

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

J.K., Appellant

and

**DEPARTMENT OF THE ARMY, ARMY
MATERIAL COMMAND, Fort Monmouth, NJ,
Employer**

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**Docket No. 09-1339
Issued: August 17, 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 April 27, 2009 appellant timely appealed a February 13, 2009 decision of the Office of Workers' Compensation Programs affirming a July 29, 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 this claim.

ISSUE

The issue is whether the Office properly terminated appellant's compensation benefits effective August 31, 2008 on the grounds that she no longer had any residuals or disability causally related to her accepted employment-related injuries.

On appeal, appellant's counsel contends that the Office failed to meet its burden of proof as Dr. William Head, an impartial medical specialist, was not properly selected from the Physicians' Directory System (PDS) and his opinion was insufficiently rationalized.

FACTUAL HISTORY

On July 23, 2002 appellant, then a 58-year-old inventory management specialist, was struck in the head by a window. The Office accepted the claim for cervical sprain, concussion without loss of consciousness, cervical root injury to brachial plexus and lumbar sprain and strain. Appellant stopped work on July 23, 2002 and did not return. She was eventually placed on the periodic compensation rolls.

Appellant was treated by Dr. Angelo T. Scotti, Board-certified in internal and emergency medicine, who noted continuing symptoms and disability from the brachial plexus injury. Dr. Scotti referred her to Dr. Robert J. Schwartzman, a Board-certified internist and neurologist, who first treated her for her work injury on November 2, 2002. On December 1, 2005 Dr. Schwartzman noted that appellant's problems had progressed and listed impressions of brachial plexus traction injury with sensitization of all components of the plexus, L5 and S1 radiculopathy and early chronic regional pain syndrome. On June 8, 2006 he indicated that her chronic regional pain syndrome was driven by her underlying L4-5 and L5-S1 radiculopathy and bilateral brachial plexus problems. Dr. Schwartzman noted an impression of generalized chronic regional pain syndrome; sensitization of all components of brachial plexus bilaterally and sensitization of the trigeminal nerve complex resulting in facial pain. A sinus computerized tomography was negative, except for a mucosal cyst. Dr. Schwartzman indicated that appellant's pain was coming from the central sensitization source. On April 3, 2007 he noted brachial and cervical plexus traction injuries and irritation of C2 and C3 on the right side. In an April 20, 2007 work capacity evaluation form, Dr. Scotti indicated that appellant was disabled.

In a March 6, 2007 report, Dr. Irving D. Strouse, a Board-certified orthopedic surgeon and Office referral physician, reviewed appellant's history and set forth his findings. He diagnosed cervical sprain. Dr. Strouse advised that appellant had complained of neck pain since the work injury. He stated that magnetic resonance imaging (MRI) scans of the cervical spine showed small extradural defects at C4-5 and C5-6 consisting of ridging defects and bulges which preexisted the July 23, 2002 work injury. Dr. Strouse noted that, while appellant had degenerative changes in her neck and bulging of the disc, they were a normal part of the degenerative process for which she was treated with physical therapy and medication. He advised that she had significant neurological symptoms that were being treated by neurologists. Regarding appellant's orthopedic conditions, Dr. Strouse stated that he was unable to objectively substantiate her significant subjective symptoms. He noted that portions of her examination demonstrated symptom exaggeration, such as nonphysiologic collapsing-type weakness. Dr. Strouse noted that, while a brachial plexus injury was diagnosed neurologically, the MRI scan of the brachial plexus and electromyogram findings in the arms were negative. He opined that appellant reached maximum medical improvement and could work eight hours daily in her date-of-injury position. Dr. Strouse noted that she required no further orthopedic medical care as it related to her cervical injury. In a March 22, 2007 supplemental report, he advised that he was unaware of any concurrent nonwork-related disability that appellant had.

On July 3, 2007 the Office found a conflict in medical opinion between Dr. Scotti and Dr. Strouse and referred appellant, together with a statement of accepted facts, the case record and a list of questions, to Dr. Steven Berkowitz, a Board-certified orthopedic surgeon. In a July 27, 2007 report, Dr. Berkowitz provided his examination findings along with his medical

review of the record. Examination revealed normal curvature of the spine with slightly decreased cervical range of motion but no spasm or trigger points. Dr. Berkowitz diagnosed residual cervical sprain/strain superimposed on bulging degenerative discs at C5-6 and C6-7 and residual lumbar strain superimposed on bulging disc at L5-S1. He opined that appellant did not suffer from the condition causally related to the July 23, 2002 claim and no further medical treatment was necessary. Dr. Berkowitz advised that there were no objective findings to substantiate her significant subjective complaints, particularly of facial pain related to her cervical spine and lower back. He opined that appellant was capable of returning full time to her date-of-injury position. Dr. Berkowitz advised that she reached maximum medical improvement and there were no permanent residuals as a result of the accepted condition from an orthopedic point of view.

Dr. Scotti continued to opine that appellant was totally disabled.

On October 24, 2007 the Office proposed to terminate appellant's compensation benefits based on the opinion of Dr. Berkowitz, the impartial medical specialist.

In a November 29, 2007 medical report, Dr. Afshin E. Razi, a Board-certified orthopedic surgeon, noted the history of injury and appellant's complaints regarding her neck, shoulders, head and back pain. He diagnosed occipital headache. Dr. Razi advised appellant's significant occipital pain as well as facial pain did not correspond to the cervical spine MRI scan findings. He advised the small disc herniation at C5-6 would not cause this type of pain and there was no instability in her dynamic cervical x-rays. Dr. Razi opined that appellant's symptoms did not originate from the cervical spine. He noted that she may have an injury to occipital nerves causing her occipital pain and that she was to be assessed by her neurologist. Dr. Razi advised that appellant had right hip trochanteric bursitis and iliotibial band tendinitis. He stated that her low back pain might be due to disc degeneration and central disc protrusion at L5-S1.

In a November 28, 2007 report, Dr. Ludmilla Bronfin, a Board-certified neurologist, noted appellant's history of a work-related head injury presented with complaints of headaches, right arm pain and change in sensory function. She noted impressions of: traumatic brain injury with post-traumatic headache and post-traumatic peripheral vestibular dysfunction; right facial pain, possibly of post-traumatic origin of trigeminal neuropathy; right shoulder dysfunction; right tennis elbow syndrome secondary to tendinitis; right de Quervain tenosynovitis; post-traumatic cervicgia versus cervical radiculopathy and depression. Dr. Bronfin recommended further testing and evaluation.

In a December 17, 2007 letter, the Office referred appellant to Dr. Melvin P. Vigman, a Board-certified neurologist, to determine whether her neuropsychiatric problems were causally related to her accepted employment injuries. In a February 11, 2008 report, Dr. Vigman noted evaluating appellant on February 6, 2008 and provided an impression of no neurological disease. He advised that she had no objective findings to correlate with her multiple subjective symptoms. Dr. Vigman stated that there was no evidence of brachial plexus involvement or lumbar nerve root involvement at any level. There was no showing of objective finding of any sort neurologically. Dr. Vigman noted that appellant showed some subjective factitious sensory findings which were consistent with symptom magnification and exaggeration. He stated there was no permanent neurological disability. Dr. Vigman opined that appellant no longer had

cervical nerve root involvement or brachial plexus involvement and that she no longer had postconcussion symptoms. Thus, he opined, all neurological problems had resolved. Dr. Vigman opined that appellant was neurologically capable of full-time work without restrictions.

In a March 27, 2008 note, Dr. Scotti advised that appellant has been seen by multiple neurologists with no firm diagnosis and requested that she be seen at a clinic in Florida for a neurological evaluation.

In an April 29, 2008 report, Dr. Christina Drafta, a Board-certified neurologist, noted the history of injury and provided an impression of trigeminal and occipital neuralgia; protracted; post-traumatic and nonfocal neurological examination.

In a May 20, 2008 letter, the Office advised appellant that a conflict in medical opinion existed between Dr. Bronfin, her treating neurologist, and Dr. Vigman, an Office referral neurologist, as to whether there was any current injury-related neurological condition or disability. It referred appellant, together with a statement of accepted facts, the case record and a list of questions to Dr. William Head, a Board-certified neurologist, for an impartial medical examination. A May 20, 2008 appointment schedule notification report noted that appellant was scheduled for a referee examination on June 10, 2008 with Dr. Head.

In a June 13, 2008 report, Dr. Ramon Manon-Espaillet, a Board-certified neurologist to whom appellant was referred by Dr. Scotti, noted the history of injury and reported his examination findings. He advised that appellant presented with post-traumatic head and neck pain. Dr. Manon-Espaillet indicated that she had a normal neurological examination and questioned whether this was a component of fibromyalgia. He recommended a brain and cervical MRI scan, which appellant underwent on June 17, 2008. In a July 10, 2008 report, Dr. Manon-Espaillet indicated that appellant had a normal medical status examination and neurological review of systems were noncontributory. He indicated that the brain MRI scan showed age-related changes and the cervical spine MRI scan showed degenerative changes, but nothing significant to explain all her symptoms. Dr. Manon-Espaillet recommended appellant see a rheumatologist.

In a July 14, 2008 report, Dr. Head reviewed the history of the July 23, 2002 work injury, appellant's treatment and objective testing. Neurological examination revealed objectively normal findings with signs of conscious functional exaggeration on grip testing and on general sensory testing. Dr. Head stated that parts of her examination were somewhat bizarre and provided examples. Spinal range of motion was somewhat limited on examination but was more complete on indirect observation. Dr. Head found no evidence of joint or muscle tenderness, apart from appellant claiming that her paraspinal muscles were tender on palpation. He found no clinical evidence of fibromyalgia and no objective evidence of brachial plexus injury. Dr. Head diagnosed symptom-magnification syndrome, manifested by attempts to exaggerate or simulate pathology on grip testing and on general sensory testing. He reported no objective evidence of any underlying neurological condition or disorder relative to the July 23, 2002 injury and no evidence of cervical disc herniation. Dr. Head concluded that appellant did not have a brachial plexus injury, reflex sympathetic dystrophy, or fibromyalgia and that her neurological examination was objectively normal, although she showed signs of conscious exaggeration. He

stated there was no objective basis for neurological disability from the July 23, 2002 injury or an objective basis for further neurological evaluation or treatment. Dr. Head indicated that there were no objective findings that the accepted conditions of cervical strain, concussion, cervical root injury to brachial plexus and lumbar sprain and strain were active and that those conditions would have resolved within 2 to 16 weeks of the injury. He advised there was no current neurological disability and appellant had no work limitations from a neurological perspective. Dr. Head found no objective findings that an aggravation of appellant's prior condition occurred due to the work injury. He stated that appellant was attempting to feign pathology.

In a July 29, 2008 decision, the Office terminated compensation benefits effective August 31, 2008. It found that appellant no longer had any residuals or disability causally related to her accepted employment injuries and no additional treatment was required.

On August 15, 2008 appellant requested an oral hearing which was held by video conference on December 18, 2008.

In an August 23, 2008 report, Dr. John A. Schaefer, a Board-certified neurologist, noted evaluating appellant regarding her work injuries. Formal neurological examination was unremarkable and general physical examination was normal. Dr. Schaefer advised the cause of appellant's pain remained uncertain and he doubted a specific diagnosis could be established. Further medical testing was suggested. In his September 24, 2008 report, Dr. Schaefer indicated that appellant's neurological examination was unchanged and results of a nuclide bone scan and routine laboratory studies would be forwarded to Dr. Scotti.

By decision dated February 13, 2009, an Office hearing representative affirmed the July 29, 2008 decision.

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.¹ It may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.² The right to medical benefits is not limited to the period of entitlement to disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that requires further medical treatment.³

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 to make an examination.⁴ When there are opposing medical reports of virtually equal weight and rationale

¹ *Jorge E. Sotomayor*, 52 ECAB 105, 106 (2000).

² *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

³ *Frederick Justiniano*, 45 ECAB 491 (1994).

⁴ 5 U.S.C. § 8123(a).

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.⁵

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.⁶ 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.⁷ 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.⁸ Moreover, the reasons for the selection made must be documented in the case record.⁹

ANALYSIS

The Office accepted the conditions of cervical sprain, concussion without loss of consciousness, cervical root injury to brachial plexus and lumbar sprain/strain as arising out of the July 23, 2002 employment injury. On July 23, 2007 it referred appellant to Dr. Berkowitz, a Board-certified orthopedic surgeon, to resolve the conflict in the medical opinion evidence between Dr. Scotti and Dr. Schwartzman, who opined that appellant continued to suffer residuals of the work injury and was totally disabled, and Dr. Strouse, an Office referral physician, who opined that appellant's orthopedic conditions related to her cervical injury had resolved and she was capable of returning full time to her date-of-injury position. Thus, at the time appellant was referred to Dr. Berkowitz, the Office properly determined that there was a conflict in medical opinion evidence regarding whether appellant's accepted orthopedic conditions had resolved.

In Dr. Berkowitz's July 27, 2007 report, he stated that appellant had residual cervical sprain/strain superimposed on bulging degenerative discs at C5-6 and C6-7 and residual lumbar strain superimposed on bulging disc at L5-S1. He noted findings on examination and reviewed appellant's history. While Dr. Berkowitz used the term "residual," he specifically opined that there were no permanent residuals as a result of the accepted orthopedic conditions and appellant was capable of returning full time to her date-of-injury position. He indicated that appellant did not have residuals of the July 23, 2002 work injury. Dr. Berkowitz noted there were no objective findings to substantiate her significant subjective complaints, particularly of facial pain related to

⁵ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁶ *See LaDonna M. Andrews*, 55 ECAB 301 (2004).

⁷ *See Raymond J. Brown*, 52 ECAB 192 (2001).

⁸ *Id.* *See also Miguel A. Muniz*, 54 ECAB 217 (2002).

⁹ *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.

her cervical spine and lower back. The Board finds that his opinion is sufficiently rationalized and based upon a proper factual background such that it is entitled to special weight and resolves the medical conflict regarding appellant's orthopedic conditions. Dr. Berkowitz's opinion establishes that appellant no longer has residuals or disability due to her accepted orthopedic conditions of cervical and lumbar sprains.

Following the Office's October 24, 2007 notice of proposed termination, appellant submitted additional medical evidence from Dr. Razi and Dr. Bronfin which noted appellant's work injury and supported that she had a continuing neurological condition. The Office properly determined that this evidence required further development regarding whether appellant had continuing neurological residuals or disability due to her July 23, 2002 employment injury and referred appellant to Dr. Vigman who found that appellant had no neurological problems due to her work injury. Consequently, it found a conflict in the medical evidence between Dr. Bronfin and Dr. Vigman regarding whether appellant had an employment-related neurological condition.

The Office referred appellant to Dr. Head to resolve the medical conflict regarding whether appellant had an employment-related neurological condition. In his July 14, 2008 report, Dr. Head found no objective findings of neurological disability and opined that the accepted conditions would have resolved within several weeks or months after the injury. Thereafter, the Office found that Dr. Head's report established that appellant had no continuing neurological condition or disability due to the July 23, 2002 employment injury.

On appeal, however, appellant's counsel contends that the Office did not properly select Dr. Head 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. The district Office is to document in the case record how the rotational procedures were followed.¹⁰

The evidence of record does not provide adequate documentation pertaining to the selection of Dr. Head as the impartial medical specialist. The only documentation of record pertaining to the selection is a May 20, 2008 Appointment Schedule Notification report in which a claims examiner noted that appellant was scheduled for a referee examination on June 10, 2008 with Dr. Head. The evidence does not reflect whether Dr. Head was the first physician contacted on that date, that he 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 is not adequate to establish that Dr. Head was properly selected in compliance with the rotational system using the PDS.¹¹ For this reason, the Board finds that Dr. Head was not properly selected as the impartial medical specialist. The Office's decision terminating appellant's compensation benefits with regard to his neurological conditions must be reversed due to an unresolved conflict

¹⁰ *Id.* at Chapter 3.500.4(b)(7).

¹¹ A.R., 61 ECAB ____ (Docket No. 09-1566, issued June 2, 2010).

in medical opinion as to whether appellant has any neurological condition or disability causally related to the accepted employment injury.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate benefits with regard to appellant's orthopedic conditions but did not meet its burden of proof to terminate appellant's compensation benefits with regard to her neurological conditions.

ORDER

IT IS HEREBY ORDERED THAT the February 13, 2009 and July 29, 2008 decisions of the Office of Workers' Compensation Programs are affirmed in part and reversed in part.

Issued: August 17, 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