

bone spurs. Regarding the cause of the injury, she stated, “Repetitive motions of answering telephone and holding it between head and shoulder while typing on the keyboard.”² In an accompanying statement, appellant related that most of the positions she held in her 24 years at the employing establishment required her to talk on the telephone and use the computer at the same time. She used a telephone headset several years prior but that she was not given another one after it broke. Appellant first noticed neck and arm pain in 2007 and then sought chiropractic and medical treatment for her condition. Her neck and arm condition significantly worsened in 2010.

The findings of December 6, 2010 x-ray testing of appellant’s cervical spine showed a normal cervical spine; however, magnetic resonance imaging (MRI) scan testing of her cervical spine from February 3, 2011 showed that at C3-4 the right neural foramen was widely patent. The left was moderately narrowed by lateral disc with possibly some degree of uncovertebral hypertrophy. The findings further noted, “At the inferior aspect of the neural foramen, this is particularly prominent where there appears to be a disc protrusion. This produces mild deformity of the left ventral spinal cord and extends into the neural foramen at the location of the left C4 nerve root. Significant central canal stenosis is not produced.”

Appellant submitted reports dated July 2007 through 2010, related to periodic chiropractic care for cervical pain/stiffness and other conditions. In a November 30, 2010 report, Dr. Layne Jorgensen, an attending osteopath and family practitioner, stated that appellant reported having cervical and bilateral arm pain with numbness. On February 17, 2011 Dr. Carmina Angeles, an attending Board-certified neurosurgeon, noted that appellant presented with left-sided posterior neck pain that radiated to her left arm in its entirety. She stated that the February 3, 2011 MRI scan test showed a large disc protrusion at C3-4 and recommended decompression surgery as soon as possible.

On March 4, 2011 Dr. Angeles performed C3-4 anterior cervical discectomy and fusion using hardware and iliac crest graft harvest. The procedure was not authorized by OWCP.

In an April 6, 2011 duty status report, Dr. Angeles listed the cause of appellant’s injury, “Repetitive answering [tele]phones and working on the computer at same time. Holding [tele]phone between head and shoulder.” She indicated that the diagnosis due to injury was “disc herniation” and recommended work restrictions.³

On May 10, 2011 OWCP accepted that appellant sustained displacement of cervical disc at C3-4 without myelopathy.

In a June 2, 2011 report, Dr. Aleksandar Curcin, a Board-certified orthopedic surgeon serving as an OWCP referral physician, stated that appellant presented with complaints that related to her neck and upper extremities. Appellant had a history of chronic neck complaints,

² Appellant listed the date of injury as “November 15, 2010” although she otherwise indicated that the injury occurred by performing her work duties for a number of years.

³ Dr. Angeles listed the date of injury as November 15, 2010. She completed a similar duty status report on June 16, 2011.

and, on or about November 15, 2010, her neck and upper extremity symptoms suddenly significantly worsened. Prior to that time, she had some symptoms of left upper extremity pain, numbness and bilateral upper extremities, headaches, neck and shoulder pain and received chiropractic treatment. Dr. Curcin discussed appellant's medical history and detailed physical examination findings, noting that appellant had voluntary range of motion of the cervical spine which was significantly restricted. Sensory examination was normal on the right from C5 to C8 and slightly decreased at C5 and C8 on the left. In response to questions OWCP posed regarding the cause of appellant's cervical condition, Dr. Curcin stated:

“[Appellant] was questioned today whether or not there was a point specific time of injury. She related to me a history of neck pain spanning many years, however, the medical records document a single evaluation in 2007 for complaints of neck pain. Furthermore, the work conditions that have been described in the [statement of accepted facts] refer to [appellant's] duties requiring answering the [tele]phone, cradling the [tele]phone between her head and shoulder, and typing on a computer.

“In my opinion, on a more probable than not basis, the C3-4 disc herniation is not related to occupational repetitive factors of employment. First of all, there is no evidence of a continuum of complaints and medical evaluation and treatment. There is the x-ray report from December 6, 2010, documenting, ‘normal cervical spine.’ Therefore, nothing in this case appears to point to the C3-4 diagnosed condition as related to repetitive factors of employment. In my opinion, on a more probable than not basis, the C3-4 cervical disc herniation is related to either preexisting or normal degenerative pathway conditions.”

* * *

“Once again, based on the fact that [appellant's] file does not contain a documented timeline of continued neck complaints requiring professional medical evaluation or treatment, it is my opinion that work exposure did not cause a permanent or temporary aggravation with regards to the herniated nucleus pulposus at C3-4.”

In a June 27, 2011 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on the opinion of Dr. Curcin. Appellant was provided 30 days to submit additional evidence or argument.

In an August 15, 2011 decision, OWCP terminated appellant's wage-loss compensation and medical benefits. In another August 15, 2011 decision, it denied authorization for her March 4, 2011 cervical surgery. In an August 17, 2011 decision, OWCP denied appellant's claim for disability from April 22 to June 28, 2011.

In a December 15, 2011 decision, an OWCP hearing representative reversed the August 15, 2011 decisions and August 17, 2011 decision, finding that appellant was not given adequate due process prior to issuance.

In an October 25, 2011 report, Dr. Angeles stated that appellant presented on February 17, 2011 with signs and symptoms of cervical myelopathy. Her MRI scan showed a left paracentral disc herniation with cervical stenosis at C3-4. Dr. Angeles stated that appellant subsequently underwent C3-4 anterior cervical discectomy and fusion on March 4, 2011. She stated that appellant's work "required repetitive answering of the telephone and that she would frequently hold it between her head and shoulder while typing on the computer. This mechanism can result in slowly progressive disc herniation." Dr. Angeles noted that preoperatively, appellant had left-sided weakness and numbness. The surgery was intended to try to improve her symptoms and prevent progression, but she would likely sustain permanent left-sided weakness, numbness and pain to some extent after her surgery.

In an October 31, 2011 report, Dr. Jorgensen stated that appellant recently began having problems with pain into her left arm which was eventually diagnosed as a cervical radiculopathy from a herniated cervical disc. He noted appellant's March 4, 2011 cervical fusion surgery and indicated that she had no previous history of cervical disc disease prior to this. Dr. Jorgensen stated that appellant continued to have some sequelae of intermittent neuropathic symptoms and significant loss of range of motion of her cervical spine due to her cervical fusion and noted, "Her herniated disc is felt to be the result of repetitive range of motion of her neck and poor ergonomics at work. Appellant has had no specific injury causing her herniated disc but rather a gradual and intermittent increase in her symptoms leading up to the disc herniation."

In a March 28, 2012 report, Dr. Jorgensen discussed his treatment of appellant for epicondylitis. He noted that she also had a longstanding history of radicular symptoms in her arms which were ruled out as being caused by carpal tunnel syndrome or a rheumatic condition. MRI scan testing showed a disc herniation at C3-4 and appellant underwent a cervical discectomy and laminectomy. Dr. Jorgensen noted that appellant had persistent radicular symptoms since her surgery and stated that he believed that appellant's degenerative cervical disc disease, herniated disc and recurrent episodes of lateral epicondylitis were related to her repetitive workload at the employing establishment. He indicated that appellant's symptoms had improved postsurgery but she was having significant exacerbations of her symptoms with continued work.

OWCP requested that Dr. Curcin provide a supplemental report addressing the cause of appellant's cervical condition. It provided Dr. Curcin with additional documents submitted by appellant, including reports regarding her chiropractic care since 2007.

In a June 15, 2012 report, Dr. Curcin reviewed the additional documents provided by OWCP, including the chiropractic notes dated from 2007 to 2010. He stated that there were no changes to his June 2, 2011 report. Dr. Curcin noted:

"It would appear that these additional records were produced to corroborate the fact that the claimant had a history of cervical spine complaints progressing in time. While I agree that this appears to be the case, this nonetheless does not singularly cause me to change any of my previously stated opinions. Once again, the primarily mechanism of injury alleged here is her work and clerical duties and cradling the [tele]phone on her shoulder; which again, is inconsistent with

development of a C3-4 disc herniation that ultimately required surgical decompression and fusion.

“In other words, I have seen plenty of examinees who did not have that particular mechanism of injury, but rather simple progression of degenerative intradiscal conditions leading to essentially the similar presentation. Therefore, on the basis of my evaluation and her mechanism of injury, I am unable to draw a causal connection to the job[-]related event and the C3-4 disc herniation and the subsequent surgical treatment.”

In an August 22, 2012 letter, OWCP advised appellant that it proposed to terminate her wage-loss compensation and medical benefits based on the reports of Dr. Curcin. It provided her 30 days to submit additional evidence and argument.

In an August 28, 2012 letter, appellant contended that the opinions of her attending physicians established that her cervical condition was due to her work duties.

In a September 25, 2012 decision, OWCP rescinded its acceptance of appellant’s claim for displacement of cervical disc C3-4 without myelopathy, noting that the weight of the medical evidence rested with the opinion of Dr. Curcin.⁴

Appellant submitted additional medical reports concerning the treatment of her cervical and arm problems. She also submitted chiropractic documents dated from 2007 to 2010, some of which had previously been submitted.

Appellant requested a hearing with an OWCP hearing representative. At the February 14, 2013 hearing, she contended that the medical evidence showed that she suffered a work-related cervical condition.

In a May 1, 2013 decision, a hearing representative affirmed the September 25, 2012 decision. He found that Dr. Curcin represented the weight of medical opinion.

LEGAL PRECEDENT

Section 8128 of FECA provides that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.⁵ The Board has upheld OWCP’s authority to reopen a claim at any time on its own motion under section 8128 of FECA and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.⁶ The Board has noted, however, that the power to annul an award is not an

⁴ OWCP indicated that it had rescinded appellant’s entitlement to wage-loss compensation and medical benefits for this condition.

⁵ 5 U.S.C. § 8128.

⁶ *John W. Graves*, 52 ECAB 160, 161 (2000).

arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁷

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory provision, where there is good cause for so doing, such as mistake or fraud. It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits. This holds true where, as here, OWCP later decides that it erroneously accepted a claim. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of the rationale for rescission.⁸

Section 8123(a) of FECA provides in pertinent part: "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."⁹ When there are opposing reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a) of FECA, to resolve the conflict in the medical evidence.¹⁰

ANALYSIS

On May 10, 2011 OWCP accepted that appellant sustained displacement of cervical disc C3-4 without myelopathy. On March 4, 2011 Dr. Angeles, an attending Board-certified orthopedic surgeon, performed C3-4 anterior cervical discectomy and fusion using hardware and iliac crest graft harvest. In a September 25, 2012 decision, OWCP rescinded its acceptance of appellant's claim for displacement of cervical disc C3-4 without myelopathy based on the June 2, 2011 and June 15, 2012 reports of Dr. Curcin, a Board-certified orthopedic surgeon, serving as an OWCP referral physician.

The Board finds that there is a conflict in the medical evidence on the cause of appellant's cervical condition between Dr. Curcin, OWCP's referral physician and her attending physicians, Dr. Angeles and Dr. Jorgensen, an osteopath and Board-certified family practitioner.¹¹

In his June 2, 2011 report, Dr. Curcin noted that appellant related to him a history of neck pain spanning many years, but asserted that the medical records documented a single evaluation in 2007 for complaints of neck pain. He noted that her work duties included answering the telephone, cradling the telephone between her head and shoulder, and typing on a computer and stated that her C3-4 disc herniation was not work related in that "there is no evidence of a

⁷ See 20 C.F.R. § 10.610.

⁸ *John W. Graves, supra* note 6.

⁹ 5 U.S.C. § 8123(a).

¹⁰ *William C. Bush*, 40 ECAB 1064, 1975 (1989).

¹¹ See *supra* notes 7 and 8.

continuum of complaints and medical evaluation and treatment.” Dr. Curcin felt that appellant’s C3-4 disc herniation was related to either preexisting or normal degenerative pathway conditions. In his June 15, 2012 report, he stated that he had reviewed the additional documents provided by OWCP, including the chiropractic notes dated from 2007 to 2010, and noted that these documents corroborated the fact that she had a history of cervical spine complaints progressing in time. Dr. Curcin noted, “Once again, the primarily mechanism of injury alleged here is her work and clerical duties and cradling the [tele]phone on her shoulder; which again, is inconsistent with development of a C3-4 disc herniation that ultimately required surgical decompression and fusion.” He stated that he had seen many patients who did not have that particular mechanism of injury, but rather had a simple progression of degenerative intradiscal conditions leading to essentially the similar presentation.

In contrast, Dr. Angeles and Dr. Jorgensen both provided opinions that appellant’s C3-4 disc herniation was related to work factors. In April 6 and June 16, 2011 duty status reports, Dr. Angeles listed the cause of appellant’s injury as repetitive answering of telephones, working on the computer at same time and holding the telephone between head and shoulder. She indicated that the diagnosis due to injury was disc herniation. In an October 25, 2011 report, Dr. Angeles indicated that appellant’s work “required repetitive answering of the telephone and that she would frequently hold it between her head and shoulder while typing on the computer. This mechanism can result in slowly progressive disc herniation.” In an October 31, 2011 report, Dr. Jorgensen noted appellant’s March 4, 2011 cervical fusion surgery and indicated that she had no previous history of cervical disc disease prior to this. He stated that appellant continued to have some sequelae of intermittent neuropathic symptoms and significant loss of range of motion of her cervical spine due to her cervical fusion and noted, “Her herniated disc is felt to be the result of repetitive range of motion of her neck and poor ergonomics at work. Appellant has had no specific injury causing her herniated disc but rather a gradual and intermittent increase in her symptoms leading up to the disc herniation.” In a March 28, 2012 report, Dr. Jorgensen indicated that appellant had persistent radicular symptoms since her surgery and stated that he believed that her degenerative cervical disc disease, herniated disc and recurrent episodes of lateral epicondylitis were related to her repetitive workload at the employing establishment.

Due to the unresolved conflict in the medical opinion evidence regarding whether the accepted condition in this case was work related, OWCP did not show that this condition, displacement of cervical disc C3-4 without myelopathy, was not work related. Therefore, it did not meet its burden of proof to rescind its acceptance of appellant’s claim and effectively rescind her entitlement to wage-loss compensation and medical benefits for this condition.¹²

CONCLUSION

The Board finds that OWCP did not meet its burden of proof to rescind its acceptance of appellant’s claim for a cervical condition.

¹² See *supra* note 9.

ORDER

IT IS HEREBY ORDERED THAT the May 1, 2013 decision of the Office of Workers' Compensation Programs is reversed.

Issued: November 25, 2013
Washington, DC

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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

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