

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of DEBORAH D. RANDOLPH and U.S. POSTAL SERVICE,  
POST OFFICE, Capitol Heights, MD

*Docket No. 99-182; Submitted on the Record;  
Issued August 23, 1999*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs has met its burden to terminate appellant's compensation benefits effective March 13, 1997.

On September 10, 1995 appellant, then a 39-year-old postal clerk, filed a claim alleging that the activities of her job had aggravated preexisting neck and back problems. She stated that she first realized that her conditions were aggravated by her employment on January 27, 1995. The Office accepted the claim for aggravation of chronic myofascial syndrome.<sup>1</sup>

Appellant initially sought treatment with Dr. Robert Smith, a Board-certified orthopedist. She stopped work on February 10, 1995. On April 18, 1995 she was released to return to light duty for four hours per day. Appropriate compensation for the remaining four hours of work was received.

The Office referred appellant, along with medical records and a statement of accepted facts, to Dr. Neville Gibbs, a Board-certified neurologist. In a report dated December 18, 1995, Dr. Gibbs provided a history and results on examination. He diagnosed chronic cervical and thoracic myofascial pain syndrome, by history. The nerve conduction study and electromyography of the upper extremity and neck did not reveal evidence of a cervical radiculopathy. Dr. Gibbs opined that he did not think that appellant's aggravation was permanent and that in time with therapy, appellant should improve.

Appellant continued to work light duty for four hours per day and undergo physical therapy. On April 26, 1996 Dr. Smith took appellant off work. On May 23, 1996 appellant was discharged from Dr. Smith's care.

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<sup>1</sup> The record reflects that appellant has a previous worker's compensation claim which was accepted for a neck sprain and back sprain as a result of an October 30, 1993 injury.

The Office referred appellant, along with medical records and a statement of accepted facts, to Dr. Peter Bernad, a Board-certified internist and neurologist. In a report dated March 13, 1997, Dr. Bernad provided a history and results on examination. He found a normal neurologic and musculoskeletal examination. Dr. Bernad stated that appellant's chronic myofascial syndrome had resolved and stated that no further medical treatment would help appellant. He stated that although appellant had been going to physical therapy, in his opinion, appellant has reached maximum medical improvement. Dr. Bernad recommended that physical therapy be discontinued.

In a supplemental report dated May 14, 1997, Dr. Bernad stated that appellant was capable of returning to her regular position in a full-time capacity without restrictions. He noted that it was anticipated that when she returns to a full eight hours, she may experience pain again. Dr. Bernad further stated that the subjective pain appellant experiences is not based on her work injury of January 27, 1995. He stated that her pain was nonspecific and something that appellant describes. Dr. Bernad noted that the neurologic examination was normal and that it apparently irritates appellant to work more than four hours.

In a letter dated June 4, 1997, the Office advised appellant that it proposed to terminate her compensation on the grounds that the work injury of January 27, 1995, which resulted in aggravation of chronic myofascial syndrome, has resolved. An accompanying memorandum found that Dr. Bernad's reports of March 13 and May 14, 1997 represented the weight of the medical evidence.

In a decision dated July 7, 1997, the Office terminated appellant's compensation for medical benefits and wage loss effective July 7, 1997.

In a letter dated July 19, 1997, appellant requested a hearing before an Office hearing representative. Submitted with her request was a June 23, 1997 report from Dr. Arthur Litofsky, a neurological surgeon. Dr. Litofsky provided a history and results on examination. He stated that appellant appears to have a cervical radiculopathy, which began at the onset of her initial injury at work in 1993 and since that time she has had repeated episodes of pain requiring courses of physical therapy and she has deteriorated to the point where she cannot work her regular work, but has been on light duty for two years and on part time, four hours a day. Dr. Litofsky further stated that it appeared that this problem currently is related to the original injury of 1993 and is deteriorating. He stated that he felt very strongly that appellant does have a cervical disc problem which is causing compression and a cervical radiculopathy.

In a decision dated September 16, 1997, an Office hearing representative vacated the July 7, 1997 decision and remanded the case for a *de novo* decision.

In a decision dated November 18, 1997, the Office terminated appellant's compensation for medical benefits and wage loss effective March 13, 1997. The accompanying memorandums found that Dr. Bernad's reports represented the weight of the medical evidence.

In a letter dated December 8, 1997, appellant requested a hearing before an Office hearing representative. Included with the request was a report from Dr. Virginia D. Steen, a Board-certified internist and rheumatologist, which the Office received February 13, 1998. After

providing a history and results on examination, Dr. Steen diagnosed chronic myofascial pain syndrome with concomitantly active depression. She recommended physical therapy, range of motion exercises and a regimen of prescription muscle relaxers.

In a report dated December 3, 1997, Dr. Steen provided her results on examination and diagnosed aggravated chronic myofascial pain syndrome which had not totally resolved. She further stated that appellant should not return to full-time work capacity without restrictions at this time. Dr. Steen stated that there were objective findings on her examination which were constant with her problems. She further stated that appellant has developed a clinical depression on top of the myofascial pain syndrome. Dr. Steen specifically disagreed with Dr. Bernad that physical therapy was not beneficial and stated that myofascial release types of physical therapy benefit patients with chronic myofascial pain.

In a decision dated July 2, 1998, the Office hearing representative affirmed the November 18, 1997 termination. She found that the medical evidence submitted during and subsequent to the hearing failed to establish that appellant continued to suffer residual disability related to the accepted work condition on or after March 13, 1997, the effective date of the termination of benefits.

The Board finds that the Office did not meet its burden of proof in terminating compensation effective March 13, 1997.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>2</sup>

In the present case, an Office referral physician, Dr. Bernad, opined that appellant's myofascial pain syndrome had resolved, that physical therapy would be of little benefit and that appellant only wants to work four hours a day. However, Dr. Lifofsky, in his June 23, 1997 report, opined that appellant's cervical radiculopathy was causally related to her original work injury of 1993 and has deteriorated to the point where she cannot work her regular work. Dr. Steen diagnosed chronic myofascial pain syndrome that has not totally resolved with concomitantly active depression. She additionally specifically disagreed with Dr. Bernad regarding physical therapy as she thought it would benefit appellant. Thus, a conflict in the medical evidence exists as to the continuing existence of the chronic myofascial pain syndrome and, in turn, appellant's continuing entitlement to compensation. It is, as noted above, the Office's burden of proof to terminate compensation in this case. The Office cannot meet its burden until the conflict in the medical evidence is properly resolved.<sup>3</sup> Since the Office has not resolved the conflict, it has failed to meet its burden and the termination of compensation was improper.

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<sup>2</sup> *Frank J. Mela, Jr.*, 41 ECAB 115 (1989); *Mary E. Jones*, 40 ECAB 1125 (1989).

<sup>3</sup> See *Gail D. Painton*, 41 ECAB 492 (1990). 5 U.S.C. § 8123(a) provides in relevant part as follows: "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."

The decisions of the Office of Workers' Compensation Programs dated July 2, 1998 and November 18, 1997 are reversed.

Dated, Washington, D.C.  
August 23, 1999

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member