

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

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**M.B., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Cherry Hill, NJ, Employer**

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**Docket No. 13-1330  
Issued: February 6, 2014**

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

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On May 15, 2013 appellant, through counsel, filed a timely appeal from a February 19, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this claim.

**ISSUE**

The issue is whether OWCP properly terminated appellant's wage-loss and medical compensation benefits effective July 12, 2013 on the grounds that the accepted lumbar strain had ceased without residuals.

On appeal, counsel asserts that Dr. Zohar Stark, a Board-certified orthopedic surgeon and the impartial medical examiner in the case, should not be accorded the weight of medical opinion as he did not explain why he found no evidence of bilateral carpal tunnel syndrome whereas prior testing demonstrated the condition through September 4, 2009. He also asserts that

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

Dr. Stark failed to support his conclusions and did not recognize the accepted lumbar strain. Additionally, counsel asserts that Dr. Stark supported continuing disability as he found appellant unable to perform her date-of-injury position due to the accepted lumbosacral sprain.

### **FACTUAL HISTORY**

This is appellant's second appeal before the Board. By order issued January 12, 2012,<sup>2</sup> the Board set aside OWCP's December 13, 2010 decision terminating appellant's wage-loss and medical compensation benefits effective May 27, 2010. The Board found that Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, could not serve as impartial medical examiner in the case as he was not properly selected using the Physicians Directory Service (PDS). The Board remanded the case to OWCP for selection of another impartial medical specialist. The law and the facts of the case as set forth in the Board's prior order are incorporated by reference. The relevant factual history is set forth below.

OWCP accepted that on or before July 19, 2005 appellant, then a 58-year-old distribution clerk, sustained a lumbar sprain and left carpal tunnel syndrome. She stopped work on October 5, 2005 and did not return. Appellant received wage-loss compensation benefits on the periodic compensation rolls beginning on August 20, 2005.

From April to August 2006, the employing establishment investigated appellant's activities maintaining rental properties which she owned. It obtained surveillance video showing appellant cutting wood with a circular saw, carrying wood up exterior steps, painting window frames with a brush, pulling weeds and moving trash cans. In an October 5, 2006 administrative interview, appellant admitted that she collected rents and inspected her rental properties. She denied performing the carpentry, painting and gardening tasks as shown in the surveillance video and photographs.<sup>3</sup>

In a December 21, 2006 report, Dr. Mark A. Filippone, an attending Board-certified psychiatrist, diagnosed bilateral repetitive stress injuries to the upper extremities and low back

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<sup>2</sup> Docket No. 11-1003 (issued January 12, 2012).

<sup>3</sup> On April 17, 2006 OWCP obtained a second opinion from Dr. Irving Strouse, a Board-certified orthopedic surgeon, who opined that appellant could perform full-time limited-duty work. On April 25, 2006 OWCP obtained a second opinion from Dr. Bruce Monaghan, a Board-certified orthopedic surgeon, who diagnosed bilateral carpal tunnel syndrome and C5-6 and C6-7 radiculopathy. On August 10, 2006 Dr. Scott M. Fried, an attending osteopathic physician Board-certified in orthopedic surgery, found appellant able to perform full-time work with restrictions, based on the activities she performed in the surveillance video. OWCP found a conflict of opinion between Dr. Fried, for appellant, and Drs. Strouse and Mongahan, for the government, regarding the nature and extent of any continuing disability. To resolve the conflict, OWCP selected Dr. Robert Bachman, a Board-certified orthopedic surgeon, as impartial medical examiner. In an April 30, 2007 letter, OWCP disqualified Dr. Bachman as he was not properly selected. On January 7, 2008 OWCP obtained an impartial opinion from Dr. Ronald Gerson, a Board-certified orthopedic surgeon, who submitted January 7 and March 31, 2008 reports finding the accepted conditions had resolved without residuals.

derangement due solely to her federal employment. He found appellant totally disabled for work through September 2009.<sup>4</sup>

On July 16, 2009 OWCP obtained a second opinion from Dr. Kevin Hanley, a Board-certified orthopedic surgeon, who diagnosed degenerative cervical and lumbar disc disease and bilateral carpal tunnel syndrome. After viewing the 2006 surveillance video, Dr. Hanley submitted a February 4, 2010 supplemental report opining that appellant could return to full-duty work with no restrictions.

OWCP found a conflict of opinion between Dr. Filippone, for appellant, and Dr. Hanley, for the government, regarding the extent of any continuing work-related disability. To resolve the conflict, it selected Dr. George P. Glenn, Jr., a Board-certified orthopedic surgeon, to serve as an impartial medical examiner. Dr. Glenn submitted a December 22, 2009 report finding that the accepted conditions had resolved.

By notice dated April 20, 2010, finalized May 27, 2010 and affirmed on December 13, 2010, OWCP terminated appellant's wage-loss and medical compensation benefits, based on Dr. Glenn's opinion. Counsel then appealed to the Board. On January 12, 2012 the Board issued an order disqualifying Dr. Glenn as he was not properly selected and directed the selection of a new impartial medical examiner.<sup>5</sup>

On March 1, 2012 OWCP selected Dr. Stark as impartial medical examiner. Dr. Stark submitted an April 3, 2012 report, reviewing the medical record and statement of accepted facts. On examination, he found a normal gait, no tenderness of the cervical paraspinals or spinous process, normal cervical range of motion, no sensory or motor deficit in either upper extremity, equal and present deep tendon reflexes of the upper extremities, full range of motion throughout both hands and wrists, no thenar atrophy, negative Tinel's and Phalen's signs at the median and ulnar nerves bilaterally, normal lumbar range of motion with no paraspinal tenderness, negative straight leg raising tests bilaterally, and normal deep tendon reflexes throughout both legs. On review of the medical record, Dr. Stark noted that EMG studies indicated carpal tunnel syndrome on August 22 and September 23, 2005 and September 4, 2009. However, Dr. Stark opined that the accepted carpal tunnel syndrome had resolved as there was no clinical evidence of reduced sensation, atrophy or sensory deficits supporting the condition. He also found that the lumbar strain had resolved as there was no clinical evidence to substantiate the condition. Dr. Stark opined that appellant could perform full-time work with lifting limited to 20 pounds.

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<sup>4</sup> January 23, 2007 electromyography (EMG) and nerve conduction velocity (NCV) studies demonstrated left L5 radiculopathy. A March 12, 2007 lumbar magnetic resonance imaging (MRI) scan obtained for Dr. Filippone showed a Grade 2 L5-S1 spondylolisthesis, L1-2 disc herniation, and bulging of the annulus fibrosis at L3-4. June 4, 2008 and September 4, 2009 EMG and NCV studies demonstrated bilateral carpal tunnel syndrome, left greater than right.

<sup>5</sup> The Director filed a petition for reconsideration and requested oral argument on February 10, 2012, asserting that Dr. Glenn was properly selected. Appellant, through counsel, joined in the request for oral argument on February 24, 2012. By order issued May 3, 2012, the Board denied the Director's request for oral argument. By separate order issued May 3, 2012, the Board denied the petition for reconsideration on the grounds that the Director's petition did not establish an error of law or fact warranting further consideration.

In a July 6, 2012 letter, counsel asserted that Dr. Stark could not serve as impartial medical examiner as his opinion was vague and poorly rationalized.

By decision dated July 12, 2012, OWCP terminated appellant's wage-loss and medical compensation benefits effective that day, based on Dr. Stark's opinion as impartial medical examiner.

In a July 17, 2012 letter, counsel requested a hearing, held by video conference on November 29, 2012. At the hearing, counsel reiterated his contentions that Dr. Stark's opinion was insufficiently rationalized.

By decision dated and finalized February 19, 2013, an OWCP hearing representative affirmed the July 12, 2012 decision terminating appellant's compensation. The hearing representative found that Dr. Stark's opinion contained sufficient medical rationale to resolve the conflict of medical opinion.

### **LEGAL PRECEDENT**

Once OWCP has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.<sup>6</sup> Having determined that an employee has a disability causally related to his or her federal employment, OWCP may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.<sup>7</sup> The Board has long recognized that the evidence needed to sustain OWCP's burden in termination cases must be in the record prior to the action effecting termination. The claimant must have notice and an opportunity to be heard.<sup>8</sup>

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>9</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>10</sup>

Section 8123(a) of FECA provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.<sup>11</sup> When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial medical specialist, pursuant to section 8123(a), to resolve the conflict in the medical

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<sup>6</sup> *Bernadine P. Taylor*, 54 ECAB 342 (2003).

<sup>7</sup> *Id.*

<sup>8</sup> *M.L.*, 57 ECAB 746 (2006).

<sup>9</sup> *Roger G. Payne*, 55 ECAB 535 (2004).

<sup>10</sup> *Pamela K. Guesford*, 53 ECAB 726 (2002).

<sup>11</sup> 5 U.S.C. § 8123(a); *Robert W. Blaine*, 42 ECAB 474 (1991).

evidence.<sup>12</sup> In situations where there are 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 on a proper factual background, must be given special weight.<sup>13</sup>

### ANALYSIS

OWCP accepted that appellant sustained a lumbar sprain and left carpal tunnel syndrome. She received wage-loss compensation on the periodic compensation rolls beginning on August 20, 2005. Dr. Filippone, an attending Board-certified physiatrist, found appellant totally disabled for work through September 2009. Dr. Hanley, a Board-certified orthopedic surgeon and second opinion physician, found appellant able to perform full duty as of February 4, 2010. OWCP found a conflict between Dr. Filippone and Dr. Hanley, and selected Dr. Glenn, a Board-certified orthopedic surgeon, to resolve it. It terminated appellant's compensation benefits effective May 27, 2010, based on Dr. Glenn's December 22, 2009 opinion that the accepted conditions had resolved. Appellant sought an appeal with the Board. By order issued January 12, 2012, the Board found that Dr. Glenn had not been properly selected and remanded the case for selection of a new impartial medical examiner.

On remand of the case, OWCP selected Dr. Stark, a Board-certified orthopedic surgeon, as impartial medical examiner. Dr. Stark submitted an April 3, 2012 report opining that the accepted conditions had resolved without residuals. By decision dated July 12, 2012, OWCP terminated appellant's wage-loss and medical compensation benefits effective that day, based on Dr. Stark's opinion as the weight of the medical evidence. Following an oral hearing, it affirmed the termination by decision issued February 19, 2013.

The Board finds that Dr. Stark's opinion represents the weight of the medical evidence. Dr. Stark's report was based on a complete and accurate medical history as well as a thorough clinical examination. He provided medical rationale to support his opinion that appellant could return to full duty as the accepted conditions had resolved. Dr. Stark explained that he found no objective sign of the accepted carpal tunnel syndrome previously indicated in 2005 and 2009 EMG studies. There were no sensory or motor deficits in either arm. Dr. Stark also explained that the lumbar strain had resolved as appellant had a full range of lumbar motion, no paraspinal tenderness and a normal neurologic examination throughout both lower extremities. Therefore, OWCP's February 19, 2013 decision affirming the prior termination decision was proper under the law and facts of this case.<sup>14</sup>

On appeal, counsel asserts that Dr. Stark should not be accorded special weight because he did not explain why he found no evidence of bilateral carpal tunnel syndrome or a lumbar strain. However, Dr. Stark provided detailed clinical findings that these conditions had resolved. He thoroughly explained that the accepted conditions had ceased without residuals.

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<sup>12</sup> *Delphia Y. Jackson*, 55 ECAB 373 (2004).

<sup>13</sup> *Anna M. Delaney*, 53 ECAB 384 (2002).

<sup>14</sup> *Id.*

Additionally, counsel asserts that Dr. Stark supported continuing disability. The Board notes, however, that Dr. Stark found appellant able to perform full-time work.

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 properly terminated appellant's wage-loss and medical compensation benefits effective July 12, 2013.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 19, 2013 is affirmed.

Issued: February 6, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

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