

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

D.V., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
West Palm Beach, FL, Employer**

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**Docket No. 11-1629
Issued: February 3, 2012**

Appearances:
Capp Taylor, 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 6, 2011 appellant, through her attorney, filed a timely appeal from a January 11, 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 this case.

ISSUE

The issue is whether OWCP properly determined that appellant was not entitled to compensation from May 14, 2005 to July 14, 2006.

FACTUAL HISTORY

The case was before the Board on a prior appeal. In a decision dated March 3, 2010, the Board remanded the case for additional development.² The Board found OWCP did not properly

¹ 5 U.S.C. § 8101 *et seq.*

² Docket No. 09-1109 (issued March 3, 2010).

consider the evidence regarding disability from May 14, 2005 to July 14, 2006. In the prior decision, the Board provided a history of the case which is incorporated herein by reference.

To summarize the relevant facts on the issue, OWCP had accepted that appellant, a mail handler, sustained cervical and right shoulder strains in the performance of duty on July 13, 2000. On December 28, 2004 appellant was working four hours a day in a modified position and as of January 22, 2005 she increased to six hours a day. OWCP paid compensation for the remaining two hours. On March 17, 2005 an attending orthopedic surgeon, Dr. Rolando Garcia Jr., stated that appellant had chronic neck pain radiating into the arm. He noted a magnetic resonance imaging (MRI) scan showing disc herniations at C5-6 and C6-7. Dr. Garcia recommended cervical surgery and indicated that appellant was placed in a no work status.

In a report dated May 9, 2005, Dr. Graham Whitfield, an attending orthopedic surgeon, provided results on examination and noted the results of the March 11, 2005 MRI scan. He indicated that appellant should remain off work and a request for authorization of cervical surgery had been submitted. Appellant retired from employment as of May 13, 2005.

OWCP referred appellant for a second opinion examination by Dr. Jerry Sher, a Board-certified orthopedic surgeon. In a report dated June 20, 2005, Dr. Sher stated that the work-related cervical strain represented an aggravation of preexisting cervical degenerative disc disease which had not resolved. He further stated that appellant's "latest work stoppage would be related to the work injury of July 13, 2000 as the recommendation is reflective of and consistent with an aggravation of her [preexisting] condition."

On August 19, 2005 OWCP accepted the claim for aggravation of cervical degenerative disc disease. On July 14, 2006 appellant submitted a claim for compensation, Form CA-7, through July 14, 2006. By decision dated April 5, 2007, OWCP denied the claim on the grounds that she had elected Office of Personnel Management disability retirement for the period May 14, 2005 to July 14, 2006. In a decision dated May 17, 2007, its hearing representative reversed the April 5, 2007 decision and returned the case for a decision regarding disability after May 13, 2005.

By letter dated July 26, 2007, OWCP advised appellant, "Since your disability from work is causally related to your work injury of [July 13, 2000], you are entitled to compensation for the period [May 14, 2005] to [July 14, 2006]." As the Board noted in its prior decision, it subsequently denied the claim in decisions dated June 17, 2008 and January 23, 2009.

Following the Board's remand, OWCP issued a decision dated May 4, 2010. It found that the medical evidence did not establish an employment-related disability from May 14, 2005 to July 14, 2006. In a decision dated September 8, 2010, OWCP's hearing representative remanded the case for further development. The hearing representative noted that OWCP had the burden of proof to terminate compensation, and it had not considered the findings of second opinion physician, Dr. Sher.

Appellant was referred to Dr. Brad Cohen, an orthopedic surgeon, for a second opinion examination. In a report dated October 27, 2010, Dr. Cohen provided a history and results on examination. With respect to disability commencing in 2005, he stated that the modified job

duties did not involve heavy lifting or overhead work and it was unlikely these duties would have accelerated the condition to the point of total disability. Dr. Cohen stated that it was unlikely that a material acceleration of the condition occurred during the time that appellant worked on limited duty. He stated, “There is no objective evidence of significant progression of her cervical pathology based on available MRI [scans]. The injury of [July 13, 2000] most likely did not cause the work stoppage in 2005.” Dr. Cohen stated that according to a functional capacity evaluation (FCE) on May 27, 2004 appellant was capable of work in a medium physical demand level classification. He further stated, “Although she was not able to functionally meet the occupational demands of a [m]ail [c]arrier, including occasional lifting of up to 70 pounds, she was certainly capable of performing the occupational demands for the modified-duty position.” Dr. Cohen also included an “addendum” report dated November 19, 2010 indicating that he had reviewed a November 12, 2010 FCE.

By letter dated November 30, 2010, OWCP requested an additional report from Dr. Cohen. It advised him that terms such as “likely” were speculative and not medically rationalized. OWCP requested additional explanation as to disability commencing in 2005. Dr. Cohen submitted a report dated December 7, 2010. As to the issue of work stoppage in 2005, he repeated his statements as noted above. In his history, Dr. Cohen stated that Dr. Sher did not indicate that any objective MRI scan evidence of permanent worsening of the preexisting cervical condition as a result of the work injury.

By decision dated January 11, 2011, OWCP denied the claim for compensation from May 14, 2005 to July 14, 2006. It found the weight of the evidence was represented by Dr. Cohen.

LEGAL PRECEDENT

The Board has upheld OWCP’s authority to reopen a claim at anytime on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.³ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁴

It is well established that, once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation.⁵ Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.⁶

³ *Eli Jacobs*, 32 ECAB 1147 (1981).

⁴ *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁵ *Linda L. Newbrough*, 52 ECAB 323 (2001).

⁶ *E.W.*, Docket No. 08-1890 (issued February 19, 2009).

ANALYSIS

In this case the issue of burden of proof requires some clarification. As the factual history indicates, appellant was working in 2005 at six hours a day and receiving compensation for two hours a day. It is OWCP's burden of proof to establish that she was not entitled to receive two hours a day compensation for wage loss as of May 14, 2005. This is based on the principle noted above that OWCP has the burden to terminate compensation. When appellant filed the claim for compensation for total disability as of May 14, 2005, it would be her burden of proof regarding the remaining six hours a day. In this case, however, after initially denying the claim OWCP explicitly found in a July 26, 2007 letter that based on the evidence appellant was "entitled to compensation" for the period May 14, 2005 to July 14, 2006. Having accepted the claim and a period of disability, the burden is now on OWCP to rescind acceptance of the period of disability.⁷ The Board notes that OWCP's hearing representative did acknowledge the burden of proof was held by OWCP, although the January 11, 2011 decision does not discuss the issue.

As the burden of proof is on OWCP to establish that appellant is not entitled to compensation for wage loss from May 14, 2005 to July 14, 2006. The January 11, 2011 decision finds that Dr. Cohen represents the weight of the medical evidence. The Board finds that the reports of Dr. Cohen are not sufficient to represent the weight of the evidence on the issue presented.⁸

Dr. Cohen opined that the work stoppage in 2005 was most likely not the result of the employment injury. OWCP did explain to him that such terms as "likely" were speculative and a rationalized medical opinion was required. The December 7, 2010 report used the same terms as the initial October 27, 2010 report. Dr. Cohen stated that he did not believe that the MRI scans showed any objective evidence of a significant progression of the cervical pathology and stated that Dr. Sher, the previous second opinion physician, did not indicate any objective MRI scan evidence. Dr. Sher, however, had reviewed the MRI scan and other evidence and opined that the work stoppage in 2005 was employment related. He found an employment-related aggravation of underlying cervical degenerative disc disease that was disabling. Dr. Sher's June 20, 2005 report provided a contemporaneous medical report based on an accurate background supporting an employment-related disability. There is no adequate basis for a finding that Dr. Cohen's opinion has more probative weight than Dr. Sher's opinion on the issue presented. As to the period from June 20, 2005 (the date of Dr. Sher's report) to July 14, 2006, the only medical evidence of record is a September 27, 2005 report from Dr. Whitfield, who indicated that appellant should remain off work.

The Board accordingly finds that the medical evidence of record is not sufficient to meet OWCP's burden of proof. OWCP has not provided a clear explanation of its rationale for

⁷ See *M.G.*, Docket No. 10-818 (issued March 21, 2011) (OWCP needs clear explanation of rationale for rescinding acceptance of surgery and accompanying disability).

⁸ Dr. Cohen's opinion regarding appellant's current condition and casual relationship to federal employment is a separate issue and is not addressed in the current appeal.

rescission and has not established that rescission of an accepted period of disability was warranted in this case.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof with respect to compensation from May 14, 2005 to July 14, 2006.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated January 11, 2011 is reversed.

Issued: February 3, 2012
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