

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

J.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Seattle, WA, Employer**

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**Docket No. 12-1237
Issued: September 9, 2013**

Appearances:
Howard L. Graham, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 15, 2012 appellant, through her attorney, filed a timely appeal from the December 30, 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 this case.²

ISSUE

The issue is whether OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 2, 2011.

¹ 5 U.S.C. §§ 8101-8193.

² On appeal, counsel also argued that OWCP improperly handled a back pay matter from 2008 and 2009, *i.e.*, a period prior to the June 2, 2011 termination of compensation. While the record contains an August 8, 2011 OWCP decision regarding this matter, the decision is not within the Board's jurisdiction is not currently before the Board. *See* 20 C.F.R. § 503(e).

FACTUAL HISTORY

OWCP accepted that on November 12, 2008 appellant, then a 50-year-old clerk, sustained a head laceration due to being struck by an opening door at work. It expanded the accepted conditions to include head laceration, postconcussion syndrome and neck sprain. Appellant stopped work on November 12, 2008 and alternated between periods of total disability and working on a part-time basis. She filed wage loss and leave buyback claims for the work stoppages, but OWCP denied the claims and she did not receive any wage-loss compensation or leave buyback in connection with these accepted work injuries.³ Appellant received medical expenses necessitated by the accepted work injuries.

In reports dated January 8 and 15, 2009, Dr. Mario G. Alinea, Jr., an attending Board-certified occupational medicine physician, stated that appellant continued to have disabling residuals of her work-related conditions of postconcussion syndrome and neck sprain.

OWCP referred appellant for a second opinion evaluation to determine if she continued to have residuals of her work injuries. Appellant was referred to Dr. Joan Sullivan, a Board-certified orthopedic surgeon, and Dr. Edward G. DeVita, a Board-certified neurologist.

In a March 24, 2009 report, Dr. Sullivan stated that there was an unremarkable examination and diagnosed closed-head injury, with comments to defer to neurology, constant headaches, again deferred to neurology and neck strain administratively accepted and resolved. Other than pain behavior and some voluntary reduction of motion on examination, there were no orthopedic findings to support appellant's ongoing complaints. Dr. Sullivan stated that the subjective complaints were greatly outweighed by any objective findings and noted that a neurologist was needed to address the other issues. She stated that there was no disability with reference to the neck.

In an April 1, 2009 report, Dr. DeVita listed appellant's main complaint as headaches and that she felt her memory was worsening. He noted that the neurological examination of appellant was normal. Appellant's conversational mental status evaluation was normal with excellent recall of events and no memory abnormalities were detected. She had some dysesthesias of the right side of her face, splitting nonphysiologically. Palpation and visual inspection of the calvarium was normal with tenderness on the right side. Dr. DeVita stated that appellant's neurological examination was dominated by nonphysiologic findings and pain behavior. He found that she had no neurologic diagnosis as there were no objective examination findings. Dr. DeVita stated that the degree of injury did not correlate with appellant's complaints, in particular with regards to cognitive/memory complaints.

In a November 3, 2009 letter, OWCP advised appellant that it proposed to terminate her compensation benefits on the grounds that she ceased to have residuals of her accepted work

³ OWCP denied appellant's claims for wage-loss compensation and leave buyback in decisions dated May 20 to July 24, 2009 and August 8, 2011. These decisions are not currently within the Board's jurisdiction and the decisions are not currently before the Board.

conditions.⁴ It stated that the proposed termination action was based on the opinions of Dr. Sullivan and Dr. DeVita. OWCP provided appellant 30 days to submit evidence and argument challenging the proposed termination.

Appellant submitted additional status reports and work restriction forms from her attending physicians.

In a December 10, 2009 decision, OWCP terminated appellant's compensation benefits effective December 10, 2009.

Appellant disagreed with the decision and requested a review of the written record. In a July 2, 2010 decision, OWCP's hearing representative remanded the case finding that additional clarification was needed from the second opinion specialists. She found that there were errors in the questions presented to the second opinion physicians and that the physicians needed to review certain diagnostic test reports.

On remand, OWCP updated the questions presented to Dr. Sullivan and Dr. DeVita and asked them to review the diagnostic reports. Additional opinions were requested from the second opinion physicians. In a November 4, 2010 report, Dr. Sullivan noted that it was inappropriate for her to comment on Dr. DeVita's evaluation. In a November 8, 2010 report, Dr. DeVita noted that he had reviewed the diagnostic testing and subsequent medical records and his opinion remained unchanged after having reviewed these records. He advised that appellant suffered no alteration of consciousness and, therefore, there was no basis for her injury from a neurologic point of view. Dr. DeVita reiterated that he found no memory abnormalities but that she exhibited significant pain behavior and nonphysiologic findings.

In a December 6, 2010 decision, OWCP terminated appellant's wage-loss and medical benefits effective December 6, 2010.

In a January 21, 2011 brief, counsel argued that the opinions of Dr. Sullivan and Dr. DeVita did not support the termination action.

By decision dated March 9, 2011, OWCP's hearing representative set aside the termination of benefits and remanded the case for further medical development. He noted the treating physicians had diagnosed cervical disc bulges and a tear, postconcussive syndrome, neck strain, headaches, cognitive dysfunction and a depressive disorder. The hearing representative found that the opinions of Dr. Sullivan and Dr. DeVita did not carry the weight of the medical evidence. The medical reports from the attending physicians were not well rationalized, but OWCP had the burden to establish that the accepted conditions had resolved. OWCP's hearing representative also found that a possible psychological component had arisen. He remanded the case for new second-opinion examinations in the fields of neurology, orthopedics and psychiatry. OWCP was to ask the neurologist and orthopedist whether the accepted conditions had resolved, and if so, by what date. The neurologist was to be asked if there was evidence of a continuing

⁴ As appellant did not receive wage-loss compensation due to the accepted work injuries, OWCP effectively proposed to terminate her future entitlement to wage-loss compensation due to these injuries.

postconcussive syndrome and for findings supporting such a condition. The psychiatrist was to be asked if appellant sustained a work-related psychiatric condition.

OWCP prepared a new statement of accepted facts and referred appellant, together with the medical records and the statement of accepted facts, to Dr. John Wendt, a Board-certified neurologist, Dr. Eric Puttler, a Board-certified orthopedic surgeon, and Dr. Gary R. Hudak, a Board-certified psychiatrist.

On May 5, 2011 Dr. Wendt and Dr. Puttler performed a joint examination of appellant's orthopedic and neurologic systems. A Korean-English interpreter was present at the examination.

In a joint May 5, 2011 report, the physicians provided an extensive review of appellant's medical history, including summaries of the physical examination reports and diagnostic studies of record. Dr. Puttler performed the orthopedic evaluation, noting that she was visibly frustrated and exhibited consistent effort-related variability in her examination. He stated that appellant had no obvious splinting or guarding of the cervical spine or shoulders. Appellant had no tenderness or deformity along the cervical spine or upper thoracic spine and there was no muscle spasm. Dr. Puttler noted that she complained of diffuse tenderness in the trapezius region bilaterally. Appellant had a negative Spurling's sign, but axial compression of the neck caused her some discomfort in the head primarily. She had negative impingement signs with no tenderness along the course of the biceps tendon.

Dr. Wendt performed a neurologic evaluation and stated that appellant had an "excellent general found of knowledge." He noted that her immediate recall of three items was disproportionately impaired initially, but she was able to recall the items at a later time. Dr. Wendt stated that appellant followed general commands adequately in that her speech was normal and fluent and affect was appropriate. Spurling's test, Tinel's sign at the wrists and elbows and Phalen's test were normal. Examination of the head and the motor examination were normal. Appellant did not know if touch and pin were symmetric in the upper extremities but the remainder of the sensory examination was normal. Dr. Wendt found that her gait was normal with a negative Romberg's test.

In the conclusion portion of the report, the physicians diagnosed a closed-head injury without laceration and without loss of consciousness, "doubt actual postconcussive syndrome," post-traumatic headaches "that initially fulfilled diagnosis for post-traumatic migraine," cervical strain (injury related), memory problems "that were" multifactorial and, at this point, not injury related," nonspecific white matter changes noted on head magnetic resonance imaging (MRI) scan likely related to a history of hypertension, mild cervical degenerative disc disease (preexisting and not injury related) and a history of depression and anxiety, likely preexisting, "with unclear relationship to current injury, referred to psychiatry." The physicians stated that the closed-head injury, post-traumatic headaches and cervical strain were due to the work injury. They found no objective abnormalities on examination and noted nonorganic features "including inordinate difficulty with immediate recall, with subsequent better remote memory in the face of very precise history going back to the time of injury without loss of consciousness," which did not reflect a true postconcussive syndrome, but rather an initial post-traumatic migraine. The physicians stated that the cervical strain diagnosis was injury related with cervical degenerative

disc disease, preexisting and not injury related. The cervical strain had resolved by the time of Dr. Sullivan's examination and the accepted postconcussive syndrome and head laceration resolved by the time of Dr. DeVita's April 2009 evaluation. The physicians stated that there was no aggravation of any preexisting condition and found that appellant could work full duty on a full-time basis. They noted, "All injury-related conditions are objectively fixed and stable and considered resolved."

In a May 3, 2011 report, Dr. Hudak reported the findings of his psychiatric examination. A Korean-English interpreter also was present. Dr. Hudak stated that appellant answered his questions on her own with little use of the interpreter. Appellant's affect was appropriate on examination. She had no evidence of psychomotor problems and there was no evidence of significant mental distractibility or psychotic symptoms. Appellant stated that she was worried about her condition and that she was concerned about returning headaches if she worked too hard. During her workday break, she would lie down to avoid any postconcussive symptoms, but noted that these symptoms had abated. Dr. Hudak stated that appellant's memory and concentration were intact without mental distractibility. Appellant was oriented to person, place, time and situation. She was able to complete serial sevens without error and was able to recall three objects after five minutes of distracting mental tasks. Dr. Hudak acknowledged the accepted diagnosis of postconcussive syndrome but found that it had resolved. He stated that there were no other diagnoses after the examination. Dr. Hudak also stated that there were no restrictions or impairment that would preclude appellant from returning to full duty on a full-time basis.

Appellant submitted a number of brief reports from attending physicians, including treatment notes and form reports advising that she could only perform light-duty work. In an April 20, 2011 report, Dr. Alinea stated, "Her work status is eight hours a day but could not tolerate so wants to go back to six hours." The reports did not provide a rationalized medical opinion on whether appellant had disability or needed medical treatment due to residuals of her accepted work injuries.

On June 2, 2011 OWCP terminated appellant's wage-loss and medical benefits effective that date. It found that the weight of the medical evidence rested with the well-rationalized opinions of Drs. Wendt, Puttler and Hudak. OWCP found that the reports of appellant's attending physicians, including Dr. Alinea, did not provide adequate medical rationale showing that she still had residuals of her accepted work injuries.

Appellant requested a hearing before an OWCP hearing representative. Treatment notes were received from the attending physicians, most of which duplicated those of record. In an August 4, 2011 report, Dr. Alinea stated that appellant was seeing other specialists under her own health insurance "as I am unclear if all the symptoms are due to the injury three years ago." None of the reports addressed whether appellant continued to have residuals of her accepted work injuries.

On October 13, 2011 a telephonic hearing was held with an OWCP hearing representative. Appellant appeared with her counsel and testified on her own behalf. A Korean-English interpreter was present during the hearing. Appellant stated that she told Dr. Hudak that she was having memory problems and described physical problems which she believed were

work related. She noted that one of the physicians stated that there was no laceration of the head when she was hit by the door; however, her head was bleeding after she was hit. Appellant described the medical care that she received for her injuries.

In a December 30, 2011 decision, OWCP's hearing representative affirmed the June 2, 2011 termination decision. She found that the opinions of Dr. Puttler, Dr. Wendt and Dr. Hudak were well rationalized and supported the termination of compensation benefits. The hearing representative noted that the reports of attending physicians, including those of Dr. Alinea, did not establish that she had continuing work-related residuals.

LEGAL PRECEDENT

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁵ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

ANALYSIS

OWCP accepted that on November 12, 2008 appellant sustained postconcussion syndrome, head laceration and neck sprain due to being hit in her head by an opening door at work. It terminated her compensation benefits effective June 2, 2011.

The Board finds that OWCP obtained sufficient medical evidence to support its termination of appellant's compensation benefits effective June 2, 2011. OWCP properly based its decision on the May 2011 opinions of three second-opinion physicians, Dr. Wendt, a Board-certified neurologist, Dr. Puttler, a Board-certified neurologist, and Dr. Hudak, a Board-certified psychiatrist.

The Board has carefully reviewed the opinions of the second-opinion physicians and finds that they have reliability, probative value and convincing quality with respect to the stated conclusions regarding the relevant issue of the present case. The physicians provided a thorough factual and medical history and accurately summarized the relevant medical evidence.⁸ They provided medical rationale for their opinions. Appellant did not exhibit objective signs of the accepted work injuries. Rather, a number of aspects of her presentation were subjective in nature and not explained by work-related conditions.

In the joint report dated May 5, 2011, Drs. Wendt and Puttler provided an extensive review of appellant's medical history, including summaries of the physical examination reports

⁵ *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁶ *Id.*

⁷ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

⁸ *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

and diagnostic testing findings of record. Upon the orthopedic examination, appellant had no tenderness or deformity along the cervical spine or upper thoracic spine and there was no muscle spasm. The neurologic evaluation revealed that she had an “excellent general found of knowledge.” Appellant followed general commands adequately in that her speech was normal and fluent and affect was appropriate. Spurling’s test, Tinel’s sign at the wrists and elbows and Phalen’s test were normal. Examination of the head and the motor examination were normal. The physicians stated that the closed-head injury, post-traumatic headaches and cervical strain were related to the employment injury but had since resolved.⁹ They noted that there were no objective abnormalities on examination and stated that there were nonorganic features to the examination which were not work related. The physicians indicated that the cervical strain, postconcussive syndrome and head laceration would have resolved by early 2009. They stated that there was no aggravation of any preexisting condition and that appellant could work full duty on a full-time basis. The physicians noted, “All injury-related conditions are objectively fixed and stable and considered resolved.”

In a May 3, 2011 report, Dr. Hudak reported the findings of his psychiatric examination. He stated that appellant’s memory and concentration were intact without mental distractibility. Appellant was oriented to person, place, time and situation. She was able to complete serial sevens without error and was able to recall three objects after five minutes of distracting mental tasks. Dr. Hudak acknowledged the accepted diagnosis of postconcussive syndrome but noted that it had resolved. He stated there are no other diagnoses after the examination and that there were no restrictions or impairments that would preclude appellant from returning to full duty on a full-time basis.

On appeal, counsel argued that the opinions of the second opinion specialists were too general and without medical rationale. As noted, the Board finds that the reports were highly detailed and well rationalized with respect to the stated conclusions. Counsel also argued that OWCP did not consider the reports submitted by appellant’s attending physicians, but a review of the record establishes that the reports were considered but found to lack probative value. Appellant submitted a number of brief reports from attending physicians, including treatment notes and form reports indicating that she could only perform light-duty or part-time work. Dr. Alinea, an attending Board-certified occupational medicine physician, stated in an April 20, 2011 report, “Her work status is eight hours a day but could not tolerate so wants to go back to six hours.” These reports did not provide adequate medical opinion addressing appellant’s disability or need for medical treatment due to residuals of her accepted conclusions. In an August 4, 2011 report, Dr. Alinea stated that appellant was seeing other specialists under her own health insurance and was “unclear if all the symptoms are due to the injury three years ago.” The records from him are speculative in nature and not fully rationalized on continuing disability or residuals.

⁹ The Board notes that it was incorrectly stated that appellant did not sustain a laceration on her head on November 12, 2008, but it is clear from the examination findings that she had long since recovered from this condition. While it was indicated in one portion of the report that there was doubt about the actual occurrence of postconcussion syndrome, the physicians appear to accept the occurrence of the condition when the report is viewed in whole.

For these reasons, OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective June 2, 2011.

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 appellant's wage-loss compensation and medical benefits effective June 2, 2011 on the grounds that she had no residuals of her work injuries after that date.

ORDER

IT IS HEREBY ORDERED THAT the December 30, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 9, 2013
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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