

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

R.F., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Eureka, CA, Employer**

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**Docket No. 12-918
Issued: October 11, 2012**

Appearances:
Norman F. Nivens, 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, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On March 20, 2012 appellant, through her attorney, filed a timely appeal from a September 23, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP) which terminated 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 this case.²

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss and medical compensation effective September 24, 2011 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

¹ 5 U.S.C. § 8101 *et seq.*

² The Board notes that, following the issuance of the September 23, 2011 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal, appellant's attorney contends that OWCP improperly terminated appellant's compensation benefits as she had residuals of her employment-related thoracic outlet syndrome and the termination was not supported by the medical evidence.

FACTUAL HISTORY

On May 22, 2009 appellant, then a 28-year-old mail carrier, filed an occupational disease claim (Form CA-2) which OWCP accepted for left shoulder and upper arm sprain. On October 10, 2009 she filed a second occupational disease claim which OWCP accepted for left brachial plexus lesions (Thoracic Outlet Syndrome) and mononeuritis of left upper limb. Appellant was subsequently placed on the periodic rolls.

In a March 19, 2010 report, Dr. Mark T. Roback, an osteopath Board-certified in family medicine, diagnosed left thoracic outlet syndrome secondary to upper somatic dysfunction of appellant's head, upper extremities, cervical and thoracic region. He noted that she was also developing strains of the shoulders and upper arm. Dr. Roback stated that it was reasonable that the osteopathic terms of somatic dysfunction of the upper extremities was more appropriate for this case and this was just a question of semantics; however, they were essentially the same entity.

To determine whether appellant continued to have residuals of her employment injuries and whether she was capable of work, OWCP referred her to Dr. Aubrey A. Swartz, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a July 23, 2010 report, Dr. Swartz reviewed appellant's medical records and a statement of accepted facts. Upon examination, he found tenderness in the interscapular and infrascapular regions bilaterally, audible and palpable crepitus with snapping in the left scapula, 4/5 strength in the left thumb abductor and 5/5 on the right, negative Adson testing clinically and a positive Froment's test in the left hand and decreased intrinsic strength in the left hand. Dr. Swartz noted that appellant's subjective complaints were partially proportional to the objective findings and some subjective complaints outweighed the objective findings. For example, appellant stated that she could not walk her dog or do any housework; however she completed a physical capacities checklist stating that activities of daily living in which she participated around the house included lifting and carrying groceries, doing the laundry, gardening, driving, bending and lifting. It took her longer with difficulty to vacuum, sweep, mop, dust, wipe and clean. Dr. Swartz opined that appellant had some physical limitations but was not totally disabled with respect to her activities of daily living or to gainful employment.

Dr. Swartz referred appellant to Drs. Marc Griffey and Adam Attoun, Board-certified radiologists, for magnetic resonance imaging (MRI) scan tests. An August 30, 2010 MRI scan of the left shoulder was unremarkable. Magnetic resonance imaging scans dated August 30, 2010 of the left and right scapula were unremarkable. In an MRI scan dated August 31, 2010, no acute osseous abnormalities of the shoulders were identified. An August 31, 2010 MRI scan of the temporomandibular joints (TMJs) was normal bilaterally.

In a September 14, 2010 report, Dr. Swartz reviewed the diagnostic studies and additional medical records. He found no evidence of residuals referable to work-related injuries. Dr. Swartz concluded that appellant had reached maximum medical improvement. He noted that

she may have developed a soft tissue strain with respect to the neck and left shoulder. With respect to the issue of a thoracic outlet syndrome, Dr. Swartz stated that the diagnosis would require angiographic studies, particularly to evaluate the subclavian vein and its relationship to the first rib and the thoracic outlet and would be best done with a consultation by a neurosurgeon.

In a May 21, 2010 MRI scan of the right shoulder, Dr. Stephen L. Viltrakis, a Board-certified radiologist, diagnosed acromial osteophyte and acromioclavicular (AC) joint inferior margin bony hypertrophic change which could create external impingement mechanism. He also diagnosed supraspinatus and subscapularis tendinosis. Dr. Viltrakis indicated that he could not exclude “hidden” lesion with biceps pulley complex injury.

On September 8, 2010 Dr. Roback diagnosed thoracic outlet syndrome and multiple other issues, including a right shoulder derangement, which was not addressed. Upon examination, he found a significant amount of muscle spasm of her left anterior scalenes and trapezius muscles bilaterally. On October 19, 2010 Dr. Roback reiterated the diagnoses of left thoracic outlet syndrome and right shoulder impingement. On December 3, 2010 he advised that appellant had increased muscle density in the paraspinal muscles in the cervical region and anterior scalene muscles bilaterally, left markedly more so than the right and more so than at her last visit. In progress notes dated January 11, February 28 and June 16, 2011, Dr. Roback reiterated his diagnosis of left thoracic outlet syndrome and advised her to remain off work.

By letter dated August 10, 2011, OWCP notified appellant that it proposed to terminate compensation for wage-loss and medical benefits. It found the weight of the medical evidence rested with Dr. Swartz and allotted 30 days for appellant to respond with additional evidence or argument.

Appellant submitted two August 23, 2011 reports by Dr. Roback who reiterated that she had left-sided thoracic outlet syndrome since December 2007 and her complaints were consistent with this diagnosis. Dr. Roback reported that she developed similar symptoms in her right upper extremity after a modification of her work duty in June 2009, for which she reported her symptoms to her supervisor and opined that therefore her right upper extremity was also a direct result of injuries obtained at her job site. He explained that while appellant was right-handed she would use her left arm to deliver the mail. Dr. Roback advised her to remain off work.

By decision dated September 23, 2011, OWCP terminated appellant’s wage-loss compensation and medical benefits effective September 24, 2011.

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

³ See *Jorge E. Sotomayor*, 52 ECAB 105, 106 (2000); *Curtis Hall*, 45 ECAB 316 (1994).

⁴ See *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁶ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which requires further medical treatment.⁷

ANALYSIS

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits.

On appeal, counsel contends that OWCP improperly terminated appellant's compensation benefits as it erroneously assumed that she no longer suffered from her accepted thoracic outlet syndrome condition and argues that the termination was not supported by the medical evidence. It is OWCP that bears the burden to justify modification or termination of benefits.⁸ OWCP based its decision to terminate appellant's benefits on reports dated July 23 and September 14, 2010 by Dr. Swartz, the second-opinion physician. On September 14, 2010 Dr. Swartz found no evidence of residuals referable to work-related injuries and concluded that she had reached maximum medical improvement. However, he indicated that appellant may have developed a soft tissue strain which may well be with her with respect to the neck and left shoulder. Dr. Swartz further indicated that the thoracic outlet syndrome diagnosis would require angiographic studies, particularly to evaluate the subclavian vein and its relationship to the first rib and the thoracic outlet and would be best done with a consultation by a neurosurgeon.

The Board finds that OWCP did not meet its burden of proof to terminate appellant's wage-loss and medical benefits effective September 24, 2011. The Board notes that the September 14, 2010 report of Dr. Swartz was of record prior to the September 23, 2011 termination decision of OWCP. The Board finds that once OWCP received Dr. Swartz's report, it should have referred appellant to a neurosurgeon for the appropriate angiographic studies and requested a supplemental report before issuing a final decision on appellant's entitlement. As OWCP failed to base its decision on a resolution of the opinion evidence, the Board finds that it did not meet its burden of proof to terminate appellant's benefits. Accordingly, OWCP's decision to terminate her compensation and medical benefits shall be reversed.

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to terminate appellant's compensation benefits effective September 24, 2011.

⁵ See *Del K. Rykert*, 40 ECAB 284 (1988).

⁶ See *T.P.*, 58 ECAB 524 (2007).

⁷ See *I.J.*, 59 ECAB 408 (2008); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ See *Curtis Hall*, 45 ECAB 316 (1994).

ORDER

IT IS HEREBY ORDERED THAT the September 23, 2011 decision of the Office of Workers' Compensation Programs is reversed.

Issued: October 11, 2012
Washington, DC

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

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

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