

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of FIORI PUGLIANO and U.S. POSTAL SERVICE,  
POST OFFICE, Pittsburgh, PA

*Docket No. 99-937; Submitted on the Record;  
Issued February 23, 2001*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
BRADLEY T. KNOTT

The issues are: (1) whether appellant met his burden of proof to establish that he sustained a recurrence of disability during the period August 12, 1982 to January 23, 1986 due to his August 26, 1980 employment injury; and (2) whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation effective July 17, 1995 on the grounds that he had no disability due to his employment injuries after that date.

The Board finds that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability during the period August 12, 1982 to January 23, 1986 due to his August 26, 1980 employment injury.

On August 26, 1980 appellant, then a 44-year-old special delivery messenger, sustained a partial rupture of the belly and tendon of his left arm biceps muscle. In September 1980 appellant underwent a surgical repair, which was authorized by the Office. He returned to regular duty on February 21, 1981. On February 24, 1982 appellant sustained a left arm contusion and left carpal tunnel syndrome. In May 1982 he underwent a left carpal tunnel release which was authorized by the Office. He returned to regular duty on July 1, 1982 and stopped work on August 12, 1982 claiming that he sustained a recurrence of disability due to his August 26, 1980 employment injury. By decisions dated October 15, 1982 and April 6, 1983, the Office denied appellant's recurrence of disability claim.<sup>1</sup> By decision dated September 24, 1997, the Office terminated appellant's compensation effective July 17, 1995 on the grounds that he had no employment-related disability after that date.<sup>2</sup> The Office also determined that appellant did not meet his burden of proof to establish that he sustained a recurrence of disability on or after August 12, 1982 due to his August 26, 1980 employment injury. By decision dated

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<sup>1</sup> On April 10, 1982 appellant was granted a schedule award for an eight percent permanent impairment of his left arm.

<sup>2</sup> In September 1983 appellant's case was remanded to the Office for further development of the medical evidence. The Office began to pay appellant compensation for partial disability effective January 23 1986.

and finalized December 1, 1998, an Office hearing representative affirmed the Office's September 24, 1997 decision.

An individual who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which compensation is claimed is causally related to the accepted injury.<sup>3</sup> This burden includes the necessity of furnishing medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical rationale.<sup>4</sup> Where no such rationale is present, medical evidence is of diminished probative value.<sup>5</sup>

In the present case, the Office determined that there was a conflict in the medical opinion between Dr. John J. Nicolas, an attending physician specializing in physical medicine and rehabilitation, and Dr. Howard B. Finkelhor, a Board-certified neurosurgeon acting as an Office referral physician, on the issue of whether appellant sustained a recurrence of disability on or after August 12, 1982 due to his August 26, 1980 employment injury.<sup>6</sup> In order to resolve the conflict, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Robert O. Sarver, a Board-certified orthopedic surgeon, for an impartial medical examination and an opinion on the matter.<sup>7</sup>

In situations where there exist 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 upon a proper factual background, must be given special weight.<sup>8</sup> The Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized opinion of Dr. Sarver, the impartial medical specialist selected to resolve the conflict in the medical opinion. The November 7, 1984 report of Dr. Sarver establishes that appellant did not sustain a recurrence of disability on or after August 12, 1982 due to his August 26, 1980 employment injury.

In his report, Dr. Sarver determined that appellant did not exhibit any objective evidence of disability due to his August 26, 1980 employment injury on or after August 12, 1982. He

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<sup>3</sup> *Charles H. Tomaszewski*, 39 ECAB 461, 467 (1988); *Dominic M. DeScala*, 37 ECAB 369, 372 (1986).

<sup>4</sup> *Mary S. Brock*, 40 ECAB 461, 471-72 (1989); *Nicolea Bruso*, 33 ECAB 1138, 1140 (1982).

<sup>5</sup> *Michael Stockert*, 39 ECAB 1186, 1187-88 (1988).

<sup>6</sup> In a report dated February 13, 1984, Dr. Finkelhor indicated that appellant did not sustain an employment-related recurrence of disability but noted that his continuing problems were due to hysteria or malingering. In reports dated March 30, 1983 and July 2, 1984, Dr. Nicolas indicated that when he first examined appellant in 1983 he exhibited employment-related disability.

<sup>7</sup> 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 who shall make an examination." 5 U.S.C. § 8123(a).

<sup>8</sup> *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

noted that the lack of atrophy or sensory changes in appellant's left arm showed that he had been using the arm without difficulty. Dr. Sarver indicated that appellant exhibited inconsistent responses upon range of motion testing and diagnosed conversion hysteria or malingering. He noted that appellant might have some shoulder capsulitis or loss of supination related to the August 26, 1980 injury but that these conditions would not be disabling. Dr. Sarver noted that appellant sustained a type of employment injury which would have long since resolved.

The Board has carefully reviewed the opinion of Dr. Sarver and notes that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue of the present case. Dr. Sarver's opinion is based on a proper factual and medical history in that he had the benefit of an accurate and up-to-date statement of accepted facts, provided a thorough factual and medical history and accurately summarized the relevant medical evidence.<sup>9</sup> Dr. Sarver provided medical rationale for his opinion by explaining that appellant did not exhibit objective evidence of employment-related disability and by noting that appellant sustained a type of employment injury which would have long since resolved. He noted the role of hysteria or malingering in appellant's continuing problems.<sup>10</sup>

The Board further finds that the Office met its burden of proof to terminate appellant's compensation effective July 17, 1995 on the grounds that he had no disability due to his employment injuries after that date.

Under Federal Employees' Compensation Act, once the Office has accepted a claim it has the burden of justifying termination or modification of compensation benefits.<sup>11</sup> The Office may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.<sup>12</sup> The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>13</sup>

The Office properly based its termination of appellant's compensation effective July 17, 1995 on the opinion of Dr. Robert Yanchus, a Board-certified orthopedic surgeon who served as an Office referral physician. In a report dated July 17, 1995, Dr. Yanchus determined that appellant did not exhibit any objective residuals of his August 20, 1980 and February 24, 1982 employment injuries and noted that he could return to his regular work for the employing establishment. He indicated that appellant had excellent results after his biceps and carpal tunnel surgeries and noted that his employment-related condition would have long since resolved. Dr. Yanchus suggested that appellant exhibited inappropriate responses on range of motion and grip strength testing. In a supplemental report dated August 13, 1997, Dr. Yanchus noted that

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<sup>9</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>10</sup> The record contains reports of attending physicians dated after Dr. Sarver's evaluation, but these reports do not contain a clear opinion that appellant sustained an employment-related recurrence of disability.

<sup>11</sup> *Charles E. Minniss*, 40 ECAB 708, 716 (1989); *Vivien L. Minor*, 37 ECAB 541, 546 (1986).

<sup>12</sup> *Id.*

<sup>13</sup> See *Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

the testing performing in July 1995 showed that appellant could perform his regular duties. He emphasized that appellant responded well to his surgeries and exhibited normal findings on diagnostic testing, including electromyogram testing, of his left arm.<sup>14</sup>

The Board notes that the opinion of Dr. Yanchus has sufficient probative value to serve as the basis for terminating appellant's compensation effective July 17, 1995. Dr. Yanchus' opinion is based on a proper factual and medical history and accurately summarized and analyzed the relevant medical evidence.<sup>15</sup> He provided medical rationale for his opinion by explaining that appellant did not exhibit any objective evidence of employment-related disability and by noting that the medical evidence showed that his employment-related conditions had long since resolved.<sup>16</sup>

The decision of the Office of Workers' Compensation Programs dated and finalized December 1, 1998 is affirmed.

Dated, Washington, DC  
February 23, 2001

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Member

Bradley T. Knott  
Alternate Member

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<sup>14</sup> Dr. Yanchus also indicated that it was unclear whether appellant actually sustained left carpal tunnel syndrome due to employment factors.

<sup>15</sup> See *Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

<sup>16</sup> The record does not contain any rationalized reports of attending physicians which conflict with the opinion of Dr. Yanchus regarding appellant's claim of continuing disability.