U. S. DEPARTMENT OF LABOR

# Employees' Compensation Appeals Board

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In the Matter of CONSTANCE J. PEREZ and DEPARTMENT OF THE ARMY, MILITARY ACADEMY, West Point, NY

*Docket No. 02-1638; Submitted on the Record;*
*Issued December 5, 2002*

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DECISION and ORDER

Before WILLIE T.C. THOMAS, MICHAEL E. GROOM,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to terminate appellant's compensation benefits.

On October 20, 1988 appellant, then a 45-year-old clerk typist, filed a notice of traumatic injury alleging that on October 11, 1988 she fell and sustained injuries to her right foot and head. By letter dated November 28, 1988, the Office accepted appellant's claim for a head contusion. The claim was later accepted for an aggravation of lumbar radiculopathy.

Appellant sought treatment from Dr. Stanley Mandell, a Board-certified psychiatrist and neurologist, whom she had seen previously for injuries resulting from a motor vehicle accident which occurred on February 2, 1984. In a medical report dated January 15, 1990, Dr. Mandell reviewed his medical reports and concluded:

> "In summary as a result of the trauma sustained in an occupational injury, patient has a herniated disc at L5-S1. This is consistent with her clinical complaints clinical examination and is demonstrated on CT [computerized tomography] scan. Since this patient has persistence of severe pain in back, radiating to left leg, it is my opinion with reasonable medical certainty, this is causally related to the accident of October 11, 1988 as reported. It is my feeling because of persistence of pain, patient is totally disabled, unless she has a laminectomy, her disability is permanent."

In a report dated September 11, 1990, Dr. Mandell noted that, although appellant had some back pain following a motor vehicle accident, appellant's complaints of disability at the present time were related to the October 1988 work injury.

On December 15, 2000 the Office referred appellant to Dr. Patrick Hughes, a Board-certified psychiatrist and neurologist, for a second opinion evaluation. In a medical opinion dated December 15, 2000, Dr. Hughes concluded that there were no current objective findings

that appellant's work-related accepted condition was still active and causing appellant disabling residuals. He stated:

> "There is no remaining injury-related disability. She is capable of performing the full duties of her date-of-injury job as a clerk/typist. This is based on the absence of any objective findings on neurologic examination to support the diagnosis of herniated disc at L5-S1 causing symptoms."

Dr. Hughes further indicated that appellant required no further medical treatment.

In a work restriction evaluation dated January 15, 2001, Dr. Mandell noted that appellant could not work an eight-hour day and in fact, indicated that she was limited to zero hours a day of, *inter alia*, sitting, walking, lifting, bending and standing. He indicated that appellant had a herniated disc at L5-S1 and that he did not "anticipate any recovery unless the patient has surgery, which she declines."

As there existed a conflict in the medical evidence, the Office referred appellant to Dr. Jeffrey S. Oppenheim, a Board-certified neurosurgeon, for an impartial medical examination. In a medical report dated September 7, 2001, Dr. Oppenheim noted that appellant "had absolutely no evidence of neurological deficits" and that there was "profuse evidence of symptom amplification and magnification." He continued that, although it was accepted that appellant had an aggravation of a lumbar radiculopathy, that was 12 years ago and that the results of that CT scan were entirely irrelevant at the present time. He opined:

> "To suggest that a patient could have a persistent symptomatic disc herniation over the course of 12 years without obtaining any subsequent follow-up studies is in my opinion preposterous. Therefore, there is no objective radiographic evidence to indicate that this patient suffered any structural injury that is resulting in an ongoing disability."

Dr. Oppenheim concluded that appellant had "no objective findings of a work-related accepted condition that is active and causing any disabling residuals," and that appellant "suffers from no other medical conditions that are related to the occupational injury...." He further noted, "Since there is no remaining injury or disability, the patient is capable of performing the duties of her date-of-injury job as a clerk/typist."

By letter dated October 26, 2001, the Office proposed to terminate appellant's compensation based upon the report of Dr. Oppenheim, noting that the weight of the medical evidence supported that appellant had no disability and did not need continuing medical treatment due to the injury of October 11, 1988.

Appellant noted her objections by letter dated November 12, 2001 and the accompanying attachments. Most of the attachments were medical reports that were already a part of the record. However, appellant also submitted a November 14, 2001 report by Dr. Steven Birnbaum, a chiropractor, who first saw appellant on May 11, 1991. Dr. Birnbaum stated that appellant was totally disabled from her job, and that her disability was causally related to the work accident of October 11, 1988. Appellant also submitted a November 5, 2001 report from Dr. Alan J. Zambito, a dentist, who indicated that appellant demonstrated difficulty entering and

exiting the dental chair, and was limping and favoring her left side as she sat and walked. Furthermore, appellant submitted a November 6, 2001 medical report by Dr. Louis R. Cappa, a podiatrist, who stated that appellant's back injury was causing her altering gait.

By decision dated November 29, 2001, the Office terminated appellant's benefits effective December 2, 2001.

By letter dated December 10, 2001, appellant requested a hearing. On February 22, 2002 appellant, through her newly hired attorney, withdrew her request for a hearing and instead requested reconsideration. On March 14, 2002 the Office accepted appellant's withdrawal of hearing request.

In support of appellant's request for reconsideration, two new medical reports were submitted. In a report dated January 8, 2002, Dr. Susan M. Jensen, a Board-certified internist, found that appellant was "disabled to do work." She noted that appellant had been under her care since 1987 and suffered from chronic pain in her neck and low back area, arthritis, diabetes and hypertension, *inter alia.* In a report dated November 13, 2001, Dr. Shirley J. Cirillo indicated that appellant had chronic neck and back pain. She also noted that appellant's history had a suggestion of an L5-S1 radiculopathy, but that the magnetic resonance imaging and a clinical examination did not document this. Dr. Cirillo recommended further studies.

By decision dated April 9, 2002, the Office, after reviewing appellant's case on the merits, denied appellant's request for modification of the prior order.

The Board finds that the Office met its burden of proof to terminate appellant's compensation benefits.

Once the Office accepts a claim, it has the burden of proof of justifying modification or termination of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability has ceased or that it is no longer related to employment.[1] 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 appellant no longer has residuals of an employment-related condition, which requires further medical treatment.[2]

In the instant case, the Office accepted appellant's claim for head contusion and aggravation of lumbar radiculopathy. The Office reviewed the medical evidence and determined that a conflict existed between appellant's treating physician, Dr. Mandell, who found that appellant was disabled from work as a result of the accepted injury and the doctor who provided the second opinion for the Office, Dr. Hughes, who indicated that appellant no longer suffered any disability as a result of her accepted injury and required no further treatment. Accordingly, the Office referred appellant to Dr. Oppenheim for an impartial medical examination. Where

[1] *Martin T. Schwartz,* 48 ECAB 521, 522 (1997).

[2] *Id.*

there exists a conflict of medical opinion and the case is referred to an impartial medial specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, is entitled to special weight.[3]

Dr. Oppenheim's well-rationalized medical opinion supports the termination of benefits. He reviewed appellant's medical records, conducted a physical examination and concluded that, if appellant did suffer any injury as a result of the fall in 1988, it had long resolved. Although Dr. Oppenheim indicated that the date of the last report of appellant's treating physician, Dr. Mandell, that he reviewed was in 1990, none of Dr. Mandell's more recent reports show that he changed his opinion or indicated any new objective testing. The remaining medical reports are not sufficiently persuasive to overcome the weight given to the opinion of Dr. Oppenheim as the impartial medical examiner. Dr. Birnbuam's opinion that appellant was totally disabled is entitled to no weight as he is a chiropractor and under the Federal Employees' Compensation Act, this report would constitute medical evidence only if it was based on diagnosis of lumbar subluxations based on x-rays, which it is not.[4] As Dr. Cappa is a podiatrist and Dr. Zambito is a dentist, their opinions with regard to appellant's disability as a result of the accepted head contusion and aggravation of lumbar radiculopathy are entitled to no weight. The opinions of Drs. Jensen and Cirillo are insufficient to overcome the weight given to the opinion of Dr. Oppenheim. Neither of these doctors provided a history of appellant's injury or any reasoned explanation as to how appellant's present condition was causally related to the work incident. Accordingly, their additional reports are insufficient to overcome the weight accorded Dr. Oppenheim's report as the impartial medical specialist's report.[5]

[3] *William Morris*, 52 ECAB ___ (Docket No. 01-475, issued June 15, 2001); *Aubrey Belnavis*, 37 ECAB 206 (1985).

[4] Under section 8101(2) of the Act, chiropractors are only considered physicians and their reports considered medical evidence, to the extent that they treat spinal subluxations as demonstrated by x-rays to exist. 5 U.S.C. § 8107(a); *see Jack B. Wood*, 40 ECAB 95, 109 (1988).

[5] *See Dorothy Sidewell*, 41 ECAB 857, 874 (1990).

The April 9, 2002 and November 29, 2001 decisions of the Office of Workers' Compensation Programs are hereby affirmed.

Dated, Washington, DC
December 5, 2002

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member