

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

O.C., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Federal Way, WA, Employer)

**Docket No. 12-432
Issued: August 17, 2012**

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On December 20, 2011 appellant, through her attorney, filed a timely appeal from a June 28, 2011 decision of the Office of Workers' Compensation Programs (OWCP) which affirmed a decision terminating her compensation benefits. 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 met its burden of proof to terminate appellant's compensation benefits for her accepted injury as of November 19, 2010.

FACTUAL HISTORY

On October 23, 2007 appellant, then a 39-year-old letter carrier, was injured when her government automobile was hit by another motor vehicle while in the performance of duty.

¹ 5 U.S.C. §§ 8101-8193.

OWCP accepted appellant's claim for a neck sprain and sprain of the lumbosacral joint ligament. Appellant stopped work on October 23, 2007 and returned to part-time limited-duty work on February 7, 2008, for four hours a day.

Appellant was treated in an emergency room on October 23, 2007 after the motor vehicle accident. X-ray of the left hip and pelvis revealed no acute findings. Appellant was diagnosed with myofascial pain syndrome. An x-ray of the cervical spine dated October 23, 2007 revealed degenerative changes. A January 7, 2008 magnetic resonance imaging (MRI) scan of the lumbar spine revealed disc desiccation and small broad-based posterior central disc protrusion at L5-S1 with underlying tear of the annulus fibrosis, mild bilateral degenerative facet disease at L5-S1 and mild bilateral neuroforaminal narrowing at L5-S1. An April 24, 2008 electromyogram (EMG) revealed moderately severe right carpal tunnel syndrome with no evidence of ulnar neuropathy or cervical radiculopathy.

Appellant was treated by Dr. Arnel M. Brion, a Board-certified orthopedic surgeon, on February 14, 2008 for her work injury. Dr. Brion diagnosed a work-related cervical and lumbar strain and bilateral shoulder strain. He also diagnosed moderate carpal tunnel syndrome of unclear etiology. Dr. Brion noted that appellant was working light duty, part time for four hours per day. He continued to treat appellant for an improving work-related cervical and lumbar strain. On August 8, 2008 Dr. Brion increased appellant's work hours from six to eight hours a day with restrictions. On August 26, 2008 he noted that appellant was not ready to work full time with restrictions and reduced her hours to six a day. On October 3, 2008 Dr. Brion returned appellant to work full time with restrictions. A January 22, 2009 functional capacity evaluation noted that appellant could work in the light physical demand category for eight hours a day.

Appellant was also treated by Dr. Luan T. Gip, a chiropractor, from October 24, 2008 to February 9, 2009, for thigh, back, neck pain that occurred after the October 23, 2007 automobile accident. Dr. Gip diagnosed left lumbosacral sprain, left thoracic sprain, cervical and thoracic subluxation, all related to the motor vehicle accident.

Appellant continued to be treated by Dr. Brion from January 14 to June 25, 2010, for chronic neck and back pain after a work injury. Dr. Brion diagnosed work injury with lumbar and cervical strain and noted that her back pain was improving with lumbar epidural steroid injections.

Appellant was treated by Dr. Xavier I. Ibarreta, a chiropractor, from February 27 to June 25, 2010, for occipital headaches, neck pain and back pain which began after a work-related automobile accident. Dr. Ibarreta diagnosed cervical, thoracic, lumbar and lumbosacral sprain/strain and cervical, thoracic, lumbar and sacroiliac subluxations, muscle spasm and tension headache. A May 10, 2010 MRI scan of the lumbar spine revealed L5-S1 disc bulge with central disc protrusion without impingement.

OWCP referred appellant to Dr. Richard G. McCollum, a Board-certified orthopedic surgeon, for a second opinion. In an August 12, 2010 report, Dr. McCollum noted that the examination revealed normal cervical and lumbar lordosis, tenderness to touch over the entire thoracic region, diffuse tenderness in the low back, no lumbar, cervical or dorsal atrophy or spasm, normal gait, normal motor testing of the upper and lower limbs and biceps and triceps

reflexes were equal and symmetrical. The cervical range of motion was normal, limited lumbar flexion to 45 degrees and negative sitting straight leg raises. Dr. McCollum diagnosed cervical and lumbar sprain due to the October 23, 2007 injury with no significant findings on examination.² He noted that he found no significant objective findings which would predict that appellant would continue with pain requiring narcotic medication three years after the injury. Dr. McCollum opined that the degenerative findings at L5-S1 on the MRI scan were common in a person of appellant's age and were not caused or aggravated by her work injury either temporarily or permanently. He noted that appellant's examination was checkered by marked pain behavior. Dr. McCollum noted that her general well being, handling maneuvers quickly and agilely and laughing throughout the examination, in addition to the examination findings, led him to believe there was no residual problem from her work injury. He noted that appellant's prognosis was excellent and she had no further need for diagnostic or therapeutic measures or chiropractic treatment. Dr. McCollum noted that the diagnosed carpal tunnel syndrome, headaches and trochanteric bursitis had no relationship to her work injury. He opined that appellant could return to her job, full time without any physical restrictions based on her work injury.

In reports dated July 16 to August 13, 2010, Dr. Brion diagnosed chronic lumbar strain, status post lumbar steroid injections and chronic cervical strain symptoms. On August 13, 2010 Dr. Brion informed appellant that he did not agree with long-term chiropractic treatment. As her injury was in 2007, he recommended the treatment be tapered off and then stopped completely.

OWCP requested that Dr. Brion review Dr. McCollum's report and address whether he agreed with his conclusions. In a September 2, 2010 report, Dr. Brion disagreed with Dr. McCollum's conclusion that there were no significant findings on examination. He noted that active flexion of 45 degrees was abnormal. Dr. Brion opined that the February 14, 2008 findings were not inconsistent and that the straight leg test was normal but he could only lift appellant's leg 45 degrees with complaints of pain and tightness. He agreed with Dr. McCollum's conclusion that the May 10, 2010 lumbar spine MRI scan findings did not show definite worsening and the abnormalities found were common place and do not explain appellant's symptoms. Dr. Brion agreed with Dr. McCollum that appellant exhibited pain behavior and that there was no need for continuing chiropractic care; but disagreed with Dr. McCollum's finding that appellant could be released to work without restrictions. He noted that she underwent a functional capacity evaluation on January 22, 2009 which recommended a lifting limitation of 13 pounds. Dr. Brion stated that the job of a letter carrier required intermittent lifting up to 70 pounds which was impossible for appellant to perform. On September 10, 2010 he stopped chiropractic treatment and denied her request for prescriptions for Vicodin and Tramadol. Dr. Brion assessed a work injury with chronic cervical and lumbar strain symptoms. On September 20, 2010 he noted that he would no longer treat appellant. Dr. Brion noted that appellant was upset that he agreed with several of Dr. McCollum's findings. In chiropractic reports dated March 5 to September 22, 2010, Dr. Ibarreta noted that appellant

² Dr. McCollum reviewed Dr. Brion's February 14, 2008 report and opined that there were inconsistencies in his findings. He referenced Dr. Brion's physical examination findings which revealed normal strength in the upper extremities, reflexes for the knee, ankle, biceps, triceps were present and symmetrical with negative straight leg raising. Dr. Brion further noted that he could only raise each leg 45 degrees with complaints of tightness in the low back region.

reached a fixed and stable status as of September 22, 2010 and would not require additional chiropractic treatment.

On October 13, 2010 OWCP issued a notice of proposed termination of compensation and medical benefits based on Dr. McCollum's reports.

Appellant submitted a September 16, 2010 duty status report from Dr. Brion who diagnosed cervical and lumbar strain and recommended that appellant return to work full time subject to a lifting restriction of 13 pounds and mail truck deliveries limited to two hours. In an August 6, 2010 report, Dr. Christopher D. Merifield, an orthopedic surgeon, performed a bilateral L5 transforaminal epidural steroid injection and diagnosed lumbar degenerative disc disease and small lumbar herniated nucleus pulposus at L5-S1.

In a November 18, 2010 decision, OWCP terminated appellant's compensation benefits effective November 19, 2010. It found that Dr. McCollum's report represented the weight of the medical evidence and established that appellant had no continuing residuals of her accepted injuries.

On December 12, 2010 appellant requested a hearing which was held on March 31, 2011. In a November 5, 2010 report, Dr. Kara Warden, a Board-certified internist, diagnosed lumbar radiculopathy, low back pain with paresthesias which radiated down her leg into the foot which was most likely related to the L5-S1 radiculopathy. She noted appellant's examination was normal aside from the subjective decrease of sensation in the face and on the leg. In a March 30, 2011 attending physician's report, Dr. Uday Mehta, a Board-certified emergency room physician, treated appellant for a left knee condition. He diagnosed medial meniscal tear of the left knee and noted with a checkmark "yes" that appellant's condition was caused or aggravated by a work activity.

In a decision dated June 28, 2011, an OWCP hearing representative affirmed the November 18, 2010 decision.

LEGAL PRECEDENT

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ After it has determined that an employee has disability causally related to his or 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.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.⁵

³ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁴ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁵ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

ANALYSIS

OWCP accepted that appellant sustained a neck sprain and sprain of the lumbosacral joint ligament. Appellant stopped work on October 23, 2007 and returned to work on February 7, 2008, part time, four hours per day, limited duty. OWCP terminated her compensation effective November 19, 2010, based on Dr. McCollum's examination and report. The Board finds, however, that there is a conflict in medical opinion between Dr. McCollum, OWCP's referral physician and Dr. Brion, appellant's treating physician.

In his report, Dr. McCollum opined that appellant did not have residuals of her accepted work-related condition of neck sprain and sprain of the lumbosacral joint ligament. He found no significant objective findings and opined that the degenerative findings at L5-S1 on the MRI scan were age-related changes. Dr. McCollum noted that appellant's examination was checkered by marked pain behavior and noted appellant's prognosis was excellent and she had no further need for diagnostic or therapeutic measures and could return to her job, full time without any physical restrictions based on her work injury. By contrast, reports from Dr. Brion dated September 2 and 10, 2010 continued to support partial disability due to appellant's work-related cervical and lumbar sprains. Although Dr. Brion agreed with portions of Dr. McCollum's opinion, he disagreed with Dr. McCollum's finding that appellant could be released to work without restrictions and noted that she underwent a functional capacity evaluation on January 22, 2009 which provided a lifting limitation of 13 pounds. He noted that the letter carrier position required intermittent lifting up to 70 pounds which appellant could not perform. Dr. Brion has consistently supported work-related disability and restrictions related to appellant's neck and lumbosacral sprain, while Dr. McCollum found that appellant has no work-related residuals of the accepted injury and could return to full-time work. The Board, therefore, finds that a conflict in medical opinion has been created.

Section 8123 of FECA provides that, if there is a disagreement between the physician making the examination for the United States and the employee's physician, OWCP shall appoint a third physician who shall make an examination.⁶ The Board finds that because OWCP relied on Dr. McCollum's opinion to terminate appellant's compensation without having resolved the existing conflict,⁷ it has failed to meet its burden of proof in terminating medical and compensation benefits on the grounds that disability had ceased.

CONCLUSION

The Board finds that OWCP has not met its burden of proof to terminate benefits effective November 19, 2010.

⁶ 5 U.S.C. § 8123(a); *Shirley L. Steib*, 46 ECAB 39 (1994).

⁷ See *Craig M. Crenshaw, Jr.*, 40 ECAB 919, 923 (1989) (finding that OWCP failed to meet its burden of proof because a conflict in the medical evidence was unresolved).

ORDER

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

Issued: August 17, 2012
Washington, DC

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

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board