

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BEVERLY GRIMES and U.S. POSTAL SERVICE,
POST OFFICE, Phoenix, AZ

*Docket No. 03-42; Submitted on the Record;
Issued April 18, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
WILLIE T.C. THOMAS,

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits effective January 23, 2001.

This case has previously been before the Board on appeal. In a February 2, 2000 decision, the Board found that the Office had not met its burden of proof to terminate appellant's compensation benefits effective July 22, 1994 on the grounds that the record contained an unresolved conflict of medical opinion evidence.¹ The Board further found that appellant had not met her burden of proof to establish that her diagnosed condition of fibromyalgia was caused or aggravated by factors of her federal employment. The facts and circumstances of the case as set forth in the Board's prior decision are adopted herein by reference.

Following the February 2, 2000 decision of the Board, the Office referred appellant for an impartial medical examination with Dr. Stuart B. Phillips, a Board-certified orthopedic surgeon. In a letter dated July 31, 2000, the Office informed appellant and her attorney that Dr. Phillips' reports were flawed as he failed to rely on the statement of accepted facts. The Office stated that Dr. Phillips' reports would be excluded as evidence and not be used as the basis for any decisions.

The Office then referred appellant to Dr. Thomas E. Roesener, a Board-certified orthopedic surgeon. After appellant's August 30, 2000 appointment and examination,

¹ Docket No. 98-129 (issued February 2, 2000).

Dr. Roesener informed the Office that he had previously examined appellant. The Office did not include this report in the record.²

The Office referred appellant to Dr. Richard L. Collins, a Board-certified orthopedic surgeon, for an impartial medical examination. Based on Dr. Collins' December 19, 2000 report, the Office terminated appellant's compensation benefits in a decision dated January 23, 2001.

Appellant, through her attorney, requested an oral hearing. In a decision dated January 14, 2002, the hearing representative found that the Office erred by excluding Dr. Phillips' reports from the record. The hearing representative reviewed Dr. Phillips' reports and concluded that the reports were not sufficient to resolve the conflict of medical opinion evidence and that the additional medical development from Dr. Collins was necessary to resolve the existing conflict of medical opinion evidence. The hearing representative affirmed the findings of the Office's January 23, 2001 decision.

The Board finds that the Office met its burden of proof to establish that appellant had no continuing disability causally related to her accepted employment injury.

In its February 2, 2000 decision, the Board found a conflict of medical opinion evidence regarding the issue of whether appellant had continued disability due to her accepted employment injury of lumbar strain. The Office attempted to resolve this conflict by referring appellant to Dr. Phillips, a Board-certified orthopedic surgeon. In his report dated May 17, 2000, Dr. Phillips described appellant's employment injury and resultant medical treatment. He provided his findings on physical examination including tender points at the bilateral occiputs, bilateral trapezius and scapular spines, bilateral scapular vertex, bilateral lateral epicondyles and medial epicondyles, bilateral greater trochanters, bilateral outer gluteal quadrant, bilateral medial knee, bilateral low cervical spinous processes and upper thoracic spinous processes. Dr. Phillips stated that appellant had restricted range of motion in the cervical spine and that x-ray examination of the lumbar spine revealed moderate degenerative changes throughout with no specific disc space collapse. He diagnosed thoracic spine strain, lumbago and fibromyalgia. Dr. Phillips noted that fibromyalgia was a preexisting condition and stated: "It is generally agreed by rheumatologists who treat fibromyalgia that fibromyalgia can be triggered or exacerbated by trauma." He opined that appellant's current symptoms were an exacerbation of her fibromyalgia by her employment injury. Dr. Phillips stated that appellant was disabled due to her fibromyalgia. He concluded, "This patient suffered from underlying fibromyalgia syndrome at the time of the injury, which was triggered and exacerbated by the injury and has remained with increased symptoms of that disorder until the present time. According to the current literature on fibromyalgia syndrome, this is a common scenario."

The Office requested a supplemental report on June 9, 2000 and asked that Dr. Phillips clarify how appellant's accepted employment injury resulted in an exacerbation of her previously

² The Board notes that this report could have been included in the case record. As it does not fall within the requirements for exclusion discussed in this decision. However, appellant's attorney did not contest the exclusion of this report from the record. Furthermore, as Dr. Roesener had previously examined appellant, he could not serve as the impartial medical specialist and his report would not be entitled to the special weight accorded to an impartial medical specialist's report.

diagnosed condition of fibromyalgia and why appellant continued to experienced residuals of her accepted lumbar strain. In his June 21, 2000 report, Dr. Phillips stated that he was providing an article explaining the physiological mechanism of exacerbation of fibromyalgia. This article noted that fibromyalgia can be initially triggered by trauma or inflammation and amplified by poor sleep, depression and anxiety, mental stress and physical deconditioning. Dr. Phillips further stated that appellant's current symptoms were not the residuals of a lumbar strain, but symptoms of her fibromyalgia. He stated that appellant's fibromyalgia was triggered and had been ongoing since her back trauma. Dr. Phillips further stated that whether or not appellant still suffered the residuals of lumbar strain was essentially beside the point and that the lumbar spine injury had probably resolved. He concluded that appellant's current symptoms were from the fibromyalgia and were ongoing.

The Office informed appellant on July 31, 2000 that Dr. Phillips' reports would be excluded as evidence as he failed to abide by the statement of accepted facts and statement of medical conflict. Before the hearing representative and on appeal, appellant's attorney has alleged that Dr. Phillips' reports were improperly excluded from the record.

The Office's procedure manual provides the instances in which medical evidence will be excluded. These include when the physician selected for referee examination is regularly involved in performing fitness-for-duty examinations for the claimant's employing agency; when a second referee specialist's report is requested before the Office has attempted to clarify the original referee specialist's report; when a medical report is obtained through telephone contact; and when leading questions have been posed to the physician in either a second opinion or referee context. The procedure manual notes that the excluded report need not be physically removed from the file.³ The Board's case law draws a distinction between those situations in which the Office may have influenced the opinion of the impartial medical specialist from circumstances in which the evidence establishes that the medical report obtained is defective for other procedural reasons.⁴

Dr. Phillips' reports do not fall within the categories of impartial reports which should be excluded from the record. There is no evidence that Dr. Phillips performed fitness-for-duty examinations for the employing establishment, that the Office had previously requested an impartial report and failed to seek clarification before seeking Dr. Phillips' opinion; that Dr. Phillips' reports were obtained through telephone contact or that the Office improperly utilized leading questions. The Office therefore was not required to exclude Dr. Phillips' reports from the record. However, the Office error in excluding Dr. Phillips' reports from the record was ameliorated by the review of the reports conducted by the hearing representative and this Board. The hearing representative properly noted that the reports were not required to be excluded, and properly weighed the substantive value of the reports in reaching a final decision. Furthermore, the reports are currently included in the record and are under review by the Board.

³ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.6 (September 1995).

⁴ *Terrance R. Stath*, 45 ECAB 412, 421 (1994) (in procedural instances, the medical report is not excluded from the record, but is not accorded special weight).

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.⁵ The Board finds that Dr. Phillips' reports were not sufficiently well rationalized to constitute the weight of the medical opinion evidence and resolve the conflict of medical opinion evidence regarding whether appellant had continued disability due to her accepted employment injury. Dr. Phillips dismissed as irrelevant the issue of whether appellant had residuals of her accepted employment injury of lumbar strain and focused his reports on her diagnosed condition of fibromyalgia. He opined that the lumbar spine injury had probably resolved without providing physical findings or medical reasoning in support of his one-sentence opinion. Therefore, his reports cannot be used to resolve the conflict of medical opinion evidence regarding appellant's continued employment-related residuals.

The Office referred appellant to Dr. Collins, a Board-certified orthopedic surgeon, to resolve the existing conflict of medical opinion evidence. In his December 19, 2000 report, Dr. Collins described appellant's employment incident and resultant medical treatment. He performed a physical examination noting widespread mild tenderness including most fibromyalgia tender points. Dr. Collins found that appellant's neurologic examination was within normal limits. He diagnosed connective tissue disorder and lumbar strain resolved. Dr. Collins stated that appellant had the signs and symptoms of a connective tissue disorder predating her January 29, 1993 employment injury and that this disorder was not related to her employment injury. He further opined that appellant had no residuals of her January 1993 lumbar strain and that this condition resolved by May 12, 1994.

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.⁶ 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.⁷ Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁸ 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.⁹

The Board finds that the weight of the medical opinion evidence establishes that appellant does not have any continuing disability or medical residuals as a result of her accepted employment injury of lumbar strain. Dr. Collins reviewed the statement of accepted facts and the historical medical evidence in appellant's claim. His report was therefore based on a proper factual background. Dr. Collins diagnosed connective tissue disorder and lumbar strain resolved.

⁵ *Nathan L. Harrell*, 41 ECAB 401, 407 (1990).

⁶ *Mohamed Yunis*, 42 ECAB 325, 334 (1991).

⁷ *Id.*

⁸ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

⁹ *Id.*

He performed a physical examination and concluded that appellant did not have any signs, symptoms or residuals of her accepted condition. Furthermore, Dr. Collins opined that appellant's diagnosed condition of connective tissue disorder was not caused nor impacted by her accepted employment injury. As he provided physical findings in support of his conclusion that appellant's accepted employment-related disability had ceased, his report is sufficiently well rationalized to be accorded special weight and resolves the conflict of medical opinion evidence on the issue of whether appellant continued to experience residuals of her accepted lumbar strain.

The January 14, 2002 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, D.C.
April 18, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member