

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

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**REBECCA M. CROSS, Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
St. Louis, MO, Employer**

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**Docket No. 03-2020  
Issued: May 12, 2004**

*Appearances:*  
*Michael Wheeler, for the appellant*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

COLLEEN DUFFY KIKO, Member  
MICHAEL E. GROOM, Alternate Member  
A. PETER KANJORSKI, Alternate Member

**JURISDICTION**

On August 13, 2003 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated June 5, 2003. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the termination of appellant's wage-loss and medical benefits.

**ISSUE**

The issue is whether the Office properly terminated appellant's wage-loss and medical benefits effective May 18, 2002 on the grounds that she no longer had any disability on or after May 18, 2002 due to her accepted January 20, 1983 employment injury.

**FACTUAL HISTORY**

Appellant, a 50-year-old data technician filed a traumatic injury claim on February 3, 1983 alleging that on January 20, 1983 she was emotionally traumatized when an elevator door closed on the cart she was pushing onto the elevator, which caused two wheels to come off the cart. The Office initially accepted the claim for traumatic neurosis and subsequently expanded to

include post-traumatic stress syndrome.<sup>1</sup> Appellant was subsequently placed on the automatic rolls for temporary total disability effective December 1, 1983.

On February 8, 2001 the Office issued a notice of proposed termination of benefits on the grounds that she had no continuing disability or medical condition due to her accepted employment injury.

In a letter dated March 9, 2001, appellant disagreed with the Office's proposal to terminate her compensative benefits.

On March 14, 2001 the Office issued a decision which terminated compensation benefits effective March 24, 2001.

In a July 16, 2001 decision, an Office hearing representative reversed the termination of appellant's compensation, finding an unresolved conflict in the medical opinion evidence which warranted further development.

On December 19, 2001 the Office referred appellant to Dr. Fred Wayne Gaskin, a Board-certified psychiatrist, to resolve the conflict in the medical opinion evidence between Dr. Thomas K. Mangelsdorf, a second opinion Board-certified psychiatrist, and Dr. John H.K. Sweet, an attending Board-certified psychiatrist, on the issue of whether she continued to have any residuals or disability due to the January 20, 1983 employment injury.

In a December 29, 2001 letter, appellant objected to the selection of Dr. Gaskin as an impartial medical examiner. She contended that his office was 40 miles away and that it was approximately a 2-hour ride from her home. Appellant argued that there were other physicians closer to her home and stated her preference to be examined by a black physician.

In a January 7, 2002 letter, the Office informed appellant that Dr. Gaskin was not under contract with the Office and that the physician had been selected "on a strict rotational system using appropriate medical directories located on the Physician's Directory System." Regarding her objection to Dr. Gaskin, the Office noted that she failed to provide a valid reason as to why Dr. Gaskin was unacceptable to conduct the examination.

In a report dated March 8, 2002, Dr. Gaskin reported on his examination of appellant. He reviewed the medical record and statement of accepted facts, diagnosed malingering and personality disorder not otherwise specified. Regarding appellant's continuing disability Dr. Gaskin opined:

"The continuing relationship between the incident of [January] 20, [19]83, and the accepted condition of [c]hronic [p]ost [t]raumatic [s]tress [d]isorder is that the incident in itself was not sufficient to cause [c]hronic [p]ost [t]raumatic [s]tress [d]isorder and in my opinion, she does not manifest [c]hronic [p]ost [t]raumatic [s]tress [d]isorder."

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<sup>1</sup> In letter dated September 3, 1985, the employing establishment notified appellant that she would be removed from the employing establishment effective October 6, 1985.

Dr. Gaskin concluded that appellant “was not psychiatrically disabled for work” and was capable of performing her date-of-injury job as a data transcriber technician. Regarding his diagnosis and disability, Dr. Gaskin stated:

“The essential feature of [m]alingering is the intentional product of false or grossly exaggerated physical or psychological symptoms motivated by external symptoms such as avoiding work and obtaining financial compensation. This lady has, or in the past, has fulfilled all of the criteria mentioned which should strongly suspect [m]alingering, including all the medical legal context of this presentation, the discrepancy between the claimed stress or disability and the objective findings, a history of lack of cooperation during diagnostic evaluations, and in complying with prescribed treatment regimens, as well as the presence of [p]ersonality [d]isorder.”

Dr. Gaskin concluded that appellant had no psychiatric impairment at the time of his evaluation.

On April 2, 2002 the Office issued a notice of proposed termination of wage-loss and medical compensation benefits on the basis that she no longer had any residuals or disability due to the accepted employment injury. The Office informed appellant that the opinion of Dr. Gaskin, the impartial medical examiner, represented the weight of the medical opinion evidence which found any psychiatric disability due to her work injury had ceased.

In a letter dated May 4, 2002, appellant’s representative disagreed with the proposal to terminate benefits.

By decision dated May 13, 2002, the Office terminated appellant’s compensation benefits effective May 18, 2002.

In a letter dated May 22, 2002, appellant requested an oral hearing.

A hearing was held on February 26, 2003 at which appellant and Dr. Sweet, her attending physician. Subsequent to the hearing, she submitted an April 19, 2003 report from Dr. Sweet.

By decision dated June 5, 2003, the Office hearing representative affirmed the termination of appellant’s compensation benefits.<sup>2</sup>

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<sup>2</sup> The Office hearing representative found the hearing testimony and April 19, 2003 report by Dr. Sweet required further development. She instructed the Office to provide Dr. Gaskin with a transcript of Dr. Sweet’s hearing testimony and his April 19, 2003 report to review and then provide his opinion to the Office. As the hearing representative has determined that further development is required on this issue and no final decision has been issued by the Office on this matter, the Board finds that the case is an interlocutory posture with regard to this issue, over which the Board may not exercise jurisdiction. *See* 20 C.F.R. § 501.2(c).

## LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.<sup>3</sup> 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>4</sup> 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.<sup>5</sup>

In situations where opposing medical opinions on an issue are of virtually equal evidentiary weight and rationale, the case shall be referred for an impartial medical examination to resolve the conflict in medical opinion.<sup>6</sup> The opinion of the specialist properly chosen to resolve the conflict must be given special weight if it is sufficiently well rationalized and based on a proper factual background.<sup>7</sup>

## ANALYSIS

On appeal, appellant contends that the Office prepared an improper statement of accepted facts, improperly selected the impartial medical examiner and the improperly rescinded acceptance of appellant's claim.

The Board notes that appellant argued that the Office improperly selected Dr. Gaskin as being outside the appropriate geographical area as the physician's office was located 40 miles from appellant's residence. She also contended that the Office improperly selected Dr. Gaskin as it failed to allow her an input into the selection of an impartial medical examiner. Appellant requested the Office to send her to a black physician and that, by ignoring her request, Dr. Gaskin's selection showed evidence of bias.

A physician selected by the Office to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. Office procedures provide that, unlike selection of second opinion examining physicians, selection of referee physicians is made by a strict rotational system using appropriate medical directories. The services of all available and qualified Board-certified specialists will be used as far as possible to eliminate any inference of bias or partiality. This is accomplished by selecting specialists in alphabetical order as listed in the roster chosen

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<sup>3</sup> *Paul L. Stewart*, 54 ECAB \_\_\_\_ (Docket No. 03-1107, issued September 23, 2003).

<sup>4</sup> *Elsie L. Price*, 54 ECAB \_\_\_\_ (Docket No. 02-755, issued July 23, 2003).

<sup>5</sup> *James F. Weikel*, 54 ECAB \_\_\_\_ (Docket No. 01-1661, issued June 30, 2003).

<sup>6</sup> *Richard L. Rhodes*, 50 ECAB 259, 263 (1999).

<sup>7</sup> *Sherry A. Hunt*, 49 ECAB 467, 471 (1998).

under the specialty and/or subspecialty heading in the appropriate geographic area and repeating the process when the list is exhausted.<sup>8</sup> The procedures contemplate that impartial medical specialists will be selected from all available Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.<sup>9</sup> Under Office procedures, a claimant is entitled to participate in the selection of an impartial medical specialist. However, the claimant does not possess an unqualified right to participate. In two instances, the Office will prepare a list of three specialists for selection by the claimant: first, when there is a specific request for participation and a valid reason for participation is provided; or, when there is a valid objection to the physician selected by the Office.<sup>10</sup>

Under Office procedures, a claimant who asks to participate in the selection of an impartial medical specialist or objects to the selected physician must provide a valid reason. The procedural opportunity of a claimant to participate in the selection of an impartial medical specialist is not an unqualified right. The Office has imposed the requirement that the employee provide a valid reason for any participation request or for any objection proffered against a designated impartial medical specialist. Office procedures provide that a claimant who asks to participate in selecting the referee physician or who objects to the selected physician should be requested to provide her reason for doing so, and the claims examiner is responsible for evaluating the explanation offered.<sup>11</sup>

Appellant requested to be examined by a black physician, but provided no basis for this request. Appellant has not provided any probative evidence to demonstrate bias on the part of Dr. Gaskin nor does the evidence indicate that the Office failed to use the proper rotational selection procedures. The Board finds that the Office followed the proper rotational selection procedures as previously noted. The Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.<sup>12</sup> The Board finds that appellant has not established bias on the part of Dr. Gaskin.

Appellant contends that Dr. Gaskin should be disqualified from serving as the impartial medical examiner because his office was located 40 miles away from her home and was not

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<sup>8</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(1) (March 1994); see *Charles M. David*, 48 ECAB 543 (1997).

<sup>9</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b) (March 1994); *Wallace B. Page*, 46 ECAB 227 (1994).

<sup>10</sup> *David Alan Patrick*, 46 ECAB 1020 (1995).

<sup>11</sup> *Richard Coonradt*, 50 ECAB 360 (1999). Examples of circumstances under which the claimant may participate in the selection include (but are not limited to) documented bias by the selected physician, documented unprofessional conduct by the selected physician, or a female claimant who requests a female physician when a gynecological examination is required. Federal (FECA) Procedural Manual, Part 3 -- Medical, *Referee Examinations*, Chapter 3.500.4(b)(4) (March 1994).

<sup>12</sup> *Roger S. Wilcox*, 45 ECAB 265 (1993).

within her geographic area. Office procedures require that, when a specialist is selected by the strict rotational system devised by the Office, consideration must be given to the appropriate geographic area. The Office has determined that when scheduling a medical examination a distance of 25 miles is reasonable within most urban areas.<sup>13</sup> The Board notes that the distance appellant would drive from her home at 4548A Clarence Avenue, St. Louis, MO to Dr. Gaskin's office located at 12700 Southfork Road, Saint Louis, MO is approximately 21 miles. The distance of approximately 21 miles from appellant's home to Dr. Gaskin's office is not unreasonable and is within appellant's geographic commuting area in St. Louis. The Board finds appellant's argument regarding the distance of her drive to Dr. Gaskin's office is without merit.

Appellant contends that Dr. Gaskin should be disqualified from serving as the impartial medical examiner because the Office failed to copy appellant's representative on the letter scheduling appellant for an examination. Under the circumstances of this case, the Board finds this argument is without merit. In *Henry J. Smith, Jr.*,<sup>14</sup> the Board held 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 she may then choose to exercise the procedural right to participate in the selection of the impartial medical examiner.<sup>15</sup> In this case, however, the Board notes that appellant had actual notice of the existence of the conflict and referral to the impartial medical examiner. The July 16, 2001 decision of the Office hearing representative reversed the March 14, 2001 termination based on the unresolved conflict of medical opinion. The record makes clear that Dr. Gaskin was selected for the purpose of resolving a conflict in medical opinion. Appellant was advised of the referral prior to examination and made several objections to the selection of Dr. Gaskin.

The Board is not persuaded by appellant's argument that the Office has rescinded her claim. In the instant case, the Office terminated appellant's compensation benefits effective May 18, 2002. The decisions issued by the Office show that this case was treated as a termination case and not a rescission of the original claim. The Office hearing representative's July 12, 2001 decision found a conflict of medical opinion between appellant's attending psychiatrist, Dr. Sweet, and an Office referral psychiatrist, Dr. Mangelsdorf. At issue in the conflicting medical evidence was the diagnosis of post-traumatic stress disorder on which the physicians disagreed. Based on his examination and record review, Dr. Gaskin explained his opinion for finding that appellant did not manifest post-traumatic stress disorder. Thereafter, the Office determined that appellant had no continuing disability due to her 1983 injury.

The Board is not persuaded by appellant's arguments that the Office improperly issued a statement of accepted facts. The Office's procedure manual states that "other elements may be included" in the statement of accepted facts depending on the issues to be resolved and the nature

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<sup>13</sup> Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.201.11(a) (September 1996).

<sup>14</sup> 43 ECAB 524 (1992), *reaff'd on recon.*, 43 ECAB 892 (1992).

<sup>15</sup> *See Delmom R. Rumsey*, 37 ECAB 645 (1986).

of the claim.<sup>16</sup> In the instant case, the Office properly included appellant's work history and all pertinent facts including her work at the employing establishment, that she had been imprisoned, and then returned to work for the employing establishment until her injury. In view of the nature of appellant's condition, the Office properly included elements that might have influenced her emotional condition and in view of appellant's claims that the employing establishment had not treated her fairly.

The Board finds that Dr. Gaskin's opinion is entitled to the special weight accorded an impartial medical specialist and establishes that appellant's accepted work injuries had resolved.<sup>17</sup> In a March 8, 2002 report, the physician opined that appellant did not currently exhibit chronic post-traumatic stress disorder. Moreover, he concluded that the January 20, 1983 incident "in itself was not sufficient to cause [c]hronic [p]ost-[t]raumatic [s]tress [d]isorder." Dr. Gaskin further opined that any current disability was due to malingering. In support of this conclusion, he noted that appellant "fulfilled all of the criteria" of malingering, including the essential element of "the intentional product of false or grossly exaggerated physical or psychological symptoms motivated by external symptoms such as avoiding work and obtaining financial compensation." Dr. Gaskin reviewed the case record and various reports on appellant's medical treatment since the 1983 employment incident. He interviewed appellant thoroughly, discussed his clinical findings and provided medical rationale for his conclusion that appellant's work-related emotional condition had resolved. Dr. Gaskin provided an opinion that is sufficiently well rationalized to support his conclusion that appellant has no residuals of the accepted emotional condition and that any current disability is not work related.

### CONCLUSION

The Board finds that the Office properly terminated appellant's wage-loss and medical compensation benefits on the basis that the evidence established that she had no continuing disability or residuals due to her accepted January 20, 1983 employment injury as of May 18, 2002.

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<sup>16</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Statements of Accepted Facts*, Chapter 2.809.13(a) (June 1995).

<sup>17</sup> See *Jimmie H. Duckett*, 52 ECAB 332 (2001) (opinion that appellant's back condition was due to the natural progression of his spondylolisthesis was sufficiently rationalized to establish that his work-related back condition had resolved and to meet the Office's burden of proof in terminating compensation).

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated June 5, 2003 be affirmed.

Issued: May 12, 2004  
Washington, DC

Colleen Duffy Kiko  
Member

Michael E. Groom  
Alternate Member

A. Peter Kanjorski  
Alternate Member