

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THOMAS HARTKORN and U.S. POSTAL SERVICE,  
POST OFFICE, Southampton, PA

*Docket No. 02-514; Submitted on the Record;  
Issued July 5, 2002*

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DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,  
A. PETER KANJORSKI

The issue is whether the employment-related aggravation of appellant's thoracic outlet syndrome resolved by February 1, 2001.

The Office of Workers' Compensation Programs accepted that appellant sustained bilateral carpal tunnel syndrome and aggravation of underlying thoracic syndrome resulting from the performance of his duties as a carrier.

On January 9, 1997 the Office issued appellant a schedule award for a 10 percent permanent loss of use of each arm related to appellant's carpal tunnel syndrome.

Appellant requested a hearing, which was held on September 18, 1997. By decision dated January 31, 1998, an Office hearing representative remanded the case to the Office on the basis that appellant's thoracic outlet syndrome had not been considered in determining the percentage of permanent impairment of his arms.

An Office medical adviser reviewed the medical evidence on March 3, 1998 and stated that the 4<sup>th</sup> edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* did not provide a separate diagnosis-based estimate for thoracic outlet syndrome, but that a schedule award was payable if there was motor, sensory or vascular damage or loss of range of motion. This Office medical adviser also stated that the A.M.A., *Guides* indicated, under cumulative trauma disorder, that patients whose symptoms were reduced by altering work activities were not considered permanently impaired.

By decision dated March 26, 1998, the Office found that the evidence failed to demonstrate that appellant had an increased permanent impairment.

In a report dated April 8, 1998, appellant's attending physician, Dr. Patrick E. Pellecchia, a Board-certified surgeon, stated that appellant "has a severe thoracic outlet syndrome involving his subclavian axillary artery. On elevation of his extremities, Mr. Hartkorn has obliteration of

his pulses of the right arteries to his hand causing him to have a severe restriction of movement that is, range of motion of the bilateral upper extremities.” Dr. Pellecchia stated that pulse volume recordings of appellant’s upper extremities in the neutral position and when he raised his arms were dramatic in that his pulse disappeared on movement of his upper extremities. Attached to this report was a February 23, 1999 study that Dr. Pellecchia labeled “very abnormal,” in that there was a loss of perfusion to the upper extremities when appellant raised his arms to waist height and to above his head.

In a report dated May 1, 1998, Dr. Pellecchia stated that appellant had “a very serious problem of bilateral thoracic outlet syndrome with a significant arterial component and musculoskeletal component, which as you know, is a later sequela of chronic thoracic outlet syndrome. Treatment with very vigorous physical therapy must be performed in a physical therapy setting.” In a report dated October 23, 1998, Dr. Pellecchia stated that appellant was being treated for “vascular thoracic syndrome, which is bilateral and symptomatic.” Dr. Pellecchia stated that appellant’s “symptomatic thoracic outlet syndrome is the direct result of his work activities which has caused this condition, exacerbated the condition and will continue to do so.”

Appellant again requested a hearing regarding the degree of permanent impairment of his arms. Following a hearing held on October 27, 1998, an Office hearing representative found, by decision dated January 11, 1999, that further development of the medical evidence was necessary and remanded the case for a second opinion on permanent impairment related to appellant’s thoracic outlet syndrome.

On February 22, 1999 the Office referred appellant, a statement of accepted facts and prior medical reports to Dr. Steven J. Valentino, an osteopath specializing in orthopedic surgery, for a second opinion on the extent and degree of impairment of appellant’s arms. In a report dated March 18, 1999, Dr. Valentino stated that review of an electromyogram (EMG) of February 19, 1998 revealed no evidence of impingement of the thoracic nerves or a basis for thoracic outlet syndrome and concluded that appellant’s “impairment with regard to any neurogenic thoracic outlet syndrome is 0 percent.” Dr. Valentino then stated: “[w]ith regard to his history of vascular component of thoracic outlet, I used Table 13 on page 6/197 of the A.M.A., *Guides*, fourth edition.<sup>1</sup> Based on this classification, I give him at most a nine percent impairment of the whole person with regard to his residual vascular component of thoracic outlet syndrome.”

Based on an Office medical adviser’s April 27, 1999 review of Dr. Valentino’s report, on May 11, 1999 the Office issued appellant a schedule award for an additional eight percent permanent loss of use of each arm.

On August 12, 1999 the Office referred appellant, the case record and a statement of accepted facts to Dr. Edward Resnick, a Board-certified orthopedic surgeon, to resolve a conflict of medical opinion on appellant’s need for ongoing physical therapy. In a report dated September 7, 1999, Dr. Resnick set forth appellant’s history, complaints and findings on physical examination, one of which was “[t]he pulses remain easily palpable and regular in all positions

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<sup>1</sup> This table is titled, “[i]mpairment of the [u]pper [e]xtremity [d]ue to [p]eripheral [v]ascular [d]isease.”

of the wrists and shoulders including abduction and full overhead elevation.” Dr. Resnick stated that he was unable to find objective confirmation of the diagnosis of vascular thoracic outlet syndrome in Dr. Pellecchia’s reports and noted that a February 19, 1998 EMG showed no evidence for neurogenic thoracic outlet syndrome. Dr. Resnick concluded:

“The present condition appears static and permanent with no significant deterioration to be expected in the future. The treatment which is being provided appears purely symptomatic and supportive and has made no evident effect on the man’s subjective complaints or objective findings even though carried out on a frequent and regular basis for five years. I must consider that this treatment is probably ineffective and[,] therefore[,] unnecessary. It would appear that there has not been much change in [appellant’s] objective condition for more than five years. Thus, I certainly would not consider him to have been totally disabled during that time and he is not totally disabled at present. I find no evidence of anything which could be considered as thoracic outlet syndrome and, in my opinion, further evaluation or treatment for such a condition would probably be ineffective.”

In a report dated September 14, 1999, Dr. Pellecchia stated, “[h]is need for continued physical therapy is not for rehabilitation, but to maintain his level of activity, so he can continue to work.” In a report dated October 1, 1999, Dr. Peter R. McCombs, a Board-certified vascular surgeon, stated that testing for thoracic outlet syndrome revealed easy obliteration of the radial pulses in both upper extremities. Dr. McCombs concluded, “I agree completely with the diagnosis of bilateral thoracic outlet syndrome.”

On November 30, 1999 the Office issued a notice of proposed termination of compensation on the basis that the medical evidence confirmed that the effects of the thoracic outlet syndrome had resolved and no further treatment was necessary. Appellant submitted a September 20, 2000 report from Dr. Pellecchia that reiterated the findings of that doctor’s April 8, 1998 report.

By decision dated February 1, 2001, the Office found that the weight of the medical evidence, represented by the report of Dr. Resnick, established that appellant no longer suffered from residuals of thoracic outlet syndrome.

Appellant requested a hearing which was held on June 27, 2001.

By decision dated September 20, 2001, an Office hearing representative found that there was a conflict of medical opinion between appellant’s attending physician, Dr. Pellecchia, and the Office’s referral physician, Dr. Valentino, and that the conflict was resolved by Dr. Resnick’s report, which represented the weight of the medical evidence and established that appellant’s thoracic outlet syndrome had resolved.

The Board finds that the Office did not meet its burden of proof to terminate appellant’s compensation effective February 1, 2001.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits. 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>2</sup> 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 a specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.<sup>3</sup>

The Office found that Dr. Resnick's report was entitled to special weight as that of an impartial medical specialist resolving a conflict between Drs. Pellecchia and Valentino. The Board finds, however, that there was no conflict of medical opinion between Drs. Pellecchia and Valentino at the time of the referral to Dr. Resnick. Dr. Pellecchia, appellant's attending physician, has consistently maintained that appellant has a predominantly vascular thoracic outlet syndrome related to his employment. Dr. Valentino, the Office's referral physician, concluded that appellant did not have a neurogenic thoracic outlet syndrome, but that appellant had a permanent impairment of the arms "with regard to his residual vascular component of thoracic outlet syndrome." This conclusion, at least on the vascular aspect of appellant's condition, is not contrary to Dr. Pellecchia's opinion, but rather is consistent with it. There was also no conflict between these physicians on whether further treatment was needed, as Dr. Valentino was not asked to and did not address this issue.

The report of Dr. Resnick, who concluded that appellant did not have thoracic outlet syndrome, thus did not resolve a conflict of medical opinion. Instead, Dr. Resnick's report created a conflict of medical opinion with the reports of Drs. Pellecchia and McCombs, who concluded that appellant's diagnosis was thoracic outlet syndrome. In light of this unresolved conflict of medical opinion, the Office has not met its burden of proof to terminate appellant's compensation.<sup>4</sup>

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<sup>2</sup> *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

<sup>3</sup> *James P. Roberts*, 31 ECAB 1010 (1980).

<sup>4</sup> If the Office chooses to resolve this conflict of medical opinion, it appears that a vascular surgeon would be the appropriate specialist, as the medical evidence indicates appellant's condition is primarily vascular rather than orthopedic or neurologic.

The September 20 and February 1, 2001 decisions of the Office of Workers' Compensation Programs are reversed.

Dated, Washington, DC  
July 5, 2002

Colleen Duffy Kiko  
Member

David S. Gerson  
Alternate Member

A. Peter Kanjorski  
Alternate Member