

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

V.C., Appellant)

and)

DEPARTMENT OF THE NAVY, MARINE)
CORPS BASE, Camp Pendleton, CA, Employer)

**Docket No. 11-1658
Issued: April 18, 2012**

Appearances:

Alan J. Shapiro, Esq., for the appellant
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 July 8, 2011 appellant, through her attorney, filed a timely appeal from an April 28, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether OWCP properly terminated appellant's medical benefits related to her accepted cervical condition effective October 4, 2010.

FACTUAL HISTORY

On April 20, 2004 appellant, then a 55-year-old information technology specialist, was injured in a motor vehicle collision while in the performance of duty. OWCP accepted her traumatic injury claim on July 14, 2004 for left wrist contusion and abrasion, bilateral shoulder

¹ 5 U.S.C. § 8101 *et seq.*

sprains and strains and bilateral knee contusions. It subsequently expanded the claim to include cervical and thoracic strains and migraine headaches on May 26, 2005. Appellant stopped work on August 14, 2005 and did not return.² She received compensation for temporary total disability.

By decision dated November 3, 2009, OWCP terminated appellant's medical benefits related to her left wrist contusion and abrasion, bilateral shoulder sprains and strains, bilateral knee contusions, thoracic strain and migraine headaches.³

OWCP referred appellant for a second opinion examination to Dr. William P. Curran Jr., a Board-certified orthopedic surgeon, regarding her cervical condition. In a July 29, 2009 report, Dr. Curran noted that she experienced intermittent neck pain. On examination, he observed tenderness, limited range of motion (ROM) and a positive foraminal compression test. Various radiological scans obtained in 2004 exhibited degenerative disc and joint disease at C5- and C6-7 and a herniated disc at C6-7. Dr. Curran diagnosed cervical strain and sprain, C6-7 disc herniation, bilateral neural foraminal stenosis and preexisting cervical degenerative disc disease. He opined that the April 20, 2004 motor vehicle collision permanently aggravated appellant's cervical degenerative disc disease. Dr. Curran added: "[Appellant] continues to suffer residuals of her injury and the medical reasons related to that include limitation of cervical spine motions [and] diagnostic studies indicating significant pathology at the C6-7 level of the cervical spine." He recommended cervical discectomy and permanent physical restrictions. In a September 13, 2009 addendum, Dr. Curran reiterated that the April 20, 2004 employment incident aggravated appellant's arthritic condition and led to her C6-7 disc herniation.

In an October 21, 2009 report, Dr. Janet Dunlap, a Board-certified orthopedic surgeon, examined appellant's neck and observed tenderness to palpation and diminished ROM. A May 19, 2009 magnetic resonance imaging (MRI) scan showed C5- and C6-7 disc degeneration as well as right C6-7 foraminal stenosis. Dr. Dunlap diagnosed cervical strain and sprain and pointed out the absence of radiculopathy or myelopathy symptoms. She concurred with Dr. Curran's opinion that the April 20, 2004 motor vehicle collision aggravated appellant's preexisting cervical degenerative disc disease, but determined that surgery was unnecessary as she merely sustained a simple strain with axial neck pain. In a November 16, 2009 addendum, Dr. Dunlap clarified that the April 20, 2004 employment incident did not directly cause, aggravate, precipitate or accelerate appellant's cervical degenerative disc disease and spondylosis because a material change altering the course of the underlying disease did not occur.

² The foregoing information was incorporated into a December 9, 2009 statement of accepted facts.

³ On May 13, 2010 OWCP reversed the November 3, 2009 decision in part, finding that the medical evidence did not sufficiently establish that appellant's migraine headaches resolved. The case remains open for this condition, which is not presently before the Board.

OWCP informed appellant in a March 1, 2010 letter that a conflict in medical opinion existed between Drs. Curran and Dunlap and referred appellant for a referee examination to Dr. Laurence M. McKinley, a Board-certified orthopedic surgeon.⁴

In an April 12, 2010 report, Dr. McKinley conducted a physical evaluation and commented that the cervical spinal posture and ROM were essentially normal. Following a review of the medical file and the December 9, 2009 statement of accepted facts, he diagnosed cervical strain and aggravation of underlying cervical degenerative disc disease. Dr. McKinley advised that appellant had mild residual cervical pain related to the work injury. He remarked that she sustained permanent aggravation of cervical degenerative disc disease due to the April 20, 2004 motor vehicle accident, but indicated that it “ceased approximately 12 weeks following the motor vehicle accident [in or around July 2004].” Dr. McKinley agreed with Dr. Dunlap’s opinion that surgery was unwarranted. OWCP informed him in a May 14, 2010 letter that he needed to provide medical rationale explaining whether appellant sustained permanent or temporary aggravation of her cervical degenerative disc disease and, if temporary, whether the aggravation resolved. In a supplemental report dated May 14, 2010, Dr. McKinley elaborated that she sustained a temporary aggravation of her preexisting cervical degenerative disc disease that did not result in permanent damage and should have resolved approximately 12 weeks after the accepted employment incident.

On July 19, 2010 OWCP issued a notice of proposed termination of medical benefits related to appellant’s cervical condition. It gave appellant 30 days to submit rebuttal evidence.

In a September 10, 2010 report, Dr. Scott P. Leary, a neurosurgeon, noted that appellant complained of neck pain radiating to the left interscapular region. On examination, he observed posterior cervicothoracic junction tenderness and a positive left Spurling’s test. A September 8, 2010 MRI scan exhibited C4-5, C5-6 and C6-7 disc height losses, C5-6 disc bulging, foraminal stenosis and osteophyte formation and C6-7 retrolisthesis and foraminal stenosis.⁵ Dr. Leary diagnosed cervical radiculopathy due to C5-6 and C6-7 disc disease and instability and advised that appellant undergo cervical discectomy.⁶

In a September 16, 2010 report, Dr. Jamieson S. Glenn, a Board-certified orthopedic surgeon, restated the findings of the September 8, 2010 MRI scan and assessed cervical spondylosis with foraminal narrowing and cervicalgia.⁷

By decision dated October 4, 2010, OWCP terminated appellant’s medical benefits related her cervical strain effective immediately, finding that Dr. McKinley’s April 12 and May 14, 2010 reports constituted the weight of the medical evidence.

⁴ OWCP indicated that an attached statement identified the nature of this conflict. This attachment is not included in the case record.

⁵ The case record contains a September 8, 2010 cervical MRI scan obtained by Dr. Glenn H. Tsukada, a Board-certified diagnostic radiologist.

⁶ Appellant underwent neck surgery on September 29, 2010.

⁷ Other medical evidence submitted by appellant did not address her cervical condition.

Appellant's counsel requested a telephonic hearing, which was held on February 7, 2011. Appellant testified that the April 20, 2004 motor vehicle collision resulted in cervical spondylosis, stenosis and foraminal narrowing. In an April 11, 2011 letter, she argued that Dr. McKinley's referee examination did not sufficiently resolve the conflict in medical opinion. Appellant also denied having any preexisting neck condition before April 20, 2004.

On April 28, 2011 OWCP's hearing representative affirmed the October 4, 2010 decision.

LEGAL PRECEDENT

Once OWCP has accepted a claim, it has the burden of justifying termination or modification of compensation benefits,⁸ which includes furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹ 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 ceased or was no longer related to the employment.¹⁰ The right to medical benefits for an accepted condition, on the other hand, is not limited to the period of entitlement to disability compensation. To terminate authorization for medical treatment, OWCP must establish that an employee no longer has residuals of an employment-related condition, which would require further medical treatment.¹¹

If there is a conflict in medical opinion between the employee's physician and the physician making the examination for the United States, OWCP shall appoint a third physician, known as a referee physician or impartial medical specialist, to make what is called a referee examination.¹² Where OWCP has referred appellant to a referee physician to resolve a conflict, the referee's opinion, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹³

ANALYSIS

OWCP accepted that appellant sustained a work-related cervical strain due to an April 20, 2004 motor vehicle collision. In July 29 and September 13, 2009 reports, Dr. Curran, OWCP's second opinion examiner, diagnosed a cervical strain and concluded that the accepted employment incident aggravated her preexisting cervical degenerative disease. Dr. Dunlap opined in a November 16, 2009 report that the motor vehicle accident did not materially alter this underlying condition. She also diagnosed a cervical strain. OWCP determined that a conflict in

⁸ *I.J.*, 59 ECAB 408 (2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁹ *D.C.*, Docket No. 09-1070 (issued November 12, 2009); *Larry Warner*, 43 ECAB 1027 (1992).

¹⁰ *I.J.*, *supra* note 8.

¹¹ *L.G.*, Docket No. 09-1692 (issued August 11, 2010); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

¹² *See* 5 U.S.C. § 8123(a); 20 C.F.R. § 10.321.

¹³ *L.W.*, 59 ECAB 471 (2007); *James P. Roberts*, 31 ECAB 1010 (1980).

medical opinion existed and thereafter appointed Dr. McKinley as an impartial medical specialist.

The Board finds that Dr. McKinley was not an impartial medical specialist with regard to whether appellant's accepted cervical condition has resolved because a conflict in medical opinion on this matter did not exist at the time of the referral. As noted, OWCP accepted cervical strain. However, Drs. Curran and Dunlap each diagnosed cervical strain in their respective reports. Neither physician expressly addressed whether this accepted condition resolved or if it was no longer employment related. Instead, both reports focused on whether appellant aggravated preexisting cervical degenerative disease, a condition that OWCP did not accept as employment related. While Dr. McKinley's opinion was not entitled to the special weight afforded to a referee physician, his report can still be considered for its own intrinsic value and can still constitute the weight of the medical evidence.¹⁴

The Board finds that OWCP failed to meet its burden of proof to terminate appellant's medical benefits related to her accepted cervical strain. In his initial April 12, 2010 report, Dr. McKinley diagnosed cervical strain and aggravation of preexisting cervical degenerative disc disease. He added that this aggravation of a nonaccepted condition stemmed from the April 20, 2004 motor vehicle collision and ceased in or around July 2004, approximately 12 weeks after the incident. Dr. McKinley also noted that appellant had mild residual cervical pain related to the work injury. He did not indicate that the work-related cervical strain had resolved. In a May 14, 2010 supplemental report, Dr. McKinley elaborated that appellant sustained a temporary aggravation of underlying cervical degenerative disc disease that resolved in or around July 2004. OWCP did not ask him to address whether the accepted cervical strain had resolved and he did not specifically address whether the accepted cervical strain had resolved. Thus, the medical evidence is insufficient to establish that the accepted cervical strain has resolved. Instead, the reports of Drs. Curran, Dunlap and McKinley all diagnose a cervical strain and none of these physicians clearly indicate that it is no longer employment related. Therefore, the Board finds that OWCP improperly relied on Dr. McKinley's opinion in terminating appellant's medical benefits related to her accepted cervical condition.

CONCLUSION

The Board finds that OWCP improperly terminated appellant's medical benefits related to her accepted cervical condition effective October 4, 2010.

¹⁴ *Cleopatra McDougal-Saddler*, 47 ECAB 480 (1996).

ORDER

IT IS HEREBY ORDERED THAT the April 28, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: April 18, 2012
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