

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

KIMBERLY R. FLAGG, Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
South Dayton, NY, Employer**

)
)
)
)
)
)
)
)
)
)
)

**Docket No. 05-1462
Issued: December 14, 2005**

Appearances:
David W. Covino, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
WILLIE T.C. THOMAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On June 30, 2005 appellant filed a timely appeal of a June 8, 2005 merit decision of the Office of Workers' Compensation Programs that terminated her compensation effective April 23, 2004. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the merits of this case.

ISSUE

The issue is whether the Office has established that appellant's disability causally related to her February 24, 2001 employment injury ended by April 23, 2004.

FACTUAL HISTORY

On March 8, 2001 appellant, then a 35-year-old rural carrier associate, filed a claim for compensation for a traumatic injury sustained on February 24, 2001 in a motor vehicle accident. She listed the nature of the injury as contusions to the head, face, right leg and hip, severe neck pain and abdomen-ribcage pain. Appellant stopped work on February 24, 2001.

On March 23, 2001 the Office advised appellant that it had accepted that she sustained a neck contusion on February 24, 2001. She filed a claim for compensation for disability beginning April 11, 2001. The Office began payment of compensation for temporary total disability on that date.

In an April 25, 2001 report, Dr. Dana Anderson, a Board-certified family practitioner, diagnosed cervical strain with C7-8 radiculopathy. A magnetic resonance imaging (MRI) scan of appellant's cervical spine on May 7, 2001 was normal. A nerve conduction velocity study and electromyogram (EMG) on October 12, 2001 showed evidence of a mild cervical radiculopathy versus brachial plexopathy on the right. In an April 29, 2002 report, Dr. Anderson stated that appellant had a persistent soft tissue injury of the paracervical muscles with resulting right radiculopathy. In a June 17, 2002 report, she stated that she had "moderate to severe soft tissue dysfunction of the cervical and thoracic spine secondary to whiplash injury she sustained in a work-related injury on February 24 2001." Dr. Anderson noted that spasm of the trapezius and paracervical muscles resulted in restricted neck motion and that the paresthesias of appellant's right hand was "thought to be from muscle spasm rather than any specific nerve injury." In an August 2, 2002 report, Dr. Eugene J. Gosy, a neurologist, diagnosed myofascial pain syndrome secondary to her motor vehicle accident. He administered monthly trigger point injections beginning September 11, 2002. In an August 22, 2002 report, Dr. Anderson diagnosed cervical strain with myofascial pain in the upper back and neck, which he attributed to appellant's February 24, 2001 employment injury.

On October 28, 2002 the Office referred appellant, her medical records and a statement of accepted facts to Dr. Thomas Pastore, a Board-certified orthopedic surgeon, for a second opinion evaluation. In a December 4, 2002 report, he stated that she had multiple complaints not substantiated by any objective evidence. Dr. Pastore noted that all diagnostic studies were negative except the nerve conduction studies, whose results were not borne out on physical examination. Dr. Pastore categorized her complaint of reduced sensation to pinprick in the entire right upper extremity and her sensitivity to very light feather skin pressure over her neck and shoulder area as "fictitious" and noted that his findings were borne out by the videotape and photographs from the inspector general. He concluded that appellant had fully recovered from her injuries, was no longer disabled, able to return to her usual occupation without restrictions and needed no further medical treatment.

On October 23, 2003 the Office referred appellant, the case record and a statement of accepted facts, to Dr. Frank Luzi, a Board-certified orthopedic surgeon, selected to resolve a conflict of medical opinion on causal relationship and continuing disability. In a November 10, 2003 report, he reviewed her history of injury, the medical records and described appellant's complaints, which included pain with right shoulder motion and paresthesias of the right upper extremity. Findings on examination included 75 percent of normal neck motion and palpable neck and shoulder tenderness. Dr. Luzi concluded that appellant was capable of returning to work without restrictions and that she required no further medical treatment. He stated:

"Diagnosis: Cervical and right shoulder strain as a result of the motor vehicle accident on February 24, 2001. This diagnosis is supported by the file, as it was the claimant's primary complaint following the motor vehicle accident of

February 24, 2001. The objective findings including some mild limitations of cervical and right shoulder motion with discomfort support this diagnosis.

“Though [appellant] has ongoing subjective complaints, I feel she is fully recovered from the effects of the job injury of February 24, 2001. As noted by Dr. Pastore in his [evaluation] of December 4, 2002, [she] has subjective complaints greater than objective findings. This is evidenced by the video surveillance. I feel [that appellant] shows evidence of symptom magnification and malingering behavior. This would explain the continued subjective complaints without objective findings.”

On March 7, 2004 the Office issued a notice of proposed termination of compensation on the basis that the weight of the medical evidence established that appellant was no longer disabled from her regular job and required no further medical treatment due to her February 24, 2001 employment injury. By decision dated April 23, 2004, the Office terminated her compensation benefits.

Appellant appealed to the Board, which, by order dated April 6, 2005, remanded the case to the Office because the record submitted to the Board on appeal was incomplete, in that the videotapes made by a postal inspector were not part of the record.¹ On remand the Office completed the record by completing this evidence and on June 8, 2005 issued a decision again terminating appellant’s compensation effective April 23, 2004 on the basis that appellant’s disability and need for medical treatment of her February 21, 2004 injury had ended.

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 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 specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight.³

ANALYSIS

There was a conflict of medical opinion in this case. Appellant’s attending physicians, Dr. Anderson and Dr. Gosy, supported continuing disability and need for medical treatment related to her February 24, 2001 employment injury. In an August 22, 2002 report,

¹ Docket No. 04-1851 (issued April 6, 2005).

² *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

³ *James P. Roberts*, 31 ECAB 1010 (1980).

Dr. Anderson, a Board-certified family practitioner, attributed her cervical strain with myofascial pain in the upper back and neck to her February 24, 2001 employment injury and in his August 2, 2002 report, Dr. Gosy, a neurologist, attributed her myofascial pain syndrome to this injury. Both physicians considered appellant disabled for her regular work. Dr. Pastore, the Board-certified orthopedic surgeon, to whom the Office referred her for a second opinion evaluation, concluded in a December 4, 2002 report, that she had fully recovered from her employment injury, that appellant was no longer disabled and that she was able to return to her usual work without restrictions.

To resolve this conflict of medical opinion, the Office, pursuant to section 8123(a) of the Federal Employees' Compensation Act,⁴ referred appellant, the case record and a statement of accepted facts to Dr. Luzi, a Board-certified orthopedic surgeon. In a November 10, 2003 report, he concluded that she had fully recovered from the effects of her February 24, 2001 employment injury, had no work restrictions and required no further medical treatment. However, Dr. Luzi also diagnosed cervical and right shoulder strain which he stated were the result of the February 24, 2001 employment injury and were supported by objective findings on examination. Cervical strain is the condition for which Dr. Anderson has been treating appellant since April 2001 and his report not only does not show that this condition resolved, it states it is still present and related to her February 24, 2001 employment injury. As this statement contradicts his statement in the same report that she recovered from her employment injury, Dr. Luzi's report is not sufficient to show that appellant's disability and need for medical treatment related to her February 24, 2001 injury ended.

CONCLUSION

The Board finds that the report of Dr. Luzi, the impartial medical specialist, is not sufficient to meet the Office's burden of proof to terminate appellant's compensation.

⁴ 5 U.S.C. § 8123(a) states 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."

ORDER

IT IS HEREBY ORDERED THAT the June 8, 2005 decision of the Office of Workers' Compensation Programs is reversed.

Issued: December 14, 2005
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Willie T.C. Thomas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge, dissenting:

I respectfully record my dissent from the holding of the majority. I find that the report of Dr. Luzi, the impartial medical specialist, is well rationalized and based upon a proper factual and medical background. Dr. Luzi found that appellant was fully recovered from the effects of the accepted February 24, 2001 motor vehicle accident and that she had subjective complaints which he attributed to symptom magnification and malingering behavior. I would affirm the June 8, 2005 decision of the Office.

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board