

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

A.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Philadelphia, PA, Employer**

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**Docket No. 14-1510
Issued: October 23, 2014**

Appearances:
Richard A. Daniels, for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 23, 2014 appellant, through her representative, filed a timely appeal from the March 12, 2014 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

ISSUES

The issues are: (1) whether OWCP met its burden of proof to terminate appellant's wage-loss and medical benefits effective March 22, 2011 on the grounds that she had no residuals of her February 20, 2010 work injury after that date; and (2) whether appellant met her burden of proof to establish that she had residuals of her February 20, 2010 work injury after March 22, 2011.

¹ 5 U.S.C. §§ 8101-8193.

² Appellant submitted additional evidence after OWCP's March 12, 2014 decision, but the Board cannot consider such evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

FACTUAL HISTORY

OWCP accepted that on February 20, 2010 appellant, then a 57-year-old carrier, sustained sprains of her neck, lumbar and sacroiliac regions when she slipped on an icy area causing her body to lurch back and forth. Appellant stopped work on February 20, 2010. Beginning April 24, 2010 she received disability compensation on the daily rolls.

The findings of a March 18, 2010 magnetic resonance imaging (MRI) scan of appellant's neck revealed grade 1 anterolisthesis of C4 on C5 and C3-4, broad-based disc herniation at C3-4 with bilateral intraforaminal extension and moderate bilateral foraminal narrowing, broad-based disc osteophyte complex at C4-5 with mildly narrowed foramina and broad-based disc osteophyte complex at C5-6 with mildly narrowed foramina. The findings of March 22, 2010 MRI scan testing of her lumbar region showed a broad-based disc bulge at L5-S1, broad-based disc protrusion at L4-5 with moderately narrowed foramina and mildly stenotic canal and broad-based disc bulges at L2-3 and L3-4 with mildly narrowed foramina. Electromyogram (EMG) and nerve conduction velocity testing from April 1, 2010 showed mild radiculopathy stemming from L3-4, L4-5 and S1.

Appellant received treatment from Dr. William H. Burnstein, a Board-certified internist. In a report dated March 23, 2010, Dr. Burnstein diagnosed cervical sprain/strain, disc herniation at C3-4, thoracolumbar sprain/strain, disc bulge at L2-3, L3-4 and L5-S1. He stated that, due to these injuries, appellant sustained a serious impairment of bodily function and noted, "Based upon this history given to me by the patient and my physical examination, it is my opinion that the injuries set forth in my diagnoses are causally related to the February 20, 2010 accident."

Given the limited assessment of appellant's condition by attending physicians, OWCP referred her and the case record to Dr. Robert A. Smith, a Board-certified orthopedic surgeon, for a second opinion examination and opinion on whether she had continuing residuals of her February 20, 2010 work injury.

In a September 9, 2010 report, Dr. Smith detailed appellant's medical history including the circumstances of her February 20, 2010 work injury and the findings of diagnostic testing of her neck and lower back. He noted that the diagnostic testing showed degenerative changes of the cervical and lumbar spines, but did not show acute focal compression lesions that could be considered post-traumatic in nature. On physical examination, appellant's gait and station appeared to be normal. Examination of her neck revealed no finding of any spasm, atrophy, trigger points or deformity. Active cervical range of motion was satisfactory but self-limited due to complaints of pain. Dr. Smith noted that during these maneuvers there was no spasm or rigidity present. In the thoracolumbar spine, there was satisfactory range of motion self-limited by complaints of pain, but there was no spasm or rigidity present during these maneuvers. Dr. Smith stated that, although appellant complained of numbness and tingling in both of her legs (left worse than right), the symptoms did not appear to be in any specific anatomical pattern and there were no objective deficits such as reflex change, motor weakness or atrophy. Distracted straight leg raising maneuvers bilaterally were negative without any radicular finding.

In A September 9, 2010 report, Dr. Smith concluded that there were no discernable objective residuals with regards to the accepted conditions of sprains of the neck, lumbar and

sacroiliac regions on current examination. He noted that there was never any acceptance for aggravation of preexisting arthritis, herniated cervical disc or neurological injury. Appellant required no additional treatment such as physical therapy, chiropractic manipulation, injections, aquatic therapy or surgery with regards to the accepted soft-tissue sprains. The reported findings from the MRI scans and the EMG studies were degenerative in nature and unrelated to the work incident of February 20, 2010. Dr. Smith stated:

“Based on the above medical facts, [appellant] could return to regular-duty work with regards to the resolution of the accepted conditions of soft-tissue sprain of the spine. If any additional treatment or disability occurs, this would be related to her nonindustrial degenerative disease and not the incident of February 20, 2010. There are no residuals from the soft-tissue injuries to the spine that are the accepted conditions....”³

In a September 17, 2010 letter, OWCP advised appellant that it proposed to terminate her wage-loss and medical benefits on the grounds that she ceased to have residuals of her February 20, 2010 work injury.⁴ The proposed termination action was supported by the September 9, 2010 report of Dr. Smith. Appellant was provided 30 days to present evidence or argument challenging the proposed action.

Dr. Burnstein continued to submit treatment notes regarding appellant, none of which provide a clear opinion regarding whether she continued to have residuals of her February 20, 2010 work injury. In an October 9, 2010 form report, he listed the date of injury as February 20, 2010 and provided various work restrictions.⁵

In a November 24, 2010 decision, OWCP terminated appellant’s compensation effective that date. It found that she ceased to have residuals of her February 20, 2010 work injury after that date. OWCP later set aside this decision because the September 17, 2010 preliminary notice of proposed termination was not sent to counsel.

On December 2, 2010 OWCP sent appellant and her representative a new letter advising that it proposed to terminate her wage-loss compensation and medical benefits on the grounds that she ceased to have residuals of her February 20, 2010 work injury. It noted that the proposed termination action was based on the September 9, 2010 report of Dr. Smith. Appellant was provided 30 days from the date of the letter to present evidence and argument challenging the proposed action.

In an undated report received on December 27, 2010, Dr. Burnstein stated that he initially evaluated appellant on February 22, 2010 after she sustained injuries to her neck and back due to

³ In an attached September 9, 2010 form report, Dr. Smith indicated that appellant could perform her regular work without restrictions.

⁴ The letter was sent to appellant but was not sent to her representative at the time.

⁵ The record also contains an Attending Physician’s Report which appears that have been completed by Dr. Burnstein on October 26, 2010, but the findings of the report are illegible.

slipping on ice/snow while carrying mail on February 20, 2010. He discussed her diagnostic testing and stated:

“I disagree with Dr. Smith’s opinions. Firstly, even if the MRI scan and EMG findings were present prior to her work-related injury, they clearly became symptomatic as a result of the injury. [Appellant] was carrying mail, which indicates she was in good health relevant to her neck and back and denied having any symptoms prior to slipping while at work. While some of the MRI scan findings are clearly degenerative and therefore preexisted the injury, it is impossible to state whether or not some of the disc abnormalities were a direct result of the fall. In any event, the underlying abnormalities found on MRI scan are now symptomatic as a direct result of the fall. Furthermore the EMG findings ... were likely a direct result of the injury sustained on February 20, 2010. Additionally, Dr. Smith fails to mention chronic pain syndrome which she was diagnosed with since her pain is not significantly improved -- it has been 10 months with no significant improvement.”⁶

OWCP found that Dr. Smith was in good standing with medical licensing authorities and that a different physician named Robert A. Smith had his license suspended.

In a March 22, 2011 decision, OWCP terminated appellant’s wage-loss compensation and medical benefits effective March 22, 2011. It found that she had no residuals of her February 20, 2010 work injury after that date. OWCP relied on the well-rationalized report of Dr. Smith, OWCP referral physician.⁷ It found that the opinion of Dr. Burnstein was of limited probative value on the relevant issue of the case because it lacked medical rationale.

Appellant requested a telephone hearing with an OWCP hearing representative. During the July 19, 2011 hearing, appellant’s representative argued that the opinion of Dr. Burnstein showed that appellant continued to have work-related residuals.

In a September 8, 2011 decision, an OWCP hearing representative affirmed the March 22, 2011 termination decision finding that the weight of the medical opinion rested with Dr. Smith.

In an August 14, 2012 report, Dr. Matthew McLean, an attending Board-certified orthopedic surgeon, stated that he first saw appellant on October 19, 2011 for neck and back pain. Appellant advised him that she had slipped on some ice at work in February 2010. Dr. McLean reported the findings of the initial October 19, 2011 examination, including mild paraspinal tenderness of the neck and left-sided lumbar paraspinal tenderness radiating into the

⁶ Dr. Burnstein indicated that it had come to his attention that a physician named Robert A. Smith had been disciplined for various professional improprieties. He stated that, if Dr. Smith who examined appellant was the same physician, then his opinion on appellant’s condition would be without merit.

⁷ OWCP noted that Dr. Smith was in good standing with medical licensing authorities.

left buttock. He discussed the findings of additional examinations between December 7, 2011 and appellant's last visit on April 11, 2012 and stated:

“[Appellant] developed symptomatic cervical degenerative disc disease and cervical [herniated nucleus pulposus] as well as lumbar degenerative disc disease and lumbar radiculopathy along with myofascial pain in both trapezius as a result of her work injury in February 2010. As of her most recent visit she was doing fairly well and should be able to do some light[-]duty work.”

In a January 3, 2013 decision, OWCP affirmed its September 8, 2011 decision noting that the opinion of Dr. McLean was not supported by adequate medical rationale.

In a December 12, 2013 letter, appellant, through her representative, requested reconsideration of the January 3, 2013 decision. Appellant's representative argued that Dr. McLean was well qualified to assess appellant's medical condition and asserted that his August 14, 2012 report established that she continued to have work-related residuals.

In a March 12, 2014 decision, OWCP affirmed its December 13, 2012 termination decision finding that the opinion of Dr. McLean was not well rationalized.

LEGAL PRECEDENT -- ISSUE 1

Under FECA, once OWCP has accepted a claim it has the burden of justifying termination or modification of compensation benefits.⁸ OWCP may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁹ Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.¹⁰

ANALYSIS -- ISSUE 1

OWCP accepted that on February 20, 2010 appellant, then a 57-year-old carrier, sustained sprains of her neck, lumbar and sacroiliac regions when she slipped on an icy area and her body lurched back and forth. Beginning April 24, 2010 appellant received disability compensation on the daily rolls. OWCP terminated his wage-loss compensation and medical benefits effective March 22, 2011 on the grounds that she had no residuals of her February 20, 2010 work injury after that date. Its termination action was based on the September 9, 2010 report of Dr. Smith, a Board-certified orthopedic surgeon who served as an OWCP referral physician.

The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Smith, OWCP's referral physician. The September 9, 2010

⁸ *I.J.*, 59 ECAB 408 (2008); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

⁹ *Charles E. Minniss*, 40 ECAB 708, 716 (1989).

¹⁰ *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

report of Dr. Smith establishes that appellant had no disability due to her February 20, 2010 work injury after March 22, 2011.

Dr. Smith addressed appellant's medical history, including the findings of diagnostic testing and indicated that examination of her neck revealed no finding of any spasm, atrophy, trigger points or deformity. Active cervical and thoracolumbar range of motion was satisfactory but self-limited due to complaints of pain. Dr. Smith noted that during these maneuvers there was no spasm or rigidity present. He indicated that, although appellant complained of numbness and tingling in both of her legs, these symptoms did not appear to be in any specific anatomical pattern and there were no objective deficits such as reflex change, motor weakness or atrophy. Distracted straight leg raising maneuvers bilaterally were negative without any radicular finding. Dr. Smith concluded that there were no discernable objective residuals with regards to the accepted conditions of sprains of the neck, lumbar and sacroiliac regions on current examination. These conditions had resolved and appellant could return to her regular work. Dr. Smith noted that the reported findings from the MRI scans and the EMG studies were degenerative in nature and unrelated to the work incident of February 20, 2010 and stated that appellant's continuing complaints would be related to these nonwork-related conditions.

The Board has carefully reviewed the opinion of Dr. Smith and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Smith provided a thorough factual and medical history and accurately summarized the relevant medical evidence.¹¹ He provided medical rationale for his opinion by explaining that there was no objective evidence, either on physical examination or diagnostic testing, that appellant continued to have residuals of the soft-tissue injuries that were accepted as occurring on February 20, 2010. Moreover, appellant's continuing neck and back complaints could be explained by the natural progression of nonwork-related degenerative disease in those regions.

On appeal, appellant's representative argued that the reports of Dr. Burnstein, an attending Board-certified, internist established that appellant continued to have residuals of her February 20, 2010 work injury after March 22, 2011. The Board finds that the opinion of Dr. Burnstein is of limited probative value because his opinion on causal relationship is not fortified by adequate medical rationale.¹² In a December 27, 2010 report, Dr. Burnstein suggested that the degenerative cervical and lumbar spine changes seen on diagnostic testing were related, in part, to the February 20, 2010 work injury. He also suggested that appellant had a chronic pain syndrome related to the February 20, 2010 work injury. The Board notes that appellant's claim was accepted by OWCP for the soft-tissue injuries of sprains of her neck, lumbar and sacroiliac regions. Dr. Burnstein did not describe the February 20, 2010 work injury in any detail or otherwise provide adequate rationale for his opinion that appellant sustained a more severe injury on February 20, 2010.

¹¹ See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

¹² See *C.E.*, Docket No. 14-710 (issued August 11, 2014); *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (finding that a medical opinion not fortified by medical rationale is of little probative value).

Moreover, Dr. Burnstein's opinion on causal relationship is equivocal in nature as he stated, "While some of the MRI scan findings are clearly degenerative and therefore preexisted the injury, it is impossible to state whether or not some of the disc abnormalities were a direct result of the fall." He indicated that a physician named Robert A. Smith had been disciplined for various professional improprieties. Dr. Burnstein stated that, if the physician who examined appellant was the same physician, then his opinion on appellant's condition would be without merit. However, the record contains evidence showing that Dr. Smith of the present case is in good standing with medical licensing authorities and that another physician named Robert A. Smith had his license revoked.

LEGAL PRECEDENT -- ISSUE 2

After termination or modification of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to the claimant. In order to prevail, the claimant must establish by the weight of the reliable, probative and substantial evidence that he or she had an employment-related disability which continued after termination of compensation benefits.¹³

ANALYSIS -- ISSUE 2

After OWCP's March 22, 2011 decision terminating appellant's compensation appellant submitted additional medical evidence which she felt showed that she was entitled to compensation after March 22, 2011 due to residuals of her February 20, 2010 work injury. Given that the Board has found that OWCP properly relied on the opinion of its referral physician, Dr. Smith, in terminating appellant's compensation effective March 22, 2011, the burden shifts to appellant to establish that she is entitled to compensation after that date. The Board has reviewed the additional evidence submitted by appellant and finds that it is not of sufficient probative value to establish that she had residuals of her February 20, 2010 work injury after March 22, 2011.

Appellant submitted an August 14, 2012 report of Dr. McLean, an attending Board-certified orthopedic surgeon. However, the Board finds Dr. McLean's report of limited probative on the relevant issue of this case because its opinion on causal relationship is not fortified by adequate medical rationale.¹⁴ In his report, Dr. McLean discussed his several examinations of appellant between October 19, 2011 and April 11, 2012 and stated that, "[Appellant] developed symptomatic cervical degenerative disc disease and cervical [herniated nucleus pulposus] as well as lumbar degenerative disc disease and lumbar radiculopathy along with myofascial pain in both trapezius as a result of her work injury in February 2010." However, he did not provide any explanation for this conclusory statement. As previously noted, appellant's claim has only been accepted for sprains of her neck, lumbar and sacroiliac regions.

¹³ *Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

¹⁴ In its January 3, 2013 decision, OWCP suggested that Dr. McLean was not a qualified Board-certified orthopedic surgeon and therefore did not have the appropriate qualifications to evaluate appellant's medical condition. The Board notes that he is, in fact, certified by the American Board of Orthopedic Surgery.

Dr. McLean did not discuss her February 20, 2010 work injury in any detail and explain how it caused such severe and varied injuries to her neck and spine.

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 March 22, 2011 on the grounds that she had no residuals of her February 20, 2010 work injury after that date. The Board further finds that appellant did not meet her burden of proof to establish that she had residuals of her February 20, 2010 work injury after March 22, 2011.

ORDER

IT IS HEREBY ORDERED THAT the March 12, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 23, 2014
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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