

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MARY G. BORDONARO and U.S. POSTAL SERVICE,
POST OFFICE, Poughkeepsie, NY

*Docket No. 98-1500; Submitted on the Record;
Issued May 18, 2000*

DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective January 1, 1997; and (2) whether appellant met her burden of proof to establish that she had any disability after January 1, 1997 causally related to her employment injury.

On December 27, 1989 appellant, then a 57-year-old postmaster, sustained an employment-related vertebral subluxation at C4 when she was rear-ended in a motor vehicle accident. She continued to work until she retired on October 3, 1992. On May 24, 1993 she sustained a recurrence of disability and was placed on the periodic rolls. The Office continued to develop the claim and on July 16, 1996 referred appellant to Dr. Michael J. Fracchia, a Board-certified orthopedic surgeon, for a second opinion evaluation. By letter dated October 2, 1996, the Office informed appellant that it proposed to terminate her compensation, based on the opinion of Dr. Fracchia. In a letter dated October 22, 1996, appellant disagreed with the proposed termination and submitted additional evidence. By decision dated January 2, 1997, the Office terminated her benefits, effective January 4, 1997, finding that the employment-related residuals had ceased. On January 16, 1997 appellant, through counsel, requested reconsideration and submitted additional evidence. Finding that a conflict in the medical opinion existed between the opinion of Dr. Fracchia and that of Dr. Shlomo Piontkowski, appellant's treating Board-certified orthopedic surgeon, regarding whether she continued to be disabled, by letter dated January 15, 1998, the Office referred appellant to Dr. Edmund Stewart, a Board-certified orthopedic surgeon, for an impartial medical evaluation.¹ By decision dated February 19, 1998, the Office denied modification of the prior decision on the grounds that the opinion of Dr. Stewart established that appellant was no longer totally disabled as a result of the 1989 employment injury. The instant appeal follows.

¹ Drs. Fracchia and Stewart were furnished with the medical record, a statement of accepted facts and a set of questions.

The medical evidence relevant to the termination of appellant's compensation includes a number of reports from appellant's treating Board-certified neurologist, Dr. Frederic A. Mendelsohn, including a March 12, 1996 treatment note, in which he noted neck and left upper extremity pain, left ear and head pain and pulsatile tinnitus on the left. Magnetic resonance imaging of the brain and inner ear was reported as normal. In a June 18, 1996 treatment note, Dr. Mendelsohn advised that appellant's neck pain was persistent. In an attending physician's report also dated June 18, 1996, he diagnosed cervical spondylosis and thoracic outlet syndrome, checked boxes indicating that appellant's condition was caused by the December 27, 1989 employment injury, that she was disabled from her usual work and advised that her prognosis was guarded because she was unable to lift, push, pull, stand or sit for long. In an October 15, 1996 report, Dr. Mendelsohn stated that appellant's cervical spondylosis with persistent cervical and arm pain was secondary to nerve root irritation and advised that her condition was permanent and caused her to have pain with lifting and prolonged sitting.

In a June 26, 1996 attending physician's report, Dr. David J. BenEliyahu, a chiropractor, diagnosed cervical subluxation² at C4 with associated discopathy and myofascitis, which Dr. BenEliyahu advised were due to the "severe" motor vehicle accident of December 27, 1989 and advised that her prognosis was poor. In an October 31, 1996 report, he reported appellant's complaints of headache and chronic pain in the neck, upper back and arms and numbness in the hands. Dr. BenEliyahu noted findings on examination and diagnosed chronic post-traumatic cervical subluxation with associated cervical radiculitis, peripheral neuritis, myofascitis and disc displacement and advised that her symptoms were causally related to the accident and that she continued to require supportive care for her post-traumatic injuries and chronic pain syndrome.

Dr. BenEliyahu concluded that appellant was 61 percent disabled.

Dr. Fracchia, a Board-certified orthopedic surgeon, who provided a second opinion evaluation for the Office, submitted a report dated July 30, 1996, in which he diagnosed chronic cervical strain with associated degenerative arthritis and opined that appellant was mildly partially disabled but advised that this was due to chronic cervical arthritis. Dr. Fracchia concluded that she could perform the duties of a postmaster. In an attached work capacity evaluation, he advised that appellant had no limitations due to the employment injury but provided restrictions to her physical activity due to nonemployment-related chronic cervical arthritis.³

The Board finds that the Office met its burden of proof to terminate appellant's compensation.

Once the Office accepts a claim it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally

² In a January 18, 1983 x-ray report, Dr. BenEliyahu diagnosed, *inter alia*, subluxation at the C4 level.

³ Dr. Fracchia advised that appellant should not lift greater than 15 pounds and should not keep her neck in a contorted position and provided restrictions on extending, bending and rotating her neck.

related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.⁴

In assessing medical evidence, the weight of such evidence is determined by its reliability, its probative value and its convincing quality. The factors which enter in such an evaluation include the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of the analysis manifested and the medical rationale expressed in support of the physician's opinion.⁵ In this case, the Board finds that the weight of the medical evidence regarding the termination of appellant's compensation rests with the opinion of Dr. Fracchia as he provided a comprehensive, well-rationalized report in which he explained his findings and conclusions. The Board, therefore, finds that appellant had no employment-related disability on or after January 4, 1997 and the Office met its burden of proof to terminate her compensation benefits on that date.

The Board further finds that this case is not in posture for decision regarding appellant's disability after January 4, 1997.

As the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to her to establish that she had continuing disability causally related to her accepted injury.⁶ Subsequent to the January 2, 1997 decision terminating her benefits, appellant submitted, *inter alia*,⁷ reports dated January 16 and August 9, 1997 from Dr. Piontkowski, a Board-certified orthopedic surgeon, who advised that she continued to be totally disabled due to the employment injuries to her cervical spine. The Office determined that a conflict in the medical opinion existed between the opinion of Drs. Fracchia and Piontkowski regarding whether appellant continued to be disabled. The Office then referred her to Dr. Stewart, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

In a January 27, 1998 report, Dr. Stewart advised that he had reviewed the medical record, noted findings on examination and stated that appellant had a causally related diagnosis of status post cervical sprain. He advised that the noncausally-related diagnoses were preexistent degenerative arthritis of the cervical spine, tenosynovitis of both thumbs, right trigger thumb and bilateral carpal tunnel syndrome and stated:

“Despite the fact that [appellant] returned to work as a postmaster after one week and worked until her retirement in 1992, there are ample records available substantiating the chronicity of her neck pain from the time of the incident of December 27, 1989 up until the present date. Therefore, it is my opinion that [she] suffers from a permanent aggravation of her underlying cervical arthritis, related to the incident of December 27, 1989.”

⁴ See *Patricia A. Keller*, 45 ECAB 278 (1993).

⁵ *Gary R. Sieber*, 46 ECAB 215 (1994).

⁶ See *George Servetas*, 43 ECAB 424 (1992).

⁷ With her reconsideration request appellant submitted reports from Drs. BenEliyahu and Mendelsohn, and Drs. Piontkowski and Neil J. Kurtz, who are Board-certified orthopedic surgeons.

He advised that she required only symptomatic orthopedic followup regarding her cervical condition and could perform a light-duty, sedentary occupation befitting her age. In an attached work capacity evaluation, Dr. Stewart advised that appellant had restrictions on reaching above the shoulder, twisting, climbing, and pushing, pulling and lifting not greater than 10 pounds.

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.⁸ However, when the Office secures an opinion from an impartial medical specialist for the purpose of resolving a conflict in medical opinion evidence and the opinion from such specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the impartial specialist for the purpose of correcting the defect in the original report.⁹

In this case, in his January 27, 1998 report, Dr. Stewart advised that appellant suffered from a permanent aggravation of her underlying cervical arthritis, related to the December 27, 1989 employment injury which would require only symptomatic orthopedic followup. He concluded that she could work in a light-duty, sedentary occupation befitting her age category. The record contains Office CA-17 forms dating from 1990 that indicate that the physical requirements of appellant's usual postmaster job required lifting of up to 50 pounds and intermittent sitting, standing, walking, climbing, kneeling, bending, stooping, pulling/pushing and reaching above the shoulder. Therefore, as Dr. Stewart advised that appellant's cervical arthritis was aggravated by the December 1989 employment injury and that she could only perform sedentary work, the case will be remanded for the Office to prepare an updated statement of accepted facts, containing a position description of the postmaster-manager job that appellant was performing at the time of her retirement to include the physical requirements of the job. The Office should then obtain a supplemental report from Dr. Stewart.¹⁰ After such development as it deems necessary, the Office shall issue a *de novo* decision.

The decisions of the Office of Workers' Compensation Programs dated February 19, 1998 is affirmed in part and vacated in part and the case is remanded to the Office for proceedings consistent with this opinion.

Dated, Washington, D.C.
May 18, 2000

⁸ See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECAB 702 (1992).

⁹ See *Talmdage Miller*, 47 ECAB 673 (1996).

¹⁰ The Board notes that, when the impartial medical specialist's statement of clarification or elaboration is not forthcoming to the Office, or if the physician is unable to clarify or elaborate on the original report, or if the physician's report is vague, speculative or lacks rationale, the Office must refer the employee to another impartial specialist for a rationalized medical opinion on the issue in question.

George E. Rivers
Member

David S. Gerson
Member

Bradley T. Knott
Alternate Member