

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of NELLY DIAZ and U.S. POSTAL SERVICE,
POST OFFICE, Devon, PA

*Docket No. 03-883; Submitted on the Record;
Issued June 13, 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 properly terminated appellant's benefits effective January 16, 2002.

On December 22, 1999 appellant, then a 33-year-old mailhandler, filed a notice of occupational disease and claim for compensation (Form CA-2) alleging that she suffered from constant stiffness and pain in her neck, which extends to her right shoulder, right arm, wrist and hand as a result of the repetitive nature of her federal employment. By letter dated February 13, 2001, the Office accepted appellant's claim for exacerbation of right upper extremity radiculopathy.

On November 16, 2000 appellant began treatment with Dr. Scott M. Fried, an osteopath. At that time, Dr. Fried noted that appellant's condition was:

“(1) Status post cervical strain with resultant cervical radiculopathy and brachial plexus injury right from June 1, 1997 work incident with multi-directional instability left shoulder stabilized.

“(2) Exacerbation of right upper extremity radiculopathy with overuse syndrome and repetitive strain injury July 17, 1999 secondary to repetitive work at [the employing establishment].

“(3) Median and ulnar neuropathy right upper extremity and repetitive strain injury.

“(4) Long thoracic neuritis right with mild scapular winging.”

In his report dated January 4, 2001, Dr. Fried indicated that appellant's complaints and injuries were directly and causally related to her repetitive work duties for the employing establishment. In his March 14, 2001 report, he indicated that continued activity modification

was necessary. In a July 20, 2001 report, Dr. Fried indicated that appellant may not return to her previous work activities and that restrictions and modified duties were necessary. He indicated that these limitations were permanent.

By letter dated April 24, 2001, the Office referred appellant to Dr. Steven J. Valentino, an osteopath, for a second opinion. In a medical report dated May 22, 2001, Dr. Valentino listed his impression as resolved exacerbation of right upper extremity radiculopathy. He indicated that her prognosis with regard to her work injury was excellent and that she was fully recovered and no longer suffered from any residuals from her work-related injury.

By letter dated September 13, 2001, the Office referred appellant to Dr. Norman Stempler, an osteopath: "In order to clarify the cause and extent of [appellant's] injury-related impairment." By letter to the Office dated September 28, 2001, appellant's attorney indicated that he was in receipt of the letter referring appellant for a second opinion by Dr. Stempler, asked for a copy of Dr. Stempler's report, and indicated that, if an impartial examination was necessary, appellant would like to participate in the selection of the examiner.

In an opinion dated October 2, 2001, Dr. Stempler indicated that there did not appear to be any objective findings to substantiate appellant's complaints and that, in his opinion, appellant was capable of returning to full-time functional and gainful employment without restrictions.

On November 6, 2001 the Office issued a notice of proposed termination of benefits based on Dr. Stempler's report. By decision dated January 16, 2002, the Office made the proposed termination of benefits final.

By letter dated January 23, 2002, appellant requested a hearing.

By decision dated December 2, 2002, the hearing representative affirmed the Office's January 16, 2002 decision.

The Board finds that the Office improperly terminated appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has determined that an employee has disability causally related to his or her employment, the Office may not terminate compensation without establishing that the disability has ceased or that it was no longer related to the employment.¹ Furthermore, 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.²

In the present case, the Office found that a conflict in the medical evidence existed between appellant's treating physician, Dr. Fried, who opined that appellant continued to suffer residuals from her employment-related condition, and Dr. Valentino, who provided a second

¹ See *Patricia A. Keller*, 45 ECAB 278 (1993).

² See *Kathryn Haggerty*, 45 ECAB 383 (1994); *Edward E. Wright*, 43 ECB 702 (1992).

opinion for the Office and opined that appellant no longer had any residuals from her employment-related condition. Accordingly, the Office referred appellant to Dr. Stempler. On the basis of Dr. Stempler's opinion, the Office determined that appellant's employment-related disability had ceased and terminated her compensation benefits effective January 16, 2002.

The Office gave the opinion of Dr. Stempler the special weight accorded to an impartial medical examiner. However, this was inappropriate for two reasons. First, the Board has held, in the case of *Henry J. Smith, Jr.*,³ that when the Office does not notify a claimant of a physician's status as impartial medical examiner, that physician may not serve as the impartial medical examiner in that case. The Office's procedures, as noted in the *Smith* decision, are intended to assure a claimant's knowledge that a physician is an impartial medical examiner, so that he or she may then choose to exercise the procedural right to participate in the selection of the impartial medical examiner.⁴

In the instant case, the letter notifying appellant of the impending examination by Dr. Stempler made no mention of the fact that this examination was to resolve a conflict in the evidence. Instead, the letter indicated that the purpose of the examination was to clarify the cause and extent of appellant's employment-related impairment. In fact, appellant's attorney interpreted this letter as a referral for a second opinion. As appellant was not properly informed that Dr. Stempler was to serve as an impartial medical examiner, and as appellant was not able to participate in the selection of the impartial medical examiner, Dr. Stempler's opinion was entitled to no special weight.

Second, the Board notes that Dr. Stempler's opinion was not entitled to special weight because it cannot be ascertained that if he is a Board-certified specialist. Office procedures require that an impartial medical specialist be a Board-certified physician unless the physician has special qualifications for performing the examination as documented by the Office medical adviser.⁵ As it has not been established that Dr. Stempler is Board-certified or that he has any special qualifications,⁶ it was improper for the Office to use him as an impartial medical examiner.

Accordingly, as an unresolved conflict of opinion remains between the physicians for the Office and appellant's treating physician regarding whether her work-related disability had ceased; the Office has not met its burden of proof to terminate appellant's compensation benefits.

³ 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

⁴ *David Alan Patrick*, 46 ECAB 1020, 1024 (1995).

⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b(1) (March 1994).

⁶ Although the hearing representative listed Dr. Stempler as a Board-certified orthopedic surgeon, this Board has been unable to verify these credentials.

The decision of the Office of Workers' Compensation Programs dated January 16, 2002 is reversed.

Dated, Washington, DC
June 13, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member