

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

M.B., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Middlesex, NJ, Employer**

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**Docket No. 09-1568
Issued: April 26, 2010**

Appearances:
Thomas R. Uliase, 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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 4, 2009 appellant filed a timely appeal from the August 19, 2008 and February 24, 2009 decisions of the Office of Workers' Compensation Programs terminating her compensation benefits. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUES

The issues are: (1) whether the Office met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective August 19, 2008; and (2) whether appellant met her burden of proof to establish that she had any employment-related disability or medical condition after August 19, 2008 causally related to her employment injury.

FACTUAL HISTORY

On September 10, 2007 appellant, then a 42-year-old letter carrier, filed an occupational disease claim for bilateral hand and shoulder conditions and aggravation of neck and back conditions caused by her physical job requirements. The Office accepted her claim for cervical

or brachial (shoulder) neuritis or radiculitis and thoracic or lumbosacral neuritis or radiculitis.¹ Appellant was placed on the periodic compensation rolls in receipt of compensation for temporary total disability.

In a November 2, 2007 report, Dr. Mark A.P. Filippone, an attending Board-certified physiatrist, reviewed appellant's medical history and provided findings on physical examination. He noted that an electromyogram (EMG) of the cervical spine revealed a disc herniation at C6-7 and bulging at C5-6. Dr. Filippone found that appellant was totally disabled due to bilateral cervical pain radiating to both upper extremities and low back pain radiating to her left lower extremity.

In a February 5, 2008 report, Dr. Melvin P. Vigman, a Board-certified neurologist and psychiatrist and an Office referral physician, reviewed the medical history and provided findings on physical examination. He found no evidence of neuritis or radiculitis or any other neurological condition. Dr. Vigman found that the accepted neurological conditions had resolved and appellant could perform her regular work.

On February 27, 2008 the Office determined that there was a conflict in medical opinion between Dr. Filippone and Dr. Vigman. It referred appellant, together with a statement of accepted facts, a job description, a list of questions and the case file, to Dr. William B. Head, Jr., a Board-certified neurologist and psychiatrist, for an impartial medical examination.²

In a June 23, 2008 report, Dr. Head reviewed appellant's medical and work history, including diagnostic tests. He provided detailed findings on physical examination. Subjective findings included bilateral paraspinal tenderness reported by appellant in the cervical area, left-sided paraspinal tenderness in the lumbosacral region and no complaint of paraspinal tenderness in the thoracic region. There was no paraspinal muscle spasm in her spine. Appellant had a normal gait and stance. Carotid pulses were present and equal. There were no arthritic changes in appellant's hands. Direct testing of straight leg raising was positive on the left, negative on the right. However, indirect testing produced negative findings bilaterally. Appellant could walk on her heels and toes and tandem walk with ease. She arose easily from a chair without assistance. Appellant turned easily on the examination table and arose easily from it without assistance. Neurological examination revealed no objective evidence of any neurological condition. Dr. Head opined that, based on her normal neurological examination, appellant was able to perform her regular work.

By letter dated July 7, 2008, the Office advised appellant of its proposed termination of her wage-loss compensation and medical benefits on the grounds that the weight of the medical evidence, represented by the report of Dr. Head, established that she had no remaining disability or medical condition causally related to her August 29, 2007 employment injury.

¹ Appellant has a separate claim accepted for a neck sprain and lumbar back sprain sustained on April 18, 2000.

² An Office Physicians Directory System (PDS) bypass form indicates that Dr. Stephanus Busono, a neurologist, was bypassed because he could not give an appointment in a reasonable amount of time.

In response, appellant, through her attorney, requested verification that Dr. Head had been properly selected from the PDS. She also asserted that Dr. Head was not an appropriate specialist because he was “primarily a psychiatrist” and certified in behavioral neurology and neuropsychiatry. Appellant contended that she was not qualified to give an examination relative to her “orthopedic and neurologic conditions.” She contended that Dr. Head’s report was speculative until he could review certain earlier diagnostic results that he had requested. Dr. Head did not explain why the November 2, 2007 EMG findings, which revealed left C5, 6 and 7 radiculopathy and left L5-S1 radiculopathy, did not reveal continuing residual disability. Appellant indicated that Dr. Head did not seem to have knowledge of the physical requirements of her letter carrier position. She submitted a July 16, 2008 report in which Dr. Filippone stated that she continued to be totally disabled.

By decision dated August 19, 2008, the Office finalized its termination of appellant’s wage-loss compensation and medical benefits.

In an October 15, 2008 disability certificate and a November 11, 2008 report, Dr. Filippone stated that appellant could perform regular work without restrictions.

Appellant requested an oral hearing that was held on December 16, 2008.

By decision dated February 24, 2009, an Office hearing representative affirmed the August 19, 2008 decision.

LEGAL PRECEDENT -- ISSUE 1

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation benefits.³ It may not terminate compensation without establishing that the disability ceased or that it is no longer related to the employment.⁴ The Office’s burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁵ Furthermore, 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 that require further medical treatment.⁶

Section 8123(a) of the Federal Employees’ Compensation Act provides that “if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary [of Labor] shall appoint a third physician who shall make an examination.”⁷ Where a case is referred to an impartial medical specialist for the

³ *I.J.*, 59 ECAB ___ (Docket No. 07-2362, issued March 11, 2008); *Fermin G. Olascoaga*, 13 ECAB 102, 104 (1961).

⁴ *J.M.*, 58 ECAB 478 (2007); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁵ *T.P.*, 58 ECAB 524 (2007); *Larry Warner*, 43 ECAB 1027 (1992).

⁶ *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

⁷ 5 U.S.C. § 8123(a); *see also Raymond A. Fondots*, 53 ECAB 637 (2002); *Rita Lusignan (Henry Lusignan)*, 45 ECAB 207 (1993).

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.

ANALYSIS -- ISSUE 1

Appellant's claim was accepted for cervical or brachial neuritis or radiculitis and thoracic or lumbosacral neuritis or radiculitis. Dr. Filippone found continuing work-related disability. Dr. Vigman found no residual disability or medical condition. The Office properly determined that there was a conflict in the medical opinion evidence. It referred appellant, together with a statement of accepted facts, a job description, a list of questions and the case file, to Dr. Head for an impartial medical specialist examination to resolve the conflict.

Dr. Head provided a comprehensive 23-page report dated June 23, 2008. He reviewed appellant's medical history, including diagnostic tests and provided detailed findings on physical examination. Subjective findings included paraspinal tenderness reported by appellant in the cervical and lumbosacral areas but no paraspinal tenderness in the thoracic region. There was no paraspinal muscle spasm. Appellant had a normal gait and stance. Carotid pulses were present and equal. Direct testing of straight leg raising was positive on the left, negative on the right. However, indirect testing produced negative findings bilaterally. Appellant could walk on her heels and toes and tandem walk with ease. She arose easily from a chair, turned easily on the examination table and arose easily from the table without assistance. Appellant's neurological examination revealed no objective evidence of any neurological condition. Dr. Head opined that, based on her normal neurological examination, appellant was able to perform her regular work. The report of Dr. Head is based upon a complete and accurate factual and medical background and detailed findings on physical examination. Dr. Head is a Board-certified neurologist and psychiatrist. Neurology is an appropriate field for evaluating appellant's nerve conditions, neuritis and radiculitis. The Board finds that Dr. Head's thorough and well-rationalized report established that appellant had no continuing disability or medical condition causally related to her accepted neuritis and radiculitis conditions in her shoulders and back. Accordingly, the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective August 19, 2008 based on the medical opinion of Dr. Head that the accepted neuritis and radiculitis conditions had resolved.

On appeal, appellant, through her attorney, argues that Dr. Head's report was not sufficient to carry the weight of the medical evidence. She argues that Dr. Head acknowledged a prior injury in 2000 and noted that she was out of work for two years as a result and underwent a substantial amount of diagnostic testing, including magnetic resonance imaging scan and EMG testing. Dr. Head requested an opportunity to review these earlier test results. Appellant speculates that Dr. Head wished to compare the earlier diagnostic testing to more recent test results and determine the relationship, if any, to her accepted conditions and whether there was worsening of any condition when compared to an earlier test. However, Dr. Head did not provide a reason for requesting the earlier tests. Further, he determined that there was no objective evidence of any neurological condition, let alone a worsening of any condition. This argument regarding the earlier test results is not sufficient to undermine the weight given to Dr. Head's report by the Office. Appellant asserted that Dr. Head did not demonstrate knowledge of her job duties. However, the record reflects that the Office provided Dr. Head with a position description. Appellant argues that the Office should have combined this case

with her April 18, 2000 case before her referral to Dr. Head. However, her April 18, 2000 case involved a neck sprain and back sprain, injuries to ligaments. This case involves neurological conditions, nerve injuries. In light of these different types of injuries, appellant did not provide sufficient explanation as to why the Office should have combined the two cases before her referral to Dr. Head.

On appeal, appellant asserts that Dr. Head was not properly selected as the impartial medical specialist. A physician selected by the Office to serve as an impartial medical specialist should be wholly free to make a completely independent evaluation and judgment. To achieve this, the Office has developed specific procedures for the selection of impartial medical specialists designed to provide safeguards against any possible appearance that the selected physician's opinion is biased or prejudiced. The procedures contemplate that impartial medical specialists will be selected from Board-certified specialists in the appropriate geographical area on a strict rotating basis in order to negate any appearance that preferential treatment exists between a particular physician and the Office.⁸ The Federal (FECA) Procedure Manual (the procedure manual) provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the PDS should be used for this purpose wherever possible.⁹ The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.¹⁰ The PDS database of physicians is obtained from the American Board of Medical Specialties which contains the names of physicians who are Board-certified in certain specialties. In this case, appellant alleged that there is no indication in the record that Dr. Head was selected by the Office using the PDS. However, the record contains a PDS bypass note indicating that Dr. Busono was bypassed because he was not able to schedule an appointment within a reasonable time. There is no evidence that Dr. Head was not selected through the PDS after Dr. Busono was bypassed. Appellant asserts that the reason given for the bypass of Dr. Busono is not sufficient because it does not indicate a time frame when Dr. Busono could schedule an examination. She argues that, without a specific description of the amount of time involved, there is no basis on which to judge whether the bypass was appropriate. However, although the bypass note does not indicate the specific anticipated time delay in scheduling an appointment with Dr. Busono, appellant has provided no evidence that the Office's decision to bypass Dr. Busono was inappropriate.

LEGAL PRECEDENT -- ISSUE 2

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 employment injury.¹¹ In order to prevail, the employee must establish by the

⁸ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003). *See also Willie M. Miller*, 53 ECAB 697 (2002); *Arden E. Butler*, 53 ECAB 680 (2002).

⁹ Federal (FECA) Procedure Manual, *supra* note 8, Chapter 3.500.4b (May 2003).

¹⁰ Federal (FECA) Procedure Manual, *supra* note 8, Chapter 3.500.7 (September 1995 and May 2003).

¹¹ *I.J.*, *supra* note 3; *Anna M. Blaine*, 26 ECAB 351, 353-54 (1975); *see Fred Foster*, 1 ECAB 127, 132-33 (1948).

weight of the reliable, probative and substantial evidence that he or she had an employment-related disability, which continued after termination of compensation benefits.¹²

ANALYSIS -- ISSUE 2

The Board finds that, following the proper termination of her compensation and medical benefits on August 19, 2008, appellant failed to establish that she had any continuing disability or medical condition causally related to her August 29, 2007 employment-related neuritis and radiculitis conditions. Following the August 19, 2008 termination decision she submitted an October 15, 2008 disability certificate and November 11, 2008 report in which Dr. Filippone stated that she could perform work without restrictions. Because Dr. Filippone found that appellant could perform regular work, this medical evidence from Dr. Filippone does not establish that she had any employment-related disability or medical condition after August 19, 2008. Appellant argued that the report of Dr. Head was not entitled to special weight. Her arguments in this regard are addressed above. Appellant failed to submit medical evidence establishing that she had any work-related disability or medical condition after August 19, 2008 causally related to her accepted employment injury. Accordingly, the Office properly affirmed the August 19, 2008 termination decision.

CONCLUSION

The Board finds that the Office met its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective August 19, 2008. The Board further finds that appellant did not meet her burden of proof to establish that she had any work-related disability or medical condition after August 19, 2008.

¹² *I.J. supra* note 3; *Gary R. Sieber*, 46 ECAB 215, 222 (1994); *see Wentworth M. Murray*, 7 ECAB 570, 572 (1955).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated February 24, 2009 and August 19, 2008 are affirmed.

Issued: April 26, 2010
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

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

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board