

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

J.L., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Newark, NJ, Employer**

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**Docket No. 09-735
Issued: December 22, 2009**

Appearances:
Thomas 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
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 22, 2009 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated September 5, 2008 affirming a March 12, 2008 decision terminating her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective March 15, 2008.

FACTUAL HISTORY

On April 23, 2007 appellant, then a 36-year-old mail handler, sustained a back injury while pushing a container weighing approximately 300 pounds.¹ She stopped work on April 24, 2007 and did not return. The Office accepted the claim for lumbar and thoracic neuritis and radiculitis and paid appropriate benefits.

Appellant submitted medical reports from Dr. Mark A. P. Filippone, a Board-certified physiatrist. In a May 9, 2007 report, Dr. Filippone reviewed her history and listed an impression of thoracalgia with possible thoracic radiculitis or radiculopathy and lumbosacral radiculitis with possible radiculopathy, spinal compression fracture and herniated disc. He found that appellant was totally disabled as a result of the April 23, 2007 injury.

The Office referred appellant to Dr. David Rubinfeld, a Board-certified orthopedic surgeon, for a second opinion. In a September 4, 2007 report, Dr. Rubinfeld reviewed her history of injury and the medical records. He noted that appellant complained of pain in the back and left leg without numbness and had difficulty walking and bending. Dr. Rubinfeld listed the results of examination and opined that appellant's accepted conditions had resolved with no further disability or residual. He found that she was able to return to her date-of-injury position and no further medical care was necessary. Dr. Rubinfeld completed an OWCP-5c work capacity evaluation.

In reports dated September 13 to November 6, 2007 Dr. Filippone reiterated that appellant was totally disabled due to thoracic and lumbosacral radiculopathy since April 23, 2007 and that there had been no change in her condition. Appellant submitted physical therapy reports and diagnostic test reports.

The Office found a conflict in medical opinion arose between Dr. Filippone and Dr. Rubinfeld as to whether appellant had continuing disability or residuals related to the accepted injury. On November 8, 2007 it referred appellant, together with the case record, a statement of accepted facts, to Dr. Andrew Carollo, a Board-certified orthopedic surgeon, for an impartial evaluation. In a December 4, 2007 report, Dr. Carollo reviewed the statement of accepted facts, the history of the April 23, 2007 injury and her medical treatment. He noted that magnetic resonance imaging (MRI) scan studies of the thoracic and lumbar spines did not show the presence of any disc herniation or annular disruptions in the disc structures. Appellant also had normal alignment of both the thoracic and lumbosacral spines. Dr. Carollo described the results of his examination of the cervical, dorsal and lumbosacral spine. Appellant did not complain of pain with motion of the cervical spine and there was no objective evidence of muscle spasm or muscle hardening in the neck region. Her deep tendon reflexes were symmetrical in the upper extremities with no motor or sensory deficits or decrease in grip strength of either extremity noted. Examination of the dorsal spine revealed mild discomfort to

¹ On April 23, 2007 appellant had submitted an occupational claim form and medical evidence for a back condition caused or aggravated by her employment April 23, 2007. The Office assigned the case file number xxxxxx714. It subsequently determined case file number xxxxxx714 was a duplicate of the current case and deleted case file number xxxxxx714 from the case management system after moving the contents of that case into the current case.

direct digital pressure over the lower midline with no significant evidence of muscle spasm or muscle hardening in the dorsal paraspinal muscles. Examination of the lumbosacral spine revealed minimal discomfort with flexion and extension with mild muscle spasm from L4 to sacrum mostly on the left side. The straight leg raising was negative bilaterally and deep tendon reflexes were symmetrical in the lower extremities with no motor or sensory deficits present. Dr. Carollo opined that appellant's work-related conditions had resolved without residuals. He found that she was not disabled and could perform her usual job as mail handler without physical restrictions. Dr. Carollo noted that there was no objective evidence on examination of any thoracic-lumbosacral dysfunction. Rather, appellant had full, unrestricted motion of the cervical and dorsal-lumbar region with no motor or sensory deficits present in either the upper or the lower extremities. Dr. Carollo advised that there was no need for additional medical treatment. He also completed an OWCP-5c work capacity evaluation finding that appellant had no work restrictions and could perform her usual job.

On November 6, 2007 Dr. Filippone noted appellant's complaint of back pain, with numbness and tingling in the right hand. He advised that she still had, guarding and spasm in the cervical region more so than the lumbar or the thoracic paraspinal muscles. Central and peripheral neurologic examinations were unchanged. Positive testing for bilateral carpal tunnel syndrome was noted. Dr. Filippone advised that appellant remained totally disabled and should continue with physical therapy and medication.

On February 8, 2008 the Office issued a notice of proposed termination of compensation benefits. It found the weight of the medical evidence was represented by Dr. Carollo and established that appellant no longer had any residuals or disability causally related to the accepted conditions.

Appellant submitted additional reports from Dr. Filippone. On January 23, 2008 Dr. Filippone stated that she still had low back and cervical complaints, with radiation into the right lower extremity. The medical history was unchanged as were appellant's central and peripheral neurologic examinations. Dr. Filippone opined that she remained totally disabled. In a February 28, 2008 report, he stated that an August 14, 2007 lumbar spine MRI scan study was abnormal and showed bilateral posterior lateral bulging of the annulus resulting in narrowing of the inferior recess of each neural foramina at this level with straightening of the normal lordotic curvature of the lumbar spine. An August 13, 2007 MRI scan of the thoracic spine was also abnormal, with posterior bulging of the annulus fibrosis T4/5 with spondylosis deformans. A June 20, 2007 electromyogram (EMG)/nerve conduction study (NCS) of the upper and lower extremities was abnormal and showed evidence of bilateral carpal tunnel syndrome, worse on the left. Dr. Filippone indicated that appellant had pain, guarding and spasm in the left cervical paraspinals and in the lumbar paraspinals, bilaterally. There was a decreased prominence of the right abductor pollicis brevis, bilateral positive Phalen's and Tinel's signs referable to the median nerve at the wrist. Central and peripheral neurologic examinations were unchanged. Dr. Filippone found that appellant was totally disabled noting that when she underwent the independent medical examination she was taking prescribed narcotic medication that masked her symptoms and physical presentation. He reiterated that the abnormal MRI scan and EMG/NCS studies objectively established pathology consistent with appellant's history and physical presentation.

By decision dated March 12, 2008, the Office terminated appellant's compensation benefits effective March 15, 2008 on the basis of Dr. Carollo's impartial medical opinion.

Appellant requested an oral hearing, which was held July 15, 2008. At the hearing, appellant's attorney questioned whether Dr. Carollo was properly selected to resolve the medical conflict through the Physician's Directory System (PDS). Counsel also argued that Dr. Carollo's opinion was not sufficiently rationalized.

In a March 19, 2008 report, Dr. Filippone noted that appellant's examination was unchanged. He reiterated that she was totally disabled and unable to return to her regular employment. In a June 10, 2008 report, Dr. Filippone disagreed with the opinions of Dr. Rubinfeld and Dr. Carollo that appellant was capable of returning to her job as a mail handler based on the results the August 14, 2007 of MRI scan of the lumbar and thoracic spines and the June 20, 2007 EMG/NCS studies. He stated that Dr. Carollo's diagnoses did not include the abnormalities revealed by those studies. Dr. Filippone diagnosed bilateral carpal tunnel syndrome, C5-6 cervical radiculopathy, L5 lumbosacral radiculopathy, bulging disc at L4-5, lumbar muscle spasms and lumbar myalgia, posterior bulging of the annulus fibrosis T4-5 and spondylosis deformans, which he attributed to the April 23, 2007 work injury. He opined that appellant could not return to the repetitive tasks required in her mail handler job as her work would cause her condition to further deteriorate. Appellant could not perform the constant lifting, bending, pushing of heavy equipment also required by her job. Dr. Filippone recommended further medical treatment and medication.

By decision dated September 5, 2008, the Office hearing representative affirmed the March 12, 2008 decision.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.² After it has determined that an employee has disability causally related to 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.³ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁴ The right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for disability.⁵ To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.⁶

² *Paul L. Stewart*, 54 ECAB 824 (2003).

³ *Elsie L. Price*, 54 ECAB 734 (2003).

⁴ *See Del K. Rykert*, 40 ECAB 284 (1988).

⁵ *Jaja K. Asaramo*, 55 ECAB 200 (2004); *Furman G. Peake*, 41 ECAB 361 (1990).

⁶ *T.P.*, 58 ECAB ___ (Docket No. 07-60, issued May 10, 2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

Section 8123(a) provides that, 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.⁷ It is well established that, when 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.⁸

ANALYSIS

Appellant's claim for an injury on April 23, 2007 was accepted for lumbar and thoracic radiculitis and neuritis. She stopped work on April 23, 2007 and has not returned. Appellant was treated by Dr. Filippone who found her totally disabled due to the residuals of her accepted conditions.

The Office referred appellant for a second opinion evaluation with Dr. Rubinfeld. On September 4, 2007 Dr. Rubinfeld advised that she had fully recovered from the April 23, 2007 work injury without residuals. Appellant needed no further medical treatment and could return to work without restrictions. Dr. Filippone submitted additional reports reiterating that she continued to be totally disabled as a result of the April 23, 2007 work injury. The Board finds that a conflict in medical opinion arose between Dr. Filippone and Dr. Rubinfeld regarding whether appellant had continuing residuals of the April 23, 2007 work injury and her capacity for work. The Office properly referred her to Dr. Carollo for an impartial medical examination.⁹

The Board finds that Dr. Carollo, the impartial medical specialist, based his opinion on a proper factual and medical background. Dr. Carollo was provided with a copy of the case file, a list of questions and a statement of accepted facts. He set forth the results of his findings on physical examination of appellant and found the accepted conditions had resolved without residuals or causing further need for medical treatment. Dr. Carollo noted that the MRI scan studies of the thoracic and lumbar spines did not show the presence of any disc herniation or annular disruptions in disc structures. There was normal alignment of both the thoracic and lumbosacral spines. Dr. Carollo found that there was no objective evidence on examination that appellant had any thoracic-lumbosacral dysfunction. Full, unrestricted range of motion was found in the cervical and dorsal-lumbar region with no motor or sensory deficit in either the upper or lower extremities. Dr. Carollo concluded that appellant was able to perform her mail handler job with no restrictions and there was no need for additional medical treatment. He found no basis on which to attribute any continuing condition or disability to the April 23, 2007 work injury.

Dr. Carollo offered a medical opinion that is sound, rational and logical. Because the opinion of the impartial medical specialist is based on a proper history and is sufficiently rationalized, the Board finds that it must be accorded special weight in resolving the conflict.

⁷ *F.R.*, 58 ECAB __ (Docket No. 05-15, issued July 10, 2007); *Regina T. Pellecchia*, 53 ECAB 155 (2001).

⁸ *Darlene R. Kennedy*, 57 ECAB 414 (2006).

⁹ *Id.*

Appellant did not submit sufficient medical evidence to overcome the weight of Dr. Carollo's opinion or to create a new conflict. She submitted additional reports from Dr. Filippone, who discussed the findings of diagnostic testing performed in 2007. Dr. Filippone disagreed with Dr. Carollo's opinion. His findings are generally the same as those which existed at the time his opinion created a conflict with that of Dr. Rubinfeld. The Board has held that reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.¹⁰ Dr. Filippone also related appellant's disability to cervical and upper extremity conditions, which were not accepted conditions.¹¹ Appellant also submitted physical therapy notes in support of her claim of continuing disability. However, a physical therapist is not a physician as defined by the Federal Employees' Compensation Act. Therefore, their opinions are of no probative value.¹² As the weight of the medical opinion evidence supports that appellant no longer has residuals due to the April 23, 2007 work injury, the Board finds that the Office met its burden of proof in terminating her compensation benefits effective March 15, 2008.

Appellant's counsel contends that Dr. Carollo's report is insufficient to carry special weight and that the Office should have sought clarification from Dr. Carollo regarding his examination findings that appellant had L4 radiculopathy on the left side and required him to outline any restrictions in light of his findings that she suffered from lumbar radiculopathy. While Dr. Carollo noted that she had mild muscle spasm from L4 to sacrum mostly on the left side, he specifically addressed the objective evidence and explained that the MRI scan studies of the thoracic and lumbar spines failed to show the presence of any disc herniations or annular disruptions in disc structures. He did not relate any findings on examination to the accepted conditions. Dr. Carollo opined that appellant was not disabled and had no residuals of the accepted conditions. It is further noted that he completed an OWCP-5 form and found that she could perform her regular job without restrictions.

Appellant's counsel contends that Dr. Carollo was not properly selected by the Office from the PDS.¹³ However, the record reflects that on October 30, 2007 the appointment schedule notification was run with reference to appellant and her zip code. Appellant has not submitted any evidence to support her argument that Dr. Carollo was not properly selected in accordance

¹⁰ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008).

¹¹ *See T.M.*, 60 ECAB ___ (Docket No. 08-975, issued February 6, 2009) (for a condition not accepted or approved by the Office as being due to an employment injury, the claimant bears the burden of proof to establish that the condition is causally related to the employment injury).

¹² Section 8101(2) of the Act provides as follows: (2) physician includes surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law.

¹³ The selection of referee physicians is made by a strict rotational system using the PDS. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialist in alphabetical order as listed in the roster chosen under the specialty and/or subspecialty heading in the appropriate geographical area and repeating the process when the list is exhausted. Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(1) (May 2003); *see also L.W.*, 59 ECAB ___ (Docket No. 07-1346, issued April 23, 2008).

with the Office's rotational system. Moreover, she did not first challenge Dr. Carollo's selection until after her benefits were terminated. If appellant disagreed with the selection of the physician, she should have noted her objections at or near the time she was informed of the appointment.¹⁴

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective March 15, 2008.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated September 5, 2008 is affirmed.

Issued: December 22, 2009
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

¹⁴ See *L.W., id.*