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

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| **A.B., Appellant** | ) | |
| **and** | ) | **Docket No. 09-1899** |
| | ) | **Issued: April 14, 2010** |
| **U.S. POSTAL SERVICE, POST OFFICE, Ahoskie, NC, Employer** | ) | |

*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, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

### *JURISDICTION*

On July 20, 2009 appellant filed a timely appeal from the February 20 and June 23, 2009 decisions of the Office of Workers' Compensation Programs terminating her wage-loss compensation and medical 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 March 15, 2009; and (2) whether appellant met her burden of proof to establish that she had any employment-related disability or residuals after March 15, 2009 causally related to her employment injury.

### *FACTUAL HISTORY*

On April 15, 2005 appellant, then a 46-year-old window distribution clerk, filed a claim for a traumatic injury alleging that she sustained an injury on March 24, 2005 when she contracted influenza at work. The Office accepted her claim for influenza and aggravation of her

preexisting autoimmune hemolytic anemia. Effective July 9, 2005, appellant began receiving wage-loss compensation benefits.

In an August 15, 2006 letter, Dr. Lee R. Berkowitz, a Board-certified internist specializing in hematology and a professor and residency program director at the University of North Carolina's School of Medicine, stated that appellant had chronic autoimmune hemolytic anemia requiring daily immunosuppression. Due to appellant's condition, she was prone to infections and had experienced a number of infections, including influenza and gastroenteritis, both of which aggravated her hemolytic anemia. Based on the recurrent nature of her infections, Dr. Berkowitz advised that appellant had a permanent disabling condition. Since August 2005 appellant's anemia had been difficult to control because of her repeated exposure to infectious diseases.

On May 8, 2007 Dr. D.R. Lang, Jr., an attending family practitioner, stated that appellant's accepted aggravation of autoimmune hemolytic anemia was permanent. Appellant was totally disabled due to this condition.

In a December 27, 2007 report, Dr. Humberto Henriquez, a Board-certified internist and an Office referral physician, reviewed the medical history and provided findings on physical examination. He noted that appellant was diagnosed at age 23 with idiopathic thrombocytopenia purpura. In 2003, appellant was diagnosed with severe anemia and Evans syndrome. She was placed on chronic steroid therapy for her hemolytic anemia. Dr. Henriquez noted that Evans syndrome was a chronic relapsing condition but that the aggravation of appellant's hemolytic anemia caused by the exposure to influenza at work on March 24, 2005 had resolved and she had no continuing work-related disability. He advised that appellant could return to work if her condition was controlled.

The Office found a conflict in the medical opinion evidence between Dr. Lang and Dr. Henriquez. It referred appellant, together with a statement of accepted facts, the case record and a list of questions, to Dr. Timothy E. Frei, a Board-certified internist, for an examination and evaluation to resolve the conflict in medical opinion as to whether she had any remaining disability or medical condition causally related to her March 24, 2005 employment injury.[1]

In an April 18, 2008 report, Dr. Frei reviewed the case record and the statement of accepted facts. He provided findings on physical examination and noted the diagnosis of Evans syndrome, which was not a work-related condition. Dr. Frei stated that appellant's viral infection sustained at work on March 24, 2005 had resolved and was a temporary aggravation. Appellant's anemia was significantly worse after the 2005 infection but gradually improved over the years. She had experienced continued exacerbations of her anemia. Dr. Frei stated that "[t]hese exacerbations cannot be definitely related to that one episode of infections." He opined that the 2005 aggravation of appellant's anemia was temporary but it was difficult to say whether her condition returned to the baseline level of progression since he had no medical records dated prior to the March 2005 incident to review. Dr. Frei stated that he could not specifically relate appellant's ongoing disability to the March 24, 2005 aggravation. There were too many episodes

[1] The Office indicated that Dr. Frei had no internal medicine subspecialty.

of worsening of her anemia for a physician to sort out whether her current disability was related to the March 24, 2005 aggravation or to some other aspect of her chronic condition.

By letter dated July 17, 2008, the Office asked Dr. Frei to clarify whether the accepted aggravation of appellant's preexisting anemia condition had resolved.

On October 9, 2008 Dr. Frei stated that appellant's viral illness on March 24, 2005 had temporarily aggravated her preexisting anemia. He stated that the 2005 aggravation "I would certainly think has resolved by this time." Dr. Frei stated that he did not think the March 24, 2005 aggravation would have caused any permanent worsening of her underlying anemia. However, he had no way of resolving that question because the natural progression of the anemia was quite variable.

By letter dated November 5, 2008, the Office advised appellant that it proposed to terminate her wage-loss compensation and medical benefits on the grounds that the weight of the medical evidence, represented by the opinion of Dr. Frei, established that she had no remaining disability or medical condition causally related to her March 24, 2005 employment injury.

By decision dated February 20, 2009, the Office finalized the termination of appellant's wage-loss compensation and medical benefits effective March 15, 2009.

Appellant requested a review of the written record. In a March 2, 2009 report, Dr. Mary Wynn, a psychiatrist, stated that appellant developed anxiety and depression due to her autoimmune hemolytic anemia. On March 6, 2009 Dr. Berkowitz stated that she was under his care for autoimmune hemolytic anemia and thrombocytopenia. These conditions required the removal of appellant's spleen and chronic medication and immunotherapy for control. Appellant experienced exacerbations of her blood counts when she was exposed to upper respiratory pathogens. This exposure occurred frequently at her job but she had clearly gotten better since she stopped working. Dr. Berkowitz noted that stopping work allowed appellant to avoid the risk of further infections. On March 16, 2009 Dr. Lang stated that appellant was first diagnosed with autoimmune hemolytic anemia while working in extremely hot conditions at the employing establishment in 2003. Appellant's condition worsened on March 24, 2005 and was almost fatal. Dr. Lang opined that the March 24, 2005 work-related aggravation of her anemia could have caused her present grave condition.

By decision dated June 23, 2009, an Office hearing representative affirmed the February 20, 2009 decision.[2]

[2] Subsequent to the June 23, 2009 Office decision, additional evidence was submitted to the record. The Board's jurisdiction is limited to the evidence that was before the Office at the time it issued its final decision. *See* 20 C.F.R. § 501.2(c). The Board may not consider this evidence for the first time on appeal.

## ***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 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.[8]

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

Dr. Lang, appellant's attending family practitioner, stated that appellant's accepted aggravation of autoimmune hemolytic anemia was permanent. Appellant was totally disabled due to this condition. Dr. Henriquez, a Board-certified internist and an Office referral physician, found that the aggravation of her preexiting hemolytic anemia caused by the exposure to influenza at work on March 24, 2005 had resolved and she had no continuing work-related disability. The Office referred her to Dr. Frei for a resolution of the conflict in the medical opinion evidence.

The Board finds that the opinion of Dr. Frei is not sufficient to resolve the conflict in medical opinion.

In an April 18, 2008 report, Dr. Frei advised that he had reviewed the case record and the statement of accepted facts. He provided findings on physical examination. Dr. Frei stated that appellant's viral infection sustained at work on March 24, 2005 had resolved. He noted that her anemia was significantly worse after the 2005 infection but gradually improved over the years.

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[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).

[8] *See Roger Dingess*, 47 ECAB 123 (1995); *Glenn C. Chasteen*, 42 ECAB 493 (1991).

Dr. Frei opined that the 2005 aggravation of her anemia was temporary but there were too many aggravations of appellant's anemia condition for him to sort out whether her current disability was related to the March 24, 2005 aggravation or to some other aspect of her chronic underlying condition. Dr. Frei noted that he had no medical records to review prior to the March 2005 episode. This statement is contradictory in that he advised that appellant's 2005 aggravation was temporary and had resolved but that it was not possible to sort out whether her continuing problems were related to the 2005 work-related aggravation implying the possibility of permanent aggravation. On October 9, 2008 Dr. Frei stated that he did not think the March 24, 2005 aggravation would have caused a permanent worsening of appellant's underlying anemia but he had no way of resolving the question because the natural progression of the anemia was quite variable. The Board finds that the report of the impairment specialist is speculative in addressing the relationship between appellant's underlying autoimmune hemolytic anemia and the 2005 accepted aggravation. Dr. Frei was unable to provide adequate clarification of his medical opinion, as requested. His opinion is not sufficient to resolve the conflict in medical opinion. When an impairment specialist is unable to clarify or elaborate on his original report or if the supplemental report is also vague or lacking in rationale, the Office must submit the case to another impairment specialist for the purpose of obtaining a rationalized medical opinion.[9]

The Office did not meet its burden of proof in terminating appellant's wage-loss compensation and medical benefits based on the reports of Dr. Frei. In light of the Board's resolution of the first issue, the second issue in this case is moot.

## ***CONCLUSION***

The Board finds that the Office failed to meet its burden of proof in terminating appellant's wage-loss compensation and medical benefits effective March 15, 2008.

[9] *See Nancy Keenan*, 56 ECAB 687 (2005).

## ***ORDER***

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated June 23 and February 20, 2009 are reversed.

Issued: April 14, 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