

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

J.L., Appellant

and

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

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**Docket No. 11-1511
Issued: January 24, 2012**

Appearances:
Appellant, pro se
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 June 14, 2011 appellant filed a timely appeal from a January 18, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) terminating her benefits effective February 13, 2011 and from a March 14, 2011 decision denying her request for a hearing. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective February 13, 2011; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed.

On appeal, appellant contends that the medical evidence establishes that she still has damage to her neck, and that she is still experiencing pain in her neck and shoulders.

FACTUAL HISTORY

On December 4, 2008 appellant, then a 45-year-old distribution clerk, filed a traumatic injury claim alleging that on December 3, 2008 she hurt her neck when a package fell while she was retrieving another package. On February 26, 2009 OWCP accepted her claim for sprain of the neck and brachial radiculitis.

In a November 3, 2009 report, Dr. Ben Benatar, appellant's treating Board-certified orthopedic surgeon, stated that appellant was still complaining of pain in her neck, pain in both upper shoulder areas, pain extending into her forearm and occasional paresthesias in both forearms. He diagnosed her with cervical radiculopathy and opined that she was disabled. In subsequent medical reports and duty status reports, Dr. Benatar noted that appellant's pain had not improved and that she remained disabled, specifically noting that appellant could not use her arms lifting, carrying and sorting mail.

Dr. Benatar referred appellant to Dr. Greg M. Szerlip, an osteopath, for a consultation. In a February 18, 2010 report, Dr. Szerlip listed appellant's diagnoses as cervical disc displacement, cervical radiculopathy and cervical paraspinal muscle spasms and recommended that she undergo a series of cervical epidural steroid injections. He gave her injections on April 15, 2010, but this injection was not successful in providing relief.

On July 14, 2010 OWCP referred appellant to Dr. P. Leo Varriale, a Board-certified orthopedic surgeon, for a second opinion. In a July 28, 2010 report, Dr. Varriale diagnosed her with resolved cervical strain and resolved strain to the right and left shoulders. He noted no objective findings of cervical strain or brachial radiculitis. Although Dr. Varriale believed that appellant's injuries were causally related to the employment injury of December 3, 2008, he opined that there was no further need for any physical therapy or orthopedic treatment. He further opined that appellant had no disability at this time and was capable of performing all her duties as a distribution clerk without any restrictions.

On December 3, 2010 OWCP proposed termination of appellant's compensation for wage loss and medical benefits.

In a December 15, 2010 report, Dr. Benatar indicated that appellant's objective studies evinced cervical disc herniations and cervical disc neuropathy in both left and right upper extremities showing positive cervical radiculopathy that are consistent with her injuries. He opined that she does have a disability which is aggravated by her working conditions and actually caused by her working conditions. Dr. Benatar considered appellant markedly disabled and stated that she could not return to work for the employing establishment.

By decision dated January 18, 2011, OWCP terminated appellant's wage-loss compensation and medical benefits effective February 13, 2011.

On February 18, 2011 appellant requested an oral hearing before an OWCP hearing representative. By decision dated March 14, 2011, OWCP denied her request for the reason that it was not timely filed. It further denied the request as it found that the issue in the case could be equally well addressed by appellant requesting reconsideration and submitting new evidence.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ 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 had ceased or that it is no longer related to the employment.² The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.³ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.⁴

Furthermore, FECA⁵ provides that, if there is disagreement between the physician making the examination for OWCP and the employee's physician, OWCP shall appoint a third physician who shall make an examination.⁶

ANALYSIS

OWCP accepted appellant's claim for a sprain of the neck and brachial radiculitis, and compensation and medical benefits were paid. Appellant was treated for her condition by Dr. Benatar, who has continuously maintained that she remains disabled due to her employment-related condition. Dr. Benatar referred appellant to Dr. Szerlip for consultation and injection, however, Dr. Szerlip noted that the injection given on April 15, 2010 was not successful in providing appellant relief. OWCP referred appellant to a second opinion from Dr. Varriale, who concluded that, although her injuries were causally related to the employment injury of December 3, 2008, she was in no further need for any physical therapy or orthopedic treatment. Dr. Varriale also opined in his July 28, 2010 report that appellant was capable of performing all her duties as a distribution clerk without any restrictions. In a December 15, 2010 report, Dr. Benatar disagreed with Dr. Varriale's conclusion. He indicated that appellant's objective studies evince cervical disc herniations and cervical disc neuropathy in both left and right upper extremities showing positive cervical radiculopathy that was consistent with appellant's injuries. Dr. Benatar concluded that appellant does have a disability which is aggravated, and actually caused, by her working conditions. He reiterated that appellant was markedly disabled and stated that she cannot return to work at this time.

In terminating appellant's compensation and medical benefits, OWCP gave greater weight to the opinion of Dr. Varriale, the second opinion physician. However, the Board finds that a conflict existed between appellant's treating physicians, Drs. Benatar and Szerlip, and the

¹ *Curtis Hall*, 45 ECAB 316 (1994).

² *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

⁴ *Calvin S. Mays*, 39 ECAB 993 (1988).

⁵ 5 U.S.C. §§ 8101-8193, 8123(a).

⁶ *Id.* at § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

second opinion physician, Dr. Varriale, on the issue of whether appellant had any remaining disability or residuals from her accepted employment injury, and OWCP should have referred appellant to an impartial medical specialist⁷ for resolution thereof, pursuant to 5 U.S.C. § 8123(a). Accordingly, OWCP did not meet its burden of proof to terminate appellant's compensation benefits, and the Board will reverse the decision terminating benefits. The case is remanded for payment of appropriate compensation.

CONCLUSION

The Board finds that OWCP did not properly terminate appellant's wage-loss compensation and medical benefits effective February 13, 2011. As OWCP's decision terminating appellant's wage-loss compensation and medical benefits is reversed, the second issue regarding whether OWCP properly denied appellant's request for a hearing as untimely filed is moot.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated March 14 and January 18, 2011 are reversed.

Issued: January 24, 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

⁷ *M.D.*, Docket No. 11-928 (issued December 1, 2011).