

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

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**D.K., Appellant**

**and**

**DEPARTMENT OF JUSTICE, BUREAU OF  
PRISONS, Glynco, GA, Employer**

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**Docket No. 09-1361  
Issued: September 8, 2010**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

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

**JURISDICTION**

On May 4, 2009 appellant filed a timely appeal from merit decisions of the Office of Workers' Compensation Programs dated July 30, 2008 and February 19, 2009 regarding the termination of her compensation benefits and the denial of her request to expand her accepted claim to include a cervical condition. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant's claim should be expanded to include a cervical condition; and (2) whether the Office properly terminated compensation benefits effective July 30, 2008.

**FACTUAL HISTORY**

This case has previously been before the Board. By decision dated April 22, 2008, the Board reversed the Office decisions dated December 21, 2006 and March 30, 2007 terminating

her compensations benefits.<sup>1</sup> The Board also set aside decisions dated October 31 and December 4, 2006 and June 13, 2007 denying her request for expansion of her claim to include a cervical condition and authorization for treatment for her cervical condition due to an unresolved conflict in the medical opinion evidence. The Board found an unresolved conflict in medical opinion between Dr. Mark A.P. Filippone,<sup>2</sup> a Board-certified physiatrist, and Dr. A.R. Sayed Bakhaty,<sup>3</sup> a physician, for appellant and Dr. Zohar Stark,<sup>4</sup> a second opinion Board-certified orthopedic surgeon, regarding appellant's ongoing residuals and disability were due to her accepted right shoulder contusion and labral tear and whether her diagnosed cervical disc disease was caused or contributed to by the May 22, 2001 employment injury. The findings of fact and conclusions of law from the prior decision are hereby incorporated by reference.<sup>5</sup>

On May 22, 2008, following the Board's April 24, 2008 decision, the Office referred appellant to Dr. Robert Dennis, a Board-certified orthopedic surgeon to resolve the conflict in the medical opinion evidence between Drs. Filippone and Dr. Bakhaty, for appellant, Dr. Stark, the Office referral physician. The record contains a bypass sheet dated May 14, 2008 for Dr. Elliot Semet with "L" noted under reason for bypass and a referral form to Dr. Dennis.

In a June 11, 2008 report, Dr. Dennis diagnosed mild right shoulder labral abrasion, status post arthroscopic debridement, total right shoulder recovery, preexisting and unrelated mild cervical spine degenerative changes. A physical examination of the right shoulder revealed normal range of motion, minimal crepitus and normal power grip and pinch. Dr. Dennis also reported there were no impingement syndrome signs and appellant was able to raise her hands over head. An examination of the cervical spine revealed trigger points, a negative adduction test and negative compression test. Range of motion included 60 degrees forward flexion, 40 degrees back flexion and 30 degrees lateral bending. Overall, Dr. Dennis concluded that the cervical examination was very close to normal and appellant did "not have neck pathology that is in any way in excess of her chronological age." He opined that her accepted shoulder injury had resolved and that her degenerative cervical spine changes were unrelated to the May 22, 2001 employment injury. In support of his conclusions, Dr. Dennis opined that the degenerative

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<sup>1</sup> Docket No. 07-2311 (issued April 22, 2008).

<sup>2</sup> Dr. Filippone diagnosed right shoulder pain, right cervical paraspinal pain and C5-6 cervical radiculopathy which he attributed to her employment injury.

<sup>3</sup> Dr. Bakhaty diagnosed right-sided C5-6 radiculopathy, C5-6 post-traumatic disc bulge, post-traumatic myofascial syndrome, post-traumatic right shoulder tendinitis with persistent complaints following surgery, which he attributed to her employment injury.

<sup>4</sup> Dr. Zohar concluded that appellant had no disability attributable to the May 22, 2001 employment injury. He attributed her ongoing symptoms to her cervical spine degenerative disc disease, which was not caused or aggravated by the employment injury.

<sup>5</sup> On May 22, 2001 appellant, then a 31-year-old corrections officer, filed a traumatic injury claim alleging that she injured her right shoulder on that date while shooting a shotgun. The Office accepted the claim for right shoulder contusion and labral tear and authorized right shoulder arthroscopic surgery, which occurred on October 20, 2005. Appellant was reassigned to a secretarial position effective November 12, 2001. The Office accepted appellant's June 8 and September 8, 2005 recurrence claims. Appellant was released to full-duty work on January 6, 2006 by Dr. Lawrence I. Barr, a treating osteopath. On October 10, 2006 the Office placed appellant on the periodic rolls for temporary total disability.

cervical spine changes were not employment related and were not caused by her firing of a shotgun. As to her right shoulder, he noted the condition was no longer present and any aggravation had ceased. Dr. Dennis stated that giving appellant “the maximum benefit of the doubt, the impacts were responsible for the [diagnosed conditions]” and the surgery completely resolved those problems. He noted appellant’s examination revealed no “definable clinical functional impairment.” In his orthopedic summary, Dr. Dennis related that he was unable to find an injury to the cervical spine due to a normal muscle and range of motion testing, no cervical spasm and the normal age-related degenerative spine changes. As to her right shoulder, he noted that usually the cervical spine is spared when there is impact to the right shoulder.

On June 24, 2008 the Office issued a proposed notice of termination of compensation benefits based on Dr. Dennis’ impartial medical examiner findings that appellant had no ongoing residuals or disability due to the May 22, 2001 employment injury and that her cervical condition had not been caused or aggravated by the employment injury.

In a letter dated June 8, 2008, appellant’s counsel disagreed with the proposal to terminate appellant’s compensation benefits and requested proof that Dr. Dennis had been properly selected from the Physicians Directory System (PDS). She also contended that Dr. Dennis’ opinion regarding the cervical condition was speculative and should not be entitled to the weight normally given to an impartial medical examiner.

On July 22, 2008 an Office medical adviser reviewed Dr. Dennis’ June 11, 2008 report and opined that the physician had adequately addressed the questions posed in an excellent report.

By decision dated July 30, 2008, the Office terminated appellant’s compensation benefits effective that day.

On August 5, 2008 appellant’s counsel requested an oral hearing before an Office hearings representative, which was held on December 2, 2008.

Appellant submitted reports from Drs. Filippone and Dr. Bakhaty in support of her claim that she continued to have residuals from her accepted employment injury and that her cervical condition was employment related. Dr. Filippone, in an August 22, 2008 report, noted his disagreement with Dr. Dennis’ conclusion that appellant’s cervical condition was not employment related and that her shoulder condition had resolved. In reports dated September 2 and December 2, 2008, Dr. Bakhaty reiterated his opinion that appellant’s cervical conditions continued and were employment related.

By decision dated February 19, 2009, an Office hearing representative affirmed the July 30, 2008 decision terminating appellant’s compensation benefits.

**LEGAL PRECEDENT -- ISSUE 1**

To establish a causal relationship between the condition as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background supporting such a casual

relationship.<sup>6</sup> Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.<sup>7</sup> Rationalized medical evidence is evidence which includes a physician's rationalized medical opinion on the issue of whether there is a causal relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>8</sup> Neither the mere fact that a disease or condition manifests itself during a period of employment, nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.<sup>9</sup>

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: 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.<sup>10</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>11</sup>

It is well established that Office procedures provide that an impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists, including those certified by the American Medical Association and American Osteopathic Association.<sup>12</sup> The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, the Office has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.<sup>13</sup> These procedures contemplate selection on a strict rotating basis in order to negate any appearance that preferential treatment exists between a physician and the Office.<sup>14</sup> Moreover, the reasons for the selection made must be documented in the case record.<sup>15</sup>

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<sup>6</sup> *M.W.*, 57 ECAB 710 (2006); *John D. Jackson*, 55 ECAB 465 (2004).

<sup>7</sup> *D.E.*, 58 ECAB 448 (2007); *Mary J. Summers*, 55 ECAB 730 (2004).

<sup>8</sup> *Phillip L. Barnes* 55 ECAB 426 (2004); *Leslie C. Moore*, 52 ECAB 132 (2000).

<sup>9</sup> *V.W.*, 58 ECAB 428 (2007); *Ernest St. Pierre*, 51 ECAB 623 (2000).

<sup>10</sup> 5 U.S.C. § 8123(a); *R.C.*, 58 ECAB 238 (2006); *Darlene R. Kennedy*, 57 ECAB 414 (2006).

<sup>11</sup> *V.G.*, 59 ECAB \_\_\_\_ (Docket No. 07-2179, issued July 14, 2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

<sup>12</sup> *See A.R.*, 61 ECAB \_\_\_\_ (Docket No. 09-1566, issued June 2, 2010); *LaDonna M. Andrews*, 55 ECAB 301 (2004).

<sup>13</sup> *See Raymond J. Brown*, 52 ECAB 192 (2001).

<sup>14</sup> *Id.* *See also Miguel A. Muniz*, 54 ECAB 217 (2002).

<sup>15</sup> *See* Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (May 2003). A claimant may ask to participate in the selection of the impartial medical specialist under certain conditions; however, no request was made in this case.

## LEGAL PRECEDENT -- ISSUE 2

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>16</sup> The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.<sup>17</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>18</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>19</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.<sup>20</sup>

Section 8123(a) of the Act provides in pertinent part: "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."<sup>21</sup> Where a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background must be given special weight.<sup>22</sup>

It is well established that Office procedures provide that an impartial medical specialist must be selected from a rotational list of qualified Board-certified specialists, including those certified by the American Medical Association and American Osteopathic Association.<sup>23</sup> The physician selected as the impartial specialist must be one wholly free to make an independent evaluation and judgment. To achieve this end, the Office has developed procedures for the selection of the impartial medical specialist designed to provide adequate safeguards against the appearance that the selected physician's opinion was biased or prejudiced.<sup>24</sup> These procedures

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<sup>16</sup> *S.F.*, 59 ECAB \_\_\_\_ (Docket No. 08-426, issued July 16, 2008); *I.J.*, 59 ECAB \_\_\_\_ (Docket No. 07-2362, issued March 11, 2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

<sup>17</sup> *I.J. id.*; *J.M.*, 58 ECAB 478 (2007); *Elsie L. Price*, 54 ECAB 734 (2003); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>18</sup> *See T.P.*, 58 ECAB 524 (2007); *J.M., id.*; *Del K. Rykert*, 40 ECAB 284 (1988).

<sup>19</sup> *T.P., id.*; *Darlene R. Kennedy*, *supra* note 10.

<sup>20</sup> *T.P.*, *supra* note 18; *Kathryn E. Demarsh*, 56 ECAB 677 (2005); *James F. Weikel*, 54 ECAB 660 (2003); *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>21</sup> 5 U.S.C. § 8123(a); *see also R.H.*, 59 ECAB \_\_\_\_ (Docket No. 07-2124, issued March 7, 2008); *Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

<sup>22</sup> *V.G.*, 59 ECAB \_\_\_\_ (Docket No. 07-2179, issued July 14, 2008); *Sharyn D. Bannick*, 54 ECAB 537 (2003); *Gary R. Sieber*, 46 ECAB 215 (1994).

<sup>23</sup> *See supra* note 12.

<sup>24</sup> *See Raymond J. Brown*, *supra* note 13.

contemplate selection on a strict rotating basis in order to negate any appearance that preferential treatment exists between a physician and the Office.<sup>25</sup> Moreover, the reasons for the selection made must be documented in the case record.<sup>26</sup>

### **ANALYSIS -- ISSUES 1 & 2**

The Office found, pursuant to the Board's April 24, 2008 decision, that there was an unresolved conflict in the medical opinion evidence between Drs. Filippone and Bakhaty, for appellant and Dr. Stark, an Office referral physician, regarding whether appellant continued to have any residuals and disability due to her accepted right shoulder condition. Medical evidence from Drs. Filippone and Bakhaty indicated that appellant continued to have residuals and disability as a result of her accepted May 22, 2001 employment injury. Dr. Stark concluded that appellant had no residuals or disability as a result of her injury. Dr. Dennis found that appellant had no employment-related cervical condition and that appellant had no residuals or disability due to her accepted right shoulder employment injury.

On appeal, counsel contends that the Office did not properly select Dr. Dennis as the impartial medical specialist. Under its procedures, the Office claims examiner is to assure that the impartial medical specialist is selected in conformance with the PDS from those Board-certified specialists who are qualified and available to conduct the examination. The procedure manual provides that the case file is to be supplemented with documentation of those instances in which a physician was contacted and declined the referral or examination is not otherwise feasible.<sup>27</sup> The district Office is to document in the case record how the rotational procedures were followed.

The evidence of record does not provide adequate documentation pertaining to the selection of Dr. Dennis as the impartial medical specialist. A bypass form notes that Dr. Elliot Semet was bypassed on May 14, 2008 with the letter "L" noted under the reason for the bypass and a referral form for Dr. Dennis. The evidence does not reflect whether Dr. Dennis was the first physician contacted after bypassing Dr. Semet on May 14, 2008, what the letter "L" means for bypassing Dr. Semet, whether Dr. Dennis was next on any list maintained by the Office or provide any reference to the rotational procedures for selecting the impartial medical specialist. This evidence, however, is not adequate according to the procedure manual's requirement that the reason for the selection must be documented on the case record. To establish that Dr. Dennis was properly selected in compliance with the rotational system using the PDS, the record must reflect the process. For this reason, the Board finds that Dr. Dennis was not properly selected as the impartial medical specialist. The Office's decision denying expansion of appellant's claim to include a cervical condition is set aside and the decision terminating her compensation benefits must be reversed due to an unresolved conflict in medical opinion.

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<sup>25</sup> *Id.* See also Miguel A. Muniz, *supra* note 14.

<sup>26</sup> See Federal (FECA) Procedure Manual, *supra* note 15.

<sup>27</sup> *Id.* at Chapter 3.500.4(b)(7).

**CONCLUSION**

The Board finds that this case is not in posture for a decision as to whether appellant's claim should be expanded to include a cervical condition and authorization for treatment for her cervical condition due to an unresolved conflict in the medical opinion evidence. The Board further finds that the Office did not meet its burden of proof to terminate her compensation as of July 30, 2008.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 19, 2009 and July 30, 2008 are reversed with respect to the termination of appellant's benefits and set aside and remanded with respect to the expansion of her claim.

Issued: September 8, 2010  
Washington, DC

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

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board