

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of SCARLETT ANN SHANTON and DEPARTMENT OF VETERANS  
AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Martinsburg, WV

*Docket No. 00-1166; Submitted on the Record;  
Issued November 26, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective January 27, 2000 on the grounds that she had no disability due to her employment injuries of October 8, 1996 and June 3, 1998 after that date.

In this case, the Office accepted the conditions of cervical strain and subluxation as arising from appellant's October 8, 1996 work injury. The case was assigned claim number A3-221958. By decision dated September 12, 1997, the Office denied appellant's continuing entitlement to benefits as the weight of the medical evidence supported that she had fully recovered from the effects of the work injury. By decision dated June 26, 1998, an Office hearing representative affirmed the prior decision.

The Office also accepted the condition of cervical strain as arising from a June 3, 1998 work injury. The case was assigned claim number A3-235430. Appellant was paid appropriate benefits and eventually returned to light duty on a part-time basis. The Office merged appellant's original claim arising from her October 8, 1996 work injury into the claim number A3-235430.

In an October 12, 1998 response to a September 17, 1998 letter from appellant's certified case manager, Dr. Joseph Liberman, appellant's attending neurologist, advised that appellant's current diagnosis was post-traumatic cervical myofascial pain syndrome. Trigger point injections, physical therapy and an electromyogram (EMG) nerve conduction study to rule out carpal tunnel syndrome and right suprascapular nerve entrapment were the recommended medical treatment regimen. Dr. Liberman advised that appellant would not be able to return to her original employment as a registered nurse, but could possibly increase her modified light-duty work to eight hours per day on or about January 1, 2000. He further advised that appellant might possibly be able to resume her usual job activities as a registered nurse for four hours per day on January 1, 2000, but stated that it was uncertain whether she would be able to resume full-time employment in that position.

In a follow-up neurologic evaluation of appellant on December 10, 1998, Dr. Liberman noted that appellant had good motor strength in both upper extremities with symmetrical reflexes. Tenderness over both shoulder girdles was noted. Appellant could flex her neck forward 15 degrees and extend it backwards 15 degrees. She had 15 degrees of lateral flexion and 35 degrees of rotation of her neck bilaterally. Dr. Liberman provided an impression of chronic neck and right shoulder pain with headaches secondary and occasional right hand numbness. He stated that appellant's condition was permanent and she had a 15 percent disability based on the range of motion model as found in the fourth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment*. He continued to recommend trigger point injections and have an EMG to rule out a suprascapular nerve entrapment. In an accompanying Form CA-20a, Dr. Liberman advised appellant could only work four hours per day with restrictions.

The Office referred appellant, together with a statement of accepted facts, medical records, and list of questions, to Dr. Robert Cirincione, an orthopedic surgeon, for a second opinion on whether appellant had any continuing residual disability due to her accepted injury of cervical strain. The Office noted that appellant had been receiving medical treatment from her physician and chiropractor since June. The Office further noted that appellant has been working four hours per day in a light-duty status.

In a report dated December 16, 1998, Dr. Cirincione, based upon a review of the medical records, physical examination and statement of accepted facts, opined that there was no objective finding to support an ongoing diagnosis of significant impairment to appellant's cervical spine or right shoulder. He noted that appellant was on chronic narcotic treatment where she only sees her physician once every two months. Appellant was noted to be on high dose chronic narcotic usage. Dr. Cirincione opined that appellant was able to return to work in her clerical position. He further stated that he did not believe that the physical examination and history supports any permanent impairment secondary to appellant's dramatic symptom magnification findings noted on the physical examination and the inconsistencies in the medical record. Dr. Cirincione stated diagnosis was not established as there were no clinical diagnosis which could be performed based on the findings noted in examination.

In a February 11, 1999 response to a January 25, 1999 letter from appellant's certified case manager, Dr. Liberman disagreed with Dr. Cirincione's opinion that appellant could resume her normal activities. He further stated that there has been no side effects from appellant's use of Tylenol #4 nor any indication of abuse or addiction and recommended that appellant continue to take narcotic analgesics and muscle relaxants. In an accompanying Form CA-20a of February 11, 1999, Dr. Liberman diagnosed cervical radiculopathy, opined that appellant could only work four hours of limited duty. Physical therapy, trigger point injections, use of a TENS unit, and an EMG/nerve conduction study were recommended. Subsequent reports continued to provide an impression of chronic neck and right shoulder pain and continue with the medical treatment regimen along with part-time modified work with restrictions.

The Office found that a conflict in the medical opinion evidence existed between Dr. Liberman, appellant's attending physician, who continued to opine that appellant could only work four hours per day light duty and Dr. Cirincione, a second opinion physician, who opined that the work-related injury had resolved and appellant could work an eight-hour day with no

work injury-related restrictions. The Office advised appellant by letter dated March 25, 1999 that she would be undergoing an additional examination.

In a report dated September 27, 1999, Dr. Frank G. Nisenfeld, a Board-certified orthopedic surgeon, based upon a review of the medical record, statement of accepted facts and physical examination, opined that he could find no evidence of any diagnosis based on his review of records and his physical examination. Physical examination revealed no tenderness, no muscular spasm in the cervical spine or upper extremities. There was no evidence of surgical scar or edema. Peripheral circulation was intact to the upper extremities. Decreased range of motion of the cervical spine was noted. Flexion was 40 degrees, rotation was 40 degrees in each direction, and sidebending was 30 degrees to the right and 15 degrees to the left. Muscle strength, sensory, reflex and circulatory examinations in both upper extremities was within normal limits. As mentioned, there was no muscular spasm or muscular atrophy. Dr. Nisenfeld stated that appellant's prognosis to be guarded because of the chronicity of her condition. Dr. Nisenfeld opined that appellant could return to full duty, full time and that there was no evidence of any impairment. He stated that he had no recommendations for any medical treatment.

By notice of proposed termination of compensation dated November 30, 1999, the Office advised appellant that her compensation benefits would be terminated based upon Dr. Nisenfeld's well-rationalized and complete medical report, which demonstrated that appellant had no further residuals from her accepted employment injury. The Office determined that, based upon Dr. Nisenfeld's report, her current disability was not due to her accepted cervical strain.

In response to the Office's proposed termination, appellant submitted reports from Dr. Liberman dated December 20 and a December 29, 1999 report from Dr. Kerry V. Bertschinger, a chiropractor.

In the December 20, 1999 report, Dr. Liberman advised that he reviewed the reports of Drs. Cirincione and Nisenfeld and disagreed with their impressions and conclusions. He stated that appellant's diagnosis was post-traumatic myofascial pain syndrome as evidenced by prominent trigger points noted in the neck and shoulder region. Dr. Liberman opined that this post-traumatic myofascial pain syndrome was a result of appellant's actual work-related injuries, the last being on June 3, 1998. He advised that this is an extremely common syndrome, but that orthopedic surgeons are unfamiliar with this diagnosis and treatment. Dr. Liberman recommended that appellant be referred to a rheumatologist. He further stated that appellant's problem was permanent and would require accommodations at work indefinitely.

In the December 29, 1999 report, Dr. Bertschinger noted appellant's history of injury and medical treatment received. Examination findings of December 28, 1999 were provided which Dr. Bertschinger stated were conclusive that appellant has a chronic long-standing myofascial condition of the muscles and fascia of her neck and right shoulder due to repetitive injuries to her neck. He stated that this condition has been helped with medication, chiropractic manipulation and myofascial release. Dr. Bertschinger opined that appellant's condition was permanent as she would experience neck and right shoulder pain in times of stress, heavy lifting and repetitive

lifting. He further advised that appellant had a soft tissue injury and should be treated by a soft tissue specialist.

By decision dated January 27, 2000, the Office finalized its decision to terminate appellant's compensation and medical benefits effective the same day for the reason that her condition had resolved. The Office found that the weight of the medical opinion evidence was represented by the report of Dr. Nisenfeld acting as an independent medical examiner, who concluded that the effects of the accepted cervical strain had resolved.

The Board finds that the Office properly found that the evidence established that appellant's employment-related disability had ceased effective January 27, 2000, the date compensation benefits were terminated.

It is well established that, once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.<sup>1</sup> After it has been determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without first establishing that the disability has ceased or that it is no longer related to the employment.<sup>2</sup>

In this case, the Office accepted appellant's claims for cervical strain for work injuries arising on October 8, 1996 and June 3, 1998. The Office found a conflict in the medical opinion evidence between Dr. Liberman, appellant's treating neurologist, and Dr. Cirincione, a second opinion physician, concerning whether the effects of appellant's employment injuries had resolved. Section 8123(a) of the Federal Employees' Compensation Act provides that, if 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.<sup>3</sup> Because of the conflict of medical opinion evidence between Drs. Liberman and Cirincione, the Office referred appellant to Dr. Nisenfeld, a Board-certified orthopedic surgeon, for an impartial medical evaluation. In his report of September 27, 1999, Dr. Nisenfeld opined that appellant's work-related residuals had ceased and that she could return to full-time employment without restrictions.

In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical examiner for the purpose of resolving the conflict, the opinion of such examiner, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>4</sup> As Dr. Nisenfeld's report was well rationalized and was based on a complete factual and medical background, it represents the weight of the medical evidence and establishes that appellant's work-related residuals had ceased.

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<sup>1</sup> *Lawrence D. Price*, 47 ECAB 120 (1995).

<sup>2</sup> *Id.*

<sup>3</sup> 5 U.S.C. § 8123(a); *see also Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>4</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

Thereafter, appellant submitted reports from Drs. Liberman and Bertschinger. The Board notes that Dr. Nisenfeld was selected to resolve the conflict in medical opinions between Drs. Liberman and Cirincione. For this reason, the subsequent report of Dr. Liberman which was essentially repetitive of his prior reports is insufficient to outweigh the special weight given the report by Dr. Nisenfeld as Dr. Liberman had participated in the creation of the medical conflict which was referred to Dr. Nisenfeld for resolution.<sup>5</sup> Regarding Dr. Bertschinger's opinion, the Board notes that Dr. Bertschinger is the chiropractor of record and his report offers no new insight into appellant's condition as it in essence is a restatement of opinions already contained in the record.

Thus, the opinions of Drs. Liberman and Bertschinger are insufficient to create a conflict in the medical opinion evidence with the well-rationalized and complete medical report by Dr. Nisenfeld.<sup>6</sup> Consequently, Dr. Nisenfeld's report remained the weight of the medical opinion evidence in this case and established that appellant had no continuing disability after January 27, 2000 causally related to her October 8, 1996 and June 3, 1998 accepted employment injury of cervical strain.

The decision of the Office of Workers' Compensation Programs dated January 27, 2000 is hereby affirmed.

Dated, Washington, DC  
November 26, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member

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<sup>5</sup> *Josephine L. Bass*, 43 ECAB 929 (1992); *see Dorothy Sidwell*, 41 ECAB 857 (1990).

<sup>6</sup> *Connie Johns*, 44 ECAB 560 (1993); *see also Billie C. Rae*, 43 ECAB 192 (1991) and cases cited therein.