

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of MARK ZYSK and U.S. POSTAL SERVICE,  
POST OFFICE, Detroit, MI

*Docket No. 02-271; Submitted on the Record;  
Issued July 26, 2002*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

This case has twice been on appeal before the Board. In a July 1, 1998 decision, the Board found that the Office failed to meet its burden of proof to terminate appellant's compensation benefits on the grounds that there was an existing conflict of medical opinion evidence.<sup>1</sup> Following that decision, the Office undertook further development of the medical evidence and terminated appellant's compensation benefits effective November 15, 1995 by decision dated October 16, 1998. Appellant requested an oral hearing and by decision dated March 18, 1999, the hearing representative set aside the October 16, 1998 decision as the Office failed to provide appellant with pretermination notice. The hearing representative granted appellant 30 days to submit additional evidence in response to the proposed termination. By decision dated April 23, 1999, the Office terminated appellant's compensation benefits. Appellant requested an oral hearing on April 29, 1999. By decision dated June 10, 1999, the Branch of Hearings and Review denied appellant's request for an oral hearing. Appellant appealed this decision to the Board. In a decision dated February 27, 2001, the Board found that appellant was entitled to an oral hearing.<sup>2</sup> By decision dated October 26, 2001, the Branch of Hearings and Review affirmed the April 23, 1999 termination decision.

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

Once the Office accepts a claim, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation benefits.<sup>3</sup>

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<sup>1</sup> Docket No. 96-1693.

<sup>2</sup> Docket No. 99-1955.

<sup>3</sup> *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

After it has determined that an employee has 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>4</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.<sup>5</sup> To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.<sup>6</sup>

The Office accepted that appellant sustained a neck strain and subluxation at C5 as a result of his April 5, 1995 employment injury. On January 16, 1996 appellant sustained an additional employment injury accepted by the Office for head and back contusion and subluxations at C5, T2 and L5. Appellant also sustained an additional employment-related injury on January 25, 1997 which resulted in the accepted condition of cervical strain. On June 3, 1998 the Office terminated appellant's compensation benefits due to his January 25, 1997 employment injury. The Office terminated appellant's medical benefits for this condition on April 6, 1999.

Following the Board's July 1, 1998 decision, the Office referred appellant to Dr. Emmanuel Obianwu, a Board-certified orthopedic surgeon, to resolve the conflict of medical opinion evidence between appellant's attending physician, Dr. Henry J. Cousineau, a chiropractor, who found that appellant continued to experience subluxations at C5, T3 and L5 which required further treatment and a second opinion physician, Dr. Norman Pollak, a Board-certified orthopedic surgeon, who found that appellant had no disability or medical residuals as a result of his April 5, 1995 employment injury.

In a report dated October 9, 1998, Dr. Obianwu described appellant's April 5, 1995 employment injury. He noted that appellant had sustained additional employment-related injuries since that time and described the treatment as indicated by appellant.<sup>7</sup> Dr. Obianwu performed a physical examination and noted that appellant had full range of motion of the cervical spine with no reflex or sensory changes in the upper extremities. He found excellent strength in the various muscle groups of both upper extremities and full distal pulses. Dr. Obianwu also found full range of motion in both of appellant's shoulders and adequate strength in the various muscle groups of the shoulders. He noted that appellant had no atrophy and that impingement test was negative in the various muscle groups of both upper extremities. Dr. Obianwu reviewed appellant's diagnostic studies and found that the February 28, 1997 bone scan was normal and that the magnetic resonance imaging (MRI) scan of the cervical spine on April 4, 1997 was normal. He examined appellant's plain x-rays taken on February 28, 1997 and

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<sup>4</sup> *Id.*

<sup>5</sup> *Furman G. Peake*, 41 ECAB 361, 364 (1990).

<sup>6</sup> *Id.*

<sup>7</sup> At the time of the Office's referral to Dr. Obianwu, the statement of accepted facts did not contain any information regarding appellant's additional employment injuries.

found some mild degenerative changes in the cervical spine as well as in the thoracolumbar spine. Dr. Obianwu stated:

“A true assessment of [appellant’s] condition as of 1995 cannot be made at this time because of the time that has elapsed and a number of intervening injuries. A reasonable estimate can, however, be made. The rather negative cervical spine x-rays from 1997 and the essentially normal MRI of the cervical spine in 1997 leads me to suspect that no significant pathology to the discs occurred as a result of the April 5, 1995 injury. As such, one can for all practical purposes discount the diagnosis of subluxation. It would be rare for a true subluxation of the vertebra to occur without an associated disc injury. In any a case, a true subluxation over three years would have left a significant mark in the posterior articular elements. Therefore, one is left with the only possible option of the problem in 1995, namely a soft tissue injury of the cervical spine. I would expect that 6 to 10 weeks would be the maximum duration of lingering symptoms from such an injury. Therefore, whatever restrictions were required from that injury of April 5, 1995 would no longer be sustainable medically after 10 weeks. No restrictions, in my opinion, would be supportable by medical evidence after 10 weeks of that injury. The clinical examination today fails to reveal any finding that can be construed as a sequela of an injury to his neck or shoulders. Both areas reveal normal clinical findings.”

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.<sup>8</sup> This report is based on the factual background as provided by appellant and includes detailed findings on physical examination and review of medical studies. Dr. Obianwu noted that appellant had normal clinical findings and that he did not require further work restrictions as a result of his 1995 employment injury. He also provided reasoning to support his opinion that appellant did not currently have nor had ever sustained a subluxation of the spine as the result of his injury. Dr. Obianwu noted that such an injury would have resulted in a significant mark in the posterior articular elements which was not present in appellant’s films.

On appeal, appellant alleges that Dr. Obianwu is not an appropriate physician to resolve the conflict of medical evidence regarding his continuing medical residuals from his accepted employment injuries of neck sprain and cervical subluxation at C5. He alleges that only a chiropractor can properly interpret his x-rays to determine if he has a subluxation. The Board notes that the Federal Employees’ Compensation Act provides limitations on treatment which a chiropractor can provide.<sup>9</sup> A Board-certified orthopedic surgeon, however, specializes in the diagnosis and treatment of musculoskeletal conditions including both sprains and spinal

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<sup>8</sup> *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

<sup>9</sup> 5 U.S.C. § 8101(2) of the Act provides that the term “physician” includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation demonstrated by x-ray to exist. *George E. Williams*, 44 ECAB 530, 533 (1993).

subluxations. The Board has accepted the definition of a subluxation as, “an incomplete dislocation, off-centering, misalignment, fixation or abnormal spacing of the vertebrae anatomically which must be demonstrable on any x-ray film to individuals trained in the reading of x-rays.”<sup>10</sup> As a Board-certified orthopedic surgeon is trained in the reading of x-rays, Dr. Obianwu is an appropriate physician to address this issue.

Following Dr. Obianwu’s October 9, 1998 report, appellant submitted additional reports from Dr. Cousineau. On April 5 and 23, 1999, Dr. Cousineau repeated his previous diagnoses of subluxations at C5 with associated inflamed connective tissue, radiculitis, hypolordosis, cervicgia and subluxation of the T3 vertebra with associated inflamed connective tissue, myospasm, scoliosis, thoracic pain and subluxation of L5 vertebra with associated myospasm, hypolordosis and lumbar region pain. He provided his findings on x-ray, opined that appellant’s current condition was a direct result of appellant’s employment injury on April 5, 1995 and stated that this condition had been exacerbated due to the extreme length of time between chiropractic treatments. Dr. Cousineau stated that without chiropractic care to remove vertebral subluxations, destructive changes can occur in the spine and in the soft tissues causing symptoms and reduction in spinal mobility to occur months or years after the original injury. He further stated that appellant should not carry a mailbag.

These reports are not sufficient to establish that appellant has a continuing employment-related condition and disability. Dr. Cousineau did not provide an explanation of why appellant did not have the articular changes that Dr. Obianwu stated would be present given a subluxation of the spine. He also failed to indicate whether chiropractic treatment would result in a change in appellant’s condition on x-rays. As Dr. Cousineau was on one side of the conflict that Dr. Obianwu resolved, the additional report from Dr. Cousineau is insufficient to overcome the weight accorded Dr. Obianwu’s report as the impartial medical specialist or to create a new conflict with it.<sup>11</sup>

Appellant also submitted a report from Dr. Brian D. Beller, a chiropractor, dated April 7, 1999. Dr. Beller noted appellant’s history of injury on April 5, 1995 and subsequent employment injuries. He examined appellant and the February 28, 1997 x-rays. Dr. Beller stated that these x-rays were consistent with the diagnosis of subluxation. He further stated that appellant sustained reinjury on January 16, 1996 and January 25, 1997. It is not clear from this report that Dr. Beller based his finding of subluxation on appellant’s accepted injury, rather than noting new injuries sustained in 1996 and 1997. Therefore, this report is not sufficient to establish a continuing condition as a result of appellant’s accepted employment injury.

As the weight of the medical opinion evidence establishes that appellant has no injury-related condition, the Office met its burden of proof to terminate appellant’s compensation benefits.

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<sup>10</sup> *George E. Riley*, 44 ECAB 458, 462 (1993).

<sup>11</sup> *Dorothy Sidwell*, 41 ECAB 857, 874 (1990).

The October 26, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC  
July 26, 2002

Michael J. Walsh  
Chairman

David S. Gerson  
Alternate Member

Michael E. Groom  
Alternate Member