

On November 10, 2010 OWCP accepted that appellant sustained a recurrence of disability on July 19, 2010 causally related to her 1999 work injury. It paid compensation for temporary total disability.

Dr. Laxmidhar Diwan, the attending Board-certified orthopedic surgeon, examined appellant on August 25, 2010. He related her history and complaints and described his findings on physical examination. There was a loss of cervical lordosis as well as midcervical and paracervical tenderness. Range of motion was limited to no more than 25 degrees in any plane. Dr. Diwan diagnosed rule out herniated disc involving C5-6 and C6-7 with right radiculopathy.

Dr. Diwan reviewed his examinations and treatment of appellant. He found that her neck condition was static and she had achieved maximum medical improvement and would stay symptomatic, which would interfere with her work and activities of daily living. Dr. Diwan added that appellant continued to have severe symptoms of right carpal tunnel syndrome causing tingling, numbness, hypesthesia, an inability to hold heavy objects and an inability to sleep due to constant pain. He found that this condition had also stabilized and would not improve.

On September 22, 2010 Dr. Diwan noted that appellant continued to complain of pain in the cervical spine. Appellant had difficulty turning her head in any direction and also had difficulty driving, as her motion was limited. Her neck felt stiff, and she had difficulty sleeping at night due to stiffness and pain in her neck. Appellant also complained of pain and limited motion in her right elbow. Dr. Diwan again found loss of cervical lordosis, midcervical and paracervical tenderness and limited motion. Motion had improved only slightly to 30 degrees in three of four planes but was still significantly limited. Dr. Diwan found tenderness over the right medial and lateral epicondyle with swelling at the back of the elbow. Ranges of motion were slightly restricted. Dr. Diwan diagnosed cervical spondylosis and tendinitis and synovitis of the right elbow.

When it accepted appellant's recurrence claim, OWCP asked Dr. Diwan to complete a work capacity evaluation. Dr. Diwan did so on November 16, 2010, finding appellant totally disabled from her usual job. He indicated, however, that she could work 8 hours a day with restrictions: intermittent walking; no standing more than 30 minutes; intermittent reaching; no reaching above the shoulder; no twisting, bending/stooping or operating a motor vehicle; intermittent repetitive movement of the wrists and elbows; no pushing, pulling or lifting more than five pounds; no squatting, kneeling or climbing; and no working 8 hours in a sitting position in a chair without a back support. Dr. Diwan again found that appellant had reached maximum medical improvement.

On December 20, 2010 Dr. Robert J. Orlandi, a Board-certified orthopedic surgeon and OWCP referral physician, reviewed appellant's "injuries" and complaints. He found no loss of cervical lordosis and normal range of motion, but for a slight loss of cervical extension to 40 degrees. Dr. Orlandi's examination of the cervical spine was otherwise normal in all respects. Examination of the right elbow was also normal except for a 1+ tenderness over the lateral epicondyle, which was not associated with soft-tissue swelling and which was not worsened by resisted digital extension. Examination of the right wrist and hand was normal.

Dr. Orlandi reviewed the medical record, including Dr. Diwan's August 25, 2010 findings of a 50 percent reduction in cervical motion leading to marked disability. He diagnosed cervical strain, resolved but superimposed on age-related cervical spondylosis, and minimal and nondisabling subjective right lateral epicondylitis. Dr. Orlandi concluded that appellant could work without restriction: "There is no musculoskeletal disability."

In a decision dated January 13, 2011, OWCP terminated appellant's compensation for wage loss. It found that Dr. Orlandi's opinion represented the weight of the medical evidence and established that appellant had no current disability for work as a result of her November 8, 1999 occupational injury or July 19, 2010 recurrence. Addressing only the accepted right lateral epicondylitis, OWCP noted that Dr. Diwan found no deformity, only tenderness, which was a subjective finding not reported by Dr. Orlandi. Further, Dr. Diwan did not support his diagnosis of tendinitis and synovitis of the right elbow with diagnostic testing. OWCP concluded that Dr. Diwan's reports did not support the need for further restrictions or continued disability. It found that Dr. Orlandi's opinion was unequivocal and supported by his findings on examination and by sufficient medical rationale.

On appeal, appellant notes the disagreement between her doctor and OWCP's doctor on whether her accepted injuries have resolved and whether her pain and symptoms are residual to those injuries.

LEGAL PRECEDENT

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.² Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁴

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.⁵

ANALYSIS

OWCP accepted that appellant sustained a recurrence of disability on July 19, 2010 causally related to her 1999 work injury. It therefore has the burden of proof to justify the termination of compensation for temporary total disability.

² 5 U.S.C. § 8102(a).

³ *Harold S. McGough*, 36 ECAB 332 (1984).

⁴ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ 5 U.S.C. § 8123(a).

OWCP found that Dr. Orlandi's opinion represented the weight of the medical evidence. The Board, however, finds that Dr. Diwan's opinion is just as probative. Dr. Diwan was the attending physician. He had examined and treated appellant for several years. In August and September 2010, Dr. Diwan reported significant findings on physical examination. He found that appellant had reached maximum medical improvement and would remain symptomatic, thus interfering with her work. In November 2010, consistent with his findings, Dr. Diwan imposed significant work restrictions. He indicated that appellant could not return to her date-of-injury job. Only one month later, Dr. Orlandi reported an almost entirely normal examination. He saw no musculoskeletal disability. Dr. Orlandi found that appellant could return to her date-of-injury job.

Pursuant to 5 U.S.C. § 8123(a), there is disagreement between the physician making the examination for the United States and the physician of the employee. Dr. Orlandi's findings on examination of the cervical spine are remarkably different from those of Dr. Diwan. Considering Dr. Diwan's opinion that appellant had achieved maximum medical improvement and would stay symptomatic, Dr. Orlandi's findings raise a question as to whether appellant could have recovered so quickly. Dr. Orlandi acknowledged Dr. Diwan's August 2010 findings of a greater than 50 percent reduction in cervical motion that would lead to marked disability, but he did not attempt to reconcile those findings with his lack of findings in December 2010. He did not mention Dr. Diwan's findings in September 2010 or his work restriction evaluation in November 2010. Dr. Orlandi did not discuss the accepted herniated cervical disc. Indeed, OWCP did not address the accepted herniated cervical disc when it terminated appellant's compensation for wage loss. It appeared to terminate compensation for wage loss because Dr. Orlandi considered appellant's right elbow condition to be minimal and nondisabling. This was not sufficient.

Because a conflict existed between Dr. Diwan and Dr. Orlandi on the issue of disability for work, further development of the medical evidence was warranted. OWCP should have referred appellant to an impartial medical specialist. Without a resolution of the conflict, the Board finds that OWCP did not meet its burden of proof to justify the termination of appellant's compensation for wage loss. The Board will reverse OWCP's January 13, 2011 decision and remand the case for payment of appropriate compensation.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's compensation for wage loss. A conflict in medical opinion warrants referral to an impartial medical specialist under 5 U.S.C. § 8123(a).

ORDER

IT IS HEREBY ORDERED THAT the January 13, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 1, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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