

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JUANITA L. BRYNE and U.S. POSTAL SERVICE,
POST OFFICE, South Jersey, NJ

*Docket No. 03-948; Submitted on the Record;
Issued August 27, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant continues to suffer residuals from an employment-related injury.

This case is on appeal to the Board for the second time. In the first appeal, by decision dated September 6, 2001, the Board found that the opinion of the impartial medical specialist, Dr. Howard Zeidman, a Board-certified orthopedic surgeon, was deficient in that he failed to address whether the residuals of the diagnosed neuropathies were present and did not obtain new electrodiagnostic studies as authorized by the Office of Workers' Compensation Programs and did not review the previous studies that were in the record.¹ Further, the Office provided Dr. Zeidman with a statement of accepted facts informing him that appellant's thoracic outlet syndrome was not work related even though the Office had accepted appellant's claim for that condition.

The Board found it was necessary to remand the case for the Office to obtain a supplemental report from Dr. Zeidman. The Board instructed the Office to provide him a proper statement of accepted facts, which listed all the conditions accepted in the case, together with the case record including previous electrodiagnostic studies and reports. The Board specifically indicated that the results of the electromyogram (EMG) and nerve conduction studies dated June 6, 1990, September 3, 1991, October 20, 1992 and April 29, 1993. The Board also instructed the Office to ask Dr. Zeidman to obtain further diagnostic studies and discuss whether residuals of the previously diagnosed neuropathies were still present and, if so, whether they were related to the duties that appellant performed in her federal employment. The Board stated that Dr. Zeidman should be requested to address whether appellant's work dates aggravated her conditions and if so, the period of any such aggravation. The Board, therefore, vacated the

¹ Docket No. 00-1894 (issued September 6, 2001). The facts and history surrounding the prior appeal are set forth in the initial decision and are hereby incorporated by reference.

Office's June 26, 1999 and February 2, 2000 decisions and remanded the case for further development, to be followed by a *de novo* decision.

By letter dated November 7, 2001, the Office submitted a statement of accepted facts dated November 2, 2001 and asked Dr. Zeidman to answer additional questions. In the statement of accepted facts, the Office stated that appellant's claim was accepted for right carpal tunnel syndrome and right shoulder strain. The Office stated that appellant underwent EMGs on September 3 and 11, 1991, April 29, 1993 and October 29, 2001. The Office asked Dr. Zeidman based on his review of the most recent EMG and the nerve conduction studies, referring specifically to those performed on October 29, 2001 by Dr. Hillard C. Sharf, a Board-certified internist, psychiatrist and neurologist, to state whether residuals of the previously diagnosed neuropathies were still present. If they were, the Office asked Dr. Zeidman to provide a diagnosis of the conditions found on examination and state whether or not they are related to the April 24, 1990 employment injury. Further, the Office asked Dr. Zeidman to state, if any of appellant's conditions were aggravated by appellant's employment, whether the aggravation was temporary or permanent and if it was temporary when did the condition return to "STATUS QUO ANTE." [sic]. If the condition were not temporary, the Office asked Dr. Zeidman to state whether appellant was a candidate for a work hardening or work conditioning program.

In a report dated November 15, 2001, Dr. Zeidman considered appellant's ongoing symptoms of coldness in her hand with occasional bilateral burning in the hands and pain in the posterior neck, which occasionally increased with activity but with no specific activity. He stated that on examination appellant had good motion without evidence of spasms or tenderness and that her hand had good motion as well, with symmetrical reflexes and active and sensory functions intact. Dr. Zeidman found no evidence of motor loss. He stated that on the Tinel's sign test, appellant reported tingling in her third, fourth and fifth finger with percussion on the volar wrist. Dr. Zeidman stated that the statement of accepted facts was "essentially as previously noted." He considered the October 29, 2001 EMG and noted that it was normal for both arms and paraspinals with no evidence of radiculopathy or entrapment neuropathy.

Dr. Zeidman concluded that his findings were essentially "as previously noted." He stated that the finding of the tingling in the third, fourth and fifth fingers with percussion was certainly not consistent with any type of carpal tunnel problem. Dr. Zeidman stated that the recent EMG study indicated that there was no evidence of any entrapment neuropathy by electrical study and that this was consistent with the findings at the time of this and his prior examination. He found no objective evidence of any functional disability.

Dr. Zeidman stated that there were no residuals of the neuropathy that existed based on the physical examination and the EMG study and appellant did not have a work-related condition. He stated:

"According to the information in the record, some type of findings existed at the previous examination, but by the time of Dr. [Robert R.] Bachman's examination in 1996 this appeared to have not been identified. Certainly, by 1996, therefore, the temporary problem would have passed. At the time of my examinations in 1997 and 2001 the problems were not present."

By decision dated December 19, 2001, the Office found that Dr. Zeidman's November 15, 2001 report constituted the weight of the evidence and established that appellant no longer had a continuing work-related injury causally related to the April 24, 1990 employment injury.

By letter dated December 26, 2001, appellant requested an oral hearing before an Office hearing representative, which was held on August 28, 2002. At the hearing, appellant's attorney stated that Dr. Zeidman's report was defective because, as instructed by the Board, Dr. Zeidman failed to review all the EMGs of record but only reviewed the most recent EMG performed in 2001, which showed no neuropathy. Appellant's attorney stated that Dr. Zeidman's reports were also defective because Dr. Zeidman did not address the injury to appellant's right shoulder in 1984. Appellant's attorney requested that the record remain open for 30 days so that he would have the opportunity to review the most recent EMG and provide supplemental medical information.

The October 29, 2001 EMG, which was submitted prior to the hearing showed no evidence of radiculopathy or entrapment neuropathy.

By decision dated December 4, 2002, the Office hearing representative affirmed the Office's December 19, 2001 decision.

Once the Office has accepted 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.² The Office's burden of proof includes the necessity of furnishing rationalized medical evidence based on a proper factual and medical background.³

In this case, the Office terminated benefits on March 14, 1996 relying on the opinion of Dr. Robert L. Bachman, a Board-certified orthopedic surgeon, that appellant could work full time, with restrictions which were not work related. On appeal to the Branch of Hearings and Review, appellant submitted a medical report dated November 20, 1996 from her treating physician, Dr. Paul A. Marchetto, a Board-certified orthopedic surgeon and assistant professor, in which Dr. Marchetto opined that appellant's neurologic thoracic outlet syndrome, brachial plexopathy and median nerve neuropathy at the right wrist were work related. By decision dated January 31, 1997, the Office hearing representative affirmed the Office's termination of benefits but found that the submission of Dr. Marchetto's November 1996 report, created a conflict in the evidence with Dr. Bachman's report and remanded the case for the Office to refer appellant to an impartial medical specialist to resolve the conflict. On remand, the Office referred appellant to Dr. Zeidman. Dr. Backman's report, which is complete and well rationalized, justified the Office's termination of benefits on March 14, 1996. Since the Office met its burden of proof to terminate appellant's compensation benefits, the burden shifted to appellant to establish that she

² *Wallace B. Page*, 46 ECAB 227, 229-30 (1994); *Jason C. Armstrong*, 40 ECAB 907, 916 (1989).

³ *Larry Warner*, 43 ECAB 1027, 1032 (1992); *see Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

had a disability causally related to her accepted injury.⁴ To establish a causal relationship between the condition, as well as any attendant disability claimed and the employment injury, an employee must submit rationalized medical evidence, based on a complete factual and medical background, supporting such a causal relationship.⁵

In situations where there exists 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.⁶ When the Office secures an opinion from an impartial medical specialist and the opinion of the specialist requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the specialist for the purpose of correcting the defect in the original report. However, when the impartial medical specialist's statement of clarification or elaboration is not forthcoming or if the physician is unable to clarify or elaborate on his original report or the supplemental report is also vague, speculative or lacks rationale, the Office must refer appellant to a second impartial medical specialist for a rationalized medical report on the issue in question.⁷

In this case, in his supplemental report dated November 15, 2001, Dr. Zeidman noted that the statement of accepted facts "was essentially as previously noted" and considered the results of the October 29, 2001 EMG, which he stated was normal for both arms and paraspinals with no evidence of radiculopathy or entrapment neuropathy. Dr. Zeidman stated that "some type of findings existed at the previous examination, but by the time of Dr. Bachman's examination in 1996 this appeared not to have been identified." Dr. Zeidman stated that by 1996 the "temporary problem would have passed" and at the time of his 1997 and 2001 examinations the problems were not present. He concluded that no residuals of the neuropathy existed based on the physical examination and the EMG study and that appellant did not have a work-related condition.

Dr. Zeidman's opinions; however, continues to be deficient. The Office did not indicate in the statement of accepted facts that appellant's condition was accepted for thoracic outlet syndrome. Thus, Dr. Zeidman did not address the status of that condition. Further, Dr. Zeidman's statements regarding appellant's "temporary" problem were vague and general. He did not address appellant's right shoulder strain and whether that condition had healed. In accordance with the Office's instructions, he addressed the results of the most recent EMG and nerve conduction study, which he stated were normal and showed no neuropathies, but his opinion was incomplete in that he did not address the prior EMG and nerve conduction studies. Because Dr. Zeidman's report did not address appellant's condition of thoracic outlet syndrome and the right shoulder strain, both of which were accepted conditions and did not address all the relevant diagnostic tests, his opinion is not well rationalized and does not justify the Office's termination of benefits.

⁴ See *George Servetas*, 43 ECAB 424 (1992).

⁵ 20 C.F.R. § 115; *Kathryn Haggerty*, 45 ECAB 383, 389-90 (1994).

⁶ *Terrance R. Stath*, 45 ECAB 412, 418 (1994).

⁷ *Id.* at 420.

Since the Office already obtained a supplemental report from Dr. Zeidman, the case should be remanded for the Office to refer appellant, with the case record and a complete statement of accepted facts, to a second impartial medical specialist for another medical evaluation. The impartial medical specialist should address all of appellant's accepted conditions, the carpal tunnel syndrome, the right shoulder sprain and the thoracic outlet syndrome. The impartial medical specialist should address whether appellant suffered an aggravation of his conditions, whether the aggravation was temporary or permanent and how long any aggravation lasted.

After such further development as it deems necessary, the Office should issue a *de novo* decision.

The December 4, 2002 and December 19, 2001 decisions of the Office of Workers' Compensation are hereby set aside and remanded for further action consistent with this decision.

Dated, Washington, DC
August 27, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member