

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

C.S., Appellant)

and)

U.S. POSTAL SERVICE, POST OFFICE,)
Theodore, AL, Employer)

**Docket No. 12-163
Issued: February 21, 2013**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On November 2, 2011 appellant filed a timely appeal from a July 18, 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 the case.

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate compensation benefits for her accepted injury effective May 9, 2010; and (2) whether appellant established that she had any continuing disability or residuals relating to her accepted conditions after May 9, 2010.

FACTUAL HISTORY

This is the second appeal in the present case. In a July 18, 2006 decision, the Board reversed a November 16, 2005 OWCP decision. The Board found that OWCP failed to meet its burden of proof to terminate appellant's compensation benefits based on her refusal of suitable

¹ 5 U.S.C. §§ 8101-8193.

work.² The facts and the circumstances of the case up to that point are set forth in the Board's prior decision and incorporated herein by reference.³

Appellant submitted a magnetic resonance imaging (MRI) scan of the cervical spine dated February 5, 2008, which revealed cervical degenerative change, with no herniation or stenosis identified. She was treated by Dr. Ilyas A. Shaikh, a Board-certified neurologist, from April 10 to December 2, 2008, for work-related neck, shoulder and low back pain. Dr. Shaikh diagnosed cervical and lumbar spondylosis without myelopathy, radiculitis, cervical muscle spasm, insomnia and migraine headache. He opined that, based on appellant's clinical history, MRI scan review and the presence of carpal tunnel syndrome and migraine headaches, she may not be able to engage in work activities and believed her symptoms would become worse with time. In a November 25, 2008 report, Dr. Shaikh explained that appellant still had disabilities related to her work injury including cervical spondylosis without myelopathy, migraine headache, cervical muscle spasm and insomnia. He noted appellant's disabilities were directly due to her work injuries. Dr. Shaikh further advised that appellant may not be a good candidate for productive work. On October 14, 2008 appellant was treated by Dr. Jeffrey D. Faggard, a Board-certified orthopedist, for evolving inflammatory arthropathy. Dr. Faggard opined that appellant's severe arthritis caused limited range of motion in her joints with pain and fatigue. On August 3, 2009 he treated appellant for osteoarthritis, gout and rheumatoid arthritis. Dr. Faggard opined that her condition caused severe joint pain, stiffness and fatigue.

In an August 18, 2009 memorandum, OWCP noted that the employer's Office of Inspector General conducted an investigation which included a surveillance tape of appellant performing various activities from October 19, 2007 to April 7, 2008. Appellant was observed pushing a person in a wheel chair, pushing a shopping cart, standing and walking.

On July 21, 2009 OWCP referred appellant to Dr. Charlton Barnes, a Board-certified orthopedist, for a second opinion. It provided Dr. Barnes with the surveillance discs depicting appellant's physical activities. In an August 26, 2009 report, Dr. Barnes noted that examination revealed limited range of motion of the cervical spine and normal range of motion of the shoulder, bilateral wrist, hips and bilateral knees. Appellant had marked difficulty moving her right ankle through range of motion with possible palsy, straight leg raising was normal and neurological testing in the upper and lower extremities was normal. Dr. Barnes further noted bilateral carpal tunnel syndrome, normal reflexes, no atrophy or joint abnormality and sensory was decreased in both hands. He diagnosed work-related cervical strain and pain in both shoulders and nonwork-related lumbar strain, bilateral carpal tunnel syndrome and difficulty controlling her right ankle on command. Dr. Barnes opined that appellant's cervical strain had not resolved but the only objective finding was limitation of motion of her neck. He found that appellant's current disability was related to her accident of 2000, the aging process and 35 years of smoking. Dr. Barnes did not think appellant would be qualified to perform the duties of a gate guard or auto service station person since she had difficulty mobilizing herself. He stated that he was unable to review the surveillance video of appellant's physical activities but indicated that

² On October 28, 2000 appellant, a rural letter carrier, was injured when her postal delivery vehicle was struck by another motor vehicle and she sustained an injury to her neck. OWCP accepted the claim for neck strain and aggravation of cervical degenerative disc disease. Appellant initially returned to light duty on February 20, 2001, but eventually stopped work on July 30, 2001 and did not return. She retired on disability in February 2002.

³ Docket No. 06-760 (issued July 18, 2006).

he would like to reexamine her and discuss the matter with her. In a work capacity evaluation form, Dr. Barnes noted that appellant would not be able to return to her regular job, but could perform certain restricted duties for one hour per day.

On December 15, 2009 OWCP scheduled another examination with Dr. Barnes. In a report dated January 20, 2010, Dr. Barnes noted examining appellant and reviewing the surveillance video which depicted her walking and functioning normally. He noted examining appellant's neck and left shoulder where her main complaints centered. Dr. Barnes specifically noted appellant's complaints of pain in the left trapezial area; however, he found no objective evidence that she had any permanent residuals. He opined that the cervical strain and aggravation of cervical degenerative disc disease related to her October 28, 2000 work injury had resolved and there was no objective evidence to prove it was active. Dr. Barnes further opined that all the accepted injuries had resolved and that appellant's ongoing symptoms and pain were the result of the natural progression of an underlying degenerative disc disease. He advised that appellant could return to her job as a rural mail carrier as there was no objective evidence showing that she had residuals that would prevent her working. Dr. Barnes determined that appellant had returned to her preinjury status and no limitations were found with regard to her work status as a rural carrier. In a work capacity evaluation dated January 20, 2010, he noted that appellant could return to her usual job without restriction.

On March 22, 2010 OWCP issued a notice of proposed termination of compensation benefits based on Dr. Barnes' reports.

Appellant, through her attorney, submitted an April 15, 2010, request for an extension of time to respond to the proposed termination of benefits stating that she was hospitalized from April 1 to 9, 2010 for pneumonia. Counsel also requested to review the surveillance video.⁴

By decision dated April 30, 2010, OWCP terminated appellant's compensation and medical benefits effective May 9, 2010, finding that Dr. Barnes' reports represented the weight of the medical evidence and established that appellant had no continuing residuals of her accepted injuries.

In a statement dated March 17, 2011, appellant requested reconsideration and disagreed with the findings of Dr. Barnes. She indicated that she was unaware of the surveillance tape at the time she was examined by Dr. Barnes and later learned that it was filmed in 2007 when she was under great stress. Appellant also indicated that she was hospitalized from April 3 to 10, 2010.

Appellant submitted additional evidence that included a November 14, 2008 MRI scan of the right foot which revealed diffuse edema, possible tenosynovitis and possible osteomyelitis. An April 16, 2010 x-ray of the cervical spine revealed degenerative changes, no bony fractures or acute soft tissue abnormalities. Also submitted was an April 16, 2010 report from Dr. Faggard who treated her for arthritis felt to be due to gout, osteoarthritis and rheumatoid arthritis. He noted that appellant's complaints of neck and cervical pains were not due to her inflammatory arthropathy but likely due to osteoarthritis from a past trauma. On November 11, 2010 appellant was treated by Dr. R.M. Tarabein, a Board-certified neurologist, who noted

⁴ OWCP sent counsel a copy of the surveillance video on April 19, 2010.

appellant was a mail carrier and was involved in a motor vehicle accident at work on October 28, 2000 and sustained a cervical injury. He diagnosed displacement of the cervical and lumbar disc with myelopathy, thoracic, lumbosacral neuritis and radiculitis, carpal tunnel syndrome and neuralgia, neuritis and radiculitis. Appellant reported that her symptoms were related to a work-related accident. In a February 22, 2011 report, Dr. Tarabein noted treating appellant for chronic neck pain, cervical strain, cervical disc disease at C7-8 with radiculitis consistent with the job injury she sustained. He noted that appellant could return to work with restrictions. A February 22, 2011 electromyogram (EMG) showed moderate C6-7 and mild L4-5 radiculitis with early radiculopathy, possibly traumatic and could be related to appellant's injury.

In a decision dated July 18, 2011, OWCP denied modification of the April 30, 2010 decision.⁵

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁶ 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.⁷ 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.⁸

ANALYSIS -- ISSUE 1

OWCP accepted appellant's claim for work-related cervical strain and aggravation of cervical degenerative disc disease. Thereafter, it referred appellant for a second opinion evaluation by Dr. Barnes.

In an August 26, 2009 report, Dr. Barnes diagnosed work-related cervical strain and pain in both shoulders causally related to the October 28, 2000 work injury. He noted that appellant's cervical strain had not resolved but the only objective finding was limitation of neck motion. Dr. Barnes opined that appellant's current disability was related to her accident of 2000, the aging process and 35 years of smoking. He noted that he did not review the surveillance video of appellant's physical activities prior to preparing his report and recommended a reevaluation. In a January 20, 2010 report, Dr. Barnes noted reexamining appellant and that he had reviewed the surveillance video which depicted appellant walking and functioning normally. He examined the left trapezial area and found no objective evidence that appellant had any permanent residuals. Dr. Barnes opined that the cervical strain and aggravation of cervical degenerative

⁵ OWCP issued a decision dated June 13, 2011 denying modification of the April 30, 2010 decision; however, the decision was returned due to an incorrect address. It reissued the decision on July 18, 2010.

⁶ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Alice J. Tysinger*, 51 ECAB 638 (2000).

⁷ *Mary A. Lowe*, 52 ECAB 223 (2001).

⁸ *Id.*; *Leonard M. Burger*, 51 ECAB 369 (2000).

disc disease related to her October 28, 2000 work injury had resolved and he found no objective evidence to prove these conditions continued to be active. He further opined that the ongoing symptoms and pain were the result of the natural progression of an underlying degenerative disc disease. Dr. Barnes advised that appellant returned to her preinjury status and could return to her job as a rural mail carrier as there was no objective evidence of work-related residuals. He found no limitations with regard to her work status as a rural carrier.

The Board finds that Dr. Barnes' reports represent the weight of the medical evidence and that OWCP properly relied on his reports in terminating appellant's compensation and medical benefits on May 9, 2010. Dr. Barnes' opinion is based on proper factual and medical history as he reviewed a statement of accepted facts and appellant's prior medical treatment and test results. He also related his comprehensive examination findings in support of his opinion that the accepted work-related condition had resolved. Dr. Barnes indicated that appellant did not have residuals from the condition of cervical strain and aggravation of cervical degenerative disc disease and that her current condition was due to her preexisting degenerative conditions. There is no contemporaneous medical evidence of equal weight supporting appellant's claim for continuing disability and medical residuals. Although Dr. Shaikh provided reports from 2008 indicating that appellant remained disabled due to her work injury, these reports are of diminished probative value as he attributed disability to conditions other than the accepted cervical strain and aggravation of cervical degenerative disc disease and there is no indication that he was aware of the surveillance video documenting appellant's ability to perform various activities.⁹

Appellant submitted an April 15, 2010 request for an extension of time to respond to the proposed termination of benefits and also requested to review the surveillance video. However, she did not submit any medical evidence supporting continuing residuals of the accepted condition prior to the April 30, 2010 decision.¹⁰

The Board finds Dr. Barnes' second opinion reports are sufficiently rationalized to establish that appellant's employment-related cervical strain and aggravation of cervical degenerative disc disease has resolved.¹¹ Dr. Barnes' opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant

⁹ See *G.A.*, Docket No. 09-2153 (issued June 10, 2010) (for conditions not accepted by OWCP as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation); *Leonard J. O'Keefe*, 14 ECAB 42, 48 (1962) (where the Board held that medical opinions based upon an incomplete history have little probative value).

¹⁰ OWCP procedures do not provide for extending the 30-day period for responding to a pretermination notice. Instead the procedures contemplate that a decision will be issued at the end of the 30-day period unless additional evidence reaches the file before the decision is issued. See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Disallowances*, Chapter 2.1400.8(b) (March 1997). Here, no responsive medical evidence was received at the time OWCP issued its April 30, 2010 decision.

¹¹ *Michael S. Mina*, 57 ECAB 379 (2006) (in assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality; the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

medical evidence. OWCP met its burden of proof to terminate appellant's compensation benefits.

LEGAL PRECEDENT -- ISSUE 2

As OWCP met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had continuing disability causally related to her accepted employment injury.¹² To establish causal relationship between the claimed disability and the employment injury, appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship.¹³

ANALYSIS -- ISSUE 2

The Board finds that appellant has not established that she has any continuing residuals of her work-related cervical strain and aggravation of cervical degenerative disc disease on or after May 9, 2010.

After the termination of benefits on April 30, 2010 appellant submitted an April 16, 2010 report from Dr. Faggard who treated her for arthritis felt to be due to gout, osteoarthritis and rheumatoid arthritis. Dr. Faggard noted that appellant's complaints of neck and cervical pain which he believed was likely due to osteoarthritis from a past trauma. However, his report is of limited probative value as it does not provide sufficient medical reasoning that specifically explains how any continuing condition or disability was causally related to the October 2000 work injury.¹⁴

In his November 11, 2010 report, Dr. Tarabein noted that appellant was involved in a motor vehicle accident at work on October 28, 2000 and had a cervical injury. He diagnosed displacement of the cervical and lumbar disc with myelopathy, thoracic, lumbosacral neuritis and radiculitis, carpal tunnel syndrome and neuralgia, neuritis and radiculitis. Appellant reported her symptoms were related to an accident she had at work. However, Dr. Tarabein appears merely to be repeating the cause of disability as reported by appellant without providing his own opinion regarding whether appellant's medical restrictions or disability was work related. To the extent that Dr. Tarabein is providing his own opinion, the physician failed to provide a rationalized opinion regarding the causal relationship between appellant's work injury and her continuing condition and disability. Therefore, this report is insufficient to meet appellant's burden of proof. Likewise, in his February 22, 2011 report, Dr. Tarabein treated appellant for chronic neck pain, cervical strain, cervical disc disease at C7-8 with radiculitis consistent with the job injury she sustained. He noted appellant could return to work with restrictions. As noted above, Dr. Tarabein's report does not specifically provide medical reasoning to explain how any continuing condition or disability was causally related to the October 2000 work injury and therefore is of limited probative value. Rather, he advised that appellant could return to work with restrictions.

¹² See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

¹³ *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

¹⁴ *A.D.*, 58 ECAB 149 (2006); *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Michael E. Smith*, 50 ECAB 313 (1999).

Other medical evidence provided by appellant is insufficient as it did not provide an opinion on whether appellant had continuing residuals causally related to the accepted injury. Appellant submitted no other current medical evidence supporting that her work-related conditions had not resolved.

None of the reports submitted by appellant after the termination of benefits included a rationalized opinion regarding the causal relationship between her current condition and her accepted work-related conditions. Consequently, appellant did not establish that she had any employment-related condition or disability after May 9, 2010.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

CONCLUSION

The Board finds that OWCP has met its burden of proof to terminate benefits effective May 9, 2010 and that appellant failed to establish that she had any continuing disability due to her accepted condition after May 9, 2010.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated July 18, 2011 is affirmed.

Issued: February 21, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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