

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

S.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Cleveland Heights, OH, Employer**

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**Docket No. 09-1647
Issued: May 25, 2010**

Appearances:

*Alan J. Shapiro, Esq., for the appellant
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
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On June 22, 2009 appellant filed a timely appeal from the November 5, 2008 and May 6, 2009 merit decisions of the Office of Workers' Compensation Programs. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.¹

ISSUE

The issue is whether the Office met its burden of proof to terminate appellant's compensation benefits on November 5, 2008.

On appeal, appellant's attorney asserts that the decision is contrary to fact and law.

¹ The record also contains a June 15, 2009 decision denying appellant's request for a hearing on the grounds that she previously received a hearing on the merit issue in the case. On May 24, 2009 appellant, through her attorney, requested that the request for a hearing be dismissed and did not file an appeal with the Board of the June 15, 2009 decision.

FACTUAL HISTORY

On December 4, 2000 appellant, then a 32-year-old letter carrier, injured her neck and shoulder while in the performance of duty. The Office accepted that she sustained an employment-related thoracic strain and she began working at modified duty. Following development of the claim, left frozen shoulder and intermittent left ulnar neuritis were accepted.² The Office accepted an October 12, 2005 recurrence of disability. On February 16, 2006 appellant returned to full-time modified duty with restrictions provided by Dr. Daniel A. Breitenbach, an attending internist, who advised no climbing, reaching above the shoulder, occasional pushing and pulling to 10 pounds and no carrying mail.³ On October 7, 2006 she fell on her face while being chased by a dog and stopped work. The claim was accepted for cervical strain, bilateral trapezius strain and left abdominal abrasion. Appellant returned to restricted duty for two hours a day on October 16, 2006 and worked up to full-time modified duty on February 1, 2007.

On March 21, 2007 the Office referred appellant to Dr. Mahal A. Ghanma, a Board-certified orthopedic surgeon, for a second opinion evaluation. In an April 30, 2007 report, Dr. Ghanma provided findings on examination and advised that appellant had no diagnosis because she had no objective findings. He reported evidence of abnormal illness behavior and symptom magnification and concluded that the accepted conditions had resolved without residual or impairment. Appellant was capable of performing the regular duties of a letter carrier. In an attached work capacity evaluation, Dr. Ghanma advised that she could perform her regular duties without restriction. In reports dated June 1 and 28, 2007, Dr. Breitenbach provided restrictions to her physical activity including a 10-pound weight restriction and advised that she could not carry mail on either shoulder.

The Office determined that a conflict in medical opinion arose between the Dr. Breitenbach and Dr. Ghanma regarding the extent of appellant's work-related injuries and physical restrictions. On August 1, 2007 it referred her to Dr. Mark S. Berkowitz, Board-certified in orthopedic surgery, for an impartial evaluation. In an dated August 22, 2007 report, Dr. Berkowitz reviewed the history of both injuries, the medical records, the accepted conditions and appellant's complaint of constant sharp burning pains across her shoulders and down her arm and mid back.⁴ He reported that she worked full time at modified duty with a 20-pound lifting restriction. On physical examination there was no redness, erythema, increased temperature or cellulitis of the cervical or thoracic spine or either shoulder. Mild tenderness to palpation over the left trapezius muscle but no muscle spasms were noted and sensation to soft touch was intact in both upper extremities. Dr. Berkowitz advised that shoulder range of motion was limited but

² The Office determined that a conflict in medical evidence had been created regarding appellant's claimed left shoulder condition and referred her to Dr. Robert Corn, Board-certified in orthopedic surgery, for an impartial evaluation. Based on Dr. Corn's November 30, 2001 report, it accepted the above-named left upper extremity conditions.

³ The modified assignment listed duties of casing mail, answering telephones, lobby monitoring and pickup papers and pulling labels.

⁴ Dr. Berkowitz reported that appellant sustained an employment-related abdominal strain, when the accepted condition was an abdominal abrasion.

there were no current objective findings to support continuing residuals of the accepted conditions, which had resolved within 8 to 12 weeks of injury. He stated that appellant's current condition was due to nonwork-related factors and that she could perform the duties of a letter carrier without limitations and required no further medical treatment. On October 10, 2007 Dr. Berkowitz reported that appellant's adhesive capsulitis condition of both shoulders was not caused, aggravated, accelerated or precipitated by either the December 2000 or the October 2006 employment injury. This condition most frequently occurred without trauma. On examinations appellant had no tenderness to palpation of either anterior shoulder, shoulder capsules or rotator cuff muscles. Dr. Berkowitz reiterated that appellant had reached maximum medical improvement. In work capacity evaluations dated August 22 and October 10, 2007, he advised that she could work eight hours a day without restrictions.

A December 20, 2007 x-ray of the left shoulder revealed no fracture, dislocation, advanced arthritic changes or significant intraosseous lesions. Electrodiagnostic studies of the upper extremities on February 8, 2008 revealed no abnormalities. A June 17, 2008 magnetic resonance imaging (MRI) scan of the right shoulder demonstrated supraspinatus tendinopathy/tendinosis and acromioclavicular (ACL) joint hypertrophy with mild impingement. Dr. Breitenbach submitted medical records in which he provided findings on examination and restrictions to appellant's physical activity.

On August 22, 2008 the Office proposed to terminate appellant's compensation benefits on the grounds that the medical evidence, as represented by Dr. Berkowitz reports, established that her employment-related conditions had resolved with out residuals or disability. The employing establishment submitted a fitness-for-duty examination dated August 19, 2008, in which Dr. Elizabeth Mease, Board-certified in internal and occupational medicine, reported that appellant used a cart for carrying mail. Dr. Mease provided findings on examination, stating that appellant winced and moaned with minor movement, demonstrated insufficient effort with active range of motion testing and had full passive range of motion of both shoulders and prominent symptom magnification behavior. She diagnosed history of work-related strain/sprain, resolved, stating that there were symptoms only and no objective physical findings of any impairment that warranted restrictions or permanent light duty. Dr. Mease concluded that appellant was intolerant of performance of full duties rather than incapable of performance of full duties.

Appellant submitted a number of duty status and treatment notes from Dr. Breitenbach dated August 12 to October 23, 2008. Dr. Breitenbach continued her physical restrictions, advising that she could not carry a mailbag on either shoulder. In a September 8, 2008 report, he disagreed with the assessments of Dr. Berkowitz and Dr. Ghanma stating that appellant continued to have pain with palpable swelling and spasm requiring injections. Dr. Breitenbach described her conditions exacerbated by carrying a mailbag, she could not abduct her left arm to 90 degrees and had pain with flexion/extension of the neck. He also was diagnosed with cervical strain and spasm, right should strain and bilateral trapezius muscle spasm on October 7, 2006 with MRI scan findings of supraspinatus tendinopathy and ACL joint hypertrophy with impingement, due to the December 4, 2000 employment injury. Dr. Breitenbach advised that appellant was restricted from carrying a mailbag or doing any overhead work and asked that the right shoulder condition be accepted. On October 22, 2008 appellant accepted a modified assignment of casing and delivering mail to apartment buildings and businesses with no carrying of mail satchel.

By decision dated November 5, 2008, the Office terminated appellant's compensation benefits.

On November 12, 2008 appellant, through her attorney, requested a hearing and submitted treatment records from Dr. Breitenbach dated October 23 and 30, 2008. Dr. Breitenbach reiterated his prior findings and conclusions. At the February 17, 2009 hearing, appellant testified that she was continued on work restrictions. Appellant's attorney stated that he would submit additional evidence. A second hearing was held on March 19, 2009, which was determined to be a duplicate hearing and that one decision would be issued covering appellant's claims.

In a May 6, 2009 decision, an Office hearing representative affirmed the November 5, 2008 decision.⁵

LEGAL PRECEDENT

Once the Office accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.⁶ The Office's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁷

Section 8123(a) of the Federal Employees' Compensation Act⁸ provides that, 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.⁹ When 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.¹⁰

ANALYSIS

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on November 5, 2008. The accepted conditions in this case are thoracic strain and brachial neuritis/radiculitis due to a December 2000 employment injury and cervical strain, bilateral trapezius strain and abdominal abrasion due to an October 2006 employment injury. The Office determined that a conflict in medical evidence arose between Dr. Breitenbach

⁵ In an order dated November 23, 2009, the Board dismissed Docket No. 09-1693, as a duplicate appeal of the instant claim.

⁶ *Jaja K. Asaramo*, 55 ECAB 200 (2004).

⁷ *Id.*

⁸ 5 U.S.C. §§ 8101-8193.

⁹ *Id.* at § 8123(a); see *Geraldine Foster*, 54 ECAB 435 (2003).

¹⁰ *Manuel Gill*, 52 ECAB 282 (2001).

appellant's treating physician, and Dr. Ghanma, an Office referral physician, regarding the extent of appellant's work-related injuries and physical restrictions. It properly referred appellant to Dr. Berkowitz, Board-certified in orthopedic surgery, for an impartial evaluation. In an August 22, 2007 report, Dr. Berkowitz noted the history of both injuries, his review of the medical records, the accepted conditions and her complaints. He provided physical examination findings and advised that there were no objective findings to support that appellant had continuing residuals of each of the accepted conditions, stating that her current condition was due to nonwork-related factors. Dr. Berkowitz indicated that she could perform the duties of a letter carrier without limitations and that the accepted conditions required no further medical treatment. In a supplementary report dated October 10, 2007, he advised that the condition of adhesive capsulitis of both shoulders was not caused, aggravated, accelerated or precipitated by either the December 2000 and/or the October 2006 employment injury, explaining that this condition most frequently occurred without trauma. Dr. Berkowitz reported that appellant had no tenderness to palpation of either anterior shoulder, shoulder capsules or rotator cuff muscles. In work capacity evaluations dated August 22 and October 10, 2007, he advised that she could work eight hours a day without restrictions.

The Board finds that, as Dr. Berkowitz provided a comprehensive, well-rationalized opinion in which he clearly advised that any residuals of appellant's accepted conditions had resolved, his opinion is entitled to the special weight accorded an impartial examiner and constitutes the weight of the medical evidence.¹¹

The Board further finds that the medical evidence appellant subsequently submitted is insufficient to overcome the weight accorded Dr. Berkowitz as an impartial medical specialist regarding whether appellant had residuals of her accepted conditions. Dr. Breitenbach submitted a number of medical reports which reiterated his prior opinion that appellant could not carry a mailbag with either arm. On September 2, 2008 he noted his disagreement with the assessments of Dr. Berkowitz and Dr. Ghanma, stating that appellant continued to have diminished shoulder range of motion with pain and palpable swelling and spasm in her shoulders requiring injections. Dr. Berkowitz opined that this was exacerbated by carrying a mailbag and that appellant was restricted from such duty or doing any overhead work. Reports from a physician who was on one side of a medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded to the report of the impartial medical examiner or to create a new conflict.¹² Dr. Breitenbach reiterated his prior findings and conclusions, opined that appellant's supraspinatus tendinopathy and ACL joint hypertrophy with impingement were caused by the December 4, 2000 employment injury and asked that the conditions be accepted, Dr. Berkowitz found that her shoulder condition was not caused, aggravated, accelerated or precipitated by either employment injury.

As Dr. Berkowitz provided a comprehensive, well-rationalized opinion in which he clearly advised that, any residuals of appellant's accepted conditions had resolved, his opinion is

¹¹ See *Sharyn D. Bannick*, 54 ECAB 537 (2003).

¹² *I.J.*, 59 ECAB ____ (Docket No. 07-2362, issued March 11, 2008).

entitled to the special weight accorded an impartial medical examiner.¹³ The Board concludes that Dr. Breitenbach's medical opinion is insufficient to overcome the weight accorded Dr. Berkowitz as an impartial medical specialist regarding whether appellant had residuals of her accepted conditions. The Office therefore properly terminated appellant's compensation benefits.¹⁴

CONCLUSION

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits on the grounds that she had no residuals or disability due to her accepted conditions.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated May 6, 2009 and November 5, 2008 are affirmed.

Issued: May 25, 2010
Washington, DC

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

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

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

¹³ See *Sharyn D. Bannick*, *supra* note 11. Furthermore, the Board notes that the August 19, 2008 fitness-for-duty examination performed by Dr. Mease supports Dr. Berkowitz' conclusions.

¹⁴ *Manuel Gill*, *supra* note 10.