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

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| **CHERYL A. NEVINS, Appellant** | ) | |
| **and** | ) | **Docket No. 05-1662** |
| | ) | **Issued: February 21, 2006** |
| **U.S. POSTAL SERVICE, POST OFFICE, Southbury, CT, Employer** | ) | |

*Appearances:*
*Cheryl A. Nevins, pro se*
*Office of Solicitor,* for the Director

*Case Submitted on the Record*

## DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge

### *JURISDICTION*

On August 8, 2005 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated May 13, 2005. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

### *ISSUES*

The issues are: (1) whether the Office met its burden of proof to terminate compensation for wage-loss and medical benefits effective March 24, 2004; and (2) whether appellant established entitlement to a schedule award pursuant to 5 U.S.C. § 8107.

### *FACTUAL HISTORY*

The case was before the Board on a prior appeal relating to an overpayment of compensation from November 5, 1991 to January 11, 1992.[1] The Office accepted that on April 26, 1991 appellant was exposed to insecticide spray while in the performance of duty and sustained the following injuries: foreign body in both eyes, chemical conjunctivitis,

[1] Docket No. 94-265 (issued July 7, 1995).

photophobia[2] and a consequential major depression. She resigned from federal employment effective August 17, 1997.

The Office referred appellant for second opinion examinations with respect to her medical conditions. In a report dated February 14, 1996, Dr. Bernard Zuckerman, a Board-certified ophthalmologist, reported that he found no objective findings consistent with her complaints and indicated that appellant could return to work without restrictions. In a report dated February 14, 1997, Dr. Harvey L. Ruben, a Board-certified psychiatrist, indicated that she needed intensive psychotherapy but should return to work as soon as possible.

By decision dated August 5, 1998, the Office terminated compensation on the grounds that appellant refused an offer of suitable work. In a decision dated January 13, 1999, an Office hearing represented reversed the August 5, 1998 decision on the grounds that the Office did not properly follow its procedures with respect to suitable work terminations.

In a report dated August 12, 1998, Dr. John Pulaski, an optometrist, provided results on eye examination and opined that appellant had a permanent eye impairment. In a report dated April 28, 1999, he stated that she did not have normal vision and did not meet the requirements for the letter carrier position.

By decision dated May 20, 1999, the Office again terminated compensation on the grounds that appellant refused suitable work. In a decision dated April 18, 2000, an Office hearing representative set aside the May 20, 1999 decision. The hearing representative found that a conflict in the medical evidence existed between Dr. Zuckerman and Dr. Pulaski. The case was remanded for resolution of the conflict.

The Office referred appellant, with medical records and a statement of accepted facts, to Dr. David M. Brothers, a Board-certified ophthalmologist. In a report dated January 31, 2001, he provided results on examination and diagnosed amblyopia of both eyes and probable amblyopia of the left eye from childhood and probable toxic amblyopia secondary to nerve gas exposure.[3] Dr. Brothers stated that based on subjective findings there was significant limitation of visual acuity in both eyes, but it would have been useful to compare a Visual Evoked Potential test with a prior test which was apparently not available. The Office then referred appellant for an impartial examination by Dr. Dan Omohundro, a Board-certified ophthalmologist. Based on a June 10, 2002 report from Dr. Omohundro, the Office issued a July 2, 2002 notice of proposed termination.

Prior to a final termination decision, the Office referred appellant for examination by Dr. Edgardo Lorenzo, a psychiatrist. In a report dated November 26, 2002, Dr. Lorenzo provided a history and results on examination. He indicated that appellant was not currently earning from depression and there were no factors in her emotional state that would preclude

[2] Photophobia is an abnormal visual intolerance to light. Dorland's *Illustrated Medical Dictionary* (30th ed. 2003).

[3] Dr. Brothers submitted a brief report dated October 8, 2001 stating that his initial history of 20/20 vision in both eyes prior to the employment incident was incorrect, as appellant had 20/400 in the left eye.

full-time employment. Dr. Lorenzo indicated that she should be followed by an eye specialist to determine her level of disability based on visual impairment.

By decision dated April 18, 2003, the Office terminated compensation for wage-loss and medical benefits on the grounds that the medical evidence indicated she did not have residuals of the employment injury. In a decision dated September 24, 2003, an Office hearing representative set aside the April 18, 2003 decision. The hearing representative found that the Office should have asked Dr. Brothers for a supplemental report, rather than refer the case to Dr. Omohundro. The hearing representative further noted that appellant had seen Dr. Brothers on her own following the initial report.[4] She remanded the case for referral to a new impartial medical specialist.

The Office referred appellant, the medical records and a statement of accepted facts to Dr. Arnold Pearlstone, a Board-certified ophthalmologist. In a report dated December 5, 2003. He provided a history and results on examination. Dr. Pearlstone reported no evidence of physical abnormality of either eye and left eye amblyopia by history. He opined that appellant did not have any residual effects of the April 26, 1991 employment injury. Dr. Pearlstone noted that the external chemical injury appeared to resolve within short time after the injury and found that she could work as a letter carrier. Dr. Pearlstone noted that appellant complained of decreased vision in her right eye, but the physical examination was normal for the right eye. He indicated that he could not make a determination of whether she was malingering.

In a letter dated January 26, 2004, the Office issued a notice of proposed termination of compensation for wage-loss and medical benefits. By decision dated March 24, 2004, the Office terminated compensation for wage-loss and medical benefits effective that date.

In a report dated March 24, 2004, an Office medical adviser noted that Dr. Pearlstone had reported a normal physical examination with no residuals from the employment injury. The medical adviser opined that appellant did not have an employment-related impairment. By decision dated March 25, 2004, the Office found that she was not entitled to a schedule award for an impairment to a scheduled member of the body.

Appellant requested a hearing before an Office hearing representative, which was held on February 24, 2005. By decision dated May 13, 2005, the hearing representative affirmed the March 24 and 25, 2004 Office decisions.

## ***LEGAL PRECEDENT -- ISSUE 1***

Once the Office has accepted a claim, it has the burden of justifying termination or modification of compensation benefits.[5] The Office may not terminate compensation without establishing that disability ceased or that it was no longer related to the employment.[6] The right

[4] The record contains a form report (OWCP-5c) from Dr. Brothers dated June 2, 2003. He indicated that appellant's ability to work depends on the status of visual acuity which varied with the tests performed.

[5] *Jorge E. Stotmayor*, 52 ECAB 105, 106 (2000).

[6] *Mary A. Lowe*, 52 ECAB 223, 224 (2001).

to medical benefits is not limited to the period of entitlement to disability. To terminate authorization for medical treatment, the Office must establish that appellant no longer has residuals of an employment-related condition that require further medical treatment.[7]

The Federal Employees' Compensation Act provides that, if there is a 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 the examination.[8] The implementing regulation states that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an Office medical adviser, the Office shall appoint a third physician to make an examination. This is called a referee examination and the Office will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.[9]

It is well established that, when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[10]

## ***ANALYSIS -- ISSUE 1***

In the present case, the Office accepted that appellant sustained both physical injuries as well as a consequential emotional injury from the April 26, 1991 insecticide incident. With respect to the physical injuries, the Office found that there was a conflict in the evidence with respect to the extent of a continuing employment-related condition. A second opinion physician, Dr. Zuckerman, found that appellant did not have any evidence of a continuing employment-related eye condition. Dr. Pulaski, an attending optometrist, indicated that she had a visual impairment that was disabling.

The initial physician selected as an impartial specialist, Dr. Brothers, did not provide a complete medical report sufficient to resolve the issues. He provided diagnoses referring to amblyopia secondary to nerve gas exposure, but the report did not provide additional details or a reasoned medical opinion. Dr. Brothers indicated that he had attempted to obtain a test called a Visual Evoked Potential from the early 1990's but was unable to do so. As noted by the hearing representative, the Office should have attempted to secure a supplemental report that clarified his opinion on the relevant issues, rather than refer the case to Dr. Omohundro.[11] Since Dr. Brothers subsequently submitted a report as an attending physician, the Office properly referred appellant to Dr. Pearlstone as an impartial medical specialist.

[7] *Frederick Justiniano*, 45 ECAB 491 (1994).

[8] 5 U.S.C. § 8123.

[9] 20 C.F.R. § 10.321 (1999).

[10] *Gloria J. Godfrey*, 52 ECAB 486, 489 (2001).

[11] *Martin L. Baumgarden*, 37 ECAB 583 (1986).

In a December 5, 2003 report, Dr. Pearlstone provided a reasoned medical opinion that appellant did not have any continuing residuals of the employment injury. He provided results on examination and indicated a normal examination. Dr. Pearlstone noted that appellant had a preexisting left eye condition. He opined that based on the evidence she was not suffering from any residuals of the employment injury and that the external chemical injury had resolved. The Board finds that Dr. Pearlstone provided a reasoned opinion based on an accurate background. As noted above, a well-reasoned report from a physician selected as an impartial medical specialist is entitled to special weight. Dr. Pearlstone's report is entitled to special weight and it represents the weight of the evidence in this case.

With respect to the accepted major depression, Dr. Lorenzo indicated in his November 26, 2002 report that appellant was not currently suffering from depression. The most recent medical evidence as to the accepted psychiatric condition, therefore, indicated that the major depression had resolved and there is no evidence of continuing residuals from the accepted condition. The Board accordingly finds that the Office met is burden of proof in terminating compensation for wage-loss and medical benefits effective March 24, 2004.

## ***LEGAL PRECEDENT -- ISSUE 2***

Section 8107 of the Federal Employees' Compensation Act provides that, if there is permanent disability involving the loss or loss of use, of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.[12] Neither the Act nor the regulations specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants the Office has adopted the American Medical Association, *Guides to the Evaluation of Permanent Impairment* as the uniform standard applicable to all claimants.[13]

## ***ANALYSIS -- ISSUE 2***

The weight of the medical evidence in this case, as noted above, was represented by Dr. Pearlstone. Although the attending optometrist, Dr. Pulaski, had reported an impairment to the eyes in an August 12, 1998 report, he did not provide a reasoned medical opinion on causal relationship with employment or the degree of impairment. Dr. Pearlstone indicated that appellant did not have any permanent residual from the employment injury. An Office medical adviser also opined that the evidence did not establish an impairment causally related to the April 26, 1991 employment injury. The Board accordingly finds that appellant has not established entitlement to a schedule award in this case.

[12] 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

[13] *A. George Lampo*, 45 ECAB 441 (1994).

## ***CONCLUSION***

The Office met its burden of proof to terminate compensation for wage loss and medical benefits effective March 24, 2004. In addition, the probative medical evidence of record does not establish an impairment to a scheduled member of the body under 5 U.S.C. § 8107.

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated May 13, 2005 is affirmed.

Issued: February 21, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

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