

FACTUAL HISTORY

On May 31, 1994 appellant, a 34-year-old letter carrier, sustained a traumatic injury in the performance of duty while pulling down her route. OWCP accepted her claim for right shoulder strain, cervical strain and right shoulder impingement.

A conflict in medical opinion arose between the attending physician, Dr. R. Thomas Grotz, and an OWCP referral physician, Dr. Richard G. Dedo, a Board-certified orthopedic surgeon, on whether appellant had any residuals of her 1994 employment injury requiring ongoing medical treatment. OWCP referred appellant, together with the medical record and a statement of accepted facts, to Dr. James M. Glick, a Board-certified orthopedic surgeon, for resolution of the conflict.

OWCP terminated appellant's compensation on the grounds that the weight of the medical evidence rested with Dr. Glick and established that she had recovered from her work-related injuries. The Board found that OWCP met its burden to terminate compensation for the accepted right shoulder condition. Because Dr. Glick supported continuing residuals of the accepted cervical strain, for which he suggested ongoing medical treatment, the Board found that OWCP did not meet its burden to establish that the accepted cervical condition had resolved.²

OWCP obtained a supplemental opinion from Dr. Glick, who explained there was no objective evidence of cervical strain. It thereupon terminated compensation for the accepted cervical strain. The Board noted, however, that OWCP had now expanded its acceptance of the claim to include a cervical disc herniation but did not provide that information to Dr. Glick or request an opinion on whether this accepted condition had resolved. As Dr. Glick did not base his opinion on a proper factual background, the Board found that OWCP did not meet its burden to terminate medical benefits for the accepted cervical conditions.³

On August 6, 2009 Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon and OWCP's second opinion physician, related appellant's history and his findings on examination. He reviewed the statement of accepted facts and appellant's medical record. Dr. Swartz found it more likely than not that the cervical strain of May 31, 1994 had completely resolved. He stated that the cervical strain that Dr. Glick found in 2001 appeared to be just a temporary aggravation of appellant's preexisting multilevel degenerative disease.

From his examination in 2009, Dr. Swartz observed that appellant was painful to light fingertip touch in the cervical spine. There was some spasm in the upper trapezius muscles, but she was not tender in that region. Spasm and tension, Dr. Swartz explained, can occur from factors other than injury. Myofascial tightness or myositis often occurs in the absence of injury. Appellant had normal cervical spine range of motion, and there were no neurologic findings. He concluded that no medical treatment was required.

² Docket No. 05-1905 (issued March 6, 2006).

³ Docket No. 08-1843 (issued June 15, 2009).

In a supplemental report, Dr. Swartz reviewed the medical record and noted that an imaging study in 2007 revealed disc bulges at C3-7 and a small protrusion at C7-T1. But nowhere was there found a disc herniation. Dr. Swartz explained that the natural history of disc herniation is that over time they often undergo a gradual process of dehydration, where they lose water content and shrink down. This appeared to be the case with appellant.

Dr. Swartz also believed that none of appellant's cervical spine findings, including her extensive degenerative disease, had any relationship to her 1994 claim, which involved lifting a letter weighing less than one ounce: this was not going to precipitate one or more disc herniations or extrusions. "It is understood that she has been accepted for a work-related disc herniation; however, there is no evidence for that." Dr. Swartz stated instead that there may have been a temporary cervical strain that was long since resolved.

OWCP terminated appellant's compensation benefits on December 15, 2009. It found that Dr. Swartz' opinion represented the weight of the medical evidence.

On August 17, 2011 an OWCP hearing representative affirmed, finding that the medical evidence creating the original conflict had grown stale and was of no probative value in establishing appellant's current condition. Dr. Glick's examination was in 2006 and appellant had not seen Dr. Grotz since 2007. The hearing representative found that OWCP properly referred appellant for a second opinion. The hearing representative also found that Dr. Swartz' opinion represented the weight of the medical evidence and established that appellant had no residuals of her accepted 1994 injury.

Appellant requested reconsideration on August 28, 2011. Her representative argued that the finding of the second opinion physician that there was no evidence the cervical disc herniation was work related was in opposition to the statement of accepted facts, and OWCP should have rejected his opinion. The representative also argued that the original conflict was not resolved and OWCP was required to refer appellant for a referee examination.

In an October 7, 2011 decision, OWCP denied appellant's reconsideration request without reviewing the merits of her case. It found that the arguments her representative raised were repetitive, substantially similar to arguments already considered by the hearing representative.

On appeal, appellant's representative relates the history of the case and argues that OWCP erred in referring appellant for a second opinion.

LEGAL PRECEDENT -- ISSUE 1

The United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of duty.⁴ Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.⁵

⁴ 5 U.S.C. § 8102(a).

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

ANALYSIS -- ISSUE 1

OWCP initially accepted appellant's claim for right shoulder strain, cervical strain and right shoulder impingement. When the early conflict arose between the attending physician, Dr. Grotz, an orthopedic surgeon, and OWCP's referral physician, Dr. Dedo, a Board-certified orthopedic surgeon, on whether appellant had any residuals of her 1994 employment injury requiring ongoing medical treatment, cervical disc herniation was not an issue. OWCP had not yet accepted it.

Thus, Dr. Glick, the impartial medical specialist, was not an impartial medical specialist on the issue of cervical disc herniation. The fact that OWCP did not inform him of an accepted cervical disc herniation did not mean that OWCP was required to refer appellant to a second impartial medical specialist.⁶ A second opinion evaluation would suffice.

Dr. Glick remained an impartial medical specialist on the issue of cervical strain. As the Board held, OWCP did not provide him a proper factual background. Dr. Glick's opinion was therefore of little probative value. The Board found that OWCP did not meet its burden to terminate medical benefits for either cervical condition.

Here, too, a second impartial medical specialist was not warranted. The passage of time had, by now, so removed the early conflict between Dr. Grotz and Dr. Dedo from the question of appellant's current medical condition that their opinions lost probative value. A second opinion evaluation would suffice here as well.

OWCP provided Dr. Swartz, the orthopedic surgeon and second opinion physician, with appellant's medical record and a statement of accepted facts so he could base his opinion on a proper medical and factual background. He examined appellant and found it more likely than not that the cervical strain of May 31, 1994 had completely resolved. Dr. Swartz cited examination findings, including full range of motion, and concluded that no medical treatment was required. The Board finds that Dr. Swartz' opinion represents the weight of the medical evidence on the issue of cervical strain and is sufficiently well rationalized to establish that appellant no longer suffers from the accepted condition.

Dr. Swartz noted that a 2007 imaging study revealed no disc herniation. He offered a medical explanation of the natural history of disc herniation over time and concluded that this appeared to be consistent with appellant's case. The Board finds that Dr. Swartz's opinion represents the weight of the medical evidence on the issue of cervical disc herniation and is sufficiently well rationalized to establish that appellant no longer suffers from the accepted condition.

⁶ When OWCP obtains an opinion from an impartial medical specialist for the purpose of resolving a conflict in the medical evidence, and the specialist's opinion requires clarification or elaboration, OWCP must secure a supplemental report from the specialist to correct the defect in his original report. *April Ann Erickson*, 28 ECAB 336, 341-42 (1977). However, when the impartial medical specialist is unable to clarify or elaborate on his original report or if his supplemental report is also vague, speculative or lacking in rationale, OWCP must submit the case record and a detailed statement of accepted facts to a second impartial medical specialist for the purpose of obtaining his rationalized medical opinion on the issue. *Harold Travis*, 30 ECAB 1071, 1078 (1979).

The Board finds that OWCP properly terminated compensation for the accepted cervical conditions. The Board will affirm the hearing representative's August 17, 2011 decision.

As the Board has explained, OWCP did not err in referring appellant to a second opinion physician for an opinion on the accepted cervical conditions. Although Dr. Swartz made clear that he personally believed that the May 31, 1994 incident at work was not sufficient to cause a cervical disc herniation, he acknowledged that OWCP had accepted such an injury. He explained how a disc herniation can dehydrate and shrink over time, as the 2007 imaging study appeared to confirm.

LEGAL PRECEDENT -- ISSUE 2

OWCP may review an award for or against payment of compensation at any time on its own motion or upon application.⁷ An employee (or representative) seeking reconsideration should send the request for reconsideration to the address as instructed by OWCP in the final decision. The request for reconsideration, including all supporting documents, must be in writing and must set forth arguments and contain evidence that either: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.⁸

A request for reconsideration must be sent within one year of the date of OWCP's decision for which review is sought.⁹ A timely request for reconsideration may be granted if OWCP determines that the employee has presented evidence or argument that meets at least one of these standards. If reconsideration is granted, the case is reopened and the case is reviewed on its merits. Where the request is timely but fails to meet at least one of these standards, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹⁰

ANALYSIS -- ISSUE 2

Appellant sent her August 28, 2011 reconsideration request within one year of OWCP's August 17, 2011 merit decision affirming the termination of her compensation benefits for the accepted cervical conditions. Her request was therefore timely. The question for determination is whether the request met at least one of the three standards for obtaining a merit review of her case.

Appellant did not show that OWCP erroneously applied or interpreted a specific point of law. She cited precedent for the proposition that when an impartial medical specialist's statement of clarification or elaboration was not forthcoming, or the supplemental report was also vague, speculative or lacked rationale, OWCP must refer the claimant to a second impartial

⁷ 5 U.S.C. § 8128(a).

⁸ 20 C.F.R. § 10.606.

⁹ *Id.* § 10.607(a).

¹⁰ *Id.* § 10.608.

medical specialist. Appellant did not show how this point of law applied to the circumstances of the present case, in which the medical evidence creating the conflict had grown stale and was no longer material to the issue of whether she currently suffered residuals of her accepted cervical conditions.

Appellant did not advance a new and relevant legal argument. The hearing representative previously found that Dr. Swartz had reviewed the statement of accepted facts and had based his opinion on a proper factual and medical background. Appellant's representative had already made the argument that OWCP erred in not referring appellant for an impartial medical examination.

Appellant did not submit relevant and pertinent new evidence not previously considered by OWCP.

The Board finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). She did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent new evidence not previously considered by OWCP. Accordingly, pursuant to 20 C.F.R. § 10.608, OWCP properly denied a merit review.

Appellant's representative argues the merits of the case and does not attempt to establish that the August 28, 2011 reconsideration request met at least one of the three standards for obtaining a merit review.

CONCLUSION

The Board finds that OWCP properly terminated appellant's compensation benefits for the accepted cervical conditions. The Board also finds that OWCP properly denied appellant's August 28, 2011 reconsideration request.

ORDER

IT IS HEREBY ORDERED THAT the October 7 and August 17, 2011 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 22, 2012
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

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