

**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. 05-1284
Issued: February 10, 2006**

Appearances:

*Jeffrey P. Zeelander, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On May 26, 2005 appellant filed a timely appeal from the May 24, 2005 merit decision of the Office of Workers' Compensation Programs, which denied modification of the termination of her compensation. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review this denial of modification.

ISSUE

The issue is whether the Office properly denied modification of its prior decision terminating appellant's compensation effective December 20, 2001.

FACTUAL HISTORY

On the prior appeal of this case,¹ the Board found that the Office properly terminated appellant's compensation benefits effective December 20, 2001. The Board found that the February 22, 2001 opinion of Dr. Thomas C. Peff, a Board-certified orthopedic surgeon selected to serve as an impartial medical specialist, was entitled to special weight and was sufficient to

¹ Docket No. 02-1434 (issued November 2, 2004).

discharge the Office's burden of proof to terminate compensation. The Board found that appellant had not met her burden of proof to demonstrate that she was still disabled due to her accepted employment injuries of strain or sprain of the left shoulder and cervical area of the spine. The Board further found that appellant had not established that her left brachial plexopathy, superior tendinitis and superior glenoid degeneration in her left rotator cuff, and her right biceps tenosynovitis and supraspinatus tendinitis were causally related to her employment. The Board affirmed the Office's December 20, 2001 decision terminating compensation and the Office's April 2, 2002 merit decision denying modification. The facts of this case as set forth in the Board's prior decision are hereby incorporated by reference.

On March 10, 2005 appellant, through her attorney, requested reconsideration. Counsel submitted a portion of a Physician Directory System (PDS) log and argued that this evidence showed a defective referral to Dr. Peff noting that the log showed that the Office had referred another injured worker to Dr. Peff for an impartial medical evaluation just one day earlier, contrary to the strict rotational system used for selecting referee physicians, and that the Office did not select a physician from appellant's zip code. Counsel contended that no conflict in medical opinion existed to justify the selection of an impartial medical specialist. He also argued that additional evidence submitted to the record since the termination of compensation had not yet been considered, and that this evidence documented the inadequacy of Dr. Peff's medical opinion.

In a decision dated May 24, 2005, the Office reviewed the merits of appellant's case and denied modification of its prior decision. The Office produced a complete copy of the PDS log in question and explained how the additional information at the bottom of the page, which appellant's attorney omitted, showed a proper medical referral. This information clearly showed that a call was placed to Dr. Peff's office on February 8, 2001 to schedule an appointment for appellant; it was not until the following day that actual action was taken to confirm the physician's selection and to send appointment letters. The Office explained how the omitted information confirmed the use of appellant's zip code (19151) at the time the appointment was being scheduled. The Office noted that Dr. Peff's zip code (19152) was within appellant's commuting area. The Office found that a conflict in medical opinion did indeed exist, that Dr. Peff's opinion was well rationalized and afforded special weight, and that all of the medical evidence submitted by appellant was before the Board at the time of its November 2, 2004 decision, which found that the evidence was not sufficient to overcome the weight of Dr. Peff's opinion.

LEGAL PRECEDENT

Section 8123(a) of the Federal Employees' Compensation Act provides in 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."²

² 5 U.S.C. § 8123(a).

When 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.³

Where the Office meets its burden of proof in justifying termination of compensation benefits, the burden is on the claimant to establish that any subsequent disability is causally related to the accepted employment injury.⁴

ANALYSIS

Appellant's attorney premised his March 10, 2005 request for reconsideration on the assertion that the Office's referral of appellant to Dr. Peff was defective. To support this assertion, he submitted an incomplete copy of a PDS log. The Office, however, provided a complete copy of the PDS log with explanation of its referral of appellant to Dr. Peff as the impartial medical specialist. The information omitted by appellant's attorney shows that the "Last IME [impartial medical examination]" date was merely the date that the Office initially made appellant's appointment with Dr. Peff. It does not support that the Office had bypassed some 170 orthopedic surgeons to make consecutive referrals to Dr. Peff.

The omitted information also tells a different story with respect to appellant's zip code. The complete log shows that the Office did enter appellant's zip code at the time the appointment was being scheduled. To buttress his argument, counsel submitted a three-page listing of 171 orthopedic surgeons from the Philadelphia area, together with their respective zip codes. However, this listing actually undermines his argument because not one of the physicians is shown to share appellant's zip code. Counsel's assertion of improprieties concerning the Office's referral of appellant to Dr. Peff is not established.

Appellant's attorney also supported his March 10, 2005 request for reconsideration by arguing that a conflict did not in fact exist, that referral to an impartial medical specialist was not warranted, and that Dr. Peff's opinion was unrationalized. The Board decided these matters in its November 2, 2004 decision. The Office may not review the Board's decision, and appellant's attorney may not use his request for reconsideration before the Office as a vehicle for readjudicating that decision.⁵

³ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

⁴ *Wentworth M. Murray*, 7 ECAB 570 (1955) (after a termination of compensation payments, warranted on the basis of the medical evidence, the burden shifts to the claimant to show by the weight of the reliable, probative and substantial evidence that, for the period for which he claims compensation, he had a disability causally related to the employment resulting in a loss of wage-earning capacity); *Maurice E. King*, 6 ECAB 35 (1953).

⁵ The decision of the Board shall be final as to the subject matter appealed and such decision shall not be subject to review, except by the Board. The decision of the Board shall be final upon the expiration of 30 days from the date of the filing of the order, unless the Board shall in its order fix a different period of time or reconsideration by the Board is granted. 20 C.F.R. § 501.6(c)-(d).

Finally, appellant's attorney argues that additional evidence submitted since the termination has not yet been considered and that this evidence documents the inadequacy of Dr. Peff's opinion. The Board's jurisdiction on the prior appeal was limited to the evidence that was before the Office at the time of its April 2, 2002 merit decision, not as the evidence stood on the date appellant's benefits were terminated, effective December 20, 2001. The record does show that evidence has been submitted since the Office's April 2, 2002 decision, evidence that the Board currently has jurisdiction to review.

This evidence includes, but is not limited to, physical therapy treatment notes; a number of prescription notes and narrative reports from appellant's osteopath, Dr. David S. Tabby, who was on one side of the conflict resolved by Dr. Peff. There are also numerous claim forms. The Board has reviewed this evidence and finds that it is insufficient to shift the weight of medical opinion evidence from Dr. Peff or to create a new conflict with the impartial medical specialist. The reports from Dr. Tabby merely relate appellant's complaints, findings, assessment and treatment plan. They offer no basis to modify or reverse the Office's termination of compensation for the accepted conditions. Counsel's argument in this regard is without merit. The Board will affirm the Office's denial of modification.

CONCLUSION

The Board finds that the Office properly denied modification of its prior decision terminating appellant's compensation effective December 20, 2001.

ORDER

IT IS HEREBY ORDERED THAT the May 24, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 10, 2006
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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