United States Department of Labor
Employees' Compensation Appeals Board

B.H., Appellant	)	
and	)	**Docket No. 13-1053**
	)	**Issued: April 8, 2014**
U.S. POSTAL SERVICE, BULK MAIL CENTER, Philadelphia, PA, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On March 22, 2013 appellant, through counsel, timely appealed the December 4, 2012 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether OWCP properly terminated wage-loss compensation and medical benefits effective June 3, 2012.

[1] 5 U.S.C. §§ 8101-8193 (2006).

FACTUAL HISTORY

Appellant, a 51-year-old clerk, has an accepted claim for cervical and thoracic sprains which arose on May 4, 1999.[2] She did not recall anything specific happening that day, but at the end of her shift appellant experienced soreness in her neck, shoulders and back, which she attributed to "overwork." The volume of mail on May 4, 1999 was reportedly heavier than normal. Appellant received wage-loss compensation for temporary total disability. She returned to part-time, limited-duty in early November 1999, but her return to work lasted only a week. Effective December 6, 2000, OWCP resumed payment of compensation for total disability. Appellant continued to receive such payments for approximately 12 years.[3]

In a report dated February 28, 2011, appellant's treating physician, Dr. William Burch, diagnosed chronic cervical and thoracic strains, herniated disc at C5-6 and disc protrusion at C6-7.[4] Appellant had not reported any new injuries since her May 4, 1999 employment injury. There were no reported exacerbations since Dr. Burch's last examination in February 2010. Based on his latest examination, Dr. Burch noted that appellant's prognosis for a complete recovery was poor. He recommended limited activity and no work.[5] Dr. Burch submitted a work capacity evaluation (Form OWCP-5) which similarly noted appellant's inability to work. He attributed appellant's injuries and chronic pain to her March 4, 1999 work-related accident.

Dr. Noubar A. Didizian, a Board-certified orthopedic surgeon and OWCP-referral physician, examined appellant on March 29, 2011. He also reviewed her medical records, including the July 7, 1999 cervical MRI scan films.[6] Dr. Didizian found that appellant's clinical examination was negative for any organic or objective pathology, both from a neurologic and orthopedic standpoint. He further indicated that she did not require any additional medical

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[2] Appellant previously sustained a whiplash-type cervical/thoracic/lumbar injury as a result of an August 31, 1990 motor vehicle accident. A July 7, 1999 cervical magnetic resonance imaging (MRI) scan was initially interpreted as revealing a small disc herniation at C5-6 and a small disc protrusion at C6-7 without spinal stenosis or neuroforaminal encroachment. OWCP has not accepted any additional cervical-related diagnoses apart from the above-noted soft tissue cervical and thoracic injuries.

[3] OWCP twice terminated wage-loss compensation and medical benefits. However, in both instances the decisions were later reversed and OWCP reinstated compensation retroactive to the date when benefits were improperly terminated.

[4] Dr. Burch is a Board-certified orthopedic surgeon. At appellant's request, OWCP recognized him as her treating physician in March 2008. Appellant was previously under the care of Dr. Corey K. Ruth, an orthopedic surgeon specializing in sports medicine, who first examined her on October 26, 1999. Dr. Ruth's latest report of record is dated September 28, 2005. At that time, he diagnosed C5-6 herniated disc and C6-7 bulging disc with left cervical radiculopathy, and advised that appellant was "disabled as a clerk."

[5] Dr. Burch also advised appellant to continue home care (heat, stretching and therapeutic exercises), NSAIDs (naproxen or ibuprofen) as needed, and to follow up in six to nine months.

[6] Dr. Didizian indicated that the July 7, 1999 MRI scan showed normal alignment of the vertebral bodies in the cervical spine. Also, the curvature was maintained. Dr. Didizian further noted there was desiccation signal from C3-C7. Appellant's spinal cord signal was intact and there was no evidence of disc herniation at any level. Dr. Didizian further noted that the exiting nerve roots were intact with intact foramen. Lastly, he noted that soft tissue shadows were also normal.

treatment. Appellant's prognosis was good and she currently had no injury-related disability.[7] Dr. Didizian also stated that appellant was able to perform her regular job without limitations.

OWCP declared a conflict in medical opinion and referred appellant to an impartial medical examiner (IME).[8]

In a report dated February 23, 2012, Dr. Scott A. Rushton, a Board-certified orthopedic surgeon and IME, noted a May 4, 1999 history of injury while working as a distribution clerk. Dr. Rushton also noted that OWCP had accepted appellant's claim for cervical and thoracic sprains. She had not worked since 1999, and had last undergone physical therapy in April 2000. Dr. Rushton further noted that appellant reportedly received more than a dozen cervical injections, but her symptoms had not improved over the past 13 years. Appellant's primary complaint consisted of neck pain with pain radiating in a nondermatomal fashion to both shoulders. She denied any radicular pain or dermatomal distribution of her complaints, and also denied any associated neuritic symptoms such as numbness, tingling or paresthesias. Appellant advised Dr. Rushton that she was not receiving active treatment. Her current medications were limited to Aleve and aspirin. Appellant reported pain on a daily basis, which appellant rated 6 on a scale of 1 to 10.[9]

Physical examination of the cervical spine revealed no midline tenderness, pain, or muscle spasm. Cervical range of motion (ROM) was full and painless in all planes. Similarly, shoulder ROM was full and painless in all planes. Dr. Rushton also reported negative Tinel's and Spurling's signs bilaterally. Additionally, gross motor testing in the upper extremities from C5 to T1 was 5/5 bilaterally, with no demonstrable weakness to manual resistance. Appellant's reflexes were 2+ (normal) at the biceps, triceps and brachioradialis bilaterally. Also, grip and release test was negative and there was a negative Hoffmann's reflex bilaterally. Lastly, appellant's lower extremity reflexes were 2+ (normal) at the patella and Achilles.

Dr. Rushton personally reviewed appellant's July 7, 1999 cervical MRI scan, as well as x-rays of the cervical and thoracic spine dated May 12, 1999. The x-rays were noted to be unremarkable. The July 7, 1999 cervical MRI scan demonstrated normal height, contour and hydration of each subaxial disc segment. Dr. Rushton further indicated that the MRI scan showed no evidence of disc herniation or any other clinically relevant pathology.

Based on his overall evaluation, Dr. Rushton found that appellant had fully recovered from her cervical and thoracic sprains. He noted on physical examination that there was absolutely no evidence of ongoing injury or any objective support for appellant's need for disability. Dr. Rushton indicated that appellant did not suffer from any current residuals, and she was capable of returning to her preinjury occupation as a distribution clerk without restrictions.

[7] Appellant's disability reportedly ended in March 2008.

[8] OWCP also prepared an amended statement of accepted facts (SOAF) dated January 11, 2012.

[9] In addition to the above-noted history, Dr. Rushton's report included an itemized list of the various treatment records, medical reports and objective studies he reviewed.

He explained that her subjective complaints were poorly substantiated by the objective diagnostic studies, as well as the current physical examination.

By decision dated May 16, 2012, OWCP terminated wage-loss compensation and medical benefits effective June 3, 2012.[10]

Appellant's counsel timely requested an oral hearing, which he later changed to a request for review of the written record.

In a May 1, 2012 letter, Dr. Burch advised appellant's counsel that he had discharged her from his care at least six months prior, and would not further comment on her status.

In a December 4, 2012 decision, the Branch of Hearings and Review affirmed OWCP's decision terminating compensation and medical benefits effective June 3, 2012.

LEGAL PRECEDENT

Once OWCP accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.[11] Having determined that an employee has a disability causally related to her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.[12] The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.[13] To terminate authorization for medical treatment, OWCP must establish that the employee no longer has residuals of an employment-related condition that require further medical treatment.[14]

FECA provides that if there is disagreement between an OWCP-designated physician and the employee's physician, OWCP shall appoint a third physician who shall make an examination.[15] For a conflict to arise the opposing physicians' viewpoints must be of "virtually equal weight and rationale."[16] Where OWCP has referred the case to an impartial medical examiner to resolve a conflict in the medical evidence, the opinion of such a specialist, if

[10] On April 13, 2012 OWCP issued a notice of proposed termination which afforded appellant 30 days in which to submit additional evidence and/or argument. Appellant's counsel replied on April 26, 2012 challenging OWCP's reliance on the IME's report. However, OWCP did not receive any additional evidence prior to issuing its May 16, 2012 final decision.

[11] *Curtis Hall*, 45 ECAB 316 (1994).

[12] *Jason C. Armstrong*, 40 ECAB 907 (1989).

[13] *Furman G. Peake*, 41 ECAB 361, 364 (1990); *Thomas Olivarez, Jr.*, 32 ECAB 1019 (1981).

[14] *Calvin S. Mays*, 39 ECAB 993 (1988).

[15] 5 U.S.C. § 8123(a); *see* 20 C.F.R. § 10.321 (2012); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

[16] *Darlene R. Kennedy*, 57 ECAB 414, 416 (2006).

sufficiently well reasoned and based upon a proper factual background, must be given special weight.[17]

ANALYSIS

OWCP has accepted cervical and thoracic sprains under the current claim. Counsel has repeatedly argued that OWCP should have also accepted cervical disc disease, as evidenced by appellant's July 7, 1999 cervical MRI scan. Additionally, counsel argued that the MRI scan results should have been included in OWCP's January 11, 2012 SOAF.[18] Lastly, appellant's counsel challenged OWCP's reliance on the IME's report alleging that Dr. Rushton was not properly selected.

Appellant's July 7, 1999 cervical MRI scan was initially interpreted as revealing a small disc herniation at C5-6 and a small disc protrusion at C6-7.[19] More than a decade later, Dr. Burch, appellant's then-treating physician, referenced the July 7, 1999 cervical MRI scan results in his February 17, 2010 and February 28, 2011 reports. It is not clear whether he personally reviewed the July 7, 1999 cervical MRI scan or merely reiterated the initial radiologists' interpretation. Both Dr. Didizian and Dr. Rushton, the IME, personally reviewed appellant's July 7, 1999 MRI scan, and disagreed with the initial interpretation, as wells as Dr. Burch's opinion. Dr. Didizian indicated that the cervical scan showed no evidence of disc herniation at any level. The IME found no evidence of disc herniation or any other clinically relevant pathology.

Where an employee claims that a condition not accepted or approved by OWCP was due to an employment injury, she bears the burden of proof to establish that the condition is causally related to the employment injury.[20]

OWCP properly declared a conflict in medical opinion based on the reports of Dr. Burch and Dr. Didizian. Accordingly, it referred appellant to Dr. Rushton for an impartial medical evaluation.[21] Unlike appellant's physician, the IME did not find evidence of cervical disc

[17] *Gary R. Sieber*, 46 ECAB 215, 225 (1994).

[18] The SOAF may optionally include information regarding medical treatment received, including diagnostic testing. However, the SOAF should not include a recitation of medical opinions or findings. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.6a(2) (September 2009). Medical opinions and/or findings should not be confused with the medical history of the claim, which may properly be included. *Id.* at Chapter 2.809.7c.

[19] The film was reviewed by Dr. Kim B. Baker and Dr. Jay D. Goodman, both of whom are Board-certified diagnostic radiologists. Neither physician specifically attributed their July 8, 1999 findings to appellant's May 4, 1999 employment injury.

[20] *Jaja K. Asaramo*, 55 ECAB 200, 204 (2004).

[21] Counsel suggested that Dr. Rushton was not properly selected as IME because of the absence of a screen shot image. The current record includes one bypass screen shot and a ME023 -- Appointment Schedule Notification, which together confirm Dr. Rushton's proper selection as IME pursuant to OWCP's Medical Management (MM) application. *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.500.5i (May 2013). OWCP bypassed Dr. Mark S. Rekant because although he is a Board-certified orthopedic surgeon, Dr. Rekant's medical practice was limited to treatment of the hand.

herniation and/or disc protrusion. As noted, his review of appellant's July 7, 1999 cervical MRI scan revealed no evidence of disc herniation or any other clinically relevant pathology. Also, Dr. Rushton's February 23, 2012 physical examination was essentially normal. There was no tenderness, pain or muscle spasm, no reported motor or sensory deficits, appellant had full range of motion in her shoulders and cervical spine, her upper extremity reflexes were intact and there was no demonstrable weakness. Dr. Rushton found that appellant had fully recovered from her cervical and thoracic sprains. She did not suffer from any current residuals and was capable of returning to her preinjury occupation as a distribution clerk without restrictions. Dr. Rushton indicated that there was absolutely no evidence of ongoing injury or any support for disability. The IME explained that appellant's subjective complaints were poorly substantiated by his personal review of the objective diagnostic studies, as well as the current physical examination.

When a case is referred to an IME to resolve a conflict, the resulting medical opinion, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[22] The Board finds that OWCP properly deferred to Dr. Rushton's February 23, 2012 findings. The IME provided a well-reasoned report based on a proper factual and medical history. He also accurately summarized the relevant medical evidence. Additionally, Dr. Rushton provided a thorough examination and he personally reviewed appellant's July 7, 1999 cervical MRI scan. His February 23, 2012 report included detailed findings and medical rationale supporting his opinion. As the IME, Dr. Rushton's opinion was entitled to determinative weight.[23] Accordingly, the Board finds that OWCP properly relied on the IME's findings as a basis for terminating appellant's wage-loss compensation and medical benefits.

In light of Dr. Rushton's February 23, 2012 report, appellant failed to establish that she has cervical disc disease causally related to her May 4, 1999 employment injury. Dr. Rushton's report also establishes that appellant no longer has residuals of her accepted cervical and thoracic sprains. Consequently, OWCP satisfied its burden in terminating appellant's FECA benefits.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision.[24]

CONCLUSION

OWCP properly terminated appellant's wage-loss compensation and medical benefits effective June 3, 2012.

[22] *Gary R. Sieber*, *supra* note 17.

[23] *Id.*

[24] *See* 5 U.S.C. § 8128(a); 20 C.F.R. §§ 10.605-10.607.

ORDER

IT IS HEREBY ORDERED THAT the December 4, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 8, 2014
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