

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of PHYLLIS D. SCOTT and U.S. POSTAL SERVICE,
BULK MAIL CENTER, Jersey City, NJ

*Docket No. 02-946; Submitted on the Record;
Issued August 16, 2002*

DECISION and ORDER

Before ALEC J. KOROMILAS, COLLEEN DUFFY KIKO,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof in terminating appellant's compensation.

Appellant's claims, filed on June 5, 1998 and August 14, 1999, were accepted for neck and left shoulder sprains,¹ based on reports from Dr. Nathan E. Doctry, an orthopedic practitioner. The Office referred appellant to Dr. Phillip Keats, a Board-certified orthopedic surgeon, for a second opinion evaluation on February 7, 2000.

Based on Dr. Keats' February 21, 2000 report, the Office found a conflict of medical opinion between him and Dr. Doctry, and referred appellant to Dr. Michael Bercik, a Board-certified orthopedic surgeon, to resolve the issue of whether appellant had any residuals of her accepted work injuries.²

The Office issued a notice of proposed termination of compensation on November 17, 2000, based on the August 14, 2000 report of Dr. Bercik.

On February 6, 2001 the Office terminated appellant's compensation, effective February 25, 2001, on the grounds that her work-related injuries had resolved. The Office noted that appellant had not responded to its November 17, 2000 proposed termination notice.

By letter dated September 10, 2001, appellant requested reconsideration and submitted reports from Dr. Steven L. Nehmer, a Board-certified orthopedic surgeon. The Office denied modification of its previous decision on November 27, 2001.

¹ A May 28, 1999 claim for a recurrence of disability was denied.

² 5 U.S.C. § 8123(a) states in pertinent part: "If there is a 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 Board finds that the Office met its burden of proof in terminating appellant's compensation.

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.³ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.⁴

In situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examination to resolve the conflict in medical opinion.⁵ The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.⁶

The Office properly determined that a conflict of medical opinion existed over whether appellant's work-related neck and left shoulder strains had resolved. Dr. Doctry stated in his October 5, 1999 report that appellant's continued symptoms and complaints about her neck and left shoulder were related to her June 5, 1998 injury and that the degenerative changes in her acromioclavicular joint with bone spur formation directly resulted from the June trauma. He added that the work injury would eventually lead to an impingement syndrome and that appellant was totally disabled.

In his February 21, 2000 report, Dr. Keats found appellant capable of full-time work with a weight restriction, noting that objective findings of limited motion and significant pain were inconsistent among the examining physicians and that magnetic resonance imaging (MRI) scans of appellant's cervical spine and left shoulder showed no pathology other than degenerative changes and no impingement or rotator cuff problems.

Dr. Bercik resolved the conflict in his August 14, 2000 report, concluding that appellant could resume regular work activities. He reviewed a statement of accepted facts and a history of appellant's treatment for her neck and left shoulder strains, including the August 26, 1999 MRI studies. During physical examination of appellant's left shoulder, Dr. Bercik noted her "inconsistent effort in regard to range of motion." He stated that no clinical findings correlated with appellant's subjective complaints of pain, that she had reached the maximum benefit of treatment, and that she had "no permanent physical impairment" resulting from the 1998 and 1999 injuries.

³ *Betty Regan*, 49 ECAB 496, 501 (1998).

⁴ *Raymond C. Beyer*, 50 ECAB 164, 168 (1998).

⁵ *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

⁶ *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

Dr. Bercik reviewed the case record and various reports on appellant's medical treatment since the 1998 injuries. He examined appellant thoroughly, discussed the diagnostic testing, explained his clinical findings and provided medical rationale for his conclusion that appellant's work-related sprains had resolved. Dr. Bercik provided an opinion that was sufficiently well rationalized to support his conclusion that appellant had no residuals of her work-related sprains and could resume her regular duties. The Board finds that Dr. Bercik's report represents the weight of the medical opinion evidence and establishes that appellant's accepted work injuries had resolved.⁷

On reconsideration appellant submitted the reports of Dr. Nehmer. He stated on October 29, 2001 that he was treating appellant for left shoulder impingement and cervical radiculitis, that she would need surgery on her left shoulder, and that she was able to return to work with a 10-pound weight restriction.

In his August 14, 2001 report, Dr. Nehmer stated that he had treated appellant since December 18, 2000 for complaints of pain in the left shoulder following an August 1999 injury at work. He disagreed with the physical findings of Dr. Bercik, noting positive impingement signs and tenderness about the shoulder on repeated examinations. Dr. Nehmer concluded that appellant's impingement syndrome was causally related to the 1999 injury, which significantly aggravated her symptoms stemming from the degenerative changes in the acromioclavicular joint.

The Board finds that Dr. Nehmer's opinion is insufficient to overcome the special weight accorded the opinion of the impartial medical examiner, Dr. Bercik, because Dr. Nehmer provided no medical rationale for his conclusion that appellant's impingement syndrome was causally related to the accepted shoulder strain. Dr. Nehmer stated that the MRI study showed a degenerative acromioclavicular joint, which could be a cause of impingement for the rotator cuff tendon. Such a speculative opinion has little probative value.⁸

Dr. Nehmer's basis for finding a causal relationship between appellant's shoulder impingement and the August 1999 injury was the onset of symptoms at that time but he failed to explain how the mechanics of that injury -- appellant stated that an empty plastic jug fell on her neck, causing her to twist in surprise -- resulted in a shoulder impingement years later. Inasmuch as Dr. Nehmer's conclusion is not rationalized, the weight of the medical opinion evidence remains with Dr. Bercik.⁹ Therefore, the Office properly denied modification of its decision to terminate appellant's compensation.

⁷ See *Jimmie H. Duckett*, 52 ECAB ____ (Docket No. 99-1858, issued April 6, 2001) (opinion that appellant's back condition was due to the natural progression of his spondylitis was sufficiently rationalized to establish that his work-related back condition had resolved and to meet the Office's burden of proof in terminating compensation).

⁸ See *Samuel Senkow*, 50 ECAB 370, 377 (1999) (finding that, because a physician's diagnosis of legionnaires' disease was not definite and was unsupported by medical rationale, his report was insufficient to establish a causal relationship).

⁹ See *Richard L. Rhodes*, 50 ECAB 259, 263 (1999) (finding that the impartial medical examiner's opinion that appellant's hysterical conversion disorder had resolved was sufficiently well rationalized to merit special weight).

The November 27, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC
August 16, 2002

Alec J. Koromilas
Member

Colleen Duffy Kiko
Member

Michael E. Groom
Alternate Member