

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

M.D., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Smithtown, NY, Employer**

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**Docket No. 11-246
Issued: September 8, 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 November 8, 2010 appellant, through his representative, filed a timely appeal from the October 14, 2010 merit decision of the Office of Workers' Compensation Programs (OWCP), which denied modification of its previous decision to terminate medical benefits for the accepted cervical strain. Pursuant to the Federal Employees' Compensation Act (FECA)¹ 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 properly terminated medical benefits for appellant's December 29, 2000 cervical strain.

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On December 29, 2000 appellant, a 37-year-old letter carrier, sustained an injury in the performance of duty when he picked up a bucket full of bulk mail and felt a pull in his shoulder and neck on the left side. OWCP accepted his claim for cervical strain and left shoulder strain.

Effective July 6, 2007, OWCP terminated appellant's compensation for wage loss and medical benefits. On March 14, 2008 an OWCP hearing representative affirmed the termination of compensation for wage loss. She found that the opinion of Dr. John Larkin, an impartial medical specialist, constituted the weight of the medical evidence and established that appellant had no remaining injury-related disability for work. The hearing representative, however, set aside, the termination of medical benefits. She found there was no conflict in medical opinion on whether the accepted medical conditions had resolved, so Dr. Larkin was only a second opinion physician on the issue of continuing medical treatment. Moreover, OWCP did not ask the physician to address the issue. The hearing representative remanded the case for further development of the medical evidence.²

On May 13, 2008 OWCP referred the case, together with the case record and a statement of accepted facts, to Dr. Malcolm A. Meyn, Jr., a Board-certified orthopedic surgeon.³ On June 11, 2008 Dr. Meyn related appellant's history and complaints, which centered on his left shoulder. Appellant reported that his neck did not currently cause him much difficulty. Examination of the cervical spine showed tenderness in the anterior part of the right sternocleidomastoid muscle and some numbness in the entire right hand. Sensory findings were consistent with peripheral neuropathy due to diabetes. The cervical spine showed full range of motion.

After reviewing the statement of accepted facts and appellant's medical records, Dr. Meyn opined that appellant's cervical spine strain had resolved. He supported this view by noting only mild tenderness in the right sternocleidomastoid muscle and essentially normal range of motion in the cervical spine. He added that appellant continued to have left shoulder tendinitis caused by the work incident but had reached maximum medical improvement and would not benefit from further medical treatment.

On July 28, 2008 OWCP terminated appellant's medical benefits for the accepted condition of cervical strain. OWCP explained that it was not terminating medical benefits for the accepted left shoulder condition, as appellant had a permanent impairment of his left upper extremity. But the weight of the medical evidence supported that his cervical injury had resolved. On August 4, 2008 appellant requested a telephone hearing before an OWCP hearing representative.

² OWCP's March 14, 2008 decision stands as the most recent merit decision on the issue of injury-related disability for work.

³ The Board notes that the referral letter of May 13, 2008 identified Dr. Meyn as an impartial medical specialist.

On February 16, 2009 appellant requested reconsideration of OWCP's July 28, 2008 decision. He stated that the issue was whether he was entitled to temporary total disability, and he noted that Dr. Meyn supported temporary total disability.

OWCP acknowledged receipt of appellant's February 16, 2009 reconsideration request but noted that he had requested a telephone hearing on August 4, 2008. Further noting that the Branch of Hearings & Review had acknowledged appellant's request for a telephone hearing, OWCP advised: "Therefore, your request for a reconsideration review is being dismissed and no further action will be taken on your [February 16, 2009] request."

On July 3, 2009 appellant wrote to the Branch of Hearings and Review: "OWCP correctly reports that the above claim is pending in your office. However this has been since August 4th, 2008. Please advise as to when the claim will be set for telephone hearing."

On September 30, 2009 appellant reminded OWCP that he had filed an appeal "sometime ago" on the issue of compensation for temporary total disability. Noting that the appeal was filed on August 4, 2008, he requested an update on the status of the request.

On July 16, 2010 appellant drew OWCP's attention to its July 28, 2008 decision, which terminated medical benefits for the accepted condition of cervical strain. He stated that he had filed a timely request for reconsideration on or about February 16, 2009: "it concerned the denial of ongoing temporary total disability benefits." Appellant argued that OWCP's July 28, 2008 decision should have been addressed by reconsideration, but there was never a decision. He added: "You indicated that you were dismissing the reconsideration because there was a BHR appeal. However in fact there was no BHR appeal concerning this issue, there was a reconsideration request on the 7/28/2008 decision. Please advise."

In a decision dated October 14, 2010, OWCP reviewed the merits of the case and denied modification of its July 28, 2008 decision terminating appellant's medical benefits for the accepted cervical strain. It found that none of the medical evidence submitted since the July 28, 2008 decision had any bearing on whether the accepted cervical strain had resolved.

LEGAL PRECEDENT

Section 8103(a) of FECA provides that the United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician that the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of any disability or aid in lessening the amount of any monthly compensation.⁴

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵ After it has determined that an employee has disability

⁴ 5 U.S.C. § 8103(a).

⁵ *Harold S. McGough*, 36 ECAB 332 (1984).

causally related to 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.⁶

ANALYSIS

On August 4, 2008 appellant timely requested a telephone hearing before OWCP's hearing representative from the July 28, 2008 decision to terminate his medical benefits for the accepted cervical strain. He was entitled to a hearing as a matter of right. The Branch of Hearings and Review, though late to respond, acknowledged the hearing request. Appellant confirmed his intentions on July 3, 2009 and again on September 3, 2009, when he asked for a status update on his August 4, 2008 request.

On July 16, 2010, however, appellant made clear that he did not want a hearing before OWCP's hearing representative, stating there was no hearing request. Instead, he wanted OWCP to address its July 28, 2008 decision through reconsideration, which he had also requested. The Board finds that appellant's July 16, 2010 correspondence constitutes a withdrawal of his August 4, 2008 request for a hearing on OWCP's July 28, 2008 decision. OWCP properly proceeded to rule on his request for reconsideration. The Board will review the October 14, 2010 merit decision to deny modification of its July 28, 2008 decision to terminate medical benefits for the accepted cervical strain.

OWCP based its July 28, 2008 decision on the June 11, 2008 report of Dr. Meyn, a Board-certified orthopedic surgeon and OWCP referral physician. As the hearing representative explained in her March 14, 2008 decision, there was no conflict in medical opinion on whether the accepted medical conditions had resolved. She remanded the case to OWCP for further development on this issue. For this reason, Dr. Meyn does not hold the status of an impartial medical specialist under 5 U.S.C. § 8123(a), someone selected to resolve a conflict in medical opinion. He is an OWCP referral or second opinion physician.

OWCP provided Dr. Meyn with a statement of accepted facts and appellant's medical record so he could base his opinion on a proper factual and medical history. He physically examined appellant's neck and found no evidence of the soft-tissue injury that occurred on December 29, 2000 when appellant picked up a bucket full of bulk mail. Dr. Meyn concluded that the accepted neck injury had resolved. He supported his opinion by noting only mild tenderness in the right sternocleidomastoid muscle -- appellant claimed that he had injured his shoulder and neck on the left side -- and essentially normal range of motion in the cervical spine.

Dr. Meyn's opinion appears sound, logical and rational. His conclusion was consistent with appellant's current complaints, with his findings on physical examination, and with his review of appellant's medical record. There is no reasonably contemporaneous medical opinion to the contrary. Given these circumstances, as well as the nature of the injury and the passage of time, the Board finds that Dr. Meyn's opinion is sufficiently rationalized that it constitutes the weight of the medical evidence on the issue of whether the accepted cervical strain has resolved.

⁶ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

As the weight of the medical opinion evidence establishes that the accepted cervical strain has resolved, the Board further finds that OWCP has met its burden to justify the termination of medical benefits for that particular condition. The Board will therefore affirm OWCP's October 14, 2010 decision.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP properly terminated medical benefits for the accepted cervical strain.

ORDER

IT IS HEREBY ORDERED THAT the October 14, 2010 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 8, 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