

On February 3, 2003 the Office authorized appellant to change treating physicians to Dr. Mark A.P. Filippone, a Board-certified physiatrist. She commenced treatment with Dr. Filippone on February 12, 2003. In a medical report dated March 24, 2003, Dr. Filippone indicated:

“In summary then, there is EMG [electromyography] evidence of a left C5-6 (C7) cervical radiculopathy and nerve conduction evidence of a bilateral carpal tunnel syndrome.

“In my professional medical opinion, all the above electrical abnormalities are directly and solely the result of injury sustained while at work for the [employing establishment] as stated above.”

Dr. Filippone further indicated that appellant continued to be totally disabled “directly and solely because of the injury that occurred while at work for the [employing establishment] on [July 25, 2002].” In a report dated March 19, 2003, Dr. Filippone indicated that appellant continued to have symptoms in her extremities and was not able to return to work.

By letters dated May 19 and 22, 2003, the Office referred appellant to Dr. Alan R. Miller, a Board-certified orthopedic surgeon, for a second opinion. In a report dated June 11, 2003, he diagnosed cervical muscular strain, left arm strain and carpal tunnel syndrome, left hand (post surgery). Dr. Miller stated that appellant’s cervical muscular strain and left arm strain were causally related to the work accident of July 25, 2002 and that appellant’s carpal tunnel syndrome was related to her history of diabetes and consistent with diabetic neuropathy. He opined that further treatment and testing were not medically necessary for the injuries sustained in the work accident and that appellant did not require physical therapy. With regard to disability, Dr. Miller opined that appellant currently had a mild, partial disability secondary to the diabetic neuropathy and was unable to perform her full-work activity but could do modified work with a restriction on lifting of no greater than 5 to 10 pounds.

By letter dated November 14, 2003, the Office referred appellant to Dr. Walter M. Flax for an impartial medical examination. He was to resolve the conflict in the medical opinions between Drs. Filippone and Miller with regard to whether there was a need for further medical treatment, whether a causal relationship existed between appellant’s condition and the accepted work injury and whether there is continuing disability due to the accepted work injury.

In a medical report dated December 18, 2003, Dr. Flax opined:

“[Appellant] does show the usual residuals of a carpal tunnel syndrome for which I presently suggest a permanent orthopedic disability of [five percent] of the left hand. Treatment is no longer indicated. She has reached MMI [maximum medical improvement]. She is capable of working with no restrictions or limitations. In my opinion, one cannot deny a causal relationship between the work that she performs and the development of carpal tunnel syndrome which in my opinion was treated satisfactorily.

“Insofar as her complaints to her neck which appeared several months following the incident for which I am examining her today, I can find no causal relationship.”

Dr. Flax’s letterhead states that he is a “consultant in occupational orthopedic medicine and disability evaluation.”

On December 23, 2003 the employing establishment forwarded a copy of a surveillance videotape of appellant to Dr. Flax and asked for his comments. In a medical report dated January 5, 2004, Dr. Flax noted that the videotape did not change his opinion as appellant’s neck pain was unrelated to the incident of July 25, 2002.

In an opinion dated January 29, 2004, Dr. Filippone noted that appellant was complaining of increasing weakness of the left shoulder to left hand. He noted that she remained totally disabled.

On March 4, 2004 the Office issued a notice of proposed termination of compensation.

On March 9, 2004 Dr. Filippone examined appellant and reviewed Dr. Flax’s report. He indicated:

“[Appellant] has her ability to use both upper extremities but she has nerve injury in the form of numbness and tingling. Based on the EMG study, which I performed on March 24, 2003, there is significant bilateral carpal tunnel syndrome, worse on the left. She also has EMG evidence of left cervical radiculopathy. These are objective test results, rather than any subjective complaint on [appellant’s] behalf.”

Dr. Filippone indicated that he believed appellant to be an honest person, and did not find that the behavior that Dr. Flax indicated appellant exhibited in the videotape would be contrary to any of Dr. Filippone’s findings or advice. On March 18, 2004 Dr. Filippone indicated that appellant remained totally disabled due solely to the work-related injuries of July 25, 2002.

By decision dated April 6, 2004, the Office finalized the termination of benefits effective April 17, 2004 for the reason that the weight of the medical evidence established that appellant’s injury-related disability ceased no later than that date.

On April 19, 2004 appellant requested an oral hearing.

In a May 4, 2004 report, Dr. Filippone opined that it was incomprehensible that Drs. Flax and Miller could find no relationship between appellant’s neck injury and her work-related injury. He noted that appellant is complaining of increasing pulling pain into the volar aspect of the left wrist and increasing dysesthesias to the light touch along the area of the carpal tunnel release scar and increased pain in the left cervical paraspinals radiating into the left shoulder. Dr. Filippone noted that the neck pain flared up when appellant tried to return to work in January 2003. He noted that appellant remained totally disabled.

By decision dated May 31, 2005, the hearing representative affirmed the Office's decision terminating benefits.

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.¹

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.²

ANALYSIS -- ISSUE

In this case, to resolve the conflict between Dr. Filippone and Dr. Miller with regard to whether appellant had any continuing disability or further need for medical treatment, the Office referred appellant to Dr. Flax for an impartial medical examination. However, Dr. Flax is not listed in the applicable medical directory or on the American Board of Medical Specialties web site as a Board-certified specialist in any medical field. Absent any documentation of special qualifications which might exempt Dr. Flax from the requirement that he be Board-certified, he cannot serve as an impartial specialist in the present case.³

Therefore, there remains an unresolved conflict in the medical opinion in this case.⁴ As an unresolved conflict exists as to whether appellant has any residual disability causally related to her work-related injury, the Office improperly terminated appellant's compensation.

CONCLUSION

The Board finds that the Office improperly terminated appellant's compensation effective April 17, 2004 as there remained an unresolved conflict in the medical evidence.

¹ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979).

² *James P. Roberts*, 31 ECAB 1010 (1980).

³ "A physician who is not Board-certified may be used if he or she has special qualifications for performing the examination, but the [medical management assistant] must document the reasons for the selection in the case record." Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4(b)(1) (March 1994).

⁴ *Fred Simpson*, 53 ECAB 165 (2002).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 31, 2005 is reversed.

Issued: March 13, 2006
Washington, DC

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

David S. Gerson, Judge
Employees' Compensation Appeals Board

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