

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FRANCES A. VIRRUSO and U.S. POSTAL SERVICE,  
POST OFFICE, Mineola, N.Y.

*Docket No. 96-1556; Submitted on the Record;  
Issued May 13, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS,  
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

On July 20, 1992 appellant, then a 33-year-old window/distribution clerk, filed a claim for pain in her right shoulder and neck area while attempting to lift a sack of parcels. Following development of the medical evidence, the Office accepted appellant's claim for sprain of the trapezius muscle. Appellant stopped work on July 22, 1992 working intermittently through August 15, 1992. She has not worked since. Appellant was paid 45 days continuation of pay and then paid compensation for total disability.

Appellant came under the care of Dr. Mario J. Ciani, a chiropractor, on July 22, 1992. She came under the care of Dr. Martin Lehman, a Board-certified orthopedic surgeon, on August 21, 1992. Appellant has continually submitted disability notes and medical reports from Dr. Lehman, which diagnosed acute severe sprain cervical spine with radiculitis and nerve root irritation right upper extremity with magnetic resonance imaging (MRI) scan findings of mild central disc bulging C3-4, C4-5 and C5-6 with malalignment of the cervical spine, noting that these findings were consistent with the chiropractic term vertebral subluxation complex. He further diagnosed contusions and sprain with traumatic tendinitis right shoulder. Dr. Lehman opined that these injuries were causally related to the July 20, 1992 work injury and that these disabilities were total and permanent in nature. Appellant has also continually submitted progress reports from Dr. Ciani who recommended the continued need for chiropractic care based on his diagnoses of severe acute and chronic cervical subluxation complex, cervical brachial neuritis, and severe acute and chronic sprain/strain which he opined were causally related to appellant's work injury.

A multi nerve root-upper somatosensory evoked potential (SSEP) performed on September 11, 1992 revealed a borderline conduction delay of the right median nerves. The

report stated that this may be consistent with a right C6-7 nerve root dysfunction. An MRI scan and clinical correlation were suggested.

Dr. Steven J. King, a Board-certified radiologist, performed an MRI scan on January 14, 1993. He noted a mild straightening of the cervical spine from C2 to C5. He opined that this may be due to muscle spasm. He found no mild central disc bulging at C3-4, C4-5 and C5-6. He further found no frank disc herniation or impingement of the spinal cord. Dr. King's impression was "misalignment of the cervical spine and disc bulging."

In a July 28, 1995 medical report, Dr. Lehman noted appellant's history following the injury she sustained on July 20, 1992 and noted her initial diagnosis of severe acute C5-6 sprain. Dr. Lehman described his physical examination and noted that x-rays taken of the right shoulder showed the bony structures intact, but the MRI scan of the cervical spine showed malalignment of the cervical spine with disc bulging at C3-4, C4-5 and C5-6. Dr. Lehman diagnosed acute severe sprain cervical spine with radiculitis and nerve root irritation right upper extremity with MRI scan findings of mild central disc bulging C3-4, C4-5 and C5-6 with malalignment of the cervical spine. He stated that these findings were consistent with the chiropractic term vertebral subluxation complex. Dr. Lehman additionally diagnosed contusions and sprain with traumatic tendinitis right shoulder. Dr. Lehman has opined that these injuries were causally related to the July 20, 1992 work injury and that these disabilities were total and permanent in nature..

In July 1995, the Office referred appellant to Dr. Joel Teicher, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an August 9, 1995 report, Dr. Teicher reviewed appellant's medical history and treatment, noting appellant's complaints of intermittent right shoulder pain and intermittent neck pain with radiation of pain to the right upper extremity with paresthesias extending to the right side of the neck and right side of the head, on an intermittent basis. Dr. Teicher described his physical examination and diagnosed acute cervical sprain with right cervical radiculitis, by history, resolved. He additionally diagnosed sprain of the right shoulder, by history, resolved. Dr. Teicher stated that he found no objective physical findings present to suggest the presence of residual underlying orthopedic pathology causally related to the accident of July 20, 1992. He noted that appellant has apparently responded to a course of conservative management. He stated that appellant's subjective complaints must be viewed in light of the absence of objective physical findings, a normal neurological examination and a normal physical examination. Dr. Teicher opined that appellant was capable of returning to her regular duties of employment on a full-time basis. Dr. Teicher further opined that appellant had reached maximum medical benefit from treatment.

On August 30, 1995 the Office issued a notice of proposed termination of compensation, finding that appellant had no continuing disability and that the weight of medical opinion was represented by the August 9, 1995 report, of Dr. Teicher. The Office found that as Dr. Lehman's report of July 28, 1995 was not supported by objective findings (with the exception of the MRI scan whose impression was inconsistent) or rationale, the weight of the medical evidence was found in the August 9, 1995 detailed and well-reasoned report, of Dr. Teicher which indicated that appellant had no continuing disability as a result of the work-related injury of July 20, 1992.

By letter dated September 11, 1995, appellant wrote the Office requesting an extension of the 30-day period to submit medical evidence.

By decision dated October 3, 1995, the Office terminated appellant's compensation for wage-loss effective October 14, 1995. The Office noted that appellant did not submit additional evidence.

By letter dated September 28, 1995, appellant responded to the Office's August 30, 1995 notice of proposed termination of compensation. Appellant wrote that Dr. Teicher examined her under the mistaken diagnosis of trapezius muscle sprain, the condition for which the Office accepted the claim under. Appellant stated that her actual diagnoses could be found in Dr. Lehman's September 27, 1995 report and Dr. Ciani's September 1, 1995 report. In his September 27, 1995 report, Dr. Lehman diagnoses included: (1) acute and chronic acute recurrent sprain cervical spine with radiculopathy involving the right and left upper extremities with weakness in the use of the upper extremity especially right extremity; and (2) recurrent traumatic tendinitis and bursitis with impingement syndrome and restricted motion in the use of the right shoulder. In his September 1, 1995 report, Dr. Ciani's diagnoses were severe acute and chronic cervical subluxation complex; cervical brachial neuritis; and severe acute and chronic sprain/strain. Appellant requested that the Office include these diagnoses as part of her accepted condition and provided a copy of a letter dated January 4, 1994, wherein she requested the same.

By letter dated October 5, 1995, the Office acknowledged receipt of appellant's September 28, 1995 letter. The Office further notified appellant of her appeal rights and stated that if she exercised her appeal rights, the medical evidence submitted with her September 28, 1995 letter, would be considered as a part of the appeal.

In a letter dated November 30, 1995, appellant requested reconsideration of her claim. In a brief dated October 10, 1995, appellant's representative requested reconsideration and presented argument concerning whether appellant had a continuing work-related disability entitling her to continued compensation for wage loss and medical benefits and argument pertaining to the mischaracterization of appellant's condition. Included within the reconsideration request were a September 15, 1995 medical report, from Dr. Lehman, a September 1, 1995 medical report, from Dr. Ciani and a copy of a SSEP study conducted on March 19, 1993, which revealed right C6-7 nerve root dysfunction.

In his September 15, 1995 medical report, Dr. Lehman reviewed appellant's history, noting that he had been following appellant for recurrent marked pain in the neck with pain, numbness and weakness in the use of upper extremity especially the right with weakness in the right shoulder which had continued and persisted with exacerbation following an injury sustained on July 20, 1992. He noted her conservative treatment and performed a physical examination. Dr. Lehman diagnosed the conditions of (1) acute and chronic acute recurrent sprain cervical spine with radiculopathy involving the right and left upper extremities with weakness in the use of the upper extremity especially right extremity and (2) recurrent traumatic tendinitis and bursitis with impingement syndrome and restricted motion in use of the right shoulder. Dr. Lehman opined that appellant still had continued significant disabilities and limitation causally related to the July 20, 1992 injury when she sustained injuries with tearing of muscle, ligaments and tendons of the cervical spine, right shoulder with scarring of these structures especially involving the nerve roots of right upper extremity and nerve root pressure and irritation of the right upper extremity with marked restriction in the use in fine and gross

motor activities. Dr. Lehman stated that appellant required periods of rest after 5 to 10 minutes and that she cannot lift more than 5 pounds. Dr. Lehman opined that in view of the injury and its causal related injuries, her condition was permanent in nature and there were no prospects for her to be working in the future.

In his September 1, 1995 report, Dr. Ciani stated that appellant had been under his care since July 22, 1992 for symptoms and disability associated with acute and chronic subluxations relating to her accident sustained on July 20, 1992. He stated that subluxation had been documented in past and recent x-ray studies as well as MRI of cervical spine. Dr. Ciani reviewed appellant's medical history and treatment, noting that appellant continued to present with persistent symptomology and objective findings supporting the subluxation complex vertebral syndrome which he opined was causally related to appellant's accident sustained on July 20, 1992. He further stated that recent examination and findings on x-ray taken on August 30, 1995 confirm continued need for chiropractic care. Dr. Ciani opined that appellant continued to be totally disabled and unable to perform any type of gainful employment.

The Office found a conflict in medical opinion, between Drs. Lehman and Ciani and Dr. Teicher, as to appellant's capacity for work. By letters dated January 19, 1996, the Office referred appellant to Dr. Kenneth Seslowe, a Board-certified orthopedic surgeon, selected as the impartial medical specialist.<sup>1</sup> In a February 12, 1996 report, Dr. Seslowe reviewed appellant's medical history and noted her complaints of neck pain and right shoulder pain, weakness and pain on motion of the right shoulder and pain on motion of her neck. He noted his physical findings and concluded that appellant sustained a strain of the right rotator cuff and a cervical strain. Dr. Seslowe opined that appellant was left with a minimal partial impairment, but that she could work 8 hours a day so long as she did not reach or lift above her right shoulder with a weight of more than 20 pounds.

By letter dated February 12, 1996, the Office asked Dr. Seslowe to opine whether appellant could perform her date-of-injury job. The Office stated that at the time of appellant's injury, appellant was performing the job of a window clerk and at times working in the registry, which is a sedentary clerical job.<sup>2</sup> The Office stated that the job did not require lifting over the shoulder and did not as a rule require heavy lifting. The Office noted that if a heavy package was brought to the counter, appellant was required to have a fellow employee lift it. By letter dated February 23, 1996, Dr. Seslowe stated that based on his physical examination of February 12, 1996, appellant could perform the duties of her sedentary clerical job with no restrictions.

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<sup>1</sup> By letter dated February 1, 1996, the Office approved appellant's request to reschedule the original appointment with Dr. Seslowe from February 6 to 12, 1996.

<sup>2</sup> In a conference resolution memorandum dated March 11, 1996, the Office determined that on the date of injury appellant was working as a window clerk, she was not required to do any lifting and her job duties did not require her to lift her arm over her shoulder. The Office noted that appellant was in this modified job due to a previous injury which occurred in 1987. The Office determined that this modified job fairly and reasonably represented her wage-earning capacity in accordance with 5 U.S.C. § 8115.

By decision dated March 12, 1996, the Office denied modification of its October 3, 1995 decision, terminating compensation benefits effective October 14, 1995 as the weight of the medical evidence was represented by Dr. Seslowe's opinion that appellant was capable of returning to her date-of-injury job. The Office, however, modified the prior decision to allow for payment of compensable medical expenses as Dr. Seslowe opined that appellant continued to sustain residuals of her employment injury. He further stated that appellant reached maximum medical improvement.

The Board finds that this case is not in posture for decision, because of a conflict in the medical opinion evidence and thus must be remanded for further evidentiary development.

Section 8123 of the Federal Employees' Compensation Act<sup>3</sup> provides that if there is disagreement between the physician making the examination, for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.<sup>4</sup>

In this case, the Board finds there remains a conflict in the medical opinion evidence, which requires a remand for resolution. The Board initially notes that the Office terminated benefits prematurely based on Dr. Teicher's August 9, 1995 report that appellant had no continuing disability as a result of the work-related injury of July 20, 1992. The Board notes that, at the time the Office received Dr. Teicher's report, all of Dr. Lehman's narrative reports of record had opined that appellant's injuries were causally related to the July 20, 1992 work injury and that those disabilities were total and permanent in nature.<sup>5</sup> Thus, the Office had prematurely terminated compensation benefits when there was a medical conflict.

Although the Office subsequently found a conflict and referred the case to Dr. Seslowe, Dr. Seslowe's initial report lacks rationale. In his February 12, 1996 report, Dr. Seslowe opined that appellant had a minimal partial impairment, but that she could work 8 hours a day so long as she did not reach or lift above her right shoulder with a weight of more than 20 pounds. Dr. Seslowe states a conclusion with no medical reasoning to substantiate such conclusion.<sup>6</sup> He does not explain why the findings on examination are not work related or disabling. He also indicates that appellant has some continuing impairment and that she cannot lift more than 20 pounds above her right shoulder. While the Office properly requested a supplemental report to see if appellant could return to her date-of-injury job position, Dr. Seslowe in his letter of February 23, 1996, stated that based on his physical examination of appellant on February 12, 1996, appellant could perform the duties of her sedentary clerical job with no restrictions. Dr. Seslowe's one sentence response is devoid of any rationale. Furthermore, from the description of appellant's date-of-injury job which the Office provided to Dr. Seslowe, there is no indication as to whether lifting more than 20 pounds above shoulder level is required. The

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<sup>3</sup> 5 U.S.C. §§ 8101-8193; 5 U.S.C. § 8123(a); 20 C.F.R. § 10.408.

<sup>4</sup> *Shirley L. Steib*, 46 ECAB 309, 316 (1994).

<sup>5</sup> The Board also notes that the medical reports Dr. Lehman submitted before the Office received Dr. Teicher's report are not that different from the ones he submitted after the Office terminated benefits.

<sup>6</sup> See *George S. Johnson*, 43 ECAB 712, 716 (1992) (finding that a conflict in medical opinion was not resolved because the opinion of the referee physician was insufficiently rationalized; thus, further remand was required).

Office did not try to get another supplemental report or send appellant to a new independent medical examiner.

Thus, the Office had prematurely terminated compensation while there was an outstanding medical conflict and, when it sought to resolve the conflict, the independent medical examiner's reports were not sufficiently well rationalized to be entitled to the special weight accorded to an impartial medical specialist.<sup>7</sup> Accordingly, a lack of resolution of the medical conflict in this case, still exists. Thus, on remand, the Office should refer appellant, the case record and the statement of accepted facts to an appropriate medical specialist for an impartial evaluation pursuant to section 8123(a).<sup>8</sup>

The Board further notes that the Office retroactively made a loss of wage-earning calculation determination in its March 12, 1996 decision, when it relied on Dr. Seslowe's opinion that appellant was capable of returning to her date-of-injury job. This loss of wage-earning capacity appears to be based on a 1987 injury, for which the Board does not have the record. Generally, when the claimant is no longer working in the position, as is reflected in the instant case, it is inappropriate to do an actual earnings loss of wage-earning capacity determination.<sup>9</sup> Even if a retroactive loss of wage-earning capacity determination is considered when the claimant is no longer working in the position, current Office procedures dictate that the retroactive determination not be made if the work stoppage occurred due to a change in the claimant's injury-related condition.<sup>10</sup> Without the record of regarding the condition which occurred in 1987, the Board cannot determine whether the Office met its burden in establishing an actual earnings loss of wage-earning capacity. Thus, the loss of wage-earning capacity determination is reversed.

The Board additionally notes that with the Office's June 21, 1995 statement of accepted facts, the Office refers to medical reports by a Dr. Hugh Packer, Dr. Killian, Dr. Pasquale A. Carone and Dr. Leonard W. Krinsky. Inasmuch as the Board notes that such reports are not in the record, on remand, the Office is directed to reconstruct the record insofar as possible.

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<sup>7</sup> *Glenn C. Chasteen*, 42 ECAB 493 (1991).

<sup>8</sup> *See* 20 C.F.R. § 10.408; *Debra S. Judkins*, 41 ECAB 616, 620 (1990).

<sup>9</sup> *See Jimmie L. Clark, Jr.*, 42 ECAB 252 (1990).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (December 1993).

The March 12, 1996 decision of the Office of Workers' Compensation Programs is reversed as to the loss of wage-earning capacity determination. The remainder of the decision is set aside and the case is remanded for further proceedings consistent with this opinion.

Dated, Washington, D.C.  
May 13, 1999

George E. Rivers  
Member

Willie T.C. Thomas  
Alternate Member

A. Peter Kanjorski  
Alternate Member