

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of CAROL VISCO and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Seattle, WA

*Docket No. 02-1328; Submitted on the Record;  
Issued December 27, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, COLLEEN DUFFY KIKO,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs has met its burden of proof to justify termination of appellant's compensation benefits effective April 21, 1998.

On September 25, 1994 appellant, then a 54-year-old nurse, filed a claim alleging that she injured her neck when lifting a patient who had fallen to the floor. She stopped work on September 24, 1994 and returned to limited duty on November 28, 1994. Appellant stopped working on November 29, 1994 and returned to a limited-duty job on July 10, 1995 and thereafter stopped on August 20, 1995 and did not return.<sup>1</sup> The Office accepted the claim for cervical strain and major depressive episode. Appellant was paid appropriate compensation.

Subsequently appellant submitted various medical records from Dr. Thomas E. Williamson-Kirkland, a specialist in physical medicine and rehabilitation, dated February 1995 to March 5, 1996; and Dr. Steven Fey, a psychologist, dated February to August 1995. Dr. Kirkland noted treating appellant after her work-related cervical injury. He diagnosed appellant with congenitally fused C6-7 vertebral segments and degenerative disc disease at C4-5 and C5-6. Dr. Kirkland recommended that appellant be treated at the pain management program. Dr. Fey noted that appellant's psychological depression was in part due to her neck injury with elements longer standing and preceding the cervical injury.

On April 4, 1996 the Office referred appellant for a second opinion to Dr. John E. Dunn, a Board-certified orthopedist. The Office provided him with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties. In a report dated May 7, 1996, Dr. Dunn indicated that there was no clinical or laboratory findings indicating appellant's cervical strain continued to cause disability. He noted appellant had significant history of preexisting neck problems. Dr. Dunn indicated that appellant had returned

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<sup>1</sup> The record indicates that appellant accepted disability retirement in October 1995.

to her preinjury condition. He noted that appellant's injury in 1994 did not cause a material change in her underlying condition.

On June 25, 1996 the Office issued a notice of proposed termination of compensation on the grounds that Dr. Dunn's report established no continuing disability as a result of the 1994 employment injury.

By decision dated July 31, 1996, the Office terminated all appellant's compensation benefits effective the same date on the grounds that the weight of the medical evidence established that she had no continuing disability resulting from her 1994 employment injury.

In a letter dated August 27, 1996, appellant requested a hearing before an Office hearing representative. The hearing was held on August 25, 1997. Appellant submitted a report from Dr. W. Carl Allen, a specialist in orthopedics, who noted that appellant's positive magnetic resonance imaging (MRI) scan and his physical findings of significant spasms in her neck indicated that she was still experiencing residuals of her work-related injury. He disagreed with Dr. Dunn noting that appellant's work-related injury in 1994 aggravated her underlying condition and that she was not in the clinical condition she was in prior to the 1994 injury. Dr. Allen classified appellant as a category III of cervical dorsal impairment, which was caused by her work-related injury of 1994.

In a decision dated November 8, 1997, the hearing representative determined that a conflict was present between appellant's treating physician, Dr. Allen, who concluded that she still experienced residuals of her 1994 work-related injury and Dr. Dunn, the second opinion physician, who determined that appellant had no residuals of her work-related injury. The Office remanded the case for further development including sending appellant for an impartial medical examination to a Board-certified orthopedist and psychiatrist.

On February 9 and March 18, 1998 respectively, the Office referred appellant for referee examinations to Dr. Donald D. Hubbard, a Board-certified orthopedist; and Dr. G. Christian Harris, a Board-certified psychiatrist. The Office provided Drs. Hubbard and Harris with appellant's medical records, a statement of accepted facts as well as a detailed description of appellant's employment duties.

In a report dated February 23, 1998, Dr. Hubbard indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of her condition. Dr. Hubbard diagnosed appellant with cervical strain/sprain more probable than not related to the work injury; upper dorsal strain/sprain related more probable than not to the work injury; occipital headache; preexisting spondylosis of the cervical spine related to the injuries of the cervical spine in 1970 and 1976; intervertebral disc degeneration and congenital C6-7 fusion unrelated to the work injury; cervical and upper dorsal pain related to the work injury; and preexisting depression secondary to neck injuries. Dr. Hubbard indicated that there was no distinct objective findings noted during the examination, which indicated a residual or persistent impairment strictly related to the employment injury.

In a report dated April 14, 1998, Dr. Harris indicated that he reviewed the records provided to him and performed a physical examination of appellant. He noted a history of

appellant's condition. Dr. Harris diagnosed appellant with a dysthymic disorder not caused by her September 1994 injury, but aggravated by this injury; and a significant history of cervical vertebral pathology. He noted that appellant recovered from the effects of her employment injury from a psychiatric standpoint in the spring through summer 1995. Dr. Harris noted appellant was capable of performing her duties of the position she held when the 1994 injury occurred within the physical limitations necessitated by her long history of cerebral vertebral disc syndrome. He noted appellant underwent a craniotomy in 1993 for a colloid cyst of the brain and returned to work within three months.

On April 21, 1998 the Office issued a notice of proposed termination of compensation on the grounds that Drs. Hubbard and Harris' reports established no continuing disability as a result of the 1994 employment injury.

By decision dated May 27, 1998, the Office terminated all appellant's compensation benefits, effective the same date, on the grounds that the weight of the medical evidence established that appellant had no continuing disability resulting from her 1994 employment injury.

In a letter dated June 13, 1998, appellant requested an oral hearing before an Office hearing representative. The hearing was held on November 18, 1998.

In a decision dated January 28, 1999, the hearing representative remanded the case for further development with regard to appellant's psychiatric condition and orthopedic condition. The hearing representative indicated that the orthopedist, Dr. Hubbard, should submit a supplemental report clarifying his opinion with regard to whether appellant had any work-related residuals from her 1994 injury.

On March 2, 1999 the Office referred appellant to a second opinion physician, Dr. Michael K. Friedman, an osteopath, for evaluation. In a report dated March 16, 1999, he indicated that appellant had a temporary exacerbation of her depressive symptoms related to her September 24, 1994 incident. Dr. Friedman indicated that appellant's current condition was not causally related to the 1994 incident. He opined that appellant had recovered from the psychological effects of her employment related condition and could return to gainful employment.

In a report dated March 9, 1999, Dr. Hubbard indicated that there was no evidence which would indicate that appellant's employment injury caused any additional objective or measurable worsening of loss of range of motion, headaches or pain in the neck as a result of the September 24, 1994 injury. He noted that he could not identify any residual or persistent impairment above and beyond that anticipated and related to the preexisting degenerative cervical spine condition. Dr. Hubbard noted, with appellant's preexisting difficulty with her neck and pain syndrome, her orthopedic injury would have resolved nine months post injury or June 1995.

In a decision dated April 8, 1999, the Office denied appellant's claim for compensation after April 21, 1998 on the grounds that the evidence established that she recovered from her injury-related disability at the time of termination of benefits. The Office determined that based

on the report of the referee physician Dr. Hubbard, appellant's employment-related cervical condition was resolved. The Office further determined that, based on the second opinion physician, Dr. Friedman, appellant did not suffer residuals of an emotional condition as a result of her employment-related injury in 1994. In a letter dated April 12, 1999, appellant requested an oral hearing before an Office hearing representative. The hearing was held on September 15, 1999.

In a decision dated December 7, 1999, the hearing representative set aside the Office decision dated April 8, 1999 and remanded the case for another second opinion psychiatric evaluation from a physician not previously associated with the case. The Office affirmed the decision with respect to appellant's employment-related cervical condition being resolved as of April 21, 1998.

On January 6, 2000 the Office referred appellant for a second opinion examination to Dr. Friedman. In a report dated January 14, 2000, he indicated that appellant had a temporary exacerbation of her depressive symptoms related to the September 1994 injury. Dr. Friedman noted appellant's condition could not be considered causally related to the incident as appellant had a long history of depression predating the 1994 incident.

In a decision dated March 29, 2000, the Office denied appellant's claim for compensation after April 21, 1998. The Office determined that, based on the report of Dr. Friedman, appellant did not suffer residuals of her emotional condition as a result of her work-related injury of 1994.

On April 5, 2000 appellant requested a hearing before an Office hearing representative.

In a decision dated August 21, 2000, the hearing representative set aside the decision of the Office dated March 29, 2000 with respect to the determination that appellant's psychiatric condition was resolved. The hearing representative indicated that appellant should be referred to a new second opinion psychiatric evaluation not previously associated with the case and be provided with a reasonable amount of time so that she could arrange for a physician of her choosing to participate in the examination. The Office indicated that the decision dated April 8, 1999 with respect to termination of appellant's compensation based on her cervical condition being resolved is affirmed; however, the decision was being reissued because appellant was not given appeal rights.

The Office referred appellant to a second opinion physician, Dr. Sharon Romm, a Board-certified psychiatrist. In reports dated November 27, 2000 and February 1, 2001, she indicated that she reviewed the records provided to her and performed a physical examination of appellant. She noted a history of appellant's condition and diagnosed her with major depressive episode, chronic and recurrent; and psychosocial and environmental problems. Dr. Romm noted that appellant was chronically depressed and this depression was exacerbated by the injury of September 1994. She noted that appellant's current state of depression was not related to the 1994 injury. Dr. Romm opined that appellant had recovered from the psychological effects of her injury. She indicated that appellant was capable of gainful employment only limited by her orthopedic condition. Dr. Romm indicated that appellant had not obtained adequate treatment for her depression but had recovered from the effects of her work-related depression. Her February 1, 2001 report indicated that a psychological examination Minnesota Multiphasic

Personality Inventory-2 was performed on appellant and the profile was considered invalid. Dr. Romm noted that appellant responded in an extremely exaggerated manner. She noted that her previous report stands, however, she opined that appellant may have an element of malingering or false reporting of symptoms. Dr. Romm indicated that appellant most likely became somewhat depressed from her injury however the results of the injury should have long since resolved. Dr. Romm opined that appellant's current depression was not related to the injury of 1994. She concluded that there was no indication that appellant suffered from any residual psychological effects of the industrial injury.

In a decision dated February 28, 2001, the Office determined that appellant sustained a major depressive episode as a result of her work-related injury in 1994. The Office further noted that the weight of the evidence as represented by Dr. Romm's report indicates that this condition resolved as of the date of termination April 21, 1998.

On March 7, 2001 appellant requested an oral hearing before an Office hearing representative. The hearing was held on September 19, 2001.

In a decision dated December 27, 2001, the hearing representative affirmed the Office decision dated February 28, 2001. The Office further found that appellant was not deprived of her right to have her physician present at the examination.

The Board finds that the Office has met its burden of proof to terminate benefits effective April 21, 1998.

Once the Office accepts a claim, it has the burden of proof to justify termination or modification of compensation benefits.<sup>2</sup> After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>3</sup>

In this case, the Office accepted appellant's claim for cervical strain and major depressive episode. The Office reviewed the medical evidence and determined that a conflict existed in the medical evidence between appellant's attending orthopedist, Dr. Allen, who indicated that appellant had residuals of her accepted cervical condition and Dr. Dunn, the Office referral physician, who indicated that appellant did not have residuals of her work-related cervical condition. Consequently, the Office referred appellant to Dr. Hubbard to resolve the conflict.

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.<sup>4</sup>

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<sup>2</sup> *Harold S. McGough*, 36 ECAB 332 (1984).

<sup>3</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>4</sup> *Aubrey Belnavis*, 37 ECAB 206 (1985).

Dr. Hubbard reviewed appellant's history, reported findings and in a report dated February 23, 1998, indicated that there were no distinct objective findings noted during the examination, which indicate a residual or persistent impairment strictly related to the employment injury. In a report dated March 9, 1999, Dr. Hubbard noted that there was no evidence which would indicate that appellant's employment injury caused any additional objective or measurable worsening of loss of range of motion, headaches or pain in the neck as a result of the September 24, 1994 injury. He noted that he could not identify any residual or persistent impairment above and beyond that anticipated and related to the preexisting degenerative cervical spine condition. Dr. Hubbard noted that, with appellant's preexisting difficulty with her neck and pain syndrome, her orthopedic injury would have resolved nine months post injury or June 1995.

The Board finds that the opinion of Dr. Hubbard is well rationalized and based upon a proper factual background such that it is the weight of the evidence and established that appellant's work-related orthopedic condition has ceased.

The Board further finds that the Office properly terminated appellant's benefits with regard to the accepted psychiatric condition.

After it has determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.<sup>5</sup> The fact that the Office accepted appellant's claim for a specified period of disability does not shift the burden of proof to appellant. The burden of proof is on the Office with respect to the period subsequent to that date when compensation is terminated or modified.<sup>6</sup>

On November 2, 2000 the Office referred appellant for a second opinion to Dr. Romm. In her reports dated November 27, 2000 and February 1, 2001, Dr. Romm noted that appellant's current state of depression was not related to the injury of 1994. She opined that appellant had recovered from the psychological effects of her injury. Dr. Romm indicated that appellant was capable of gainful employment only limited by her orthopedic condition. She indicated that appellant had not obtained adequate treatment for her depression but had recovered from the effects of her work-related depression. Dr. Romm also noted that appellant may have an element of malingering or false reporting of symptoms. She indicated that appellant most likely became somewhat depressed from her injury, however the results of the injury should have long since resolved. Dr. Romm concluded that appellant's current depression was not related to the 1994 injury. She opined that there was no indication that appellant suffered from any residual psychological effects of the industrial injury.

The Board finds that, under the circumstances of this case, the opinion of Dr. Romm is sufficiently well rationalized and based upon a proper factual background, such that it is the weight of the evidence and established that appellant's work-related psychiatric condition has ceased.

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<sup>5</sup> *Vivien L. Minor*, *supra* note 3.

<sup>6</sup> *George Hoffman*, 41 ECAB 135, 141 (1989).

The Board finds that there is no medical evidence, which supports that appellant's continued disability was causally related to her accepted work-related condition. Drs. Hubbard and Romm had full knowledge of the relevant facts and evaluated the course of appellant's condition. They are specialists in the appropriate fields. They clearly opined that appellant had absolutely no work-related reason for disability after April 21, 1998. Their opinions are found to be probative evidence and reliable. The Board finds that Drs. Hubbard and Romm's opinions constitute the weight of the medical evidence and are sufficient to justify the Office's termination of benefits.

Furthermore, the Board notes that appellant's allegation that she was denied her right to have her physician present at the psychiatric evaluation is without merit. She alleges that she notified the medical scheduling office that her physician was unavailable on the date of the second opinion psychiatric evaluation. Appellant alleges that the medical scheduling office informed her that they would contact the Office to reschedule the examination and they failed to do so. She indicated that she attended the examination under protest. However, the Board notes the record is void of any evidence that appellant or her representative attempted to reschedule the appointment or to contact the Office directly. The Office advised appellant that a request to reschedule the appointment within seven days could be approved by the medical scheduling office but any request beyond this period had to be approved by the Office. There is no evidence that appellant followed these procedures to reschedule the examination to allow her physician to attend the examination.

For these reasons, the Office met its burden of proof in terminating appellant's compensation benefits.<sup>7</sup>

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<sup>7</sup> With her appeal appellant submitted additional evidence. However, the Board may not consider new evidence on appeal; *see* 20 C.F.R. § 501.2(c).

The decision of the Office of Workers' Compensation Programs dated December 27, 2001 is hereby affirmed.

Dated, Washington, DC  
December 27, 2002

Michael J. Walsh  
Chairman

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member