

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

K.K., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Kansas City, MO, Employer**

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**Docket No. 10-1950
Issued: May 23, 2011**

Appearances:

Alan J. Shapiro, Esq., for the appellant
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 July 22, 2010 appellant, through her attorney, filed a timely appeal from a June 22, 2010 decision of the Office of Workers' Compensation Programs terminating her compensation. 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.

ISSUES

The issues are: (1) whether the Office properly terminated appellant's wage-loss compensation benefits on the grounds that the accepted conditions had ceased without residuals; and (2) whether appellant met her burden of proof to establish that she remained disabled for work due to her accepted neck and left shoulder injuries.

On appeal, counsel contends that the June 22, 2010 decision was "contrary to fact and law."

¹ 5 U.S.C. §§ 8101 *et seq.*

FACTUAL HISTORY

The Office accepted that on or before May 1, 1990 appellant, then a 44-year-old data entry clerk, sustained a cervical strain, trapezius strain and left shoulder impingement due to carrying heavy satchels of mail from October 1989 to July 1998, overhead reaching as a stamp order clerk from July 1998 to February 1999 and repetitive bending and overhead reaching in the machine room from 2001.

On April 28, 2005 appellant underwent a C6-7 foraminotomy, authorized by the Office. On April 11, 2006 Dr. Steven Smith, an attending Board-certified orthopedic surgeon, performed left shoulder arthroscopy with arthroscopic subacromial decompression, arthroscopic distal clavicle excision and labral debridement, authorized by the Office. Appellant returned to light-duty work on April 27, 2006 as a modified mail order clerk. She received wage-loss compensation for intermittent work absences through January 2007.

In a December 5, 2006 report, Dr. James S. Zarr, an attending Board-certified physiatrist to whom appellant was referred by Dr. Smith, diagnosed cervical and left trapezius strains. In a January 17, 2007 report, he permanently restricted her to pulling and pushing for one hour, lifting no more than five pounds and no overhead reaching.

On December 20, 2007 appellant underwent C5-6 and C6-7 anterior discectomies and fusion. In an April 18, 2008 report, Dr. Smith related her complaints of neck and left periscapular tenderness. He agreed with Dr. Zarr's permanent work restrictions.² In April 2008, appellant returned to full duty as a data entry clerk, with lifting up to one pound sitting for eight hours a day, simple grasping and fine manipulation for eight hours a day and no overhead reaching.

On August 11, 2008 appellant claimed a schedule award. The Office advised her to submit an impairment rating by an attending physician conforming to the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, "A.M.A., *Guides*"). On September 26, 2008 Dr. Smith rated 12 percent impairment of the left upper extremity but did not refer to specific portions of the A.M.A., *Guides*. On March 11 2009 the Office obtained a second opinion from Dr. George Varghese, a Board-certified physiatrist, who assessed a three percent impairment of the left upper extremity due to limited range of motion. On March 26, 2009 an Office medical adviser concurred with Dr. Varghese's rating.

By decision dated April 16, 2009, the Office granted appellant a schedule award for a three percent permanent impairment of the left arm. Following an August 11, 2009 telephonic hearing, an Office hearing representative issued an October 21, 2009 decision affirming the April 16, 2009 schedule award.

On October 19, 2009 the Office obtained a second opinion from Dr. Edward J. Prostic, a Board-certified orthopedic surgeon, regarding the nature and extent of any residuals of the accepted conditions. A statement of accepted facts and a copy of the medical record were

² An April 14, 2008 magnetic resonance imaging scan of the left shoulder showed acromioclavicular arthritis with a small subchondral cyst at the humeral head.

provided for his review. On examination, Dr. Prostic found a normal range of cervical spine motion, 20 degrees loss of internal rotation in the left shoulder, weakness on external rotation of the left arm and minimal crepitus in the acromioclavicular joint. He opined that appellant had no objective clinical evidence of the accepted conditions and could perform all activities of a data entry clerk without restrictions.

By notice issued November 5, 2009, the Office advised appellant that it proposed to terminate her wage-loss compensation benefits on the grounds that the accepted conditions had resolved without residuals and she was able to perform her data entry clerk job without restrictions.

In a November 17, 2009 letter, appellant stated that she had not received wage-loss compensation other than for brief absences to attend medical appointments. She acknowledged that she was able to work full duty as an order entry clerk. Appellant contended, however, that her permanent restrictions disqualified her from work in the automatic processing department to which clerks were detailed during staffing shortages.

By decision dated December 10, 2009, the Office finalized termination of appellant's wage-loss compensation effective that day. It found that Dr. Prostic's report established that the accepted conditions had ceased without residuals and appellant was able to perform full duty as a data entry clerk.

In a December 15, 2009 letter, counsel requested a telephonic hearing, held on March 19, 2010. At the hearing, appellant stated that her physicians found her able to work as a data entry clerk without restrictions and that she had performed the job since April 2008. She again contended that medical restrictions prevented her from being sent to the automatic processing department. Appellant noted that work in other departments was not a requirement of her regular bid job. Counsel acknowledged that this was an administrative issue as she was able to perform all duties of the data entry clerk job without restrictions.

In a December 8, 2009 report, Dr. Smith agreed with Dr. Prostic that "light clerical duty involving no work above shoulder level and no ... significant lifting should be tolerable." He stated that appellant could work her normal data entry job without restrictions. Dr. Smith noted that she did not require further medical treatment.

By decision dated and finalized June 22, 2010, an Office hearing representative affirmed the December 10, 2009 decision, finding that the medical evidence established that appellant was no longer disabled for work and was able to perform full duty as a data entry clerk. Appellant did not submit any medical evidence to the contrary. The hearing representative noted that she would not rule on whether appellant could perform duties outside her division, as this was an administrative issue.

LEGAL PRECEDENT -- ISSUE 1

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ Having determined that an employee has a

³ *Bernadine P. Taylor*, 54 ECAB 342 (2003).

disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁴

ANALYSIS -- ISSUE 1

The Office accepted that appellant sustained a cervical strain, trapezius strain and left shoulder impingement, requiring a C6-7 foraminotomy and arthroscopic subacromial decompression. It granted her a schedule award for a three percent permanent impairment of the left upper extremity.

On December 20, 2007 appellant underwent C5-6 and C6-7 discectomies and fusion. Dr. Smith, an attending Board-certified orthopedic surgeon, restricted her to pulling and pushing for one hour, lifting no more than five pounds and no overhead reaching. Appellant returned to full-duty work in April 2008 as a data entry clerk. The position required no overhead reaching, lifting up to one pound, simple grasping and fine manipulation for eight hours a day.

The Office referred appellant to Dr. Prostic, a Board-certified orthopedic surgeon, for a second opinion examination. In an October 19, 2009 report, Dr. Prostic found that she had no residuals of the accepted injuries and could perform full duty as a data entry clerk. He based his opinion on a statement of accepted facts, the complete medical record and a thorough clinical examination.

Based on Dr. Prostic's opinion, the Office issued a notice of proposed termination on November 5, 2009. In response, appellant submitted a November 17, 2009 letter acknowledging that she was able to perform full duty as a data entry clerk. She noted concern about being detailed to another department. The Office terminated appellant's compensation by December 10, 2009 decision on the grounds that the medical evidence established that the accepted injuries had resolved without residuals.

The Board finds that Dr. Prostic's opinion is sufficient to represent the weight of the medical evidence. It is well rationalized and based on a complete factual and medical history.⁵ Dr. Prostic emphasized that appellant no longer had any work-related residuals and that therefore the accepted neck and left shoulder conditions no longer disabled her for work. The Board notes that she acknowledged that she was able to perform her data entry clerk position with no restrictions. The Board finds that the Office met its burden of proof to terminate appellant's wage-loss compensation benefits.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of 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 reliable, probative and substantial evidence

⁴ *Id.*

⁵ *James R. Taylor*, 56 ECAB 537 (2005).

that he or she had an employment-related disability that continued after termination of compensation benefits.⁶ For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.⁷ The fact that a condition's etiology is unknown or obscure neither relieves appellant of the burden of establishing a causal relationship by the weight of the medical evidence, nor shifts the burden of proof of the Office to disprove an employment relationship.⁸

ANALYSIS -- ISSUE 2

Following the Office's December 10, 2009 decision terminating her compensation benefits, appellant, through counsel, requested a telephonic hearing. At the hearing, counsel acknowledged that she was able to perform full-duty work as a data entry clerk and that her concerns about being detailed to another department were an administrative matter.

In a December 8, 2009 report, Dr. Smith agreed with Dr. Prostic that appellant was medically capable of performing the data entry clerk position without any physical restrictions. His opinion supports the Office's termination of appellant's wage-loss compensation benefits.

The Board finds that appellant did not submit medical evidence to establish disability or residuals on and after December 10, 2009 due to the accepted cervical and left shoulder injuries. Appellant has failed to meet her burden of proof.

On appeal, appellant contends that the Office's June 22, 2010 decision is "contrary to fact and law." As stated, she did not submit probative medical evidence demonstrating that she was disabled for work on and after December 10, 2009 due to residuals of the accepted injuries.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation benefits effective December 10, 2009 on the grounds that the accepted cervical and trapezius strains and left shoulder impingement had ceased without residuals. The Board further find that appellant did not meet her burden of proof in establishing a continuing work-related disability on and after the termination of her wage-loss compensation benefits on December 10, 2009.

⁶ See *Virginia Davis-Banks*, 44 ECAB 389 (1993); see also *Howard Y. Miyashiro*, 43 ECAB 1101, 1115 (1992).

⁷ *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁸ *Judith J. Montage*, 48 ECAB 292, 294-95 (1997).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 22, 2010 is affirmed.

Issued: May 23, 2011
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