

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

J.M., Appellant

and

**DEPARTMENT OF AGRICULTURE, FRESH
PRODUCTS BRANCH, Everett, MA, Employer**

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**Docket No. 12-589
Issued: September 14, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
PATRICIA HOWARD FITZGERALD, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On January 24, 2012 appellant filed a timely appeal from the August 17, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP), which affirmed the termination of her wage-loss compensation. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUE

The issue is whether OWCP properly terminated appellant's wage-loss compensation.

FACTUAL HISTORY

On November 1, 1996 appellant, an administrative support assistant, sustained a traumatic injury in the performance of duty when her chair rolled out from beneath her as she attempted to sit and she landed on the floor. OWCP accepted a contusion of the lumbosacral

¹ 5 U.S.C. § 8101 *et seq.*

spine, herniated disc at L4-5 and lumbar neuropathy. Appellant sustained a recurrence of disability in 2006 and received compensation for temporary total disability on the periodic rolls.

A conflict in medical opinion arose on whether appellant continued to have residuals of the accepted employment injury. Dr. Nabil W. Basta, a referral Board-certified orthopedic surgeon, reviewed a statement of accepted facts, her medical records and multiple imaging and electrodiagnostic studies. Although the records indicated a failed L4-5 laminectomy syndrome, and although the records also reflected that nonsurgical approaches had not worked for appellant, he could elicit no objective findings on physical examination to substantiate her subjective complaints. Dr. Basta acknowledged that his findings were completely different from those of the attending physician, who considered appellant permanently disabled and unable to perform her duties as an administrative assistant. He recommended an evaluation by a neurologist or neurosurgeon before a final assessment of whether she was totally and permanently disabled.

Dr. Joseph Abate, the attending Board-certified orthopedic surgeon, reviewed Dr. Basta's report and disagreed with his conclusion. He stated that appellant remained totally and permanently disabled as a direct result of the November 1, 1996 employment injury and required ongoing pain management. Dr. Abate also pointed out that Dr. Basta found a diminished left ankle jerk, which was an objective finding.

To resolve this conflict, OWCP referred appellant, together with the case record and a statement of accepted facts, to Dr. Paul S. Blachman, a Board-certified neurologist. On September 23, 2010 Dr. Blachman reviewed the entire medical record, discussed appellant's complaints and described his findings on physical examination. There was significant evidence of symptom magnification, especially with testing of straight leg raising. The only objective finding was an irrelevant diminished left ankle jerk in comparison with the right. Dr. Blachman explained that this was indicative of the initial disc herniation and did not in any way reflect whether appellant had ongoing symptoms related to the November 1, 1996 employment injury. It was an extraordinarily weak argument, he explained, to point out, as Dr. Abate did, that this was an objective finding to correlate with appellant's severe subjective symptoms. One would expect the left ankle jerk to be diminished following disc herniation and surgery even in patients who become entirely asymptomatic. Dr. Blachman stated that it was clear that Dr. Abate could point to nothing else as an objective finding.

Dr. Blachman concluded that the effects of the 1996 employment injury had long ceased. There were no consistent objective abnormalities. It was clear that appellant's symptoms varied. Multiple repeat imaging studies showed no anatomical cause for the ongoing symptoms. Multiple electrophysiological studies showed no evidence of active nerve injury. Appellant's depression, Dr. Blachman noted, was not related to the work injury.

Dr. Blachman felt the effects of the work injury did not persist. He found that appellant's ongoing symptoms were unrelated to the 1996 employment injury or her later recurrence. Dr. Blachman found no limitation on her activities resulting from the work injury. He explained, however, that appellant did have certain work restrictions but was able to return to full-time employment. Dr. Blachman later clarified that, as the effects of the 1996 employment injury had long ceased, and taking into consideration only the conditions accepted by OWCP as being

caused by that injury, she was capable of performing the full duties of her date-of-injury job as an administrative support assistant, as described in the statement of accepted facts.

Dr. Abate reviewed the last three pages of Dr. Blachman's 45-page report and his work capacity evaluation. He concluded that Dr. Blachman's restrictions supported that appellant remained totally and permanently disabled for any reasonable, gainful employment. Dr. Abate added that Dr. Basta offered no opinion on appellant's ability to return to work.

On January 13, 2011 OWCP terminated appellant's wage-loss compensation. It found that the opinion of the impartial medical specialist represented the weight of the medical evidence with respect to the issue of injury-related disability.

In an August 17, 2011 decision, OWCP's hearing representative affirmed the January 13, 2011 decision. He found that the weight of the medical evidence rested with the opinion of the impartial medical specialist, who found that appellant was no longer disabled from work as a result of the accepted work injury. The hearing representative further found that repetitive statements from Dr. Abate stated that appellant was still disabled from work was insufficient to shift the weight of the medical evidence.

LEGAL PRECEDENT

FECA provides compensation for the disability of an employee resulting from personal injury sustained while in the performance of her duty.² "Disability" means the incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury.³

Once OWCP accepts a claim, it has the burden of proof to justify any termination of compensation benefits.⁴ After it has determined that an employee has disability causally related to federal employment, OWCP may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵

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.⁶ When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving

² *Id.* at § 8102(a).

³ 20 C.F.R. § 10.5(f).

⁴ *Harold S. McGough*, 36 ECAB 332 (1984).

⁵ *Vivien L. Minor*, 37 ECAB 541 (1986); *David Lee Dawley*, 30 ECAB 530 (1979); *Anna M. Blaine*, 26 ECAB 351 (1975).

⁶ 5 U.S.C. § 8123(a).

the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.⁷

ANALYSIS

There is a critical difference between an inability to return to work and an inability that is attributable to an accepted employment injury. Evidence that appellant is unable to return to her date-of-injury position does not, in itself, mean that she continues to suffer disability causally related to the accepted medical conditions. There may be other reasons for her disability. As OWCP pays wage-loss benefits only for disability caused by the accepted medical conditions, the mere fact that appellant has restrictions or incapacity may be immaterial to the termination of those benefits.

OWCP accepted that appellant's November 1, 1996 employment injury caused a contusion of the lumbosacral spine, a herniated disc at L4-5 and lumbar neuropathy, for which she had surgery and for which she received wage-loss compensation. The question presented by OWCP's termination of wage-loss compensation is not whether she still has restrictions or remains unable to work, but whether the accepted medical conditions -- the contusion, the herniated disc, the neuropathy, the effects of her surgery -- continue to cause disability for work.

Dr. Basta, OWCP's referral orthopedic surgeon, could elicit no objective findings on physical examination to substantiate appellant's subjective complaints. Although he deferred an opinion on whether she might be totally and permanently disabled, the absence of any objective physical manifestation of injury supported that the accepted medical conditions no longer caused disability for work.

Dr. Abate, the attending orthopedic surgeon, disagreed with Dr. Basta's finding. He found that appellant remained totally and permanently disabled as a direct result of the 1996 employment injury. This disagreement created a conflict under section 8123(a) of FECA requiring referral to an impartial medical specialist.

OWCP referred appellant to Dr. Blachman, a Board-certified neurologist, to resolve the conflict. It provided Dr. Blachman with appellant's medical record and a statement of accepted facts so he could offer a well-informed opinion. Dr. Blachman found significant evidence of symptom magnification and only one objective finding: a diminished left ankle jerk that gave no indication whether appellant had any ongoing symptoms of the 1996 employment injury.

It was Dr. Blachman's opinion that the effects of the 1996 employment injury had long ceased. He supported that opinion with sound medical reasoning: the record showed no consistent objective abnormalities; appellant's complaints were variable; and multiple repeat imaging studies showed no anatomical cause for her ongoing symptoms; multiple electrophysiological studies showed no evidence of active nerve injury. Although he imposed work restrictions, Dr. Blachman made it clear that appellant was capable of performing the full duties of her date-of-injury job as an administrative support assistant insofar as the accepted medical conditions were concerned, which is the relevant issue.

⁷ *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

The Board finds that Dr. Blachman's opinion is based on a proper foundation and is sufficiently well reasoned that it must be accorded special weight in resolving the conflict between Dr. Basta and Dr. Abate. Additional reports by Dr. Abate supporting that appellant remained totally and permanently disabled as a result of the 1996 employment injury, as he reported when the conflict arose, are insufficient to shift the weight of the medical opinion evidence. As the weight of that evidence establishes that appellant is no longer disabled for work as a result of the accepted medical conditions, the Board finds that OWCP has met its burden of proof to justify the termination of her wage-loss compensation. The Board will therefore affirm OWCP's August 17, 2011 decision.

CONCLUSION

The Board finds that OWCP properly terminated appellant's wage-loss compensation.

ORDER

IT IS HEREBY ORDERED THAT the August 17, 2011 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 14, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge
Employees' Compensation Appeals Board

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