

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ALICE J. TYSINGER and U.S. POSTAL SERVICE,
POST OFFICE, Bellmawr, NJ

*Docket No. 98-2423; Submitted on the Record;
Issued August 29, 2000*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant had any continuing disability or residuals after June 22, 1997, the date the Office of Workers' Compensation Programs terminated her compensation benefits, causally related to her February 21, 1995 cervical soft tissue muscular strain injury.

The Office accepted that on February 21, 1995 appellant, then a 50-year-old mailhandler, sustained a cervical strain when a carrier loaded with mail that she was pushing stopped suddenly. She performed limited duty on an intermittent basis until August 15, 1995 when she ceased work entirely. Appellant received appropriate monetary compensation and medical benefits.

On May 2, 1995 appellant came under the care of Dr. Thomas E. Peff, a Board-certified orthopedic surgeon, who noted that she had a myriad of orthopedic pain complaints, diagnosed "[r]ight shoulder girdle pain and spasm. Suspect cervical radiculopathy" and who continued, in additional reports, to support injury-related disability.¹

However, by report dated November 8, 1995, Dr. Frank A. Mattei, a Board-certified orthopedic surgeon, noted appellant's history of injury, indicated that she had degenerative changes of the spinal column with possible plantar fasciitis of her feet, but noted "[s]he complains of severe spasms of the cervical musculature, with pain, however, I could not elicit any pathological entities that would support her subjective complaints." He opined: "It is my medical opinion, with proper motivation, she can return to her duties in full capacity."

On an attending physician's report dated March 28, 1996 Dr. Peff diagnosed shoulder girdle pain and cervical radiculopathy and indicated that appellant was totally disabled for work.

¹ In his May 2, 1995 report, Dr. Peff noted that appellant was working light duty; he recommended a more active flexibility and exercise program and noted that no further diagnostic studies were indicated as long as appellant continued to improve.

On a work restriction evaluation dated May 14, 1996, he indicated that appellant could work 8 hours per day with a lifting limit of 20 pounds, but noted that she had emotional problems which would need to be considered in identifying a suitable position.

In a May 28, 1996 report, Dr. Richard W. Cohen, a Board-certified psychiatrist, noted that in 1992 appellant was a crime victim when she was followed by a car in a high speed chase and shot at. He indicated appellant recovered from that incident, but that when she sustained an injury due to the February 21, 1995 cart pushing incident, she became afraid that she would not be able to defend herself. Dr. Cohen indicated that appellant had nightmares and flashbacks about the pushing incident, wherein he noted appellant sustained a whip lash injury, left subscapular pain and right foot pain.²

The employing establishment determined that a fitness-for-duty examination was necessary and, on June 3, 1996, referred appellant to Dr. Perry A. Berman a Board-certified psychiatrist.

By report dated June 18, 1996, Dr. Berman, reviewed appellant's factual and medical history, noted her complaints and the results of his examination and diagnosed "depression -- mild -- secondary to financial difficulties." He noted that appellant's various physical complaints did not make sense, that he saw no evidence that she was actually injured or knew of any reason why she could not return to work immediately and concluded: "[Appellant] is not physically injured and her mental condition is not the result of the cart stopping while she was pushing it."

A magnetic resonance imaging (MRI) scan on July 9, 1996 revealed "moderately advanced degenerative disc disease at C5-6 and C6-7 with moderately large herniated discs ... causing slight cord compression."

The Office referred appellant, together with a statement of accepted facts and the relevant case record, for a second opinion orthopedic examination.

By report dated August 1, 1996, Dr. Harold F. Shuster, a Board-certified orthopedic surgeon, reviewed appellant's records, discussed her history and noted his findings upon examination. He noted: "chronic degenerative arthritis of the cervical spine. Under these circumstances, I would restrict her to a light[-]duty job on a primary basis" and additionally concluded that appellant was "fully recovered from the work-related incident of February 21, 1995." Dr. Shuster opined: "Despite this full recovery, it is my opinion that she still should be permanently restricted to a light[-]duty job for the above reasons. No additional treatment or therapy is indicated."

On August 6, 1996 a right shoulder MRI scan demonstrated a rotator cuff tear of the critical zone and supraspinatus tendon.

² Dr. Cohen also noted that work injuries appellant had sustained in the past included hurting her left knee, sustaining a corneal abrasion, injury to her right ear and right wrist injury, which he noted she overcame. He noted that appellant additionally underwent surgery on a cyst on her buttocks in 1991.

Thereafter, a second opinion psychiatric evaluation was sought.

In a report dated August 12, 1996, Dr. Harold J. Byron, a Board-certified psychiatrist, noted that he had reviewed the medical reports of record, noted appellant's factual and medical history, conducted a psychiatric examination and opined: "I find no evidence of any psychiatric illness or disability that can be related to her accident of February 1995."

In a report dated August 12, 1996, Dr. Cohen noted that appellant continued to see him for psychotherapy and medication adjustment, due to her depression related to shoulder, foot and neck pain. He opined that appellant's "depression and anxiety are secondary to her accident of February 21, 1995 with a reasonable degree of medical certainty."

In a report dated October 10, 1996, Dr. Richard H. Kaplan, a Board-certified physiatrist, noted that appellant reported disabling neck and shoulder pain and opined that she remained disabled for employment. Prior electromyography (EMG) had demonstrated electrical evidence of denervation at C5-6-7 levels. Disc herniations at C5-6 and C6-7 with cord compression were noted. Dr. Kaplan continued to find appellant totally disabled.

The Office determined that there was a conflict in medical opinion evidence between appellant's treating physicians and Dr. Shuster, as to whether appellant had any continuing disability causally related to her accepted cervical soft tissue muscular strain injury and it referred appellant, together with a statement of accepted facts, the complete case record and questions to be addressed, to Dr. Joseph A. Fabiani, a Board-certified orthopedic surgeon, for an impartial medical examination to resolve the conflict.

By report dated March 3, 1997, Dr. Fabiani reviewed appellant's factual and medical history and the complete case record, noted radiographic evidence and other test results,³ reported his examination results⁴ and opined:

"[Appellant's] present symptomatology is secondary to cervical degenerative disc disease at the C5-6, C6-7 levels which is causing her shoulder pain. There are no neurological objective findings during my examination or of those of the other examining physicians. I do find that she has pain with extension and some compression causes pain that would indicate facet changes and this is based and supported by x-ray and MRI [scan] findings. The MRI [scan] findings of the rotator cuff certainly are not caused by the accident. In my opinion it is preexisting. [Appellant] also appears to have a significant amount of functional overlay and for this reason she should be treated 'gently' and encouraged to

³ Dr. Fabiani noted that cervical MRI scan results demonstrated significant advanced degenerative disc disease at C5-6 and C6-7 with some spur formation present, and that EMG findings suggested some changes in the C5-6 and C6-7 right dermatome.

⁴ Dr. Fabiani noted that appellant could rotate her head to the right and left and flex without difficulty, that she guarded her cervical spine when examined in rotation, that there was no trapezius spasm and no atrophy of any of the neck or shoulder musculature. He further noted that appellant had some tenderness along the rhomboid parascapular muscle, but had full flexion, that she extended only 10 to 15 degrees and that compression here caused pain.

return to light duty in a job with no overhead lifting. If she would have to case mail then she would have to stand on a platform so that she does not extend her neck, however, she could certainly utilize a collar to prevent this. I would allow [appellant] to return to work lifting a maximum of 20 pounds, with a part sitting and part standing position utilizing a collar in flexion. She may eventually need an anterior cervical disc fusion.”

On March 4, 1997 Dr. Kaplan noted that appellant continued to report neck and shoulder pain and he opined that she remained disabled from employment. Reports dated April 8 and May 8, 1997 noted the same.

On April 17, 1997 the Office requested that Dr. Fabiani provide a supplemental report clarifying his opinion regarding causal relation and it posed specific questions to be addressed.

By report dated April 23, 1997, Dr. Fabiani opined:

“[Appellant] did sustain a cervical strain due to the employment. It is my impression that she did not sustain a tear of the rotator cuff. It is my opinion that this lasted for approximately three months. The present symptomatology are due to the osteoarthritic degenerative disc disease of the cervical spine and are not work related. The objective findings to support this is pain with compression of the cervical spine and the MRI [scan] findings of purely mild advanced degenerative disc disease of C5-6 and C6-7 with moderate advanced disc protrusions.

“The restrictions that I gave [appellant] were strictly for prevention of aggravating the condition of her arthritis and not due to the cervical strain that she has.”

On May 8, 1997 the Office issued a notice of proposed termination of compensation finding that the weight of the medical evidence established that appellant no longer suffered from any residuals of the February 21, 1995 cervical soft tissue muscular strain injury. It indicated that the conflict between appellant’s treating physicians and Dr. Shuster was resolved by the well-rationalized reports of Dr. Fabiani which were based on a complete and accurate factual and medical history and which found that appellant’s February 21, 1995 cervical soft tissue muscle strain injury had resolved after about three months and that her present symptomatology was due to degenerative disc disease and other preexisting nonwork-related conditions.

By letter dated June 6, 1997 appellant, through her representative, contended that the Office never adjudicated whether appellant had a consequential psychological injury, that Dr. Fabiani did not provide rationale as to why appellant’s rotator cuff tear was preexisting and was not related to the February 21, 1995 incident and that Dr. Fabiani could not be impartial in this case because he was affiliated with Allegheny University Hospitals, as were two of appellant’s physicians who provided other services for appellant and were not involved in the creation of the conflict.

By decision dated June 11, 1997, the Office finalized the proposed termination of compensation finding that the arguments raised were not sufficient to support continuation of compensation. The Office found that, as a consequential injury arises out of original injury residuals or impairment and as there were no injury residuals or impairment identified in this case, there was no basis for such consequential injury claim. The Office further found that, as no rotator cuff injury had been accepted by the Office, it was appellant's burden of proof to demonstrate, through the submission of rationalized evidence, that such injury was causally related to her employment and not the Office's burden of proof to disprove such relationship. The Office also found that physicians in a partnership with a treating physician were not eligible to act as an impartial medical examiner, but that did not apply to physicians who merely had an affiliation with the same hospital as had some of appellant's treating physicians.

By letters dated June 19 and 23, 1997, appellant requested an oral hearing. In support, appellant submitted a May 8, 1997 report from Dr. Kaplan who stated, regarding Dr. Fabiani's report: "He certainly agrees that there is ongoing evidence of cervical disc problems. These most certainly were aggravated by her work trauma. [Dr. Fabiani] did ignore the EMG formulating his opinion but does admit that she may require surgery at some point in the future. In any event, [appellant] remains disabled for any and all employment at this time." Appellant also submitted a June 17, 1997 statement from Dr. Kaplan which noted that appellant was under his care "for injuries incurred on February 21, 1995. She is disabled from February 21, 1995 through the present." Also submitted was a June 17, 1997 progress note from Dr. Peff which noted multiple complaints of musculoskeletal pain including neck, shoulder girdle, lower back, arms and legs. He stated, "I agree that she is disabled for any and all employment at this time."

The hearing was held on January 28, 1998 at which appellant testified and was represented by a new representative. She testified regarding the duties of a mailhandler, her injury and treatment and her attempt to return to work, but claimed that she finally had to stop in August 1995. Appellant stated that she was under the care of an orthopedist, a pain specialist, and a chiropractor. She alleged that, since her original injury, her neck and shoulder pain had never resolved. Appellant's representative argued that Dr. Fabiani's report was not rationalized, and argued that appellant's rotator cuff tear was work related.

Also submitted was a March 2, 1998 report from Dr. Peff, which noted in pertinent part:

"[Appellant's] condition is a complicated problem with a strong emotional component on top of numerous complaints of musculoskeletal pain. Findings on the diagnostic tests of her cervical spine including x-rays and an MRI [scan] demonstrating evidence of degenerative disc disease, certainly a preexisting condition. [Appellant] has evidence of cervical radiculopathy, but on numerous examinations performed by me over the past few years, she has not demonstrated any significant radicular findings in her upper extremities. It is my opinion that the findings on the MRI [scan] of the rotator cuff tear of the right shoulder are not related to the event on February 21, 1995 and is most likely a preexisting condition. It is my opinion, based on a reasonable degree of medical certainty, that she sustained some type of soft tissue injury at the time of her accident on February 21, 1995 and despite prolonged conservative treatment including

medications, manipulations and conventional modalities, continues to complain of pain. Moreover, [appellant] has demonstrated a strong psychiatric component which has complicated her musculoskeletal injury.

“In summary, [appellant] has had the benefit of extensive prolonged treatment for a soft tissue injury which occurred three years ago and despite that has failed to resolve her condition. She has an underlying degenerative condition of the cervical spine which is progressive and may in fact lead to significant disability in the future, possibly surgical intervention....”

By decision dated May 13, 1998, the hearing representative affirmed the June 11, 1997 Office termination decision finding that the weight of the medical opinion evidence of record supported that appellant had no further disability due to or need for continued medical treatment for her accepted cervical soft tissue muscle strain injury. The hearing representative found that the conflict in medical opinion evidence was resolved by the reports of Dr. Fabiani. The hearing representative noted that Dr. Fabiani opined that appellant’s accepted condition of cervical soft tissue muscular strain lasted about three months, that her present neck symptomatology was due to osteoarthritic degenerative disc disease of the cervical spine which was not work related and that appellant’s current work restrictions were not due to the accepted injury, but were prophylactic in nature and were designed to prevent further aggravation of her arthritic condition. The hearing representative also noted that Dr. Fabiani opined that appellant’s right rotator cuff tear was a preexisting condition, unrelated to her February 21, 1995 accepted injury. The hearing representative found that Dr. Kaplan’s report was conclusory and was unsupported by rationale explaining the pathophysiology of how and why appellant’s preexisting cervical arthritis was aggravated by her cervical soft tissue muscular strain injury and that Dr. Peff’s additional report concurred in most part with the opinions of Dr. Fabiani, but failed to offer any pathophysiologic explanation for why appellant’s soft tissue injury had failed to resolve with appropriate treatment after three years.

The Board finds that appellant had no continuing disability or injury residuals which required further treatment after June 22, 1997, causally related to her February 21, 1995 cervical soft tissue muscular strain injury.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁵ After it has determined that an employee has disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁶ Further, the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss.⁷ To terminate authorization for medical

⁵ *Harold S. McGough*, 36 ECAB 332 (1984).

⁶ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁷ *Marlene G. Owens*, 39 ECAB 1320 (1988).

treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.⁸

In the instant case, the Office met its burden of proof to terminate both compensation entitlement and entitlement of medical benefits.

In this case, appellant's physicians who addressed her ability to work, including Drs. Peff and Kaplan, opined that she remained disabled for all employment.⁹

However, Drs. Mattei and Shuster found no pathological entities that would support appellant's subjective complaints, and Dr. Shuster opined that appellant was fully recovered from the February 21, 1995 work incident, and that no additional therapy or treatment was indicated.

Accordingly, the Office correctly determined that a conflict in medical opinion evidence had arisen on whether appellant remained disabled due to her accepted 1995 cervical soft tissue muscular strain injury and it properly referred appellant, together with a statement of accepted facts and the complete case record, to a properly chosen impartial medical specialist, to resolve the conflict.

In two complete and well-rationalized medical reports, and with the benefit of a complete and accurate factual and medical history and the review of the other medical reports of record, Dr. Fabiani opined that appellant's present symptomatology was secondary to cervical degenerative disc disease, which was not a condition accepted as being employment related. He opined that appellant's accepted employment-related cervical soft tissue strain would have lasted approximately three months, and noted that the recommended activity restrictions were merely prophylactic to avoid aggravation of her osteoarthritic nonwork-related condition. Dr. Fabiani further found that appellant's rotator cuff tear was preexisting, and was not caused by the February 21, 1995 accident.

When there exist opposing medical reports of virtually equal weight and rationale, and 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 upon a proper factual background, must be given special weight.¹⁰

In this case, as Dr. Fabiani's opinions were sufficiently well rationalized, based upon his findings of an absence of objective symptomatology related to the accepted cervical soft tissue

⁸ See *Calvin S. Mays*, 39 ECAB 993 (1988); *Patricia Brazzell*, 38 ECAB 299 (1986); *Amy R. Rogers*, 32 ECAB 1429 (1981).

⁹ The Board notes, however, that these physicians appeared to base these determinations of continuing disability on consideration of conditions other than the accepted 1995 cervical soft tissue muscle strain, including cervical radiculopathy, cervical degenerative disc disease and osteoarthritis, right shoulder problems including a rotator cuff tear, and other musculoskeletal back problems, which are not now compensable under the Federal Employees' Compensation Act.

¹⁰ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

muscular strain injury and were based upon a proper factual and medical background, they must be accorded that special weight and therefore constitute the weight of the medical opinion evidence of record in establishing that appellant had no further disability or medical residuals requiring further treatment, causally related to her 1995 cervical soft tissue muscular strain injury.

Thereafter appellant submitted an additional report from Dr. Peff, whose previous reports were specifically identified as creating the conflict that was resolved by Dr. Fabiani. As this additional report merely repeated a prior assessment and opinion on causal relationship and as Dr. Peff was on one side of the conflict that Dr. Fabiani resolved, his additional report is insufficient to overcome the special weight accorded Dr. Fabiani's opinion or to create a new conflict with it.¹¹

On appeal appellant's representative contends that Dr. Fabiani provided no medical rationale for his opinion that appellant's rotator cuff tear was preexisting. The Board notes that such condition had not been accepted by the Office as occurring related to the February 21, 1995 incident, such that it is appellant's burden to provide rationalized medical evidence sufficient to establish causal relation, not the Office's burden to disprove any such relationship.¹² The Board further notes that the existence of any consequential emotional condition has not been accepted by the Office, such that it is also remains appellant's burden of proof to establish. The medical evidence of record includes the reports of Drs. Berman and Byron who found no evidence of any 1995 cervical soft tissue muscle strain-related emotional condition.

¹¹ *Dorothy Sidwell*, 41 ECAB 857 (1990); *see also Helga Risor (Windell A. Risor)*, 41 ECAB 939 (1990) (additional reports from Office medical adviser, who was on one side of a conflict resolved by an impartial medical specialist, could not be used as a basis for creating another conflict in medical opinion).

¹² The representative also argued that the selection of Dr. Fabiani was improper due to his having the same hospital affiliation as two of appellant's treating physicians not involved in the conflict. This argument was already addressed by the Office hearing representative in his May 13, 1998 decision. As to the argument that the Office's determination of a conflict was improper, that Dr. Fabiani's reports were speculative, vague, incomplete or unrationalized and that Dr. Fabiani's syntax was confusing, the Board finds these contentions are unconvincing and unsupported by the record.

Accordingly, the decision of the Office of Workers' Compensation Programs dated May 13, 1998 is hereby affirmed.

Dated, Washington, D.C.
August 29, 2000

David S. Gerson
Member

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member