



his head and the back of his neck. OWCP accepted his claim for cervical sprain and concussion and he received compensation for periods of disability.

On September 16, 2011 Dr. Lindsey J. Robinson, a Board-certified clinical neuropsychologist, diagnosed cognitive disorder due to concussion (improved). Although some fluctuations in cognitive performance were noted due to fatigue on the day of testing, appellant's overall clinical presentation and neuropsychological test performance suggested continued recovery from the head injury and concussion he sustained on June 28, 2010.

On February 23, 2012 Dr. Scott S. Katzman, an attending Board-certified orthopedic surgeon, described appellant's work injury as significant. He noted an indentation on appellant's head where the truck door had struck him. Dr. Katzman also noted that appellant continued to have neck pain and problems in that region had not improved in spite of conservative treatment. A physical examination showed tenderness to the neck, decreased motion, positive spasms all along the cervical spine and a positive Jackson compression sign. Dr. Katzman diagnosed multiple cervical disc bulges, a probable herniated disc, radiculopathy, neck pain and a closed head injury. He recommended surgery and advised that the need for surgery was directly related to the June 28, 2010 work injury.

On March 16, 2012 Dr. Robert A. Smith, a Board-certified orthopedic surgeon and OWCP second opinion physician, related appellant's treatment history and his findings on examination. There was no spasm, atrophy, trigger points or deformity. Active spinal range of motion was essentially normal without spasm or rigidity. Dr. Smith could not clinically appreciate any crepitation. Appellant complained of no headaches or other central neurological problem. Diagnostic studies showed multilevel disc bulging but no evidence of post-traumatic abnormality. Dr. Smith stated that the only accepted musculoskeletal condition appeared to be a cervical sprain. It was his opinion based on the current clinical examination that this condition had resolved. Appellant was not complaining about any postconcussive symptomatology: "In that regard, it appears that his concussion has resolved as well."

OWCP found a conflict in medical opinion between Dr. Katzman and Dr. Smith on whether appellant had residuals of the June 28, 2010 employment injury. It referred him, together with the case file and a statement of accepted facts, to Dr. Donald F. Leatherwood, II, a Board-certified orthopedic surgeon, to resolve the conflict. OWCP asked Dr. Leatherwood to address whether the injury of June 28, 2010 had resolved and any residuals of the accepted injury."<sup>2</sup>

On May 3, 2012 Dr. Leatherwood reviewed appellant's record and related his history of injury. Appellant reported that his neck was really not any better. The cervical spine demonstrated approximately 70 percent voluntary rotation in all planes with some degree of crepitus. There was tenderness in the lower cervical paraspinal musculature, particularly on the left and going into the trapezius muscle. There was no ecchymosis, crepitus, step-offs or spasm.

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<sup>2</sup> The statement of accepted facts correctly noted that OWCP had accepted both a sprain of the neck and a concussion.

Dr. Leatherwood explained that a cervical sprain/strain was an injury that could be expected to recover in approximately six weeks. In the face of underlying degenerative disease, it might take longer, certainly up to three months. As appellant was well beyond that period of time, it was Dr. Leatherwood's opinion that he had recovered from his cervical sprain/strain.

In a decision dated July 18, 2012, OWCP terminated appellant's medical benefits, on the grounds that he had fully recovered from his June 28, 2010 employment injury.

In a February 12, 2013 decision, an OWCP hearing representative affirmed. Based on the opinion of the impartial medical specialist, she found that OWCP met its burden of proof justifying the termination of medical benefits for the accepted condition of cervical sprain. Although the hearing representative stated at one point in the decision that OWCP did not meet its burden with respect to the accepted condition of concussion, she later noted that there was no indication that appellant continued to suffer from or was undergoing treatment for a concussion. She thereby affirmed OWCP's July 18, 2012 decision.

### **LEGAL PRECEDENT**

The United States shall furnish to an employee who is injured while in the performance of duty the services, appliances and supplies prescribed or recommended by a qualified physician which the Secretary of Labor considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.<sup>3</sup>

Once OWCP accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>4</sup> It may not terminate compensation without a positive demonstration by the weight of evidence that entitlement to benefits has ceased.<sup>5</sup>

If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>6</sup> When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>7</sup>

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<sup>3</sup> 5 U.S.C. § 8103(a).

<sup>4</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Periodic Review of Disability Cases*, Chapter 2.812.3 (July 1993).

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

## ANALYSIS

A conflict arose between the attending orthopedic surgeon, Dr. Katzman, and the second opinion orthopedic surgeon, Dr. Smith, on whether appellant continued to suffer from the accepted cervical sprain. Although Dr. Katzman did not directly address the accepted cervical sprain, he noted that the June 28, 2010 employment injury was significant and that appellant continued to have neck pain and problems in that area and had not improved in spite of conservative treatment. Dr. Smith, however, found that the accepted cervical sprain had resolved, based on appellant's current clinical examination. OWCP properly referred appellant to Dr. Leatherwood, a Board-certified orthopedic surgeon and impartial medical specialist.

OWCP provided Dr. Leatherwood with appellant's case file and a statement of accepted facts so he could base his opinion on a proper medical and factual history. Dr. Leatherwood examined appellant and explained that a cervical sprain/strain was an injury that could be expected to recover in approximately six weeks, or up to three months in the face of underlying degenerative disease. As appellant was well beyond that period of time, Dr. Leatherwood concluded that he had recovered from his cervical sprain/strain.

The Board finds that Dr. Leatherwood's opinion is based on a proper factual background and current clinical examination and is sufficiently well rationalized that it must be accorded special weight in resolving whether appellant continues to suffer from the accepted cervical sprain. As the weight of the medical opinion evidence establishes that the accepted cervical sprain has resolved, the Board finds that OWCP has met its burden to justify the termination of medical benefits for that particular condition. Accordingly, the Board will affirm OWCP's February 12, 2013 decision on the issue of cervical sprain.

On the issue of concussion, the Board finds that OWCP has not met its burden of proof. OWCP found a broad conflict on whether appellant continued to suffer residuals of the June 28, 2010 employment injury, and the statement of facts it provided Dr. Leatherwood made clear that both cervical sprain and concussion were accepted medical conditions. Dr. Leatherwood, however, did not address the accepted concussion.

Dr. Katzman diagnosed a closed head injury, but he did not find that appellant continued to suffer from concussion. He focused his attention on the disc bulges, possible disc herniation and positive compression sign. Dr. Smith noted that appellant was not complaining about any postconcussive symptomatology, and therefore it "appeared" that his concussion had resolved. He did not address the September 16, 2011 report of Dr. Robinson, the Board-certified clinical neuropsychologist, who found that appellant was continuing to recover from the June 28, 2010 head injury and concussion and who diagnosed cognitive disorder due to concussion (improved).

Dr. Smith's opinion on concussion stands as the only medical opinion to support that the accepted concussion has resolved, but his opinion carries little weight because it is couched in speculative terms. As the medical opinion evidence does not positively establish that appellant has fully recovered from the accepted concussion, the Board finds that OWCP has not met its burden to justify the termination of medical benefits for that particular condition. The Board will reverse OWCP's February 12, 2013 decision on the issue of concussion.

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 met its burden of proof to terminate medical benefits for the accepted condition of cervical sprain but did not meet its burden to support the termination of medical benefits for the accepted concussion.

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 12, 2013 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part.

Issued: July 3, 2013  
Washington, DC

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

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

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board