received progress reports dated November 2 to February 28, 2008 as well as psychiatry outpatient notes dated October 24, 2006, April 24 and August 27, 2007. The reports discussed appellant’s upper back, neck and arm conditions but they did not address whether these conditions were related to the June 26, 2003 injury.

³ Appellant did not submit any evidence within the allotted time.

In a June 6, 2008 decision, the Office hearing representative affirmed the October 18, 2007 decision.

On August 29, 2008 appellant requested reconsideration. Her attorney argued that Alabama workers' compensation law dictated that her compensation should not have been terminated. Appellant submitted a September 17, 2008 report detailing diagnostic test results for her back.

In a June 9, 2009 decision, the Office denied modification of its decisions terminating appellant's compensation effective October 16, 2007.

LEGAL PRECEDENT

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.⁴ It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁵ After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability which continued after termination of compensation benefits.⁶

Section 8123(a) of the Federal Employees' Compensation 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."⁷ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of the Act, to resolve the conflict in the medical evidence.⁸

ANALYSIS

The Office accepted that on June 26, 2003 appellant sustained thoracic, rhomboid and left shoulder strains and aggravation of cervical and thoracic arthritis due to lifting mail tubs and placing mail on a machine ledge. It determined that a conflict in medical opinion arose between Dr. Davis, an attending Board-certified family practitioner, and Dr. Fowler, a Board-certified orthopedic surgeon acting as an Office referral physician, regarding whether appellant continued to have residuals of her June 23, 2006 work injury. The Office referred appellant to Dr. Weaver, a Board-certified orthopedic surgeon for an impartial medical examination and an opinion on the

⁴ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁵ *Id.*

⁶ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

⁷ 5 U.S.C. § 8123(a).

⁸ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

matter. It terminated her compensation effective October 16, 2007 based on the opinion of Dr. Weaver.

The Board finds that the weight of the medical evidence regarding the relevant issue of this case is represented by the thorough, well-rationalized opinions of Dr. Weaver, the impartial specialist. The report of Dr. Weaver establishes that appellant had no residuals of her June 26, 2003 work injury after October 16, 2007.

In a February 6, 2007 report, Dr. Weaver found that appellant no longer had a medical condition or disability as a result of the June 26, 2003 work injury. He noted on examination that appellant had essentially full range of motion of her neck without radicular complaints, although she had a touch of decreased rotation to the left versus right. Appellant had full range of motion of her shoulders with no impingement and she was nontender to light touch of her neck or back. Dr. Weaver advised that appellant had no complaints, except minimal discomfort in her low back with pelvic and axial rotation. He diagnosed arthritis of the left shoulder that was a preexisting condition and chronic from what was noted at the time of surgery. Appellant's significant arthritic changes to the shoulder and spine as seen on MRI scan and x-ray testing was temporarily aggravated by the accepted injury but had resolved. Dr. Weaver noted that appellant's arthritis would progress without any relation to her accepted injury.

The Board has carefully reviewed the opinion of Dr. Weaver and notes that it has reliability, probative value and convincing quality with respect to his conclusions. Dr. Weaver's opinion was based on a proper factual and medical history and accurately summarized the relevant medical evidence.⁹ He provided medical rationale for his opinion by explaining that the current conditions of arthritis of the left shoulder and thoracic spine were preexisting and unrelated to appellant's June 26, 2003 work injury. The June 26, 2003 injury did not cause the arthritis and the aggravation related to the June 26, 2003 injury had resolved leaving the underlying condition as the sole cause of appellant's need for work restrictions.

After the Office's October 18, 2007 decision terminating appellant's compensation effective October 16, 2007, appellant submitted additional medical evidence which she felt showed that she was entitled to compensation after October 16, 2007 due to residuals of her June 26, 2003 work injury. As noted, the Board finds that the opinion of Dr. Weaver supports the termination of appellant's compensation effective October 16, 2007, the burden shifts to her to establish that she is entitled to compensation after that date.

The Board has reviewed the additional evidence submitted by appellant and notes that it is not of sufficient probative value to establish that she had residuals of her June 26, 2003 work injury after October 16, 2007. Appellant submitted progress and test result reports dated November 2, December 10, 27, 2007, February 28 and September 17, 2008.¹⁰ The reports discussed her upper back, neck and arm conditions, but they did not provide any indication that these problems were related to her June 26, 2003 work injury. Appellant's attorney argued that

⁹ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹⁰ Appellant submitted psychiatry outpatient notes dated October 24, 2006, April 24 and August 27, 2007, but these reports would have no relevance to the June 23, 2006 work injury which was physical in nature.

Alabama workers' compensation law dictated that her compensation should not have been terminated; but the Board has held that entitlement to benefits under statutes administered by other federal agencies or state authorities does not establish entitlement to benefits under the Act.¹¹

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation effective October 16, 2007 on the grounds that she had no residuals of her June 23, 2006 work injury after that date.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 9, 2009 is affirmed.

Issued: October 15, 2010
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

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

¹¹ See *Donald Johnson*, 44 ECAB 540, 551 (1993).