



On appeal, appellant contends that OWCP erroneously weighed the medical evidence.<sup>2</sup>

### **FACTUAL HISTORY**

On September 13, 2010 appellant, then a 57-year-old postmaster, filed an occupational disease claim, alleging that she suffered back pain caused by moving over 3,500 pounds of parcels by herself. She listed her date of awareness as August 19, 2010.

In a September 15, 2010 report, Dr. Todd E. Curzie, appellant's treating chiropractor, listed appellant's diagnoses as thoracic sprain/strain; thoracic region subluxation (segmental dysfunction); cervical sprain/strain; spasm of muscle; myalgia and myositis, unspecified; degeneration of thoracic or thoracolumbar disc; thoracic spine pain; and cervicalgia. Appellant continued to receive chiropractic treatment from Dr. Curzie.

On October 18, 2010 OWCP accepted appellant's claim for closed dislocation thoracic vertebra. Appellant was placed on modified duty on October 5, 2010. She stopped work on October 25, 2010 due to nonavailability of light work. Appellant began part-time work on November 24, 2010. OWCP paid for medical benefits and compensation for periods of disability.

On February 1, 2011 OWCP scheduled appellant for a second opinion appointment with Dr. Douglas Bald, a Board-certified orthopedic surgeon. In a February 17, 2011 opinion, Dr. Bald diagnosed multilevel degenerative disc disease of the cervical, thoracic and lumbar spines, preexisting and not related to the injury of August 19, 2010 on a more probable than not basis; and muscular strain, thoracic spine, related to the injury of August 19, 2010 on a more probable than not basis. He opined that appellant did incur a muscular-type strain on or around August 19, 2010, and that the medical treatment that has been provided to date has been reasonable and appropriate in nature for treatment of the injury-related thoracic strain and subluxations. Dr. Bald opined that although appellant reported significant improvement with the treatments that have been provided, she is not yet medically stable and stationary. He believed that she continued to be disabled as a direct result of the original work injury claim from August 19, 2010. Dr. Bald believed that, after additional physical therapy, ongoing exercise and the use of prescription-strength anti-inflammatories, appellant will be capable of returning to her employment without residual disability or restrictions. He noted that appellant had initial x-rays when she initiated treatment with Dr. Curzie on September 14, 2010, that he reviewed these x-rays and that there is evidence on x-ray of multilevel degenerative disc disease with involvement of the cervical, thoracic and lumbar areas. Dr. Bald stated that a thoracic subluxation is a clinical diagnosis and that his evaluation today revealed no evidence of subluxation.

In an April 21, 2011 note on a prescription pad, Dr. Cary S. Keller, a physician Board-certified in emergency medicine, noted that appellant had numbness and tingling, bilaterally, in her hands. He attached a note report of the same date wherein his physician's assistant diagnosed thoracic strain exacerbating underlying degenerative changes and paresthesias

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<sup>2</sup> On appeal to the Board appellant submitted new evidence. As OWCP did not consider this evidence in reaching a final decision, the Board may not consider it for the first time on appeal. 20 C.F.R. § 501.2(c)(1).

bilateral upper extremities most likely secondary to carpal tunnel syndrome. Attached was a work capacity evaluation, also dated April 21, 2011, countersigned by Dr. Keller and indicating that appellant had closed dislocation thoracic vertebra. He noted that appellant was unable to perform her job at that time. In a June 7, 2011 note on a prescription pad, someone with an illegible signature from the same office diagnosed thoracic strain.

Appellant continued to have regular appointments with Dr. Curzie. In an August 5, 2011 progress note, Dr. Curzie noted that appellant was responding well to conservative chiropractic therapy. He listed diagnoses of thoracic sprain/strain, thoracic region subluxation (segmental dysfunction); thoracic or thoracolumbar disc, thoracic spine pain and cervalgia (neck pain).

On August 23, 2011 OWCP scheduled appellant for another second opinion with Dr. Thomas Gritzka, a Board-certified orthopedic surgeon. In a September 28, 2011 opinion, Dr. Gritzka noted that at that time appellant had an onset of spinal symptomatology centered in her mid-thoracic area and associated with muscle spasms that spread toward both thoracic outlets. He noted mild signs of thoracic outlet syndrome on the right. Dr. Gritzka described appellant's condition as a chronic thoracic sprain. He opined that she was not capable of performing her regular duties, but can work light duty for four hours a day. Dr. Gritzka noted that appellant has reached maximum medical improvement for the injury in the present case, but that she cannot return to full-time work at her job of injury.

On May 31, 2012 OWCP referred appellant to Dr. Aleksandar Curcin, a Board-certified orthopedic surgeon, for a second opinion. In a June 16, 2012 opinion, Dr. Curcin noted that the accepted condition of thoracic subluxation is a diagnosis that originates in the chiropractic arena. He reviewed the record and found no objective imaging study documentation of any form of subluxation occurring and indicated that additional x-ray testing was unnecessary. Dr. Curcin noted that there are no residuals of the employment-related condition identified, and that the only residuals are continued symptomatic complaints of pain. He opined that the thoracic sprain/strain found by Dr. Bald was "felt to have resolved." Dr. Curcin opined that appellant was capable of performing duties as a postmaster.

On August 13, 2012 OWCP referred appellant to Dr. Charles Kase, a Board-certified orthopedic surgeon, for an impartial medical examination. It had previously noted that a conflict existed between the opinions of appellant's physicians, Drs. Curzie and Keller, and the second opinion physician, Dr. Curcin. OWCP noted that Dr. Curzie opined that appellant had a thoracic subluxation and work restrictions and that Dr. Keller supported the thoracic subluxation diagnosis, whereas Dr. Curcin opined that appellant had no residuals of a work-related subluxation, and that the only residuals were continued symptomatic complaints of pain. Dr. Curcin also disagreed with Drs. Curzie and Keller in that he believed that appellant could return to full-duty employment. In a September 10, 2012 report, Dr. Kase diagnosed appellant with chronic thoracic pain syndrome without objective evidence to support any neurologic or structural abnormalities. He stated that previous orthopedic surgeons have correctly noted that there has never been any objective evidence of subluxation of any of her vertebral bodies. Dr. Kase further indicated that subluxation would have to be caused by trauma to bone or ligamentous structures resulting in relative misalignment, and that this has never been demonstrated. He believed that appellant had degenerative arthritis of her spine, moderate to severe, located pretty much throughout her spine, which was painful and is not a condition that is

reversible. Dr. Kase again indicated that appellant never had a subluxation of her thoracic spine, but rather had degenerative arthritis of her thoracic spine and thoracic spine pain syndrome. He opined that appellant can continue to work as the postmaster but will have restrictions placed upon her as a result of her chronic degenerative spine disease, not the result of any specific employment-related injury. Dr. Kase also submitted a work capacity evaluation wherein he indicated that appellant needed to condition herself over three to six months before returning to full duty.

On September 27, 2012 OWCP accepted appellant's claim for sprain of back, thoracic region, resolved by September 10, 2012. Its acceptance letter was accompanied by instructions for filing claims for wage-loss compensation and an appeal request form. On the same date, OWCP issued a notice of proposed rescission and termination. It proposed rescission of the acceptance for thoracic subluxation as it determined that the correct diagnosis was thoracic strain, a condition which OWCP accepted. OWCP also determined that the thoracic strain had ceased and therefore the weight of the medical evidence established that appellant no longer had any residuals or disability from her employment-related condition.

By decision dated November 7, 2012, OWCP rescinded appellant's medical and compensation benefits for the accepted thoracic subluxation. It also terminated the medical and compensation benefits for the accepted condition of thoracic strain because the medical evidence established that she did not have residuals or disability due to the thoracic strain work injury.

By correspondence dated October 22, 2012, appellant requested reconsideration of the decision dated September 27, 2012. Copies of appellant's request were received by OWCP on October 26 and November 8, 2012. Appellant submitted no new evidence or argument with her request.

By decision dated November 29, 2012, OWCP denied appellant's reconsideration request without conducting a merit review.

### **LEGAL PRECEDENT -- ISSUE 1**

OWCP may review an award for or against compensation at any time on its own motion or application.<sup>3</sup> The Board has upheld OWCP's authority to reopen a claim at any time on its motion and, where supported by the evidence, to set aside or modify a prior decision and issue a new decision.<sup>4</sup> The Board has held, however, that the power to annul an award is not an arbitrary one and that an award for compensation can be set aside only in the manner provided by the compensation statute.<sup>5</sup>

Workers' compensation authorities generally recognize that compensation awards may be corrected, in the discretion of the compensation agency and in conformity with statutory

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<sup>3</sup> 5 U.S.C. § 8128(a).

<sup>4</sup> *Eli Jacobs*, 32 ECAB 1147 (1981); *see also E.S.*, Docket No. 12-596 (issued April 11, 2013).

<sup>5</sup> *See Stephen N. Elliott*, 53 ECAB 659 (2001); *Doris J. Wright*, 49 ECAB 230 (1997); *Shelby J. Rycroft*, 44 ECAB 795 (1993); *see also R.H.*, Docket No. 08-1961 (issued August 17, 2009).

provision, where there is good cause for doing so, such as mistake or fraud.<sup>6</sup> It is well established that, once OWCP accepts a claim, it has the burden of justifying the termination or modification of compensation benefits.<sup>7</sup> Its burden of justifying termination or modification of compensation holds true where it later decides that it has erroneously accepted a claim for compensation. In establishing that the prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

Appellant alleged that she suffered from back pain caused by the duties of her federal employment as a postmaster. On October 18, 2010 OWCP accepted her claim for closed dislocation thoracic vertebra, later referred to as a thoracic subluxation. On September 27, 2012 it proposed rescinding the acceptance of appellant's claim for a thoracic subluxation and the rescission was made final in a November 7, 2012 decision.

The Board finds that OWCP presented sufficient evidence to meet its burden of proof to rescind its acceptance of appellant's claim for a thoracic subluxation. Although Dr. Curzie, appellant's treating chiropractor, diagnosed thoracic region subluxation, there is no x-ray evidence in the record to support his determination. Section 8101(2) of FECA provides that the term physician includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist.<sup>9</sup> A chiropractor is not considered a physician as defined under FECA unless it is established that there is a subluxation as demonstrated by x-ray evidence.<sup>10</sup> As there was no evidence of subluxation in any x-ray report, Dr. Curzie is not considered a physician under FECA. Dr. Bald, who examined appellant for a second opinion for OWCP, determined in his February 17, 2011 opinion that subluxation was a clinical diagnosis, and that his evaluation on that date showed no evidence of subluxation. Although Dr. Keller noted on his April 21, 2011 work capacity evaluation that appellant had a closed dislocation of the thoracic vertebra, this conclusion is simply stated on a work capacity evaluation and is totally unsupported by any medically-rationalized report. In fact the report in support of the work capacity evaluation was completed by his physician's assistant and notes thoracic strain. Accordingly, the statement on the work capacity evaluation that is countersigned by Dr. Keller is of diminished probative value as it provides no explanation for the diagnosis.<sup>11</sup>

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<sup>6</sup> *L.C.*, 58 ECAB 493 (2007).

<sup>7</sup> *Andrew Wolfgang-Master*, 56 ECAB 411 (2005).

<sup>8</sup> *See Delphia Y. Jackson*, 55 ECAB 373 (2004).

<sup>9</sup> 5 U.S.C. § 8101(2); *see also K.J.*, Docket No. 13-702 (issued May 9, 2013).

<sup>10</sup> OWCP's regulations at 20 C.F.R. § 10.5(bb) defines subluxation to mean an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae which must be demonstrated on x-ray. *See Mary A. Ceglia*, 55 ECAB 626 (2004).

<sup>11</sup> *J.B.*, Docket No. 07-1472 (issued December 11, 2007).

Dr. Curcin, in a June 16, 2012 opinion, noted that he reviewed the record and found no objective imaging study documenting any form of subluxation. He noted no residuals from any employment-related condition.

Dr. Kase noted that the previous orthopedic surgeons have correctly noted that there has never been any objective evidence of subluxation of any of her vertebral bodies. He noted that subluxation would have to be caused by trauma to bone or ligamentous structures and that this has never been demonstrated. Dr. Kase opined that appellant never had a subluxation of her thoracic spine but rather had degenerative arthritis of her thoracic spine and thoracic spine pain syndrome.

Accordingly, there is no probative medical report establishing that appellant had a thoracic subluxation. Therefore, OWCP presented sufficient evidence to show that she did not sustain a subluxation in the performance of her duties as postmaster. It met its burden of proof to rescind its acceptance of appellant's claim for thoracic subluxation.

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.

### **LEGAL PRECEDENT -- ISSUE 2**

Once OWCP accepts a claim it has the burden of justifying modification or termination of compensation. After it has determined that an employee has disability causally related to his employment, it may not terminate compensation without establishing that the disability ceased or is no longer related to the employment injury.<sup>12</sup> The fact that OWCP accepted an employee's claim for a specified period of disability does not shift the burden of proof to the employee. The burden is on OWCP to demonstrate an absence of employment-related disability or residual in the period subsequent to the date of termination or modification.<sup>13</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>14</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>15</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>16</sup>

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<sup>12</sup> *R.H.*, Docket No. 12-1085 (issued April 9, 2013); *Edwin Lester*, 34 ECAB 1807 (1983).

<sup>13</sup> See *Elsie L. Price*, 54 ECAB 734 739 (2003); *Raymond M. Shulden*, 31 ECAB 297 (1979); *Anna M. Blaine (Gilbert H. Blaine)*, 26 ECAB 351 (1975).

<sup>14</sup> *Roger G. Payne*, 55 ECAB 534 (2004).

<sup>15</sup> *J.H.*, Docket No. 12-1848 (issued May 15, 2013).

<sup>16</sup> *T.P.*, 58 ECAB 524 (2007); *Furman G. Peake*, 41 ECAB 351 (1975).

## ANALYSIS -- ISSUE 2

In a decision dated September 27, 2012, OWCP accepted appellant's claim for sprain of the back, thoracic region, resolved by September 10, 2012. It provided her a copy of her appeal rights. The Board notes, under OWCP procedures, if a case is accepted as resolved but continued as an open case, OWCP must address the medical evidence upon which it determines the condition has resolved and provide appeal rights.<sup>17</sup> OWCP provided appellant with appeal rights and kept the case open. Therefore, it has the burden of proof to establish that the accepted thoracic strain has resolved.

As discussed, *supra*, the opinion of Dr. Curzie, appellant's treating chiropractor, is not given any weight as a medical opinion under FECA.<sup>18</sup> Dr. Keller's physician's assistant diagnosed a thoracic strain, but unlike the duty status report, the report diagnosing thoracic strain is not countersigned by Dr. Keller. Because healthcare providers such as nurses and physician's assistants are not considered physicians under FECA, their reports do not constitute competent medical evidence.<sup>19</sup> Accordingly, there is no remaining rationalized report from a treating physician indicating that appellant had a thoracic sprain. Therefore there was no conflict in the medical evidence between appellant's treating physician and the second opinion physician with regard to whether appellant had any residuals from his thoracic strain to be resolved by an impartial medical examiner.<sup>20</sup>

Although both Dr. Bald and Dr. Gritzka found that appellant had residuals from her thoracic sprain in their respective second opinion reports, the most recent second opinion, that of Dr. Curcin, determined that appellant had no residuals from any employment-related condition. Dr. Curcin specifically indicated that appellant's thoracic lumbar sprain/strain had resolved. Dr. Kase found chronic thoracic pain syndrome without any objective evidence to support any neurological or structural abnormalities. Although he found that appellant had nonemployment-related degenerative arthritis of her spine, he indicated that she will no longer have restrictions placed upon her employment activities due to any specific work injury. Accordingly, the evidence established that appellant no longer had a thoracic strain and that she was no longer disabled from her federal employment due to her employment-related condition. The Board finds that OWCP properly terminated appellant's compensation and medical benefits.

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<sup>17</sup> See Federal (FECA) Procedure Manual, Part 2 -- Claims, *Initial Acceptance, Resolved Conditions*, Chapter 2.806(5) (June 2011).

<sup>18</sup> *Supra* note 9.

<sup>19</sup> 5 U.S.C. § 8101(2); *see also G.G.*, 58 ECAB 389 (2007).

<sup>20</sup> Section 8123(a) of FECA provides that where there is a 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. 5 U.S.C. § 8123(a).

### **LEGAL PRECEDENT -- ISSUE 3**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>21</sup> OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.<sup>22</sup> To be entitled to a merit review of an OWCP decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.<sup>23</sup> When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.<sup>24</sup>

### **ANALYSIS -- ISSUE 3**

Appellant submitted no new evidence along with her request for reconsideration. Moreover, she did not assert a relevant new legal contention or show that OWCP erroneously applied or interpreted a specific point of law. Because appellant failed to meet one of the standards enumerated under section 8128(a) of FECA, she was not entitled to further merit review of her claim.

### **CONCLUSION**

The Board finds that OWCP properly rescinded acceptance of appellant's claim for a thoracic subluxation; properly terminated appellant's wage-loss compensation and medical benefits; and properly denied appellant's request for reconsideration under 5 U.S.C. § 8128(a).

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<sup>21</sup> 5 U.S.C. §§ 8101-8193. Under section 8128 of FECA, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

<sup>22</sup> 20 C.F.R. § 10.606(b)(3).

<sup>23</sup> *Id.* at § 10.607(a).

<sup>24</sup> *Id.* at § 10.608(b).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated November 29 and 7, 2012 are affirmed.

Issued: September 3, 2013  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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

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