

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

S.M., Appellant)

and)

DEPARTMENT OF THE ARMY,)
INSTALLATION MANAGEMENT AGENCY,)
Fort Campbell, KY, Employer)

**Docket No. 10-1699
Issued: June 23, 2011**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
ALEC J. KOROMILAS, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 15, 2010 appellant filed a timely appeal from a January 20, 2010 decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ and 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 OWCP met its burden to terminate appellant's compensation benefits on June 12, 2009.

FACTUAL HISTORY

Appellant, a 49-year-old secretary, filed a Form CA-2 claim for benefits on February 18, 1993, alleging that she developed a burning, stinging sensation in her left shoulder causally

¹ 5 U.S.C. § 8101 *et seq.*

related to employment factors. She stated that she became aware of this condition as of November 11, 1991. OWCP accepted the claim for temporary aggravation of cervical spondylosis and thoracic subluxation at T6.

On August 22, 2001 Dr. Keith D. Starkweather, Board-certified in orthopedic surgery and appellant's treating physician, restricted her from more than two hours a day of fine manipulation, reaching over the shoulder and simple grasping. On December 11, 2001 he restricted her from keyboarding. Appellant stopped working on April 1, 2002 when the employing establishment was no longer to accommodate her with modified-duty work consistent with Dr. Starkweather's restrictions.² On December 19, 2002 she returned to full-time modified duty. Appellant worked at this position until January 13, 2006, when the employing establishment was no longer able to accommodate her restrictions. She has not returned to work since that time.

On July 13, 2005 OWCP accepted a separate claim by appellant for right rotator cuff syndrome under case number xxxxxx543. On August 15, 2005 Dr. J. Michael Kioschos, Board-certified in orthopedic surgery, performed right rotator cuff surgery to repair a torn right rotator cuff.

In a report dated November 21, 2006, Dr. Starkweather stated that he had treated appellant for complaints of pain in her neck, shoulders and upper extremities for several years; she had experienced pain in her shoulders and her neck for more than 15 years and he had therefore placed her on work restrictions. He noted that he had diagnosed notalgia paraesthetica of the left shoulder and arm, myofascial pain syndrome, cervical brachial disorder, osteoarthritis of the acromioclavicular joint of her shoulders, left shoulder rhomboid strain and left shoulder tendinitis. Dr. Starkweather advised that appellant underwent magnetic resonance imaging (MRI) scan which demonstrated degenerative disc disease of her cervical spine and lumbar spine and had surgery on her left shoulder. He opined that her shoulder and neck conditions worsened over the past few years and that she would never be medically rehabilitated because of her persistent pain. Dr. Starkweather stated that appellant was unable to push, pull, lift or type for more than two hours in a day total; she also required a 10-minute break after typing for any significant period of time.

Dr. Starkweather advised that appellant should apply for medical retirement due to permanent impairments in her right and left upper extremity. He opined that she would never be able to return to full-time clerical duty.

On March 14, 2007 Dr. Kioschos stated in a work capacity evaluation form report that appellant was capable of performing her usual job and had no restrictions stemming from her accepted right rotator cuff condition.

In order to determine appellant's current condition and ascertain whether she still suffered residuals from her accepted conditions, OWCP referred her for a second opinion examination with Dr. John W. Bacon, a specialist in orthopedic surgery. In a January 18, 2008

² A May 3, 2002 statement of accepted facts indicated that appellant's job as a secretary required her to type for approximately 75 percent of her workday. It was a sedentary type position which required little lifting or walking.

report, Dr. Bacon stated that she continued to have residuals of her employment-related condition, myofascial pain syndrome. He advised that appellant's symptoms had persisted despite treatment and continued to be aggravated by typing activities. Dr. Bacon indicated that her subjective symptoms were consistent with the objective findings of muscle spasm; he stated that given her long history of symptoms the muscle spasms had become permanent and would be ongoing. He opined that appellant could return to full duty with restrictions on typing throughout the day (no more than 15 minutes at a time), reaching above her shoulder on a repetitive basis, repetitive movements with her wrist, elbow or left upper extremity or activities involving pushing, pulling and lifting (no more than two hours in any of these activities).

In a functional capacity evaluation dated March 21, 2008, appellant demonstrated an ability to function at the light physical demand level for an eight-hour workday. She showed an ability to sit, stand, walk, balance and reach on a frequent basis and stoop, crouch and perform typing and fingering on an occasional basis. The results of the tests indicated that appellant was unable to meet the required tasks of continuous typing for her previous occupation; she reported left upper extremity radicular symptoms after performing typing and fingering activities on an occasional basis.

On June 13, 2008 OWCP found that there was a conflict in medical evidence between Dr. Bacon and Dr. Kioschos regarding whether appellant had restrictions due to her accepted conditions. It referred her to Dr. Charles A. Barlow, Board-certified in orthopedic surgery, for a referee medical examination to resolve the conflict in the medical evidence. In a December 5 2008 report, Dr. Barlow found that appellant had cervical spondylosis and "possible" T6 subluxation which were aggravated by an injury that developed on or prior to November 11, 1991. He asserted that he had "no idea how the T6 subluxation diagnosis was made" at the time she filed his claim in 1991; he stated that there were no studies or clinical findings which confirmed this diagnosis.

Dr. Barlow further opined that there were few, if any objective findings which corresponded with appellant's subjective complaints of pain; he advised that these subjective complaints were the only residuals from her 1991 employment. He stated that she had MRI scan findings in the cervical and lumbar spine, but noted that these were commonly found in people of her age who did not experience pain. Dr. Barlow stated that appellant's cervical spondylosis and T6 subluxation, "if the ladder exists" were aggravated by her 8- to 10-hour day typing episodes at her secretarial job. He advised that her employment did not directly cause, precipitate or accelerate the two conditions. Dr. Barlow noted that the functional capacity evaluation appellant underwent placed her in the light physical demand category, which indicated that she could exert up to 20 pounds of force occasionally and 10 pounds of force frequently; he stated that these physical demand requirements exceeded those for sedentary work. He concluded that there was no objective evidence precluding her from returning to full-time work in any capacity.

Dr. Barlow submitted a supplemental report dated March 16, 2009. He reiterated that the results of appellant's functional capacity evaluation indicated that she demonstrated a physical demand capacity, which exceeded the demands for sedentary work. Dr. Barlow therefore opined that she was capable of performing her date-of-injury job.

On May 6, 2009 OWCP issued a notice of proposed termination of compensation to appellant. It found that the weight of the medical evidence, as represented by Dr. Barlow's impartial opinion, established that she had no work-related residuals stemming from her accepted conditions.

In a May 19, 2009 report, Dr. Eugene F. Gulish, Board-certified in orthopedic surgery, reviewed the medical history, stated findings on examination and advised that appellant continued to experience left shoulder and back pain. He stated that she was not able to type for long periods of time and recommended continued conservative treatment and pain management.

By decision dated June 12, 2009, OWCP terminated appellant's compensation for medical benefits, finding that Dr. Barlow's opinion represented the weight of the medical evidence.

By letter dated March 23, 2009, appellant requested an oral hearing, which was held on November 9, 2009.

In progress reports dated June 30 and July 16, 2009, Dr. Gulish essentially reiterated his previously stated findings and conclusions. He also stated that appellant had chronic neck pain, which had caused her to develop a depression condition.

By decision dated January 20, 2010, OWCP's hearing representative affirmed the March 23, 2009 termination decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.³ Following a proper termination of compensation benefits, the burden of proof shifts back to the claimant to establish continuing employment-related disability.⁴

Section 8123(a) provides that, if there is a 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 It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.⁶

³ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁴ *John F. Glynn*, 53 ECAB 562 (2002).

⁵ *Regina T. Pellicchia*, 53 ECAB 155 (2001).

⁶ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

ANALYSIS

The Board finds that OWCP did not meet its burden to terminate appellant's compensation benefits. OWCP determined that a conflict existed in the medical evidence between Dr. Kioschos and Dr. Bacon, OWCP's second opinion physician, as to whether she had continuing residuals from her accepted conditions. It thereafter based its decision to terminate appellant's compensation on the opinion of Dr. Barlow, the independent medical examiner. The Board, however, finds that OWCP erred in finding that there was a conflict in the medical evidence regarding the accepted conditions of temporary aggravation of cervical spondylosis and T6 subluxation at the time it referred appellant to Dr. Barlow. OWCP erred by finding that Dr. Kioschos represented one side of the medical evidence. Dr. Kioschos' March 14, 2007 form report indicating that appellant had no restrictions from her right rotator cuff syndrome pertained to a separate claim and is not relevant to the instant case; he did not examine her left shoulder or spine and did not render an opinion as to whether she still had residuals from her cervical spondylosis and T6 subluxation conditions. In addition, Dr. Bacon did not render an opinion as to whether her accepted conditions had resolved. Rather, he discussed whether appellant had residuals from myofascial pain syndrome, a condition not accepted by the OWCP. Dr. Bacon opined that she could return to full duty with restrictions on typing and other activities -- due to myofascial pain syndrome. There was thus no conflict regarding residuals of appellant's accepted conditions at the time of the referral to Dr. Barlow. Accordingly, Dr. Bacon's opinion is not entitled to the weight of the evidence as that of an impartial medical specialist.

The Board finds that Dr. Barlow's reports are not sufficient to constitute the weight of the medical evidence. Dr. Barlow opined that appellant had sustained an aggravation of cervical spondylosis in November 1991 but that this aggravation was temporary and had since resolved. He also stated that it was possible that she also had T6 subluxation aggravated by the work injury but opined that he had no idea how this diagnosis was issued since there were no studies or clinical findings which confirmed this diagnosis. Dr. Barlow stated that appellant's cervical spondylosis and T6 subluxation "if the ladder exists" were aggravated by her 8- to 10-hour day typing episodes at her secretarial job. He advised that her employment did not directly cause, precipitate or accelerate the two conditions. Dr. Barlow's opinion is therefore of diminished probative value, as his reports do not acknowledge or accept elements contained in the statement of accepted facts.

Finally, Dr. Barlow noted that the January 2008 functional capacity evaluation appellant underwent placed her in the light physical demand category, which exceeded the requirements for sedentary work. Based on the results of this evaluation he concluded that there was no objective evidence precluding her from returning to full-time work in any capacity. Dr. Barlow subsequently opined in his March 16, 2009 supplemental report that she was capable of performing her date-of-injury job. This opinion also runs contrary to the statement of accepted facts. The medical evidence dating back to 1991 irrefutably establishes that appellant can no longer perform her date-of-injury position as a secretary due to her inability to perform typing or keyboarding for extended periods. The employing establishment placed her on disability as of January 2006 because it no longer had work available to accommodate these limitations.

Dr. Barlow did not provide any current findings to support his conclusion. His conclusion was an unsupported opinion. OWCP did not sustain its burden to establish that

appellant's accepted conditions had ceased. The termination of compensation for these conditions will be reversed.⁷

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

ORDER

IT IS HEREBY ORDERED THAT the January 20, 2010 decision of the Office of Workers' Compensation Programs is reversed.

Issued: June 23, 2011
Washington, DC

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

Alec J. Koromilas, Judge
Employees' Compensation Appeals Board

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

⁷ The Board notes that OWCP's hearing representative stated in his January 20, 2010 decision that appellant "may be claiming" a consequential depression condition but that there was not sufficient medical evidence to support such a condition. While the May 15, 2008 statement of accepted facts states that Dr. Ronald Oakland diagnosed major depression, and Dr. Gulish stated that she had developed a depression condition due to her chronic neck pain, the record contains no documentation indicating that she has filed such a claim. OWCP has not accepted a claim for depression.