

**United States Department of Labor
Employees' Compensation Appeals Board**

DENISE P. BLACKBURN, Appellant

and

**U.S. POSTAL SERVICE, WESTWOOD
BRANCH, Kalamazoo, MI, Employer**

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**Docket No. 02-1093
Issued: June 7, 2004**

Appearances:

Stuart H. Deming, Esq., for the appellant

Paul L. Klingenberg, Esq., for the Director

Oral Argument September 3, 2003

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Member
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On March 26, 2002 appellant, through her attorney, filed a timely appeal from the December 21, 2001 decision of the Office of Workers' Compensation Programs terminating her compensation benefits, effective December 21, 2001, on the grounds that she no longer had any remaining residuals causally related to her December 31, 1991 employment injury. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether the Office properly terminated appellant's compensation, effective December 21, 2001, on the grounds that she no longer had any remaining residuals causally related to her December 31, 1991 employment injury.

FACTUAL HISTORY

On December 31, 1991 appellant, then a 39-year-old clerk, filed a traumatic injury claim alleging on that date she hurt her lower back while prepping the mail. She stated that she lifted a

tub from the top of a cage and felt a pull in her back. Appellant stopped working on February 28, 1992 and returned to limited-duty work on March 10, 1992.

By letter dated January 15, 1992, the Office accepted appellant's claim for low back strain and a protruding disc at L4-5. She stopped working again on April 21, 1992 and has not returned to work. Appellant received appropriate compensation beginning April 21, 1992.

By letter dated January 7, 1993, the Office referred appellant to Dr. George Fuska, a Board-certified orthopedic surgeon, for a second opinion medical examination. He submitted a February 8, 1993 medical report finding that appellant's scoliosis on the lumbar spine was caused by a developmental anomaly in her lumbar spine. Dr. Fuska opined that the December 31, 1991 employment injury temporarily aggravated a preexisting condition and that her current complaints of pain were not work related rather, they were related to her developmental problems.

In a March 8, 1993 decision, the Office found the evidence of record insufficient to establish that appellant had any residuals or disability caused by the December 31, 1991 employment injury based on Dr. Fuska's opinion. In a March 24, 1993 letter, she requested an oral hearing before an Office hearing representative.

By decision dated March 25, 1994, the hearing representative affirmed the Office's decision. Appellant, through her attorney, Stuart H. Deming, requested reconsideration by letters dated March 14, 1995 and submitted numerous documents in support of her request.

On June 19, 1995 the Office issued a decision denying appellant's request for modification based on a merit review of her claim. The Office again found that the weight of the medical evidence rested with the opinion of Dr. Fuska. Appellant appealed the Office's decision to the Board.

In an April 3, 1998 decision, the Board found that the Office did not meet its burden of proof in terminating appellant's compensation benefits, as a conflict existed in the medical opinion evidence between her treating physicians and Dr. Fuska as to whether appellant had any residuals of her December 31, 1991 employment injury. Accordingly, the Board reversed the Office's June 15, 1995 decision.¹

Following the Board's decision, the Office received medical evidence from Dr. Romolo Harris Russo, appellant's attending Board-certified neurosurgeon, indicating that she continued to have residuals of her employment-related injury. After reviewing this evidence, the Office referred appellant along with the case record, a statement of accepted facts and a list of specific questions to Dr. Magdi Gabriel, a Board-certified orthopedic surgeon, for a second opinion medical examination by letter dated December 15, 1999.

On January 7, 2000 Mr. Deming telephoned the Office because appellant received notification of an independent medical examination and he did not receive a copy of it. He

¹ Docket No. 95-2976 (issued April 3, 1998). It appears that the Board inadvertently indicated that it was reversing the Office's June 15, 1995 decision, rather than the Office's June 19, 1995 decision.

wanted to know whether the examination was for a referee or second opinion. Mr. Deming also requested copies of materials sent to Dr. Gabriel. In response to Mr. Deming's question as to the nature of the examination, the Office advised him that "we had referred his client for a second opinion not a referee examination." Mr. Deming responded "that was what he thought."

Dr. Gabriel submitted a January 10, 2000 medical report, finding that appellant's work-related lumbar strain had resolved and that she was not totally disabled for work based on a detailed review of the medical records and his findings on x-ray and physical examination. He stated that appellant's present complaints were due to the preexisting and increasing severe degenerative changes and lumbar hemivertebrae and structural scoliosis of the lumbar spine.

In May 2000, the Office received the employing establishment's May 18, 2000 investigative report and accompanying videotape and pictures regarding appellant's physical activities.

Based on Dr. Gabriel's opinion, the Office, on May 11, 2000, determined that a conflict existed in the medical opinion evidence between Dr. Gabriel and Dr. Russo, as to the issue of whether appellant had any residuals of her employment injury.

To resolve the conflict, the Office referred appellant to Dr. John A. Milcu, a Board-certified physiatrist, for an impartial medical examination by letter dated May 12, 2000. By letter dated May 23, 2000, the Office advised Dr. Milcu of the referral accompanied by appellant's case record, a statement of accepted facts dated September 1, 1999, an amended statement of accepted facts dated May 26, 2000 and a list of specific questions. The amended statement of accepted facts pointed out that the Office had accepted a low back strain and protruding disc at L4-5 and included a summary of the findings of the employing establishment's investigative report which included appellant's ability to drive, ambulate from her vehicle, carry her purse and groceries and throw trash from a tray into a trash receptacle. In addition, Dr. Milcu was asked to review the accompanying still photographs from a videotape of appellant's activities on certain dates and provide his comments.

Dr. Milcu submitted a June 1, 2000 report, providing a history of appellant's December 31, 1991 employment injury and medical background. On physical examination of her lumbosacral area, he found thoracolumbar dextroscoliosis, but no other visible bony or soft tissue abnormalities. Range of motion of the spine was functional. Dr. Milcu noted that he was not able to assess or perceive any increase in muscle tone or splinting of the lumbar paraspinal muscles. He also noted that tentative palpitation of the lumbosacral area was extremely difficult to perform because appellant would not let him apply even light pressure over the lumbar paraspinal muscles or gluteal muscle. Straight leg raising, sitting and supine were negative for radicular irritation, but positive for lumbosacral pain. Dr. Milcu stated that deep tendon reflexes were equal and symmetrical bilaterally. He also stated that appellant's toes were down-going, no muscle atrophies and sensory or corticosensory deficits were present and strength was 5/5.

Dr. Milcu provided a detailed review of appellant's medical records, including her condition at L4. He stated that the report showed a right-sided L4 hemivertebra with associated scoliosis and narrowing of the L3-4 disc space on a developmental basis. He also stated that "[a]t L4-5, a narrow lateral recess is present, but there are no signs of impingement." He further

stated that a majority of appellant's physicians believed that she suffered from a lumbar muscle strain superimposed on her congenital abnormalities. Dr. Milcu related that he believed the muscle strain had resolved and appellant's ongoing pain may be attributed to her developing chronic pain syndrome and related to the developmental abnormalities she had in the lumbar spine. He reported that appellant was diagnosed as having depression for which she was being treated at that time. Based on his clinical examination and review of the medical records, Dr. Milcu diagnosed lumbar hemivertebra with rotoscoliosis and associated degenerative spondylitic changes, chronic pain syndrome and depression. Regarding appellant's chronic pain, Dr. Milcu stated that it was mechanical and myofascial in origin. Dr. Milcu could not find any test results in the file which demonstrated a disc herniation and nerve root impingement. He stated that "[t]he lumbar muscle strain in 1992 has resolved, in my opinion, at this time.² He further stated that "I do not find any ongoing residuals related to her lifting injury which occurred in December of 1991."

Dr. Milcu believed that he was not dealing with past injury residuals, but with the effects of her congenital abnormalities and progressive degenerative changes related to them. He concluded that "her current disability is related to the developmental abnormalities and do not stem from the injury she suffered in 1991." Dr. Milcu stated that he was not only dealing with chronic pain syndrome, but also depression, dependency, deconditioning and narcotic analgesic dependency. He suspected social and psychological problems that interfered with appellant's well-being and return to gainful employment. During his examination, Dr. Milcu observed symptom magnification by appellant.

Dr. Milcu reviewed the photographs of appellant carrying shopping bags, getting in and out of her car and driving and noted the discrepancy between the pictures and the history she provided to him that her husband did all the driving because she was unable to do so and she never shopped or, when she did so it was only once or twice a year and she used an electric wheelchair at the store. He stated that appellant's work abilities were probably infringed upon by her congenital abnormalities and degenerative changes in her spine. Dr. Milcu opined that he did not believe that appellant's inability to work or work restrictions imposed on her by her physicians and independent examiners were in any form or shape related to the lumbar muscle strained, which had resolved.

On July 6, 2000 the Office issued a proposed notice of termination of compensation to appellant on the grounds that her employment-related back strain and protruding disc at L4-5 had resolved based on Dr. Milcu's opinion.

Appellant was given 30 days to submit additional evidence or argument if she disagreed with the proposed action.

In response to the notice, the Office received a July 12, 2000 letter from Mr. Deming, requesting a stay of the proposed termination because neither he nor appellant received all the documents in appellant's case record in a timely manner as requested. He requested specific

² It appears that Dr. Milcu inadvertently stated that appellant sustained a muscle strain in 1992, rather than in 1991 as he previously noted in his report that she sustained a back injury at the employing establishment in 1991.

documents including the employing establishment's May 18, 2000 investigative report, videotape and photographs.

By letter dated July 19, 2000, Jerry T. Blackburn, appellant's husband, requested a copy of appellant's case records from January 1, 1991 to and, including the date of the last production of records pursuant to the Freedom of Information Act. Along with his request, Mr. Blackburn submitted a durable power of authority signed by appellant on July 13, 2000 authorizing him to represent her.

In response to Mr. Deming's July 12, 2000 letter, the Office stated, in an August 2, 2000 letter, that it was unable to comply with his request pursuant to 20 C.F.R. § 10.700 of the Office's regulation, which allowed a claimant to appoint one individual to represent his or her interests and emphasized that there can be only one representative at any one time. The Office explained that it received a durable power of attorney signed by appellant on July 13, 2000 giving authority to her husband to represent her. The Office advised Mr. Deming that it was more recent than the authorization appellant had granted to him. The Office further advised him that, if he wished to continue representing appellant before the Office, it will need a more recent signed authorization from her.

By letter of the same date, the Office sent Mr. Blackburn a complete copy of appellant's case file stating that, "This includes all documents as well as a U.S. Postal Inspection Service videotape labeled: "Denise Blackburn January 10 and 11, February 24 and March 20, 2000...."

By decision dated August 8, 2000, the Office terminated appellant's compensation, effective August 12, 2000, on the grounds that Dr. Milcu's opinion constituted the weight of the medical evidence in establishing that she no longer had any remaining residuals resulting from her December 31, 1991 employment injury. In a November 6, 2000 letter, appellant, through Mr. Deming, appealed the Office's decision to the Board. She also requested an oral hearing before the Board.³

On July 20, 2001 the Director of the Office filed a motion to remand, requesting that its August 8, 2000 decision be set aside and the case remanded to the Office for further action on the grounds that the Office failed to address contentions raised by appellant's attorney. On August 22, 2001 Mr. Deming filed an opposition to the Director's motion and requested oral argument before the Board. By order dated September 17, 2001, the Board denied the Director's motion and scheduled the date for oral argument.⁴ In a supplement to motion to remand, filed on October 23, 2001, the Director renewed his request to remand the case for the reasons set forth in the July 20, 2001 motion to remand. Subsequent to the November 15, 2001 oral argument, the Board issued an order remanding the case on November 29, 2001, granting the Director's motion on the grounds that the Office failed to consider all the evidence submitted prior to the issuance of its August 8, 2000 decision terminating appellant's compensation. Following further

³ Appellant's appeal was docketed as No. 01-0373.

⁴ The Board notes that it appears appellant's attorney's August 22, 2001 letter and the Board's September 17, 2001 order denying the Director's motion are not in the record.

development of the case, the Board instructed the Office to issue a *de novo* decision on the merits of the case.⁵

On remand Mr. Deming submitted arguments and medical evidence that he believed merited further review by the Office. The medical evidence included reports from Board-certified anesthesiologists, Dr. Phyllis J. Lashley, Dr. Brian J. Gronert and Dr. Michael Chafty, and Dr. Patrick R. Reddan, covering the period May 25 through August 30, 2000 and, indicating that appellant was treated for pain in her lower back, neck, shoulders, legs and knees and that she was diagnosed with having fibromyalgia and depression. Progress reports dated May 25, July 11 and 18, August 1, 2000 from appellant's occupational therapy assistants, Danielle Thompson and someone else whose signature is illegible addressed her physical therapy. An April 4, 2000 computerized tomography (CT) scan report of Dr. Mohammed J. Zafar, a Board-certified neurologist, revealed a small focus of low attenuation in the right cerebella region. His April 7, 2000 electromyogram (EMG) report revealed no definite evidence of right lumbar sacral radiculopathy or peripheral nerve entrapment in the right lower extremity.

By decision dated December 21, 2001, the Office terminated appellant's compensation effective that date on the grounds that the weight of the medical evidence established that she no longer had any residuals causally related to her December 31, 1991 employment injury. The Office stated that based on the Board's November 29, 2001 remand order, eligibility for compensation and medical treatment had been reinstated retroactive to August 8, 2000. The Office further stated that this eligibility extended from August 8 through December 21, 2000 and would be terminated effective close of business on December 21, 2000 after which there was no further eligibility for either compensation or medical treatment.⁶

LEGAL PRECEDENT

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.⁷ 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.⁸ The Office's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁹ However the right to medical benefits for an accepted condition is not limited to the period of entitlement to compensation for wage loss due to disability.¹⁰ To terminate authorization for medical treatment

⁵ Docket No. 01-0373 (issued November 29, 2001).

⁶ It appears that the Office inadvertently stated that appellant's eligibility for compensation and medical treatment had been reinstated through December 21, 2000 rather than December 21, 2001, the date of its termination decision.

⁷ *Gloria J. Godfrey*, 52 ECAB 486 (2001).

⁸ *Lynda J. Olson*, 52 ECAB 435 (2001).

⁹ *Manuel Gill*, 52 ECAB 282 (2001).

¹⁰ *Furman G. Peake*, 41 ECAB 361, 364 (1990).

the Office must establish that appellant no longer has residuals of an employment-related condition which require further medical treatment.¹¹

Section 8123(a) of the Federal Employees' Compensation Act provides in pertinent part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."¹²

In situations where there exist 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.¹³

ANALYSIS

The Office properly determined that there was a conflict in the medical opinion between Dr. Russo, appellant's attending physician, who opined that she continued to suffer residuals of her December 31, 1991 employment injury and Dr. Gabriel, an Office referral physician, who opined that appellant did not have residuals causally related to her accepted employment injury. Further, the Office properly referred appellant, pursuant to section 8123(a) of the Act, to Dr. Milcu for an impartial medical examination and an opinion on the matter to resolve the conflict.¹⁴

The Board has carefully reviewed the opinion of Dr. Milcu that appellant does not have any residuals causally related to her December 31, 1991 employment injury and finds that it has reliability, probative value and convincing quality with respect to its conclusions regarding the relevant issue in the present case. His opinion is based on a proper factual and medical history in that he reviewed the statements of accepted facts prepared by the Office, which specifically advised him of the accepted low back strain and protruding disc at L4-5. He provided a thorough factual and medical history and accurately summarized the relevant medical evidence. Moreover, he provided a proper analysis of the factual and medical history and his findings on examination, including the results of diagnostic testing and reached conclusions regarding appellant's back condition which comported with this analysis.¹⁵ In addition, Dr. Milcu provided medical rationale in support of his opinion by explaining that appellant's current problems and disability were related to her congenital abnormalities and her progressive degenerative changes of the lumbar spine and not to her December 1991 employment injury. He also reviewed the photographs from the postal investigation and determined that contrary to appellant's contention, she was able to perform certain activities such as, carrying shopping bags, getting in and out of

¹¹ *Franklin D. Haislah*, 52 ECAB 457 (2001).

¹² 5 U.S.C. § 8123(a).

¹³ *Jack R. Smith*, 41 ECAB 691, 701 (1990); *James P. Roberts*, 31 ECAB 1010, 1021 (1980).

¹⁴ *Id.*

¹⁵ *See Melvina Jackson*, 38 ECAB 443, 449-50 (1987); *Naomi Lilly*, 10 ECAB 560, 573 (1957).

her car and driving. Accordingly, the Board finds that the weight of the medical evidence is represented by the thorough, well-rationalized medical opinion of Dr. Milcu and establishes that appellant no longer has any residuals causally related to her December 31, 1991 employment injury.¹⁶

In support of her contention that she continues to suffer from employment-related residuals, appellant submitted medical reports from Drs. Lashley, Reddan, Gronert and Chafy revealing a diagnosis of fibromyalgia and depression. These reports, however, failed to address whether she had any residuals caused by her December 31, 1991 employment injury. Similarly, Dr. Zafar's April 4, 2000 CT scan report revealing a small focus of low attenuation in the right cerebella region and his April 7, 2000 EMG report demonstrating no definite evidence of right lumbar sacral radiculopathy or peripheral nerve entrapment in the right lower extremity did not address whether appellant had any residuals causally related to her accepted employment injury.

The progress reports from appellant's occupational therapy assistants, Ms. Thompson and someone else whose signature is illegible, are not considered medical evidence as an occupational therapist is not considered to be a physician under the Act.¹⁷ Accordingly, the Board finds that appellant has failed to submit rationalized medical evidence establishing that she continues to suffer residuals of her December 31, 1991 employment-related injury.

On appeal appellant's attorney, Mr. Deming, has submitted several arguments. He argued that, although he had been appellant's attorney of record for a number of years, he did not receive the Office's December 15, 1999 letter referring her to Dr. Gabriel for a second opinion medical examination. Mr. Deming cited the Board's decisions *Donald J. Knight*¹⁸ and *Margaret C. Dugan*¹⁹ in support of his argument. In *Donald J. Knight*, the Board set aside the Office's decision to terminate appellant's compensation benefits and remanded the case to the Office on the grounds that the Office failed to notify appellant's authorized representative of a referral to a second opinion physician pursuant to 20 C.F.R. § 10.144 of the Office's regulations. In *Margaret C. Dugan*, the Board set aside the Office's decision to terminate appellant's compensation benefits and remanded the case to the Office on the grounds that the Office failed to notify appellant's attorney of a referral to an impartial medical examiner pursuant to Chapter 3.0500 in the Office's procedure manual.²⁰

¹⁶ *Donald J. Miletta*, 34 ECAB 1822 (1983) (medical evidence must be in the form of a reasoned opinion by a qualified physician, based on a complete and accurate factual and medical history of the employee whose claim is being considered).

¹⁷ See 5 U.S.C. § 8101(2) (this subsection defines a "physician" as surgeons, podiatrists, dentists, clinical psychologists, optometrists, chiropractors and osteopathic practitioners within the scope of their practice as defined by State law. 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 as demonstrated by x-ray to exist and subject to regulation by the Secretary).

¹⁸ 47 ECAB 706 (1996).

¹⁹ Docket No. 00-2212 (issued May 8, 2001).

²⁰ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations, Referee Examinations*, Chapter 3.0500.4b(d) (October 1995).

Section 10.144 has been replaced by section 10.700(c) which reads:

“A properly appointed representative who is recognized by [the Office] may make a request or give direction to [the Office] regarding the claims process, including a hearing. This authority includes presenting or eliciting evidence, making arguments on facts of the law and obtaining information from the case file, to the same extent as the claimant. Any notice requirement contained in this part of the [Act] is fully satisfied if served on the representative and has the same force and effect, as if sent to the claimant.”²¹

Requirements for referral to second opinion examinations are provided in the Office’s procedure manual. Chapter 3.500 of the procedure manual provides:

“*Information Sent to Claimant.* After contacting the physician, the Medical Management Assistant will notify the claimant in writing of the following:

- (1) *The name and address* of the physician to whom he or she is being referred as well as the date and time of the appointment.
- (2) *Any request to forward x-rays*, electrocardiograms, etc., to the specialist.
- (3) *The claimant’s right*, under section 8123 of the [Act], to have a physician paid by him or her present during a second opinion examination,
- (4) *A warning* that benefits may be suspended pursuant to 5 U.S.C. § 8123(d) for failure to report for examination.
- (5) *Copies* of Forms SF-1012, SF-1012A and instructional Form CA-77 to claim travel expenses.”²²

Although counsel has argued that he did not receive written notification of the Office’s referral of appellant to a second opinion medical examination, the record establishes that he had actual knowledge of the referral. On January 7, 2000 Mr. Deming telephoned the Office to ascertain whether appellant’s appointment with Dr. Gabriel was for an impartial medical examination or a second opinion medical examination. The Office informed him that “we had referred his client for a second opinion not a referee examination” and he responded “that was what he thought.” The Board, therefore, finds that Mr. Deming had actual knowledge of the Office’s referral of appellant to Dr. Gabriel for a second opinion medical examination.

Mr. Deming further argued that the Office improperly relied on an investigative report prepared by the employing establishment pursuant to Chapter 2.809.5d and 2.809.11.d of the Office’s procedure manual. He stated that appellant was not given an opportunity to refute the

²¹ 20 C.F.R. § 10.700 (1999).

²² Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations, Second Opinion Examinations*, Chapter 3.500.3d (March 1994).

report prior to the inclusion of its findings regarding her physical capabilities as an amendment to the Office's statement of accepted facts which was given to Dr. Milcu for his consideration in his impartial medical examination. Mr. Deming further stated that the report was questionable on its face because the employing establishment provided no basis for its conclusion that appellant's "alleged" injury did not occur. Mr. Deming also stated that the employing establishment did not provide support for its findings regarding appellant's physical activities. He contended that there was no need for surveillance of appellant as the employing establishment's postmaster and an employing establishment physician agreed that appellant should retire because her medical condition prevented her from performing her work duties. He further contended that the Office intentionally withheld evidence which constituted a denial of appellant's right to due process.

Chapter 2.809.5d provides:

*"When allegations are made or conflicting evidence is received, the claims examiner (CE) must provide the interested parties an opportunity to comment on the testimony and offer evidence to refute that testimony. In addition to ensuring that the facts are known to the parties, this process is also a useful vehicle for developing the claim, refining the issues for the CE and assisting in the resolution of conflicts prior to making findings of fact."*²³

Chapter 2.809.11d has been replaced with Chapter 2.809.11a which provides:

*"All evidence on which the statement is based must be part of the case record. The CE may not make findings based on an undocumented conversation or an investigative report which is not subject to examination or refutation. The CE must also avoid making findings based on similar evidence found in other case files (e.g., position descriptions)."*²⁴

Contrary to counsel's assertion that appellant was not given the opportunity to refute the findings of the employing establishment's investigative report because it was not subject to examination, the Board finds that the report was in fact subject to examination by appellant. The employing establishment's May 18, 2000 investigative report was received by the Office in May 2000. Prior to the issuance of its December 21, 2001 decision terminating appellant's compensation, the Office, by letter dated August 2, 2000, mailed a complete copy of appellant's case record to her husband, Mr. Blackburn, as requested and stated that "This includes all documents as well as a U.S. Postal Inspection Service videotape labeled: "Denise Blackburn January 10 and 11, February 24 and March 20, 2000...." As the Office mailed the employing establishment's report, videotape and photographs to Mr. Blackburn over one year before the issuance of its December 21, 2001 decision, appellant had ample time to refute any findings in the report.

²³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.5d (June 1995).

²⁴ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statement of Accepted Facts*, Chapter 2.809.11a (June 1995).

Mr. Deming contended that the impartial medical opinion of Dr. Milcu was improper for the following reasons: (1) his report was obtained by leading questions; (2) he is not a Board-certified orthopedic specialist as incorrectly noted by the Office in its July 6, 2000 notice of proposed termination; (3) he, as well as, Dr. Gabriel never addressed the question whether appellant had residuals related to a protruding disc at L4-5; (4) he did not address the conflict between Dr. Russo and Dr. Gabriel as he did not specifically reference their findings; (5) he did not adequately and accurately describe the facts of the case as he reported that appellant did not appear to be in distress during the examination and he failed to mention appellant's recent hospitalization in March and April 2000 and accurately describe the findings of other physicians; and (6) he did not indicate the date appellant's residuals ceased.

With respect to Mr. Deming's contention that Dr. Milcu's report was obtained by leading questions, the Office's procedure manual provides the instances in which medical evidence will be excluded:

6. *Exclusion of Medical Evidence.* The Employees' Compensation Appeals Board (ECAB) has required exclusion of medical reports from the case record if:

a. *The physician selected* for referee examination is regularly involved in performing fitness-for-duty examinations for the claimant's employing agency. While such physicians may not be used as medical referees, they may be used as second opinion specialists (see FECA.PM 2-810.10).

b. *A second referee specialist's report* is requested before the Office has attempted to clarify the original referee specialist's report. Only if the selected physician fails to provide an adequate and clear response after a specific request for clarification may the Office seek a second referee specialist's opinion.

c. *A medical report is obtained* through telephone contact or submitted as a result of such contact. DMAs should refrain from verbal contact with physicians who are engaged to provide referee opinions to discuss any substantive issues in the case. All such communication must be in writing.

d. *'Leading questions'* have been posed to the physician in either a second opinion or referee context.

"If the CE determines that a report has been improperly obtained, he or she will staple the pages together and write "excluded" and the date on the front of the report. The report need not be physically removed from the file."

When the Office referred appellant to Dr. Milcu for an impartial medical examination regarding whether she any residuals causally related to her December 31, 1991 employment injury, the Office informed him that appellant's claim had been accepted for low back strain and a protruding disc at L4-5 due to a lifting injury at work on December 31, 1991. The Office asked him to discuss "whether there continues to be objective medical findings indicative of ongoing

residuals from these accepted conditions” and if so discuss the objective findings in detail after his assessment and review of the case record. The Office also asked Dr. Milcu to address whether appellant’s preexisting conditions of congenital right hemavertebra between L3 and L4 with associated scoliosis and a vena cava clip implanted at L3 due to a pulmonary embolism and thrombosis “affected her present disability status.” Lastly, the Office asked Dr. Milcu that if residuals remained, would they “impose disability which would restrict her work capability in any way.” The Board finds that the Office did not ask leading questions as it did not suggest or imply an answer to the questions posed.²⁵ Instead, the Office provided Dr. Milcu with an accurate factual background of the case necessary for a reasoned medical opinion.

Mr. Deming’s contention that Dr. Milcu was not qualified to render an opinion on appellant’s orthopedic condition, is without merit. Although the Office incorrectly stated that he is a Board-certified orthopedic specialist in its July 6, 2000 notice of proposed termination, the Board finds that such error is harmless. Dr. Milcu, a Board-certified physiatrist, is a medical doctor specializing in physical and rehabilitative medicine, an area of medical practice germane to the assessment of physical impairment of musculoskeletal conditions. Mr. Deming submitted no evidence that Dr. Milcu was not qualified to assess the nature and extent of appellant’s ongoing symptoms and her ability to work. Further, as found above, Dr. Milcu’s report was rationalized and based on an accurate factual and medical background. Therefore, his opinion is of probative medical value in this case.²⁶

Mr. Deming contended that neither Dr. Milcu nor Dr. Gabriel addressed the question whether appellant had residuals related to a protruding disc at L4-5. In his June 1, 2000 report, Dr. Milcu stated that a January 27, 1992 MRI report showed a right-sided L4 hemivertebra with associated scoliosis and narrowing of the L3-4 disc space on a developmental basis. He also stated that “[a]t L4-5, a narrow lateral recess is present, but there are no signs of impingement.” Further, he stated that not only had appellant’s lumbar strain resolved at that time, but also “I do not find any ongoing residuals related to her lifting injury which occurred in December of 1991.” As Dr. Milcu specifically addressed appellant’s protruding disc at L4-5 and found that she no longer had any residuals of her December 1991 employment injury, which included her back condition at L4-5, the Board finds that counsel’s argument is without merit.

Mr. Deming’s argument that Dr. Milcu failed to address the conflict between Dr. Russo and Dr. Gabriel has no merit. Although Dr. Milcu did not specifically address the findings of Drs. Russo and Gabriel, he addressed the relevant issue in this case, whether appellant had any residuals caused by her accepted December 31, 1991 employment injury, which caused the conflict between these physicians and opined that appellant did not have any residuals of her December 31, 1991 employment injury.

²⁵ See *Mary Poller*, 54 ECAB ____ (Docket No. 04-31, issued May 3, 2004); see also *Richard O’Brien*, 53 ECAB ____ (Docket No. 00-1665, issued November 21, 2001); compare *Stanislaw M. Lech*, 35 ECAB 857 (1984)(finding that the Office posed a leading question to the impartial medical specialist by asking him to “Give date when aggravated disability ceased,” implying that it had ceased).

²⁶ *Donald J. Miletta*, *supra* note 16.

Contrary to Mr. Deming's argument that Dr. Milcu did not adequately and accurately describe the facts of the case and the findings of other physicians, Dr. Milcu provided an accurate history of appellant's December 31, 1991 employment injury and medical treatment as provided to him by appellant and the Office's statements of accepted facts.

With respect to Mr. Deming's contention that Dr. Milcu's examination was improper because he did not provide the date appellant's residuals ceased, Dr. Milcu's June 1, 2000 report revealed that appellant's employment-related lumbar strain and protruding disc at L4-5 resolved by the time of his examination on that date. Based on the Board's November 29, 2001 remand order, the Office reinstated appellant's compensation and medical treatment from August 8, 2000, the date of its initial termination decision, through December 21, 2001, the date of its subsequent termination decision. As Dr. Milcu found that appellant's employment-related conditions had ceased as of June 1, 2000 and the Office allowed appellant to receive compensation and medical treatment well beyond the date that Dr. Milcu found that she no longer had any residuals of her accepted employment-related injuries, the Board finds that Mr. Deming's contention is without merit.

Lastly, Mr. Deming contends that the appearance of impartiality of the Office was jeopardized by the Office's repeated *ex parte* contacts with the employing establishment. He stated that the employing establishment was given full access to appellant's records, every step taken by the Office was prompted by the employing establishment who put pressure on the second opinion and impartial medical examinations and certain communication between the Office and the employing establishment was not contained in the record.

Proceedings under the Act are not adversarial in nature, nor are the Office a disinterested arbiter. While the claimant has the burden to establish entitlement to compensation benefits, the Office shares responsibility in the development of the evidence. It has the obligation to see that justice is done.²⁷ The Office's contact with the employing establishment was necessary for the development of appellant's claim. Further, there is no evidence in the record of any improper contact between the Office and the employing establishment or any pressure on Drs. Gabriel and Milcu by the employing establishment.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation effective, December 21, 2001, on the grounds that she no longer had any remaining residuals causally related to her December 31, 1991 employment injury.

²⁷ *William J. Cantrell*, 34 ECAB 1223 (1983).

ORDER

IT IS HEREBY ORDERED THAT the December 21, 2001 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: June 7, 2004
Washington, DC

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member