

FACTUAL HISTORY

On April 1, 1997 appellant, then a 52-year-old special delivery messenger, filed a claim alleging that she sustained injuries on March 29, 1997 in the performance of duty when she was in an elevator that fell half a floor. OWCP accepted her claim for neck sprain and post-traumatic stress disorder. Appellant sustained intermittent periods of total disability from April 1 to August 26, 1997.

In a report dated August 13, 1997, Dr. E. Trent Andrews, a Board-certified orthopedic surgeon, related that appellant had reached her preinjury status. He noted that, prior to her injury, she had worked in a limited-duty status with no heavy lifting or climbing. Dr. Andrews found that she could return to “the position she was in prior to July 1997. At that time apparently [appellant] was given a new position which exceeded the demands that she was working....”

In a duty status report dated August 18, 2008, Dr. Parvez Fatteh, a physiatrist, diagnosed chronic neck pain and found that appellant was disabled from work through October 2008.

On September 3, 2008 appellant filed a notice of recurrence of disability on August 4, 2008 causally related to her March 29, 1997 employment injury. She attributed her recurrence of disability to a reassignment to another facility in violation of her medical restrictions. The employing establishment noted that she was reassigned to a position requiring lifting parcels from 2 to 70 pounds. Appellant also filed a claim for compensation (Form CA-7) from August 4 to September 5, 2008.

By letter dated September 17, 2008, OWCP informed appellant that evidence from her attending physician established that her cervical strain resolved by August 13, 1997. It advised her of the evidence required to reopen her case for medical treatment.

On March 19, 2009 OWCP advised appellant that it had accepted that she sustained a recurrence of disability beginning August 4, 2008 as she was transferred to another location without an appropriate job offer or accommodation.²

By decision dated April 15, 2009, OWCP terminated appellant’s compensation for wage loss and medical benefits for the accepted condition of cervical strain. It found that the September 16, 1997 report from her attending physician, Dr. Andrews, established that she had no disability or need for medical treatment for her cervical strain after August 13, 1997. OWCP noted that medical evidence established that appellant experienced chronic neck pain due to preexisting December 14, 1993 and February 1, 1994 motor vehicle accidents.

On May 11, 2009 appellant requested an oral hearing. Following a preliminary review, a hearing representative vacated the April 15, 2009 decision. He noted that OWCP had the burden of proof and could not meet its burden through stale medical evidence. The hearing representative remanded the case for OWCP to refer appellant for a second opinion examination

² In a report dated April 28, 2009, Dr. Helena Edith Weil, a licensed clinical psychologist, related that appellant should work with minimum stress in a position similar to her prior job.

to determine whether she had a current cervical condition due to her March 29, 1997 work injury.

On August 13, 2009 OWCP referred appellant to Dr. Philip Z. Wirganowicz, a Board-certified orthopedic surgeon, for a second opinion examination. It requested that he address whether she had residuals due to her cervical strain, whether her current cervical spine condition was due to the March 29, 1997 employment injury and to determine the period of total disability due to her accepted cervical strain. OWCP provided a statement of accepted facts (SOAF) that indicated that appellant's "injury-related neck strain resolved by August 13, 1997."³

In a report dated August 22, 2009, Dr. Wirganowicz diagnosed a resolved sprain of the cervical spine due to appellant's work injury. On examination, he found tenderness to midline palpation of the cervical spine but no muscle spasm or decreased range of motion. Dr. Wirganowicz determined that appellant had full motor strength and no atrophy of the upper or lower extremities and decreased sensation of the thumb, index and long fingers. He found normal objective findings for the cervical spine and subjective numbness of the fingers consistent with carpal tunnel syndrome not related to her cervical strain. Dr. Wirganowicz stated, "[Appellant's] period of total disability due to her work-related condition would be for [a] duration of approximately one month from the time of injury." He found that she could work without restrictions based on her cervical condition.

By decision dated October 27, 2009, OWCP terminated appellant's compensation and authorization for medical benefits for her accepted condition of cervical strain.

On October 26, 2009 appellant, through her representative, requested an oral hearing. At the hearing, held on March 4, 2010, her representative asserted that appellant had other injuries employment-related cervical and back conditions which were not included in the SOAF provided to Dr. Wirganowicz.

On February 18, 2010 Dr. Fatteh reviewed medical reports of record. He disagreed with Dr. Wirganowicz' opinion that appellant had no preexisting disability as he noted that she had prior work injuries to the neck on December 14, 1993 and February 1, 1994. Dr. Fatteh related, "In the section of the [physician's] report involving 'objective findings and subjective complaints,' he does acknowledge subjective reports of numbness but chalks them up to possible carpal tunnel syndrome. I found this to be highly speculative...." He recommended diagnostic testing to evaluate appellant's cervical spine and upper extremities. Dr. Fatteh further noted that Dr. Wirganowicz' found that appellant had no work restrictions for the cervical spine but opined that this conclusion "does not take into account [her] two prior industrial cervical spine injuries, nor does it accurately reflect her current symptomatology without further workup..."

In a statement dated March 24, 2010, appellant's representative maintained that OWCP had accepted that appellant sustained a recurrence of disability on August 4, 2008. He listed her history of work injuries, including a cervical strain injury in 1987.

³ In a progress report dated July 29, 2009, Dr. Weil treated appellant for panic disorder and PTSD.

By decision dated May 6, 2010, the hearing representative affirmed the October 27, 2009 decision. She discussed Dr. Fatteh's opinion that the work injury aggravated a preexisting cervical condition but noted that he provided no rationale in support of his opinion and that there was no evidence appellant received treatment for a cervical condition from 1997 until 2007. The hearing representative phrased the issue as whether appellant had established a recurrence of disability. She noted that appellant had not explicitly claimed an ongoing cervical condition due to her 1997 work injury.

LEGAL PRECEDENT -- ISSUE 1

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on her own motion or application.⁴ The Board has upheld OWCP's authority to set aside or modify a prior decision and issue a new decision under section 8128 of FECA.⁵ The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute.⁶

It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits.⁷ This holds true where OWCP later decides that it erroneously accepted a claim.⁸ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment. It is required to provide a clear explanation of the rationale for rescission.⁹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained neck sprain and PTSD due to a March 29, 1997 work injury. On August 13, 1997 Dr. Andrews found that she could resume working in her preinjury limited-duty position.

On September 3, 2008 appellant alleged that she sustained a recurrence of disability beginning August 4, 2008 due to her March 29, 1997 work injury. She attributed her recurrence of disability to the employing establishment reassigning her to a position outside of her medical restrictions. On March 19, 2009 OWCP advised appellant that it had accepted that she experienced a recurrence of disability on August 4, 2008. As it accepted that she sustained a recurrence of disability, it has the burden of proof to rescind acceptance.¹⁰ In a decision dated

⁴ 5 U.S.C. § 8128; *see also M.E.*, 58 ECAB 694 (2007).

⁵ *John W. Graves*, 52 ECAB 160 (2000).

⁶ *See* 20 C.F.R. § 10.610; *Cary S. Brenner*, 55 ECAB 739 (2004); *Stephen N. Elliott*, 53 ECAB 659 (2002).

⁷ *See Linda L. Newbrough*, 52 ECAB 323 (2001).

⁸ *Id.*

⁹ *See Andrew Wolfgang-Masters*, 56 ECAB 411 (2006); *see also* 20 C.F.R. § 10.610.

¹⁰ *See Linda Newbrough*, *supra* note 7.

October 27, 2009, OWCP terminated appellant's compensation and authorization for medical benefits based on its determination that the opinion of Dr. Wirganowicz, the second opinion examiner, constituted the weight of the evidence and established that she had no further residuals of her cervical strain. On May 7, 2010 a hearing representative affirmed the termination after finding that she had not established a recurrence of disability.

The Board finds that OWCP did not properly adjudicate the issue presented. As OWCP was not paying appellant compensation, it improperly characterized the issue as termination of wage-loss compensation. The issue is whether OWCP met its burden of proof to rescind acceptance of its finding that she sustained a recurrence of disability beginning August 4, 2008.

OWCP referred appellant to Dr. Wirganowicz and requested that he address whether she had any residuals due to her March 29, 1997 employment injury. It further asked that he ascertain the period of total disability due to her accepted work injury. OWCP provided Dr. Wirganowicz with a statement of accepted facts that indicated that appellant's neck strain resolved no later than August 13, 1997. This goes to the ultimate question of fact. The issue of whether she had any further disability or residuals of her employment-related neck strain, however, was the medical determination that OWCP asked him to resolve. To assure that a report of a medical specialist is based upon a proper factual background, OWCP provides information to the physician through the preparation of a statement of accepted facts.¹¹ OWCP's procedure manual provides, "When the DMA [district medical adviser], second opinion specialist or referee physician renders a medical opinion based on a SOAF which is incomplete or inaccurate or does not use the SOAF as the framework in forming his or her opinion, the probative value of the opinion is seriously diminished or negated altogether."¹² Consequently, as Dr. Wirganowicz relied upon a SOAF that indicated that appellant's cervical strain had resolved, his opinion is of little probative value.

Further, it appears that OWCP was attempting to rescind acceptance of its finding that appellant established an employment-related recurrence of disability. It, however, must inform a claimant correctly and accurately of the grounds on which a rejection rests so as to afford the claimant an opportunity to meet, if possible, any defect appearing therein.¹³ As OWCP failed to issue an appropriate decision rescinding its finding that appellant sustained a recurrence of disability beginning August 4, 2008, it did not meet its burden of proof.¹⁴

CONCLUSION

The Board finds that OWCP improperly issued a decision terminating appellant's compensation.

¹¹ *Helen Casillas*, 46 ECAB 1044 (1995).

¹² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Requirements for Medical Reports*, Chapter 3.600.3 (October 1990).

¹³ *John M. Pittman*, 7 ECAB 514 (1955).

¹⁴ In view of the Board's disposition regarding whether OWCP properly issued a decision terminating appellant's compensation, the issue of whether it properly terminated authorization for medical benefits is moot.

ORDER

IT IS HEREBY ORDERED THAT the May 6, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: August 23, 2011
Washington, DC

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

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