

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

DONNA L. GUERNSEY, Appellant

and

**DEPARTMENT OF COMMERCE, BUREAU
OF CENSUS, Jeffersonville, IN, Employer**

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**Docket No. 04-1659
Issued: February 10, 2005**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

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

JURISDICTION

On June 21, 2004 appellant filed a timely appeal of the May 17, 2004 merit decision of the Office of Workers' Compensation Programs which affirmed a September 16, 2003 decision terminating her wage-loss compensation and medical benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d), the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits effective September 16, 2003.

FACTUAL HISTORY

On February 13, 1989 appellant, then a 39-year-old lead mail clerk, filed a claim alleging that her elbow and wrist conditions were causally related to factors of her employment. The Office initially accepted the claim for thoracic outlet syndrome and right elbow epicondylitis and later accepted the conditions of bilateral carpal tunnel syndrome and pronator teres compression.

Appellant underwent several surgeries for her accepted conditions and received appropriate wage-loss compensation on the periodic rolls.

Dr. Erdogan Atasoy, an attending Board-certified general surgeon specializing in hand surgery, opined that appellant was totally disabled from her date-of-injury job.

The Office referred appellant for evaluation by Dr. Richard T. Sheridan, a Board-certified orthopedic surgeon, who examined her on August 13, 2002. In an August 13, 2002 report, he provided a history of injury and findings which showed evidence of active residuals of her bilateral carpal tunnel syndromes, right elbow epicondylitis, pronator teres compression and stiffness in her shoulders from the previous thoracic outlet syndromes and surgeries for same. Based solely on active residuals of her work-related medical conditions, Dr. Sheridan opined that appellant was not medically capable of performing her date-of-injury job, but could perform sedentary work for a total of two hours a day with restrictions.

The Office forwarded Dr. Sheridan's August 13, 2002 report to Dr. Atasoy for his review and comments. In a September 5, 2002 letter, Dr. Atasoy advised that appellant underwent a functional capacity evaluation on April 9, 2002 which found that she was unable to perform any sedentary to low light-duty level tasks within a given amount of time due to nerve irritation and pain and advised that simple tasks must be spread out over time.

The Office found a conflict in medical opinions between Dr. Sheridan and Dr. Atasoy as to appellant's current level of work-related disability. On March 28, 2003 the Office referred appellant to Dr. James Fesenmeier, a Board-certified neurologist, for an impartial medical evaluation.

In a report dated May 2, 2003, Dr. Fesenmeier noted the history of injury, reviewed the medical records and presented his examination findings. He noted that appellant has had long-standing pain in the upper extremities and had been given several different diagnoses, including thoracic outlet syndrome, lateral epicondylitis, bilateral carpal tunnel syndrome, and pronator teres compression. However, Dr. Fesenmeier opined that there was very little evidence of record to support any objective abnormalities. He noted that he could not find an electromyogram (EMG) in the record, although he saw a reference to an EMG which was said to be normal. Dr. Fesenmeier advised that appellant's present diagnosis was chronic myofascial pain of an uncertain cause. He indicated that there was no evidence of atrophy or definite weakness to support a diagnosis of continuing carpal tunnel syndrome or thoracic outlet syndrome. Dr. Fesenmeier found that appellant was completely disabled from any occupation as her condition had gone on for 10 years and she had assumed the role of a disabled person. From a psychological perspective, he did not believe that appellant was ever going to see herself as able to return to work. Dr. Fesenmeier opined that appellant's present disability was not a direct result of her employment as he did not find any objective evidence of a problem or dysfunction other than her multiple surgical scars and subjective complaints of pain. Although her employment seemed to initially trigger the events, the prolonged rest should have allowed her to completely improve and her ongoing chronic pain was either psychologically based or based on some physical predisposition to this condition and was not a direct result of her work. He recommended that appellant be given a trial of a tricyclic anti-depressant, but noted that she was resistant to try any new medication.

In a July 15, 2003 addendum report, Dr. Fesenmeier clarified his opinion performed an EMG of both upper extremities, which was normal and revealed no evidence of thoracic outlet syndrome or carpal tunnel syndrome. He stated that, in his review of the medical records, he did not believe that appellant had any ongoing carpal tunnel syndrome or thoracic outlet syndrome. Dr. Fesenmeier noted that since she had diffuse arm pain, rather than focal pain, he did not believe that she had lateral epicondylitis of the right elbow or pronator teres syndrome. He stated that since appellant's diagnoses were made several years earlier, it was difficult for him to comment on whether they had resolved or were not present to begin with. Dr. Fesenmeier reiterated that he was not sure what caused appellant's chronic pain but opined that it was not a result of a work-related diagnosis. He found no objective evidence of weakness and her complaints were based on subjective pain with diffuse tenderness. Dr. Fesenmeier reiterated that, although appellant was disabled as a result of her chronic pain syndrome, this was not a result of her work-related diagnoses. A copy of the July 14, 2003 EMG and nerve conduction studies were provided.

On August 14, 2003 the Office issued a notice of proposed termination of compensation. The Office found that Dr. Fesenmeier's impartial medical opinion represented the weight of the medical evidence of record.

Appellant submitted an August 26, 2003 report from Dr. Atasoy, who advised that, when she was evaluated on August 12, 2003, she had clinical signs of continual myofascitis and radial epicondylitis, with improving rotator cuff tendinitis and some signs of de Quervain's syndrome. Carpal tunnel, pronator teres, and thoracic outlet compression symptoms appeared to be stable. Dr. Atasoy noted that appellant's main complaint was of pain, which he treated with oral medications and topical analgesic patches. He monitored appellant every four to six months. A September 4, 2003 functional capacity evaluation, which Dr. Atasoy signed on September 9, 2003, advised that appellant was capable of performing only sedentary work, lifting a maximum of 15 pounds using both hands and 5 pounds frequently. It was noted that appellant should avoid certain motions of the upper extremity. The restrictions set forth were noted as being permanent. A September 4, 2003 impairment evaluation was also provided.

In a decision dated September 16, 2003, the Office found that appellant's disability work was not due to the effects of her accepted injuries and terminated her compensation benefits.

In a letter dated September 22, 2003, appellant requested an oral hearing, which she subsequently changed to a request for a review of the written record. She submitted a December 16, 2003 report from Dr. Atasoy who expressed his disagreement with the termination of her benefits. He stated that it had been documented in literature that findings of thoracic outlet compression were most often subjective rather than objective and provided a listing of such sources. Dr. Atasoy opined that appellant's psychological component would be indirectly related to her employment as the work-related physical problems had initiated the psychological problem. He further stated that appellant's main problem was that of myofascitis and associated headaches which resulted from disuse of the extremity due to pain and weakness caused by thoracic outlet compression. Dr. Atasoy provided copies of his medical records and treatment notes from July 27, 1989 to August 12, 2003.

By decision dated May 17, 2004, an Office hearing representative affirmed the September 16, 2003 decision.

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it bears the burden to justify modification or termination of benefits.¹ Having determined that an employee has a disability causally related to his or her federal employment, the Office may not terminate compensation without establishing either that the disability has ceased or that it is no longer related to the employment.² The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for medical treatment, the Office must establish that a claimant no longer has residuals of an employment-related condition, which requires further medical treatment.³

ANALYSIS

The Office accepted appellant's claim for thoracic outlet syndrome, right elbow epicondylitis, bilateral carpal tunnel syndrome and pronator teres compression. The Office properly determined that a conflict of medical opinion was created between the opinions of Dr. Sheridan, for the Office, and Dr. Atasoy, for appellant, as to her current work-related disability. Therefore, the Office properly referred appellant for an impartial medical examiner.⁴

Where there exists a conflict of medical opinion and the case is referred to an impartial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.⁵

In reports of May 2 and July 15, 2003, Dr. Fesenmeier reviewed appellant's history and reported his findings. He noted that she exhibited no objective complaints or definite abnormality and that the medical records, which included a reference to an EMG, also failed to show any objective abnormalities. Dr. Fesenmeier indicated that there was no evidence of atrophy or definite weakness to support a diagnosis of continuing carpal tunnel syndrome or thoracic outlet syndrome and an EMG of both upper extremities, which he performed on July 15, 2003, was reported as normal with no evidence of thoracic outlet syndrome or carpal tunnel syndrome. He found that since appellant had diffuse arm pain, rather than focal pain, he did not believe that she had lateral epicondylitis of the right elbow or pronator teres syndrome. Dr. Fesenmeier advised that appellant's present diagnosis was that of chronic myofascial pain of an uncertain cause. He further opined that the cause of appellant's chronic pain was not a result

¹ *Gewin C. Hawkins*, 52 ECAB 242 (2001); *Curtis Hall*, 45 ECAB 316 (1994).

² *Mary A. Lowe*, 52 ECAB 223 (2001); *Jason C. Armstrong*, 40 ECAB 907 (1989).

³ *Leonard M. Burger*, 51 ECAB 369 (2000).

⁴ The Federal Employees' Compensation Act provides that, if there is disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician who shall make an examination. 5 U.S.C § 8123(a); *Shirley L. Steib*, 46 ECAB 309, 317 (1994).

⁵ *Solomon Polen*, 51 ECAB 341 (2000).

of any accepted work-related diagnosis as he had found no objective evidence of weakness and her complaints were based on subjective pain with diffuse tenderness. Dr. Fesenmeier advised that there were no findings to indicate that any current condition or disability was related to the accepted injuries as the prolonged rest should have allowed her to completely improve.

The Board finds that the opinion of Dr. Fesenmeier is well rationalized and based upon a proper factual background such that it is entitled to special weight and establishes that appellant's accepted conditions resolved. His reports clearly indicate that while appellant is still disabled, there are no objective residuals of her accepted work-related conditions and the conditions which she currently experiences are not work related. Dr. Fesenmeier had full knowledge of the relevant facts and evaluated the course of appellant's conditions. He is also a specialist in the appropriate field. Although Dr. Atasoy opined that appellant had permanent restrictions from her functional capacity evaluation which he related to the conditions accepted by the Office, the Board notes that in this regard his reports are similar to those that were found to give rise to the conflict in medical opinion. His additional reports, while exposing his disagreement with the finding of Dr. Fesenmeier, are not insufficient to overcome the opinion of the impartial specialist or to create a new medical conflict.⁶ Dr. Fesenmeier's opinion that appellant had no work-related disability are sufficiently probative and reliable constitute the weight of the medical evidence and sufficient to support the Office's termination of benefits.⁷

After the Office properly terminated appellant's benefits, the burden of proof shifted to appellant.⁸ For conditions not accepted by the Office as being employment related, it is the employee's burden to provide rationalized medical evidence sufficient to establish causal relation.⁹ The fact that the etiology of a disease or condition is unknown or obscure neither relieves appellant of the burden of establishing a causal relationship by the weight of the medical evidence, nor does it shift the burden of proof of the Office to disprove an employment relationship.¹⁰

The only medical evidence regarding any employment-related disability after September 16, 2003 includes a December 16, 2003 report from Dr. Atasoy along with his relevant medical treatment notes on and after September 16, 2003, the date of appellant's termination of benefits, in which the physician opined that appellant continued to have work-related residuals.¹¹ As Dr. Atasoy had been on one side of the conflict resolved by the opinion of Dr. Fesenmeier, the Board finds his additional reports are insufficient to meet appellant's

⁶ *Michael Hughes*, 52 ECAB 387 (2001).

⁷ *Solomon Polen*, *supra* note 5.

⁸ *See Dorothy Sidwell*, 41 ECAB 857 (1990).

⁹ *Mary A. Lowe*, *supra* note 2.

¹⁰ *Judith J. Montage*, 48 ECAB 292 (1997).

¹¹ The Board notes that Dr. Atasoy, in his December 16, 2003 report, failed to provide any medical rationale to support his opinion, nor were there any specific or fully-rationalized opinion regarding the issue of causal relationship in the treatment notes for the relevant period.

burden.¹² As appellant has submitted no probative medical evidence establishing that she continues to be disabled from employment-related conditions, she has not met her burden of proof.

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits effective September 16, 2003 and appellant failed to establish that she continued to be disabled after that date.

ORDER

IT IS HEREBY ORDERED THAT the May 17, 2004 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2005
Washington, DC

David S. Gerson
Alternate Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹² *Michael Hughes, supra* note 6.