

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

DARLENE R. KENNEDY, Appellant

and

**U.S. POSTAL SERVICE, WEST PARK
STATION, Philadelphia, PA, Employer**

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**Docket No. 02-1434
Issued: November 2, 2004**

Appearances:
Richard A. Veon, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chairman
DAVID S. GERSON, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On April 22, 2002 appellant, through her attorney, timely filed an appeal from an April 2, 2002 decision by the Office of Workers' Compensation Programs, which denied appellant's request for modification of the Office's December 20, 2001 decision. In the December 20, 2001 decision, the Office terminated her compensation on the grounds that her employment-related disability had ceased. The Board has jurisdiction over the merits of this case pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.¹

ISSUE

The issue is whether the Office properly terminated appellant's compensation effective December 20, 2001.

¹ The Board previously issued a decision on November 20, 2002. In a May 19, 2003 order, the Board granted appellant's petition for reconsideration and vacated the November 20, 2002 decision because appellant's attorney had previously requested a copy of the case record but his request had not been fulfilled. Docket No. 02-1434 (issued May 19, 2003).

FACTUAL HISTORY

On March 28, 2000 appellant, then a 41-year-old letter carrier, stated that, as she was getting mail from a mailbox, she felt a sharp pain on the left side of her hand and arm. She stopped working on June 17, 2000. The Office accepted appellant's claim for a strain or sprain of the left shoulder and the cervical area of the spine. She returned to light-duty work four hours a day on October 2, 2000. The Office paid compensation for the hours appellant did not work.

In a July 14, 2000 report, Dr. Philip S. Yussen, a Board-certified radiologist, stated that a magnetic resonance imaging (MRI) scan of the left shoulder showed mild to moderate supraspinatus tendinitis without definite evidence for a superimposed tear and degenerative changes of the superior glenoid labrum. He indicated that a tear in this region could not be excluded. In a July 24, 2000 report, Dr. Alan U. Glazer stated that an MRI scan of the cervical region showed torticollis convex to the left possibly secondary to positioning or a spasm and a questionable subtle disc bulging at C4-5. He found no disc herniation.

In an August 23, 2000 report, Dr. David Tabby, an osteopathic Board-certified orthopedic surgeon, noted that appellant's MRI scans showed C4-5 disc degeneration, supraspinatus tendinitis and superior glenoid degeneration. He diagnosed left brachial plexopathy from chronic compression and rotator cuff pathology, consisting of supraspinatus tendinitis and superior glenoid degeneration, which he related to chronic trauma. In a September 26, 2000 report, Dr. Tabby stated that appellant was unable to carry a mailbag. He related her condition to her employment.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Richard J. Mandel, a Board-certified orthopedic surgeon, for an examination and second opinion. In an October 16, 2000 report, Dr. Mandel diagnosed a resolved strain and sprain of the left shoulder and residual deconditioning. He stated that there was no evidence of any neurological injury and considered the electromyogram (EMG) results not to be significant, given the minimal findings on EMG testing. He indicated that appellant could return to a sedentary or light-duty position for a month for conditioning followed by a return to her regular full duties. He concluded that appellant was fully recovered from the accepted work injury.

The Office referred appellant, together with a statement of accepted facts and the case record, to Dr. Thomas C. Peff, a Board-certified orthopedic surgeon, to resolve the conflict in the medical evidence between Dr. Tabby, her attending physician, and Dr. Mandel, the physician who gave the second opinion on appellant's ability to work. In a February 22, 2001 report, Dr. Peff stated that appellant had a passive full range of motion of both shoulders but, when asked to actively abduct the shoulder, complained of pain at about 40 degrees. He indicated that he found no evidence of glenohumeral instability and no cervical tenderness. Dr. Peff commented that the records showed that appellant sustained a left shoulder and cervical strain as a result of her work activity. He stated that her soft tissue injury had resolved and concluded that she could return to work full time. Dr. Peff indicated that there was no significant neurological involvement based on the minimal findings of the EMG and appellant's physical examination.

In a November 14, 2001 letter, the Office informed appellant that the medical evidence of record showed that she had recovered from the effects of her employment injury. The Office proposed to terminate her compensation. Appellant was given 30 days to submit evidence if she disagreed with the proposed termination.

In a December 20, 2001 decision, the Office terminated appellant's compensation, effective that date, on the grounds that the weight of the medical evidence established that she had no continuing disability from the March 28, 2000 injury.

In a December 19, 2001 report, received by the Office on December 27, 2001, Dr. Tabby stated that he disagreed with Dr. Peff's report that appellant had a full range of motion of the left shoulder. Dr. Tabby found her range of motion to be restricted. He noted Dr. Peff did not conduct a sensory examination. Dr. Tabby disagreed with the conclusion that appellant only sustained a soft tissue injury. In a separate December 19, 2001 report, he diagnosed left brachial plexopathy from chronic compression, left rotator cuff pathology with supraspinatus tendinitis and superior glenoid degeneration from chronic trauma and right biceps tenosynovitis and superior glenoid degeneration from overuse of the right arm. Dr. Tabby stated that appellant had ongoing pathology in her left brachial plexus and both rotator cuffs that would continue to be exacerbated by repetitive trauma.

In an April 2, 2002 merit decision, the Office denied appellant's claim for modification on the grounds that the evidence she had submitted was insufficient to warrant modification of the prior decision. The Office noted that Dr. Tabby was using the results of tests taken four to five months after the employment injury to justify his conclusion that appellant was still affected by the employment injury 21 months after it occurred.

LEGAL PRECEDENT

Once the Office accepts 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

After the termination of compensation benefits, clearly warranted on the basis of the evidence, the burden for reinstating compensation benefits shifts to appellant. In order to prevail, she must establish by the weight of the reliable, probative and substantial evidence that she had an employment-related disability which continued after termination of compensation benefits.³

In situations when there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial specialist for the purpose of resolving the conflict,

² *Eddie Franklin*, 51 ECAB 223 (1999).

³ *Talmadge Miller*, 47 ECAB 673, 679 (1996); *Joseph Campbell*, 34 ECAB 1389, 1396 (1983).

the opinion of such specialist, if sufficiently well-rationalized and based upon a proper factual background, must be given special weight.⁴

ANALYSIS

Dr. Tabby diagnosed C4-5 disc degeneration, left brachial plexopathy from chronic compression and rotator cuff pathology consisting of supraspinatus tendinitis and superior glenoid degeneration. He related appellant's condition to chronic trauma in her employment. Dr. Mandel, on the other hand, diagnosed a resolved strain and sprain of the left shoulder and residual deconditioning. He stated that there existed no evidence of any neurological injury to appellant. Dr. Tabby and Dr. Mandel, therefore, disagreed on the diagnosis of appellant's condition. Dr. Mandel did not address the issue of causal relationship while Dr. Tabby had concluded there was a relationship between appellant's shoulder condition and repetitive motion of her left arm. Dr. Mandel instead concluded that appellant had recovered from the employment injury. Because of the conflicting diagnoses of her condition, the case was referred by the Office to an impartial medical specialist, Dr. Peff.

Dr. Peff found that appellant's injuries were related to the March 28, 2000 employment injury. He pointed out the minimal findings of the EMG and the lack of other findings supported his conclusion that the effects of the employing establishment had resolved. Dr. Peff stated that there was no evidence of glenohumeral instability and no cervical tenderness. He commented that the records showed appellant's accepted conditions of a left shoulder and cervical strain had resolved and concluded that she could return to work full time. Dr. Peff indicated that there was no significant neurological involvement based on the minimal findings of the EMG and her physical examination. He presented a concise, well-reasoned report, based on an accurate medical history. Dr. Peff concluded that there was no evidence that appellant had any residuals of her accepted employment injuries. His report, therefore, is entitled to special weight and, in the circumstances of this case, constitutes the weight of the medical evidence. The Board finds that Dr. Peff's report provides sufficient support for the Office's decision to terminate appellant's compensation. His report constitutes special weight as the impartial medical specialist selected to resolve the conflict in medical opinion evidence.

Since Dr. Peff's report met the Office's burden of proof in terminating appellant's compensation, the burden shifted to appellant to demonstrate that she was still disabled due to her employment injuries. She submitted two reports from Dr. Tabby, both dated December 19, 2001. In one of his December 19, 2001 reports, Dr. Tabby expressed disagreement with Dr. Peff's report. Dr. Tabby disagreed with the finding that appellant had a full passive range of motion in the shoulders. He pointed out that Dr. Peff did not perform a sensory examination. Dr. Tabby also disputed Dr. Peff's report that appellant only sustained a soft tissue injury, that she no longer needed physical therapy and that she was able to return to work full time. In the other December 19, 2001 report, Dr. Tabby only restated his diagnosis of appellant's condition and again stated that the conditions would be aggravated by repetitive trauma. Dr. Tabby's previous reports caused the conflict in the medical evidence which resulted in the conflict of the medical evidence. In this circumstance, Dr. Tabby did not offer any new medical evidence or a fuller discussion why

⁴ *James P. Roberts*, 31 ECAB 1010 (1980).

he found Dr. Peff's report to be in error. Dr. Tabby's additional reports, which contained only a statement of disagreement and a restatement of his conclusion on causal relationship, are insufficient to overcome the special weight given to Dr. Peff's opinion or cause a new conflict in the medical evidence.⁵

In his second December 19, 2001 report, Dr. Tabby diagnosed left brachial plexopathy, superior tendinitis and superior glenoid degeneration in the left rotator cuff and right biceps tenosynovitis and supraspinatus tendinitis due to his employment injury and to repetitive use of his left arm. The Office did not accept appellant's claim for these conditions. For conditions not accepted by the Office as being employment related, it is appellant's burden of proof to provide rationalized medical evidence sufficient to establish causal relationship, not the Office's burden to disprove such a relationship.⁶ Dr. Tabby only stated that appellant's conditions would continue to be aggravated by repetitive trauma. He did not provide a rationalized explanation on how appellant's employment injury would have caused the diagnosed conditions he discussed. The report, therefore, has limited probative value in showing a causal relationship between appellant's employment injury and the diagnosed conditions of left brachial plexopathy, superior tendinitis and superior glenoid degeneration in the left rotator cuff and right biceps tenosynovitis and supraspinatus tendinitis. Because of the flaws in Dr. Tabby's December 19, 2001 reports, appellant did not meet her burden of proof in establishing that these conditions were causally related to her employment injury. The Board finds, therefore, that the report of Dr. Peff continues to represent the special weight of the medical evidence and establishes that appellant has no employment-related disability on and after December 20, 2001, the date the Office terminated her compensation benefits.

CONCLUSION

The Board finds that the Office properly terminated appellant's compensation benefits with the report of Dr. Peff, the selected impartial medical specialist. The Board further finds that she has not met her burden of proof in establishing the her diagnosed conditions of left brachial plexopathy, superior tendinitis and superior glenoid degeneration in the left rotator cuff, and right biceps tenosynovitis and supraspinatus tendinitis were causally related to the employment injuries or that appellant had any continuing disability causally related to the accepted employment injuries of strain or sprain of the left shoulder and the cervical area of the spine.

⁵ *Michael Hughes*, 52 ECAB 387, 391 (2001).

⁶ *Alice J. Tysinger*, 51 ECAB 638, 646 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs, dated April 2, 2002 and December 20, 2001 are affirmed.

Issued: November 2, 2004

Washington, DC

Alec J. Koromilas
Chairman

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member