

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUDITH A. COCHRAN and U.S. POSTAL SERVICE,
GENERAL MAIL FACILITY, New Castle, PA

*Docket No. 01-1033; Submitted on the Record;
Issued December 17, 2002*

DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly terminated appellant's compensation benefits on the basis that she had no residual disability due to her accepted March 28, 1994 or August 5, 1997 employment injuries after May 13, 1999.

On March 28, 1994 appellant, then a 37-year-old clerk/carrier, filed a notice of traumatic injury (Form CA-1) alleging that she injured her back when she was hit from behind by a letter rack.¹ The Office accepted the claim for cervical and thoracic strains. Appellant stopped work for the period April 30 to May 13, 1994 and returned to limited-duty work four hours per day.

On August 5, 1997 appellant filed a traumatic injury claim alleging that she sustained head and neck pain when a door fell off its hinges and struck her.² The Office accepted the claim for a cervical strain and closed head wound (contusion).

In a January 20, 1998 report, Dr. Marshall S. Levy, an Office referral physician, concluded that appellant was capable of performing her usual work duties eight hours per day. Dr. Levy noted objective findings to support a finding of fibromyositis. Regarding the cause of appellant's fibromyositis, he noted:

“The cause of the fibromyalgia is not known and[,] therefore[,] it cannot be stated that it was caused by her injury. However[,] the generalized aches and pains have their onset quite a bit aft[er] that injury and I would not be inclined to misblame the injury. Please note that the complaint to me, quoted at the beginning of this letter, was pain all over her body and [appellant] is always in pain. This would be the fibromyositis rather than the local myofacial pain expected from the injury she

¹ This was assigned claim number 03-195855.

² This was assigned claim number 03-0229372. On October 21, 1997 the Office combined claims 03-0229372 and 03-195855 with the latter as the master number.

had. Thus the latter type of pain would be expected to occur in the neck and upper back where the tendons and ligaments are attached. It is possible for all the scattered aches and pains to precede the onset of fibromyositis but with a one year interval I find it difficult to evoke a cause and effect the relationship here between the injury and the onset of symptoms.”

Dr. Levy opined that appellant continued to have residual disability due to her 1988 employment injury for which she was given limited duty.

In a March 26, 1998 report, Dr. Stuart A. Gardner, an attending Board-certified orthopedic surgeon, diagnosed chronic upper back pain, neck pain and fibromyositis subsequent to her thoracic and cervical strains. He related “There have been no (sic) ongoing objective findings related to the pain that she has had in her upper back and neck. [Appellant] has a typical picture of cervical and thoracic strain with fibromyositis. These problems are to my knowledge solely related to her work injuries of March 28, 1994 and August 5, 1997.” He also opined that “The recovery with these problems have been prolonged because of the fibromyositis which is a long-term condition that can occur following an injury.” As to appellant’s work capabilities, Dr. Gardner concluded that it was unlikely that she would be able to return to her position prior to her injury.

In a May 18, 1998 report, Dr. John W. Lehman, a second opinion Board-certified orthopedic surgeon, concluded that appellant had recovered from her accepted employment injuries. He noted that there were “no objective findings or evidence to suggest that she has any ongoing pathology.” Regarding the diagnosis of fibromyalgia, he opined that if she did have the condition that it was unrelated to her employment injuries.

On August 28, 1998 the Office referred appellant to Dr. Robert M. Yanchus to resolve the conflict in the medical opinion evidence between Dr. Gardner, an attending physician and Dr. Lehman, an Office referral physician, on the issues of whether appellant continued to be disabled and whether she had fibromyalgia due to her employment.

In a September 22, 1998 report, Dr. Yanchus, based upon a review of the medical evidence, statement of accepted facts and physical examination, concluded that appellant had reached maximum medical improvement from her March 28, 1994 employment injury by April 15, 1994 and maximum medical improvement was reached on August 10, 1997 from her August 5, 1997 employment injury. A physical examination revealed a normal neurological examination, good range of motion in the lumbar spine and full range of motion in the shoulders and neck. Dr. Yanchus opined that appellant’s symptoms were unrelated to either of her accepted employment injuries of accepted March 28, 1994 and August 5, 1997. In support of this conclusion, he noted that there were “no objective findings to support her symptoms” or to support a diagnosis of fibromyalgia. In concluding, Dr. Yanchus opined:

“The type of treatment at this time would be ‘no treatment.’ (sic) RTW to a full eight[-]hour schedule with no modifications or restrictions should be considered part of the treatment. I do not quite understand how someone could be paid for an eight[-]hour day and yet work only four. This takes motivation to RTW completely out of the picture. There is no indication for further diagnostic

studies, physician visits, physical therapy programs, chronic pain or work[-] hardening programs, chiropractic, acupuncture, aqua therapy or any other modalities.”

On March 11, 1999 the Office issued a notice of proposed termination of compensation benefits.

Appellant’s counsel responded to the proposed notice of termination, by letter dated March 25, 1999, arguing that Dr. Gardner’s opinion should be entitled to greater weight than Dr. Yanchus’ opinion.

By decision dated May 13, 1999, the Office finalized the termination of appellant’s compensation benefits on the basis that she no longer had any continuing disability as a result of her March 28, 1994 and August 5, 1997 employment injuries. The Office found that the September 22, 1998 examination and report of Dr. Yanchus, a Board-certified orthopedic surgeon and impartial medical specialist, represented the weight of the medical evidence.³

Appellant’s counsel requested a hearing which was held on January 24, 2000.

In a decision dated April 7, 2000, an Office hearing representative affirmed the May 13, 1999 decision terminating compensation.

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

Once the Office has accepted a claim and pays compensation, it bears the burden to justify modification or termination of benefits.⁴ 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.⁵

The fact that the Office accepts appellant’s claim for a specified period of disability does not shift the burden of proof to appellant to show that he or she is still disabled. The burden is on the Office to demonstrate an absence of employment-related disability in the period subsequent to the date when compensation is terminated or modified.⁶ The Office’s burden includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

³ Dr. Yanchus concluded that appellant could return to her prior duties as a clerk/carrier without modifications or restrictions.

⁴ *Fred Simpson*, 53 ECAB ____ (Docket No. 02-802, issued August 27, 2002).

⁵ *Barbara L. Chien*, 53 ECAB ____ (Docket No. 00-1646, issued June 7, 2002).

⁶ *Patrick P. Curran*, 47 ECAB 247 (1995).

⁷ *Mary Lou Barragy*, 46 ECAB 781 (1995).

The Federal Employees' Compensation Act, at 5 U.S.C. § 8123(a), in pertinent part, provides: "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."⁸

When 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.⁹

The Office found that a conflict in the medical evidence existed with respect to appellant's continuing employment-related condition and whether her fibromyalgia was employment related. She was referred to Dr. Yanchus, a Board-certified surgeon.

The Board finds that Dr. Yanchus' September 28, 1998 report is well rationalized and is based on a proper factual background and must, therefore, be accorded special weight on the issue of whether appellant continued to have residuals of her work-related injuries. As the weight of the medical opinion evidence on this issue, this report justifies the Office's decision to terminate appellant's compensation.

In his September 22, 1998 report, Dr. Yanchus provided a history of injury, noted appellant's complaints of pain and his findings on examination and opined that appellant had no objective evidence supporting a diagnosis of fibromyalgia, no objective evidence to support her subjective complaints of pain and could return to work eight hours a day. The Board finds that Dr. Yanchus' opinion is based on a complete and accurate factual background and is sufficiently well rationalized to be accorded special weight. Dr. Yanchus' opinion thus, constitutes the weight of the medical evidence and establishes that appellant did not, at the time of the termination, have any residual disabilities or fibromyalgia causally related to her March 28, 1994 and August 5, 1997 employment injuries. As the weight of the medical opinion evidence, Dr. Yanchus' report supports the Office's termination of appellant's compensation benefits.

Finally, the Board notes that on appeal appellant alleges that Dr. Yanchus was biased because of his comments regarding appellant working four hours and being paid for eight hours. The Board has previously held, however, that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.¹⁰ Dr. Yanchus' comments regarding being paid for an eight-hour day when appellant only worked four hours per day do not show bias as the physician based his opinion regarding appellant's disability are premised upon a review of the medical record, the objective evidence and a physical examination. Appellant has not provided any evidence that Dr. Yanchus was in fact biased against appellant.

⁸ 5 U.S.C. § 8123(a).

⁹ *Adrienne L. Curry*, 53 ECAB ____ (Docket No. 01-1791, issued August 22, 2002); *Richard L. Rhodes*, 50 ECAB 259 (1999).

¹⁰ *Roger S. Wilcox*, 45 ECAB 265 (1993).

The April 7, 2000 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
December 17, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member