

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

K.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Bellmawr, NJ, Employer**

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**Docket No. 13-1723
Issued: June 17, 2014**

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

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 15, 2013 appellant, through her attorney, filed a timely appeal from an April 9, 2013 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.

ISSUE

The issue is whether OWCP properly rescinded acceptance of its authorization for cervical spine surgery.

On appeal appellant's attorney asserts that OWCP abused its discretion in rescinding acceptance of cervical spine surgery and that the opinion of the referee physician is insufficient to carry the weight of the medical evidence.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

On December 18, 2010 appellant, then a 59-year-old city letter carrier, filed a traumatic injury claim alleging that she injured her lower back when her stationary postal vehicle was rear-ended. She stopped work that day and did not return. The police report indicated that there was no damage to either vehicle, no reported injuries, no summons issued and that the report was needed to comply with postal policy. Dr. Mitash M. Shah, Board-certified in emergency medicine, advised that appellant reported no neck pain and physical examination demonstrated no neck tenderness. He diagnosed low back pain.

On February 1, 2011 OWCP accepted that appellant sustained employment-related sprain of the back, thoracic and lumbar regions and referred her to a medical management nurse. Appellant received continuation of pay and was placed on the periodic compensation rolls. In a June 15, 2011 report, Dr. Nirav K. Shah, a Board-certified neurosurgeon, noted that appellant was injured in a work-related vehicle accident. He provided physical examination findings and diagnosed cervical radiculopathy, lumbar stenosis and lumbar disc without myelopathy. Dr. Shah recommended an magnetic resonance imaging (MRI) scan study of the cervical spine.

In June 2011 OWCP referred appellant to Dr. Kenneth Heist, a Board-certified osteopath specializing in orthopedic surgery, for a second opinion evaluation. A July 1, 2011 MRI scan study of the cervical spine demonstrated multilevel degenerative changes, with bulges at C5-6 and C6-7 and a small disc protrusion at C4-5 without cord or foraminal encroachment. In a July 7, 2011 report, Dr. Heist noted the history of injury, his review of the medical record, including diagnostic studies, and appellant's complaint of low back and neck pain and left arm numbness. He provided examination findings including evidence of a slight left cervical radiculopathy. Dr. Heist diagnosed: cervical, dorsal and lumbar sprain; preexisting degenerative spinal disease of the cervical, dorsal and lumbar spines; and preexisting left cervical radiculopathy. He advised that appellant had reached maximum medical improvement with respect to the sprains, which were causally related to the December 18, 2010 employment injury, and that her present complaints and findings were related to preexisting degenerative disc disease and were not related to the employment-related motor vehicle accident. Appellant concluded that appellant could perform light duty for eight hours a day with permanent restrictions on lifting.

In October 2011 OWCP determined that a conflict in medical opinion had been created between the opinions of Drs. Shah and Dr. Heist regarding the diagnoses caused by the December 18, 2010 employment injury and referred appellant to Dr. James P. Taitsman, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a November 14, 2011 report, Dr. Taitsman noted the history of injury, his review of the medical record, and appellant's complaints of neck, thoracic and low back pain. Regarding the cervical spine, he indicated that appellant began to have symptoms sometime in January 2011. Dr. Taitsman noted that the police report indicated that there was no damage to either vehicle, that no injuries were noted, and that the emergency room reported back problems only and made no reference to cervical symptoms. He stated that he had reviewed the medical record which demonstrated significant preexisting degenerative disease of the cervical spine with a possible preexisting cervical disc herniation. Dr. Taitsman opined that there was nothing in the

medical record or in the history given to suggest that there was an injury to the cervical spine on December 18, 2010 resulting in the subsequent cervical pain, muscle spasm and radicular symptomatology described three months later.

Dr. Taitsman's physical examination demonstrated limited range of motion of the cervical spine. He advised that appellant's report of 8/10 neck pain and 10/10 radicular symptoms would suggest possible symptom-magnification with regard to the cervical spine. Dr. Taitsman advised that there was direct causation with regard to appellant's thoracic and lumbar symptomatology, with diagnoses of lumbar and thoracic strain, and exacerbation of preexisting conditions, related to the December 18, 2010 motor vehicle accident which appeared to be permanent. He indicated that appellant was unable to perform her regular duties due to the thoracic and lumbar conditions, even absent cervical problems, and that she was totally and permanently disabled. Dr. Taitsman concluded that his opinion was within a reasonable degree of medical probability.

Additional medical reports were received from a Dr. Mahoney, a doctor of osteopathic medicine, and Dr. Barry D. Fass, a Board-certified physiatrist describing appellant's condition and treatment.

On January 5, 2012 OWCP determined that appellant had reached maximum medical improvement and was totally and permanently disabled from performing any type of work due to the accepted lumbar and thoracic conditions. It further indicated that her cervical spine disease was not causally related to the December 18, 2010 employment injury. Appellant remained on the periodic compensation rolls.

Dr. Nirav Shah, appellant's treating physician, requested authorization for surgery to the cervical spine. On January 9 and 25, 2012 OWCP fiscal services authorized the procedure and in February 2012 Dr. Shah performed an anterior cervical discectomy and fusion (ACDF) procedure from C5 to C7.²

In correspondence dated February 8, 2012, OWCP advised appellant's congressional representative that a cervical condition had not been accepted. In a decision dated February 15, 2012, it denied the request for authorization for surgery. OWCP indicated that the prior authorization was granted in error and found that the weight of the medical evidence rested with the opinion of Dr. Taitsman, the referee physician, and that this decision superseded the prior authorization.

On February 22, 2012 appellant, through her attorney, requested a hearing, and submitted a February 3, 2012 computerized tomography (CT) scan study of the cervical spine that demonstrated postanterior cervical discectomy and fusion changes. In a February 14, 2012 treatment note, Dr. Fass noted that appellant recently had neck surgery and deferred examination of the cervical spine. In reports dated February 15, 2012, Dr. N. Shah noted that appellant was in for evaluation, status post a February 2, 2012 ACDF procedure. He diagnosed cervical myelopathy, neck pain and neck strain and advised that she was doing as well as could be

² The operative note does not indicate a date of surgery. Appellant was admitted to the hospital on February 2, 2012 and discharged on February 4, 2012. Dr. Shah later identified the surgery as being done on February 2, 2012.

expected. On March 12, 2012 Dr. Fass indicated that appellant reported cervical pain and stiffness and upper extremity paresthesias.

In an April 12, 2012 decision, an OWCP hearing representative found that OWCP had not provided proper notice of the decision to rescind authorization for the cervical spine surgery and remanded the case to OWCP to issue a proposal to rescind surgical authorization.

By letter dated May 3, 2012, appellant's attorney requested that the accepted conditions be expanded to include aggravation of degenerative disc disease of the thoracic and lumbar spine, L5-S1 radiculopathy, and herniated disc, based on the opinion of Dr. Taitsman.

In reports received by OWCP after the April 12, 2012 decision, in an April 10, 2012 treatment note, Dr. Mahoney noted that appellant still had some numbness in the left arm following surgery but had definitely improved. On April 11, 2012 Dr. N. Shah reported that appellant continued to have neck and back pain and numbness. He indicated that she needed to continue physical therapy. In a letter dated April 13, 2012, Dr. N. Shah stated that appellant had been referred to him for cervical radiculopathy, and that she had significant left-sided cervical pain and left upper extremity weakness which started after the December 2010 work injury when she was involved in an employment-related motor vehicle accident. He noted that she had preexisting cervical disc disease but did not have significant symptoms or weakness until after the December 2010 employment injury when she developed severe pain down the arms consistent with radiculopathy and new onset weakness. Dr. N. Shah also described appellant's lower back and leg symptoms, which continued to persist, and indicated that she was unable to work in a full-time capacity as she had prior to the accident. He advised that the December 2010 work injury caused an aggravation of appellant's cervical condition that did not resolve with conservative measures, and she therefore had required surgery, especially in light of the new symptom of weakness. Dr. N. Shah concluded that appellant did well following the surgery but had not returned to full strength.

By letter dated July 5, 2012, OWCP proposed to rescind authorization for the cervical spine surgery. It noted that a cervical condition had not been accepted and found the weight of the opinion rested with Dr. Taitsman, who provided an impartial evaluation, and advised that appellant's cervical condition was not related to the December 2010 employment injury. OWCP indicated that, prior to the surgical authorization, OWCP procedures were not followed, noting that there had been no formal acceptance of a cervical condition, and no review by OWCP's medical adviser or second opinion specialist as to the need for cervical spine surgery. It concluded that Dr. Taitsman's opinion was sufficient to support rescission of the surgical authorization.

In reports dated May 7 to August 7, 2012, Drs. Fass, Mahoney and Shah described appellant's continuing treatment for her cervical and lumbar conditions.

By decision dated August 10, 2012, OWCP rescinded authorization for the cervical spine surgery. Appellant's attorney timely requested a hearing, later changed the request for a review of the written record.

In reports dated August 30 to December 20, 2012, Drs. Fass and Mahoney noted appellant's continued pain and stiffness in the cervical spine and worsening radiating low back pain. The physicians indicated that lumbar spine surgery was contemplated.

On December 28, 2012 Dr. N. Shah disagreed with Dr. Taitsman's evaluation of the case on the basis of the police report. He stated that appellant provided a better history of injury than that provided in the police report. Dr. N. Shah indicated that she stated that she was struck from the rear and claimed that she immediately had neck pain, returned to her office, and then developed severe back and right leg spasm, for which she went to the emergency room because the leg pain was more concerning. He stated that appellant reported that she continued to be worked up for her lumbar strain and radiculopathy but also had cervical issues which were not treated until she developed neck pain with radiation into her left arm. Dr. N. Shah indicated that appellant denied any preexisting neck radiculopathy or severe neck pain that required significant medical attention. He opined that, while the cervical MRI scan study revealed degenerative disc disease and degenerative changes, appellant clearly suffered an aggravation of this preexisting condition which was unmasked by the December 2010 employment injury and her cervical condition was progressive.

In reports dated January 22 to March 20, 2013, Drs. Mahoney, Fass and Shah discussed appellant's lumbar condition.

In an April 9, 2013 decision, an OWCP hearing representative affirmed the August 10, 2012 decision.

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 her own motion or on application.³ The Board has upheld OWCP's authority to reopen a claim at any time on its own motion under 5 U.S.C. § 8128 and, where supported by the evidence, set aside or modify a prior decision and issue a new decision. The power to annul an award, however, is not an arbitrary one and an award for compensation can only be set aside in the manner provided by the compensation statute. OWCP's burden of justifying termination or modification of compensation holds true where OWCP later decides that it has erroneously accepted a claim for compensation. In establishing that its prior acceptance was erroneous, OWCP is required to provide a clear explanation of its rationale for rescission.⁴

Section 8103 of FECA provides that 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 OWCP considers likely to cure, give relief, reduce the degree or the period of disability or aid in lessening the amount of the monthly compensation.⁵ While OWCP is obligated to pay for treatment of employment-related

³ 5 U.S.C. § 8128.

⁴ *Amelia S. Jefferson*, 57 ECAB 183 (2005).

⁵ 5 U.S.C. § 8103; *see L.D.*, 59 ECAB 648 (2008).

conditions, the employee has the burden of establishing that the expenditure is incurred for treatment of the effects of an employment-related injury or condition.⁶

Section 8123(a) of FECA provides that 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.⁷ When 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 on a proper factual background, must be given special weight.⁸

ANALYSIS

In October 2011 OWCP determined that a conflict in medical evidence had been created between the opinions of Dr. N. Shah, appellant's attending neurosurgeon, and Dr. Heist, the orthopedist who provided a second opinion evaluation for OWCP, regarding the diagnosed conditions due to the December 2010 employment injury. It then referred appellant to Dr. Taitsman for an impartial evaluation. In his comprehensive November 14, 2011 report, Dr. Taitsman noted the history of injury and appellant's complaints of neck, thoracic and low back pain. He reviewed the police report which indicated that there was no damage to either vehicle and that no injuries were noted, and also noted that the emergency room reported only back problems and made no reference to cervical or other symptoms. Dr. Taitsman noted that the medical record demonstrated significant preexisting degenerative disease of the cervical spine with a possible preexisting cervical disc herniation. He opined that there was nothing in the medical record or history to suggest that there was an injury to the cervical spine on December 18, 2010 resulting in the subsequent cervical pain, muscle spasm and radicular symptomatology.

The Board finds that OWCP properly provided sufficient rationale to justify the rescission of the authorization for the February 2012 ACDF cervical procedure in that, as a result of investigation by OWCP, it was discovered that OWCP's fiscal unit had made an administrative error and authorized the surgery in error. As discussed above, OWCP found that a conflict in medical evidence had been created regarding diagnoses caused by the December 2010 employment injury and referred appellant to Dr. Taitsman who opined that appellant's cervical condition was not caused by the December 2010 motor vehicle accident.

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.⁹ In the July 5, 2012 notice of proposed rescission and the August 10, 2012 decision finalizing the rescission, OWCP made clear that a cervical condition had not been accepted as caused by the December 18, 2010

⁶ *Kennett O. Collins, Jr.*, 55 ECAB 648 (2004).

⁷ 5 U.S.C. § 8123(a); *see Geraldine Foster*, 54 ECAB 435 (2003).

⁸ *Manuel Gill*, 52 ECAB 282 (2001).

⁹ *D.G.*, 59 ECAB 734 (2008).

employment injury and found that the weight of the medical evidence rested with the opinion of Dr. Taitsman, who provided the impartial evaluation.¹⁰ Thus, it provided a clear explanation in establishing that its prior authorization was erroneous and properly rescinded authorization for the February 2012 cervical spine surgery. As OWCP properly rescinded authorization for the February 2012 surgery, appellant would not be entitled to disability compensation for surgical recovery. However, in the case at hand, it determined that appellant was totally disabled due to the accepted thoracic and lumbar conditions and remains on the periodic compensation rolls.

The Board therefore finds that, based on these considerations, OWCP properly reopened appellant's claim for further review and determined that, as a cervical condition had not been accepted as work related, the February 2012 ACDF procedure should not have been authorized.

CONCLUSION

The Board finds that OWCP properly rescinded authorization for the February 2012 cervical spine surgery.

ORDER

IT IS HEREBY ORDERED THAT the April 9, 2013 decision of the Office of Workers' Compensation Programs is affirmed.¹¹

Issued: June 17, 2014
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

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

¹⁰ Contrary to the attorney's argument on appeal, Dr. Taitsman provided a comprehensive evaluation and a clear explanation as to why appellant's cervical condition was not caused by the December 18, 2010 motor vehicle accident. His opinion is therefore entitled to the special weight accorded a referee physician. *See Manuel Gill, supra* note 8.

¹¹ Richard J. Daschbach participated in the preparation of the decision but was longer a member of the Board after May 16, 2014.